CAS 2020/O/6689 World Anti-Doping Agency v. Russian Anti-Doping Agency

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President:	Judge Mark L. Williams SC, Judge, Sydney, Australia
Arbitrators:	Prof. Avv. Luigi Fumagalli, Professor and Attorney-at-Law, Milan, Italy
	Dr Hamid Gharavi, Attorney-at-Law, Paris, France
Ad hoc Clerk:	Mr Alistair Oakes, Barrister, Sydney, Australia

in the arbitration between

World Anti-Doping Agency, Canada

Represented by Mr Ross Wenzel and Mr Nicolas Zbinden, Attorneys-at-Law with Kellerhals Carrard in Lausanne, Switzerland and Dr Tom Hickman QC, Barrister in London, United Kingdom

Claimant

and

Russian Anti-Doping Agency, Russia

Represented by Mr Philippe Bärtsch, Dr Christopher Boog, Dr Anna Kozmenko, and Ms Anya George, Attorneys-at-Law with Schellenberg Wittmer in Geneva, Switzerland

Respondent

and

International Olympic Committee, Switzerland

Represented by Prof. Antonio Rigozzi, Attorney-at-Law with Levy Kaufmann-Kohler in Geneva, Switzerland

International Paralympic Committee, Germany

Represented by Prof. Antonio Rigozzi, Attorney-at-Law with Levy Kaufmann-Kohler in Geneva, Switzerland

Russia Olympic Committee, Russia

Represented by Dr Claude Ramoni, Attorney-at-Law with Libra Law in Lausanne, Switzerland

Russia Paralympic Committee, Russia

Represented by Dr Fabrice Robert-Tissot, Attorney-at-Law with Bonnard Lawson in Geneva, Switzerland

European Olympic Committees, Italy

Represented by Mr Marc Theisen, Attorney-at-Law with Theisen & Marques in Lëtzebuerg, Luxembourg

International Ice Hockey Federation, Switzerland

Represented by Ms Ashley Elhert, Esq., Legal Counsel

Russian Ice Hockey Federation, Russia

Represented by Mr Marc Cavaliero and Ms Carol Etter, Attorneys-at-Law with Cavaliero & Associates in Zurich, Switzerland

Lilya Akhaimova, Regina Isachkina, Elena Osipova, Arina Averina, Olga Ivanova, Yana Pavlova, Dina Averina, Yulia Kaplina, Alexey Rubtsov, Ilya Borodin, Evgeniya Kosetskaya, Ekatarina Selezneva, Artur Dalaloyan, Elena Krasovskaia, Nikita Shleikher, Alina Davletova, Evgeny Kuznetsov, Vladimir Sidorenko, Evgenija Davydova, Sayana Lee, Inna Stepanova, Inna Deriglazova, Vladimir Malkov, Maria Tolkacheva, Yana Egorian, Polina Mikhailova, Dmitry Ushakov, Vladislav Grinev, Andrei Minakov, Sofiya Velikaya, Kristina Ilinykh, Nikita Nagornyy, and Andrey Yudin, Russia

Represented by Mr Mike Morgan and Mr William Sternheimer, Attorneys-at-Law with Morgan Sports Law in London, United Kingdom and Lausanne, Switzerland and Mr Ali Malek QC, Barrister in London, United Kingdom

Sasha Gusev, Daniil Sotnikov, Ilya Borisov, Igor Ovsyannikov, Nachyn Coular, Valeria Koblova, Elizaveta Sorokina, Ivan Golubkov, Elena Krutova, and Viktoria Potapova, Russia

Represented by Mr Marc Cavaliero and Ms Carol Etter, Attorneys-at-Law with Cavaliero & Associates in Zurich, Switzerland

Intervening Parties

I. PARTIES

1. The World Anti-Doping Agency ("WADA" or the "Claimant") is a private law foundation constituted under Swiss law in 1999 to promote and coordinate at international level the fight against doping in sport. WADA has its registered seat in Lausanne, Switzerland, and its headquarters in Montreal, Canada.

2. The Russian Anti-Doping Agency ("RUSADA" or the "Respondent") is the National Anti-Doping Organisation in Russia and a signatory to the World Anti-Doping Code ("WADC"). Its registered office is in Moscow, Russia.

3. WADA and RUSADA are collectively referred to as the "Parties".

4. The International Olympic Committee ("IOC") is the world governing body of Olympic sport having its registered office in Lausanne, Switzerland.

5. The International Paralympic Committee ("IPC") is the world governing body of the Paralympic Movement having its registered office in Bonn, Germany.

6. The Russia Olympic Committee ("ROC") is the National Olympic Committee representing the Russian Federation within the Olympic Movement having its registered office in Moscow, Russia.

7. The Russia Paralympic Committee ("RPC") is the National Paralympic Committee representing the Russian Federation having its registered office in Moscow, Russia. It is a recognized a member of the IPC.

8. The European Olympic Committees ("EOC") is an organisation consisting of National Olympic Committees from Europe (including the ROC).

9. The International Ice Hockey Federation ("IIHF") is the world governing body administering the sport of ice hockey. Its registered office is in Zurich, Switzerland.

10. The Russian Ice Hockey Federation ("RIHF") is the governing body overseeing ice hockey in Russia. It is a recognized member of the IIHF. Its registered office is in Moscow, Russia.

11. Lilya Akhaimova, Regina Isachkina, Elena Osipova, Arina Averina, Olga Ivanova, Yana Pavlova, Dina Averina, Yulia Kaplina, Alexey Rubtsov, Ilya Borodin, Evgeniya Kosetskaya, Ekatarina Selezneva, Artur Dalaloyan, Elena Krasovskaia, Nikita Shleikher, Alina Davletova, Evgeny Kuznetsov, Vladimir Sidorenko, Evgenija Davydova, Sayana Lee, Inna Stepanova, Inna Deriglazova, Vladimir Malkov, Maria Tolkacheva, Yana Egorian, Polina Mikhailova, Dmitry Ushakov, Vladislav Grinev, Andrei Minakov, Sofiya Velikaya, Kristina Ilinykh, Nikita Nagornyy, and Andrey Yudin are a collective group of 33 elite, internationally-ranked Russian athletes who have qualified, or are likely to qualify, for participation at 2020 Tokyo Olympic Games and/or World Championship events in the next four years (the "33 Athletes Group").

12. Sasha Gusev, Daniil Sotnikov, Ilya Borisov, Igor Ovsyannikov, Nachyn Coular, Valeria Koblova, Elizaveta Sorokina, Ivan Golubkov, Elena Krutova, and Viktoria Potapova

are a similar collective group of 11 elite, internationally-ranked Russian athletes who have qualified, or are likely to qualify, for participation at the 2020 Tokyo Olympic and Paralympic Games and/or World Championship events in the next four years (the "11 Athletes Group").

13. The IOC, IPC, ROC, RPC, EOC, IIHF, RIHF, 33 Athletes Group and 11 Athletes Group are collectively referred to as the "Intervening Parties".

II. FACTUAL BACKGROUND

14. Below is a summary of the relevant facts and allegations based on the written submissions, pleadings and evidence adduced by the Parties and Intervening Parties prior to, and at, the hearing. Additional facts and allegations found in the written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows.

15. WADA, RUSADA and the Intervening Parties provided the Panel with extensive pleadings and written submissions, totalling more than 1,500 pages. In total, the submissions, statements, expert reports, and factual and legal exhibits exceeded 48,000 pages. While the Panel has considered all submissions and evidence in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.

16. Relevantly, while the background facts relating to this Award concern a lengthy narrative of allegations of, and investigations into, systemic doping within Russian sport, this Award primarily concerns RUSADA's alleged non-compliance of a critical requirement under the International Standard for Code Compliance by Signatories (the "ISCCS") to procure the delivery to WADA of authentic data from the Moscow Anti-Doping Laboratory (the "Moscow Laboratory").

17. In these proceedings, WADA has sought a finding of such non-compliance and the imposition of a number of consequences (the "Signatory Consequences") deriving therefrom. RUSADA opposed WADA's claims. It denies that the data retrieved by WADA from the Moscow Laboratory was manipulated and, in the alternative, denies any responsibility for manipulations and challenges the validity of the Signatory Consequences sought by WADA. As a result of the Parties' submissions, the issues examined by the Panel in this Award can be broadly summarised as:

    a. the validity of the ISCCS and WADA's requirement that RUSADA procure the delivery to WADA of authentic data from the Moscow Laboratory;

    b. whether RUSADA complied with that requirement; and

    c. if not, what Signatory Consequences can and should be imposed.

A. The World Anti-Doping Code and the International Standards

18. A significant issue in these proceedings is the validity of amendments to the WADC adopted by the WADA Foundation Board in November 2017 and the associated

approval of the ISCCS by the WADA Executive Committee. It is therefore useful to set out a brief history of the WADC and the International Standards.

a. The World Anti-Doping Code

19. The WADC is, according to its terms, "*the fundamental and universal document upon which the World Anti-Doping Program in sport is based. The purpose of the Code is to advance the anti-doping effort through universal harmonization of core anti-doping elements.*" It was first adopted by the WADA Foundation Board on 5 March 2003 and took effect on 1 January 2004 (the "2003 WADC"). The 2003 WADC was the version of the WADC in effect when RUSADA signed its declaration of acceptance on 27 September 2008.

20. Article 23.6 of the 2003 WADC permitted amendments to the WADC after appropriate consultation with athletes, Signatories and governments, to be approved by a two-thirds majority of the WADA Foundation Board. As set out below, such amendments have been made on a number of occasions (and similar amendment provisions have been contained in those subsequent versions). Revisions to the WADC have included:

    a. A revision adopted by the WADA Foundation Board on 17 November 2007, which took effect on 1 January 2009 (the "2009 WADC").

    b. A revision adopted by the WADA Foundation Board on 15 November 2013, which took effect on 1 January 2015 (the "2015 WADC"). The 2015 WADC has been the subject of two sets of amendments adopted by WADA's Foundation Board:

        i. Amendments adopted in November 2017, which took effect on 1 April 2018. The validity of those amendments is disputed in these proceedings. The version of the 2015 WADC incorporating those amendments is officially referred to as the "2015 World Anti-Doping Code with 2018 amendments" but is referred to in this Award as the "2018 WADC".

        ii. Amendments adopted in May 2019, which took effect on 1 June 2019. The version of the 2015 WADC incorporating these amendments is officially referred to as the "2015 World Anti-Doping Code with 2019 amendments". It is not relevant to these proceedings.

21. A further revision of the WADC adopted by WADA's Foundation Board on 7 November 2019 is due to come into force on 1 January 2021 (the "2021 WADC").

b. International Standards

22. The introductory pages of each of the 2003 WADC, 2009 WADC and 2015 WADC provided for the development of "International Standards" "*for different technical and operational areas within the anti-doping program*", to be revised from time to time by the WADA Executive Committee.

23. There are presently six international standards, which include:

a. The International Standard for Laboratories ("ISL"). The most recent version of the ISL came into force on 1 January 2015.

b. The International Standard for Testing and Investigations ("ISTI"), which came into force on 1 January 2016.

c. The ISCCS, which came into force on 1 April 2018 and the validity of which is disputed in these proceedings. A revision of the ISCCS is due to come into force on 1 January 2021 (the "2021 ISCCS").

d. The International Standard for the Protection of Privacy and Personal Information ("ISPPPI"). The most recent version of the ISPPPI came into force on 1 June 2018.

e. The International Standard for Therapeutic Use Exemptions ("ISTUE"). The most recent version of the ISTUE came into force on 1 January 2019.

f. The International Standard for the Prohibited List ("The List"). The most recent version of the List came into force on 1 January 2020.

B. Exposure of Systemic Doping Practices in Russian Sport (2015-2016)

a. Independent Commission and declaration that RUSADA was non-compliant with WADC

24. In December 2014, a German television channel broadcast a documentary concerning the existence of sophisticated systemic doping practices within the All-Russia Athletics Federation, the governing body for athletics in Russia.

25. Following that broadcast, WADA established an independent commission chaired by Mr Richard Pound QC (the "Independent Commission") to investigate the allegations made in the broadcast. The terms of reference required the Independent Commission (see Exhibit C-12, page 2):

> *to conduct an independent investigation into doping practices; corrupt practices around sample collection and results management; and, other ineffective administration of anti-doping processes that implicate Russia, the International Association of Athletics Federations (IAAF), athletes, coaches, trainers, doctors and other members of athletes' entourages; as well as, the accredited laboratory based in Moscow and the Russian Anti-Doping Agency (RUSADA).*

26. On 9 November 2015, the Independent Commission submitted a report to WADA titled "The Independent Commission Report #1 – Final Report". In the report, which exceeded 300 pages, the Independent Commission (Exhibit C-12, pages 9-10):

> *… identified systemic failures within the IAAF and Russia that prevent or diminish the possibility of an effective anti-doping program, to the extent that neither ARAF, RUSADA, nor the Russian Federation can be considered Code-compliant.*

> *… confirmed the existence of widespread cheating through the use of doping substances and methods to ensure, or enhance the likelihood of, victory for athletes and teams.*

27. The Independent Commission also made specific findings in respect of RUSADA (Chapter 12) and the Moscow Laboratory, which was the only WADA-accredited laboratory in Russia (Chapter 13). The Independent Commission recommended, among other things, that RUSADA be declared non-compliant with the WADC (page 38) and that the WADA accreditation of the Moscow Laboratory be revoked (page 37).

28. On 18 November 2015, based on the recommendations of the Independent Commission, which were endorsed by WADA's Independent Compliance Review Committee (the "CRC"), the WADA Foundation Board declared RUSADA non-compliant with the WADC and suspended the accreditation of the Moscow Laboratory.

b. McLaren Reports – the 'disappearing positive methodology' and 'sample swapping methodology'

29. In May 2016, an American television channel and the New York Times published allegations made by the former director of the Moscow Laboratory, Dr Grigory Rodchenkov, regarding the alleged existence of a sophisticated state-sponsored doping program in Russian sport.

30. That month, WADA appointed Prof. Richard McLaren, who had been a member of the Independent Commission, to investigate Dr Rodchenkov's allegations.

31. On 18 July 2016, Prof. McLaren delivered his first report (the "First McLaren Report"). The three 'key findings' of that report were as follows (Exhibit C-16, page 1):

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

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

database management system for use by WADA's stakeholders). Personnel of the Moscow Laboratory would then falsify the result in the laboratory's own Laboratory Information Management System ("LIMS") (the database used by the Moscow Laboratory to store results of testing of samples) to show a negative result.

33. The "sample swapping methodology" was described in Chapter 5 of the First McLaren Report. In short, this methodology, which was used at the 2014 Sochi Olympic Games, involved opening Russian athletes' sample bottles and swapping out dirty urine with clean urine. This was made possible by drilling a "mouse hole" between the aliquoting room in the secure area of the laboratory used at the Sochi games and an adjacent "operations" room. Sample bottles were passed through the 'mouse hole' overnight and the urine samples would be replaced.

34. On 18 July 2016, WADA's Executive Committee confirmed that RUSADA would remain non-compliant and its staffing and independence would be further reviewed.

35. On 9 December 2016, Prof. McLaren delivered his second report (the "Second McLaren Report"). In that report, Prof. McLaren affirmed that "[t]*he key findings of the 1st Report remain unchanged*" and that (Exhibit C-18, page 1):

> *An institutional conspiracy existed across summer and winter sports athletes who participated with Russian officials within the Ministry of Sport and its infrastructure, such as the RUSADA, CSP* [the Center of Sports Preparation of National Teams of Russia] *and the Moscow Laboratory, along with the FSB* [the Russian Federal Security Service]. *The summer and winter sports athletes were not acting individually but within an organised infrastructure as reported on in the 1st Report.*

36. Together with the Second McLaren Report, Prof. McLaren published Evidence Disclosure Packages ("EDPs") containing evidence relating to athletes he considered were involved in or benefitted from the above schemes. The Second McLaren Report also noted that Prof. McLaren had (Exhibit C-18, page 12):

> *sought but was unable to obtain Moscow Laboratory server or sample data. On request, such computer records were unavailable to* [him] *and the samples in the storage area had been sealed off by the Investigative Committee of the Russian Federation.*

C. The Roadmap to Reinstatement, 2015 LIMS copy, and Reinstatement of RUSADA as a Code-compliant Signatory (2016-2017)

a. Reinstatement requirements

37. In January 2017, the 18 November 2015 declaration by the WADA Foundation Board that RUSADA was non-compliant with the WADC remained extant. In order to rebuild a credible and sustainable anti-doping system in Russia, WADA developed a detailed set of criteria, fulfilment of which would enable RUSADA to be reinstated to the list of Code-compliant Signatories (the "Roadmap Requirements").

38. The Roadmap Requirements were amended from time to time. Relevantly, on 10 October 2017, in a letter addressed to the ROC, RPC, the Russian Minister of Sport and the Russian Independent Public Anti-Doping Commission, WADA confirmed the outstanding Roadmap Requirements, which included the following (referred to herein as the "Data/Samples Requirement") (Exhibit C-20):

> *The Russian Government must provide access for appropriate entities to the stored urine samples in the Moscow Laboratory, including but not limited to the electronic data for all sample analyses conducted from 2011-2015 in the Moscow Laboratory.*

b. 2015 LIMS copy

39. WADA has asserted, and it is not disputed, that the Data/Samples Requirement was imposed following WADA's receipt of an extract of the Moscow Laboratory's LIMS data from a whistle-blower. That extract was received by WADA in October 2017 and related to samples obtained in the period from January 2012 to August 2015 (the "2015 LIMS copy")

40. The 2015 LIMS copy was found to include presumptive adverse analytical findings made on the initial testing of samples which had not been reported in ADAMS or followed up with confirmation testing. This was considered by WADA to corroborate the findings in the First McLaren Report of the 'disappearing positive methodology'.

41. Access to the information sought in the Data/Samples Requirement would enable WADA to resolve suspicions in respect of the presumptive adverse analytical findings in the 2015 LIMS copy by allowing identification of any true adverse analytical findings and eliminating other suspicious results.

c. Non-satisfaction of Data/Samples Requirement

42. By letters dated 1 and 2 November 2017 respectively, ROC President Alexander Zhukov and Russian Minister of Sport, Minister Pavel Kolobkov, wrote to WADA explaining, among other things, that WADA could not be provided access to the samples in the Moscow Laboratory. This was because, the letters stated, the Russian Investigative Committee had initiated a criminal investigation in respect of the doping allegations addressed in the McLaren Reports and the provision of the samples to WADA would contravene Russian domestic laws, as the samples were potential evidence in the investigation. That is, procurement of the samples was not something over which RUSADA or the Minister for Sport exercised any authority or control.

43. Those letters did not address provision of the electronic data sought in the Data/Samples Requirement.

44. By letter dated 10 November 2017, the CRC unanimously maintained its recommendation to the WADA Foundation Board that RUSADA not be reinstated to the list of Code-compliant Signatories unless and until the remaining Roadmap Requirements (including the Data/Samples Requirement) had been fully and satisfactorily resolved.

45. On 5 December 2017, based on the findings of a commission mandated by the IOC to investigate the matters that were the subject of the McLaren Reports (the "Schmid Commission"), the IOC Executive Board suspended the ROC and its President, barred all Ministry of Sport officials from the 2018 PyeongChang Olympic Games and fined the ROC USD 15 million. It also set up a mechanism for Russian athletes who could demonstrate they were not tainted by the doping schemes to participate in the 2018 PyeongChang Olympic Games as "Olympic Athletes from Russia". The ROC did not appeal against or otherwise challenge that decision.

46. Following these matters, there was a period during which no relevant progress was made in addressing the Data/Samples Requirement.

47. In May 2018, the CRC again considered the outstanding Roadmap Requirements, concluding that no progress had been made in respect of the two outstanding Roadmap Requirements, being public acceptance of the findings of the First and Second McLaren Reports that an institutionalised doping scheme existed and the Data/Samples Requirement. On the basis that both of those conditions remained outstanding, the CRC again unanimously recommended that RUSADA not be reinstated to the list of Code-compliant Signatories.

d. Reinstatement of RUSADA

48. On 22 June 2018, WADA sent a letter to Minister Kolobkov indicating that WADA would consider the Data/Samples Requirement satisfied if the Russian Investigative Committee unconditionally agreed to the provision of the following data and samples at an agreed time in 2018:

a. an authentic copy of the LIMS data and a copy of the raw analytical data linked to the initial and confirmation testing procedure on those samples contained in the LIMS data; and

b. access to those samples which are identified by the raw data as being true Adverse Analytical Findings, for re-analysis purposes.

49. On 13 September 2018, Minister Kolobkov responded to WADA's 22 June 2018 letter, stating (Exhibit C-31):

> *After the re-instatement of RUSADA and the consent of the Russian Investigative Committee, we will provide as soon as possible to an independent expert, agreeable to WADA and the Investigative Committee, the access to the analytical equipment to retrieve (under the supervision of the Russian Investigative Committee and under conditions that preserve the integrity of the evidence) an authentic copy of the LIMS data and of the raw analytical data mentioned in your letter. If based on the LIMS data and the raw data, potential Adverse Analytical Findings are identified in respect of samples stored in the laboratory sealed by the Investigative Committee we will work in a spirit of cooperation with WADA and the Investigative Committee and in compliance with the Russian Criminal Procedural Code to enable the independent re-testing of these samples in accordance with the International Standard for Laboratories.*

50. Although this was not an unconditional agreement, on 20 September 2018, consistent with a recommendation by the CRC, the WADA Executive Committee decided to reinstate RUSADA as compliant with the WADC, subject to two post-reinstatement conditions (referred together as the "Post-Reinstatement Conditions"), namely that RUSADA and the Russian Ministry of Sport:

    a. would "procure" that the authentic LIMS data of the Moscow Laboratory (the "Moscow Data") would be received by WADA no later than 31 December 2018 (the "Post-Reinstatement Data Requirement"); and

    b. would "procure" that any re-analysis of samples required by WADA following review of the Moscow Data is completed by no later than 30 June 2019.

51. By letters dated 25 September 2018 addressed to RUSADA and Minister Kolobkov (Exhibits C-3 and C-4), WADA informed RUSADA and Minister Kolobkov that the Post-Reinstatement Conditions were considered "critical" requirements as defined in the ISCCS.

D. The Moscow Data

a. Procurement of the Moscow Data

52. By the end of 2018, neither RUSADA nor the Russian Ministry of Sport had procured the delivery of the Moscow Data to WADA. A pre-data retrieval mission visit was conducted by WADA on 28 November 2018 and, on 17 December 2018, the WADA technical team travelled to Moscow to access and copy the data. However, it was not ultimately obtained during that mission due to an inability to agree on access conditions.

53. On 1 January 2019, WADA sent a letter to RUSADA and the Russian Ministry of Sport (Exhibit C-5):

    a. stating that the CRC would examine the situation and determine whether or not to recommend RUSADA be declared non-compliant with a critical requirement under the ISCCS;

    b. stating that WADA's Internal Compliance Taskforce considered that the potential non-compliance should be dealt with under the fast track procedure in Article 9.5 of the ISCCS; and

    c. pursuant to Article 9.5.3 of the ISCCS, requesting any written explanation for consideration by the CRC by 11 January 2019.

54. Between 10 and 17 January 2019, a WADA expert team was permitted to enter the Moscow Laboratory and make copies of the Moscow Data. Over 23 terabytes of data was obtained, including a copy of the LIMS database (the "2019 LIMS") and disks provided by the Russian Investigative Committee (the "ICR Disks").

55. In April 2019, Russian authorities sent to WADA 2,262 samples that had been in storage in the Moscow Laboratory, pursuant to the second Post-Reinstatement Condition.

b. Authentication of the Moscow Data

56. After the Moscow Data had been obtained, the WADA Intelligence and Investigations Department (the "WADA I&I"), together with a team of forensic experts from the Institute of Forensic Science of the University of Lausanne (together, the "WADA forensic experts"), undertook the task of analysing the Moscow Data. Multiple reports were prepared by the WADA forensic experts in the course of their 2019 investigations of the Moscow Data and filed in these proceedings by WADA, including:

a. the following reports prepared by the WADA I&I:

i. "Preliminary Report into the Authenticity of the Moscow LIMS data" dated 13 May 2019 (Exhibit CF-1);

ii. "Report into the CRC mandated investigation of the Moscow Data" dated 6 September 2019 (Exhibit CF-2);

iii. "Preliminary Report into the Russian Forensic Investigation" dated 11 November 2019 (Exhibit CF-3);

iv. "Final Report into the Russian Forensic Investigation" dated 15 November 2019 (Exhibit CF-4);

v. "Final Report to the CRC regarding the Moscow Data" dated 20 November 2019 (Exhibit CF-5);

b. the following reports prepared by the independent forensic experts from the University of Lausanne:

i. "Examination Report" dated 3 May 2019 (Exhibit CF-6);

ii. "Examination Report" dated 15 August 2019 (Exhibit CF-7);

iii. "Forensic Analysis of Content Alterations" dated 8 November 2019 (Exhibit CF-8);

iv. "Evaluative Interpretation" dated 8 November 2019 (Exhibit CF-9);

v. "Authentication of ICR Disks" dated 8 November 2019 (Exhibit CF-10);

vi. "Forensic Analysis of New Data" dated 13 November 2019 (Exhibit CF-11);

vii. "Overview of Digital Forensic Findings" dated 6 February 2020 (Exhibit CF-12).

57. Following the May 2019 preliminary report prepared by the WADA I&I, there were a number of meetings between, variously, WADA and its forensic experts, the Russian Ministry of Sport, a team of Russian forensic experts and the Russian Investigative Committee regarding the investigation being conducted by WADA. On 31 July 2019, WADA invited Minister Kolobkov and the Russian Investigative Committee to a

meeting in Lausanne in relation to its investigation, at which WADA provided a list of questions relevant to the investigation. On 26 August 2019, they received a response to those questions on behalf of the Russian forensic experts.

58. On 5 September 2019, WADA's forensic experts met with representatives of the Russian Ministry of Sport and the Russian Investigative Committee regarding WADA's forensic experts' findings of manipulations.

59. WADA has made allegations, which are disputed by RUSADA in these proceedings, that the Moscow Data had been materially and improperly altered prior to a copy being provided to WADA in January 2019. The alleged alterations included:

a. back-dating;

b. disk formatting;

c. deletions of database back-ups;

d. secure erasing of files;

e. selective removal of user action commands from command logs;

f. replacement of databases;

g. deletion of records;

h. removal of tables; and

i. missing command logs.

60. On 17 September 2019, WADA commenced a formal non-compliance procedure against RUSADA by sending a letter to RUSADA and Minister Kolobkov stating (Exhibit C-8):

> *Given the significant anomalies identified by WADA I&I as part of its ongoing investigation, and in light of the importance of public confidence in the integrity of Russian sport and of the World Anti-Doping Program, the Taskforce considered that this situation should be dealt with through the fast track procedure provided under Article 9.5 of the International Standard for Code Compliance by Signatories (ISCCS).*

61. The 17 September 2019 letter requested any written explanation which RUSADA wished to have considered by the CRC to be provided by 9 October 2019. That information was provided on 8 October 2019 (Exhibit C-44).

62. The information provided on 8 October 2019 included reports by unnamed 'Russian experts' concerning the analysis of the Moscow Data by the WADA forensic experts and referred to additional data sources, which were provided by the Ministry of Sport to WADA on 23 October 2019 (the "New Data").

63. On 17 November 2019, the CRC concluded, on the basis of the analyses conducted by the WADA forensic experts, that the Moscow Data had been intentionally altered before it was made available for forensic copying by WADA, and even during that copying process.

64. On 21 November 2019, the CRC recommended that WADA send RUSADA a formal notice in accordance with Article 23.5.4 of the 2018 WADC and Article 9.5.4.2 of the ISCCS, asserting RUSADA's non-compliance with the Post-Reinstatement Data Requirement and proposing Signatory Consequences for non-compliance and reinstatement conditions for RUSADA (the "CRC Recommendation", Exhibit C-9).

65. On 9 December 2019, the WADA Executive Committee endorsed the CRC Recommendation and sent a notice of non-compliance to RUSADA (Exhibit C-10). On 27 December 2019, in accordance with Article 10.4.1 of the ISCCS and Article 23.5.6 of the 2018 WADC, RUSADA notified WADA that it disputed the notice of non-compliance (Exhibit C-11).

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

66. On 9 January 2020, WADA filed a Request for Arbitration with the Court of Arbitration for Sport (the "CAS") against RUSADA in accordance with Article R38 of the Code of Sports-related Arbitration (the "CAS Code"). In the Request for Arbitration, WADA nominated Prof. Luigi Fumagalli as an arbitrator.

67. On 10 January 2020, the CAS Court Office invited the Parties to privately liaise and suggest an agreed-upon procedural calendar for any further anticipated written submissions or procedural requests (to the extent already known). To the extent the Parties were not able to provide an agreed-upon calendar, they were invited to submit their individual proposed calendars in this regard.

68. On 16 January 2020, the ROC filed its request to intervene in this procedure in accordance with Article R41.3 of the CAS Code and Article 23.5.7 of the WADC.

69. On 17 January 2020, the following procedural activity took place:

    a. RUSADA challenged the appointment of Prof. Fumagalli in accordance with Article R34 of the CAS Code.

    b. RUSADA objected to submitting its preferred procedural briefing calendar.

    c. WADA submitted its preferred procedural briefing calendar.

    d. The IOC, IPC, RPC, IIHF, and the Global Association of Sport Federations ("GAISF") filed requests to intervene in this procedure in accordance with Article R41.3 of the CAS Code and Article 23.5.7 of the 2018 WADC.

70. On 18 January 2020, the European Olympic Committees (the "EOC") filed a request to intervene in this procedure in accordance with Article R41.3 of the CAS Code and Article 23.5.7 of the 2018 WADC.

71. On 20 January 2020, RUSADA appointed Dr Hamid Gharavi as arbitrator in accordance with Article R40.2 of the CAS Code.

72. Also on 20 January 2020, the RIHF, 33 Athletes Group, 11 Athletes Group, Russian Skateboarding Federation, Russian Ski Federation, Russian Luge Federation, Russian Curling Federation and Mr Igor Makarov filed requests to intervene in this procedure in accordance with Article R41.3 of the CAS Code and Article 23.5.7 of the 2018 WADC.

73. On 21 January 2020, WADA and RUSADA were invited to express their position on the various requests for intervention in accordance with Article R41.3 of the CAS Code.

74. On 22 January 2020, the CAS Court Office invited Prof. Fumagalli and Dr Gharavi to jointly nominate a President of the Panel from the "Special List of Presidents, Article 23.5 of the World Anti-Doping Code (WADA Non-Compliance Issues)" in accordance with Article 10.4.1 of the ISCCS.

75. Also on 22 January 2020, RUSADA reiterated its objection to the process by which Prof. Fumagalli and Dr Gharavi were invited to nominate a Panel President.

76. On 27 January 2020, the following procedural activity took place:

    a. The ICAS Challenge Commission dismissed RUSADA's challenge to Prof. Fumagalli.

    b. The CAS Court Office, on behalf of the President of the CAS Ordinary Arbitration Division, and pursuant to Article R40.3 of the CAS Code and Article 10.4.1 of the ISCCS, confirmed that the Panel appointed to decide this procedure as follows:

President:	Judge Mark L. Williams SC, Judge in Sydney, Australia
Arbitrators:	Prof. Luigi Fumagalli, Professor and Attorney-at-Law in Milan, Italy
	Dr Hamid Gharavi, Attorney-at-Law in Paris, France

    c. RUSADA filed its Answer. Within its Answer, RUSADA set out a proposed briefing calendar.

    d. The Parties filed their comments on the various requests for intervention.

77. On 28 January 2020, Mr Igor Makarov withdrew his request to intervene.

78. On 29 January 2020, the CAS Court Office, on behalf of the Panel and in accordance with Article R44.1 of the CAS Code, invited the Parties to file any final comments on a proposed briefing calendar. In the same letter, the Panel proposed preliminary hearing dates from 27 April 2020 – 8 May 2020.

79. Also on 29 January 2020, WADA filed a challenge against Dr Gharavi in accordance with Article R34 of the CAS Code.

80. On 30 January 2020, the Parties filed their further comments concerning a proposed briefing calendar.

81. On 31 January 2020, the CAS Court Office, on behalf of the Panel, confirmed a briefing calendar for the remainder of the procedure.

82. On 3 February 2020, the following procedural activity took place:

    a. The CAS Court Office, on behalf of the Panel, confirmed that the IOC, IPC, ROC, RPC, and IIHF were permitted to intervene in this procedure in accordance with Article R41.4 of the CAS Code.

    b. RUSADA filed a challenge against the appointment of Judge Williams as President of the Panel.

    c. RUSADA filed an objection to the Panel's jurisdiction to decide this procedure.

    d. RUSADA filed an objection to the Panel's briefing calendar on the principal basis that it wanted additional time to file its written submissions.

83. On 5 February 2020, the ROC filed a challenge against the constitution of the Panel in accordance with Article R34 of the CAS Code.

84. On 7 February 2020, the RPC filed two challenges against Judge Williams as President of the Panel in accordance with Article R34 of the CAS Code. One challenge was directed to the ICAS Challenge Commission; the other challenge was directed to the Panel itself.

85. On 10 February 2020, the RPC filed a challenge against Prof. Fumagalli in accordance with Article R34 of the CAS Code.

86. On 11 February 2020, the ICAS Challenge Commission rendered its decision dismissing WADA's challenge to Dr Gharavi.

87. On 13 February 2020, the ICAS Challenge Commission rendered its decision dismissing RUSADA's challenge to Judge Williams dated 3 February 2020.

88. On 14 February 2020, after an extension granted in accordance with Article R32 of the CAS Code, WADA filed its Statement of Claim, along with various factual exhibits and protected data. As determined by the Panel, and after hearing objections from the ROC and RPC, only RUSADA was provided with a copy of the factual exhibits and protected data; the Intervening Parties were only provided with the factual exhibits.

89. On 19 February 2020, the ICAS Challenge Commission dismissed the RPC's challenge to Judge Williams dated 7 February 2020. Within such decision, the ICAS Challenge Commission referred any decision on jurisdiction to the Panel.

90. On 21 February 2020, the CAS Court Office, on behalf of the Panel, who considered the Parties' various procedural requests and objections, informed the Parties *inter alia* as follows:

    a. The Panel reserved any decision on objections to jurisdiction until the final award.

b. The requests from the ROC and RPC for the production of all documents/material and/or categories of documents/material produced by WADA to RUSADA, including the Protected Data were denied.

c. The issuance of a new briefing schedule.

d. Considering that RUSADA, ROC, and RPC objected to a public hearing, the hearing would only be held on a private basis.

91. On 25 February 2020, the Panel (i) denied the requests for intervention for the Russian Ski Association, RIHF, Russian Luge Federation, Russian Curling Federation, Russian Skateboarding Federation, European Olympic Committee and GAISF. Nevertheless, the Panel invited these entities to file *amicus curiae* submissions at a later stage; and (ii) granted the request for intervention for the Groups of 10 and 33 Athletes. In granting such requests, the Panel limited their scope of intervention to the proposed consequences on the Athletes as set out in the CRC Recommendation and the WADA Executive Committee Decision and set a deadline for their submissions.

92. On 26 February 2020, the ICAS Challenge Commission rendered its decision dismissing the RPC's challenge to Prof. Fumagalli.

93. On 27 February 2020, Mr Alistair Oakes, Barrister in Sydney, Australia, was appointed *ad hoc* Clerk.

94. On 28 February 2020, the ROC filed an objection to the admissibility of WADA's prayers for relief nos. (iii) and (iv).

95. On 4 March 2020, the Panel, following a request for reconsideration and on agreement of the Parties, permitted the RIHF to intervene in this procedure.

96. Also on 4 March 2020, WADA, RUSADA, RPC, IOC, IPC, and the 33 Athletes Group filed their comments on the ROC's objection the admissibility of WADA's request for relied nos. (iii) and (iv).

97. On 16 March 2020, the Panel, after consulting the Parties and Intervening Parties and addressing various requests for additional time, issued a revised procedural calendar.

98. On 11 April 2020, RUSADA filed its Response, along with various factual exhibits, legal authorities, expert reports and witness statements.

99. On 20 April 2020, GAISF filed an *amicus curiae* submission.

100. On 24 April 2020, the EOC, Russian Ski Association, Russian Luge Federation, Russian Curling Federation and Russian Skateboarding Federation filed an *amicus curiae* submission.

101. On 30 April 2020, the Intervening Parties filed their Intervening Submissions, including various exhibits and Expert Reports.

102. On 11 May 2020, the CAS Director General, Mr Matthieu Reeb, provided a response to various inquires to the International Council of Arbitration for Sport ("ICAS") and the CAS made throughout the procedure by RUSADA, ROC and RPC.

103. On 19 May 2020, the Panel, after consulting the Parties and Intervening Parties and addressing various requests for additional time, issued a revised procedural calendar.

104. On 27 May 2020, following a request from WADA and further consultation with RUSADA and the Intervening Parties, the Panel admitted the EOC as an Intervening Party. Such intervention was limited to the proposed consequences affecting the EOC as a "Major Event Organization."

105. On 4 June 2020, the Panel reiterated that despite the requests of RUSADA, ROC and RPC, it was not authorized to order or direct the CAS or ICAS to produce documents and provide evidence in this procedure. Even still, the Panel confirmed that it did not find the requests necessary or relevant, and in most cases, they were overbroad or requesting confidential/business proprietary information not necessary for the resolution of this procedure. The Panel referred the Parties to Director General Reeb's letter dated 27 May 2020, which spoke for itself.

106. On 17 June 2020, the EOC filed its Intervening Submission.

107. On 24 June 2020, WADA filed its Reply to the RUSADA's Response and both WADA and RUSADA filed their Response to the Intervening and Amicus Curiae submissions (along with various factual exhibits, legal authorities, expert reports and witness statements).

108. On 29 June 2020, after consulting the Parties and Intervening Parties and addressing various requests for additional time (and noting the adjournment of the Tokyo Games), issued a revised procedural calendar. The calendar confirmed a hearing for the week of 2 November 2020.

109. On 30 July 2020, the Panel, having considered various objections from RUSADA and the Intervening Parties as to the independence of Prof. Dr. Ulrich Haas as an Expert Witness for WADA, the Panel confirmed its agreement to admit the Haas Expert Report to the file. In doing so, the Panel confirmed that while it found Prof. Haas to be sufficiently independent from WADA so as to admit his report and permit his testimony at the hearing, it was not taking any position as to his qualifications as an expert or as to the evidentiary value of his evidence.

110. On 4 August 2020, RUSADA filed its Sur-Reply, along with various factual exhibits, legal authorities, expert reports and witness statements.

111. On 25 August 2020, the Intervening Parties filed their Replies.

112. On 1 October 2020, the Panel issued its decision on all outstanding procedural and production requests of the Parties and Intervening Parties. Additionally, the Panel provided a draft hearing schedule, along with its comments on a proposed hearing procedure. The Parties and Intervening Parties were thereafter invited to comment on the schedule and hearing procedure as needed.

113. On 15 October 2020, the Panel, having considered the comments of the Parties and Intervening Parties on the proposed hearing schedule, issued the final hearing schedule. In addition, the Panel provided various instructions for the hearing procedure.

114. On 29 October 2020, the Panel informed the Parties that due to travel and other COVID-related restrictions (and following firm medical advice), neither the President of the Panel nor Dr. Gharavi were able to physically be present for the hearing. In this respect, the Panel invited the Parties and Intervening Parties to respond to various ways to conduct the hearing. In response, the Parties and Intervening Parties informed the Panel of their preferred way to proceed, with such suggestions varying from a cancellation (and adjournment) of the hearing to a hybrid-approached hearing whereby the Parties would be present and the Panel attending remotely.

115. On 30 October 2020, the CAS Court Office confirmed that the hearing would proceed in a hybrid-approach whereby the Panel would attend the hearing remotely, and the Parties, Intervening Parties and Counsel were invited to attend in person. Technological measures would be taken for those not attending in person.

116. The Panel acknowledges that throughout the procedure certain Parties and Intervening Parties filed various requests for production, requests for extensions of time (and objections to the procedural calendar), and objections to equal treatment. The Panel considers that while all such requests and objections (and the Panel's decisions thereto) are not expressly set out above, all inquiries been addressed either in written correspondence or at the hearing by the Panel.

117. A hearing was held from 2-5 November 2020. The hearing was held in a hybrid approach whereby the Panel participated by video, and the Parties, Intervening Parties, and Counsel (along with their respective witnesses, experts, and representatives) appeared in-person and/or by video.

118. At the outset of the hearing, the Parties and Intervening Parties confirmed that they had no objections to the constitution of the Panel or any other procedural objections beyond those which they filed in writing in advance of the hearing and as noted in the Order of Procedure signed by the Parties and Intervening Parties. At the conclusion of the hearing, the Parties and Intervening Parties similarly confirmed that they had no objection to the way in which the hearing was conducted, or that their right to a fair hearing or be heard was in any way hindered, or that the use of technology impacted any ability to fully and fairly present their case (or any other procedural or substantive objection).

IV. SUBMISSIONS OF THE PARTIES

119. The Panel has considered all the submissions and evidence presented throughout the course of these proceedings. The below summary of the submissions is not an exhaustive statement of matters raised before the Panel but rather a summary of the matters the Panel considers necessary to explain its reasoning, with a focus on the submissions of WADA and RUSADA.

120. Submissions of Intervening Parties have only been summarised where they differ to those of the Parties and are necessary to explain the Panel's reasoning.

A. WADA's submissions

121. WADA's submissions, in essence, may be summarised as set out below.

1. Prayers for relief

122. In its Request for Arbitration, WADA requested the following:

> *(i) CAS has jurisdiction in this matter and the Request for Arbitration of WADA is admissible.*
>
> *(ii) RUSADA is found to be non-compliant in connection with its failure to provide full and authentic Moscow Data to WADA.*
>
> *(iii) The consequences set out in the CRC Recommendation are imposed; in the alternative, the CAS shall impose the consequences that it sees fit.*
>
> *(iv) The reinstatement conditions set out in the CRC Recommendation are imposed; in the alternative, the CAS shall impose the reinstatement conditions that it sees fit.*
>
> *(v) The arbitration costs are borne entirely by RUSADA.*
>
> *(vi) RUSADA is ordered to contribute to WADA's legal and other costs.*

123. In its Statement of Claim, WADA requested the following:

> *(i) CAS has jurisdiction in this matter and the Request for Arbitration of WADA is admissible.*
>
> *(ii) RUSADA is found to be non-compliant in connection with its failure to provide full and authentic Moscow Data to WADA.*
>
> *(iii) The consequences set out in the CRC Recommendation are imposed, with the content of the Signatory Notice and the Neutral Participation Implementation Criteria being endorsed and reflected in the CAS Award, or in the alternative, the CAS shall impose the consequences that it sees fit (including, for the avoidance of doubt, any applicable neutral participation criteria).*
>
> *(iv) The reinstatement conditions set out in the CRC Recommendation are imposed, or in the alternative, the CAS shall impose the reinstatement conditions that it sees fit.*
>
> *(v) The arbitration costs are borne entirely by RUSADA, or in the alternative by RUSADA and one or more of the intervening parties.*

(vi) RUSADA, or in the alternative RUSADA and one or more of the intervening parties, is/are ordered to contribute to W ADA's legal and other costs.

124. In its Reply, WADA set out amended prayers for relief. It submits that these amendments are not prohibited by Article R44.1 of the CAS Code as they are merely amendments and do not raise any new cause of action. The amended prayers for relief were as follows:

(i) CAS has jurisdiction in this matter and the Request for Arbitration of WADA is admissible.

(ii) RUSADA is found to be non-compliant in connection with its failure to provide an authentic copy of the Moscow laboratory's LIMS database for 2011-2015 and of the data underlying all sample analyses conducted from 2011-2015 in the Moscow laboratory to WADA.

(iii) The following consequences are imposed, to come into effect on the date of the CAS Award and to remain in effect until the fourth anniversary of that Award (the "Four Year Period"):

1) Representatives of the Government of the Russian Federation:

a. may not be appointed to sit and may not sit as members of the boards or committees or any other bodies of any Signatory (or its members) or association of Signatories during the Four Year Period; and

b. may not participate in or attend the following events held during the Four Year Period:

(a) the first edition of each of the summer and winter Youth Olympic Games;

(b) the first edition of each of the summer and winter Olympic and Paralympic Games;

(c) any other event organised by a Major Event Organisation; and

(d) any World Championships organised or sanctioned by any Signatory. For these purposes, a "World Championship" is any event or series of events that determines the World Champion for a particular sport or discipline in a sport (provided that, as qualifying events for a World Championship do not themselves determine the World Champion, they are not covered by the definition).

'Representatives of the Government of the Russian Federation' shall mean:

a) The President of the Russian Federation and all persons working for the Administrative Directorate of the President of the Russian Federation and/or for the Russian Investigative Committee.

b) With respect to the Federal Government: (i) the Prime Minister and Deputy Prime Ministers, and the Ministers and Deputy Ministers, of the Federal Government, (ii) the members of the Federation Assembly of Russia, including both the upper house (the Federation Council) and the lower house (the State Duma), (iii) the Heads and Deputy Heads (whatever their formal title, e.g., Directors and Deputy Directors) of the Federal Services and Agencies, and of the Centre for Sports Preparation, (iv) the members of the federal civil service classified at section 9 of the register referred to at article 9 of the Federal Law On the System of Public Service of the Russian Federation (1) as 'executives' (i.e., heads and deputy heads of state bodies, federal executive bodies, representations of state bodies, and their respective structural divisions); or (2) as 'assistants/advisors' to such executives; or (3) as 'specialists' providing specialist support to such persons; and (v) all civil servants with diplomatic status.

c) With respect to the Governments of the republics, territories, oblasts, autonomous oblasts, autonomous regions, and cities of federal designation listed in the Constitution of the Russian Federation (referred to below to as "Regions"): The equivalents in each Region of each of the persons listed under Federal Government at b)(i) to b)(v) above.

d) Officers of the rank of captain or above of the Armed Forces of the Russian Federation (including the National Guard and the Border Service).

e) Members of the Federal Security Service and other government security agencies (federal or of any Region).

f) Officers of the rank of captain or above in the federal police force(s) or in the police force(s) of any Region.

For the purpose of being appointed to sit as a member of a board etc., and attending/participating in an event, and without limitation to the generality of this request for relief (iii)(1), a person who has been a 'Representative of the Government of the Russian Federation' within the six months prior to the appointment or start of the event in question shall be deemed to be a 'Representative of

the Government of the Russian Federation' with respect to such appointment or event.

Notwithstanding the foregoing, any Athlete or Athlete Support Personnel who would fall within the above definition of 'Representatives of the Government of the Russian Federation' is excluded from the definition with respect to a given event to the extent they are seeking to attend or participate in that event in their capacity as Athlete or Athlete Support Personnel rather than in their capacity as a Representative of the Government of the Russian Federation.

2) Russia may not host in the Four Year Period, or bid for or be granted in the Four Year Period the right to host (whether during or after the Four Year Period), any editions of:

(a) the Youth Olympic Games (summer and winter);

(b) the Olympic Games and Paralympic Games (summer and winter);

(c) any other event organised by a Major Event Organisation; and/or

(d) any World Championships organised or sanctioned by any Signatory. For these purposes, a "World Championship" is any event or series of events that determines the World Champion for a particular sport or discipline in a sport (provided that, as qualifying events for a World Championship do not themselves determine the World Champion, they are not covered by the definition).

Where the right to host any such event in the Four Year Period has already been awarded to Russia, the Signatory in question must withdraw that right and re-assign the event to another country, unless it is legally or practically impossible to do so.

In addition, Russia may not bid for the right to host the 2032 Olympic Games and Paralympic Games, irrespective of whether the bidding for that right takes place during or after the Four Year Period.

3) Russia's (current or historical) flag may not be flown in any official venue or area controlled by the relevant Signatory or event organiser appointed by the Signatory at any of the following events held during the Four Year Period:

(a) the first edition of each of the summer and winter Youth Olympic Games;

(b) the first edition of each of the summer and winter Olympic and Paralympic Games;

(c) any other event organised by a Major Event Organisation; and

(d) any World Championships organised or sanctioned by any Signatory. For these purposes, a "World Championship" is any event or series of events that determines the World Champion for a particular sport or discipline in a sport (provided that, as qualifying events for a World Championship do not themselves determine the World Champion, they are not covered by the definition).

4) Neither the President, the Secretary-General, the CEO, nor any member of the Executive Board/Governing Board of either the Russian Olympic Committee (ROC) or the Russian Paralympic Committee (RPC) may participate in or attend any of the following events held during the Four Year Period:

(a) the first edition of each of the summer and winter Youth Olympic Games;

(b) the first edition of each of the summer and winter Olympic and Paralympic Games;

(c) any other event organised by a Major Event Organisation; and

(d) any World Championships organised or sanctioned by any Signatory. For these purposes, a "World Championship" is any event or series of events that determines the World Champion for a particular sport or discipline in a sport (provided that, as qualifying events for a World Championship do not themselves determine the World Champion, they are not covered by the definition).

Notwithstanding the foregoing, any person that is not a 'Representative of the Government of the Russian Federation' (as set out above) and who either (i) is entitled to attend or participate in the relevant event in connection with a position held within another Signatory (i.e. not the ROC or RPC), or (ii) fulfils the criteria to participate in or attend a relevant event as a neutral Athlete, shall not be prevented from participating in or attending the relevant event in that capacity provided that he/she has no function representing the ROC or RPC at such event.

5) Russian Athletes and their Athlete Support Personnel may only participate in or attend (in a neutral capacity) any of the following events held during the Four Year Period where they are able to demonstrate - in accordance with the Notice to Signatories (Exhibit C-51), or in the alternative, in accordance with strict conditions (and

a mechanism to determine whether a particular Athlete/Athlete Support Person meets the conditions) to be specified by the CAS in accordance with ISCCS Article 11.2.6 - that they are not implicated in any way by the non-compliance:

(a) the first edition of each of the summer and winter Youth Olympic Games;

(b) the first edition of each of the summer and winter Olympic and Paralympic Games;

(c) any other event organised by a Major Event Organisation; and

(d) any World Championships organised or sanctioned by any Signatory. For these purposes, a "World Championship" is any event or series of events that determines the World Champion for a particular sport or discipline in a sport (provided that, as qualifying events for a World Championship do not themselves determine the World Champion, they are not covered by the definition).

6) The content of the Notice to Signatories is endorsed and reflected in the CAS Award, if necessary as an Annex.

7) The following criteria for Russian Athletes and Athlete Support Personnel participating in or attending in a neutral capacity pursuant to article 11.2.6 ISCCS are endorsed and reflected in the CAS Award:

a. The name 'Russia' (or 'Russian' or any other derivative) shall not appear – in any language or format – in the designation of a Russian Athlete/Athlete Support Personnel (or in the designation of a delegation of Russian Athletes/Athlete Support Personnel).

b. Russian Athletes/Athlete Support Personnel shall participate in a neutral uniform to be approved by the relevant Signatory. To this end, the uniform shall not contain the flag, the colours of the flag (collectively or in combination), name (in any language or format), national emblem or other national symbol of the Russian Federation.

c. Russian Athletes/Athlete Support Personnel shall not display publicly the flag, colours of the flag (collectively or in combination), name (in any language or format), national emblem or other national symbol of the Russian Federation, including without limitation, on their body, clothes, equipment or other personal items or in a publicly visible manner at any

official venues or other areas controlled by the Signatory or its appointed Event organiser.

d. The Russian national anthem (or any anthem linked to Russia) shall not be officially played or sung at any official event venue or other area controlled by the Signatory or its appointed event organiser (including, without limitation, at medal ceremonies and opening/closing ceremonies).

8) RUSADA shall pay a fine to WADA of 10% of its 2019 income or US$100,000 (whichever is lower).

or in the alternative, the CAS shall impose the consequences that it sees fit by reference to the relevant provisions of the ISCCS (including, for the avoidance of doubt, any applicable neutral participation conditions and mechanism in accordance with ISCCS Article 11.2.6).

(iv) The reinstatement conditions set out in the CRC Recommendation are imposed as follows:

1) RUSADA shall pay all of the costs incurred by WADA and any other Anti-Doping Organizations from January 2019 to the date of the CAS Award in investigating the authenticity of the data retrieved by WADA from the Moscow laboratory in January 2019

2) RUSADA shall, under supervision of WADA Intelligence and Investigations department (WADA I&I) or the Athletics Integrity Unit (AIU) of World Athletics (as applicable), conduct investigations into any cases impacted by the deletions and/or alterations of the Moscow laboratory data, as notified by WADA, including doing everything possible to locate the complete and authentic data from the Moscow laboratory relating to those cases, so as to rectify in full the tampering that has impacted those cases;

3) RUSADA shall provide any other support (including locating and providing any further data or information, and/or carrying out interviews or other investigative measures) as required by WADA or any other Anti-Doping Organization to assist in determining whether Russian Athletes whose samples are listed in the Moscow laboratory LIMS database provided to WADA by a whistleblower in or around October 2017 have a case to answer for breach of the anti-doping rules. This includes, without limitation, providing authentic and complete hard and/or soft copies of the following documents relating to those samples: (a) doping control forms; (b) chain of custody forms; and (c) electropherograms and other records of the results of analysis of samples for EPO or related substances.

4) RUSADA shall, where requested by the WADA I&I, conduct results management in respect of adverse analytical findings identified by the targeted re-analysis of the samples obtained by WADA I&I from the Moscow laboratory in April 2019.

5) WADA must remain satisfied, throughout the four year period during which the consequences are in place, that RUSADA's independence is being respected and there is no improper outside interference with any aspect of its anti-doping activities. To this end, an international observer must remain on RUSADA's Supervisory Board, RUSADA's Director General must provide quarterly reports to WADA confirming that RUSADA's independence has been fully respected by the Russian authorities and no attempt has been made to interfere in any of its operations.

6) There must be no interference with the efforts of other Anti-Doping Organizations and their delegates (e.g., the International Testing Agency, IDTM, PWC, etc.) to test and/or investigate athletes in Russia.

7) All consequences imposed for RUSADA's non-compliance must have been respected and observed in full by the Russian authorities throughout the throughout the four year period during which the consequences are in place.

8) WADA must have been paid in full all of the costs and expenses that it has reasonably incurred from the date of the CAS Award until the date of RUSADA's reinstatement, including (without limitation) the costs and expenses reasonably incurred in implementing the above consequences (including the costs of supervising the neutral athlete mechanism(s)), and the costs of monitoring compliance with the consequences and with the reinstatement conditions.

or in the alternative, the CAS shall impose the reinstatement conditions that it sees fit by reference to the relevant provisions of the ISCCS.

(v) All requests for relief of RUSADA and the intervening parties shall be dismissed.

2. Jurisdictional and Procedural Matters

a. Jurisdiction of the CAS

125. WADA submits that the CAS has jurisdiction to hear this proceeding. Although CAS's jurisdiction generally was not disputed by RUSADA, WADA responds to the ROC and the RPC's submissions that, because they were not separately issued with notices of non-conformity with the WADC by WADA, the CAS lacks jurisdiction at least insofar as the Signatory Consequences affect the ROC and RPC.

126. WADA submits that it was not required to issue the ROC or RPC with notices of non-conformity because neither are alleged by WADA to be non-compliant with the WADC.

b. Constitution of the Panel

127. WADA disputes the submissions of RUSADA and the RPC that the Panel in these proceedings was improperly constituted.

128. In response to RUSADA's contention that the Panel lacks jurisdiction because the President of the Panel was selected from a list of only nine possible candidates (which RUSADA submitted was an improper process), WADA submits that:

a. RUSADA raises no argument that the President lacks independence or impartiality; and

b. RUSADA's submissions regarding the process of the President's selection by the co-arbitrators are 'hyper-technical and opportunistic'.

129. In response to the ROC and RPC's submission that, because they were not involved in the constitution of the Panel, it was constituted in breach of their right to be heard, WADA submits that Article 10.4.1 of the ISCCS expressly provides that it was WADA and RUSADA (being the Signatory subject to the compliance proceedings) that were to nominate arbitrators.

c. Failure to include ROC/RPC as Respondents

130. In response to the ROC and RPC's contentions that WADA's request for arbitration is inadmissible as they were not nominated as Respondents, WADA submits that:

a. it is clear from the 2018 WADC and the ISCCS that the appropriate Respondent in the proceedings is the non-compliant Signatory (being RUSADA);

b. it would not be practicable (or even possible) for WADA to include as Respondents all persons that will or may be affected by the Signatory Consequences;

c. none of the Signatory Consequences affect the ROC or RPC directly; and

d. in any event, the ROC and RPC have availed themselves of their right to intervene.

d. Failure to seek comment or submissions from ROC/RPC during internal compliance procedures

131. In response to the ROC and RPC's contentions that the proceedings are invalid as the ROC and RPC were not given an opportunity to be heard during WADA's internal compliance procedures, WADA submits that:

a. there are no provisions of the 2018 WADC or ISCCS requiring third parties to be heard during the investigation phase;

b. their rights are protected by their ability to intervene in the CAS Proceedings;

c. as the CAS Panel has the power to review both fact and law, it is not bound by any assertions or previous findings of WADA; and

d. therefore, these proceedings are in substance a *de novo* review and, consequently, there is no prejudice to the ROC or RPC.

3. Validity of the ISCCS

a. Adoption of the ISCCS

132. WADA disputes RUSADA's submission that the ISCCS is neither valid nor binding (at least as against RUSADA).

133. WADA provides a brief background to the process by which the ISCCS came into force.

134. Prior to the introduction of the ISCCS and associated amendments to the WADC in 2018, the applicable version of the WADC was the 2015 WADC. The 2015 WADC contained two provisions dealing with non-compliance, namely Articles 23.5 and 23.6.

135. In May 2017, the WADA Foundation Board approved the development of a framework to outline Signatories' rights and responsibilities, compliance matters and consequences of non-compliance by the Signatory.

136. Initial drafts of the proposed 2018 WADC as well as the ISCCS were provided to Signatories on 1 June 2017 and they were given an opportunity to provide comments by 31 July 2017. On 1 September 2017, further drafts were circulated to stakeholders, with a deadline of 14 October 2017 to submit further comments. The final draft of the ISCCS was unanimously approved by the WADA Executive Committee on 1 November 2017 and the WADA Foundation Board unanimously approved the related 2018 WADC amendments on 16 November 2017.

137. The final version of the ISCCS was published on WADA's website on 21 December 2017 and came into force on 1 April 2018. The 2018 WADC also came into force on 1 April 2018.

b. Validity of the ISCCS

138. WADA submits that the 2018 WADC and the ISCCS are valid and binding on Signatories, including RUSADA. In support of its submissions, WADA relies on the expert legal opinion of Prof. Ulrich Haas.

139. WADA agrees that the relationship between WADA and Signatories is one of contract, arising from the acceptance by the Signatories of the WADC. However, it submits that this contractual relationship is of a *sui generis* nature, due to the following characteristic elements of the relationship:

a. the long-term relationship (without a fixed term) between WADA and Signatories;

b. the fact that WADA and Signatories are pursuing a common purpose (the fight against doping in sport);

c. the contractual framework is dynamic in nature;

d. the contract between WADA and a given Signatory is part of a matrix of contracts between WADA and each other Signatory. These parallel contracts must be on the same terms; and

e. the 2018 WADC does not provide for damages in the event of breach but rather provides for WADA to impose consequences.

140. The result, in WADA's submission, is that the appropriate referential framework is not that of so-called 'exchange contracts' but rather the relationship between an association and its members (or others that subject themselves to its rules).

141. WADA disputes RUSADA's contention that the 2018 WADC and ISCCS are not binding on RUSADA because RUSADA did not provide express consent (which was a requirement as amendments to the 2015 WADC contained in the 2018 WADC were not foreseeable). In that regard, WADA submits that:

a. RUSADA's conduct demonstrated acceptance of the 2018 WADC and ISCCS. Relevantly:

i. it never objected to the validity of the 2018 WADC or ISCCS prior to filing its Response in these proceedings;

ii. it did not make any adverse comment (or any comment at all) during the consultation phases of the 2018 WADC or ISCCS;

iii. in December 2018, it participated in a WADA audit carried out pursuant to the ISCCS;

iv. its 27 December 2019 letter to WADA responding to WADA's formal notice of non-compliance (Exhibit C-11), RUSADA disputed WADA's notice '*in accordance with Article 10.3.1 ISCCS* (thereby acknowledging the validity of the ISCCS); and

v. in its Answer to the Request for Arbitration, RUSADA asserted that it disputed '*certain terms*' contained in the ISCCS, expressly identifying Articles 10.4.1, 10.4.2 of the ISCCS as terms which it disputed (and did not submit that the entirety of the ISCCS was not binding).

b. The amendments brought about by the ISCCS were not a 'paradigm shift' for the WADC but simply a 'revamp' of existing compliance-related provisions to improve transparency and predictability. Relevantly, WADA already had the ability under Article 23.6 of the 2015 WADC to unilaterally declare National Anti-Doping Organisations ("NADOs") non-compliant and impose consequences. In particular, where a NADO was declared non-compliant by WADA, the country of the NADO became ineligible to host the Olympic Games (Article 20.1.8 of the 2015 WADC).

c. As addressed by Prof. Haas, when dealing with a contract with a common purpose akin to the relationship between an association and its members, unilateral changes

in the relationship are admissible to a larger extent than in the context of exchange contracts.

d. The expert legal opinion provided by Prof. Müller (retained by RUSADA) that the ISCCS constitute general terms and conditions that include '*clauses insolites*' (unusual clauses that cannot be enforced against weaker contractual parties unless special attention is drawn to them) is flawed because that characterisation is not fit for purpose. Unlike consumers generally, RUSADA is not a weaker contractual party, the ISCCS was widely publicised and involved consultation with Signatories, and its terms were not an unforeseen paradigm shift.

142. WADA disputes the ROC's submission that, under its Statutes, WADA did not have the authority to introduce the ISCCS and the 2018 WADC. In support of its submissions, WADA relies on the expert legal opinion of Prof. Dominique Jakob. WADA submits that the non-compliance system detailed in the ISCCS is within the scope of the objectives of the WADA Statutes, in particular Article 4.1, which relevantly includes '*promoting and coordinating, at international level, the fight against doping in sport in all its forms*'. WADA submits that it would be an absurdity if it could enact the WADC but was powerless to enforce it.

143. WADA also disputes RUSADA and the RPC's submissions that application of the ISCCS in these proceedings breaches the principle of non-retroactivity. WADA submits that the non-compliance which is the subject of these proceedings is RUSADA's failure to meet the Post-Reinstatement Data Requirement, which was set out in WADA's letter to RUSADA of 25 September 2018 (which was after 1 April 2018, when the 2018 WADC and ISCCS came into force). WADA notes that failure to meet a post-reinstatement condition is expressly said to be a non-conformity pursuant to Article 12.3.8 of the ISCCS. Further, WADA notes that the data-manipulation which resulted in RUSADA's non-compliance took place as late as December 2018 and January 2019.

4. Application of the ISCCS

a. Categorisation of alleged non-compliance as 'critical'

144. WADA submits (in response to the ROC's submission to the contrary) that its categorisation of the Post-Reinstatement Data Requirement as a 'critical' requirement under the ISCCS was legitimate.

145. WADA submits the Panel can be satisfied that the Post-Reinstatement Data Requirement was in fact a 'critical' requirement by reference to Annex A of the ISCCS (which addresses the various categories of non-compliance). WADA says that the Post-Reinstatement Data Requirement either falls within the examples contained in the non-exhaustive list of critical requirements at Article A1 of the ISCCS or is otherwise a requirement '*considered as important to the fight against doping in sport as requirements listed*' in Article A1 and therefore, in accordance with Annex A of the ISCCS, ought to be construed as such.

146. Further, WADA submits that, pursuant to Annex A of the ISCCS, the alleged non-compliant Signatory (i.e. RUSADA and not ROC) is the entity that has the right to

dispute the classification of a requirement. To that end, it states that RUSADA has never disputed the critical classification of the Post-Reinstatement Data Requirement at any point during the compliance process or in this proceeding.

b. Applicability of the fast track procedure

147. WADA disputes RUSADA's submission that the use of the fast track procedure under Article 9.5 of the ISCCS is improper.

148. WADA submits that the decision as to whether to apply the fast track procedure is a discretionary one for WADA management and that WADA management properly exercised that discretion when it decided that urgent intervention (being a threshold requirement for the fast track procedure) was required in order to maintain confidence in the integrity of sport. WADA submits that such decision was justified because:

a. when RUSADA failed to meet the Post-Reinstatement Data Requirement by failing to produce the Moscow Data by 31 December 2018, many stakeholders had expressed strong concern; and

b. without urgent intervention, public confidence in the system would be fatally damaged once it was clear that the Moscow Data had been tampered with by irreversibly deleting and manipulating the data.

149. WADA also disputes RUSADA's claim that the fast track procedure carried out by WADA was invalidated because RUSADA was deprived of its right to be heard in Article 9.5.3 of the ISCCS. WADA says that RUSADA was given an opportunity to explain its apparent non-compliance with the Post-Reinstatement Data Requirement when, on 17 September 2019, RUSADA was provided the relevant forensic reports regarding the Moscow Data and asked to submit any written explanation which it wished to have considered by the CRC. WADA further contends, in any event, that any error in applying the fast track procedure would be cured by these proceedings.

c. RUSADA's obligation to comply with the Post-Reinstatement Data Requirement

i. *Relevance of RUSADA's lack of control of the Moscow Data*

150. WADA submits that, as the Moscow Data was not authentic, RUSADA failed to comply with the Post-Reinstatement Data Requirement, which was to '*procure*' that the authentic LIMS data and underlying analytical data was received by WADA by 31 December 2018.

151. The fact that the Moscow Data was not under RUSADA's control is not, in WADA's submission, an answer to the allegations of non-compliance. It states that an obligation to '*procure*' an outcome is used when a relevant counterparty is contractually liable for an obligation that is likely to be fulfilled (in whole or in part) by others.

152. Further, WADA submits that, when RUSADA accepted its reinstatement as a Code-compliant Signatory in September 2018, it did so in full knowledge that this was subject to the Post-Reinstatement Data Requirement and that a failure to meet that requirement would constitute an act of non-compliance that would be dealt with under the ISCCS.

RUSADA did not object to the requirement at any point prior to 31 December 2018 (when it was to have been satisfied). To the contrary, in its letter addressed to WADA and the CRC dated 11 January 2019, RUSADA assured WADA that it was taking measures to fulfil the requirement.

153. WADA also submits that this position is confirmed by the ISCCS:

a. Article 9.4.3.1 of the ISCCS provides that a '*Signatory's failure to comply with its obligations under the Code and/or the International Standards … caused by … a failure to provide support or other act or omission by, any governmental or other public authorities'* is not an acceptable excuse or mitigating factor for non-compliance.

b. Article 9.4.3.2 of the ISCCS provides that it is not an excuse or mitigating factor '*that a Signatory assigned the task of complying with some or all of its obligations under the Code and/or the International Standards to a third party*'. WADA submits that the 11 January 2019 letter from RUSADA to WADA, in which RUSADA confirmed it was continuing to make efforts to fulfil the Post-Reinstatement Data Requirement and was stressing the importance of its fulfilment to the '*heads of Russian sports organisations*' amounts to RUSADA's assignment of the task of complying with the requirement to the Russian Ministry of Sport or other Russian sport authorities.

ii. *Strict liability*

154. WADA submits that the imposition of strict liability on RUSADA in respect of its non-compliance is not unlawful. It says that the principle of strict liability has been upheld by the CAS in various contexts such as fan misconduct and match-fixing, where it has been provided for in the rules and justified in the circumstances.

155. By analogy to those CAS authorities, WADA submits that strict liability is justified in the present circumstances because it is essential for WADA to act when NADOs are prevented from delivering effective anti-doping programs due to the acts or omissions of third parties (and in particular public authorities). This serves both a corrective and deterrent purpose. In WADA's submission, if a NADO could avoid compliance action by blaming the interference of public authorities or other third parties, the system would be toothless.

156. WADA submits that the decision of CAS 2016/A/4745 *Russian Paralympic Committee (RPC) v. International Paralympic Committee (IPC)*, which is expressly referred to in the comment to Article 9.4.3 of the ISCCS, is perfectly analogous. In that proceeding, the CAS Panel accepted that neither the RPC nor its officials had any involvement in, or control over, the scheme that undermined the Russian anti-doping program, and nonetheless found that the RPC objectively failed to meet its obligation to the IPC to ensure an adequate doping program at a national level and therefore upheld its suspension (based on strict liability).

157. WADA disputes RUSADA's submission that the Signatory Consequences are contractual penalties and imposition of the same on the basis of third-party conduct is illicit under Swiss law without express agreement of the parties. WADA submits that

there is no requirement of an express agreement and that a regime of contractual penalties involving objective responsibility can be assumed orally or result from the circumstances and, in the present case, is specifically provided for through Article 9.4.3 of the ISCCS.

d. Standard of proof

158. WADA accepts that it bears the burden of proving that RUSADA is non-compliant and says the relevant standard, pursuant to Article 23.5.6 of the 2018 WADC and Article 10.4.2 of the ISCCS, is the balance of probabilities.

159. In response to RUSADA's submission that the applicable standard is comfortable satisfaction or strict/full proof, WADA submits that sporting federations are able to designate an applicable standard of proof using their private autonomy. It says this can be done by one body adopting certain rules and another accepting them, such as in 2018 WADC and the ISCCS. The fact that a particular allegation of non-compliance is serious does not preclude the application of the balance of probabilities standard (where that has been provided for in the rules).

160. WADA submits, in any event that, regardless of the applicable standard of proof, RUSADA's non-compliance with the Post-Reinstatement Data Requirement is so compelling that the standard of proof will not be determinative.

5. Authenticity of the Moscow Data

161. WADA states there is incontrovertible evidence that RUSADA failed to procure an authentic copy of the LIMS data.

162. It submits that, before and during its retrieval visits, deletions and manipulations of the LIMS data took place. The alleged deletions and manipulations included:

a. deletion of thousands of files (including daily back-ups of the LIMS database);

b. zeroing commands (the overwriting of free space of a disk with zeros, which renders unrecoverable all traces of prior commands, activities or previously deleted data) and secure-erase technologies;

c. targeted manipulations of data to remove indications of doping;

d. backdating commands to make it appear that the above deletions and manipulations took place in 2015, when Dr Rodchenkov (a former director of the Moscow Laboratory who made allegations regarding the State-sanctioned doping scheme) was still at the Moscow Laboratory;

e. fabricating Forum Messages designed to frame Dr Rodchenkov and Dr Sobolevsky (a laboratory staff colleague of Dr Rodchenkov) by advancing a theory that they had extorted money from athletes and coaches under the threat of manipulating sample analysis results;

f. deleting Forum Messages to cover-up the involvement of Mr Evgeny Kudryavtsev (another member of the Moscow Laboratory staff, who has been a witness in several CAS cases denying Dr Rodchenkov's allegations) in sample swapping activities; and

g. manipulating and forging new data provided to WADA in October 2019 to support theories advanced by the Russian forensic experts.

163. WADA submits that the Russian experts who liaised with WADA during the investigation and compliance process (two of whom who also appeared as witnesses for RUSADA in these proceedings) do not for the most part take issue with the identified data-altering activities but rather attempt to provide innocent explanations for those matters. It rejects those explanations as implausible and unsupported by the facts.

164. The evidence relied upon by WADA to substantiate its submissions were the reports of the WADA I&I as well as reports of the independent experts (Prof. Eoghan Casey and Prof. Thomas Souvignet) from the University of Lausanne retained by WADA in 2019 to analyse the Moscow Data. WADA also relied on statements of Dr Jose Esteban, Mr Paul Laurier and Mr Nicolas Jan, who were members of the technical teams which attended the retrieval missions in 2018 and 2019. They dispute the evidence of the LIMS system administrator, Mr Evgeny Mochalov, regarding conversations that occurred during those missions.

a. Dramatis Personae

165. There were numerous persons involved in the management, extraction and analysis of the Moscow Data and it is useful to identify the witnesses and experts relied upon by the Parties as well as relevant Moscow Laboratory Staff between 2012 and 2014.

Name	Role
WADA witnesses	
Mr Aaron Walker	Senior Investigator, WADA I&I
Dr Julian Broseus	Data Analyst, WADA I&I
Prof. Thomas Souvignet	Independent Expert, University of Lausanne
Prof. Eoghan Casey	Independent Expert, University of Lausanne
Dr Jose Esteban	Independent Expert and WADA Technical Team Leader for 2018 WADA missions to Moscow Laboratory
Mr Paul Laurier	Member of 2018 and 2019 WADA missions to Moscow Laboratory
Mr Nicolas Jan	Member of 2018 WADA mission to Moscow Laboratory
RUSADA witnesses	
Mr Paul Wang	Independent Expert
Mr Dmitry Kovalev	Russian forensic expert

Mr Yuri Silaev	Russian forensic expert
Mr Evgeniy Mochalov	Current IT Manager and System Administrator for the Moscow Laboratory
Ms Elena Mochalova	Acting Director of the Moscow Laboratory
Moscow Laboratory Staff	
Dr Grigory Rodchenkov	Former director of Moscow Laboratory
Dr Timofey Sobolevsky	Former deputy director of Moscow Laboratory
Mr Evgeny Kudryavtsev	Head of sample reception and aliquoting at the Moscow Laboratory

b. The Moscow Data

166. The data retrieved by WADA in January 2019 and subsequently analysed by its forensic experts comprised:

a. the LIMS hard-drives, comprised of two disks (the "primary disk" and the "secondary disk");

b. three hard-drives allegedly removed from the Moscow Laboratory by the Russian Investigative Committee (the "ICR Disks");

c. the computer acting as the server in the Moscow Laboratory instrument room ("Server One"); and

d. 19 instrument computers.

167. The data itself contained various different types of files. The ones that were most relevant to anti-doping matters were:

a. "MYD" files, which contained the LIMS data, itself comprised of tables storing information about an item or activity within the database's records. Tables which were relevant to anti-doping data included:

i. "*found"*: these tables contained information relating to the results of the Initial Testing Procedures;

ii. *"confirmation"*: these tables contained information relating to the Confirmation Procedures conducted on samples;

iii. *"MS_data"*: these tables contained information relating to the Steroid Profiles of samples; and

iv. *"Log_do"*: these tables logged all actions of users of the LIMS database. They identified the user, the action, its date and time as well as the LIMS table in which an action occurred.

b. "RAW" files, which contained raw data generated by the relevant testing instrument; and

c. "PDF" files, which contained the chromatograms issued for analysis procedures based on raw data (i.e. the raw data was converted into a pdf document for review by an analyst).

c. 17 December 2018 – Alterations and deletions

168. As is mentioned above, on 17 December 2018, an independent expert (Dr Esteban) and a supporting WADA team travelled to Moscow to access and copy the Moscow Data. The data was not obtained due to an inability to agree access conditions.

169. In its Statement of Claim (at [82]), WADA extracted the findings of the CRC regarding alteration and deletion of the Moscow Data that occurred on 17 December as follows (footnotes omitted):

> *As noted by the CRC, "[o]n 17 December 2018 (the day that the first WADA team landed in Moscow, and the day before they entered the Moscow laboratory to extract the Moscow Data):*
>
> *37.1 The System Administrator back-dated the LIMS system to 12 November 2015 (i.e., just after Dr Rodchenkov resigned as director of the Moscow laboratory). While the system was back-dated, someone edited database files and deleted files under the directories of the databases labelled '2012', '2013', '2014', '2015' and 'forum_t'. The System Administrator then deleted from the 'primary' disk of the LIMS server over 450 LIMS database back-up files created in 2016.*
>
> *37.2 The Russian authorities claim that the System Administrator deleted these 450+ back-up files to free up space on the 'primary' disk, and that he copied them to his work computer before he did so. However, at the time the System Administrator deleted the files, the 'primary' disk already had approximately 93% of 'free space' available, and when (at WADA I&I's request) the Russian authorities subsequently produced a forensic copy of the System Administrator's work computer, it did not contain any trace of the deleted back-up files.*
>
> *37.3 After deleting the 450+ database back-up files from the 'primary' disk of the LIMS server, the System Administrator issued a Zeroing Command - which operated for anywhere up to two hours and 50 minutes - to overwrite areas of the 'free space' on that disk with zeroes, rendering any previously deleted data once stored in those areas (including the 450+ deleted database back-up files) unrecoverable. As already noted at paragraph 27.1, the System Administrator then issued a command that irretrievably deleted information as to the precise number of zeroes written on the 'primary' disk and the exact length of time the Zeroing Command operated.*
>
> *37.4 The Russian authorities claim that the overwriting of zeros on the 'primary' disk was simply a consequence of the System Administrator performing 'a record speed check' to assess the speed at which data are written onto the disk. However, this does not explain why the System Administrator used the*

Zeroing Command, which ensured that previously deleted data existing in the 'free space' of that disk can never be recovered. Similarly, the Russian authorities' claim that the System Administrator deleted the Zeroing Command from the command history log to avoid inadvertent repetition of the command does not explain why he ran the Zeroing Command in the first place.

37.5 Log entries dated 12 November 2015 on the LIMS system were subsequently selectively deleted from a back-up log file.

37.6 The intent was to hide the fact that these changes occurred not on 12 November 2015 but rather in December 2018. It almost worked; advanced digital forensic analysis was required to uncover the truth.

37.7 The System Administrator then re-set the LIMS system to the date of 17 December 2018, then executed another command to back-date the system, this time to 11 August 2015 (when Dr Rodchenkov was still director of the Moscow laboratory). Seconds later, i.e., while the system was back-dated, the System Administrator formatted the 'secondary' disk of the LIMS server. Formatting sets up the file system and cleans all reference to existing and already allocated files. Notably, at the time of formatting, this 'secondary' disk contained no data, only zeroes. The Russian authorities' explanation that the back-dating was the consequence of a system error is rejected by the Independent Experts, who have identified a specific command that was issued to back-date the system to 11 August 2015. How the disk came to contain no data, only zeroes, remains unexplained, because evidence exists within the system that 'a' secondary disk was mounted on the system in January 2016, in April 2017, and on 15 December 2018. If the secondary disk ultimately copied by the WADA team in January 2019 was the one mounted on the system on these dates, then it is reasonable to expect it to have contained valuable data before being overwritten by the zeroes. The claim by Russian authorities that the secondary disk ultimately copied by WADA in January 2019 was only attached on the system by the System Administrator on 17 December 2018, to improve the 'reliability of the storage information', is belied by the fact that that 'secondary' disk was not mounted to the system and therefore was incapable of storing any data, let alone improving the reliability of such storage.

37.8 As a result of the above activities, database back-up files generated between August 2016 and 17 December 2018 by the automated back-up script do not exist on either the primary disk or the secondary disk from the LIMS system imaged by WADA.

37.9 Finally, still on 17 December 2018, the System Administrator removed from the history files the commands for altering and back-dating the LIMS database and Server One, with the effect that the Independent Experts only discovered by advanced digital forensic analysis that the above activities occurred in December 2018 rather than in August 2015. The explanation offered by the Russian authorities – that the System Administrator did this to avoid inadvertent repetition of the commands – again does not explain why the commands were necessary in the first place."

170. WADA submits that the explanations offered by Russian forensic experts for the above activities are implausible, inadequate and contradicted by the facts. It also submits that they must be considered in the context of:

a. the WADA mission (which arrived on 17 December 2018) to retrieve the Moscow Data;

b. the clearly-indicated importance of preserving the integrity of the Moscow Data as part of the Post-Reinstatement Data Requirement;

c. a letter provided by the Russian Minister of Sport on 12 December 2018 that it would be necessary to spend "several weeks to several months" vetting WADA's equipment to guard against the risk of the "loss of valuable information for investigative actions" (Exhibit C-36, page 24).

171. In those circumstances, WADA submits that the only reasonable inference is that the Russian authorities were still in the process of manipulating the Moscow Data into a form they were willing to share with WADA.

d. 1-10 January 2019 – Alterations and deletions

172. In its Statement of Claim (at [90]), WADA extracted the findings of the CRC regarding alteration and deletion of the Moscow Data that occurred between 1-10 January 2019 as follows (footnotes omitted):

> *As noted by the CRC, "in the days and hours before the second WADA team arrived at the Moscow laboratory on 10 January 2019 to copy the Moscow Data):*
>
> *38.1 Approximately 20,000 files were deleted, mostly from the instrument computers but also from the LIMS server. The explanation provided by the Russian authorities --that this was just part of a routine process whereby 'unnecessary' files were deleted at the beginning of every year to create space on the hard disks -- is belied (i) by the fact that there are no digital traces of any mass file deletion at the beginning of prior years, only in January 2019; and (ii) by the fact that 15,743 (79%) of the files deleted in 1-9 January 2019 dated back to 2008-2017.*
>
> *38.2 In addition, the Independent Experts recovered deleted scripts that included commands to export files, then re-import them while the system was back-dated, the effect of which was to back-date all the tables in the associated database to make it appear the data updates had occurred on earlier dates. The Russian authorities have offered no explanation for this.*
>
> *38.3 The Russian authorities assert that the deletion of the c.20,000 files 'cannot damage the integrity of the data provided by the Moscow laboratory to the WADA experts', because the files did not contain any relevant information. However, the Independent Experts have determined that the deleted files include 11,720 'SLD' (sequence) files, 337 Raw Data files, and 531 PDF Files, of which 9,298 SLD files, all 503 PDF Files, and 1 Raw Data file were created between 1 January 2012 and 31 December 2015. Of the 503 PDF Files, 133 related to the analysis of anti-doping samples, of which 121 reported the results of ITP for anabolic steroids.*

38.4 Files in the LIMS database dating back to 2012, 2013, 2014, and 2015 were deleted or altered on 6 January 2019.

38.5 On 8 January 2019, the System Administrator issued a command to back-date the LIMS system to 23 May 2015. While the system was back-dated, he replaced the LIMS database with a prior version of the database (a back-up file purportedly dated 21 December 2018), and deleted 623 database files from nine folders, including folders labelled 2012-2015. He also used a specialised software tool (which has to be downloaded from the Internet and installed on the machine) to back-date the timestamps on the associated database files to 23 May 2015, and he used automated scripts to alter the LIMS database and to back-date multiple databases and associated files to various dates. According to WADA I&I, the effect was to give 'the erroneous and fraudulent impression' that the back-up version of the database that was restored onto the LIMS system on 8 January 2019 (which was the version made available to WADA for copying) had been on the LIMS system since 23 May 2015. The System Administrator then deleted the scripts containing these back-dating and altering commands.

38.6 The Russian authorities' explanation for this is that the System Administrator accidentally saved over the LIMS database on 22 December 2018, and so on 8 January 2019 he was simply restoring an authentic copy of the LIMS database from a back-up copy of the LIMS database that had been made on 21 December 2018 and saved on a disk stored in an 'accounting' safe, in order to ensure the WADA team got a full authentic copy of the LIMS database. They say the System Administrator then back-dated the system in an attempt to address an instability issue that he believed to be caused by a 'time-stamp' problem. These explanations are rejected by the Independent Experts. Based on the forensic evidence, the copy of the LIMS database provided to the WADA team is not a fully authentic copy of the LIMS database. It is noteworthy that although WADA I&I requested that a copy of the data saved on disks stored in the 'accounting' safe be provided as part of the New Data, the copy of the New Data provided by the Russian authorities did not include any back-up copy of the LIMS database from 21 December 2018, i.e., it did not include the back-up file that the System Administrator said he 'restored' to the LIMS server on 8 January 2019.

38.7 On 9 January 2019, the Forum Messages table containing fabricated and modified messages (but not the Kudryavtsev messages) was copied onto the 2019 LIMS database.

38.8 Also on 9 January 2019, all tables from databases labelled 2008, 2009, 2010, and 2011 were removed from the LIMS server. The Russian authorities claim that the System Administrator deleted the entire LIMS database to arrest worsening instability within the LIMS system, and replaced it with the back-up file purportedly from 21 December 2018. They insist that this did not lead to deletion or alteration of any analytical data. However, WADA I&I has identified three examples (so far) of selective (and damning) manipulation of data between 6 and 9 January 2019: (1) the T:E ratio reported for a 2013 sample taken from a female track & field athlete was changed from more than 4:1 to only 2.3:1 (less than the threshold for further investigation); (2) a confirmed finding for furosemide in respect of a 2012 sample taken from a female skater was deleted (and the corresponding PDF File shows signs of

> *manipulation of the chromatogram for furosemide); and (3) a confirmed finding of a T:E ratio of more than 7:1 in respect of a 2013 sample given by a female curler was deleted (and the corresponding PDF File shows signs of manipulation of the chromatograms, particularly for testosterone and epitestosterone). WADA I&I suggests that these examples 'provide overwhelming evidence that the System Administrator's actions did result in the destruction or modification of information on the results of doping samples tests stored on the LIMS server databases'. The CRC agrees.*
>
> *38.9 On 10 January 2019, 101 SLD files and 137 PDF Files were deleted from the 'primary' LIMS disk."*

173. In addition to the matters extracted from the CRC Recommendation above, WADA states that the LIMS database backups dated 6 and 9 January 2019 referred to in paragraph 38.8 of the CRC Recommendation, which had been deleted but were able to be forensically recovered, demonstrate fraudulent removal of indications of ADRVs when compared to the 2015 LIMS copy.

174. Relevantly, it states that the 6 January 2019 LIMS back-up (which contained the incriminating indications) was consistent with the 2015 LIMS copy provided to WADA by the whistle-blower, whereas the 9 January 2019 LIMS back-up (which did not contain the incriminating indications) was consistent with the 2019 LIMS obtained by WADA in its 2019 retrieval mission.

175. Once again, WADA submits that the explanations of the Russian forensic experts (identified in the CRC Recommendation) were unconvincing. It says it is implausible that the system administrator:

a. would, by accident, have saved over the entirety of the LIMS database on 22 December 2018, but did nothing to remedy that issue until 8 January 2019; and

b. further, neither documented nor disclosed this matter to WADA until the manipulations were discovered during forensic analysis.

176. WADA further submits that no explanation has been provided regarding:

a. why the system administrator, after having replaced the LIMS database with a prior version, proceeded to delete hundreds of database files and alter their time-stamps;

b. the fabricated Forum Messages (addressed in further detail below); or

c. the targeted manipulation of incriminating data between the 6 and 9 January 2019 LIMS back-ups.

e. 16 January 2019 – Deletions

177. In its Statement of Claim (at [101]), WADA extracted the following paragraphs from the CRC Recommendation regarding deletions of the Moscow Data that occurred on 16 January 2019, which was the same time as when the WADA technical team was in the process of retrieving the Moscow Data (footnotes omitted):

> *39. While the WADA team was in the Moscow laboratory and in the middle of copying the Moscow Data, the Russian authorities advised them that removing the Server One hard drives might lead to an inability to re-start the server. The Russian authorities suggested instead to back up (transfer) the contents of Server One onto a new server. On 14 January 2019, WADA agreed to this back-up procedure, which was completed by the Russian authorities on 16 January 2019. However, the digital evidence has now revealed that on that day the System Administrator back-dated Server One to 19 August 2015, and then executed commands to format a 'secondary' disk on the server (so deleting all reference to existing and already allocated files on the disk) in a manner that made it appear the formatting had taken place on 19 August 2015; and a Zeroing Command was executed to overwrite data on the 'primary' disk with zeroes, rendering any data on that disk (including previously deleted data) irrecoverable. In addition, evidence exists that specialised software (found in free space on the LIMS system) was used to secure-erase files from Server One; and the System Administrator selectively removed from the command history files the commands to backdate the LIMS system, the Zeroing Command, the command to format the 'secondary' disk, and the commands to run a specialised tool to secure-erase files. In other words, the System Administrator did the same to the data on the Server One hard drives as he had already done to the LIMS hard drives. It is currently unknown what files he thereby erased and what data he overwrote.*
>
> *40. It is important to note that at no point during the data copying process did the Russian authorities mention to the WADA team what the System Administrator had done on 17 December 2018 or between 1 and 16 January 2019. In fact, they did not mention it until October 2019, once they were confronted with the digital evidence of his activities.*

f. Fabrication and deletion of Forum Messages (25 November 2018-10 January 2019)

178. In its Statement of Claim (at [105]), WADA extracted the following paragraphs from the CRC Recommendation regarding fabrication and deletion of Forum Messages in the LIMS data (footnotes omitted):

> *31. A 'message exchange' platform existed in the Moscow laboratory that allowed text communication (Forum Messages) between laboratory staff. The Forum Messages were time-stamped and stored within the LIMS database. There are thousands of them in both the 2015 copy and the 2019 copy of the LIMS database.*
>
> *32. In a letter to WADA President Sir Craig Reedie dated 26 August 2019, Minister Kolobkov asserted that the Russian authorities had discovered 'correspondence' (i.e., Forum Messages) between Dr Rodchenkov and Dr Sobolevsky that included the topics of 'money transfer' and 'bonuses' in the context of 'dirty samples'. Minister Kolobkov claimed that the communications showed Dr Rodchenkov and Dr Sobolevsky had extorted money from athletes and coaches under the threat of manipulating sample analysis results.*

33. However, based on forensic digital analysis, the Independent Experts have established that:

33.1 The Forum Messages relied upon in Minister Kolobkov's letter do not appear in the 2015 LIMS database, but instead were fabricated and inserted into the 2019 LIMS database at some point between 25 November 2018 and 10 January 2019 (i.e., prior to allowing WADA to copy the database).

33.2 Three further messages that do appear in the 2015 LIMS database, but were entirely innocuous in their original content, were modified in the same time-frame (i.e., 25 November 2018 and 10 January 2019) to falsely incriminate Dr Rodchenkov and Dr Sobolevsky.

33.3 In a booklet and short film produced by the Russian authorities and delivered to WADA I&I on 14 November 2019, these fabricated messages have been used as the main basis for explaining the discrepancies and/or challenging the reliability of LIMS data.

33.4 In addition, 25 messages that are present in the 2015 LIMS database were deleted from the 2019 LIMS database, again between 25 November 2018 and 10 January 2019. These deleted messages are highly material because they show that in 2013 and 2014 the then head of Sample Reception and Aliquoting Department at the Moscow laboratory, Mr Evgeny Kudryavtsev, was involved in manipulation of chain of custody records, including in relation to 'pre-departure samples' (i.e., samples that were tested to ensure Russian athletes going to compete abroad would not test positive) and in relation to 'substituted samples' (a reference to destroying evidence in advance of an anticipated site visit by WADA in December 2014). Mr Kudryavtsev is currently a witness in several CAS cases, in which he denies Dr Rodchenkov's allegation that there was a scheme to prevent the detection of doping by Russian athletes, and insists that Dr Rodchenkov is lying when he claims to the contrary. Therefore persons seeking to discredit Dr Rodchenkov, and to bolster denials of a protection scheme, would have every reason to remove these 25 messages from the 2019 LIMS database before allowing WADA to take a copy of it.

33.5 While the Independent Experts cannot narrow down the date of these fabrications and deletions further within the period 25 November 2018 to 10 January 2019, they did observe that between 5 and 10 January 2019 (most likely on 9 January 2019) a copy of the Forum Message table ('forum_t') containing the fabricated and modified messages (but not containing the 25 Kudryavtsev messages) was restored onto the LIMS database.

34. In its report, WADA I&I expresses the view that '[t]he fabricated, modified and deleted Forum Messages are a stunning deception. They are the figurative "smoking gun". Moreover, their existence demonstrates intent and provides a lens through which the totality of manipulations within the

Moscow Data should be observed. The modified and inserted messages evidence an intent to incriminate Dr Rodchenkov, Dr Sobolevsky and Mr Migachev. While the deleted messages evidence an intent to hide incriminating evidence and protect Mr Kudryavtsev, a key witness against Dr Rodchenkov and his claims of state sanctioned subversion of the doping control process in Russia. The great effort required to establish this deception is evidenced by the fact that amongst the 11,227 Forum Messages stored within the Moscow LIMS, those responsible were able to identify and delete 25 highly inculpatory messages'.

35. The CRC agrees with WADA I&I's assessment. In short, once the ExCo imposed the requirement to hand over the Moscow Data as a condition subsequent to the reinstatement of RUSADA, someone in Russia realised that upon review of the Moscow Data WADA would discover that Presumptive AAFs reported in the 2015 LIMS database were missing (along with the related Raw Data Files and PDF Files). They therefore planted fabricated evidence into the 2019 LIMS database that would allow them to blame those discrepancies on Dr Rodchenkov, Dr Sobolevsky, and Mr Migachev. Such bad faith is indeed 'stunning', and the CRC agrees that it 'provides a lens through which' the explanations offered by the Russian authorities for the following subsequent events should be observed.

179. In the Joint Statement of 16 June 2020, filed with WADA's Reply, Mr Walker and Dr Broseus also explained their observations that, in certain cases when Forum Messages were altered and the substituted message content was longer than the original message, the space within the table that recorded those Forum Messages was too small to accommodate that substituted message. To deal with this issue, the system would fragment the new message into two parts. This did not occur with any other Forum Messages and, therefore, indicated manipulation of the data.

180. WADA submits that the evidence relating to the Forum Messages must inform the way in which other alleged manipulation activities and explanations are viewed. That is, if WADA establishes an intent to manipulate the Moscow Data through the Forum Messages, then the Panel cannot accept that the other identified non-routine activities occurred as a result of accident or operational necessary, particularly when they were not voluntarily disclosed.

g. Authenticity of the 2015 LIMS copy

181. In its Response, RUSADA relies on an expert report prepared by Mr Paul Wang. As addressed in detail below, Mr Wang gave his opinion that Profs. Souvignet and Casey assumed the 2015 LIMS copy was reliable without conducting appropriate forensic testing. That opinion is rejected by WADA as well as by Profs. Souvignet and Casey.

a. WADA's forensic experts were able to "carve" deleted files from the Moscow Data. Carved files are files which have been deleted in a manner that the operating system's "map" to the data is removed and the system has permission to overwrite that area with any new data, but the data itself it not removed unless it is overwritten with new data.

b. The deleted files which were "carved" were of a deleted LIMS database, which had been replaced with a different LIMS database on or around 8 January 2019.

c. The forensic experts were able to recover from the carved files the "*found*", "*confirmation*", "*ms_data*" and "*log_do*" tables of the 2012 to 2015 LIMS databases.

d. Where there was a discrepancy between the 2015 LIMS copy and the 2019 LIMS, such as an adverse finding in the former that was absent from the latter, the result in the 2015 LIMS copy was, without exception, backed up by the carved "*found*" and/or "*confirmation*" tables retrieved from the carved files. This meant the Initial Testing Procedure and Confirmation Procedure records (which were recorded in the "*found*" and "*confirmation*" tables respectively) present in the 2015 LIMS copy but absent in the 2019 LIMS, once existed in the LIMS database but had been deleted before the LIMS database was forensically imaged by WADA on 12 January 2019.

e. There was a complete match between the "*log_do*" tables (in deleted state) in the carved files and the "*log_do*" tables in the 2015 LIMS copy, in particular with respect to the content of Forum Messages. This demonstrates that the Forum Messages, as they appeared in the 2015 LIMS copy, existed in the LIMS database but were deleted.

f. Forum messages that existed in the 2015 LIMS copy that were deleted in late 2018 (and therefore did not feature in the 2019 LIMS) could be recovered from the carved files.

g. Additionally, with respect to the Forum Messages, where a Forum Message was fabricated by adding additional text and the space that the message originally occupied was too small to accommodate the longer, fabricated version of the message, the system dealt with this by fragmenting the message into two parts.

6. Signatory Consequences

182. WADA submits that, while this proceeding primarily concerns data-manipulation and RUSADA's non-compliance with the Post-Reinstatement Data Requirement, when considering Signatory Consequences these matters cannot be viewed in isolation from their broader context. They were, in WADA's submission, an attempt to:

a. cover up evidence of the doping and anti-detection scheme described in the First and Second McLaren Reports;

b. exculpate the Russian authorities that had been implicated by it;

c. inculpate the whistle-blower(s) who exposed it; and

d. undermine evidence that could be used to prosecute anti-doping cases covered up by it.

183. In those circumstances, WADA submits that severe consequences are required and the Panel should be guided by Article 11.2.5 of the ISCCS, which provides:

> *Above all else, the Signatory Consequences imposed should be sufficient to maintain the confidence of all Athletes and other stakeholders, and of the public at large, in the commitment of WADA and its partners from the public authorities and from the sport movement to do what is necessary to defend the integrity of sport against the scourge of doping. This is the most important and fundamental objective, and overrides all others.*

a. Basis of the consequences

184. In its Request for Arbitration and Statement of Claim, WADA sought imposition of the Signatory Consequences proposed in the CRC Recommendation. In its Reply to RUSADA's Response, WADA provided amended prayers for relief, including amendments to the Signatory Consequences. The amended Signatory Consequences are set out in WADA's amended prayers for relief, extracted in full above.

185. WADA submits that it is open for the Panel, consistent with Article 23.5.6 of the 2018 WADC, to impose consequences that are more lenient or more severe than those proposed, with the full range of available consequences being set out in Article 11 of the ISCCS (with the *prima facie* consequences for critical non-compliance set out at Annex B of the ISCCS).

b. Consequences or Sanctions

186. WADA submits that, with the exception of the fine sought against RUSADA, the Signatory Consequences are not disciplinary sanctions.

187. It submits that CAS case law demonstrates that the three necessary characteristic elements of a disciplinary sanction are (i) adverse consequences (ii) that are designed to punish (iii) misconduct by the addressee of the sanction.

188. Although WADA accepts that the Signatory Consequences entail adverse effects on certain persons (Russian athletes and government officials), because those persons are not accused of any specific misconduct and the aim of the Signatory Consequences are not to punish those persons, the latter two characteristic elements of a sanction are not present.

189. With respect to RUSADA, WADA submits that the Signatory Consequences (with the exception of the fine) do not adversely affect RUSADA, and therefore the first two characteristic elements of a sanction are not present.

190. WADA relies on the expert legal opinion of Prof. Haas to submit that restrictions on athletes, support personnel and officials are not sanctions, but rather typical of eligibility criteria, because they are not linked to any individual wrongdoing and instead contain criteria for the participation in sporting events.

191. In support of this submission, WADA also relies on previous CAS decisions dealing with exclusion of Russian athletes from the Olympic and Paralympic Games, subject to

requirements (respectively) that the athletes' International Federation considered they were not implicated by the First McLaren Report or the athlete be "considered clean". It submits that those decisions held that such requirements were not sanctions but eligibility decisions.

192. WADA submits that similar principles apply in this case. Relevantly, it says that it has entered into contracts with International Federations, Major Event Organisations and NADOs, which stipulate that critical non-compliance by a NADO will result in athletes from the country of that NADO being prevented from participating in certain international events. The athletes – as nationals of the country and/or indirect members of International Federations or Major Event Organisations – are bound by the ISCCS and affected in that capacity.

7. Validity of the Signatory Consequences

193. WADA submits that each of the Signatory Consequences are valid and they were amongst the 'standard' consequences for critical non-compliance of a NADO, as set out in Annex B of the ISCCS.

194. WADA addressed the objections to the Signatory Consequences as set out below.

a. Four-year period

195. WADA rejects RUSADA's submission that Annex B of the ISCCS does not provide for consequences to be imposed for a period of four years and, therefore, such a period is unlawful.

196. WADA states that both Annex B and Article 11 of the ISCCS either contain specific references to imposing consequences for a four-year period or otherwise refer to imposing consequences for a "specific period". It says that the latter would necessarily include a four-year period.

197. Further, is says that Article 11.2.10 of the ISCCS makes it expressly clear that:

a. Annex B of the ISCCS merely identifies the range of *prima facie* or "standard" consequences for non-compliance; and

b. there is flexibility to vary within or depart from that range based on the circumstances of the particular case.

b. Youth Olympic Games

198. WADA rejects RUSADA's contention that the ISCCS does not provide for any consequences to be imposed in respect of the Youth Olympic Games. WADA submits that:

a. the ISCCS does not distinguish between the Summer Olympic Games, the Winter Olympic Games and the Youth Olympic Games;

b. the term "Olympic Games" is wide enough to cover the Youth Olympic Games; and

c. consequences dealing with restrictions on the right to host and participate in or attend events (such as Article 11.1.1.5 of the ISCCS) explicitly extend to "*other International Event(s)*" or "*other specified Events*", which cover the Youth Olympic Games.

c. Restrictions on bidding

199. WADA rejects RUSADA's contention that, although Article 11.1.15 of the ISCCS permits consequences preventing a country from being eligible to host events, it does not extend to preventing bids to host or co-host events. WADA submits that:

a. ineligibility to bid for events follows from ineligibility to be awarded the right to host events;

b. as Article 11.1.15 is not restricted to a temporal period, nothing prevents it from applying to all events for which bids will be solicited during a four-year period;

c. this is, in any event, a moot point as the IOC, International Federations and Major Event Organisations are not to accept bids from countries whose NADO is non-compliant (pursuant to Articles 20.1.8, 20.3.11 and 20.6.6. of the 2018 WADC respectively).

d. Restrictions on hosting events of Major Event Organisations

200. WADA rejects the RPC's submission that there is no legal basis under the ISCCS to impose a ban on hosting events of "Major Event Organisations" as Article 11.1.1.5 of the ISCCS only extends to a ban in respect of "International Events".

201. In that regard, WADA refers to the definition of "International Events" in Article 4.1 of the ISCCS, which includes an "*Event or Competition where … a Major Event Organization ... is the ruling body for the Event or appoints the technical officials for the Event*".

202. WADA submits, in any event, that Annex B of the ISCCS explicitly refers to events organised by Major Event Organisations. It says that, pursuant to Article 4.4.5 of the ISCCS, Annex B has the same status as the main body of the ISCCS and therefore provides a basis to impose consequences even if they are not expressly set out in Article 11 of the ISCCS.

e. Restrictions on flying the Russian flag

203. WADA rejects the RPC's contention that there is no legal basis under the ISCSS to impose restrictions on flying the Russian flag at events. In that regard, WADA submits that:

a. The fact that restrictions on the flying of a country's flag are contained in Annex B and not in Article 11 of the ISCCS does not mean it is unlawful. Pursuant to Article 4.4.5 of the ISCCS, Annex B is an integral and mandatory part of the ISCCS.

b. Prohibitions on the flying of the Russian flag reflect the fact that government officials are excluded and athletes must compete as neutrals.

f. Representatives

204. WADA rejects the ROC and RPC's submissions that no consequences can be imposed on Russian government officials as they are not "Representatives" of a Signatory.

205. WADA refers to the definition of "Representatives" in Article 4.3 of the ISCCS, which expressly includes, in the case of a NADO, representatives of the government of the country of the NADO.

g. Validity of Neutral Participation Implementation Criteria

206. WADA rejects RUSADA's contention that the Neutral Participation Implementation Criteria contained in the Signatory Consequences is not provided for in the ISCCS and therefore unlawful.

207. In response, WADA submits that:

a. The default position for critical non-compliance, as contained in Annex B to the ISCCS, is a blanket exclusion of athletes. Therefore, an exception which allows for athletes to participate in a neutral capacity is a step back from that blanket exclusion in the interests of proportionality and therefore valid. This is consistent with Article 11.2.6 of the ISCCS (which provides, *inter alia*, that consequences should not go further than is necessary to achieve the objectives underlying the WADC).

b. Further, also under Article 11.2.6 of the ISCCS, where a neutral athlete mechanism is implemented, those athletes are to compete in a neutral capacity and not as representatives of any country. The Neutral Participation Implementation Criteria proposed by WADA seeks to give effect to that principle.

208. Similarly, WADA disputes the contentions of the 33 Athletes Group and 10 Athletes Group that the Neutral Participation Implementation Criteria is invalid because it goes beyond the scope of Article 11.2.6 of the ISCCS. WADA submits that:

a. The basis of the athletes' contention is that the neutral athlete mechanism requires athletes to do more than demonstrate they are not affected by RUSADA's non-compliance (see Article 11.2.6), namely it requires them to show they are not mentioned in incriminating circumstances in the EDPs or 2015 LIMS copy and meet specific testing criteria.

b. However, as addressed in response to RUSADA, the neutral athlete mechanism is not mandatory but is a relaxation of the blanket ban of athletes;

c. Many more athletes may be excluded from competing under the athletes' interpretation of Article 11.2.6 than under the neutral athlete mechanism proposed by WADA. This is because, under their interpretation, any athlete whose data had been deleted would be unable to avail themselves of a neutral athlete mechanism (as they would be affected by the non-compliance).

d. There is a clear nexus between RUSADA's non-compliance and the incriminating circumstances in the EDPs and the 2015 LIMS copy which justify the Neutral Participation Implementation Criteria.

209. Separately, WADA submits there is no inconsistency between the Neutral Participation Implementation Criteria and Article 8 of the WADC (which governs procedural rights for athletes subject to disciplinary proceedings for ADRVs). WADA says Article 8 of the WADC has no application in the context of the neutral athlete mechanisms. It submits that, in any event, due process is respected by the procedural framework proposed in the Notice to Signatories.

210. Finally, WADA rejects the athletes' submission that the Neutral Participation Implementation Criteria violates the human rights of athletes, for the following reasons:

a. While CAS case law confirms that regard should be had to the European Convention on Human Rights (the "ECHR"), the ECHR does not apply directly to CAS or to WADA.

b. Even if principles in the ECHR are considered, Prof. Meyer's expert legal opinion confirms that there is a margin of appreciation in applying the ECHR, which would apply *a fortiori* in the present context.

c. The restrictions sought to be placed on athletes do not meet the threshold required to demonstrate a violation of athletes' rights to human dignity (ECHR Article 3).

d. Competing in neutral gear does not reach the threshold of violating the right to private and family life (ECHR Article 8).

e. With respect to the freedom of expression (ECHR Article 10), the case law of the European Court of Human Rights (the "ECtHR") does not provide that expressing adherence to a country is a protected right. Expressing adherence to a political movement or entity is entirely separate to the present context. In any event, the restrictions imposed by the neutral athlete mechanism are justified by the objectives pursued by the WADC and ISCCS.

f. With respect to the right against discrimination (ECHR Article 14), there is no free-standing right against discrimination and the athletes have not identified which rights and freedoms, as set out in the ECHR, are said to have been the subject of discrimination. Further, the ISCCS is blind to nationality.

h. Validity of fines

211. WADA rejects RUSADA's submissions that requirements for the imposition of a fine under Article 11.1.1.6 of the ISCCS are not present.

212. With respect to the requirement that aggravating factors be present, WADA submits that:

a. The circumstances of this case are squarely caught by various of the explicitly-listed aggravating factors contained in the definition of that term in Article 4.3 of the

ISCCS, including '*a deliberate attempt to circumvent or undermine the Code or the International Standards and/or to corrupt the anti-doping system*' and '*an attempt to cover up non-compliance'*. In any event, the examples contained in that definition are not exhaustive.

b. It is incorrect to suggest that aggravating factors must relate to instances where it is the Signatory's own behaviour that is at fault.

c. Further, where misconduct leading to non-compliance is misconduct of a third party, but is attributed to a Signatory for non-compliance purposes, that misconduct should be construed as being attributable to the Signatory for purposes of determining whether aggravating factors were present.

213. With respect to RUSADA's contention that a fine can only be imposed if it is capable of deterring further misconduct, WADA submits that:

a. The definition of the term "fine" in Article 4.3 of the ISCCS refers to "*an amount that reflects the seriousness of the non-compliance/Aggravating Factors, their duration, and the need to deter similar conduct in future"*. These are not pre-conditions for the imposition of a fine but rather factors to be considered in fixing its amount.

b. In any event, the deterrent effect of a fine is not simply aimed at specific deterrence of the non-compliant Signatory but also general deterrence.

i. Privity of contract

214. WADA's disputes RUSADA's contention that, based on privity of contract, the Signatory Consequences are an invalid attempt to impose obligations and sanctions on third parties.

215. WADA submits that the Signatory Consequences are measures to be implemented by other Signatories, which are all bound by the provisions of the WADC and the ISCCS.

j. Proportionality

216. WADA submits, in the first instance, that the Signatory Consequences (other than the fine) are not required to meet any test of proportionality, as they are not disciplinary sanctions.

217. In the alternative, WADA submits that questions of proportionality are answered by the fact that the consequences contained in the ISCCS already embody the principle of proportionality. Relevantly, it says that Article 4.4.2 of the ISCCS provides that the ISCCS was drafted having regard to proportionality and this is demonstrated through the category-specific ranges of consequences contained in Annex B (also having regard to the terms of Article 11.2). To that end, it submits that the CRC Recommendation demonstrates that the CRC considered the applicable consequences having regard to questions of proportionality.

218. WADA also submits that CAS Panels have consistently held that, as the WADC embodies the principle of proportionality, it is unnecessary to vary prescribed consequences on a Panel's own assessment of proportionality (and consequently, this Panel assumes, such reasoning extends to consequences imposed pursuant to the ISCCS).

219. WADA submits, in any event, that the Signatory Consequences sought are proportionate in that there is a reasonable balance between the nature of the misconduct and the consequences and they are necessary to achieve the required aims.

a. The misconduct in this case, in WADA's submission, could hardly be more serious. It involved a cynical and sophisticated attempt to manipulate and delete analytical data to prevent the identification and prosecution of doped athletes. Appropriately addressing such misconduct is essential to the integrity of sport.

b. Sitting behind the specific misconduct of data manipulation lie egregious abuses within the Russian anti-doping system including systematic doping of athletes, the non-reporting of positive results, forced opening of B sample bottles, and harvesting and substitution of clean urine.

c. The consequences are designed to deter Russian authorities that have undermined and perverted the anti-doping system in Russia. The consequences must be impactful to be capable to achieving this aim. Lesser consequences in respect of past abuses have not led to change.

d. If Russia were to participate with full visibility and without restriction in major sporting competitions, this would send a message that public authorities can corrupt and manipulate anti-doping programs and there is nothing that WADA can do about it.

e. None of the proposed consequences threaten the existence or economic livelihood of any of the Intervening Parties.

f. Exclusion of parties from international competition as a result of institutional failing (and through no fault of the athletes) has been found of previous occasions to be necessary and proportionate.

220. Further, WADA relies on the expert legal opinion of Prof. Meyer in respect of a 'margin of appreciation' that ought to be afforded to WADA, such that consequences or penalties should only be reduced if they are grossly disproportionate.

221. WADA also rejects RUSADA's submission that the 2021 WADC and 2021 ISCCS demonstrate that the Signatory Consequences are disproportionate. Annex B of the 2021 ISCCS provides that, in the case of critical non-compliance, athletes and support personal "may" be excluded from participating in certain events (c.f. the extant 2018 version which provides "will"), excludes the Olympic and Paralympic Games from events to which the prohibition may apply and limits the prohibition to fly a national flag to the Olympic and Paralympic Games. WADA submits that:

a. Article 24.1.12 of the 2021 WADC provides that these consequences may be imposed. This is consistent with Article 11 of the 2018 ISCCS (the equivalent provision).

b. Annex B of the ISCCS (in both the 2018 and 2021 versions) simply provides *prima facie* consequences which may be amended to suit the circumstances of the case. In the present case, given the non-compliance is one that does not appear capable of remedy, exclusion of athletes and support personnel would be appropriate under either version of the ISCCS.

c. Article B.3.1(e)(2) of the 2021 ISCCS provides that the *prima facie* consequence is that the exclusion "may" be imposed at the outset. Article B.3.2(b)(2) of the 2021 ISCCS provides that, if a Signatory has not satisfied conditions for reinstatement for 12 months, the *prima facie* consequence is that athletes and support personnel "will" be excluded (subject to neutral participation criteria).

k. Personality rights

222. WADA rejects RUSADA's submission that the Signatory Consequences involve an unlawful infringement upon the personality rights of affected persons.

223. To the extent that personality rights of one or more Intervening Parties are infringed, WADA submits that it is not unlawful, for the following reasons:

a. An infringement of personality rights will only be unlawful if it is not justified by either the consent of the person whose rights are infringed or by an overriding private or public interest or by law.

b. To the extent any of the Signatory Consequences affect entities that are Signatories, those Signatories are bound by the ISCCS and have therefore consented to the consequences such as the Signatory Consequences being imposed. Therefore, their personality rights are not unlawfully infringed.

c. Russian national federations and Russian athletes are (respectively) direct and indirect members of International Federation Signatories and are therefore bound by the rules of those International Federations. In the advisory opinion CAS 2005/C/976 & 986 *FIFA & WADA*, it was stated that membership of an association gives rise to deemed consent to the association's rules and regulations (including sanctions). Therefore, their personality rights are not unlawfully infringed.

d. In any event, any restrictions on personality rights are comfortably outweighed by the necessity to promote the fight against doping in sport. This is both a private interest for WADA and a public interest at large. Therefore, there has been no unlawful infringement.

l. Collective punishment

224. WADA relies on the expert legal opinion of Prof. Haas to dispute RUSADA's submission that the Signatory Consequences constitute unlawful collective punishment.

225. Prof. Haas states that the prohibition on collective punishment at international law is a principle of international criminal law, which is not recognised as a stand-alone generic human rights violation and cannot be applied in the present case. The consequences are of a civil law nature.

m. Presumption of innocence

226. WADA also relies on the expert legal opinion of Prof. Haas to dispute RUSADA's submission that the Signatory Consequences contravene the presumption of innocence and the principle of no punishment without fault (*nulla poena sine culpa*).

227. WADA submits that these principles are principles of criminal law and are not universally applicable in disciplinary matters such as this proceeding.

n. Due process

228. WADA refutes any suggestion that there has been a violation of due process. It notes that no consequences have yet been imposed on any person, and they will only be imposed if determined appropriate by this Panel. WADA submits that RUSADA and each person that had standing has had an opportunity to intervene in the proceeding.

o. Double jeopardy

229. WADA rejects the ROC's contention that the imposition of the Signatory Consequences would amount to double jeopardy (as the ROC was already suspended from the 2018 PyeongChang Olympic Games and was fined USD 15 million). In that regard, WADA submits that:

a. The Signatory Consequences are not a sanction and the principle of double jeopardy does not apply.

b. In any event, the principle of double jeopardy is not activated in this proceeding because:

i. this is a compliance proceeding brought by WADA against RUSADA (and not a proceeding by the IOC against the ROC);

ii. this proceeding concerns RUSADA's non-compliance with the Post-Reinstatement Data Requirement, which is separate to the acts and omissions which led to the exclusion of the ROC from the 2018 Winter Olympic Games; and

iii. WADA's objective in seeking imposition of the Signatory Consequences is to protect the Russian national anti-doping program from further abuse by public authorities, which is different to the measures taken by the IOC against the ROC.

p. Competition law

230. WADA disputes that the Signatory Consequences breach competition law. It relies on the expert legal opinion of Prof. Filip Tuytschaever, stating that:

a. WADA does not exercise economic activities and therefore is not an undertaking or association of undertakings in the sense of competition law. Therefore, competition law is not applicable.

b. Further, exclusion of ROC/RPC officials is outside the scope of the competition law as there is no relevant market for the participation in or the attendance of events by representatives from the national committee.

c. With respect to Swiss competition law, that body of law refers to the "effects doctrine", such that Swiss competition law applies where there is a "direct impact" in Switzerland. No such impact has been established.

231. Even if competition law applied, WADA submits that:

a. the imposition of the Signatory Consequences by the CAS would not amount to an anti-competitive agreement or decision (within the meaning of Article 101 of the Treaty on the Functioning of the European Union, "TFEU") or exclusionary abuse of a dominant position (within the meaning of Article 102 of the TFEU). This is because the WADC and ISCCS, as applied in this proceeding, are rules of a purely sporting nature.

b. The Signatory Consequences have a legitimate objective and are proportionate to the aims pursued by WADA.

c. The consequences are not an unlawful boycott within the meaning of competition law as they are not designed to exclude a competitor from a market for reasons of economic protectionism (which is a requirement for an illegitimate boycott for the purposes of competition law). With respect to boycotts in the wider sense of the term, these are legal where they are justified by a legitimate aim and are proportionate.

q. Article 27.2 of the Swiss Civil Code

232. In response to the submissions of the 33 Athletes Group that any consent to the Signatory Consequences affecting athletes would constitute an "excessive commitment" in breach of Article 27.2 of the Swiss Civil Code, WADA submits that the 33 Athletes Group overstates the prejudice. Relevantly, WADA says that, because it is CAS which will set the consequences, athletes are not subject to any alleged arbitrary discretion of WADA and the extent of the restrictions does not deprive them of economic freedom or the ability to exercise their liberty.

r. Principle of equal treatment

233. In response to submissions of the 33 Athletes Group and the 10 Athletes Group that the Signatory Consequences affecting athletes contravene the principle of equal treatment (having regard to the consequences imposed as a result of non-compliance of the NADOs of North Korea and Nigeria), WADA submits that:

a. the appropriate consequences to be applied depend on the specific circumstances of the case;

b. the scope, nature and severity of the non-compliance of the NADOs of North Korea and Nigeria cannot be compared with the present case; and

c. the fact that the CRC reached a certain conclusion in respect of those cases does not bind the Panel in this case.

s. Legitimate expectations

234. In response to the submissions of the Group of 33 Athletes Group and the 10 Athletes Group that the consequences affecting athletes cannot be imposed as the athletes had a legitimate expectation that, if they were subject to an adequate testing program, they will not face sanctions or otherwise be treated less favourably than non-Russian athletes, WADA submits that:

a. the circumstances of this case do not give rise to any estoppel from applying the ISCCS; and

b. the ISCCS makes it clear that, in the event of critical non-compliance by a NADO, athletes of that country will in principle be excluded from certain events.

8. Reinstatement Conditions

235. In addition to the Signatory Consequences, WADA has also requested that the Panel impose on RUSADA the reinstatement conditions as set out in the CRC Recommendation. The reinstatement conditions sought by WADA are set out in WADA's prayers for relief, extracted in full above.

236. In response to RUSADA's contention that WADA is not entitled to seek the recovery of investigation costs as such costs can only be recovered for 'Special Monitoring' of "Anti-Doping Activities", WADA submits that:

a. Although the definition of "Special Monitoring" in Article 4.3 of the ISCCS indicates that "Special Monitoring" relates to monitoring that occurs after the imposition of Signatory Consequences, Article 12.2.1.4(a) of the ISCCS demonstrates that recovery is available for costs of an investigation that led to the identification of the non-compliance.

b. In any event, WADA would be entitled to seek such costs under Article 12.2.1.5 of the ISCCS.

237. In response to RUSADA's submission that WADA is not entitled to seek the imposition of an order for implementation costs, WADA submits that recovery of such costs is clearly permissible under Article 12.2.1.4(b) of the ISCCS.

B. RUSADA's submissions

238. RUSADA's submissions, in essence, may be summarised as set out below.

1. Prayers for Relief

239. RUSADA's prayers for relief, as contained in its Sur-Reply (at [322]), were as follows:

For all the foregoing reasons, RUSADA respectfully requests the Panel:

1) To find that the Panel is improperly constituted and therefore does not have jurisdiction to hear and render a decision in this dispute;

Should the Panel nevertheless find that it has jurisdiction:

2) To declare that WADA's requests for relief nos. 3) and 4) are inadmissible;

Should the Panel nevertheless find that WADA's requests for relief are admissible:

3) To decide that no Signatory Consequences are imposed, alternatively, that the Signatory Consequences as set out in the CRC Recommendation of 21 November 2019 and as adopted by the decision of the WADA Executive Committee dated 9 December 2019 are not imposed;

4) To decide that the Notice to Signatories (as amended by WADA) and the NPI Criteria are not endorsed.

5) To declare:

a) That RUSADA has satisfied all of the conditions – including the Post-Reinstatement Conditions – imposed on it by WADA as part of the Roadmap to Reinstatement, insofar as WADA could legitimately impose such obligations;

b) That no Signatory Consequences (including the Notice to Signatories (as amended by WADA) and the NPI Criteria) may be imposed by WADA on non-Signatories, including in particular (i) the Russian Federation and its representatives, (ii) representatives of ROC and RPC and (iii) Russian athletes and athlete support personnel.

6) That the Panel compel the WADA Executive Committee to reinstate RUSADA into full membership, either at an ordinary or at an extraordinary WADA Executive Committee meeting, the latter to be convened urgently after the Panel has made the declarations set forth under prayers nos. 3), 4) and 5), whichever is earlier;

7) That all other requests for relief made by WADA in the Statement of Reply dated 24 June 2020 be rejected;

8) That WADA be ordered to pay the fees of the arbitrators and the administrative costs of the CAS as well as RUSADA's legal fees and expenses in accordance with Article R64.5 of the CAS Code.

2. Jurisdictional and Procedural Matters

a. Improper constitution of the Panel

240. RUSADA does not dispute the jurisdiction of the CAS Ordinary Arbitration Division *per se* or the applicability of the CAS Code to this proceeding.

241. However, RUSADA submits that the Panel was improperly constituted and therefore, pursuant to Swiss law, does not have jurisdiction to hear the Claimant's claims. Relevantly, it submits that:

a. With respect to Prof. Fumagalli, RUSADA's challenge to his independence and impartiality was dismissed by the ICAS without reasons.

b. With respect to the President of the Panel:

i. the Panel was purportedly constituted on the basis of Article 10.4.1 of the ISCCS;

ii. under objection by RUSADA, the President was selected from a closed list of only nine individuals rather than the general list of CAS arbitrators. That closed list was compiled in a confidential and opaque process that was not disclosed to the public or RUSADA. Such a closed list is invalid and/or unenforceable under Swiss and European human rights law, as it does not comply with minimum standards of independence and impartiality as required under Article 6 of the ECHR and Article 30(1) of the Swiss Federal Constitution.

iii. RUSADA's challenge to the appointment of the President was dismissed by ICAS and referred to the Panel for determination. The Panel decided to address the petition in its final Award and therefore the challenge remains extant.

b. RUSADA's due process rights

242. RUSADA submits that the procedural calendar adopted in this arbitration unilaterally favoured WADA over RUSADA and made it virtually impossible for RUSADA to properly prepare and present its defence. It submitted that that this violated RUSADA's due process rights, established an inequality of treatment and violated RUSADA's right to be heard.

243. RUSADA also submits that there has been a breach of its fundamental due process rights, because it was not provided with a copy of the 2015 LIMS copy until February 2020 and it has not been provided with all of the data in WADA's possession regarding the 2015 LIMS copy (such as forensic chain of custody documents). RUSADA submits that it cannot properly defend its rights without the complete set of data and, in any event, it has not had sufficient time to verify the authenticity of the data that has been provided.

c. Third parties' due process rights

244. RUSADA also submits that WADA violated the procedural rights of the Intervening Parties as well as of other third parties who may be affected by the consequences. These persons and entities were not given an opportunity to be heard during the procedure conducted by WADA prior to this proceeding being commenced.

d. Amendment of WADA's prayers for relief

245. RUSADA submits that WADA's amendments to its prayers for relief in its Reply of 24 June 2020 are inadmissible pursuant to Articles R44.1 and R56 of the CAS Code and therefore should be excluded. Article R44.1 provides that, after the first round of written submissions, "*no party may raise any new claim without the consent of the other party"*.

246. RUSADA submits that the prohibition on raising any "new claim" encompasses amendments of claims. To the extent WADA suggests that its amendments are permitted as they are simply modifications for the purpose of clarification, RUSADA submits that differences between the prayers in WADA's Statement of Claim and its Response go beyond mere modification of the wording but constitute a fundamental overhaul of WADA's substantive prayers for relief.

247. Further, RUSADA submits that the prohibition on amendments to prayers for relief filed after the first round of written submissions is consistent with Article R56 of the CAS Code, which governs Appeal Procedures:

> *Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument … after the submission of the appeal brief and of the answer.*

248. RUSADA submits that these principles apply by analogy to proceedings under the Ordinary Procedure (such as this proceeding), especially cases which are of a quasi-disciplinary nature and akin to an appeal (such as this case). Further, RUSADA states:

a. there are no exceptional circumstances to justify any amendments – WADA's amendments were not the result of new evidence but rather shortcomings in WADA's own drafting; and

b. RUSADA and Intervening Parties would suffer a significant prejudice if WADA were permitted to amend its prayers for relief due to the factual impossibility of addressing WADA's changing arguments.

249. RUSADA separately submits that the revisions made by WADA to the Notice to Signatories for the purposes of its Reply (Exhibit C-51) are in breach of WADA's own procedures under the ISCCS. Relevantly, RUSADA states that the ISCCS does not permit WADA to enact changes to the Notice to Signatories that have not been approved by the WADA Executive Committee (and based on the CRC Recommendation).

e. Standard of proof

250. RUSADA submits that the standard of proof of the balance of probabilities, which was introduced in Article 23.5.6 of the 2018 WADC and Article 10.4.2. of the ISCCS in respect of proving Signatory non-compliance, was never accepted by RUSADA and cannot be applied in this proceeding (this is addressed below).

251. In absence of an agreed standard of proof, pursuant to Article R45 of the CAS Code, RUSADA submits that Signatory non-compliance with the WADC must be examined according to the general standard of proof under Swiss law, which is "strict" or "full" proof. This requires the Panel to be convinced, based on objective grounds, of the correctness of the allegations raised.

252. In the alternative, RUSADA submits that, at the very least, the applicable standard cannot be lower than that of comfortable satisfaction (which is the only standard of proof indicated in previous versions of the WADC). This has been defined in CAS case law as 'greater than a mere balance of probability but less than proof beyond a reasonable doubt' and considers the seriousness of the allegation being made.

3. Validity and Application of the ISCCS

253. RUSADA submits that the Panel cannot apply the ISCCS or the 2018 WADC because RUSADA never provided its consent to the ISCCS or the 2018 WADC, which were a fundamental paradigm shift compared to earlier versions of the WADC. In those circumstances, application of the ISCCS and 2018 WADC would contravene Article R45 of the CAS Code (which provides that the Panel shall decide the dispute according to the rules of law chosen by the Parties).

a. RUSADA did not consent to the ISCCS

254. RUSADA submits that the WADC is a contractual instrument under Swiss private law and can only by unilaterally amended by a party if the anticipated event and scope of the amendments are agreed in advance by all parties (which the ISCCS and 2018 WADC were not). RUSADA relies on the expert legal opinion of Prof. Christoph Müller in relation to this submission.

255. RUSADA does not dispute being a Signatory to the WADC or being bound by the 2015 WADC. It also accepts that the 2015 WADC permitted WADA to unilaterally modify the WADC and adopt International Standards. It also accepts that, under Swiss law, contractual provisions entitling a party to modify a contract unilaterally are not *per se* unlawful.

256. However, RUSADA submits – relying on the expert legal opinion of Prof. Müller – that there is not an unlimited right under Swiss law to unilaterally modify a contract. Rather, parties to a contract must agree on the extent to which the contract can be amended or, at least, the amendments must be reasonably predictable at the time the contract was entered into by the parties.

257. In that vein, RUSADA submits that, in September 2008 when it signed a declaration of acceptance of the 2003 WADC, it did not agree to being automatically bound by any

and all "rules" that the WADA Foundation Board or the WADA Executive Committee unilaterally sought to adopt. Rather, it agreed to be bound by the framework established by the 2003 WADC. Relevantly:

a. The 2003 WADC operated as a soft law instrument, under which WADA had no powers to ensure compliance or impose sanctions against Signatories. Rather, WADA's role was to ensure monitoring of, and compliance with, the WADC by Signatories. Enforcement of obligations was left to the IOC, IPC and International Federations.

b. The revisions of the WADC in 2009 and 2015 did not detract from that compliance framework. While, under the 2009 WADC, the WADA Foundation Board could declare a Signatory non-compliant, the only consequence that WADA could impose on a Signatory was forfeiture of offices and positions within WADA (other sanctions were exclusively in the remit of other entities). The 2015 WADC only introduced cosmetic changes to compliance provisions.

258. In contrast, RUSADA submits that the 2018 WADC and the ISCCS represented a major departure from the initial contractual framework adopted by WADA and agreed by its Signatories (including RUSADA). These revisions moved away from the decentralised enforcement mechanism to a centralised process by which WADA could impose severe sanctions against Signatories. This was a completely new regime and redefinition of WADA's role which could not have been foreseen by RUSADA when it became a Signatory in 2008. Therefore, RUSADA had not, by becoming a Signatory, agreed to be bound by such revisions.

259. RUSADA submits that WADA bears the onus (to the standard of strict/full proof) of proving RUSADA's consent to be bound by the ISCCS and 2018 WADC. In that regard, RUSADA submits that:

a. Consent cannot be implied from RUSADA's non-withdrawal from the WADC. Withdrawing as a Signatory from the WADC would mean, in effect, ceasing its activities. As such, RUSADA's very existence is linked to its status as a compliant Signatory. This left Russia with a Hobson's choice, which was no choice at all.

b. RUSADA's silence during the consultation process for the ISCCS and 2018 WADC also does not amount to acceptance. The consultation process was extraordinarily short (less than five months and falling during the northern hemisphere summer holiday period, as compared to the consultation process for the 2021 revisions which stretched over more than a year). During this period, RUSADA was not in a position to provide comments as its resources were entirely dedicated to its reinstatement as well as to a WADA audit. Further, WADA's submission that the consultation process generated "overwhelming stakeholder support" does not withstand scrutiny.

c. The fact that RUSADA has only stated its position that the ISCCS does not apply in the course of these proceedings also does not amount to consent. It was not necessary for RUSADA to object to the ISCCS until WADA sought to apply its provisions against the Russian sporting community. Similarly, RUSADA compliance with a WADA audit and engagement with the Post-Reinstatement

Requirements does not amount to consent. Whether or not WADA considered these matters were supported by the ISCCS were WADA's own views.

b. The ISCCS is nonetheless invalid

260. RUSADA relies on the expert legal opinion of Prof. Müller to submit that WADA's unilateral modification of the 2015 WADC contravenes the prohibition of excessive commitment under Swiss law. Relevantly, RUSADA submits that Article 27(2) of the Swiss Civil Code protects individuals against infringements to their liberty to which they have otherwise consented and extends to limiting a party's ability to unilaterally modify a contract. Prof. Müller states that a contractual restriction to a party's economic freedom is excessive:

a. if it results in a party submitting to the arbitrariness of its contractual partner;

b. if it suppresses that party's economic freedom; or

c. if it restricts it to such an extent that the basis of the party's economic existence is endangered.

261. RUSADA also submits that, even if WADA were permitted to unilaterally impose a sanctioning framework, such a framework could not be contained in an International Standard. Relevantly:

a. The WADC confirms that International Standards are only meant to regulate "technical and operational areas within the anti-doping program".

b. RUSADA submits that all the International Standards – other than the ISCCS – meet this description.

c. RUSADA submits that this has been recognised by WADA as the proposed 2021 WADC envisages that the sanctioning framework applicable to Signatories be included in the WADC.

d. The differences in purposes of the WADC and International Standards is reflected by the different requirements for their adoption/amendment. Amendments to the WADC require a two-thirds majority of the 38-member WADA Foundation Board whereas International Standards can be adopted by a simple majority of the 12-member WADA Executive Committee.

262. Additionally, RUSADA submits it is unclear whether the centralised regime purportedly created by WADA has been implemented by Signatories in their internal rules, which would be a pre-requisite to it becoming binding on the Signatory's direct or indirect members. In that regard:

a. Article 23.2.1 of the WADC provides that each Signatory is to implement the WADC provisions in its relevant sphere of responsibility.

b. Absent implementation of the WADC in the internal rules of the Signatory, the WADC is not binding on an athlete or other individual under the authority of the Signatory.

c. Similarly, the WADC does not confer any authority on WADA to sanction athletes; WADA only has a right to appeal a Signatory's decision under Article 13 of the WADC.

d. Given that athletes are bound to the WADC only if and to the extent that the Signatory has implemented the WADC into its own rules, it follows that athletes and athlete support personnel are not bound by the new sanctioning regime introduced by Article 23.5 of the 2018 WADC and the ISCCS if it has not been implemented into the Signatories' own rules.

263. In response to WADA's submission (based on the expert legal opinion of Prof. Haas) that Swiss association law is the appropriate legal framework to apply in relation to WADA (in particular in relation to the question of whether the ISCCS is valid and binding), RUSADA submits that:

a. WADA (and Prof. Haas) do not dispute that the WADC is a private law contract and WADA is a private law foundation.

b. It is, therefore, unwarranted to apply (even by analogy) the provisions of association law to this case.

c. As stated by Prof. Müller, the provisions governing simple partnership agreements (Articles 530 *et seq* of the Swiss Civil Code) are more appropriate. Such agreements remain governed by the general rules of the Swiss Code of Obligations, in particular in relation to contract formation or modification.

d. It follows from this that:

i. WADA does not have members that are bound by its statutes and the decisions of its governing bodies. Rather, the WADC must be analysed by reference to the rules of contract law; and

ii. RUSADA's clear and unequivocal consent to the ISCCS and 2018 WADC was required.

c. Applicability of the Fast-Track procedure

264. Even if the ISCCS is valid, RUSADA submits that the fast-track procedure under Article 9.5 of the ISCCS, which was applied by WADA, was unjustified and unnecessary. This was because the requirement of objective urgency in Article 9.5.1 of the ISCCS was not met. In that regard, RUSADA submits that:

a. The ban sought in the Signatory Consequences could start at any time. In particular, RUSADA identified an admission by Mr Jonathan Taylor QC in December 2019 during an interview with CNN (at that time, Mr Taylor was the Chair of the CRC), in which he indicated that the four-year ban could either affect Russia's

participation in the (then) 2020 Tokyo Olympic and Paralympic Games or the 2024 Paris Olympic and Paralympic Games.

b. It was contradictory for WADA to suggest that RUSADA could continue carrying out its anti-doping activities without restriction, while at the same time suggesting that the alleged non-compliance needed to be addressed urgently.

4. RUSADA's Compliance with the WADC

a. RUSADA was not involved in any data manipulation

265. RUSADA submits there is no allegation that it was involved in the alleged manipulation of the Moscow Data and WADA has in fact admitted that it does not know who gave instructions to engage in the alleged manipulation. RUSADA denies any involvement.

266. RUSADA also submits that, during the relevant periods, it had neither access to, nor authority or control over, the Moscow Data or the Moscow Laboratory (the latter being an administratively and operationally independent WADA-accredited laboratory under supervision of WADA). It submits that WADA was aware of these matters when it imposed the Post-Reinstatement Data Requirement. Thus, it was aware that RUSADA had no authority to 'procure' access to the Moscow Data.

267. Further, RUSADA was not involved in the process by which WADA retrieved the Moscow Data. Therefore, to the extent that there were any issues with the data, RUSADA submits that it cannot be held responsible for those irregularities.

268. In those circumstances, RUSADA submits that it was not in breach of its obligations under the WADC.

b. Vicarious Liability

269. RUSADA also submits there is no basis to hold it vicariously liable for the alleged wrongdoing of third parties. RUSADA states that it has complied with its obligations under the WADC, the CRC having stated in the CRC Recommendation that "*the evidence … indicates that RUSADA's work is effective in contributing to the fight against doping in Russian sport*" (Exhibit C-9 at [55]).

270. To the extent that WADA relies on Article 9.4.3.1 of the ISCCS (which provides that failure by governmental or other public authorities to provide support is not an excuse or mitigating factor for non-compliance), RUSADA refers to its submissions that it never consented to the ISCCS.

271. RUSADA submits that WADA's reliance on CAS 2016/A/4745 *RPC v. IPC* to justify strict liability is misplaced because that case dealt an intra-association dispute rather than a contractual setting. Similarly, WADA's attempt to draw analogies between the present case and hooliganism and match-fixing cases is misplaced because:

a. those proceedings also concerned sanctions imposed by an association against its members and cannot be applied to a horizontal contractual setting as is the case here;

b. the sanctions were imposed on members based on an express legal basis, and the sanctions were limited to member associations, being entities subject to the relevant federations' jurisdiction; and

c. the strict liability in hooliganism cases is only valid if rebuttable (clubs must have an opportunity to show that it was not their supporters who committed the incriminating acts) which is not the case here.

272. RUSADA submits that CAS case law (in particular CAS 2018/A/5693 & CAS 2018/A/5694 *Riga FC v. TC Partizan & FIFA*) provides that strict liability, while not requiring fault, does require causality. RUSADA says that WADA has not shown that RUSADA was causally responsible for any alleged failures or wrongdoings of the Moscow Laboratory.

273. RUSADA relies on the expert legal opinion of Prof. Müller to submit that the proposed consequences are contractual penalties. Under Swiss law, contractual penalties based on the conduct of third parties are illicit unless there is an express agreement to the contrary. RUSADA denies any such agreement and says that at most, RUSADA assumed a best efforts obligation to procure the authentic Moscow Data (which does not amount to an assumption of vicarious liability).

274. RUSADA refers to Article 12.1 of the WADC, which provides that WADA may only commence proceedings against a Signatory for failure to comply with *its* obligations.

275. For completeness, RUSADA also submits it did not use the Moscow Laboratory as an auxiliary and therefore cannot be held liable on the basis of Article 101 of the Swiss Code of Obligations.

5. Authenticity of the Moscow Data

276. RUSADA's submissions regarding the authenticity of the Moscow Data were broadly addressed from three angles:

a. the procedural calendar did not allow RUSADA to carry out a proper forensic analysis of the 2015 LIMS Copy, the Moscow Data or the New Data;

b. having regard to the expert report prepared by Mr Wang, the WADA investigation was flawed; and

c. conclusions reached by the WADA I&I are not supported by WADA's forensic experts and are disputed by the Russian forensic experts.

a. Inability to analyse data

277. RUSADA submits that it has been impossible for it to undertake any meaningful analysis of the authenticity and integrity of the 2015 LIMS copy, the Moscow Data and the New Data due to the unreasonable timeframe provided by the procedural calendar in these proceedings.

278. RUSADA refers to WADA's statement that investigation of the Moscow Data totalled more than 6,000 hours. It then refers to the expert report of Mr Paul Wang, an independent IT expert. Mr Wang states that, having regard to the amount of data provided by WADA, proper analysis and reporting on that data would take "1,200 man-days".

b. WADA's flawed methodology (Wang Report)

279. RUSADA instructed Mr Wang to conduct a *prima facie* review of the investigative and technical reports filed by WADA in support of its Statement of Claim (and not a substantive forensic review due to the short amount of time available).

280. Mr Wang concluded that the WADA investigation was carried out in violation of the principles of computer forensics and relied on flawed or unproven assumptions and a flawed methodology.

i. *Principles of computer forensics*

281. RUSADA submits that, according to Mr Wang, in order for digital data to be considered and admitted as reliable evidence, it must comply with two core forensic principles of authenticity (a properly documented evidence collection and preservation process) and integrity (free from error or modification since it was first preserved). Further, it says sufficient information must be provided to allow a third party to replicate any observations or findings.

282. RUSADA says that WADA did not comply with these core principles, in particular with regard to the 2015 LIMS copy. Relevantly, WADA merely stated that the 2015 LIMS copy was obtained from a whistle-blower; it did not provide any chain of custody or evidence preservation documentation. Nor did it undertake any forensic procedures to prove its authenticity, integrity and completeness.

283. Additionally, RUSADA was not provided with the 2015 LIMS copy received by WADA from the whistle-blower. It was denied access on the ground that the information was subject to a confidentiality undertaking and could jeopardise the identity of a confidential witness. Although WADA provided a reconstruction of the 2015 LIMS copy, this was not sufficient to allow RUSADA to replicate the investigation conducted by WADA.

284. Further, RUSADA submits that WADA did not appear to have handled the electronic evidence in accordance with applicable evidence handling standards. Therefore, it could not establish that the data was free from error or modification since it was first preserved.

ii. *Assumption that the 2015 LIMS copy was authentic*

285. RUSADA criticises the WADA forensic experts' apparent assumption that the 2015 LIMS copy was a valid and reliable data source. No forensic explanation was provided for why it was considered authentic and there was not sufficient reliable data to establish whether its initial preservation and acquisition was performed in a forensically sound

manner. Therefore, it could not be excluded that the 2015 LIMS copy had been forged, tampered with or incompletely analysed.

286. RUSADA submits this was particularly concerning as WADA relies heavily on the 2015 LIMS copy to ascertain the authenticity and validity of the LIMS of the Moscow Data. This was even more so the case where the LIMS could be remotely accessed and was in fact remotely accessed on hundreds of occasions and by multiple individuals until June 2016.

iii. *Flawed methodology and approach*

287. RUSADA states that the WADA forensic experts did not limit their analysis to factual observations of forensic traces on the various data sets but went further by interpreting the observations and giving opinions as to what could be the origin of those observations. It says those opinions were given without factual evidence, without conducting appropriate tests and without applying criterions defined in operational standards in the forensic discipline to evaluate the probative value of forensic evidence.

288. Further, RUSADA states that the WADA forensic experts did not test alternative scenarios which could have potentially led to the same results they observed. Neither did they explain why such scenarios were excluded or demonstrate that they performed repeatability or reproducibility testing.

c. Correctness of WADA's conclusions

i. *WADA's conclusions are not supported by its experts*

289. RUSADA submits that many of the conclusions presented in the report prepared by WADA I&I and the CRC Recommendation appear to be wholly unsubstantiated and sometimes even contradicted by findings of WADA's forensic experts.

290. RUSADA provided two examples:

a. The CRC Recommendation found that it was reasonable to expect the secondary disk on the LIMS system to have contained valuable data before being overwritten by zeros. RUSADA says that conclusion is not supported by WADA's forensic experts, who said they did not observe any traces linking a command to overwriting the secondary disk with zeros and the digital traces were insufficient to support a conclusion about the context in which the secondary disk was filled with zeros.

b. WADA alleged that raw data files could not be trusted when the data in the WADA LIMS did not match the 2019 LIMS. However, this was inconsistent with the conclusion of the forensic experts that there was no forensic means available to distinguish whether a Raw Data file had been manipulated (and therefore the forensic experts had not observed any traces of manipulation).

ii. *Russian forensic experts*

291. RUSADA also relied on statements of Messrs Kovalev and Silaev, who were part of the team of Russian forensic experts retained by the Russian Investigative Committee, who reviewed the findings of the WADA forensic experts and WADA I&I.

292. RUSADA did not rely on Messrs Kovalev and Silaev as experts for the present proceedings as such, but asserts that they were called as factual witnesses due to their "*first-hand knowledge of the Moscow Data transfer process of December 2018 and January 2019*" and the "*WADA investigation as to the authenticity and reliability of the Moscow Data*" (RUSADA Sur-Reply at [261]). Nonetheless, their statements (and Mr Kovalev's evidence at the hearing) addressed technical analysis of the Moscow Data and responded to findings of WADA's forensic experts.

293. RUSADA submits the statements of Messrs Kovalev and Silaev confirm that the WADA has not discharged its onus of proving that the Moscow Data was intentionally manipulated, as follows:

a. WADA was provided full access to the electronic archives of the Moscow Laboratory and relevant employees and, therefore, had the opportunity to clarify issues or questions, which it failed to do. In particular, they say that, in December 2018, Mr Mochalov drew WADA's attention to multiple elements including the fact that the secondary disk of the LIMS server was empty.

b. WADA was unprepared for its data retrieval missions, in that members of the retrieval teams were not suitably qualified and did not have an appropriate understanding of the LIMS system (being an information storage and accumulation system which had many elements). In particular, RUSADA notes that Mr Mochalov had been instructed by his predecessor that, in the event of detection of signs of instability of the LIMS, he was to backdate the LIMS server to a date in 2015, as the current LIMS is based on the LIMS modified in early 2015.

c. The Moscow Laboratory failed to comply with ISL requirements for electronic data as a whole, which affected the accumulation of numerous LIMS backup copies of different content and size and gave rise to disorder and mess in the information computer network of the Moscow Laboratory.

d. WADA failed to establish that the 2015 LIMS copy is authentic and reliable.

    i. In response to WADA's submissions regarding the carved files which it says confirm the authenticity of the 2015 LIMS copy, the "*log_do*" tables do not, according to the Russian forensic experts, correspond to the 2019 LIMS or the 2015 LIMS copy. It, therefore, cannot be a valid test for establishing the authenticity of either of the LIMS versions.

    ii. Messrs Kovalev and Silaev refer to the Centre of Information Technologies and Systems of Executive Branch ("CITS") and Kaspersky Laboratory analysis, which determined that the 2015 LIMS copy was not derived from the LIMS system because it was developed on a different

MySQL platform and there are no traces of its existence on the LIMS server of the Moscow Laboratory.

e. Observations made by the WADA forensic experts which were interpreted to be traces of manipulation were in fact Mr Mochalov's attempts to correct operating errors in the LIMS system and reinstall a fully authentic LIMS database. Relevantly, Mr Mochalov identified that the system was not operating stably and thought the errors were due to the incorrect time stamps in tables connected with the metadata of files. He, therefore, attempted to correct the time stamps of the database by backdating the system.

f. The allegations of falsifications of LIMS forum messages are groundless. First, in all the "*forum_t"* tables in the LIMS databases on the LIMS server, including both existing databases and those recovered by carving, the list and content of messages were identical. Second, the assumptions of falsification are based solely on comparison to the 2015 LIMS copy, the validity and reliability of which does not stand scrutiny.

g. The allegations with respect to deletion of documents in January 2019 also do not withstand scrutiny, as none of the listed files contained doping results. Therefore, those files do not fall within WADA's jurisdiction and could not have been used to prove any alleged deliberate manipulation of the Moscow Data.

h. WADA failed to conduct any comparative analysis of the consistency of the Moscow Data, the 2015 LIMS copy and the raw data. The raw data is automatically generated by testing equipment and impossible to manipulate and, together with samples, is the best indication of the authenticity of the Moscow Data. Without having completed this comparative analysis, WADA cannot claim that the 2015 LIMS copy is authentic.

6. Signatory Consequences are sanctions

294. RUSADA submits that, although WADA uses the term "consequences", the Signatory Consequences are in fact material sanctions. It rejects WADA's contention that they are merely "eligibility rules".

295. In that regard, it refers to:

a. Article 12.1 of the 2018 WADC, which relevantly provides that ISCCS "*identifies the range of possible sanctions that may be imposed on the Signatory*".

b. The comment to Article 11.2.5 of the ISCCS, which also characterises the consequences as sanctions.

296. Further, RUSADA submits that:

a. The term "consequences", which is used throughout the ISCCS, implies a response to past misconduct.

b. WADA or its officials have made public comments confirming WADA's intent to use the consequences as a means to punish Russia. Certain of WADA's own submissions in this proceeding also indicate the same.

c. The expert legal opinion of Prof. Haas (retained by WADA) that, in order for a measure to constitute a sanction it must be taken in response to a prior violation of rules by that individual, is incorrect.

d. WADA's submission that the Signatory Consequences are merely proposals to be imposed by CAS should not be accepted because, if RUSADA had not challenged the consequences, they would have (purportedly) become binding without any involvement by CAS (pursuant to Article 10.3 of the ISCCS).

e. Despite certain of the Signatory Consequences having preventative elements, they can nevertheless retain their character as sanctions.

f. The fact that RUSADA never agreed to the consequences as set out in the ISCCS supports a conclusion that they are sanctions.

297. Specifically, in response to the suggestion by WADA that the Signatory Consequences (other than the fine) are eligibility rules, RUSADA submits that:

a. As stated by Prof. Mettraux in his expert legal opinion, WADA lacks any authority to issue eligibility rules and, in any event, eligibility rules cannot apply to athlete support personnel or officials.

b. WADA provides no cogent explanation regarding why some of the consequences contained in the ISCCS (such as a fine) are sanctions whereas others are eligibility rules.

c. WADA has made it clear that the purpose of the Signatory Consequences is to hurt Russia's 'national pride'. This suggests that the Signatory Consequences are indeed sanctions rather than eligibility rules.

d. Recalling that the WADC is a contract, a characterisation of the Signatory Consequences that is consistent with Swiss private law must be favoured. The Signatory Consequences bear greater resemblance to contractual penalties rather than concepts such as eligibility rules or boycotts.

7. Validity of the Signatory Consequences – General

a. Principles of legality and predictability

298. RUSADA submits CAS case law demonstrates that, for a sanction to be valid:

a. it must be provided for by a rule enacted beforehand that is applicable to the addressee of the sanction (principle of legality); and

b. the legal basis must allow the sanction to be predictable and, when in doubt, the relevant provision must be construed narrowly (predictability test).

b. Applicability of human rights and due process rights

299. RUSADA submits that, regardless of the characterisation of the Signatory Consequences as sanctions, eligibility rules or a boycott, Article 4.4.2 of the ISCCS requires WADA (and the Panel) to respect and apply human rights, proportionality and other applicable legal principles in actions under the ISCCS.

300. RUSADA rejects the expert legal opinion of Prof. Meyer (retained by WADA) that WADA is not directly bound by fundamental rights due to its "hybrid nature" that does not fit into traditional categories of private and public law.

301. RUSADA does not dispute that WADA's foundation and functioning is probably unique or that the fight against doping in sport is global. However, it submits that WADA is a Swiss private law foundation and is therefore subject to Swiss law. That law includes fundamental human rights and due process guarantees, as well as the application of the principle of proportionality. It says WADA or, in these proceedings, the CAS Panel, must respect these matters.

302. In response to WADA's contentions that, even if the Signatory Consequences qualified as sanctions, fundamental human rights standards do not apply because these proceedings concern private law and not criminal law, RUSADA submits that:

a. The supplementary expert legal opinion of Prof. Mettraux confirms that, although not all standards applicable in criminal proceedings are applicable in the present proceeding, certain safeguards in the criminal law context apply in the non-criminal context such as this one.

b. The suggestion by Prof. Haas (retained by WADA) that the applicability of the presumption of innocence is dependent on the purpose pursued by the sanctions regime (and, therefore, not applicable here) has no legal basis. RUSADA submits it is the process and not the purpose that determines the extent to which due process must be applied.

c. As the proceeding is disciplinary, or at least quasi-disciplinary, in nature, WADA must comply with human rights principles.

c. Fundamental rights

303. RUSADA submits that, by means of Articles 27 *et seq* of the Swiss Civil Code, Swiss constitutional rights and principles apply in contractual relationships between private parties, including in the present case.

304. RUSADA refers to the expert legal opinion of Prof. Mettraux regarding the applicability of the core minimum rights and due process safeguards, which RUSADA submits are violated by the consequences. Those core rights and safeguards include (i) the presumption of innocence; (ii) the prohibition on collective punishment; (iii) the right to be heard and right to an adversarial process; (iv) the protection against arbitrariness; (v) access to court/justice and legal certainty; and (vi) proportionality.

i. *Presumption of innocence*

305. RUSADA submits the Signatory Consequences do not comply with the presumption of innocence as WADA is seeking the imposition of sanctions on groups of individuals irrespective of whether they have committed any violation of the WADC. In that regard, RUSADA says:

a. WADA's submission that the presumption of innocence does not apply (because the proceeding is not criminal) cannot be accepted. This presumption is a basic element of procedural fairness which has been applied by the ECtHR and also CAS in a private law context.

b. Having regard to the expert legal opinion of Prof. Mettraux, the law of human rights does not differentiate between preventative and punitive measures as regards to the presumption of innocence.

c. WADA's submission that the Signatory Consequences do not contravene the presumption of innocence because WADA does not accuse Russian athletes of wrongdoing cannot be accepted. Russian athletes are stigmatised by reason of the fact that the Signatory Consequences are imposed on them without regard to the presumption of innocence and based only on their origin and nationality. Further, the fact that athletes are only permitted to compete if they demonstrate they are not implicated in data manipulations means they are substantively presumed to be guilty.

ii. *Collective punishment*

306. RUSADA submits that, in substance, WADA is using RUSADA as a proxy to punish Russia, which amounts to impermissible collective punishment. This is because the Signatory Consequences apply to entire categories of individuals whose procedural rights were not observed because they were not heard prior to WADA's issuance of the Notice of Non-Compliance (and many will not be heard at all before a decision is rendered in these proceedings).

307. RUSADA submits that such collective punishment is incompatible with international human rights law and due process guarantees which, for reasons addressed above, must be observed.

308. RUSADA relies on the expert legal opinion of Prof. Mettraux, who states that WADA has a duty to respect and apply relevant human rights standards within its sphere of activity. Further, Prof. Mettraux states that the prohibition of collective punishment is considered to be *jus cogens* by the Swiss Supreme Court and that the ECtHR has affirmed that sanctions must be individual in nature.

309. RUSADA submits that WADA's submission that the prohibition on collective punishment only applies in the context of armed conflict is incorrect. It refers to the report of Prof. Mettraux which provides several examples of where it was applied in different contexts. RUSADA submits the prohibition requires any form of sanction to be subject to the requirement of individualisation.

310. Further, RUSADA submits that, if the prohibition on collective punishment were inapplicable, WADA would be at liberty to impose blanket sanctions at will without regard for the rights of affected entities and individuals, resulting in a system of arbitrariness without regard to individual conduct.

iii. *The right to be heard*

311. RUSADA submits that the right to be heard and the right to an adversarial process were violated as addressees of the Signatory Consequences were not given an opportunity to be heard during the investigation carried out by WADA.

iv. *Protection against arbitrariness*

312. RUSADA submits the Signatory Consequences violate the prohibition of arbitrariness because WADA seeks to impose the Signatory Consequences despite having been unable to identify any misconduct by RUSADA that would justify the sanctions.

313. Therefore, WADA's approach is arbitrary because it disregards clear and undisputable legal principles such as individual responsibility and the presumption of innocence. Further, WADA fails to explain how and for whom the consequences would trigger a behavioural change.

v. *Access to court/justice and legal certainty*

314. RUSADA submits the proposed consequences violate the right of access to a court or to justice and the principle of legal certainty because addressees of the Signatory Consequences could not participate in the WADA investigation leading to the proposed consequences and therefore could not challenge the procedure in a Court of law.

vi. *Proportionality*

315. RUSADA submits that the Signatory Consequences violate the principle of proportionality. RUSADA relies on the expert legal opinion of Prof. Mettraux to submit that, as a matter of Swiss law, a measure is considered proportionate if it cumulatively meets the requirements of:

a. Aptitude, meaning that the adopted measure must be capable of effectively achieving its intended purpose.

b. Necessity, meaning that the measure was such that no other measure could have been adopted that was less restrictive of the rights concerned than the one adopted.

c. Proportionality *stricto sensu*, meaning that any measure must also strike a reasonable balance between its intended purpose and the interest and right of those affected by that measure.

316. With respect to aptitude, RUSADA submits that the objective of consequences for Signatory non-compliance is, or should be, to punish a Signatory for its non-compliance and to deter future non-compliance with the WADC. It submits that the consequences proposed by WADA are incapable of achieving this objective because:

a. WADA has not clearly identified whose behaviour it submits is supposed to be changed.

b. Neither RUSADA nor any of the addressees of the Signatory Consequences have been shown to be involved in the alleged data manipulations.

c. The vast majority of the Signatory Consequences are addressed to third parties who are not Signatories to the WADC. Therefore, those consequences are unsuitable to deter future non-compliance by RUSADA

d. The CRC already acknowledged that "*no special monitoring or supervision or takeover of RUSADA's anti-doping activities*" is necessary, even if the consequences are implemented. In those circumstances, WADA cannot reasonably contend that sanctioning RUSADA will "*defend the integrity of sport against the scourge of doping*" (Exhibit C-9 at [55] and [56.1]).

317. With respect to necessity, RUSADA submits that Article 11.2.4 of the ISCCS itself requires sanctions to be necessary in order to achieve the objectives of the WADC. RUSADA submits this includes the principle that consequences may only be imposed as an *ultima ratio*, meaning that if less severe measures are capable of achieving the same objective, these should prevail. In that regard, it relies on CAS 2010/A/2284 *Anna Arzhanova v. Confédération Mondiale des Activités Subaquatiques (CMAS)*, Article 5.2 of the ISCSS (which states that having a Signatory declared non-compliant and Signatory consequences imposed is the "last resort"), as well as Article 5.4.1 of the 2021 revision of the ISCCS.

318. RUSADA submits that the Signatory Consequences cannot be considered necessary because:

a. WADA gives no explanation why other less serious measures would be not have been equally efficient.

b. WADA did not give RUSADA an opportunity to procure that the alleged non-compliance be remedied.

c. WADA has stated that the Signatory Consequences are necessary because less severe consequences have not led to the desired changes in the past. However, a proper analysis would require WADA to explain, with empirical evidence, why alternatives and less intrusive measures would have been ineffective to reach WADA's goal.

319. With respect to proportionality *stricto sensu*, RUSADA submits that the Signatory Consequences do not strike a reasonable balance between WADA's intended purpose and the interests and rights of those affected by the measures. In particular, RUSADA says that the CRC Recommendation contained no clear consideration of the effect of measures on individuals and entities.

320. Further, RUSADA submits that the 2021 WADC and 2021 ISCCS demonstrate that the Signatory Consequences are too severe:

a. Articles B.3.1(e)(2) and (f)(1) of Annex B in the 2018 ISCCS state that athletes "will be" excluded from participating in or attending events whereas the equivalent provisions in the 2021 ISCCS merely states that they "may" be excluded.

b. The Olympic Games and Paralympic Games are excluded from events to which the above prohibition may apply.

c. Pursuant to Article B.3.1(e)(3) of Annex B of the 2021 ISCCS, the prohibition to fly a national flag is limited to the Olympic Games and the Paralympic Games – the prohibition in relation to World Championships has been deleted.

321. In response to WADA's contention that the consequences are proportionate by reason of the fact that the ISCCS allegedly embodies the principle of proportionality, RUSADA submits that:

a. Proportionality must be assessed on a case-by-case basis.

b. Article 4.4.2 of the ISCCS expressly provides that the ISCCS has been drafted giving due consideration to the principles of respect for proportionality and it shall be interpreted and applied in that light.

c. The decisions in CAS 2016/O/4684 *ROC et al v. IAAF* and CAS 2016/A/4745 *RPC v IPC* – which WADA relied on in support of its submission that exclusion of athletes has been found to be proportionate – are a fundamentally different context from the present proceeding. They concerned an association-based relationship where exclusion of athletes was a necessary consequence of sporting associations being suspended.

d. Discrimination

322. RUSADA submits that Prof. Haas conceded that the Signatory Consequences are discriminatory, but that such discrimination is justified.

323. RUSADA submits that all individuals affected by the Signatory Consequences are targeted precisely because they are Russian. Nationality is the only aspect and primary criterion in determining the personal scope of the consequences. It follows that the consequences are discriminatory in nature.

e. Obligations on third parties and privity of contract

324. RUSADA submits that the WADC and the ISCCS, as purely contractual instruments, cannot directly impose obligations, let alone sanctions, on third parties. That is, the WADC can only be directly enforced (if at all) against Signatories who have accepted to be bound by it.

325. Therefore, Signatory Consequences which constitute material sanctions against third parties with whom WADA has no direct relationship or even authority are invalid as a matter of Swiss law. To that end, RUSADA submits that previous CAS panels have expressly confirmed that the WADC does not directly apply to athletes, who thus have no contractual relationship with WADA: CAS 2011/A/2612 *Liao Hui v. International*

Weightlifting Federation (IWF); CAS 2008/A/1718-1724 *4 International Association of Athletics Federation (IAAF) v. All Russia Athletics Federation (ARAF) & Olga Yegorova.*

326. In those circumstances, even if the Panel finds that the 2018 WADC and ISCCS are valid, WADA's prayers for relief for Signatory Consequences in respect of third parties must be dismissed and the Panel has no authority to order such sanctions.

f. Lack of specificity

327. RUSADA submits that the Signatory Consequences are too vague and unspecific to be enforced, noting that stakeholders affected by the Signatory Consequences requested to intervene in these proceedings in order to ensure that the sanctions are clear.

328. Further, WADA's proposed definitions of the "representatives of the government of the Russian federation" and "Russia's flag" appear to have been created by WADA for the present proceedings and find no basis in the ISCCS (and are therefore inadmissible).

329. RUSADA submits that, if the panel were to seek to remedy the lack of specificity by WADA by supplementing the Signatory Consequences, this would amount to a violation of the prohibition to decide the proceedings *ultra petita* and violate RUSADA's right to be heard.

g. Four-Year Period

330. RUSADA submits that WADA relies on Articles B.3.1(c) or (d) of the Annex B to the ISCCS to justify the Signatory Consequences it seeks to have imposed but that neither of those provision provide for imposition of sanctions for a four-year period.

331. This, it submits, places such sanctions at odds with the principle of legality and the predictability test and it follows that the Panel cannot impose the sanctions for a four-year period.

h. Youth Olympic Games

332. To the extent that WADA requests that sanctions be applicable to the Youth Olympic Games, the CRC recommendations refer to Articles 11.1.1.5 and 11.1.1.10 of the ISCCS as well as Article B.3.1(d)(1) and (2) of Annex B to the ISCCS. However, in RUSADA's submission, none of these provisions mention the Youth Olympic Games.

333. RUSADA submits it follows that the Panel cannot impose any Signatory Consequences in relation to the Youth Olympic Games as there is no clear and predicable legal basis for doing so.

i. Discretion of the Panel

334. Contrary to WADA's submission that the Panel may impose consequences "as it sees fit", RUSADA submits that that Panel cannot render a decision outside the legal framework set out in the ISCCS (if it applies) or endorse such sanctions.

j. Inability to implement consequences in practice

335. RUSADA also submits that WADA has failed to address the many practical issues raised by Intervening Parties in relation to implementing the consequences.

8. Validity of the Signatory Consequences – Specific

336. RUSADA also makes specific submissions in respect of each of the Signatory Consequences (adopting the numbering used in WADA's amended prayers for relief).

a. First consequence (exclusion of representatives of the Russian government)

337. RUSADA submits that government officials are not bound by the WADC or the ISCCS and WADA has no power to sanction government officials or employees.

338. Further, Article 11.1.12 of the ISCCS and Article B.3.1(c) of Annex B specify that, in case of Signatory non-compliance, the Signatory's representatives will be ineligible to sit as members of boards or committees of other bodies of other Signatories. Consequently, there is no power to place restrictions on third parties.

339. Additionally, RUSADA submits that the first consequence violates the principle of State sovereignty and immunities attached to representatives of the Russian Federation.

340. RUSADA also submits that this Signatory Consequence:

a. cannot be imposed for a four-year period or in connection with the Youth Olympic Games;

b. is disproportionate;

c. violates due process;

d. lacks specificity (as WADA has not given satisfactory guidance to determine which representatives would be affected or provided criteria to this effect); and

e. is discriminatory.

b. Second consequence (restrictions on hosting and bidding on events)

341. RUSADA submits that the Panel would only have authority or jurisdiction to impose the second consequence if the Russian Federation had accepted to be subject to WADA's jurisdiction, which it never did. Consequently, neither WADA nor the CAS has jurisdiction over the Russian Federation and there is no legal basis to impose consequences on the Russian Federation.

342. RUSADA submits that Articles 11.1.1.5 and B.3.1(d)(1) of Annex B to the ISCCS only indicate that a Signatory's country can be declared ineligible to host or co-host, or to be awarded the right to host or co-host, certain major sport events. As these provisions do not allow sanctions that prohibit *bidding* for the right to host certain events, RUSADA submits that Signatory Consequences seeking to impose such a sanction are unlawful.

343. RUSADA also submits that the second consequence:

a. cannot be imposed for a four-year period or in connection with the Youth Olympic Games;

b. is disproportionate; and

c. lacks specificity (as it is complicated, if not impossible, to understand what a "Major Event Organisation" is and there is no clarity provided regarding how to re-assign events where the right to host an event in the relevant period has already been awarded to Russia).

c. Third consequence (prohibition on flying the Russian flag)

344. RUSADA submits that this consequence interferes with prerogatives of the IOC and IPC and that the use of State symbols is within the authority of the organisers or events and not WADA. Further, for reasons already addressed, Article 11.1.1.10 of the ISCCS and Article B.3.1(d)(2) of Annex B (on which WADA relies) do not state that the national flag can be banned at Youth Olympic games or events organised by Major Event Organisations.

345. RUSADA also submits the third consequence:

a. is disproportionate; and

b. lacks specificity (as there is no explanation for how the ban would apply in practice and the ambit of the consequence, insofar as it extends to "any other event organised by a Major Event Organisation", is not clearly defined).

d. Fourth consequence (exclusion of ROC and RPC leadership from Olympic Games and other major events)

346. RUSADA submits this consequence is an unjustified interference in the prerogatives of the IOC and the IPC as those bodies retain the power to exclude officials from their events.

347. RUSADA also submits the fourth consequence:

a. violates the prohibition on collective punishment; and

b. is disproportionate.

e. Fifth consequence (exclusion of Russian athletes and support personnel)

348. RUSADA submits the fifth consequence is invalid.

349. RUSADA says that, as there is no direct relationship between Russian athletes or athlete support personnel and WADA (as they are not Signatories to the WADC), there is no jurisdiction or legal basis to sanction them. Rather, the proposed sanction is the prerogative of Signatories, as relevant within the respective spheres of influence.

350. RUSADA submits that the Neutral Participation Implementation Criteria have no legal basis in the ISCCS or the 2018 WADC and are in fact sanctions of their own which severely limit athletes' and athlete support personnel's rights. In particular, it infringes:

a. the cultural rights of Russian athletes and support personnel by prohibiting them from using cultural symbols of the Russian Federation;

b. economic freedom of Russian athletes and support personnel, as it will result in the loss of income for many athletes and support personnel;

c. the protection against arbitrariness, as terms of the consequence mean its implementation is left to WADA's discretion and arbitrariness.

351. RUSADA submits that the Panel therefore cannot endorse the Neutral Participation Implementation Criteria. Further, it submits that endorsing the criteria would violate the rights and prerogatives of the IOC, IPC and International Federations.

352. RUSADA further submits this consequence constitutes an invalid and unenforceable reversal of the burden of proof, as athletes are be required to demonstrate that they are not affected by the Signatory's non-compliance. The substantive effect of this consequence is that all Russian athletes are presumed to have committed an ADRV and are ineligible for participation in major sporting events unless they can prove their innocence. This is inconsistent with the principles in Article 8 of the Swiss Civil Code (that a party must prove a fact that it alleges) and Article 3.1 of the WADC (that an anti-doping organisation must establish that an ADRV has occurred)

353. RUSADA also submits that the fifth consequence:

a. violates the prohibition on collective punishment;

b. violates the right to be heard of Russian athletes and athlete support personnel, as they were not notified by WADA of the possibility that they could be subject to sanctions and were denied the possibility to be heard in respect of sanctions and measures that WADA was considering adopting against them. RUSADA submits that admission of certain individuals to these proceedings does not cure any violation of these due process rights;

c. is inconsistent with the presumption of innocence;

d. is disproportionate; and

e. is discriminatory.

f. Sixth consequence (fine)

354. RUSADA submits the requirements to impose a fine under the ISCCS are not met.

a. In respect of the requirement that there be aggravating factors, RUSADA submits the aggravating factors must originate from the Signatory in question, which is not met in this case as none of the Aggravating Factors outlined in the CRC Recommendation can be attributed to RUSADA.

b. In respect of the requirement that there is a need to deter similar conduct in the future, the CRC Recommendation conceded that not only has RUSADA not breached the WADC but it is making an effective and valuable contribution to the fight against doping. If there is no wrongful conduct by RUSADA that would need to be deterred in the future, this requirement cannot be met.

c. There is also a requirement that the fine used by WADA must be used to finance further Code compliance monitoring activities. In RUSADA's submission, where the CRC has not recommended any special monitoring or supervision of RUSADA's anti-doping activities, it cannot be said that the fine will be used to finance compliance monitoring activities of RUSADA.

355. RUSADA also submits that this consequence is disproportionate.

9. Reinstatement Conditions

356. With respect to the reinstatement conditions, RUSADA first submits that, as RUSADA did not breach any of its obligations, there is no basis to declare it non-compliant with the WADC. In those circumstances, the proposed Reinstatement Conditions are unjustified and cannot be endorsed.

357. In the alternative, RUSADA submits that the conditions relating to restitution of costs are not justified:

a. First, under Article 12.2.1.4(a) of the ISCCS, the cost that a Signatory may be required to bear in order to be reinstated must relate to Special Monitoring actions. These are defined in the ISCCS as specific and ongoing monitoring of a non-compliant Signatory's anti-doping activities. However, as the CRC Recommendation expressly did not recommend any special monitoring of RUSADA's anti-doping activities during the four-year period, there is no basis to claim such costs.

b. RUSADA similarly submits that there is no basis for WADA to seek costs under Article 12.2.1.4(b) of the ISCCS (which relates to cost and expenses incurred in assessing a signatory's efforts to satisfy reinstatement conditions) in circumstances where the CRC does not recommend any special monitoring. That is because the costs permitted to be recovered under Article 12.2.1.4(b) only extend to costs of special monitoring or costs of supervision and or takeover of RUSADA's anti-doping activities by a third party. This will not extend to the costs of implementing the neutral participation criteria.

c. RUSADA also submits that the reinstatement conditions are disproportionate because they extend beyond "reasonably incurred" costs but rather seek all costs and expenses. Further, as these costs could amount to millions of dollars, such a sanction would substantively prevent RUSADA from performing its activities.

C. Intervening Parties' submissions

358. The Intervening Parties' submissions, in a number of areas, bore substantial similarity to those made by RUSADA or overlapped with submissions made by other Intervening

Parties. To avoid duplication, the following section of this Award summarises the Intervening Parties' submission where they relevantly extended upon, or differed to, the submissions of RUSADA or other Intervening Parties.

1. IOC and IPC

359. The IOC and IPC shared legal representation and provided submissions jointly, though some matters specific to each were addressed separately. The primary intent of the submissions of the IOC and IPC was to ensure that any sanctions imposed by the Panel were clear, left no room for interpretation and could be applied without further procedures. They did not seek to substantively address the legality of the Signatory Consequences.

360. While the IOC and IPC expressed their willingness to implement any measures imposed by the Panel, and their view was that the measures imposed should be the toughest possible in light of the seriousness of the non-compliance (while still adhering to the rules of natural justice and respecting human rights), their submissions stressed the potentially significant burden and expense on Signatories of implementing the Signatory Consequences.

361. In their first written submission of 30 April 2020, the IOC and IPC prepared a table of requested clarifications in respect of the Signatory Consequences and invited WADA to provide a response. WADA responded to that table in its Reply to the Intervening Submissions of 24 June 2020 and a number of those matters were reflected in WADA's amended prayers for relief. The outstanding matters identified by the IOC and IPC are set out below.

a. Restrictions on representatives of the Government of the Russian Federation

362. The IOC and IPC submit that WADA's clarification of this concept remained extraordinarily broad and impossible to implement (or only possible at the cost of burdensome investigations by Signatories). They submit that, if WADA could not implement a simple, practical or concrete method to identify potentially ineligible persons, it is difficult to see how any Signatory could do so. The IOC and IPC requested that a sufficiently precise definition of "Government Representatives" is used such that a list of Government Representatives could be prepared. They submit that that list should only include persons whose role might be considered relevant to restoring confidence in the integrity of the anti-doping system or be a particular source of national pride.

363. For the prohibition on such representatives sitting on "Boards or Committees of any Other Bodies", the specific body or bodies should be expressly identified and should only include those that are relevant to restoring confidence in the integrity of the anti-doping system or that are a particular source of national pride. Further, the IOC says this consequence should not impede persons who perform essential and beneficial services to the sports movement, in particular persons who are not elected or appointed to positions as representatives of Russia but in their personal capacity (such as IOC members and technical officials and volunteers). The IOC made particular reference to Ms Yelena Isinbayeva, who is an elected member of the IOC and the IOC Athletes'

Commission who could conceivably fall within the definition of a Government Representative. It submits that this prohibition should not apply to Ms Isinbayeva.

364. With respect to the prohibition on such representatives "participating in" or "attending" events, the IOC submits WADA's attempt to limit this consequence – to (i) persons invited to attend; (ii) accredited persons; (iii) official hospitality; and (iv) reasonable efforts by Signatories to prevent such persons from attending events as spectators – still presents practical concerns. The IOC submits that the prohibition should only apply insofar as accreditation is concerned and any non-compliance (by a Signatory) should only be an issue where the prohibition is knowingly breached.

b. Prohibition on Russian flag

365. The IOC submits that the breadth of this prohibition – extending to all areas that may be accessible to general spectators – makes it impractical and, in some cases, impossible to implement.

c. Restrictions on members of ROC and RPC

366. While the IOC accepts RUSADA's submission that it is the IOC's prerogative to exclude National Olympic Committee officials from its events, it submits this does not prevent the WADC or ISCCS validly providing an alternative or parallel basis for exclusion of ROC officials from the Olympic Games or Youth Olympic Games.

367. The IOC notes that all Russian IOC members are automatically members of the ROC pursuant to Rule 28.1 of the Olympic Charter and, therefore, would be caught by this consequence. It says that those members are not representing Russia but are representing the IOC in Russia. Although WADA's clarifications affirmed that such persons would be permitted to attend the relevant events, the IOC submits that IOC members who are also members of the Russian Government should be treated similarly.

368. Once again, with respect to the prohibition on attending events, the IOC submits that this should only apply insofar as accreditation is concerned.

369. To the extent that WADA also accepts an exception for ROC members genuinely falling into the category of athletes or athlete support personnel, the IOC submits it may be difficult to conclusively determine whether a ROC member genuinely qualifies as an athlete support personnel and it cannot be held non-compliant unless a knowing contravention is established.

d. Restrictions on Russian athletes and athlete support personnel

370. The IOC invited WADA to clarify how many athletes are potentially affected by this consequence and proactively assess the remaining potential cases of ADRVs, which could avoid the need to implement the neutral athlete mechanism.

371. The IOC also submits the requirements in the Notice to Signatories that (i) athletes not be mentioned in incriminating circumstances in the EDPs or the 2015 LIMS database; and (ii) there are no indications of manipulation of their data, relate to information in the possession/control of WADA and this assessment ought to be conducted by WADA.

372. It further says that the testing requirements for athletes seeking eligibility for the Olympic Games may become unduly burdensome as the long list of athletes to be potentially accredited will likely be larger than usual given the uncertainty linked to eligibility of Russian athletes and officials. This could result in the requirement for 8,000-10,000 tests, which burden could be reduced if WADA proactively commenced its assessment of potentially affected athletes.

373. With respect to identifying athlete support persons who were support persons of athletes who do not meet the neutral participation criteria, the IOC says this requires a two-step exercise for which it is unlikely to have the resources to fully implement.

374. In addition to WADA conducting, and providing to Signatories, preliminary assessments in relation to Russian athletes, the IOC submits that a Centralised Eligibility Panel should be established (considering the submissions of the parties) to ensure efficiency and consistency of decisions.

e. Other matters addressed by the IOC

375. Additionally, the IOC submits that, in imposing any consequences, it will be necessary to consider:

a. the relevance of the Olympic Charter as the founding document governing the rights and obligations of various addressees of the Signatory Consequences;

b. the respective structures of the organisations that will be required to implement the Signatory Consequences (to ensure they are not unduly interfered with);

c. the need to avoid, as far as possible, ancillary disputes which would further complicate the implementation of the Signatory Consequences; and

d. with respect to the Youth Olympic Games, whether imposing restrictions on a new generation of Russian athletes is proportionate.

376. Separately, the IOC takes issue with WADA's drawing of an analogy between the Signatory Consequences and the IOC's neutral athlete mechanism used at the 2018 PyeongChang Olympic Games. The IOC submits that the restrictions on the participation of Russian athletes in that case was on the basis that the ROC was suspended, which is different to the mechanism contemplated by WADA in these proceedings.

377. Similarly, the IOC disagrees with WADA's submission that the decision in CAS 2011/O/2422 *United States Olympic Committee (USOC) v. International Olympic Committee (IOC)* held that references to the WADC in the constitution of a Signatory will mean that any regulation contradicting the WADC will be void. The IOC submits that decision only held that the Olympic Charter cannot be relied upon to impose additional sanctions on an athlete on the basis that it refers to the WADC. Therefore, the IOC submits the Panel must consider whether any Signatory Consequences require a Signatory (which is required to implement them) to breach its own constitution.

f. Separate matters addressed by the IPC

378. The IPC submits that its position is somewhat different from the IOC, in particular because:

a. It had previously suspended the RPC from membership and only reinstated the RPC with specific post-reinstatement criteria including testing requirements. It therefore already has a system in place to test Russian athletes.

b. The IPC and many of the Para-sport International Federations do not have the same financial resources and capacity as the IOC and able-bodied International Federations.

c. CAS proceedings are not free for the IPC or Para athletes, and therefore the IPC does not have a dedicated *ad hoc* CAS system at the Paralympic Games.

379. The IPC also noted, in the table of clarifications annexed to its first written submissions, that it also acts as the International Federation for 10 Para sports. As it is also a "Major Events Organisation" within the meaning of the 2018 WADC and ISCCS, where WADA's prayers for relief relate to "any other event organised by a Major Event Organisation" they would therefore on their face extend to events organised by the IPC in its capacity as an International Federation.

380. The IPC submissions with respect to the Notice to Signatories, to the extent that they differ from those of the IOC, are as follows:

a. There should be relatively few Para athletes and athlete support personnel implicated by the relevant data and so it would not be unduly burdensome for WADA to complete its assessments in respect of those persons.

b. Due to the COVID-19 pandemic, the IPC has not currently included all additional testing analysis requested by WADA. It seeks confirmation that its existing testing requirements are sufficient to avoid any allegation of non-compliance. In particular, it requests that it be permitted to maintain its six-month testing window (rather than the nine-month window proposed by WADA).

c. WADA's proposal that decisions of eligibility panels will be rendered at least one month prior to an event and that there be a right of appeal to CAS is not practical or appropriate for the IPC: (i) the IPC eligibility panels members are volunteers and so it is more efficient for evaluations to be conducted immediately following final registration for events; (ii) the costs of CAS appeals are prohibitive for the IPC and Para athletes; and (iii) given CAS appeals are not self-evident, the binding nature of an eligibility panel's criteria is not appropriate for the IPC.

2. ROC

381. Many aspects of the ROC's submissions bore substantial similarity to those of RUSADA and/or other Intervening Parties. Those aspects of the ROC's submissions are not duplicated in the summary that follows.

a. Constitution of the Panel

382. In addition to submissions regarding the appointment of the President from the Special List, the ROC submits that the Panel has been improperly constituted because the ROC, as an Intervening Party, was not consulted with respect to the choice of the arbitrators.

383. The ROC refers to Article R41.4 of the CAS Code and submits that, when an application for intervention is filed before the constitution of the Panel, the President of the CAS Ordinary Division must determine the participation of the proposed intervenor first and only then can the CAS proceed with the formation of the Panel in accordance with the number of arbitrators and the method of appointment agreed by all parties (which includes the intervenor).

384. As this procedure was not followed, the ROC submits that the Panel was not constituted in accordance with Article R41.4 of the CAS Code and therefore also not in accordance with principles enshrined in Articles 179 and 180 of the Swiss Private International Law Act, the ECHR and the Swiss Constitution. It submits these are grounds for cancellation of the Award.

b. Legal status of entities

385. With respect to WADA's status as a Swiss private foundation, the ROC relies on an expert legal opinion of Prof. Thomas Probst to submit that this status is entirely different from the legal status of an association and that any binding effect of the 2018 WADC with regards to third parties must arise from the law of obligations. Therefore, WADA must prove that the ROC has accepted to be bound by the 2018 WADC and the ISCCS.

386. With respect to its own legal status, the ROC relies on the expert legal opinion of Prof. Dmitry Dozhdev to submit that it is a non-commercial corporate association, established in the form of a union. It says that it is a non-governmental organisation which is independent from the Russian State, RUSADA and the Moscow Laboratory.

c. WADA's claims are outside its statutory purpose

387. While the ROC acknowledges that WADA's purpose of fighting doping in sport is legitimate, it says this does not mean that WADA has a universal power to sanction Signatories or third parties. Having regard to the expert legal opinion of Prof. Probst, the ROC submits that WADA's authority is limited by its Charter.

388. Relevantly, the ROC says that WADA's claims are inadmissible because the WADA Charter does not provide that WADA has the authority to impose sanctions or initiate legal proceedings aimed at imposing sanctions.

389. In that regard, Prof. Probst refers to Article 4 of WADA's Foundation Charter and says that WADA's general purpose lies in the international promotion and coordination of the fight against sports doping and, to this end, WADA cooperates with sports organisations and athletes and seeks to obtain their "*moral and political commitment to follow its recommendations*". Prof. Probst notes that the WADA Charter only speaks of recommendations and not sanctions. He says this indicates that it was not intended

for WADA to engage in actions that go beyond recommending disciplinary measures to those who possess disciplinary power.

390. Therefore, the ROC submits that WADA lacks authority to file the present claim against RUSADA and to seek to have the CAS impose sanctions against the ROC, its affiliated athletes, national federations and officials. On that basis, the ROC submits the claim must be deemed inadmissible or the CAS has no jurisdiction to entertain WADA's claim (at least to the extent it applies for sanctions to be imposed on the ROC, its affiliated athletes, national federations and officials).

391. The ROC also brought to the Panel's attention a recent (16 July 2020, 4A_43/2020) decision of the Swiss Supreme Court regarding the Swiss Foundation for Consumer Protection and Volkswagen. It submitted that this decision held that the purpose of a foundation (such as WADA) must be interpreted in a restrictive manner. Further, the aligned interest of numerous individuals (even if legitimate) would not allow a foundation to act outside its authoritatively defined purpose.

d. Mandatory pre-arbitral requirements

392. On 10 February 2020, the ROC sought a preliminary ruling that the CAS does not have jurisdiction to impose any sanctions against the ROC, as mandatory pre-arbitral requirements had not been complied with by WADA. The Panel decided that that application would be determined at the same time as the hearing of these proceedings.

393. The ROC submits that, as WADA seeks to impose sanctions against the ROC, it must satisfy the procedural requirements of the ISCCS and the 2018 WADC in respect of the ROC prior to filing a request with the CAS to impose sanctions on the ROC. This primarily involves issuing the ROC with a written notice of non-conformity (Article 9.2 of the ISCCS and Article 23.5.4 of the 2018 WADC) and the subsequent procedural steps including providing the ROC an opportunity to explain any non-conformities.

394. As ROC never received a notice of non-conformity and the relevant procedural steps were not followed, it submits that there has been a breach of its due process rights and CAS lacks jurisdiction to impose sanctions on the ROC, its affiliated athletes, national federations and officials.

e. Failure to name the ROC as a Respondent

395. The ROC submits that:

a. under Swiss law, if a claimant seeks relief against someone, that person is to be named as a defending party; and

b. in proceedings before the CAS, if a prayer for relief is sought against a party which has not been named as a Respondent by the Claimant (which is the case for the ROC), the claim must be rejected at least to the extent that it does not affect the Respondent. The ROC referred the Panel to a number of applicable CAS authorities.

396. As the Signatory Consequences directly target the ROC (and RPC) and/or aim to sanction athletes, officials and national federations affiliated with the ROC, the ROC submits that such prayers for relief must be dismissed as WADA has failed to name those persons as Respondents. The fact that filing a request for arbitration against all persons directly affected by proposed sanctions would be burdensome is a product of the system created by WADA through the ISCCS and is not a basis to circumvent established principles of due process.

397. The ROC referred to CAS 2018/A/1583 & 1584 *Benfica & Vitoria Guimaraes v. UEFA & FC Porto*, submitting that the Panel in that decision distinguished between directly and indirectly affected parties by holding that, if the prayers for relief or decision aims at 'disposing the right of a third party', then that third party is directly affected. The ROC submits, for reasons addressed below, that it is directly affected by the Signatory Consequences.

398. Further, the fact that the ROC has been permitted to intervene in these proceedings does not, in its submission, cure WADA's failure to name it as a Respondent. The ROC has been denied any right to participate in WADA's internal procedure that led to the declaration of RUSADA's non-compliance, the ROC has not been accepted as a party to these proceedings, could not name an arbitrator, was not granted access to the case file and has not been copied in all correspondence sent by CAS to the parties.

f. Access to case file

399. The ROC objects to the non-provision of WADA's Forensic Exhibits, which it submits is a breach of a basic procedural safeguard provided for under Article 29 of the Swiss Constitution and Article 6 of the ECHR. It submits that access to a case file is part of the right to be heard and the principle of equality of arms and that there is no overriding private or public interest that justifies restriction to the case file.

g. Classification of non-compliance as 'critical'

400. The ROC states that the Post-Reinstatement Data Requirement is not expressly listed in Annex A to the ISCCS as a critical requirement. Further, the reasons for which the CRC provided for categorising the Post-Reinstatement Data Requirement as critical – allowing the anti-doping community to draw a line under allegations against Russia, ensuring Russian athletes who had tested positive could be punished and ensuring innocent Russian athletes could be cleared of suspicion – are also not provided for under Article A.1 in Annex A to the ISCCS.

401. The ROC says that the principle of legality requires sanctions to be clear and defined in advance. As the Post-Reinstatement Data Requirement is not one of the critical requirements listed in Article A.1 of Annex A to the ISCCS, the ROC submits it was not predictable and does not comply with the principle of legality. At most, it should be classified as an "other requirement".

402. Further, the fact that RUSADA did not challenge WADA's classification of the Post-Reinstatement Data Requirement as "critical" is a matter between RUSADA and WADA (under their independent contractual relationship) and does not bind the ROC.

h. Appropriate manner to deal with alleged manipulation of Moscow Data

403. The ROC submits that the inappropriateness of the present proceedings against RUSADA (and the other relevant Intervening Parties) is demonstrated by the fact that there are existing rules and processes which are available to WADA to address the alleged manipulation of the Moscow Data.

404. The ROC refers to the International Standard for Laboratories (the "ISL"), an International Standard approved by the WADA Executive Committee which applies to WADA-accredited laboratories including the Moscow Laboratory. The ISL contains numerous rules regarding processes and protections those laboratories must ensure are in place. Breaches of the ISL are considered non-compliance by the relevantly laboratory within the meaning of Article 4.6.4.2 of the ISL and may lead to disciplinary measures, such as the suspension of laboratory accreditation. They do not, in the ROC's submission, amount to non-compliance by a Code Signatory or NADO from the country of the non-compliant laboratory. The ROC further states that WADA has never before treated non-compliance by a laboratory of the ISL as non-compliance by the NADO.

405. Separately, insofar as the CRC Recommendation and WADA make allegations against "Russian authorities" (which ROC states is not supported by evidence), the ROC referred the Panel to Article 22.8 of the WADC, which specifically addresses circumstances of the failure of a government to take actions and measures necessary to comply with the UNESCO International Convention against Doping in Sports. The ROC submits that the appropriate manner for WADA to address its allegations against Russian authorities is therefore under Article 22.8 of the WADC, rather than in these proceedings.

i. ROC's lack of consent to the ISCCS and 2018 WADC

406. Similar to RUSADA, the ROC submits that it never consented to the ISCCS or the 2018 WADC and rather they were unilaterally imposed by WADA. It says that the ISCCS has not been accepted by the ROC or implemented in anti-doping regulations (nor can it be deemed to have accepted the changes).

j. Admissibility of prayers for relief not provided for in CRC Recommendation

407. The ROC submits that, under the detailed and complex procedure contained in the ISCCS for a Signatory for be declared non-compliant, it is the exclusive responsibility of WADA's Executive Committee to issue a formal notice of non-compliance to the Signatory. It says that WADA is therefore bound by the decision of its Executive Committee and cannot request the CAS Panel to impose consequences that have not been decided by the Executive Committee.

408. The ROC says that the Neutral Participation Implementation Criteria and the Notice to Signatories were issued by WADA *after* RUSADA was notified with the formal notice of non-compliance. There is no evidence regarding the circumstances in which the criteria and Signatories' Notice has been adopted by WADA and in particular no evidence that they were approved by WADA's Executive Committee.

409. As, in the ROC's submission, the formal notice of compliance defines the scope of these proceedings, the CAS does not have jurisdiction to deal with prayers for relief of WADA which are not expressly included in the CRC Recommendation and the WADA Executive Committee decision. Therefore, WADA's prayers for relief that the CAS endorses the Notice to Signatories and the Neutral Participation Implementation Criteria are inadmissible.

k. Impact of Signatory Consequences on the ROC

410. The ROC submits that the Signatory Consequences will not simply have a symbolic effect on ROC, but a real financial cost, estimated to be in the dozens of millions of USD. It says that participation of Russian athletes as "neutral" athletes will strongly reduce the attractiveness of Russian sport for sponsors and broadcasters from Russia. It provides an example of one such contract (with ZA Sport) regarding monetary and in-kind consideration including the cost of uniforms, the value of which would be lost or reduced.

411. Further, it submits that other consequences clearly directly sanction the ROC. These include the ban on bidding for Olympic events (noting Rule 27.3 of the Olympic Charter gives the ROC the right and authority to select and designate hosts interested in bidding for Olympic Games in Russia), the ban on the use of the Russian flag (noting Rule 31 of the Olympic Charter provides the free use of the ROC's flag is a right of the ROC), the ban on the ROC's officials, restriction on the ROC's right to enter athletes to the Olympic Games and the Neutral Participation Implementation Criteria (which self-evidently have an impact on the ROC).

l. Anti-trust regulations

412. The ROC submits that the sanctions sought against the ROC and its affiliated athletes, officials and International Federations are unlawful under Article 20 of the Swiss Code of obligations, as they breach anti-trust law. It notes, referring to Swiss authorities, that international sport, as well each individual sport which will be affected by the Signatory Consequences, are considered as relevant markets for the application of the Swiss Cartel Act.

413. ROC says that the Signatory Consequences would result in an abuse of a dominant undertaking under Article 7 of the Swiss Cartel Act because they would effectively impose a boycott on Russian sport by the dominant undertaking(s) that form the world of organised sport. The ROC submits that WADA has not provided a satisfactory justification for such conduct.

414. Separately, noting that the WADC is an agreement pursuant to which Signatories are required to give effect to any decision of non-compliance and associated sanctions, the ROC submits that this would constitute an unjustified agreement affecting competition within the meaning of Article 4.1 of the Swiss Cartel Act.

m. Sanctions imposed on the ROC by the IOC and double jeopardy

415. The ROC's submissions address the sanctions imposed on the ROC on 5 December 2017 by the IOC Executive Board on the basis of the Olympic Charter, including its

immediate suspension, the process for Russian athletes to compete as 'Olympic Athletes from Russia' at the 2018 PyeongChang Olympic Games, restrictions on various officials of the ROC and the Russian government and monetary penalties/contributions. The ROC says it decided to accept those sanctions based on the Olympic Charter.

416. The ROC submits that the principle of double jeopardy applies in disciplinary proceedings, including anti-doping matters. It says that these proceedings relate to the same factual nexus as its sanction by the IOC and therefore imposing further sanctions would breach the principle of double jeopardy.

n. Impact of COVID-19 pandemic

417. The ROC notes that, as a result of the COVID-19 pandemic, anti-doping programs around the world have been significantly reduced or stopped. It submits that no anti-doping organisation in the world will be able to fulfil its planned anti-doping programme for 2020. In those circumstances, it says that WADA cannot reasonably seek for Russian athletes to be subject to a minimum number of tests.

418. Further, the ROC notes the financial impact that COVID-19 has had on sports worldwide.

o. Submissions regarding specific consequences

419. The ROC addressed each of the Signatory Consequences in turn and made submissions regarding their validity or appropriateness. Matters raised in those submissions which were not relevantly addressed by RUSADA or summarised elsewhere in this Award are as follows:

a. The Neutral Participation Implementation Criteria provides that the name "Russia" is not to appear in any language or format in the designation of a Russian athlete. However, this contradicts Article 30.2 of the Olympic Charter, which provides that the name of a NOC must reflect the '*territorial extent and tradition of its country*'. The ROC submits that it is not possible for it to comply with its obligations under the Olympic Charter and at the same time refrain from making any use of the word Russia.

b. The ROC also queries the practical application of the Neutral Implementation Participation Criteria for team sports. In particular, it queries whether a neutral team is to consist only of Russian athletes or could include athletes from the entire word no matter their nationality.

3. RPC

420. The RPC's submissions also addressed many matters that are addressed in RUSADA's submissions and overlapped with submissions made by other Intervening Parties (in particular the ROC). Those aspects of the RPC's submissions are not duplicated in the summary that follows.

a. RPC's suspension from IPC membership

421. The RPC addressed its suspension from IPC membership on 7 August 2016 based on the findings of the First McLaren Report. The RPC states that those findings were meritless and the IPC's finding of 45 samples being implicated in the disappearing positive methodology was erroneous. It relies on a statement from Mr Pavel Rozkhov, the Chief of Staff of the RPC, to submit that there were in fact only 11 samples which were purportedly caught by the allegations contained in the First McLaren Report.

422. The RPC was conditionally reinstated to membership of the IPC on 15 March 2019, subject to post-reinstatement criteria imposed by the IPC. It says that it is continuing to implement that criteria and is meeting the vast majority of requirements imposed by the IPC, including compliance with the WADC and the IPC Anti-Doping Code.

423. The RPC says it is not in dispute that: (i) it was not requested by WADA to procure the Moscow Data; (ii) it was never sent a formal notice of non-compliance; (iii) it never had any involvement whatsoever in the alleged manipulation of the Moscow Data; and (iv) it had no control over the Moscow Laboratory.

b. Constitution of the Panel

424. The RPC made similar submissions to RUSADA and the ROC regarding the constitution of the Panel. Its submissions also addressed the following matters:

a. Although the Swiss Federal Supreme Court has held that compulsory arbitration in sports disputes and a closed list of arbitrators can be valid, this was on the basis that the CAS provided sufficient guarantees of independence and impartiality and therefore there can be no doubts as to such independence.

b. The process by which the arbitrators were included in the Special List lacked transparency. This is made even more apparent by the fact that both the RPC and ROC made numerous requests to the CAS Court Office and ICAS requesting information regarding the adoption of the Special List and were not provided the requested documents.

c. RPCs lack of consent to the ISCCS and 2018 WADC

425. Similar to RUSADA, the RPC submits that it never consented to the ISCCS or the 2018 WADC and rather they were unilaterally imposed by WADA. It submits it was never properly consulted about the amendments and there is no proper basis for WADA to submit that the RPC's consent was implied.

426. It also submits that WADA provides no explanation for strict liability based on Article 111 of the Swiss Code of Obligations, in that WADA has not established a basis upon which it could be said that the RPC agreed to guarantee the performance of any third party with respect to the Moscow Data.

d. Impossibility of fulfilling obligations

427. The RPC submits the sanctions are unenforceable because they aim at imposing an obligation which was initially, or subsequently became, impossible to fulfil, pursuant to Articles 20(1) and 119 of the Swiss Code of Obligations.

428. Relevantly, not only was the Moscow Laboratory completely independent from the RPC (and therefore the RPC had no means whatsoever to provide the Moscow Data to WADA), during the relevant period it had been sealed by the Investigative Committee for criminal investigation. In those circumstances, WADA's proposed sanctions against the RPC concern the non-performance of duties which were impossible to fulfil.

e. Requirements for contractual liability

i. *Article 394 of the Swiss Code of Obligations*

429. The RPC submits that the contract created by the WADC, including the obligation for Signatories to implement the WADC and efficient anti-doping measures, must be characterised as a mandate pursuant to Article 394 of the Swiss Code of Obligations.

430. In that context, the RPC says that there can only be "obligations of means" (a best efforts clause to use all reasonable means to achieve a desired outcome) and no strict liability on the RPC to achieve a specific outcome. As the RPC fully cooperated with WADA, the IPC and RUSADA and was not involved in the retrieval of the Moscow Data, it submits that it cannot be in breach of the WADC and cannot be held liable for actions of third parties, in particular the Moscow Laboratory.

ii. *No damage incurred by WADA*

431. The RPC says that WADA did not establish that it incurred any damage, which is says is required by Articles 42(1) and 99(3) of the Swiss Code of Obligations.

iii. *No causal nexus*

432. Even if it is shown that WADA has suffered damage, the RPC submits that WADA has not established any causal nexus between the alleged breach and that damage, and in particular none caused by any act or omission of the RPC.

433. Therefore, the RPC submits it was not at fault and the requirements for contractual liability under Article 97 of the Swiss Code of Obligations are not met and no contractual sanction can be ordered against the RPC.

f. Impact of Signatory Consequences on the RPC

434. The RPC relied on Mr Rozkhov's statement regarding the impact of the signatory Consequences on the RPC. This includes the sunk costs of uniforms bearing the Russian colours and flag which have already been produced, contractual penalties from sponsors, existing lack of financial resources and the need for the RPC executive from an organisational perspective.

435. Noting that the RPC and Russian athletes have already been the subject of sanctions regarding what the RPC says were "baseless" accusations of State-sponsored doping, the RPC submits that the Signatory Consequences are grossly disproportionate and should be dismissed.

g. Submissions regarding specific consequences

436. The RPC addressed each of the Signatory Consequences in turn and made submissions regarding their validity or appropriateness. Matters raised in those submissions which were not relevantly addressed by RUSADA or summarised elsewhere in this Award are as follows:

a. There is no legal basis to place restrictions on Russian Government Representatives because Article 11.1.1.2 of the ISCCS and Article B.3.1(c) of Annex B solely provide for ineligibility of Signatories' Representatives (which is says does not extend to those government officials).

b. The ban on ROC and RPC officials and members violates Article 55(3) of the Swiss Civil Code. Under that provision, the governing bodies of a legal entity may only be liable for actions of that entity if they are at fault. Therefore, ROC and RPC officials can only be sanctioned if they are shown to have been at fault (which they have not).

c. The exclusion of RPC officials and members will result in a *de facto* exclusion of the RPC from the Paralympic Games because the absence of those persons would jeopardise the preparation and participation of the Russian delegation.

d. With respect to the Neutral Participation Implementation Criteria, there is no basis to impose additional testing criteria for Russian athletes when the alleged manipulation of the Moscow Data related to anti-doping tests conducted from 2012 to 2015.

4. EOC

437. The EOC's submissions primarily focussed on (i) the fact that the Signatory Consequences were sanctions; (ii) strict liability and the legality of athletes being sanctioned without having been found guilty of ADRVs; (iii) the prohibition on collective punishment; (iv) the legality of imposing sanctions on sporting bodies which operated independently from the persons who engaged in doping contraventions; (v) the applicable burden of proof; and (vi) proportionality. These matters are addressed above in the summary of RUSADA's submissions.

438. The EOC also submitted that Russian athletes and the ROC (being a member of the EOC) had been denied an opportunity to a fair trial as required in Articles 6.1 and 6.2 of the ECHR. It submits that the right to a fair trial is not observed in "non-analytical positive" doping cases (it submits these proceedings are such an example), which undermines the legitimacy of the fight against doping.

439. The EOC also referred to the UNESCO International Convention against Doping in Sports, noting that parties to that Convention (which includes the Russian Federation)

are required to comply with the WADC. The EOC submits it is not for the Panel to determine a State's responsibility for its State-sponsored doping (if established).

5. IIHF

440. The IIHF's submissions focussed on the importance to the IIHF of the participation of the Russian national ice hockey team and the support of Russian fans and media, and in particular their importance to the IIHF Ice Hockey Men's World Championships (which are held annually and are scheduled to be held in St. Petersburg in May 2023).

a. Testing of the Russian men's National Ice Hockey Team

441. The IIHF notes that a significant portion of the Russian national team is comprised of players playing in North America, who are therefore under the authority and monitoring of their respective American and Canadian teams (and physically removed from Russia).

442. It says that almost all other Russian national team players are playing in the Kontinential Hockey League (the "KHL") which comprises teams from Belarus, China, Finland, Latvia, Kazakhstan and Russia. The IIHF states that it took over all anti-doping testing and results management of the KHL in December 2016 in order to guarantee soundness and solidarity in its anti-doping program and to instil confidence in competitors to the Russian national team.

443. The IIHF, therefore, submits that the Panel can be confident that, at least for 99% of the ice hockey community, "*no question exists as to whether clean players are competing on Russian national teams*."

b. Proportionality

444. The IIHF addressed questions of proportionality having regard to:

a. the requirement in Article 11.2.6 of the ISCCS that consequences should "*not go further than is necessary to achieve the objective underlying the code*"; and

b. the requirement in Article 36(3) of the Swiss Federal Constitution that "[a]*ny restriction on fundamental rights must be proportionate*".

445. The IIHF states that its marketing and broadcasting rights includes a "best on best" term whereby the IIHF is to ensure that the World Championships are played with the best players from the best 16 national teams. It states that its commercial partner has a right to a reduction in the annual rights fee paid to the IIHF for any reduced revenue suffered by the commercial partner as a result of a change in competition structure.

446. The IIHF asserts that the Russian market corresponds to approximately 25% of the total market for the World Championships. The IIHF submits that, if the Russian national team is required to participate in accordance with the Neutral Participation Implementation Criteria and without the Russian flag, this could result in a reduction of revenue of 10-20%, which would have a significant impact on the budget of the IIHF.

It therefore submits the Signatory Consequences would disproportionately harm the IIHF.

447. If the Panel determines that the Signatory Consequences are to apply to the participation of the Russian National Teams in the IIHF World Championships, the IIHF requests that it be permitted to independently set participation criteria, including playing under the Russian Flag.

448. Further, it requests that the Panel confirm that the Signatory Consequences apply to no more than one edition of the men's and women's World Championships. In that regard:

a. the IIHF notes that Article B.3.1(d)(2) of Annex B to the ISCCS states that restrictions are to apply to the 'next edition' of relevant events;

b. WADA's letter to the CAS of 8 April 2020 confirmed that it was not the intent of the CRC Recommendation to extend restrictions to two editions of the Summer Olympic and Paralympic Games. This should apply equally to World Championships;

c. the IIHF competition structure, unlike perhaps any other International Federation, involves World Championships being held on a yearly basis; and

d. the hosting rights of the 2023 IIHF Men's World Championships have already been awarded to St. Petersburg.

449. The IIHF submits that, in accordance with Article 11.1.1.5(a) of the ISCCS, where a right to host a World Championship has already been awarded to a country in question, the Signatory that awarded the right must re-assign the event to another country if it is legally and practically possible to do so. The IIHF states that, in accordance with that term, the IIHF is the sole authority to make that determination in respect of the IIHF World Championships. The IIHF states that the financial and legal impact of a re-allocation makes it practically and legally impossible to re-assign the 2023 IIHF men's World Championships.

450. Further, it submits this practical and legal impossibility must extend to the participation of the Russian national team without restrictions, having regard to financial, organisation and potential safety consequences should the Russian national team be excluded from full participation.

451. Finally, the IIHF submits that the financial impact of the Signatory Consequences on the IIHF's ability to continue to operate its obligations as an International Federation has been intensified by the impact of the COVID-19 pandemic.

6. RIHF

452. The RIHF submissions, at their core, were that the Signatory Consequences would negatively impact the RIHF, even though neither WADA nor the CAS have any authority over the RIHF (it not being a Signatory to the WADC or bound by the ISCCS). It submits that this violates the principle of *nulla poena sine culpa*, as well as human

and personality rights. A number of the submissions made by the RIHF are addressed in RUSADA's submission and are not duplicated in this section of the Award.

453. The RIHF placed significant emphasis on the fact that it has already been awarded the right to host the 2023 IIHF Men's World Championships in St. Petersburg and construction of a new state-of-the-art arena has already commenced. It submits that imposition of the Signatory Consequences would render the human and financial efforts invested into the bid meaningless and result in severe financial loss for the RIHF and investors involved in those World Championships. It also notes that it has submitted a bid to host the 2021 IIHF Women's World Championships in Ufa.

a. Due Process Rights

454. The RIHF submits that the parties' due process rights in these proceedings derive directly from Article 182(2) of the Swiss Private International Law Act. It submits that these include the right to equal treatment, the principle of quality of arms and the right to adversarial proceedings. It submits that its due process rights were breached before these proceedings because it never received any communication from WADA in relation to the subject-matter of these proceedings and was not given an opportunity to be heard. It submits that its due process rights have been breached during these proceedings because it was not admitted as a full party and was not provided with a copy of the full file and exhibits.

b. Strict liability

455. With respect to matters of strict liability, the RIHF's submissions broadly echoed those of RUSADA. However, the RIHF specifically addressed the fact that the Signatory Consequences do not allow any possibility for the RIHF to escape liability or any mechanism that would allow the RIHF to escape sanctions.

c. Other rights

456. The RIHF submits that the Signatory Consequences violate:

a. the RIHF's personal rights (in particular the right to host the 2023 IIHF Men's World Championships, the bid for the 2021 IIHF Women's World Championships and the restrictions on the Russian national teams and use of the Russian flag) because the impacts of the consequences would affect its economic freedom;

b. the RIHF's human rights, because the consequences reverse the burden of proof and establish a presumption of guilt and violate the prohibition to discrimination and of equal treatment (because the RIHF is being sanctioned for the sole reason that it is a Russian sports federation).

d. Lack of implementation of WADC or the ISCCS

457. The RIHF, in its sur-reply (which was provided jointly with the 10 Athletes Group, who shared legal representation) noted that the 33 Athletes Group had put in issue that none of the International Federations to which the 33 Athletes Group belong had changed

their anti-doping rules to take account of the ISCCS or the associated 2018 amendments to the WADC.

458. In circumstances where the WADC is not self-executing and its provisions must be implemented by Signatories in their own rules, the RIHF submits that WADA is required, and has failed, to prove that the ISCCS was implemented into the rules of the relevant Signatories. In those circumstances, it says that no Consequences can be imposed on the RIHF (and the relevant athletes).

e. Competition Law

459. The RIHF (and the 10 Athletes Group) relies on an expert legal opinion of Prof. Christian Bovet and Dr Pranvera Këllezi regarding the application of Swiss and EU competition law to these proceedings.

460. With respect to competition law, the RIHF submits that:

a. It is not correct that WADA is not an undertaking for the purposes of EU and Swiss competition law but, in any event, the central issue is whether the IOC, IPC and other International Federations would infringe EU and Swiss competition laws if applying the Signatory Consequences. Such entities would commit an abuse of dominant position by *de facto* boycotting Russian athletes (TFEU Article 102).

b. Regulatory activities carried out by sporting organisations cannot be excluded on the basis that they are akin to State or government activities. The WADC is neither issued by a State nor are any powers delegated by a State or government.

c. The Signatory Consequences are disproportionate to the objective sought by the WADC and ISCCS because they provide for extensive measures against innocent athletes. They are therefore liable to infringe Article 101 of the TFEU and Article 5 of the Swiss Cartel Act.

7. 33 Athletes Group

461. The athletes comprising the 33 Athletes Group are Russian nationals who are full-time professional athletes who have either qualified, or expect to qualify, for the 2020 Tokyo Olympic Games. The athletes have collectively submitted over 400 doping control samples and none have ever committed an anti-doping rule violation.

462. As was the case with respect to other Intervening Parties, a number of the submissions made by the 33 Athletes Group are addressed in RUSADA's submission and are not duplicated in this section of the Award.

a. Right to a fair hearing and presumption of innocence

463. The athletes refer to Article 8.1 of the WADC, which concerns persons who are asserted to have committed an ADRV. They submit that this article mandates that athletes are entitled to a fair hearing. They similarly refer to the October 2014 WADA "Results Management, Hearing and Decisions Guidelines", in which WADA:

a. acknowledges that a fair hearing process includes access to evidence and the ability of an Athlete to question evidence; and

b. states that a "fundamental precept" of ADRV proceedings is that the anti-doping organisation must prove the ADRV was committed and the athlete does not have to prove that they did not commit the ADRV.

b. No consent to ISCCS

464. In addition to submitting that none of the athletes have consented to the ISCCS, the athletes submit that none of their relevant International Federations have imposed on the athletes the framework within which the ISCCS can operate (if it can operate at all) by implementing the ISCCS or the 2018 WADC. Further, none of the relevant International Federations had forewarned the athletes of the new regime let alone sought their consent to be bound by that regime.

465. They further submit that, if it is found that the athletes had (by some mechanism) consented to submitting themselves to the Signatory Consequences, this represents an excessive commitment within the meaning of Article 27(2) of the Swiss Civil Code, which precludes a person from entering into an agreement (even freely) which makes their liberty subject to another person's arbitrariness or gives up their economic freedom. This is because the ISCCS creates a regime under which the athletes cannot be heard but can be barred from competing in major events, barred from competing under the national flag and have their careers and economic situations severely damaged without any fault having been found on their part, all for an indefinite period.

c. Right to equal treatment

466. The athletes refer to the NADOs of Nigeria and North Korea, both of which have been held to be non-compliant with the WADC since the ISCCS came into force on 1 April 2018. Both were determined by the WADA Executive Committee to have breached critical requirements of the WADC and had consequences imposed upon them. Neither of those NADOs had consequences imposed that negatively impacted athletes from Nigeria or North Korea. As these are the only instances of NADOs having been held non-compliant with the WADC since the introduction of the ISCCS, the athletes say they reflect a consistent course of dealing.

467. The athletes submit that the WADA Executive Committee has clearly treated Russian athletes differently compared to non-Russian athletes and the imposition of any consequence that affects the athletes under the ISCCS would breach the principle of equal treatment and be invalid and unenforceable.

d. Legitimate expectations

468. The athletes submit that they had a legitimate expectation that, if they complied with their anti-doping obligations, they would not face sanctions or be treated less-favourably than non-Russian athletes. They state that this is not the case because:

a. they are not being punished for their own conduct (or even RUSADA's conduct) but the wrongdoing of an unconnected and unidentified third party, vaguely referred to by WADA as "Russian authorities"; and

b. they are being treated less favourably than Nigerian and North Korean athletes despite the NADOs of Nigeria and North Korea being held by the WADA Executive Committee to be non-compliant with critical requirements of the WADC.

e. Personality rights

469. The athletes submit that the Signatory Consequences represent an unjustified and unenforceable infringement upon their personality rights under Swiss law. Beyond matters addressed in RUSADA's submissions, the athletes additionally say that the Swiss Federal Tribunal and the CAS have repeatedly held that a restriction on an athlete's ability to practise their profession represents in infringement of their personality rights. The consequences affecting the athletes will *prima facie* bar them from practising their sports at a level that accords with their abilities and from competing in events that afford them the greatest economic opportunities.

470. Further, the athletes submit that the Swiss Federal Tribunal has repeatedly recognised that the right to identity constitutes a personality right and as such, the restrictions on athletes from competing in Russian uniform and under the Russian flag is a breach of their personality rights.

471. The athletes deny consent to the ISCCS or any overriding private or public interest which justifies the infringement of their personality rights and therefore conclude that the Signatory Consequences affecting them are unlawful under Article 28(2) of the Swiss Civil Code.

f. Neutrality conditions

472. The athletes refer to Article 11.2.6 of the ISCCS, which provides that, where feasible, an exclusion measure must implement a mechanism that enables a Signatory's athletes to demonstrate they are not affected by the Signatory's non-compliance. The athletes submit that this can only extend to requiring athletes to satisfy the relevant Signatory that the data relating to them was not tampered with. They say the additional requirements that they (i) establish they were not mentioned in incriminating circumstances in the EDPs or the 2015 LIMS database and also (ii) meet testing criteria determined by WADA, go beyond the scope of Article 11.2.6 and are therefore invalid.

473. The athletes submit that certain of the neutrality conditions are also invalid and unenforceable because they go beyond the scope of the WADA Executive Committee decision and the CRC Recommendation. Relevantly, they say that neither of those made any suggestion, ruling or recommendation about:

a. the attire of Russian athletes;

b. what Russian athletes could adorn their clothes, bodies or equipment with;

c. the Russian national anthem, or any other kind of anthem; or

d. what Russian athletes could or could not sing.

474. They therefore submit that, pursuant to the principle *nulla poena sine lege scripta et certa*, the associated neutrality conditions cannot be endorsed by the Panel.

8. 10 Athletes Group

475. The 10 Athletes Group had the same legal representation as the RIHF. Although these two Intervening Parties provided separate intervening submissions, they provided a joint sur-reply.

a. Intervening Submission

476. The 10 Athletes Group's intervening submission was substantially similar to those of the RIHF. Only those parts that relevantly differ from the submissions made by the RIHF or RUSADA (and which the Panel has determined are necessary to render this Award) are summarised.

477. The athletes comprising the 10 Athletes Group are professional Russian athletes ranging from 10 to 45 years of age across various sports. Each intend to participate in the Olympic Games, Paralympic Games or other major sporting events for Russia. They state that none have ever been involved in any doping-related matter, let alone charged or found guilty thereof.

i. *Inadmissibility of WADA's prayers for relief*

478. The athletes submit that WADA's prayer for relief in respect of the Neutral Participation Implementation Criteria is inadmissible because it does not directly set out the relief requested but rather refers to the Notice of Signatories, which was in draft form and therefore not final and subject to changes by the WADA Executive Committee.

ii. *Violation of personality rights*

479. The athletes address the impacts the Signatory Consequences will have on them, including restrictions or exclusions from sporting events, the requirement to undergo additional testing, the requirement to participate as neutral athletes and the four-year term of these consequences. They submit that such measures clearly affect their economic freedom and will impact their income and chances to obtain sponsorship. In some cases, they submit that such sanctions may lead to the end of their careers.

iii. *Swiss and European competition law*

480. The athletes rely on two expert legal opinions of Prof. Bovet and Dr Këllezi regarding Swiss and European competition law.

481. With respect to the application of competition law principles, the athletes submit:

a. EU competition law and the Swiss Cartel Act apply to the Signatory Consequences because they have effect in the EU and Switzerland.

b. The IOC, IPC, national sport associations and international sport federations are undertakings for the purpose of applying EU and Swiss competition rules and are individually and/or jointly in a dominant position for the organisation of their respective events.

482. The athletes then submit that the Signatory Consequences proposed against Russian athletes and support personnel:

a. will constitute an abuse of dominant position by one or more of WADA, the IOC, the IPC or other Signatories as they are unnecessary and disproportionate and therefore cannot be considered as objectively justified within the meaning of Article 102 of the TFEU and Article 7 of the Swiss Cartel Act.

b. are not necessary to reach the objectives of punishment and deterrence and are not inherent to WADA's anti-doping rules and objectives. They are therefore disproportionate to the objectives pursued by WADA and fall within the scope of Article 101(1) of the TFEU.

c. raise barriers to entry, discriminate towards and are liable to *de facto* exclude Russian athletes and therefore distort competition in the markets of the relevant events as well as sponsorship and other sport rights markets in a substantial way, within the meaning of Article 101(1) of the TFEU and Article 5(1) of the Swiss Cartel Act.

d. are not justified under Article 101(3) of the TFEU or Article 5(2) of the Swiss Cartel Act and are therefore unlawful.

iv. *Alexander Gusev*

483. The athletes' submissions regarding (i) the legal nature of the Signatory Consequences proposed against the athletes (sanctions or eligibility rules), (ii) the legality of imposing consequences which negatively impact third parties and (iii) matters of proportionality bore significant similarity to those of RUSADA. However, one particular feature of the athlete's submissions concerned the impact of the consequences on Mr Alexander Gusev, a 10-year old skateboarder who has a high chance of qualifying for the Tokyo Olympic Games.

484. The athletes state that, due to his age, Mr Gusev cannot be suspected of wrongdoing and could not have been involved in any of the doping allegations in the period from 2012 to 2015. He is only indirectly a member of the Russian Skateboarding Federation, which was established in 2016.

485. To that end, the athletes submit that Mr Gusev's circumstances demonstrate that the broad-reaching nature of the Signatory Consequences are disproportionate as they do not consider the individual circumstances of the athletes they will punish, such as age, level of professionalism or sport. For instance, the athletes pose the question of how Mr Gusev, at the age of 10, could be expected to incur the costs of undertaking lengthy and complex administrative steps to demonstrate he is not mentioned in incriminating circumstances in the 2015 LIMS database.

D. Amicus Curiae briefs

486. *Amicus curiae* briefs were also received from the Global Association of International Sports Federations (the "GAISF") and, together, the Russian Ski Association, the Russian Curling Federation, the Russian Luge Federation and the Russian Skateboarding Federation (together, the "Russian Sporting Federations" or "RSFs").

1. GAISF

487. The GAISF stated that it supported the findings and conclusions of WADA, but considered aspects of the CRC Recommendation required clarification to avoid uncertainty in its implementation if the CRC Recommendations are imposed by the Panel.

488. The GAISF addressed matters regarding the definition of "major events", restrictions on bidding during the four-year period in respect of events to be held after that period and the neutral athlete mechanisms. These matters are relevantly summarised above in the positions of the Parties and Intervening Parties.

489. Separately, the GAISF submitted, with respect to restrictions on World Championships, that it would be advisable to clarify whether the Russian leg of a World Championship organised in a series falls within the definition of "World Championship" in the CRC Recommendation. If so, the GAISF submits this would be detrimental to the stability of the sport system as a whole, and particularly in consequence of the COVID-19 pandemic, which has limited possible locations for hosting sporting events.

2. Russian Sporting Federations

490. The RSFs were represented by the same counsel as the RIHF and the 10 Athletes Group. Their *amicus curiae* brief addressed many similar points as the submissions of the RIHF and the 10 Athletes Group. Those matters are not duplicated in the summary below.

491. The RSFs submit that their right to be heard was breached because they were not accepted as Intervening Parties in these proceedings and therefore have not had access to the case file. They say this contravenes Article 182(2) of the Swiss Federal Code on Private International Law and Article 6 of the ECHR. Further, they say that the failure by WADA to call them as Respondents means WADA's claims (at least those which affect the RSFs) must be dismissed for lack of standing to be sued.

V. JURISDICTION AND OTHER PROCEDURAL MATTERS

a. Introduction

492. WADA relies on Article 23.5.6 of the 2018 WADC and Article 10.4.1 of the ISCCS to confer jurisdiction on CAS to hear this dispute.

493. Article 23.5.6 of the 2018 WADC relevantly provides:

> *If the Signatory wishes to dispute WADA's assertion of non-compliance, and/or the consequences and/or the reinstatement conditions proposed by WADA, it*

> *must notify WADA in writing within twenty-one days of its receipt of the notice from WADA. WADA shall then file a formal notice of dispute with CAS and that dispute will be resolved by the CAS Ordinary Arbitration Division in accordance with the International Standard for Code Compliance by Signatories …*

494. Article 10.4.1 of the ISCCS is in very similar terms and relevantly provides:

> *If the Signatory wishes to dispute the asserted non-compliance and/or the proposed Signatory Consequences and/or the proposed Reinstatement conditions, then (in accordance with Article 25.5.6 of the Code) it must notify WADA in writing within twenty-one days of its receipt of the notice from WADA. WADA shall then file a formal notice of dispute with CAS, and the dispute will be resolved by the CAS ordinary Arbitration in accordance with the CAS Code of Sports-related Arbitration and Mediation Rules and this International Standard for Code Compliance by Signatories (and in the case of conflict between them, the latter shall prevail) …*

495. Subject to the objections addressed below, the Parties and Intervening Parties confirmed CAS's jurisdiction to hear this dispute by signing the CAS Order of Procedure in respect of these proceedings.

496. The Panel's conclusion that the 2018 WADC and the ISCCS are valid and binding on RUSADA are addressed later within this Award. The jurisdictional objections raised by RUSADA and Intervening Parties addressed in this section of the Award are considered on that basis.

497. For the reasons given below, the Panel dismisses the objections to its jurisdiction and finds that the CAS is competent to adjudicate and decide the present dispute.

b. Improper constitution of the Panel (consultation of Intervening Parties)

498. The ROC, the RPC, the RIHF and the 10 Athletes submit that the Panel was constituted in breach of their rights to be heard because the Panel was constituted without their consultation or involvement.

499. The objecting parties submitted that the Panel was constituted in violation of Article 179(1) of the Swiss Private International Law Act (the "PILA"), which provides:

> *The arbitrators shall be appointed, removed or replaced in accordance with the agreement of the parties.*

500. They further submitted that, pursuant to Article R41.4 of the CAS Code, which concerns participation of third parties in CAS ordinary arbitration procedures, where a notice of intervention is made prior to the constitution of the Panel (which was the case in these proceedings), the third party must have the opportunity to take part in the constitution of the Panel.

501. In order to address such objection, it is necessary to consider the wording of Article R41.4 of the CAS Code. Relevantly, it provides (at §1-4) that:

A third party may only participate in the arbitration if it is bound by the arbitration agreement or if it and the other parties agree in writing.

Upon expiration of the time limit set in Articles R41.2 and R41.3, the President of the Division or the Panel, if it has already been appointed, shall decide on the participation of the third party, taking into account, in particular, the prima facie existence of an arbitration agreement as contemplated in Article R39. The decision of the President of the Division shall be without prejudice to the decision of the Panel on the same matter.

If the President of the Division accepts the participation of the third party, CAS shall proceed with the formation of the Panel in accordance with the number of arbitrators and the method of appointment agreed by all parties. In the absence of agreement between the parties, the President of the Division shall decide on the number of arbitrators in accordance with Article R40.1. If a sole arbitrator is to be appointed, Article R40.2 shall apply. If three arbitrators are to be appointed, the arbitrators shall be appointed by the President of the Division and shall nominate the President of the Panel in accordance with Article R40.2.

Regardless of the decision of the Panel on the participation of the third party, the formation of the Panel cannot be challenged. In the event that the Panel accepts the participation, it shall, if required, issue related procedural directions.

502. The Panel does not accept the construction of Article R41.4 proffered by the objecting parties that a notice of intervention filed prior to the constitution of the Panel is, of itself, sufficient to grant a third party an opportunity to take part in the constitution of the Panel. In that regard, emphasis must be given to the introductory clause of §3: "*If the President of the Division accepts the participation of the third party*".

a. First, the use of the word "accepts2 as opposed to "receives a notice of intervention" makes clear that the relevant date which triggers the application of §3 is not the date on which a request for intervention is filed but rather the date upon which such request is accepted.

b. Second, the reference in §3 to only the "President of the Division" and not (as is the case in §2) "the President of the Division or the Panel" supports a conclusion that §3 only applies where the participation of the third party is accepted prior to the Panel's constitution.

503. The ROC and RPC's requests for intervention were filed on 16 and 17 January 2020 respectively. The RIHF and the 10 Athletes filed their requests for intervention on 20 January 2020. The Panel was constituted on 27 January 2020. On 3 February 2020, the requests for intervention were granted by the Panel. In those circumstances, the Panel finds that Article R41.4 §3 of the CAS Code is not applicable and, rather, §4 applies such that the objecting parties are precluded from challenging the formation of the Panel. The Panel dismisses the objections on that basis.

504. In any event, as submitted by WADA, Article 10.4.1 of the ISCCS provides that it is (1) WADA; and (2) the Signatory that is the subject of the compliance proceedings that

nominate an arbitrator. Therefore, even if Article R41.4 §3 applied in the present proceedings, pursuant to the arbitral rules for these proceedings (noting that Article 10.4.1 of the ISCCS provides that the ISCCS shall prevail over the CAS in the case of any conflict), none of the objecting parties were entitled to involvement in the nomination or appointment of arbitrators.

c. Improper Constitution of the Panel (Prof. Fumagalli)

505. On 17 January 2020, RUSADA challenged the appointment of Prof. Fumagalli pursuant to Article R34(1) of the CAS Code, on the basis of lack of independence and impartiality. On 27 January 2020, the ICAS Challenge Commission dismissed RUSADA's petition. A similar challenge was filed by the RPC on 10 February 2020 and dismissed by the ICAS on 26 February 2020.

506. In its Response to WADA's Statement of Claim, RUSADA noted the above challenge and that it had not, at the date of the Response (10 April 2020), been provided reasons for the decision of ICAS.

507. It was not clear whether, by noting this matter, RUSADA intended to reagitate its objection to Prof. Fumagalli's appointment and it did not address this matter in oral submissions at hearing. For the avoidance of doubt, the Panel dismisses any objection to jurisdiction on the basis of Prof. Fumagalli's appointment. That appointment was affirmed with finality in the decisions of the ICAS rendered on 27 January 2020 and 26 February 2020. While not privy to the decision-making process or issuance of the decision by the ICAS Challenge Commission, the Panel notes that the reasoned decision on challenge has since been notified to RUSADA.

d. Improper Constitution of the Panel (Appointment of President)

508. Article 10.4.1 of the ISCCS provides that, for CAS cases arising under Article 23.5 of the 2018 WADC, the President of the Panel is nominated by the two party-nominated arbitrators from the list of arbitrators specifically designated by CAS for such cases (the "Special List"):

> *Unless the parties agree otherwise, the proceedings will be conducted in English and the CAS Panel that hears and determines the dispute will be composed of three arbitrators. WADA and the Signatory shall each nominate an arbitrator to sit on the CAS Panel either from the list of arbitrators specifically designated by CAS for cases arising under Article 23.5 of the Code or from the general CAS list of arbitrators, as each sees fit, and those two arbitrators shall together choose a third arbitrator from the former list to act as the President of the CAS Panel.*

509. In accordance with that procedure, Judge Williams was appointed as President of this Panel by the co-arbitrators on 27 January 2020.

510. The appointment of Judge Williams was challenged by RUSADA, the ROC and the RPC in letters dated 3, 5 and 7 February 2020 respectively. These challenges were directed to both the Panel (pursuant to Article R39 of the CAS Code) and the ICAS (pursuant to Article R34(1) of the CAS Code). The challenges directed to the ICAS

were dismissed on 13 and 19 February 2020 and referred to the Panel for determination. In accordance with Article R39 of the CAS Code, the Panel decided to rule on its jurisdiction in this Award. The RIHF and the 10 Athletes made similar objections in their written submissions.

511. The challenges to Judge Williams's appointment were on the basis that the requirement in Article 10.4.1 of the ISCCS that the President be nominated from the Special List was unlawful or unenforceable. Although the objecting parties did not dispute the validity of a closed list of arbitrators *per se*, they submitted that the Special List, which contained nine potential arbitrators, ran afoul of the minimum standards of independence and impartiality required under Article 6(1) of the ECHR and Article 30(1) of the Swiss Constitution. Each of these confer a right to have a fair hearing determined by a legally constituted and impartial court or tribunal. The objecting parties submitted that the Special List numbered too few potential arbitrators and was not established through a transparent process.

512. The objecting parties placed reliance on *Mutu and Pechstein v. Switzerand* (ECtHR nos. 40575/10 and 67474/10 dated 2 October 2018, "*Mutu*") and *Lazutina* (Swiss Federal Tribunal ATF 129 III 445 dated 27 May 2003, "*Lazutina*") in support of their objection.

513. In *Mutu*, the ECtHR confirmed that, because of the compulsory nature of sports arbitration before the CAS, the right to a fair trial in Article 6(1) of the ECHR applied (at [95], [115]).

514. In *Lazutina*, the Swiss Federal Supreme Court upheld the system of a closed list of arbitrators for CAS arbitrations. The objecting parties referred the Panel to the following passage in that decision (at [3.3.3.2], page 457):

> *Tel qu'il a été aménagé depuis la réforme de 1994, le système de la liste d'arbitres satisfait aujourd'hui aux exigences constitutionnelles d'indépendance et d'impartialité applicables aux tribunaux arbitraux. Les arbitres figurant sur la liste sont au nombre de 150 au moins et le TAS en compte environ 200 à l'heure actuelle.*[1]

515. The decision in *Lazutina* is authority for the proposition that the CAS list of 150 arbitrators met the Swiss constitutional requirements of independence and impartiality. However, it is not authority for the proposition that a lesser number (or any specific number) of arbitrators will breach minimum standards of independence or impartiality.

516. In the Panel's view, the fact that the Special List contained nine potential arbitrators does not mean it fails to meet those standards. As an initial matter, it is worth noting that, since the inception of the ISCCS, this matter is the only CAS procedure ever filed. Given the seemingly relative infrequency of such cases, the Panel doubts whether there is a need for additional arbitrators to be included on the list at this juncture. Nevertheless, the party-nominated arbitrators had a real choice when considering their choice of President from the Special List. Each potential arbitrator in the Special List

[1] Free translation: *The closed list of arbitrators, as amended since the 1994 reform, now meets the constitutional requirements of independence and impartiality applicable to arbitral tribunals. There are at least 150 arbitrators on the list and the CAS currently has approximately 200 arbitrators on the list.*

appears in CAS's general list of arbitrators and the objecting parties did not point to any particular matter to challenge the impartiality or independence of Judge Williams, other than to say that his inclusion in the Special List was sufficient to raise doubts. The CAS Court Office's letter to the parties of 27 January 2020 informing them of Judge Williams's appointment expressly stated that he was selected due to *inter alia* '*his geographical diversity, experience as a sitting Judge, and lack of conflict and involvement in other cases involving the Parties and Counsel*.' In its challenge of 3 February 2020, RUSADA specifically stated that its challenge:

> *... does not relate to Mr Williams' independence or impartiality as such, but to the mechanism for the appointment of the Chair of the Panel (and thus whether this Panel is properly constituted).*

517. It is also necessary to separately address the fact that the CAS has not published or disclosed the basis upon which Special List was compiled, even following requests made by the objecting parties. Once again, the Panel does not consider this matter causes the "mechanism" of the Special List to run afoul of the safeguards in Article 6(1) of the ECHR and Article 30(1) of the Swiss Constitution. Article 10.4.1 of the ISCCS vests the CAS with the discretion to compile the Special List and there is no obligation on the CAS to disclose the basis upon which the Special List was compiled. The Panel finds that CAS's exercise of its discretion in compiling the Special List and the fact that it has not disclosed the reasoning behind that exercise of discretion does not infect each potential arbitrator in the Special List (and in particular Judge Williams) with actual or apprehended bias.

518. Therefore, the Panel dismisses the objections to the appointment of Judge Williams as the President of the Panel.

e. Failure by WADA to comply with mandatory pre-arbitral requirements and name Intervening Parties as Respondents

519. The ROC and RPC both made objections to the CAS's jurisdiction on the basis that WADA had failed to comply with mandatory steps (in Article 23.5 of the 2018 WADC and the associated provisions of the ISCCS) that they submitted were required to have been undertaken prior to initiating an arbitration against a Signatory. The relevant omissions were, in short, the failure by WADA to:

a. notify the ROC or RPC of any non-compliance;

b. give the ROC or RPC an opportunity to participate in corrective procedures under Articles 9 and 10 of the ISCCS;

c. issue a formal notice of Signatory non-compliance to the ROC or RPC; and

d. name the ROC or RPC as Respondents in these proceedings when it filed its request for arbitration.

520. Each of the ROC and RPC referred to the Swiss Federal Tribunal's decision *X._____ Ltd. v. Y. _____ S.p.A.* (ATF 142 III 296; 4A_628/2015 of 29 March 2016, "*X._____ v. Y._____*") in support of the proposition that, without WADA having satisfied

preliminary mandatory requirements, the CAS does not have jurisdiction to hear these proceedings and impose sanctions on the ROC or RPC.

521. In *X._____ v. Y._____*, the Swiss Federal Tribunal held that a failure to comply with mandatory prerequisites to arbitration is better addressed by staying the arbitration with a time limit enabling parties to proceed to conciliation, as opposed to declaring a claim inadmissible or rejecting it as it stands and closing the arbitration proceedings (at [2.4.4.1]).

522. However, this issue only arises where there are in fact mandatory preconditions which have been ignored. In that regard, WADA submitted that this objection to jurisdiction should be dismissed because neither the ROC nor the RPC were asserted to be non-compliant and, therefore, there was no requirement under Article 23.5 of the 2018 WADC or the associated provisions ISCCS that they be notified of RUSADA's non-compliance, involved in the procedures addressing that non-compliance or named as Respondents in these proceedings.

523. Although the Panel recognises that the consequences sought by WADA against RUSADA would, if imposed by the Panel, have an effect on the ROC and/or RPC (this is addressed in greater detail within), it accepts the submissions of WADA.

524. WADA has not alleged non-compliance by the ROC or RPC at any point during the investigation of the Moscow Data or during these proceedings. Therefore, there was no mandatory requirement under Article 23.5 of the 2018 WADC or the associated provisions of the ISCCS that WADA engage with the ROC or RPC with respect to non-compliance proceedings against RUSADA. The Panel therefore dismisses this objection to its jurisdiction.

525. The 33 Athletes Group also objected to the jurisdiction of the CAS to the extent that WADA sought to have the CAS impose consequences directly on Russian athletes, which could only be implemented by Signatories which were either not involved in these proceedings or not named as Respondents. For the same reasons, the Panel dismisses that objection.

526. In any event, to the extent there were any requirements to engage with the ROC, RPC, or other Intervening Parties or observe any matters of due process with respect to decisions leading to those proceedings, any failure by WADA to observe those requirements is cured by these proceedings, in which those entities have had an opportunity to lead extensive evidence and put detailed submissions to the Panel regarding consequences that might be imposed on them.

f. Intervening Parties' access to the full case file

527. The Panel did not grant applications made by the Intervening Parties for access to the forensic exhibits filed by WADA (which included the Moscow Data, 2015 LIMS copy and expert reports concerning the analysis of the Moscow Data).

528. The Panel does not accept that this has resulted in a breach of the right to be heard or equality of arms. Although the Panel permitted the Intervening Parties to address RUSADA's non-compliance in their submissions, the rationale for permitting their

intervening in these proceedings was that they might be affected by the Signatory Consequences proposed by WADA. Therefore, it was not necessary for them to be provided the forensic exhibits, which solely concerned the question of RUSADA's non-compliance.

g. Invalidity of the 2018 WADC and the ISCCS

529. Although none of RUSADA, the ROC or the RPC objected to the CAS's jurisdiction based on the 2015 WADC, each objected to jurisdiction based on Article 23.5 of the 2018 WADC and Article 10.4 of the ISCCS, on the basis that the 2018 WADC and the ISCCS were either invalid *in toto* or did not bind RUSADA, the ROC or the RPC.

530. For the reasons given within, the Panel finds that the 2018 WADC and the ISCCS were validly introduced and are binding on RUSADA. As RUSADA is the only Signatory accused of non-compliance, it is not necessary for the Panel to consider in these proceedings whether the 2018 WADC and the ISCCS are binding as against the ROC or the RPC. The Panel, therefore, dismisses this objection to its jurisdiction.

h. Due process obligations

531. The Panel does not accept RUSADA's submissions that the procedural calendar in these proceedings made it virtually impossible for RUSADA to properly prepare its defence, violating its due process rights. This submission was made in its 10 April 2020 response, though it had objected to the procedural calendar as early as 30 January 2020, when it submitted that the hearing should not be scheduled before August 2020. The hearing of these proceedings was in fact delayed to November 2020 as a result of the COVID-19 pandemic (and the postponement of the Tokyo Olympic and Paralympic Games). In the procedural calendar that was followed, RUSADA submitted a response to WADA of 242 pages, a response to the Intervening Parties of 29 pages, a sur-reply of 100 pages as well as six expert reports and four witness statements. Including the exhibits to expert reports and legal authorities, RUSADA filed approximately 22,000 pages of material. Other than analysis of the forensic material (addressed below), RUSADA did not identify any specific issues on which it could not properly prepare its defence.

532. Additionally, the Panel does not accept RUSADA's submission that it had been denied any due process on the grounds that it was not provided sufficient time to undertake analysis of the authenticity and integrity of the 2015 LIMS copy. First, prior to the commencement of these proceedings, WADA's forensic experts had been liaising with Russian forensic experts (two of whom were called as witnesses by RUSADA) for many months regarding the Moscow Data. Those Russian forensic experts had access to the data, which is evident from Messrs Kovalev and Silaev's statements filed by RUSADA. Second, whereas WADA's forensic experts were required to analyse the entirety of the Moscow Data, in these proceedings, RUSADA was only required to respond to the allegations put by WADA. Therefore, RUSADA's submission that it required an equal amount of time as that taken by WADA to prepare its defence is rejected. Finally, despite having received the Moscow Data in February 2020, by the hearing on November 2020, there was no suggestion that RUSADA or its forensic expert, Mr Wang, had taken any steps of their own to attempt to analyse the data (or parts of

it). Rather, on Mr Wang's evidence, he was specifically instructed by RUSADA not to do so.

533. A number of Intervening Parties also made objections that due process had not been observed because they had not been provided the Moscow Data and were restricted to making submissions regarding the legality and effect of the proposed Signatory Consequences. These proceedings were brought by WADA against RUSADA and concern allegations of non-compliance by RUSADA and Signatory Consequences for that non-compliance. The factual question of RUSADA's non-compliance is a dispute between WADA and RUSADA. Therefore, the Panel rejects those objections.

534. At the conclusion of the hearing, neither of the Parties raised an objection regarding the manner in which the hearing was held. The ROC raised an objection regarding its limited role in the procedure, in particular the fact that it was not granted an opportunity to further reply to the reply submissions of WADA. Its request for a further reply was not granted on the basis that the matters sought to be addressed in the ROC's further reply were matters properly raised by WADA in its reply. No other Intervening Parties raised an objection regarding how the hearing was held or requested further submissions.

i. Procedural issues regarding appointment of experts

535. It is appropriate to note the situation with respect to two of the experts retained by the Parties. RUSADA retained Prof. Christoph Müller to provide an expert legal opinion on a number of questions of Swiss contract law, including the legal nature and function of the ISCCS. In his report dated 25 March 2020, Prof. Müller disclosed that he had previously been employed by the law firm acting for RUSADA, and that he was an arbitrator on the general list of the CAS. WADA retained Prof. Ulrich Haas to provide an expert legal opinion, amongst other matters, in response to that of Prof. Müller. Prof. Haas disclosed that he too was a CAS arbitrator and had provided advice to WADA at various times. He also disclosed that he had previously sat on a number of cases with two members of the panel, Prof. Fumagalli and Dr Gharavi; that he had been appointed as an arbitrator by WADA on two occasions; and that he had appointments as an arbitrator or expert by parties represented by the present lawyers for WADA on seven occasions since 2012.

536. The fact that both principal parties had retained CAS arbitrators as legal experts, but particularly the retention of Prof. Haas, generated a significant degree of correspondence between 7 and 20 July 2020. The Panel invited the parties to state what, if any, objection they had towards the involvement of Prof. Haas in the proceedings. RUSADA, RPC, the 10 Athletes and the RIHF effectively sought to have Prof. Haas disqualified as an expert and his report to be struck from the record. The ROC did not object to Prof. Haas being involved in the proceedings, but suggested that the evidentiary value of his report should not be one of an independent university professor. The EOC stated that it had no objection to Prof. Haas being involved in the proceedings and the other intervening parties made no comment.

537. In its submissions concerning the objections to Prof. Haas's evidence, WADA submitted that it was uncontroversial between the parties that the CAS Code permits the appointment of CAS arbitrators as experts, although not as counsel. WADA maintained

that Prof. Haas was independent of WADA. Despite the positions set out in correspondence, neither RUSADA nor any of the other objecting parties were able to cite any authority, whether in the CAS rules, commentary or caselaw, for disqualifying a party-appointed expert based on perceived proximity to the relevant party. WADA submitted that the reports of Prof. Haas covered a variety of legal topics, in respect of which his unique background and experience were important, and that it would be not possible for WADA to replace him even with multiple experts at that stage of the proceedings. Upon consideration of the submissions, the Panel found that Prof. Haas was sufficiently independent from WADA to admit his report and permit his testimony at the hearing. The Panel invited parties to cross-examine Prof. Haas at the hearing regarding his relationship with WADA.

538. At the hearing, neither Prof. Haas nor Prof. Müller was cross-examined on matters of independence and no submission was put by any party as to alleged lack of independence of either expert.

j. Admissibility of WADA's amended prayers for relief

539. The Panel accepts WADA's submission that its amended prayers for relief as set out in its 24 June 2020 Reply to RUSADA's Response are not prohibited by Article R44.1 of the CAS Code. The substantive effect of WADA's amendments was to clarify and confine the scope of the prayers for relief that were set out in its 9 January 2020 Request for Arbitration and 10 February 2020 Statement of Claim. Therefore, the amended prayers do not constitute a "new claim" within the meaning of that term in Article 44.1 of the CAS Code.

540. The fact that the amended prayers were longer because they expressly set out the proposed Signatory Consequences rather than referred to the Signatory Consequences contained in the CRC Recommendation is of no moment.

541. In any event, as the Panel is of the view that it has the power to impose Signatory Consequences that are less severe than those sought by WADA, even if the amended prayers were not admissible, the Panel would be permitted to take them into account as submissions.

VI. APPLICABLE LAW

542. Article R45 of the CAS Code provides as follows:

> *The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide ex aequo et bono.*

543. Article 10.4.1 of the ISCCS provides that disputes filed pursuant to that provision and Article 23.5.6 of the 2018 WADC are governed by Swiss law. For reasons given below, the Panel holds that the 2018 WADC and the ISCCS are valid and applicable to these proceedings.

544. The 33 Athletes Group submitted that the Panel must take account of 2021 ISCCS, which is scheduled to take effect from 1 January 2021 and contains a number of differences to the ISCCS. They submit that, if this Award were issued after 1 January 2021, the 2021 ISCCS must be applied pursuant to the *lex mitior* principle (and, if issued prior to 2021, the less severe measures in the 2021 ISCCS must be considered under the principle of proportionality). As this Award is issued prior to 2021, the principle of *lex mitior* is not relevant to the law applicable to these proceedings.

545. The Panel, therefore, confirms that it shall apply the 2018 WADC, the ISCCS and Swiss law to the present dispute. In particular, pursuant to Article 4.4.2 of the ISCCS, the Panel is to interpret and apply the ISCCS in light of the fact that it has been drafted giving due consideration to the principles of respect of human rights, proportionality and other applicable legal principles.

VII. MERITS

A. Validity of the ISCCS

546. One of the hard-fought issues between the Parties in these proceedings concerned the validity of the 2018 WADC and the ISCCS and whether or not it was binding as against RUSADA.

547. A brief chronology of the events leading to the implementation of the ISCCS, together with a summary of the respective positions of WADA and RUSADA has been set out above.

a. Consent

548. RUSADA does not dispute that it was bound by the 2015 WADC and that the 2015 WADC provided that WADA had the right to unilaterally adopt International Standards by decision of the WADA Executive Committee (page 12 of the 2015 WADC) and modify the WADC by decision of the WADA Foundation Board (Article 23.7). However, it submits that the 2018 WADC and ISCCS introduced a new regime and redefinition of WADA's role and, notwithstanding the unilateral modification provisions in the 2015 WADC, could only be binding with RUSADA's consent.

549. With respect to the applicability of the 2018 WADC and ISCCS, the experts for both WADA and RUSADA agreed during the hearing that, under Swiss law, silence *per se* cannot be interpreted as consent, but that consent could be implied from conduct of the parties in the circumstances, including silence (Prof. Müller at T2 149:3-5; Prof. Haas T2 149:15-19).

550. In short, the response of WADA to the contention by RUSADA that it is not bound by the ISCCS is that it is an *ex post facto* legal construct with no basis. Prior to raising the issue in its reply, RUSADA had never objected to the ISCCS; underwent audits pursuant to the ISCCS; accepted the categorisation of the Post-Reinstatement Data Requirement as a critical compliance issue under the ISCCS; objected to the 17 September 2019 formal notice of non-compliance pursuant to specific provisions of the ISCCS (but not the application of the ISCCS itself); and stated in its answer to WADA's Request for

Arbitration that it objected only to certain provisions of the ISCCS such as standard of proof. In implementing the ISCCS, the objective of WADA was to deal with non-compliance through a single, centralised process that would lead, if necessary, to the imposition of prescribed, graded and proportionate consequences that had been agreed by, were binding on, and would be enforced by, all Signatories.

551. WADA submits that it is self-evident that Signatories are bound by the 2018 WADC and the related International Standards including the ISCCS, and that no Signatory has ever previously asserted that it does not accept and is not bound by any part of the 2018 WADC (or any previous versions of the WADC) or the ISCCS. However, now that RUSADA has been found non-compliant and subject to recommended consequences, all three Russian Signatories (RUSADA, the ROC and the RPC) are, for the first time, claiming that they are not bound by the ISCCS at all. WADA submits that those three parties have acted with such remarkable unity that it is difficult to avoid the inference that they are acting in concert. That would not be surprising, given that the founding members and controllers of RUSADA are the ROC and the RPC, a fact highlighted in the WADA opening statement by reference to a letter from the Director General of RUSADA to WADA dated 27 December 2019 (Exhibit C-45). As the RUSADA Independent Ethics Officer stated in a report of 26 December 2019 enclosed with that letter, "*RUSADA cannot, by definition, be absolutely independent from its founders. The General Meeting of the founders is the highest governing body of the organization.*"

552. During the process of drafting the ISCCS and receiving stakeholder comments, WADA sought the opinion of Jean-Paul Costa, a former president of the European Court of Human Rights, with respect to the compatibility of the ISCCS with accepted international law and human rights principles. His opinion of October 2017 (Exhibit CL-14) concluded that the draft ISCCS was "*an instrument that should be useful for all parties involved in combating doping in sport, and that overall the number and importance of its provisions that are palatable with international principles of law and human rights must be welcomed.*" Mr Costa provided an addendum to the opinion dated 14 December 2017 which did not relevantly change that conclusion.

553. WADA pointed to "*quasi-universal support for the ISCCS*" (Reply to RUSADA at [82]), support from the wider athlete committee, and the significant number of cases which have already been dealt with in accordance with the terms of the ISCCS, without objection from any Signatory (referred to in its 2019 Compliance Annual report at Exhibit C-54).

554. There is much force in the WADA submission that acceptance of the RUSADA argument would mean that a Signatory who had never objected to the ISCCS, never commented on it nor voiced concerns and not sought to terminate its Signatory status could simply, when faced with a compliance action, say that it was not bound. If that were right, there would be no certainty as to what rules the Signatories were bound by and, moreover, different Signatories would perhaps be bound by different rules depending on their factual circumstance.

555. Indeed, the WADC (in all of its versions) foresees that WADA would enter into identical and parallel contractual arrangements with each Signatory. This is significant because it indicates that a basis of each individual agreement was that other Signatories

were bound by the same provisions in exactly the same manner. If different Signatories were to be bound by different versions of the WADC or International Standards, there would not be a level playing field for athletes. This would undermine the purpose of the WADC, namely "*[t]o ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping*" (see 2015 WADC at page 11).

556. In support of the argument that it did not consent to the ISCCS, and is not bound by it, RUSADA asserts, in short, that it was too busy in 2017 to deal with the process of stakeholder consultation. A number of factual matters put by RUSADA as to its activities during the relevant period are uncontroversial, and consistent with contemporaneous documents. However, there is no evidence in support of its proposition that "*in light of its priorities at the time, RUSADA had neither the time nor the resources to be involved in the fast track consultation process initiated by WADA, in particular in light of the applicable timetable and the fact that it was summer holiday time in Russia*" (RUSADA response at [428]). There is no evidence as to the time and resources available to RUSADA. Nor is there evidence to support the proposition that the events in which RUSADA was engaged in 2017, including an audit by WADA, "*prevented RUSADA from participating in the consultation process*" (RUSADA response at [434]). There is no evidence that RUSADA ever made a request to WADA for additional time to consider and submit any comments.

557. The Post-Reinstatement Conditions imposed by WADA in relation to the reinstatement of RUSADA were set out in separate letters dated 20 September 2018 from the WADA President Sir Craig Reedie to Mr Yuri Ganus, the Director General of RUSADA and also to Minister Kolobkov, the Minister of Sport for the Russian Federation (Exhibits C-3 and C-4). The letters stated that the two conditions were to be considered "critical" requirements as defined in the ISCCS, and that failure to comply within the applicable deadline may lead to further action pursuant to the ISCCS. The letter to RUSADA stated that, in view of the critical conditions, RUSADA would be reinstated to the list of compliant Signatories and was allowed to implement all of its anti-doping activities, in line with the applicable requirements of the WADC and the International Standards.

558. In a letter to WADA dated 11 January 2019 (Exhibit C-7), Mr Ganus set out a number of actions taken by RUSADA, including:

> *active distributing of the* [ISCCS] *– in the year of 2018 alone, RUSADA ordered two printings of the* [ISCCS], *in the amount of 220 copies, which were distributed among the heads of authority bodies, heads of sport committees, sports federations and media, with emphasis of the consequence arising of non-fulfilment of the conditions set out after RUSADA reinstatement on September 20, specified in article 11 and in Annex B. The Standard was handed in person to all the heads of Russian sport organisations, who are decision-makers on this matter*

559. In the same letter, rather than objecting to the Post-Reinstatement Conditions imposed by WADA under the ISCCS, RUSADA that it had "*an extremely serious attitude*" to the Post-Reinstatement Conditions specified in WADA's 25 September 2018 letter, that it was "*extremely interested in fulfilling the WADA Executive Committee requirements*

aimed at meeting the conditions of providing the LIMS authentic data and the former Moscow Laboratory key analytical data to WADA experts" and it was "*making efforts aimed at ensuring this requirement is fulfilled within the timeframe specified by WADA*". It stated that, in the course of meetings with heads of Russian sport organisations, and during interviews and press conferences, it had "*stressed many times the importance of full and precise fulfilment*" of the Post-Reinstatement Conditions so as to ensure maintenance of RUSADA compliance status.

560. RUSADA submits that it did not accept the Post-Reinstatement Conditions as it was not at all involved in the negotiations between WADA and the Russian Ministry of Sport regarding its reinstatement until September 2018. It asserts that RUSADA was officially informed of such agreement only by letter of 25 September 2018, and thus it simply did not object to an agreement made between WADA, on the one hand, and the Ministry of Sport, on the other hand, as it saw no merit in objecting to the outcome of a procedure which it had not even been part of and where it had not had any opportunity to state its opinion.

561. A letter of 13 September 2018 from the Minister of Sport to WADA (Exhibit C-31) stated "*To move forward to reinstate the compliance of RUSADA, I agree to accept the two remaining conditions in the Roadmap… The Russian Federation fully accepted the decision of the IOC Executive Board of December 5, 2017 that was made based on the findings of the Schmidt report.*" The 5 December 2017 decision of the IOC Executive Board to which the Minister of Sport referred included a suspension of ROC and its President, restrictions on Ministry of Sport officials from attending the 2018 PyeongChang Olympic Games, a fine and a requirement for Russian athletes who could demonstrate they were not tainted by the Disappearing Positive Methodology and sample swapping schemes to participate as 'Olympic Athletes from Russia'. The Schmid report was a report commissioned by the IOC to investigate the matters that were the subject of the McLaren Reports. On 15 October 2018, the Minister for Sport reiterated that "*Russia's position on this matter was clearly stated by President Putin and restated in my letter of September 13, 2018*" (Exhibit C-46).

562. Additionally, in a letter received by WADA on 2 October 2018 (Exhibit C-36), the Minister of Sport responded to WADA's 25 September 2018 letter, noting that he had "*carefully examined*" WADA's letter and was "*ready to discuss all practical issues related to further joint steps*" to restore RUSADA to the list of compliant Signatories. Correspondence continued between WADA and the Minister of Sport for the rest of 2018 and until 8 October 2019 (Exhibit C-44). In the Panel's view, it is inconceivable that the Minister of Sport was acting other than in the interests of RUSADA, and with the knowledge and cooperation of RUSADA during this period. The Minister of Sport provided regular assurances that the Post-Reinstatement Conditions would be complied with, so as to ensure the reinstatement of RUSADA.

563. It is also relevant that, although RUSADA did not dispute that it was bound by the 2009 WADC and 2015 WADC when they were in force, it did not expressly consent to either of those versions of the WADC once introduced. Although not determinative with respect to the 2018 WADC (particularly in light of RUSADA's submission that the 2018 WADC can be distinguished from the 2009 WADC and the 2015 WADC because, unlike the latter two, the 2018 WADC introduced a paradigm shift), RUSADA's 'silent'

acceptance of the 2009 WADC and 2015 WADC inform the Panel's consideration of its conduct with respect to the 2018 WADC.

564. The evidence summarised above, satisfies the Panel that RUSADA consented to the 2018 WADC, the ISCCS and the Post-Reinstatement Conditions. The Panel further finds this consent is not compromised or invalidated by the safeguards in its defence (as set out below).

b. Swiss law safeguards

i. *Article 27(2) of the Swiss Civil Code*

565. RUSADA also made an alternative submission, relying on the expert legal opinion of Prof. Müller, that the mechanism entitling WADA to unilaterally rewrite the Parties' contractual relationship and impose sanctions on its Signatories constitutes an "excessive commitment" that is contrary to Article 27(2) of the Swiss Civil Code and, therefore, unlawful. Article 27(2) provides:

> *No person may surrender his or her freedom or restrict the use of it to a degree that violates the law or public morals.*

566. In his first report, Prof. Müller stated (at [111]):

> *… an interpretation of the unilateral contract modification clause contained in Article 23.6.1 WADC (2003) according to which the Signatories gave a blanket acceptance for any possible future modifications of the WADC or the adoption of future International Standards with any possible content, leaving the determination of that content entirely to WADA's discretion, would be excessive within the meaning of Article 27(2) SCC.*
>
> *…*
>
> *In conclusion, modifications as significant as the ones adopted by the WADA Foundation Board on 16 November 2017 and the WADA Executive Committee on 17 November—2017, namely, the revision of the WADC and the adoption of the ISCCS, where WADA granted itself the right to impose sanctions on Signatories (which was not foreseen in the WADC (2003)) violate the prohibition of excessive undertakings within the meaning of Article 27(2) SCCO (which is part of public policy), as they do not appear to have been determinable or foreseeable for the Signatories to the WADC (2003).*

567. The Panel does not accept this reasoning. First, for the reasons set out above, the Panel has found that RUSADA has, by its conduct, consented to the 2018 WADC and ISCCS. Therefore, the valid and binding nature of the 2018 WADC and ISCCS is not derived solely from the unilateral modification provisions of the 2015 WADC.

568. Second, RUSADA accepted that it was bound by the 2015 WADC. As identified by WADA, the 2015 WADC imposed consequences on Signatories for non-compliance. Article 23.6 of the 2015 WADC relevantly provided:

> *Non-compliance with the Code by any Signatory may result in consequences in addition to ineligibility to bid for Events as set forth in Articles 20.1.8 (International Olympic Committee), 20.3.11 (International Federations) and 20.6.6 (Major Event Organizations), for example: forfeiture of offices and positions within WADA; Ineligibility or non-admission of any candidature to hold any International Event in a country; cancellation of International Events; symbolic consequences and other consequences pursuant to the Olympic Charter.*

569. It is clear from the very content and application of their provisions as well as the correspondence set out above that the 2018 WADC and the ISCCS expanded upon these matters and addressed consequences of non-compliance in far greater detail and the same was acknowledged and accepted by RUSADA. The Panel, therefore, does not accept that the 2018 WADC and the ISCCS were neither determinable nor foreseeable having regard to the 2015 WADC.

570. Article 27(2) of the Swiss Civil Code is only engaged where one of the parties is left to arbitrary actions of the other party. That has not occurred in the present circumstances. Therefore, there is no violation of Article 27(2) of the Swiss Civil Code.

ii. *Rule of surprise*

571. Prof. Müller also addressed the application of the "rule of surprise" to the 2018 WADC and ISCCS. He stated in his first report that, if a party only consents to general terms and conditions as a whole, the clauses that are unfavourable to that party and which it did not expect and could not reasonably have expected at the time that the contract was concluded, do not bind that party. He noted that, as a general rule, only the party whose consent is weaker or who is inexperienced in business, can invoke the "rule of surprise" [113]-[116].

572. Prof. Müller asserts that the 2018 WADC and the ISCCS, by providing for unlimited unilateral modification without any participation by the other party, contain unusual clauses which cannot be enforced against weaker contractual parties unless special attention is drawn to them. However, Prof. Müller's characterisation of the WADC as "general terms and conditions" is not fit for purpose in the context of contracts whose parties are pursuing a common object or purpose (as is the case with the WADC). Further, as Prof. Haas identified in his report (at [23]), there is not a single decision of the Swiss Federal Tribunal that qualifies the sporting rules of a sports organisation as general terms and conditions.

573. Accordingly, the Panel finds that the "rule of surprise" raised by Prof. Müller does not apply in respect of the 2018 WADC or the ISCCS.

574. Even if the "rule of surprise" were applicable, the Panel finds that it would not invalidate the 2018 WADC or ISCCS. RUSADA contends that the new regime under the ISCCS is so dramatically different and unforeseeable that it is impermissible under the unilateral modification provisions of the 2015 WADC. However, having regard to (i) the purpose of the WADC, namely "*[t]o ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping*" (see 2015 WADC at page 11); (ii) the highly

dynamic environment of anti-doping and the consequent need for rules and regulations to be appropriately adapted; and (iii) the fact that 2015 WADC imposed consequences on Signatories for non-compliance, the 2018 WADC and ISCCS were not surprising.

iii. *Foundation law*

575. The Panel does not accept submissions that the 2018 WADC and ISCCS were *ultra vires* in that they exceeded WADA's Statutes. Articles 4.1 and 4.6 of the WADA Statutes provide:

> *The object of the Foundation is:*
>
> *1. to promote and coordinate at international level the fight against doping in sport in all its forms including through in and out-of-competition; to this end, the Foundation will cooperate with intergovernmental organizations, governments, public authorities and other public and private bodies fighting against doping in sport, inter alia the International Olympic Committee (IOC), International Sports Federations (IF), National Olympic Committees (NOC) and the athletes; it will seek and obtain from all of the above the moral and political commitment to follow its recommendations;*
>
> *…*
>
> *6. to promote harmonized rules, disciplinary procedures, sanctions and other means of combating doping in sport, and contribute to the unification thereof, taking into account the rights of the athletes;*
>
> *…*
>
> *In order to achieve its objective, the Foundation has the right to conclude any contract, to acquire and transfer, free or against payment, all rights, all movables and any real estate of whatever nature, in any country. It may entrust the performance of all or part of its activities to third parties.*

576. It is clear that the WADA statutes provide for the possibility to enter into contracts to achieve its objectives (*viz.* the WADC). This implies the possibility of establishing frameworks and starting legal proceedings to enforce the WADC. No part of the Statutes exclude power to monitor and enforce compliance of the WADC by Signatories. Therefore, the compliance framework in the 2018 WADC and ISCCS was inherent in the scope of the objects set out in the Statutes.

B. Application of the ISCCS

a. Applicability of the fast-track procedure in Article 9.5 of the ISCCS

577. Article 9.5 of the ISCCS provides for a "fast track procedure" whereby a Signatory's non-conformity with the 2018 WADC could be referred to the CRC for urgent consideration without having to satisfy the requirements of Articles 9.2 to 9.4 of the ISCCS. Under the fast track procedure, WADA management is to give the relevant Signatory an opportunity to explain the apparent non-conformity within a specified

deadline and communicate any explanation to the CRC: Article 9.5.3. If the CRC considers that the fast-track procedure is required, it may recommend that the WADA Executive Committee send a formal notice of non-compliance to the Signatory identifying any proposed consequences or reinstatement conditions: Article 9.5.4.3.

578. Article 9.5.1 of the ISCCS provides that the fast-track procedure set out in Article 9.5 of the ISCCS will apply in a case where:

> *(a) there is Non-Conformity by a Signatory with one or more Critical requirements of the Code and/or the International Standards; and (b) urgent intervention is required in order to maintain confidence in the integrity of a sport or sports and/or of a particular Event or Events.*

i. *Critical requirement*

579. WADA categorised the Post-Reinstatement Data Requirement as a critical requirement of the WADC and consequently utilised the fast-track procedure in Article 9.5 of the ISCCS.

580. WADC requirements are categorised under the ISCCS as either "Critical", "High Priority" or "Other". Article 4.3 of the ISCCS defines a "Critical" requirement to be "*a requirement that is considered to be critical to the fight against doping in sport. See further Annex A*". Annex A to the ISCCS in turn provides non-exhaustive lists of examples of each category of requirements. It also states:

> *Requirements that are not listed below shall be classified into one of the three categories, reasoning by analogy from the examples listed below (i.e., requirements that are considered as important to the fight against doping in sport as requirements listed below as Critical requirements shall be categorized as Critical, etc). The classification shall be made in the first instance by WADA Management, but the Signatory shall have the right to dispute the classification, and the CRC and WADA's Executive Committee (based on the CRC's recommendation) may take a different view. If there remains a dispute, ultimately CAS will decide.*

581. The Panel does not accept the ROC's submission that the Post-Reinstatement Data Requirement should not have been categorised as a critical requirement and therefore the use of the fast track procedure was invalid.

582. The example list of critical requirements in Annex A to the ISCCS is expressly stated to be non-exhaustive. The Panel is satisfied (having regard to the definition of "critical" requirement in Article 4.3 of the ISCCS) that the Post-Reinstatement Data Requirement is "critical to the fight against doping" in sport as it concerns the provision of authentic doping sample data in the context of a state-sanctioned doping program.

ii. *Requirement of urgent intervention*

583. Similarly, the Panel does not accept RUSADA's submission that the requirement of urgency in Article 9.5.1 of the ISCCS was not met. The seriousness of RUSADA's

failure to satisfy the Post-Reinstatement Data Requirement was to be considered in the context of *inter alia*:

a. the findings by the WADA Independent Commission;

b. the findings in the McLaren Reports;

c. the interactions between WADA, the Russian Ministry of Sport and RUSADA regarding the Moscow Data; and

d. the (at the time) imminent Tokyo Olympic and Paralympic Games.

584. In those circumstances, the Panel finds that WADA's decision that urgent intervention was required in order to maintain confidence in the integrity of sport was justified.

iii. *Implementation of the fast track procedure*

585. The Panel does not accept RUSADA's submission that the fast track procedure carried out by WADA was invalidated because RUSADA was deprived of its right to be heard in Article 9.5.3 of the ISCCS.

586. By letter dated 17 September 2019 addressed to both RUSADA and the Russian Minister of Sport (Minister Kolobkov), RUSADA was provided forensic reports regarding the Moscow Data and asked to provide any written explanation which it wished to have considered by the CRC. Minister Kolobkov provided a response on 8 October 2019, which was provided to the CRC.

b. RUSADA's obligation to comply with the Post-Reinstatement Data Requirement

587. The Post-Reinstatement Data Requirement, as set out in WADA's 25 September 2018 letter to RUSADA, was as follows:

> *RUSADA and the Russian Ministry of Sport must procure that the authentic LIMS data and underlying analytical data of the former Moscow Laboratory set out in the WADA President's letter of 22 June 2018 are received by WADA by no later than 31 December 2018.*

588. There was no dispute between that Parties that RUSADA did not have independent control over or access to the Moscow Data. Nor was it in dispute that WADA was, at the time that it imposed the Post-Reinstatement Data Requirement, aware of this fact. Therefore, it was clear that RUSADA's obligation to "procure" the authentic Moscow Data would require RUSADA to cause another person or entity (who did have control over or access to the Moscow Data) to provide the Moscow Data to WADA.

589. WADA did not present a case that the alleged manipulations of the Moscow Data (such that RUSADA failed to procure the authentic Moscow Data) were caused by RUSADA. RUSADA strongly denied any involvement in the alleged manipulations (it also denied that the Moscow Data received by WADA was not authentic).

590. WADA submits that the fact that the Post-Reinstatement Data Requirement imposed strict liability on RUSADA – in the sense that RUSADA could be held liable under the

2018 WADC and ISCCS for failure to procure the authentic Moscow Data (over which it did not have control) even where RUSADA itself was not responsible for manipulations – is not unlawful. It says that the principle of strict liability has been upheld by the CAS in various contexts such as fan misconduct and match-fixing, where it has been provided for in the rules and justified in the circumstances.

591. By analogy to those CAS authorities, WADA submits that strict liability is justified in the present circumstances because it is essential for WADA to be able to act where NADOs are prevented from delivering effective anti-doping programs due to the acts or omissions of third parties (and in particular public authorities). This serves both a corrective and deterrent purpose. In WADA's submission, if a NADO could avoid compliance action by blaming the interference of public authorities or other third parties, the system would be toothless.

592. WADA submits that the decision of CAS 2016/A/4745 *RPC v. IPC*, which is expressly referred to in the comment to Article 9.4.3 of the ISCCS, is perfectly analogous. In that decision, the CAS Panel accepted that neither the RPC nor its officials had any involvement in, or control over, the scheme that undermined the Russian anti-doping program, and nonetheless found the RPC had objectively failed to meet its obligation to the IPC to ensure an adequate doping program at national level and therefore upheld its suspension (based on strict liability).

593. WADA disputes RUSADA's submission that the Signatory Consequences are contractual penalties and imposition of the same on the basis of third-party conduct is illicit under Swiss law without express agreement of the parties. WADA submits that there is no requirement of an express agreement and that a regime of contractual penalties involving objective responsibility can be assumed orally or result from the circumstances and, in the present case, is specifically provided for through Article 9.4.3 of the ISCCS.

594. The terms of Article 9.4.3 of the ISCCS are clearly directed to establishing non-compliance based on the objective failure of a Signatory to meet its obligations. The clear purpose of the Article is that signatories cannot escape non-compliance, and the applicable consequences, by attempting to attribute fault to other parties. The article relevantly provides as follows:

> *… In no circumstances, however, shall it be an acceptable excuse, or a mitigating factor:*
>
> > *9.4.3.1 that the Signatory's failure to comply with its obligations under the Code and/or the International Standards has been caused by interference by, and/or a failure to provide support or other act or omission by, any governmental or other public authorities. Each Signatory has voluntarily accepted the obligation to comply with its obligations under the Code and the International Standards, which includes an obligation under Code Article 23.3 to devote sufficient resources, and, where applicable, an obligation to secure the support of governmental and other public authorities required to achieve and maintain Code Compliance; or*

> *9.4.3.2 that the Signatory assigned the task of complying with some or all of its obligations under the Code and/or the International Standards to a third party (such as a Sample Collection Authority to whom the Signatory has assigned the task of collecting Samples; or a local organising committee to which a Major Event Organization has assigned the task of running its Anti-Doping Program at the Event in question).*
>
> *[Comment to Article 9.4.3.2: As CAS ruled in RPC v IPC, CAS 2016/A/4745, (a) a body with an obligation to enforce the Code within its sphere of authority remains fully liable for any violations even if they are due to the actions of other bodies that it relies on but that it does not control; and (b) just as an athlete cannot escape the consequences of an anti-doping rule violation by delegating his or her responsibility to comply with his or her anti-doping obligations to others, so too a Signatory has an absolute and non-delegable obligation to comply with the requirements of the Code and the International Standards. The Signatory has the right to decide how to meet that obligation, including the right to assign certain tasks to appropriate third parties, should it see fit, but it remains fully responsible for complying with the Code and the International Standards, and is fully liable for any non-compliance caused by any failures of such third party.]*

595. WADA submits that, while it cannot identify individuals responsible for the data manipulation, the Moscow Data was under the supervision of the Russian Investigative Committee, which is a federal investigative committee under the direct supervision of the President of the Russian Federation. It notes the specific reference to interference by government or other public authorities in Article 9.4.3.1 of the ISCCS. As mentioned above, the 13 September 2018 letter from the Russian Minister of Sport to the WADA President stated "*the Russian Federation fully accepted the decision of the IOC executive board of December 5, 2017 that was made based on the findings of the Schmid report*". Among the findings made by the Schmid commission were that the Russian Ministry of Sport "*controlled every sphere related to sports in the country including … Anti-doping*".

596. WADA submits that there is no provision in Swiss law providing that strict liability may not be accepted as a matter of contract. The RPC submits, to the contrary, that no contractual sanction may be imposed based on a strict liability, referring to CAS 2013/A/3365 *Juventus FC v. Chelsea FC (*"*Juventus*"). However, as the Panel in *Juventus* held, while a nexus between fault and liability may be necessary in a tort case, that is not necessarily the case for a contractual setting, which is the case in the present proceeding. WADA also relies upon *RPC v. IPC*, cited in the comment to article 9.4.3, where there was a positive finding that RPC and its officials had no responsibility for the failure of the anti-doping program, but nonetheless RPC was found strictly liable for such failure.

597. WADA refers to a number of CAS authorities upholding the concept of strict liability where it is provided for in the rules and justified by the circumstances, in areas such as fan misconduct and match fixing.[2] That case law shows that, in cases of fan misconduct, strict liability is necessary in view of the seriousness of the threat that misconduct poses to the sport; the need to prevent recurrence through deterrence; the need to effect behavioural change; the difficulty in identifying the specific perpetrators; and the lack

[2] These cases included CAS 2016/A/4788 *Federación Mexicana de Fútbol Asociación v. FIFA*; CAS 2015/A/3875 *FAS v. UEFA*; CAS 2015/A/3874 *FAA v. UEFA & FAS*; CAS 2013/A/3094 *Hungarian Football Federation v. FIFA*; CAS 2010/A/2267 & 2278-2281 *Football Club "Metalist" et al v. FFU*.

of a disciplinary nexus with those perpetrators. WADA refers to CAS 2017/A/5306 *Guangzhou Evergrande Taobao FC v. AFC*, where the Panel said, in the context of a discussion of strict liability, *"…whilst the Appellant may not have intended to commit any offence and it acted admirably and responsibly in providing guidelines to its travelling supporters, these matters are not relevant to nor are they exculpatory of liability*." Similarly, CAS authority supports the application of strict liability in the context of match fixing, even where it leads to clubs being excluded from competition without fault, and players suffering the consequences of that ineligibility: see CAS 2010/A/2267 & 2278-2281 *Football Club "Metalist" et al v. FFU*:

> *Furthermore, the principle of strict liability in regard to disciplinary sanctions was fully applied in the respective CAS jurisprudence because of the severity of the threat that hooliganism poses to sport and not for the lack of other remedies, i.e. due to the lack of possibility to punish football fans. Applying this rationale shows that strict liability of the club is due when overriding objectives need to be reached. In the present case the overriding objective is the fight against match-fixing. The severity of match-fixing is displayed by the zero-tolerance approach the stakeholders take to fight the phenomena. Consequently, the principle of strict liability is applicable in the present case due to the specific provision of the FFU regulations and there is no room for an exception to the strict liability principle as this clearly reflected in the rules. FC Karpaty is, therefore, strictly liable for the match-fixing violations committed by its football players.*

598. WADA submits that strict liability is necessary and legitimate within the context of WADC compliance for the same reasons that it has been applied in the cases of fan misconduct and match fixing. That is because WADC compliance is directed to achieving the fundamental objective of fighting against doping in sport, and more particularly, aimed at ensuring effective anti-doping programs across all countries with a view to ensuring a level playing field and maintaining the confidence of athletes, stakeholders and the public in the integrity of sporting competition. While NADOs understandably rely upon third parties for support in delivering an effective anti-doping program they must also, *a fortiori*, rely on those same authorities or third parties not interfering with, obstructing or undermining the national anti-doping system. Where non-compliance is due to the acts or omissions of third parties that are not subject to the WADC, it is essential that WADA may take action which is capable of affecting third parties, inducing behavioural and systemic change and deterring similar interference in the future, even where the third parties cannot be identified.

599. In the Panel's view, there can be no serious challenge to the proposition put by WADA that if a NADO could avoid a compliance action by blaming the interference of public authorities or other third parties, the system would be toothless. It would mean that countries with unscrupulous governments or sports authorities with the power and the will to undermine proper anti-doping regulation would be able to do so without consequences, so that, in effect, the overriding aim of harmonised anti-doping regulation would only be possible in those countries where authorities were willing to play by the rules.

600. WADA further refers to Article 11.2.1 of the ISCCS. That Article concerns principles relevant to the determination of Signatory Consequences to be applied, and relevantly provides "*in terms of the degree of fault of the Signatory, the obligation to comply is absolute, and so any alleged lack of intent or other fault is not a mitigating factor…*".

601. RUSADA does not dispute that, as a matter of principle, the assignment of obligations to a third party does not automatically relieve the delegating party of any responsibility, but seeks to distinguish the present case on the basis that RUSADA did not delegate any obligations to a third party. RUSADA attempts to distinguish *RPC v. IPC*, but it is clearly analogous as, even though the Panel accepted the RPC submission that neither the RPC nor its officials were involved in, or controlled, the scheme that undermined the national anti-doping program, the suspension of RPC based on strict liability was upheld.

602. RUSADA asserts that it has complied with its obligations under the WADC, referring to an express recognition in the CRC Recommendation that "*The evidence … indicates that RUSADA's work is effective in contributing to the fight against doping in Russian Sport*", but that statement does not deal with failure to comply with the Post Reinstatement Conditions; rather, it comments upon the work of RUSADA in anti-doping.

603. RUSADA submits that Article 9.4.3.1 of the ISCCS does not apply because it only concerns the failure of a Signatory to comply with its obligations under the WADC. However, as WADA points out, the Article is not limited to failure to comply with obligations under the Code but also obligations under International Standards (including the ISCCS). Article 12.3.8 of the ISCCS imposes a clear obligation to comply with post reinstatement conditions, and thus it is clear that a failure to meet a post reinstatement condition is an instance of non-compliance that falls within Article 9.4.3.1. A further argument by RUSADA, which has no substance, is the suggestion that Article 9.4.3.1, by virtue of a reference to Article 23.3 of the WADC, only applies where a Signatory is in breach of an obligation to implement an anti-doping program. The reference to Article 23.3 is merely an example of WADC compliance and is preceded by a clear statement that a Signatory must comply with its obligations under the WADC and the International Standards.

604. RUSADA submits that, as explained by Prof. Müller in his first report, the Signatory Consequences bear a resemblance to contractual penalties. WADA replies by asserting that, even if the law on contractual penalties is applicable, there is no requirement of an express agreement between the parties, and indeed here the parties have specifically provided for a regime of objective responsibility in, for example, Article 9.4.3 of the ISCCS. Swiss law does not prevent contractual parties from providing for a regime of strict liability. Indeed, the Swiss Code of Obligations specifically provides for instances of strict liability provisions, such as Article 111 which states that "*a person who gives an undertaking to ensure that a third party performs an obligation is liable in damages for non performance by said third-party.*"

605. RUSADA refers to Article 12.1 of the 2018 WADC, in what WADA describes as a highly technical argument to escape strict liability, asserting that WADA may only proceed against a Signatory for failure to comply with *its* obligations under the 2018

WADC, and thus the Signatory may not be sanctioned for non-compliance of third parties. Article 12.1 of the 2018 WADC provides:

> *The* [ISCCS] *sets out when and how WADA may proceed against a Signatory for failure to comply with its obligations under the Code and/or the International Standards, and identifies the range of possible sanctions that may be imposed on the Signatory for such non-compliance.*

606. A failure to meet a post reinstatement requirement is treated as a non-conformity and, as already noted in relation to Article 9.4.3.1 of the ISCCS, can be dealt with under strict liability.

607. RUSADA confirmed in its letter of 11 January 2019 (Exhibit C-7) that it was making efforts to fulfil the Post Reinstatement Conditions including stressing the importance of fulfilment in meetings with the heads of Russian sports organisations, indicating that RUSADA understood that it could not fulfil the obligation without relying on others, as it had no authority itself with respect to the Moscow Data. The clear inference from the correspondence is that RUSADA left the fulfilment of the Post-Reinstatement Conditions to the Ministry of Sport.

608. The Panel finds that contractual obligations to procure a certain result which is not exclusively within the control of the obligor are valid and moreover customary in the field irrespective of the good faith and efforts of the obligor as in the case at hand. Indeed, the 2015 WADC (which RUSADA accepted was binding on it) provided in Article 22.8 that the failure of a State to ratify the UNESCO International Convention against Doping in Sports (which would be a perfectly lawful decision under international law) could result in adverse consequences for Signatories, such as the hosting of events. Therefore, the 2015 WADC already provided for consequences caused by actions outside the control of Signatories.

609. The nature and extent of Russian doping violations revealed during recent years, and accepted by RUSADA, demonstrate how third parties can interfere with and corrupt the anti-doping program and processes. For WADA and the world sporting movement to be able to prevent these abuses and protect clean sport, it is necessary to effect change by acting through its Signatories, if necessary on the basis of strict liability. The compliance consequences for Signatories are necessary to fight against doping and to ensure the level playing field regardless of fault.

610. The Director General of RUSADA recognised, in a letter dated 30 September 2019 after the formal non-compliance proceedings were commenced, that "*a declaration of non-compliance is necessary under the rules"* (Exhibit C-55). He also stated in that letter:

> *… one of the key conclusions that can be made: we were betrayed, we were deprived of the right to be on the side of the truth, and it was done by those responsible for the recovery of the sports organization from the doping crisis. Today the sports organization of Russia is no longer on the edge of the abyss, we are flying into the abyss, the depth of which is difficult to predict.*
>
> *…*

> *Couldn't persons initially making decisions on database changes, and then on the Moscow laboratory electronic database transfer in such state estimate the possibility of identifying such changes by professionals and the tragic severity of consequences of what was done for our long-suffering sport? Both answers are terrible. And importantly why to change base, to protect fallen athletes and their achievements*
>
> *…*
>
> *I possess sufficient information to speak about severity and the scale of consequences. Previous approaches and methods to overcome the crisis cannot be accepted, because they only aggravate the situation, they need to be urgently changed by replacing everyone involved.*

611. A number of intervening parties (the ROC, the RIHF, the 33 Athletes and the 10 Athletes) put submissions on strict liability in relevantly similar terms to those put by RUSADA. It is unnecessary to deal further with those submissions as WADA does not seek any relief against the Intervening Parties and, in any event, are dealt with through the foregoing conclusions.

612. For the reasons set out above, the Post-Reinstatement Data Requirement was valid and binding on RUSADA, and non-compliance could lead to consequences under the ISCCS.

C. RUSADA's non-compliance with the Post-Reinstatement Data Requirement

1. Preliminary Matters / Summary

613. The Panel is satisfied, not only on the balance of probabilities, but also to the standard of strict proof under Swiss law, that RUSADA failed to procure that the authentic Moscow Data was received by WADA and therefore failed to comply with the Post-Reinstatement Data Requirement.

614. The Panel finds that, prior to the Moscow Data being retrieved by WADA in January 2019, and during its retrieval, it was subjected to deliberate, sophisticated and brazen alterations, amendments and deletions. Those alterations, amendments and deletions were intentionally carried out in order to remove or obfuscate evidence of improper activities carried out by the Moscow Laboratory as identified in the McLaren Reports or to interfere with WADA's analysis of the Moscow Data.

615. In what the Panel considers to be a more egregious act of misconduct, the Panel finds that alterations were made to Forum Messages in the Moscow Data in order to deceptively inculpate certain employees of the Moscow Laboratory (Dr Rodchenkov and Dr Sobolevsky) in a contrived extortion scheme while exonerating others (Mr Kudryavtsev) from wrongdoing.

616. These matters were only identified by forensic experts retained by WADA after painstaking forensic analysis of the Moscow Data. When these matters were raised by WADA with Russian forensic experts retained by the Russian Investigative Committee to liaise with WADA (including Messrs Kovalev and Silaev, who were called by

RUSADA as witnesses in these proceedings), the New Data was provided to WADA in October 2019 which purported to support theories advanced by the Russian experts. That New Data also had dubious authenticity.

617. No case was advanced by WADA that RUSADA itself was responsible for the above manipulation of the Moscow Data and, for reasons addressed above, it is not necessary for the Panel to make such a finding in determining these proceedings. The alterations, amendments and deletions occurred between November 2018 and January 2019, while the Moscow Laboratory was under the control of the Russian Investigative Committee, which had previously prevented WADA's access to the Moscow Laboratory on the basis of an ongoing criminal investigation.

a. Standard of Proof

618. Article 23.5.6 of the 2018 WADC and Article 10.4.2 of the ISCCS both provide that, in Signatory non-compliance proceedings before the CAS, "*WADA shall have the burden of proving, on the balance of probabilities, that the Signatory is non-compliant*".

619. The Panel is satisfied that the 2018 WADC and the ISCCS are applicable to these proceedings and therefore the applicable standard of proof in determining whether RUSADA complied with the Post-Reinstatement Data Requirement is the balance of probabilities.

620. In any event, even if the Panel accepted the submissions of RUSADA and certain Intervening Parties that the applicable standard is the general standard of proof under Swiss law, being 'strict' or 'full' proof, the Panel is satisfied that RUSADA's non-compliance with the Post-Reinstatement Data Requirement has been established by WADA to that standard. That is, the Panel is convinced, based on objective grounds, that RUSADA failed to procure that the authentic Moscow Data was received by WADA.

b. Evidence of Mr Mochalov

621. Mr Mochalov, the System Administrator at the Moscow Laboratory from October 2016 and in particular between December 2018 and January 2019 at the time of the WADA retrieval missions, provided a witness statement in these proceedings dated 3 August 2020 in which he asserted that all of his activities on the LIMS system and LIMS server were in the execution of his direct duties to ensure the stable functioning of the LIMS system and LIMS server. In his statement, he provided explanations for those activities.

622. Mr Mochalov also stated that, between 18 and 21 December 2018, he had certain conversations with Mr Aaron Walker and Mr Paul Laurier of the WADA retrieval team regarding the secondary disk on the LIMS server, the use of a virtual server, and the procedure of daily LIMS backups. These conversations were denied by Messrs Walker and Laurier, as well as other members of the WADA retrieval team.

623. On 1 November 2020, the eve of the hearing, the Panel was informed that Mr Mochalov was suffering from severe pneumonia which prevented him from giving evidence at the hearing. Mr Mochalov was therefore not made available for cross-examination by WADA's counsel (at any point over the four hearing days). No medical evidence was

given in respect of this alleged illness and no evidence was led by RUSADA (including from Mr Mochalov's wife, who appeared as a witness for RUSADA, although she was not cross-examined).

624. The Panel admits the statement of Mr Mochalov as part of the record. The fact that he was not made available for cross-examination, however, has been considered by the Panel when determining the weight to be given to his statements.

c. The 2015 LIMS copy

625. In certain of its allegations regarding manipulation of the Moscow Data, in particular its allegations in respect of the Forum Messages, WADA sought to establish its non-compliance case by identifying differences between the 2015 LIMS copy (which it received from a whistle-blower in October 2017) and the 2019 LIMS (the database imaged by WADA in January 2019).

626. WADA's reliance on the 2015 LIMS copy in the course of its forensic analysis and in these proceedings was the subject of objection on due process grounds and criticism on the basis of forensic methodology.

627. With respect to the due process objection, RUSADA submitted that there had been a breach of its due process rights as it was not provided with the 2015 LIMS copy until February 2020 and, when the data was provided, it was only provided in part. Certain files that were part of the 2015 LIMS copy and forensic chain of custody documents were not produced by WADA. On 19 March 2020, RUSADA made a request to the Panel to order that WADA produce two such files. That request was challenged by WADA on the basis that the files were subject to a confidentiality undertaking and could endanger the identity of a confidential witness. The request was denied by the Panel on 25 March 2020. A similar request for reconsideration made on 1 April 2020 was also denied by the Panel on 7 April 2020.

628. RUSADA submitted that, without the files forming part of the 2015 LIMS copy which it had requested be produced, it could not properly defend its rights.

629. With respect to criticism of WADA's forensic methodology, RUSADA relied on its forensic expert Mr Wang. In his expert reports and during the course of oral evidence, Mr Wang stated that WADA's reliance on the 2015 LIMS copy resulted in a flawed forensic methodology because the reliability of the 2015 LIMS copy could not be verified and it was therefore not possible to conclude that it was authentic or genuine or had been forensically preserved and acquired. This opinion was summarised succinctly by Mr Wang in his second report, in which he stated (in bold typeface, at [11]) "*WADA is basing its entire analysis including the respective conclusions on the assumption that the 2015 LIMS Copy can be considered a genuine copy of the authentic LIMS data and is reliable.*"

630. In response to Mr Wang's report, WADA's forensic experts stated that the authenticity of the 2015 LIMS copy could be confirmed by comparing it to deleted files which had been recovered from the Moscow Data through 'carving'. During one of the expert concurrent evidence sessions, Dr Broséus presented an opening statement for WADA, in which he stated that the carved files corroborated the content of the 2015 LIMS copy.

He also stated that, in any event, the manipulation and alteration of the Moscow Data could be established without relying on the 2015 LIMS copy.

631. For the reasons given below, the Panel is satisfied that manipulations and alterations of the Moscow Data sufficient for a finding of breach are established by WADA without reference to the 2015 LIMS copy.

632. With respect to Forum Messages specifically, the Panel is satisfied that certain of the alleged alterations to Forum Messages are established without reference to the 2015 LIMS copy, but rather by references to carved files recovered by WADA's forensic experts. In those circumstances, the Panel is satisfied that the 2015 LIMS copy corroborates the remaining alleged alterations on the basis that it existed at least as early as October 2017 (when it was provided to WADA by the whistle-blower). There was no suggestion that the data pertaining to the Forum Messages was not provided to RUSADA.

633. In those circumstances, the Panel determines that RUSADA's due process rights are not breached and Mr Wang's criticism of WADA's forensic methodology (at least in respect of use of the 2015 LIMS copy) falls away.

d. Concessions made by RUSADA

634. Notwithstanding RUSADA's objections to the use of the 2015 LIMS copy and criticism of the methodology of WADA's forensic experts, RUSADA did not dispute the activities of Mr Mochalov as system administrator of the Moscow Laboratory identified by WADA's forensic experts. It did, however, strongly dispute WADA's allegations that those activities were improper.

635. In the course of RUSADA's closing submissions, the Panel asked RUSADA's counsel to answer the following question:

> *Putting aside the Forum Messages, does RUSADA accept that the alterations to the Moscow Data in December 2019 and January 2019 alleged by WADA occurred, but say that they were conducted by Mr Mochalov innocently or in accordance with system procedures? If not, which activities are disputed by RUSADA.*

636. RUSADA's counsel responded as follows (emphasis added):

> *To address the second question, RUSADA does not accept that alterations to the Moscow data [occurred] in December 2018 and January 2019 as alleged by WADA.*
>
> *Again, RUSADA cannot accept these allegations because, first of all, WADA bases its analysis on the comparison on the 2019 LIMS and the alleged 2015 LIMS received from the whistleblower. RUSADA did not receive the underlying files of the alleged 2015 LIMS copy and it cannot simply verify this data and considers it unreliable evidence.*

> ***However, as the investigation and analysis of the Russian witnesses confirmed, they detected the same traces of activities by the system administrator as [the] Lausanne experts did. These activities were required to operate the system, the live system, and fix the system errors.*** *But, and it is very important, these activities did not result in any changes, loss or deletion of the data pertaining to the results of the doping samples analysis in the relevant period from 1 January 2012 until 31 August 2015 that WADA investigated.*

637. In the Panel's view, this concession – that Mr Mochalov engaged in the identified activities (but not that they were improper as alleged by WADA) – was appropriately made.

638. In his witness statement, Mr Mochalov admitted to backdating the LIMS system to 2015 during December 2018, deleting files on the LIMS system, "restoring" the LIMS database with previous backups and deleting system log entries. He asserted, however, that his actions were in the legitimate execution of his duties by ensuring the stable functioning of the LIMS system and the LIMS server.

639. Similarly, the reports prepared by the Russian forensic experts, Messrs Kovalev and Silaev, and their corresponding annexures also confirmed the activities undertaken by Mr Mochalov on the LIMS System between December 2018 and January 2019 (but not the alleged fabrication of the Forum Messages). They stated that those actions "*were necessary due to the daily operations of the [Moscow] Laboratory*" and that none of the files deleted by Mr Mochalov related to doping sample test results.

2. Manipulation of the Moscow Data

640. WADA filed a suite of forensic reports prepared by officers in its Intelligence and Investigations Department (Mr Walker and Dr Broséus) as well as the independent forensic experts from the University of Lausanne (Profs. Casey and Souvignet). These reports provided detailed and comprehensive explanations of the forensic analysis conducted by the experts as well as their factual observations and evaluative interpretations of those observations.

a. LIMS system and Server One (other than Forum Messages)

641. The Panel notes the concession made by RUSADA (which is referred to above) that the activities of Mr Mochalov identified by WADA's experts were not disputed. The Panel has also considered the factual observations of WADA's experts (as opposed to their evaluative interpretations of what inferences or conclusions can be drawn from those factual observations), which were not challenged by RUSADA. The Panel accepts the accuracy of those observations. Accordingly, the Panel finds that the following activities occurred with respect to the Moscow Data in December 2017 and January 2018:

a. On 17 December 2018:

i. The LIMS system was backdated to 12 November 2015 and, while it was backdated, alterations were made including the deletion and creation of files.

Evidence of these activities and the backdating which was recorded in command logs was deleted.

ii. At least 450 database backups of the LIMS database created in 2016 were deleted from the primary disk of the LIMS system.

iii. A 'zeroing command' was executed on the primary disk which had the effect of overwriting free space on the disk with zeros and rendered unrecoverable traces of prior commands, activities or previously deleted data. A command was then executed to delete information regarding the number of zeros written on the primary disk and the length of time the zeroing command operated.

iv. The LIMS system was backdated to 11 August 2015 and, while it was backdated, the secondary disk of the LIMS system was formatted.

v. The command logs recording the zeroing command in respect of the primary disk, the command to backdate the LIMS system to 11 August 2015 and the commands to format the secondary disk were all deleted.

b. Between 1-9 January 2019, 19,982 files and folders from the LIMS server, computer instruments and associated recycle bins were deleted. Of those deleted files that were not in the recycle bin, 9,298 sequence files, 500 PDFs and 1 raw data file had creation timestamps between 1 January 2012 and 31 December 2015.

c. On 8 January 2019, the LIMS system was backdated to 23 May 2015. While it was backdated, the existing LIMS database was replaced with a prior version, such that it appeared that that prior version had been on the LIMS system since 23 May 2015. Six hundred and thirty-two LIMS database files were deleted, and automatic scripts were used to alter the LIMS database and backdate multiple databases and associated files to various dates. Those scripts were then deleted. An attempt was made to restore the system to the date of 8 January 2019 but it was erroneously set to 1 August 2019 due to the incorrect input of date format (08.01.2019 and 01.08.2019).

d. On 9 January 2019, the 2008, 2009, 2010 and 2011 LIMS databases were deleted from the LIMS system.

e. On 10 January 2019, 101 sequence files and 137 PDFs were deleted from the primary disk of the LIMS system.

f. On 16 January 2019, Server One (which was a separate server in the Moscow Laboratory to the LIMS server comprised of six disks) was backdated to 19 August 2015. While it was backdated, a secondary disk on Server One was formatted and a command was executed to overwrite the free space on the primary disk on Server One with zeros. The command logs recording the zeroing command were deleted.

642. Although other allegations of manipulation of the LIMS system during the period from December 2018 to January 2019 were raised by WADA, the Panel does not consider it necessary to address those allegations for the purposes of considering the question of RUSADA's non-compliance (the Forum Messages are separately addressed below).

b. ICR Disks

643. On 11 January 2019, the Russian Investigative Committee delivered three hard drives to WADA at the Moscow laboratory (the "ICR Disks") together with an accompanying protocol containing an official account of the inspection of the Moscow Laboratory by the Russian Investigative Committee on 21 July 2016 and the seizure of the ICR disks. On 5 September 2019, WADA was informed by representatives of the Russian Investigative Committee that the ICR disks had been received from the Moscow Laboratory and that they had been in use by the LIMS server and Server One.

644. Neither WADA nor RUSADA sought to rely on the ICR Disks in any substantive manner in relation to WADA's non-compliance case against RUSADA and therefore they do not need to be further addressed in this Award.

c. Forum Messages

645. WADA alleged that the evidence of fabrication, modification and deletion of Forum Messages in the LIMS database was the "smoking gun" in its non-compliance case against RUSADA.

646. The relevance of the Forum Messages was first brought to WADA's attention by the Russian forensic experts in a letter from Minister Kolobkov dated 26 August 2019. WADA's forensic experts conducted a comparative analysis of the Forum Messages contained in the 2019 LIMS to the 2015 LIMS copy and identified (i) that the content of three Forum Messages differed between the respective LIMS; (ii) that 10 Forum Messages in the 2019 LIMS were not present in the 2015 LIMS copy; and (iii) that 25 Forum Messages in the 2015 LIMS copy were not present in the 2019 LIMS.

647. WADA submitted that these Forum Messages were of utmost significance because they evidenced an intent to incriminate Dr Rodchenkov, Dr Sobolevsky and Mr Migachev as conspirators in a scheme to extort money from athletes under threat that they would manipulate the athletes' sample analysis results, while hiding incriminating evidence revealing the involvement of Mr Kudryavtsev in manipulation activities at the Moscow Laboratory including sample swapping, analysis of "pre-departure" samples and falsification of chain-of-custody records. Mr Kudryavstev had been relied on in CAS proceedings as a key witness against Dr Rodchenkov and his claims of State-sanctioned subversion of the doping control process in Russia.

648. Examples of differences between the Forum Messages in the 2015 LIMS copy and those in the 2019 LIMS, as alleged by WADA, are set out here:

a. one example of an alleged modifications of a Forum Message was as follows:

	2015 LIMS copy	**2019 LIMS**
Date	2 July 2013	2 July 2013
Time sent	10.55 hours	11.05 hours
Time read	10.55 hours	15.38 hours

Sender	Mr Kudryavtsev	Dr Sobolevsky
Recipient	Dr Sobolevsky	Dr Rodchenkov
Content (translated)	*Tim, we will soon be giving it*	*Kudryavtsev is not releasing his aliquots, he is asking for a request! I propose we enlighten Kudryavtsev about our scheme involving the samples. We need to tell him straight and clearly, that we are creating the appearance of dirty samples, and the athletes and their trainers are bringing us bonuses. Otherwise he will suspect something dodgy is going on and will be unlikely to release any repeats without requests. This work has to be done very precisely. Alternatively, order him to stop fucking around and start handing over those aliquots. I prefer option number two :)*

b. one example of an alleged insertion of Forum Messages (i.e. not present in the 2015 LIMS copy but present in the 2019 LIMS) was a purported exchange between Dr Sobolevsky and Dr Rodchenkov between 2 and 5 October 2014, as follows (translated):

	2019 LIMS
Sobolevsky	*Any news on Katina from heavy, 11712? She has got str, so much time has passed…*
Rodchenkov	*for the time being, we are definitely not putting anything out there on Adams. Wait a little. They should be bringing it. Syrtsov is everything to us! … a renovated apartment and summer hous...*
Sobolevsky	*met about Katina, I took it all. I'll pop by yours when you get back.*
Rodchenkov	*Timofey, I cannot get through to you by phone. Three samples will be brought in today t/a [m/a]. Take them and check them as quickly as possible. There should also be an envelope. Don't go blabbing.*
Sobolevsky	*Well, it is a total fucking mess there. Oral turinabol, OXA, tren. At your discretion.*
Rodchenkov	*what fuckwits they are!*

a. one example of an alleged deletion of Forum Messages (i.e. present in the 2015 LIMS copy but not present in the 2019 LIMS) was an exchange between Mr Migachev, Mr Kudryavstev, Anastasia Zharihina and Dr Soblevsky between 2 and 5 October 2014, as follows (translated):

Sender/Recipient	**2015 LIMS copy**
Migachev/ Kudryavstev	*Evgeny, please find the following pairs of samples: 13808 and 13807; 14809 and 14810*

Kudryavstev/ Zharihina	*Nast, please find the following pairs of samples: 13808 and 13807; 14809 and 14810 A and B*
Kudryavstev/ Zharihina	*Nast, PK is ready for analysis, tell Masha to write the time of receipt in [CoC] as 29.11.13 + 1 min after the handover. GR is in the refrigerator, in the [CoC] I wrote that I aliquoted it, please pour it out yourself and in our refrigerator, there are about 15 pre-departure samples, pour them out please for all the procedures. Good luck!*
Migachev/ Kudryavstev	*Evgeny, what is up with the other pairs of samples? Have they been found?*
Kudryavstev/ Migachev	*yes, we have them, we found them*
Migachev/ Soblevsky	*13808 and 13807; 14809 and 14810*

649. Although the reports prepared by WADA's forensic experts placed an emphasis on the discrepancies between the Forum Messages in the 2015 LIMS copy and the 2019 LIMS, it also submitted that the three altered Forum Messages (message IDs 217, 309 and 311) could be independently substantiated in the following ways:

a. A technical inconsistency was observed by WADA's forensic experts by which the Forum Message IDs for the three alleged altered Forum Messages in the 2019 LIMS were not in sequential order when sorted chronologically (when no such discontinuity was identified in other Forum Messages in the 2019 LIMS or in the 2015 LIMS copy). This was depicted by WADA's forensic experts in the below table (Forum Messages 309 and 311 in yellow were the allegedly altered Forum Messages) (Exhibit CF-8 p.14).

DT	from	from_usename	to	to_username	subject	message	read	id_v2015	id_v2019
01.07.13 15:58:54	46	svetlana.garankina	2	oleg.migachev		пакет 184 заказчик CMAS (Confederation Mondiale des Acti	02.07.13 10:50:48	305	305
01.07.13 18:16:27	6	evgeny.kudryavtsev	2	oleg.migachev		1060 не срочные!!! Убери галочку плиз	02.07.13 10:50:48	306	306
02.07.13 10:29:27	1	tim.sobolevsky	6	evgeny.kudryavtsev		пакет 1059 штангу надо дать в работу сегодня обязательн	02.07.13 10:52:26	307	307
02.07.13 10:52:54	2	oleg.migachev	6	evgeny.kudryavtsev		объём считаем равным весу вес считаем как округленный	02.07.13 10:53:40	308	308
02.07.13 10:55:09	6	evgeny.kudryavtsev	1	tim.sobolevsky		Тим, скоро дадим	02.07.13 10:55:37	309	
02.07.13 10:55:41	6	evgeny.kudryavtsev	1	tim.sobolevsky		Тим! седня будет что-нибудь проколото из повторов? оче	02.07.13 10:55:49	310	310
02.07.13 10:59:06	1	tim.sobolevsky	6	evgeny.kudryavtsev		Женя, я уточню это..	02.07.13 15:40:36	311	
02.07.13 11:05:13	1	tim.sobolevsky	20	grigory.rodchenkov		Кудрявцев не выдает аликвоты, просит запрос! Предлага	02.07.13 15:38:12		309
02.07.13 12:54:01	2	oleg.migachev	6	evgeny.kudryavtsev		Упробы = Wфлакона - 200 где Wфлакона - весь не вскрыт	02.07.13 15:40:36	312	312
02.07.13 15:36:06	20	grigory.rodchenkov	1	tim.sobolevsky		Тим, успокойся. Я с ним поговорю позже. Все хорошо	02.07.13 15:40:36		311
03.07.13 16:37:33	46	svetlana.garankina	2	oleg.migachev		Исправьте, пожалуйста: пакет 718 принял Шкорупелов Ал	03.07.13 16:54:49	313	313
04.07.13 10:23:10	2	oleg.migachev	6	evgeny.kudryavtsev		Женя, обрати внимание! Теперь ваша работа с аликвотам	05.07.13 11:12:11	314	
04.07.13 12:16:04	2	oleg.migachev	39	denis.kulyako		исправил, должна выдача повторов работать	04.07.13 12:28:06	315	315

b. The "*log_do*" tables in respect of the three alleged altered Forum Messages, which had been recovered by WADA's forensic experts from a deleted state on the forensically preserved LIMS system, differed to the 2019 LIMS (but were consistent with the 2015 LIMS copy). Further, the "*log_do*" tables relating to Forum Messages for the 2019 LIMS were deleted. This was depicted by WADA's forensic experts in the below tables (the data from the carved "*log_do*" tables is in the far right column) (Exhibit CF-20 pp.7-9).

1st Altered Message	LIMS 2015	Record generated from LIMS 2015 (table "log_do")	Carved MYD file	LIMS 2019	Record generated from Carved MYD file (table "log_do")
Source	Whistleblower SQL backup		Moscow Data		
Message ID (id)	217	N/A[2] (id_do: 207081)	217	217	N/A
Timestamp (DT)	2013-06-07 14:35:45	2013-06-07 14:35:45	2013-06-07 14:35:45	2013-06-07 14:35:45	N/A
From	6 (evgeny.kudryavtsev)	6 (evgeny.kudryavtsev)	20 (grigory.rodchenkov)	20 (grigory.rodchenkov)	N/A
To	1 (tim.sobolevsky)	1 (tim.sobolevsky)	1 (tim.sobolevsky)	1 (tim.sobolevsky)	1 (tim.sobolevsky)
Message	OK	OK	spoke with NO [HO]: we are definitely not going to put 2780034, 2780424 and 2780489 out there!!!!! They are far from being just some homeless people... Treat all the files using the scheme, and you can take your Bonus home	spoke with NO [HO]: we are definitely not going to put 2780034, 2780424 and 2780489 out there!!!!! They are far from being just some homeless people... Treat all the files using the scheme, and you can take your Bonus home	OK
Timestamps (read)	2013-06-07 15:13:12	N/A	2013-06-07 15:13:12	2013-06-07 15:13:12	N/A

2nd Altered Message	LIMS 2015	Record generated from LIMS 2015 (table "log_do")	Carved MYD file	LIMS 2019	Record generated from Carved MYD file (table "log_do")
Source	Whistleblower SQL backup		Moscow Data		
Message ID (id)	309	N/A (id_do: 246765)	309	309	N/A
Timestamp (DT)	2013-07-02 10:55:09	2013-07-02 10:55:09	2013-07-02 11:05:13	2013-07-02 11:05:13	N/A
From	6 (evgeny.kudryavtsev)	6 (evgeny.kudryavtsev)	1 (tim.sobolevsky)	1 (tim.sobolevsky)	N/A
To	1 (tim.sobolevsky)	1 (tim.sobolevsky)	20 (grigory.rodchenkov)	20 (grigory.rodchenkov)	1 (tim.sobolevsky)
Message	Tim, we will soon be giving it	Tim, we will soon be giving it	Kudryavtsev is not releasing his aliquots, he is asking for a request! I propose we enlighten Kudryavtsev about our scheme involving the samples. We need to tell him straight and clearly, that we are creating the appearance of dirty samples, and the athletes and their trainers are bringing us bonuses. Otherwise he will suspect something dodgy is going on and will be unlikely to release any repeats without requests. This work has to be done very precisely. Alternatively, order him to stop fucking around and start handing over those aliquots. I prefer option number two :)	Kudryavtsev is not releasing his aliquots, he is asking for a request! I propose we enlighten Kudryavtsev about our scheme involving the samples. We need to tell him straight and clearly, that we are creating the appearance of dirty samples, and the athletes and their trainers are bringing us bonuses. Otherwise he will suspect something dodgy is going on and will be unlikely to release any repeats without requests. This work has to be done very precisely. Alternatively, order him to stop fucking around and start handing over those aliquots. I prefer option number two :)	Tim, we will soon be giving it
Timestamps (read)	2013-07-02 10:55:37	N/A	2013-07-02 15:38:12	2013-07-02 15:38:12	N/A

3rd Altered Message	LIMS 2015	Record generated from LIMS 2015 (table "log_do")	Carved MYD file	LIMS 2019	Record generated from Carved MYD file (table "log_do")
Source	Whistleblower SQL backup		Moscow Data		
Message ID (id)	311	N/A (id_do: 246793)	311	311	N/A
Timestamp (DT)	2013-07-02 10:59:06	2013-07-02 10:59:06	2013-07-02 15:36:06	2013-07-02 15:36:06	N/A
From	1 (tim.sobolevsky)	1 (tim.sobolevsky)	20 (grigory.rodchenkov)	20 (grigory.rodchenkov)	N/A
To	6 (evgeny.kudryavtsev)	6 (evgeny.kudryavtsev)	1 (tim.sobolevsky)	1 (tim.sobolevsky)	6 (evgeny.kudryavtsev)
Message	Zhenya [Женя=Evgeny], I will clarify that.	Zhenya [Женя=Evgeny], I will clarify that.	Tim, calm down. I will have a talk with him later. It is all OK.	Tim, calm down. I will have a talk with him later. It is all OK.	Zhenya [Женя=Evgeny], I will clarify that.
Timestamps (read)	2013-07-02 10:55:37	N/A	2013-07-02 15:40:36	2013-07-02 15:40:36	N/A

c. A technical inconsistency was observed by WADA's forensic experts by which, where the content of alleged altered Forum Messages was lengthier than the equivalent Forum Messages evidenced in the "*log_do*" tables in the carved files (and also the 2015 LIMS copy) such that it could not fit within the existing space in the relevant table of the carved file, the longer message was fragmented into two different locations in the 2019 LIMS. This was the only time that such fragmentation was observed. An example of such fragmentation in respect of message 309 was provided by WADA's forensic experts as below (Exhibit CF-18 p.14).

LIMS version	Offset	Record_state	id	DT	from	to	subject	message	read
LIMS 2015	0x0000b114	Existing	309	2013-07-02 10:55:09	6	1		Тим, скоро дадим	2013-07-02 10:55:37
Carved LIMS	0x0000b114	Fragment-309-1	309	2013-07-02 11:05:13	1	20		Кудрявцев не в◆	
Carved LIMS	0x001269ac	Fragment-309-2	309	2013-07-02 11:05:13	1	20		Кудрявцев не выдает аликвоты, просит запрос! Предлага...	2013-07-02 15:38:12
LIMS 2019	0x0000b114	Fragment-309-1	309	2013-07-02 11:05:13	1	20		Кудрявцев не в◆	
LIMS 2019	0x001269ac	Fragment-309-2	309	2013-07-02 11:05:13	1	20		Кудрявцев не выдает аликвоты, просит запрос! Предлага...	2013-07-02 15:38:12

d. WADA's forensic experts were able to identify, by reference to the existing 'messages' MYD file of the 2019 LIMS and associated modification timestamps, the sequence in which data was written/deleted in the table. The experts concluded that the Forum Messages in question were altered between 25 November 2018 and 10 January 2019 (Exhibit CF-8 pp.19-20).

650. RUSADA did not directly challenge these submissions. Rather, in response, RUSADA submitted (i) that WADA's allegations of falsification were based solely on comparisons to the 2015 LIMS copy; and (ii) the allegations were groundless because in all the "*forum_t"* tables in the existing and carved LIMS databases, the list and content of messages were identical. The "*forum_t"* table was the table in which Forum Messages were stored. However, during the cross-examination of RUSADA witness Mr Kovalev, he accepted that the consistency was only between the existing-state materials in the carved LIMS and the 2019 LIMS, and not the deleted-state materials in

the carved LIMS. It was the latter which were relied upon by WADA's forensic experts in demonstrating differences to the 2019 LIMS.

651. The Panel therefore accepts the conclusions reached by WADA's forensic experts and is satisfied that modifications of the Forum Messages are established without any reference to the 2015 LIMS copy.

652. Nonetheless, the Panel is also satisfied that, in those circumstances, it can have regard to the 2015 LIMS copy in assessing whether the balance of allegations regarding the Forum Messages (i.e. the allegations of 10 fabrications and 25 deletions) are established.

653. During the course of the hearing, WADA's counsel cross-examined the expert retained by RUSADA, Mr Wang, regarding how the Forum Messages in the 2015 LIMS copy could possibly be present in the carved files recovered from the 2019 LIMS, other than because the former was authentic. The exchange was as follows:

> *MR WENZEL:* *Mr Wang, just answer my questions. My question to you is I am asking to you hypothesise as to any even theoretical explanation as to how an earlier in time database could end up in the deleted space in a later in time database if it didn't actually exist?*
>
> *MR WANG:* *What if actually the whistleblower had access to it and did it on purpose.*
>
> *MR WENZEL:* *In 2019 that is not anyone's case, Mr Wang.*
>
> *MR WANG:* *Why not?*
>
> *MR WENZEL:* *Even RUSADA accept that is not possible.*
>
> *MR WANG:* *Have you excluded it?*
>
> *MR WENZEL:* *Is that the only one you can come up with?*
>
> *MR WANG:* *No, I am just asking you.*
>
> *CHAIRMAN:* *Mr Wang, I think you can exclude it. There is no evidence or suggestion anywhere in the case of that. I think what Mr Wenzel is getting to is, is there any other explanation?*
>
> *MR WENZEL:* *Even theoretical. I am asking you to be creative and come up with one plausible explanation as to how, if it didn't really exist, how that could have got into the later in time database in the deleted space.*
>
> *MR WANG:* *I don't have any explanation.*

654. A similar proposition was put by the Panel to another of RUSADA's witnesses, Mr Kovalev as follows:

CHAIRMAN: *If the forum messages in their deleted state do not match the versions in their existing state or in the 2019 LIMS how could there be a difference between these if the manipulations were made in 2015 or 2016?*

MR KOVALEV: *Well, we can say that that is a possibility. But the thing is that we need facts and we haven't found any convincing facts that this was the case. Of course we can say that messages were deleted at some point and could be deleted at some point but we explained it in detail in our reports.*

655. RUSADA did not ever suggest that any unauthorised person had access to the Moscow Laboratory in the period of November 2018 to January 2019. The last record of any remote access to the Moscow Laboratory systems was on 9 June 2016. The Russian Investigative Committee entered and secured the Moscow Laboratory on 21 June 2016. On 20 September 2018, RUSADA and the Russian Ministry of Sport were informed of the Post-Reinstatement Data Requirement.

656. Mr Wang and Mr Kovalev's inability to provide any satisfactory explanation for how the Forum Messages in the 2015 LIMS copy could be present in the carved files recovered from the 2019 LIMS other than because they existed in the LIMS system was, in the Panel's view, compelling evidence that all differences identified between Forum Messages in the 2015 LIMS copy and those in the 2019 LIMS were a result of intentional fabrications, modifications and deletions that occurred between November 2018 and January 2019.

d. The New Data

657. In October 2019, WADA was advised that Russian forensic experts had identified additional data sources relevant to the Post-Reinstatement Data Requirement. On 23 October 2019, WADA received a hard drive from a representative of Minister Kolobkov containing a purported virtual test server, a purported copy of Mr Mochalov's computer and a purported copy of seven optical disk images. This was referred to in the evidence as the "New Data".

658. WADA's forensic experts provided detailed reports explaining how the New Data revealed observable digital evidence that it had been intentionally altered as late as October 2019, in the days immediately preceding its production to WADA. For example, the New Data included LIMS database backups which were purported to have been found on Mr Mochalov's personal computer and a virtual server he claimed to have been using in December 2018 and January 2019. However, the observable digital evidence revealed that those backups had been fabricated and they included the fabricated and modified Forum Messages. The hard drive on Mr Mochalov's computer also showed digital traces that it had been wiped and a new operating system had been installed on 16 September 2018. Accordingly, WADA placed essentially no forensic value in the New Data and did not rely on it in its non-compliance case.

659. RUSADA did not provide any substantive response to the above conclusions of WADA's forensic experts and did not rely on the New Data in defending WADA's non-compliance case. Accordingly, it is not further addressed in this Award.

3. Conclusions to be drawn from manipulation of the Moscow Data

a. Forum Messages

660. Having regard to the nature of the differences between the Forum Messages in the 2015 LIMS copy and the 2019 LIMS, it was clear that the manipulation of the Forum Messages was carried out in order to create the false impression that previous laboratory staff were manipulating LIMS data to falsely implicate athletes in doping, in order to extort money from them. It also sought to remove incriminating messages sent by other laboratory staff. This conduct, which went well beyond mere deletion of incriminating doping samples or data, was breathtaking in its audacity.

b. Moscow Data

661. RUSADA strongly denied that identified activities that occurred with respect to the Moscow Data in December 2017 and January 2018 were the result of any improper conduct or that they resulted in any changes, loss or deletion of data pertaining to results of doping sample analysis in the relevant period (1 January 2012 to 31 August 2015).

662. With respect to whether or not the activities were improper, RUSADA's case relied on the evidence of Mr Mochalov, Mr Kovalev and (to a lesser extent) Mr Silaev. As mentioned above, Mr Mochalov was not made available for cross-examination. Accordingly, the Panel places very little weight on his evidence. In Messrs Kovalev and Silaev's expert report, they stated, "*The System Administrator provided clarifications regarding the events which occurred with the LIMS database in the period from December 2018 to January 2019.*" Therefore, their evidence in relation to why the identified activities were normal system activities was no more than a repetition of matters of which they had purportedly been advised by Mr Mochalov and was not evidence from their own personal knowledge or observations.

663. Mr Mochalov's evidence (and therefore Messrs Kovalev and Silaev's evidence) included, *inter alia*:

a. He had been instructed by a previous System Administrator that, in the event of signs of instability of the LIMS system, he was to backdate the server to a random date in 2015.

b. On 17 December 2018, he detected signs of LIMS malfunctioning, so he backdated the system to 2015. As that did not restore the LIMS functioning, he restored the LIMS from a backup. He then deleted all log entries corresponding to the backdating "*in order to eliminate confusion between [his] actions and system errors*".

c. On 22 December 2018, he was transferring the 2019 LIMS database from a virtual server to the LIMS server. When doing so, he erroneously overwrote the 2016 database and therefore had to restore it from an official backup. On 8 January 2019, he recovered a database from an official backup copy of 21 December 2018. At the same time, he noticed that there was system malfunctioning which he believed was related to incorrect time stamps and he tried to correct this by changing the system time.

d. He deleted LIMS databases for the period 2009-2011 because that data was absent from the LIMS officially operating in the Moscow Laboratory and he could not be certain of the validity of the data.

e. In January 2019, as part of routine maintenance, he deleted unnecessary files from the system.

f. After executing a large number of non-typical commands, he would usually remove all commands that he did not need in his daily activities from the command history "*in order to improve operational comfort and to avoid their accidental rerun.*"

664. The Panel does not accept Mr Mochalov's evidence on the above matters.

665. Similarly, the Panel did not consider Mr Kovalev to be a credible witness. In his statement, he stated that he had been engaged by the Russian Investigative Committee since February 2018 (almost a year before the Moscow Data was retrieved by WADA) as a technical advisor in connection with criminal proceedings against Dr Rodchenkov. In the course of his oral evidence, the Panel considered his answers to questions to be evasive in the sense that his answers (which were often long and discursive) often would not actually respond to the questions put to him. When counsel for WADA put to Mr Kovalev that he was involved in the manipulation of the Moscow Data, Mr Kovalev laughed.

666. As WADA submitted, Mr Mochalov's explanations for the identified activities that occurred with respect to the Moscow Data in December 2017 and January 2018 must be considered in their context. The WADA retrieval missions took place after significant correspondence regarding the terms and conditions of the retrieval mission. That correspondence specifically addressed the importance of preserving the integrity of the evidence. It is entirely implausible in those circumstances that, if such significant activities were undertaken in respect of the Moscow Data, they would not be recorded and disclosed to WADA at the first available opportunity. In the Panel's view, this is of itself sufficient to reject Mr Mochalov's explanations for the activities.

667. WADA's forensic experts also identified objective factors which placed doubt on the veracity of Mr Mochalov's evidence. For example, with respect to the purported routine deletions of data on 6 January 2019, WADA's forensic experts established no evidence of any similar deletions at the beginning of previous years and 79% of the deleted files had a creation timestamp between 2008 and 2017 (Exhibit CF-5 p.32).

668. Although not addressed in Mr Mochalov's 3 August 2020 statement, WADA's forensic experts also considered an assertion by Russian forensic experts (in their response dated 27 August 2019 to technical questions posed by WADA) that the deletion of 450 LIMS database backups on 17 December 2018 was conducted by Mr Mochalov "*in order to free some space on the hard drive needed for the LIMS operation*" (Exhibit CF-5 Attachment E, p.12). However, WADA's forensic experts established that the relevant disk had approximately 93% of 'free space' available, and therefore the files did not need to be moved as enough free space already existed on the disk (Exhibit CF-5 p.28).

669. Additionally, the Kaspersky Report filed by RUSADA (at Annex 1 to the statement of Messrs Kovalev and Silaev) expressly stated (at page 29), "*There are no indications of*

instability in operation of the LIMS server databases from December 2018 to January 2019 according to the time of the system".

670. Further, the Panel's findings regarding the deliberate and fraudulent manipulation of Forum Messages also informs its evaluation of the alterations to the Moscow Data. The audacity of the manipulation of Forum Messages, the implausibility of Mr Mochalov's explanations for his purported activities, the little weight given to his evidence in light of the fact that he was not made available for cross-examination and the extent of the activities and deletions of the Moscow Data in December 2018 and January 2019 all leave the Panel convinced, both on the balance of probabilities and to the higher standard of strict/full proof, that the manipulation of the Moscow Data was carried out for the purpose of mitigating or avoiding consequences of the doping schemes identified by the WADA Independent Commission and the McLaren Reports.

671. With respect to RUSADA's submission that none of the activities resulted in any changes, loss or deletion of data pertaining to results of doping sample analysis in the relevant period, given the question of non-compliance was directed to the authenticity of the Moscow Data and not the effect of its lack of authenticity, this issue is not strictly necessary to address.

672. Nonetheless, despite RUSADA's submissions, neither RUSADA nor its experts provided any evidence which effectively challenged the conclusions of WADA's experts that comparisons between recovered LIMS database backups from 6 and 9 January 2019 showed manipulation of:

a. the Testosterone to Epitestosterone ratio of a 2013 sample of an IAAF (International Association of Athletics Federations) Russian athlete, where the ratio was reduced to a lower and therefore non-suspicious level;

b. the record of a presumptive adverse analytical finding for furosemide and a successful confirmation procedure in respect of a 2012 sample of an ISU (International Skating Union) Russian athlete which was amended such that those records had been deleted; and

c. the Testosterone to Epitestosterone ratio of a 2013 sample of a WCF (World Curling Federation) Russian athlete which had been recorded as confirmed but that confirmation entry had been deleted.

673. Accordingly, the Panel does not accept RUSADA's submission that there were no changes, losses or deletions of data pertaining to results of doping sample analysis.

4. Conclusion

674. For the reasons given above, the Panel finds that RUSADA failed to procure an authentic copy of the Moscow Data and therefore failed to comply with the Post-Reinstatement Data Requirement. The steps taken to manipulate the Moscow Data and deceive WADA could hardly be more serious.

675. Accordingly, the Panel finds that WADA has established that RUSADA is non-compliant with the 2018 WADC.

D. Signatory Consequences and Reinstatement Conditions

676. Having determined that RUSADA is non-compliant with the 2018 WADC, the Panel is therefore required to consider what (if any) Signatory Consequences and/or Reinstatement Conditions should be imposed.

1. Consequences or Sanctions

677. The submissions of the Parties and relevant Intervening Parties regarding whether the Signatory Consequences are appropriately characterised as "consequences" or 'sanctions' have been summarised above. The essence of the WADA submission, based on consistent CAS law, is that the three characteristic elements of a disciplinary sanction are (i) adverse consequences; (ii) that are designed to punish; (iii) misconduct by the addressee of the sanction. WADA submitted in closing that, despite the weight of talent in many of the best-known sports counsel in the world acting for the various parties in this procedure, none had been able to point to a single clear precedent to counter the wealth of authority put forward by WADA in support of its position. It noted that RUSADA's counsel admitted in closing submissions that it did not actually matter whether the Signatory Consequences are called sanctions or eligibility rules (stating that, in either case, there are fundamental protections that will apply).

678. In CAS 2011/O/2422 *USOC v. IOC*, the CAS Panel held as follows:

> *In contrast to qualifying rules are the rules that bar an athlete from participating and taking part in a competition due to prior undesirable behaviour on the part of the athlete. Such a rule, whose objective is to sanction the athlete's prior behaviour by barring participation in the event because of that behaviour, imposes a sanction …*

679. In CAS 2007/O/1381 *RFEC & Valverde v. UCI*, the Sole Arbitrator described the essence of a disciplinary sanction in the following terms (translated):

> *On the other hand, sport associations can adopt rules that prohibit participation in a competition due to the prior undesirable behaviour of the athlete. These are not eligibility rules in the strict sense but rather rules which have the common characteristic that they sanction conduct of an athlete that occurred prior to his/her participation in the event. In other words, in order to have the right to participate, the athlete must not have engaged in one or other forms of behaviour that are prohibited by the association and the fact of having engaged in that behaviour is a ground for exclusion*

680. The recent case of CAS 2017/A/5498 *Vitaly Mutko v. IOC* confirms the consistent CAS case law with respect to the characteristic elements of a sanction:

> *According to CAS jurisprudence, a rule that bars an individual from participating in an event due to prior undesirable behaviour qualifies as a sanction: "qualifying or eligibility rules are those that serve to facilitate the organization of an event and to ensure that the athlete meets the performance ability requirement for the type of competition in question … a common point in qualifying (eligibility) rules is that they do not sanction undesirable behaviour*

> *by athletes. Qualifying rules define certain attributes required of athletes desiring to be eligible to compete and certain formalities that must be met in order to compete … In contrast to qualifying rules are the rules that bar an athlete from participating and taking part in a competition due to prior undesirable behaviour on the part of the athlete. Such a rule, whose objective is to sanction the athlete's prior behaviour by barring participation in the event because of that behaviour, imposes a sanction. A ban on taking part in a competition can be one of the possible disciplinary measures sanctioning the breach of a rule of behaviour" (emphasis added, see CAS 2011/O/2422, at paras. 33-34; see also CAS OG 02/001).*

681. In that case, measures against Mr Mutko were found to be a sanction precisely because they were imposed in view of Mr Mutko's "functional responsibility" for the Russian doping scheme. The Panel therefore found that the IOC "*did impose an individual exclusion on the Appellant based on his alleged prior behaviour. As such, it is more properly characterized as a sanction than an invitational or entry declaration*."

682. A number of cases have stressed that measures excluding a club from competition in connection with match fixing activities are not sanctions, notwithstanding significant adverse effects, because the aim of the regulations is not to sanction the club but rather to protect the integrity of the sporting competition. See CAS 2014/A/3635 *Sivasspor Kulübü v. UEFA;* CAS 2016/A/4642 *Phnom Penh Crown Football Club v. AFC*.

683. WADA does not dispute that the Signatory Consequences sought entail adverse effects for certain people, but says that in all cases those people are not accused of any specific misconduct and the aim of the measure is not to punish them. The objective of the consequences is not to punish the athletes, the government officials or (with the exception of the fine), RUSADA.

684. The Panel accepts the reasoning of Prof. Haas that, for a measure to qualify as a sanction or disciplinary in nature, the prevailing view requires that the adverse effects be inflicted in response to an alleged violation of the rules or some form of misconduct. Therefore, even where Signatory Consequences can be said to have an adverse effect on third parties (such as athletes), they are not disciplinary measures or sanctions against those athletes because they are not a response to an alleged breach of rules by the athletes.

685. Prof. Haas notes that Prof. Müller has not submitted that there was any unfair, disproportionate or unequal treatment towards Russian officials in the CRC recommendations. He points (at [91]) to several examples of justifiable discrimination based on nationality, particularly in relation to European football clubs. The purpose of such measures was to bring about behavioural change among football supporters. He argued that, just as the exclusion of English clubs from European competition served the purpose, measures against Russian athletes and officials were justified in order to bring about behavioural and systemic change in relation to the fight against doping in Russia.

686. Prof. Haas suggested (at [92]-[104] of his report), as an alternative, that the CRC Recommendations would be described as sporting boycotts instead of eligibility rules. These are legitimate, frequently encountered measures in sport, and do not constitute disciplinary measures or sanctions. The ROC submits that this is contradicted by the

decision in CAS 2012/A/3055 *Riis Cycling v. the Licence Commission of the UCI*, where it was held that "*the effect of the Neutralisation Rule is similar to a boycott, that it is clearly a sanctioning device*."

687. WADA points to CAS jurisprudence around the 2016 Rio Olympic Games where the IOC Executive Board stipulated that athletes would only be eligible for entry to the Games if their International Federation considered that they were not implicated by the findings of the McLaren Report. A number of CAS panels held that the ineligibility of athletes based on the implementation of this order was not a disciplinary sanction. See CAS OG 16/019 *Podolskaya & Dyachenko v. ICF*. Similarly, the *ad hoc* Panel at the 2018 PyeongChang Olympic Games held that an exclusion of athletes based on being mentioned in incriminating circumstances in the database could not be described as a sanction, but rather it is more properly characterised as an eligibility decision. See CAS OG 18/02 *Legkov et al. v. IOC;* CAS OG 18/03 *Ahn et al. v. IOC*. See also CAS 2016/O/4684 *ROC, Adams et al. IAAF*; CAS 2016/A/4745 *RPC v. IPC*.

688. The EOC submits that those cases can be distinguished because athletes were banned from the Olympic Games as a result of suspensions or exclusions from a Federation which were not disputed or challenged. In summary, the EOC submitted that the consequences were sanctions, or at least the effect of the consequences contain all the elements to be considered as a sanction, and that eligibility rules are in the exclusive power of the IOC or the International Federations.

689. In summary, WADA submits that it has entered into contracts with International Federations, Major Event Organisers and NADO Signatories which stipulate that, in the event of non-compliance, athletes from the country of that NADO will in principle be prevented from participating at certain international events. The athletes are not accused of any misconduct and are not the addressees of any disciplinary measures; however, they are reflexively affected in their capacity as nationals of the country where the relevant body is bound by the ISCCS and compliance-related decisions. In its Reply to the Intervening Parties' submissions it submitted (at [77]):

> *Once it is accepted that the 'standard' Athlete Non-Participation Consequence is not capable of amounting to a sanction (because there is no prior misconduct and no will to punish), a voluntary (partial) exception to the exclusion – introduced precisely so that the consequences do "not go further than is necessary to achieve the objectives underlying the Code" – cannot sensibly itself be a sanction or have the effect of turning the Measures affecting Athletes into a sanction. That would be to impermissibly conflate and confuse the two. In any event, the aim of the Measures affecting Athletes is not to punish the athletes but rather to pursue the wider aims set out in the ISCCS, the CRC Recommendation, and the WADA Reply to RUSADA.*

690. The 33 Athletes Group relied upon further cases in support of the argument that the proposed measures were sanctions because the determination of whether a measure is a sanction or a mere eligibility rule must be decided based on the impact of the measure, and not merely on its description or denomination. These included CAS 2012/A/3055 *Riis Cycling A/S v. the Licence Commission of the UCI*; CAS 2011/O/2422 *USOC v.*

IOC; CAS 2011/A/2658 *BOA v. WADA*; TAS 2007/O/1381 *RFEC & Alejandro Valverde c/ UCI*; and CAS 2008/C/1619 *IAAF Advisory Opinion*.

691. With respect to CAS 2012/A/3055 *Riis Cycling A/S v. the Licence Commission of the UCI*, WADA noted that the measure in question was the so-called "Neutralisation Rule" which stipulated that the results of a rider who had been sanctioned for an anti-doping violation with at least a two-year period of ineligibility would not be considered for two years after the suspension ended. WADA noted that the Panel concluded that the rule was a disciplinary sanction as it was based on prior behaviour.

692. With respect to CAS 2008/C/1619 *IAAF Advisory Opinion*, WADA points out this concerned a rule that prevented athletes from participating in a competition after the end of the period of ineligibility for a doping offence, and the Arbitrator considered that the ineligibility was linked to a sanction for an anti-doping rule violation, thus giving the provision the character of a penalty rule instead of an entry rule.

693. The 10 Athletes Group submits that WADA may only impose sanctions against Signatories, and further submits that the measures sought are sanctions, given the unambiguous and quasi-criminal terminology used by WADA. It relies on two joint reports prepared by Prof. Bovet and Dr Kellezi, who characterised the measures sought by WADA as sanctions within the meaning of the decision of the European Court of Justice in *David Meca-Medina and Igor Majcen v Commission of the European Communities* Case C-519/04 P; [2006] ECR I-6991.

694. The 10 Athletes Group submits that the neutral participation criteria in themselves constitute a sanction in that they would effectively prevent athletes from participating in competitions or prohibit them from doing so under their national flag. The submission acknowledges that it is only if the consequences are classified as sanctions that one then turns to questions of whether they comply with principles of legality, predictability, protection of the personality rights and principle of proportionality, as well as the athlete's right to be heard.

695. The ROC notes, as have other parties, that Article 12.1 of the 2018 WADC uses the term "sanctions" that may be imposed on a Signatory for non-compliance. Further, the comment to Articles 11.2.4 and 11.2.5 of the ISCCS points to the need to provide:

> *… a meaningful sanction that will provoke behavioural change within the Signatory's sphere of influence, and to maintain public confidence in the integrity of International Events, it may be necessary (and therefore legitimate and proportionate) to go so far as to exclude the Signatory's affiliated Athletes and Athlete Support Personnel and/or its Representatives from participation in international events/*

696. The ROC refers to a number of public statements by WADA and IOC officials which use the term "sanctions". RUSADA and the 33 Athletes Group make similar submissions.

697. The ROC submission also notes that Prof. Jakob, Prof. Tuytschaever and Prof. Meyer (all retained by WADA) used the word "sanction" in their reports. It refers to three cases in which it is said that measures qualified as sanctions even without misconduct

of the addressee. See CAS 2008/A/1545 *Anderson et al. v. IOC*; CAS 2015/A/4319 *BWF v. IWF*; CAS 2015/A/3875 *FAS v. UEFA*. However, WADA noted in its closing that, in CAS 2015/A/4319 *BWF v. IWF* (which the Panel considers to be the most factually analogous to these proceedings), it was held that the Bulgarian Weightlifting Federation was being sanctioned for its inability to guarantee an adequate national anti-doping program (i.e. its own breach) and restrictions on athletes from entering competitions was not a sanction on athletes precisely because they were not the ones who engaged in wrongdoing.

698. ROC submits that the distinction between eligibility rules and sanctions is flawed because it is an artificial distinction and because eligibility rules relate to a decision by an organiser of an event as to the criteria for entry.

699. RUSADA relies upon Prof. Mettraux, who asserts that the argument by Prof. Haas is unconvincing because WADA does not have authority to issue eligibility rules, and that, as the proposed consequences would only apply to Russian nationals, they do not meet the requirements to be considered as eligibility rules. RUSADA asserts that the argument by WADA is nothing but a vain attempt to escape the consequences of its failure to observe international human rights law and minimum due process guarantees in the investigation leading up to the WADA Executive Committee decision of 9 December 2019. This is in the light of the opinion of Prof. Mettraux that WADA must abide by a number of fundamental safeguards including the presumption of innocence and the prohibition of collective punishment.

700. The 33 Athletes Group's submission in reply contains an appendix dealing with 11 cases cited by WADA in support of its proposition that the consequences are not sanctions. The submission attempts to distinguish the cases or indicate that they provide no support for the contention by WADA. Although the Panel agrees that some of those cases can be distinguished, it remains the case that no firm authority has been identified by any party against the proposition by WADA that the jurisprudence establishes that the three necessary elements of a sanction – (i) adverse consequences; (ii) that are designed to punish; (iii) misconduct by the addressee of the sanction – are not present in this case.

701. For the above reasons, the Panel find that the Signatory Consequences proposed by WADA under the ISCCS (other than the fine in respect of RUSADA) are not sanctions. In any event, as demonstrated in the Panel's analysis below, any adverse effects of the Signatory Consequences on third parties must be considered in light of proportionality.

2. General comments regarding Signatory Consequences

a. General

702. Although this case primarily concerns data manipulation and the non-compliance by RUSADA with the Post-Reinstatement Data Requirement, in accordance with the WADA submission, these must be considered in the context of an attempt to:

a. cover up evidence of the doping and anti-detection scheme described in early reports;

b. exculpate the Russian authorities implicated in that scheme;

c. inculpate the whistle-blowers who exposed it; and

d. undermine evidence that could be used to prosecute anti-doping cases covered up by the scheme.

703. The forensic and investigative reports show that the data manipulations and deletions affect thousands of athletes' samples, of which 298 cases have been specifically targeted by WADA for further investigation. As a result of the deletions of parts of the Moscow Data, it will never be possible to know the number of cheating athletes or officials who may have escaped detection.

704. Consideration of the proposed Signatory Consequences involves acknowledging, as set out in the CRC Recommendation, that RUSADA has consistently asserted that it was not in control of access to the Moscow Data, but instead depended on the Russian authorities (in particular, the Russian Ministry of Sport and the Russian Investigative Committee) to provide a complete and authentic copy of the Moscow Data to WADA.

705. The data manipulations in the Moscow Laboratory took place while the laboratory was supposedly a "crime scene" under the supervision of the Russian Investigative Committee, a police agency under the direct control of the President of the Russian Federation, tasked with preventing corruption in public office (see Exhibit CL-13: the Russian Investigative Committee is a federal state body. The Chairman of the Russian Investigative Committee is appointed and dismissed by the President of the Russian Federation).

706. The WADA Executive Committee clearly and deliberately placed the requirement on RUSADA and the Ministry of Sport to procure that an authentic copy of the Moscow Data was provided to WADA, and neither body objected to that requirement or said that it could not be fulfilled. The WADA submissions frequently resort to the generic term "the Russian authorities", which is an appropriate description given the evidence of involvement, at high levels, of the Russian government. The Russian government has expressly confirmed that it no longer disputed the doping manipulation scheme, including the sample swapping on the occasion of the 2014 Sochi Olympic Games. In a letter addressed to WADA dated 13 September 2018, the Russian Minister of Sport, Minister Kolobkov, "*fully accepted the decision of the IOC Executive Board of December 5, 2017 that was made based on the findings of the Schmid report*".

707. The decision of the WADA Executive Committee to impose the Post-Reinstatement Data Requirement was an opportunity for the Russian authorities to provide full and transparent disclosure of the Moscow Data so that those who were guilty of cheating could be prosecuted and punished, and those who were innocent could be exonerated. Rather than pursuing this aim, the evidence accepted by the Panel demonstrates the staggering extent of data alteration activities being conducted, apparently by or at the request of the Russian authorities, prior to and during the WADA retrieval visit. The Panel has also accepted that Forum Messages in the LIMS system were fabricated, modified and deleted in an attempt to blame and frame Dr Rodchenkov and Dr Solobevsky for the manipulations of the Russian doping scheme. These were accurately described as a stunning deception and the figurative "smoking gun" in the case. The Director General of RUSADA publicly admitted that it was "*proved that there were changes in the database of doping tests that were made in January 2019,*

December 2018" and acknowledged "*a desperate need for a strong force for positive change in Russia*" (Exhibits C-46 and C-45).

708. As WADA submitted, far from recognising the opportunity to come clean and draw a line under a scandal that has plagued, and drained resources from, international sport for years, the Russian authorities unfortunately saw it as an opportunity to fraudulently promote their fabricated defence strategy and mitigate or avoid the consequences of the doping scheme. Rather than providing access to the data in the spirit of transparency and data preservation reflected in the correspondence, the Russian authorities in late 2018 and January 2019 engaged in extensive manipulation of the Moscow Data. In crude terms, the non-compliance in this case is an attempt to cover up evidence of the doping and anti-detection scheme described in the McLaren Reports. When the cover-up of the doping scheme began to unravel, the solution adopted by the Russian authorities was not to come clean but rather to double down by seeking to cover up the cover-up.

709. The data manipulation is the culmination of a fraudulent scheme that sought to undermine the fundamental tenets of anti-doping regulation and of sporting values. The Panel agrees with the view expressed in the CRC Recommendation that the non-compliance in this case "could hardly be more serious". By manipulating and deleting the Moscow Data, the Russian authorities interfered with, and undermined, the anti-doping system in the most cynical and sophisticated manner. Rather than concede the fact of the manipulations in view of the damning forensic evidence, Russian experts assisting the Ministry of Sport offered explanations that were wholly inadequate, unconvincing and far-fetched and also sought to rely on the fabricated and manipulated Forum Messages and New Data. These matters were set out in a report prepared by these experts which was included at Annex 3 of the Statement of Messrs. Kovalev and Silaev dated 9 April 2020. The report did not include the names of the authors though it appears to the Panel that Messrs. Kovalev and Silaev were the authors or involved in the preparation of that report.

710. These manipulations show that the Russian authorities remain as willing as ever to interfere with, and corrupt, the anti-doping system. Having done so in the past (in a manner previously considered unthinkable), it is necessary to take robust action to attempt to deter any repetition.

711. The Panel accepts that it is necessary to impose serious consequences not only in the interest of the fight against doping in general, but also specifically in the long-term interest of RUSADA, the protection of Russian athletes, and clean Russian sport. To attempt to ensure that RUSADA can fulfil its role of fighting against doping in Russia, it is necessary to effect a fundamental change in attitude at the level of public authorities in Russia, who have demonstrated frequently that they are able and willing to interfere with the anti-doping infrastructure and processes and also in respect of those athletes who have been willing to engage in doping. It is necessary to impose meaningful consequences to attempt to ensure the confidence of clean athletes, stakeholders and the wider public in the ability of WADA to defend the integrity of sport against doping. Otherwise, the clear message will be that governments and public authorities can corrupt and manipulate anti-doping programs and that WADA is unable to do anything about it. The Panel accepts that WADA is motivated not by ill will against Russia or Russians,

but rather by the desire for an effective and independent Russian anti-doping program, to protect a new generation of Russian athletes and for clean Russian sport.

b. Applicable Principles

712. Article 23.5.6 of the 2018 WADC provides that the Panel will consider, by reference to the relevant provisions of the ISCCS, what consequences should be imposed and what conditions signatory should be required to satisfy in order to be reinstated.

713. The Signatory Consequences should reflect the nature and seriousness of the non-compliance, considering both the degree and fault of the Signatory and the potential impact of its non-compliance on clean sport. In terms of the degree of fault of the Signatory, the obligation to comply is absolute, and so any alleged lack of intent or other fault is not a mitigating factor, but any fault or negligence on the part of a Signatory may impact on the Signatory Consequences imposed (ISCCS Article 11.2.1).

714. Above all, the Signatory Consequences imposed should be sufficient to maintain the confidence of all Athletes and other stakeholders, and of the public at large, in the commitment of WADA and its partners from the public authorities and from the sport movement to do what is necessary to defend the integrity of sport against the scourge of doping. This is the most important and fundamental objective and overrides all others (ISCCS Article 11.2.5).

715. The Signatory Consequences should go no further than is necessary to achieve the objectives underlying the WADC (ISCCS Article 11.2.6).

716. The ISCCS states that, like the WADC, it has been drafted giving due consideration to the principles of respect for human rights, proportionality, and other applicable legal principles, and it shall be interpreted and applied in that light (ISCCS Article 4.4.2).

717. In considering relief, the Panel recognises the need to consider the respective structures of the various organisations that will be required to implement the measures ordered, and to make sure that such measures will neither unduly interfere with those structures nor impact essential and beneficial work that is done by or on behalf of those organisations. It also recognises the need to avoid, where possible, ancillary disputes which may cause delay and increase the time and costs incurred preparing for major events, including the Olympic Games and Paralympic Games, particularly in the light of disruption occasioned by the COVID-19 pandemic. Further, the Panel acknowledges that imposing severe consequences upon an entirely new generation of Russian athletes may go further than necessary to achieve the objectives of the WADC.

718. In short, RUSADA submitted that no consequences should be imposed. The issue as to clarification of any measures which may be imposed was taken up by the IOC and IPC. A table of requests for clarification was provided by IOC in initial submissions dated 30 April 2020, and was subject to comments by WADA in its reply dated 24 June 2020. The relief to be granted must, as submitted by IOC, strike a balance between the toughest consequences in light of the seriousness of the non-compliance, following any applicable rules of natural justice and respective human rights, and be sufficiently specific to be implemented without unnecessary risk of ancillary disputes.

c. Proportionality

719. The Panel bears firmly in mind at all times the paramount need to consider notions of proportionality in the imposition of Signatory Consequences.

720. The Panel does not accept WADA's submissions that (i) the Signatory Consequences are not required to meet any test of proportionality; or (ii) if proportionality is applicable, it is unnecessary to vary the Signatory Consequences on the Panel's own assessment of proportionality, because the WADC embodies the principle of proportionality.

721. Proportionality is a fundamental tenet of natural justice and cannot be excluded without clear words. As stated above, Article 4.4.2 of the ISCCS expressly provides the ISCCS is to be interpreted and applied in light of the fact that it has been drafted and applied giving due consideration to the principle of proportionality.

722. The context (i.e. nature and extent) of the non-compliance; the chronology of events (notably the fact that the 26-page CRC Recommendation was issued only four days after receipt of the final expert report); and the lack of any relevant witness testimony from the CRC or other WADA representatives, suggest that proportionality may not have been the primary concern of the CRC or the WADA Executive Committee when determining the proposed Signatory Consequences. However, this is not evidence that proportionality was not considered by those bodies.

723. It is not necessary for the Panel to assess the extent to which the CRC or WADA Executive Committee considered proportionality because the Panel is entitled to make its own assessment of the proportionality of the proposed Signatory Consequences, as it has done below. This is made clear in Article 10.4.2 of the ISCCS, which provides that, in a non-compliance dispute, "*the CAS Panel will also consider, by reference to the provisions of Article 11, what Signatory Consequences should be imposed and/or, by reference to the provisions of Article 12, what conditions the Signatory should be required to satisfy in order to be Reinstated.*"

724. In considering the proportionality of the Signatory Consequences, the Panel has taken into consideration Articles 11.2.5 and 11.2.6 of the ISCCS, referred to above. It has also considering the *prima facie* consequences for non-compliance with a critical requirement of the WADC, as set out in Annex B to the ISCCS.

725. The Panel also endorses the statements made by the CAS Panel in CAS 2016/O/4684 *ROC, Lyukman Adams et al. v. IAAF*. Although that decision specifically concerned the imposition of sanctions, the principles discussed are nonetheless applicable (citations omitted):

> *The principle of proportionality implies that there must be a reasonable balance between the nature of the misconduct and the sanction. In order to be respected, the principle of proportionality requires that (i) the measure taken by the governing body is capable of achieving the envisaged goal, (ii) the measure taken by the governing body is necessary to reach the envisaged goal, and (iii) the constraints which the affected person will suffer as a consequence of the measure are justified by the overall interest to achieve the envisaged goal. In*

other words, to be proportionate a measure must not exceed what is reasonably required in the search of the justifiable aim.

726. The Panel notes Article 9.4.3.1 of the ISCCS states that non-compliance caused by interference or an act or omission by any governmental or other public authorities is not an "*acceptable excuse, or a mitigating factor*". In the Panel's view, this does not mean the Panel is prevented from taking such matters into consideration when assessing and determining the appropriate consequences.

d. Panel's discretion with respect to consequences

727. The Panel does not accept WADA's submission that Article 23.5.6 of the 2018 WADC allows the Panel to impose consequences that are more severe than those proposed in WADA's Statement of Claim. Although that provision states that the Panel will consider what consequences should be imposed, the Panel is charged with determining the dispute between WADA and RUSADA. The Signatory Consequences sought by WADA set the outer limit of what the Panel can impose.

728. However, for reasons addressed above, the Panel is required to consider matters of proportionality. It accepts that Article 23.5.6 of the 2018 WADC (and the associated Article 10.4.2 of the ISCCS) gives the Panel discretion to impose consequences that are more lenient that those sought by WADA.

729. As the 2018 WADC and the ISCCS are the basis of the Panel's jurisdiction to determine these proceedings and impose Signatory Consequences, the Panel accepts RUSADA's submission that it cannot render a decision outside the legal framework of the ISCCS.

e. Events covered by the Signatory Consequences

730. WADA has sought to have Signatory Consequences imposed in respect of the Olympic Games, Paralympic Games, Youth Olympic Games, World Championships and any other event organised by a Major Event Organisation.

i. *Youth Olympic Games*

731. There was disagreement between the parties regarding whether the ISCCS permitted restrictions in respect of the Youth Olympic Games. The Panel expresses its doubts regarding WADA's submission that the term "Olympic Games", as used in the ISCCS, is wide enough to cover the Youth Olympic Games.

732. It is not, however, necessary for the Panel to determine this question for two reasons. First, because such restrictions can be imposed in respect of "Events" and the definition of that term in Article 4.1 of the ISCCS is broad enough to cover the Youth Olympic Games. Second, in applying principles of proportionality, the Panel does not consider it is necessary to extend the application of any of the Proposed Signatory Consequences to the Youth Olympic Games.

733. Although the history of improper conduct which has ultimately led to these proceedings is long and serious, the Panel considers it would be disproportionate to impose severe restrictions on the next generation of Russian athletes. In particular, as the doping

schemes addressed in the McLaren Reports occurred between 2012 and 2016, the Panel considers it very unlikely that any athletes who will be participating in the Youth Olympic Games were involved in those schemes.

734. The Panel considers that these young athletes ought to be encouraged to participate in international sporting events as a generation of athletes that respect clean sport. As acknowledged by WADA in its Reply to RUSADA's Response, it is necessary to protect the new generation of Russian athletes to achieve the goal of clean Russian sport. To that end, young Russian athletes will be able to see, through the Signatory Consequences, that the Panel has decided to impose in respect of the Olympics, Paralympics and World Championships, the potential consequences of cheating.

ii. *Events organised by a "Major Event Organization"*

735. WADA seeks the imposition of restrictions in respect of events organized by "Major Event Organizations". The term "Major Event Organization" as it appears in Signatory Consequences in the ISCCS, adopts the definition used in the WADC, being:

> ***Major Event Organizations****: The continental associations of National Olympic Committees and other international multisport organizations that function as the ruling body for any continental, regional or other International Event.*

736. RUSADA submits that this term lacks specificity, as it is complicated, if not impossible, to understand what constitutes a "Major Event Organization". Additionally, the IPC noted in the Table of Clarifications contained in Annex A to its 30 April 2020 submission that it, in addition to being a "Major Event Organization", it operates as the International Federation for 10 Para sports and therefore WADA's proposal would extend to events organized by the IPC beyond the Paralympic Games.

737. Having regard to the relevant provisions of the ISCCS and the definitions of "Major Event Organization", "International Event" and "Event" in the ISCCS (which adopt definitions used in the WADC), the Panel is satisfied that it has the power to impose the restrictions sought by WADA.

738. However, the Panel agrees that restrictions on "events organized by Major Event Organizations" lacks the specificity that is desirable in an Award of this nature and may – having regard to the submissions of the IPC – extend beyond what is necessary to achieve the objectives underlying the WADC. Accordingly, the Panel has decided not to impose restrictions in respect of such events.

f. Period of restrictions

739. WADA has sought to have the Signatory Consequences imposed for a four-year period. However, it noted that the four-year period was only ever intended to cover one edition of each of the summer and winter Olympic/Paralympic Games, which it reflected in its revised prayers for relief in its Reply.

740. RUSADA and Intervening Parties submit that, where WADA relies on Articles B.3.1(c) and B.3.1(d)(2) of Annex B to the ISCCS as the basis for the imposition of Signatory Consequences, a four-year period is not permitted.

741. Article B.3.1(c) of Annex B to the ISCCS suggests that the restrictions on representatives sitting on boards is to apply (at least for the first instance of non-compliance with a critical requirement) for the longer of one year or until the Signatory is reinstated. Article B.3.1(d)(2) suggests that restrictions from participating in or attending the specified events is to apply for the longer of the next edition of the specified event or until the Signatory is reinstated.

742. The Panel does not accept that imposition of the above consequences for a four-year period is not permitted. The suggested consequences in Annex B are only standard consequences and Annex B makes clear that there is flexibility to depart from them "*where the application of the principles set out in Article 11 to the specific facts and circumstances of that case so warrant.*" To that end, both Articles 11.1.1.2 and 11.1.1.10 allow for such consequences to be imposed for a 'specified period'. This would permit a four-year period proposed by WADA.

743. However, notwithstanding the Panel's view that:

a. a four-year period is permissible; and

b. having regard to the seriousness of the non-compliance, Signatory Consequences must be imposed for a significant period,

the Panel is nonetheless required to consider the appropriate period for which the Signatory Consequences it imposes should have effect.

744. In doing so, the Panel has had regard to:

a. the *prima facie* periods for non-compliance with critical requirements set out in Articles B.3.1(c) and B.3.1(d)(2) of Annex B to the ISCCS (respectively, one year and until the next edition of the Olympic Games, Paralympic Games and/or any World Championships);

b. the fact that the imposition of the Signatory Consequences was only ever intended by WADA to cover one edition of each of the summer and winter Olympic and Paralympic Games (as WADA confirmed in its revised prayers for relief);

c. principles of proportionality, in particular noting that proportionality must be assessed in light of the Signatory Consequences the Panel has decided to impose as a whole.

745. Accordingly, the Panel has decided that an appropriate period for imposition of Signatory Consequences in the present circumstances is two years from the date of this Award.

3. Consideration of Signatory Consequences

a. Signatory Consequence 1: Restrictions on Representatives of the Government of the Russian Federation

746. WADA has requested the Panel to restrict specified representatives of the government of the Russian Federation from sitting on boards or committees of Signatories as well as participating in or attending specified events hosted or organised by Signatories.

i. *Legal Basis*

747. This proposed restriction is derived from Articles 11.1.1.2 and 11.1.1.10 of the ISCCS as well as Articles B.3.1(c) and B.3.1(d)(2) of Annex B to the ISCCS.

748. The above provisions permit such restrictions to be imposed in respect of "the Signatory's Representatives". The ROC and RPC submitted that the ISCCS does not permit this proposed consequence to be imposed in respect of representatives of the government of the Russian Federation because they are not "the Signatory's Representatives". That submission was misguided. As WADA rightly identified, the definition of 'Representatives' in Article 4.3 of the ISCCS expressly includes, in the case of NADOs, representatives of the government of the country of that NADO.

749. The Panel does not accept RUSADA's submission that imposition of these restrictions violates the sovereignty of the Russian Federation and the immunity of State representatives. Although the restrictions will undoubtedly affect Russian government representatives, they do not involve the exercise of any jurisdiction by the CAS over those representatives. There is no doubt that neither WADA nor the Panel has power to make orders which are binding on Russian government representatives (them not being Signatories to the WADC). Rather, the restrictions sought by WADA are given effect as binding obligations on other Signatories, who are required pursuant to Article 23.5.9 of the 2018 WADC and Article 10.5.1 of the ISCCS to give effect to Signatory Consequences imposed by the Panel.

ii. *Consideration*

750. Having regard to the matters addressed above regarding the involvement of Russian authorities in the manipulation of the Moscow Data and the need effect a fundamental change in attitude at the level of public authorities in Russia, the Panel finds it appropriate to impose restrictions on the representatives of the Russian Government. The aim of these restrictions is to emphasise the need for careful compliance with anti-doping activity and to protect the integrity of international events.

751. In considering issues of proportionality and the need for any Award delivered by the Panel to allow practical implementation, the Panel has given weight to the submissions made by the IOC. In particular:

a. Although WADA sought (in its Reply) to clarify the government representatives who were included in the proposed restriction, the categories set out by WADA remained extraordinarily broad. This would likely result in difficulties with practical implementation by placing a burdensome obligation on individual

Signatories to determine whether a person fell within the restricted categories. For example, Signatories would be required to determine if a person was an assistant to a deputy head of a state body or otherwise.

b. Given the overriding purpose of the Signatory Consequences is to maintain the confidence in WADA and its partners' commitment to defend the integrity of sport against the scourge of doping (ISCCS Article 11.2.5), the government representatives subject to restrictions should be confined to persons whose role might be considered relevant to restoring confidence in the integrity of the anti-doping system or be a particular source of national pride.

c. Restrictions should not be imposed on persons who perform essential and beneficial services to the sports movement, in particular persons who are not elected or appointed to positions in their personal capacity (such as IOC members and technical officials and volunteers).

d. Restrictions on participating in or attending events should be limited to accreditation and not attendance at large.

e. Non-compliance should only be an issue where the prohibition is knowingly breached.

f. Unexpected or unanticipated practical difficulties might arise, for example where a restricted government representative is invited to attend a specified event by a Head of State.

752. Having regard to these matters, the Panel has determined that it is proportionate and appropriate to impose the restrictions sought on representatives of Government for a two-year period but, in doing so:

a. Confine the categories of representatives of the government of the Russian Federation who are subject to the restrictions. In that regard, the Panel gave consideration as to whether it should impose an obligation on WADA to maintain a list of restricted persons. It has determined that this would not be appropriate. However, the Panel acknowledges the difficulties of identifying individuals who fall within the specified categories and therefore considers it appropriate to limit any procedures for non-compliance in respect of this consequence to circumstances of knowing breach. Nonetheless, the Panel observes that WADA may wish to prepare and make available to Signatories a non-exhaustive short list of specific persons or roles it considers fall within restricted categories.

b. Provide exceptions for (i) persons who are appointed as IOC/IPC members in their personal capacities; (ii) persons who require accreditation as athletes or legitimate athlete support personnel; and (iii) circumstances where individuals are invited to specified events by Heads of State or Prime Ministers of host countries.

c. Distinguish between a restriction on participation/attendance and accreditation. The Panel considers it necessary and proportionate to impose restrictions on participation and attendance but acknowledges that Signatories have greater oversight and control over accreditation.

d. Clarify that any future proceedings against a Signatory for non-compliance with these orders ought only take place in circumstances where the Signatory knowingly contravened the order.

iii. *Determination*

753. Having regard to the above, the Panel makes the following order:

> *a. Subject to the provisos set out below, representatives of the Government of the Russian Federation in the categories set out in order (b) below (the "Government Representatives"):*
>
> > *i. May not be appointed to sit, and may not sit, as members of the boards or committees (including sub-committees) of any Signatory (or its members) or association of Signatories during the Two-Year Period.*
> >
> > *ii. May not be issued accreditation by or for any Signatory for any of the following events held during the Two-Year Period:*
> >
> > > *1. The Olympic and Paralympic Games (winter or summer);*
> > >
> > > *2. Any World Championships organised or sanctioned by any Signatory. For these purposes, a "World Championship" is any event or one or more of a series of events that determines the world champion for a particular sport or discipline in a sport, but does not include qualifying events.*
> >
> > *iii. May not be permitted by any Signatory to participate in or attend the following events held during the two-year period:*
> >
> > > *1. The Olympic and Paralympic Games (winter or summer);*
> > >
> > > *2. Any World Championships organised or sanctioned by any Signatory. For these purposes, a "World Championship" is any event or one or more of a series of events that determines the world champion for a particular sport or discipline in a sport, but does not include qualifying events for a World Championship.*
>
> *The provisos to this order are:*
>
> > *iv. this order does not apply to a Government Representative who, in their personal capacity only, is an IOC/IPC member or is otherwise elected to an IOC/IPC body or appointed by the IOC/IPC to sit on IOC/IPC bodies;*
> >
> > *v. this order does not apply to a Government Representative who is invited to a specified event by the Head of State or Prime Minister (or equivalent) of the host country of that specified event;*

vi. orders (ii) and (iii) do not apply to a Government Representative who is required to be accredited for and participate in a specified event in their capacity as an Athlete or legitimate Athlete Support Personnel;

vii. any Signatory to the World Anti-Doping Code cannot be deemed non-compliant with this order unless it is established that that Signatory knowingly contravened the order.

b. Government Representatives includes any person who, as of the date of this Award or during the Two-Year Period, met or meets one or more of the following categories:

i. The following members of the executive government: Deputy Ministers, Ministers, Deputy Prime Ministers, the Prime Minister and the President of the Russian Federation (whatever their formal title).

ii. Members of the Federal Assembly of the Russian Federation, including both the Upper House (the Federation Council) and the Lower House (the State Duma).

iii. The Heads and Deputy Heads (whatever their formal title, e.g., Directors and Deputy Directors) of the Federal Services and Agencies, and of the Centre for Sports Preparation.

iv. All persons working for the Administrative Directorate of the President of the Russian Federation and/or for the Russian Investigative Committee.

b. Signatory Consequence 2: Restrictions on Russia hosting, bidding for or being granted the right to host events

i. *Legal Basis*

754. Restrictions on hosting, bidding for or being granted the right to host events are derived from Article 11.1.1.5 of the ISCCS and Article B.3.1(d)(1) of Annex B to the ISCCS. These provisions expressly permit a non-compliant NADO's country being ruled ineligible to host or co-host, or be awarded the right to host or co-host, certain events.

755. The Panel does not accept RUSADA's submission that it has no power to prohibit bidding for the right to host such events. As stated by WADA, there is no temporal restriction contained in Article 11.1.1.5 and therefore it is permissible to impose a restriction on hosting or co-hosting any events for which bids are to be solicited during a certain period. Further, as also identified by WADA, as the WADC already prohibits the IOC, International Federations and Major Event Organisations from accepting bids from countries whose NADOs are non-compliant, this is likely to be a moot point.

ii. *Consideration*

756. In the same vein, as addressed above regarding restrictions in respect of representatives of the government of the Russian Federation, due to the involvement of Russian

authorities in the manipulation of the Moscow Data and the need effect a fundamental change in attitude at the level of public authorities in Russia, the Panel finds it appropriate to impose restrictions on certain events being hosted by the Russian Federation.

757. The Panel considers that, to achieve the objectives underlying the WADC, it appropriate that such a restriction extends to:

a. Olympic and Paralympic Games as well as Word Championships being hosted in Russia by WADC Signatories or national federations; and

b. any such events which are to take place in the two-year period or which, during the two-year period, bids are to be solicited and/or the right to host is to be granted.

758. The Panel has not been made aware of any events during the two-year period where the right to host has already been awarded to the Russian Federation. Nonetheless, in case that there are any such events, the Panel considers it appropriate, in accordance with Article 11.1.15 of the ISCCS, to make an order that a Signatory is not required to re-assign the event to another country if it is legally or practically impossible to do so.

iii. *Determination*

759. Having regard to the above, the Panel makes the following order:

> *The Russian Federation (or any Russian Signatory or Russian national federation) may not host in the two-year period, or bid for or be granted in the two-year period the right to host (whether during or after the two-year period), any editions of:*
>
> *i. The Olympic and Paralympic Games (winter or summer);*
>
> *ii. Any World Championships organised or sanctioned by any Signatory. For these purposes, a "World Championship" is any event or one or more of a series of events that determines the world champion for a particular sport or discipline in a sport, but does not include qualifying events.*
>
> *Where the right to host any such event in the two-year period has already been awarded to the Russian Federation, the Signatory in question must withdraw that right and re-assign the event to another country, unless it is legally or practically impossible to do so.*

c. Signatory Consequence 3: Restrictions on use of the Russian flag

i. *Legal Basis*

760. Although restrictions on the use of a country's flag are not expressly provided for in Article 11.1.1 of the ISCCS, they are addressed in Article B3.1(d)(2) of Annex B to the ISCCS. As stated in Article 4.4.5 of the ISCCS, the annexes have the same mandatory

status as the rest of the ISCCS. Consequently, the Panel finds that it has the power to impose restrictions on use of the flag of the Russian Federation at certain events.

ii. *Consideration*

761. For the reasons addressed below, the Panel considers it appropriate that Russian Athletes be required to compete in a neutral capacity (albeit one which is less restrictive than that proposed by WADA). This requires restrictions to be imposed on use of the flag of the Russian Federation (current or historical).

762. The Panel has, however, considered the desirability that the Signatory Consequences in this Award permit practical implementation. In particular, it has noted the submissions of the IOC that the breadth of the prohibition sought by WADA (extending to areas accessible to general spectators) could make restrictions impractical or even impossible to implement. Further, there may be instances where there are legitimate reasons why the flag of the Russian Federation is required to be used, for example to identify technical officials or delegates.

763. Accordingly, the Panel has decided to impose restrictions on the use of the flag of the Russian Federation (current or historical) subject to exceptions including (i) the restriction does not extend to use of the flag by spectators; (ii) the restriction does not extend to use of the flag to identify Russian nationals who are technical officials or delegates; and (iii) procedures for non-compliance in respect of this consequence are to be limited to circumstances of knowing breach.

iii. *Determination*

764. Having regard to the above, the Panel makes the following order:

> *Subject to the provisos set out below, the flag of the Russian Federation (current or historical) may not be flown or displayed in any official venue or area controlled by a Signatory or event organiser appointed by the Signatory at any of the following events during the two-year period:*
>
> *i. The Olympic and Paralympic Games (winter or summer);*
>
> *ii. Any World Championships organised or sanctioned by any Signatory. For these purposes, a "World Championship" is any event or one or more of a series of events that determines the world champion for a particular sport or discipline in a sport, but does not include qualifying events.*
>
> *The provisos to this order are:*
>
> *iii. This order does not require a Signatory to prevent spectators from bringing the flag of the Russian Federation (current or historical) into official venues of an Olympic Games, Paralympic Games or any World Championships venue;*

> *iv. This order does not require a Signatory to prevent the flag of the Russian Federation (current or historical) from being displayed (if necessary) for the identification of Russian nationals who are technical officials or technical delegates at the Olympic Games, Paralympic Games or any World Championships;*
>
> *v. A Signatory cannot be deemed non-compliant with this order unless the Signatory knowingly permitted the flag of the Russian Federation (current or historical) to be let fly or displayed in official venues or areas under the Signatory's control at a specified event.*

d. Signatory Consequence 4: Restrictions on ROC and RPC officers and executives

765. For reasons addressed below, the Panel has imposed a modified and less restrictive exclusion in respect of Athletes and Athlete Support Personnel (which will likely reduce the number of Athletes and Athlete Support Personnel who might otherwise have been excluded from participating in the specified events but still require participation on a neutral basis). In those circumstances, and noting that there is no suggestion in the evidence that the ROC or RPC were responsible for the manipulation of the Moscow Data, the Panel has determined that it is not necessary to impose restrictions on ROC or RPC officers and executives.

e. Signatory Consequences 5 and 7: Restrictions on participation and attendance of Russian athletes and support personnel at events and Neutral Participation

i. *Legal Basis*

766. Article 11.1.1.10 of the ISCCS and Article B3.1(d)(2) of Annex B to the ISCCS relevantly provide that, in the case of non-compliance by a NADO, Athletes and Athlete Support Personnel affiliated to that country can be excluded from participation in or attendance at the Olympic Games and Paralympic games and/or any World Championships for the next edition of that Event (summer or winter, where relevant) or until Reinstatement (whichever is longer).

767. That exclusion is subject to Article 11.2.6 of the ISCCS, which relevantly provides:

> *The consequences should not go further than is necessary to achieve the objectives underlying the Code. In particular … consideration should be given to whether it is feasible … to create and implement a mechanism that enables … Athletes and/or Athlete Support Personnel to demonstrate that they are not affected in any way by the Signatory's non-compliance. If so, and if it is clear that allowing them to compete in the Event(s) in a neutral capacity (i.e., not as representatives of any country) will not make the Signatory Consequences that have been imposed less effective, or be unfair to their competitors or undermine public confidence in the integrity of the Event(s) … or in the commitment of WADA and its stakeholders to do what is necessary to defend the integrity of sport against the scourge of doping, then such a mechanism may be permitted, under the control of and/or subject to the approval of WADA (to ensure adequacy and consistency of treatment across different cases).*

768. The comment to Article 11.2.6 refers to the IAAF Rule 22.1A, as discussed in CAS 2016/O/4684 *ROC v. IAAF*, which created the possibility for athletes to apply for special eligibility to compete as "neutral" athletes where they could show that the suspended member's failure to enforce the anti-doping rules did not affect the athlete in any way, because he or she was subject to other, fully adequate anti-doping systems for a sufficiently long period to provide substantial objective assurance of integrity.

769. Accordingly, the Panel finds that the ISCCS permits the exclusion of Athletes and Athlete Support Personnel as a Signatory Consequence for NADO non-compliance, subject to a requirement that consideration be given to mechanisms for those persons to be permitted to compete (including in a neutral capacity).

770. For reasons given below, the Panel is of the view that it would be excessively burdensome and inappropriate in the circumstances to require Russian Athletes and Athlete Support Personnel to bear the onus of proving they were not affected in any way by the manipulation of the Moscow Data in the manner proposed by WADA in its proposed Notice to Signatories (Exhibit C-51). Nonetheless, the Panel considers it is necessary and appropriate to impose requirements for Russian Athletes and Athlete Support Personnel to compete in a neutral capacity (though a less restrictive one than that proposed by WADA).

771. In the Panel's view, there is ambiguity as to whether the ISCCS permits the Panel to impose requirements that Athletes and Athlete Support Personnel compete in a neutral capacity without the Panel having first imposed an exclusion in respect of those Athletes and Athlete Support Personnel. This issue was not addressed by the Parties in their submissions. The ambiguity arises because:

a. Article 11.1 of the ISCCS and Annex B set out potential consequences for non-compliance. Requirements of neutral participation, such as restrictions with respect to uniforms, use of national anthems or displays of national symbols, are not expressly provided for in Article 11.1 or Annex B.

b. The only reference to Athletes competing in a neutral capacity is contained in Article 11.2.6 of the ISCCS. When read in context, Article 11.2.6 of the ISCCS is not a provision which establishes a power to impose consequences. Rather, Article 11.2.6 concerns the application of the principle of proportionality to potential consequences set out in Article 11.1 and Annex B.

c. The reference to Athletes competing in a neutral capacity contained in Article 11.2.6 of the ISCCS is expressly stated to be triggered "*where a consequence imposed is exclusion of Athletes*".

d. Therefore, the Panel considers there is a persuasive argument that the reference in Article 11.2.6 to competing in a neutral capacity should be read as an illustration of how proportionality can be applied to an exclusion of athletes and does not give the Panel the power to impose, as its own standalone consequence, restrictions on uniforms, symbols and anthems (even where the Panel considers such consequences would be appropriate).

772. The Panel has also considered the alternative argument that Article 11.2.6 permits the Panel to take into consideration issues of proportionality in imposing Signatory Consequences, and that issues of proportionality ought to be considered not only in respect of individual Signatory Consequences but as a whole. In those circumstances, as a decision to impose conditions of neutrality is expressly stated (by Article 11.2.6) to be a less serious consequence that an exclusion under Article 11.1.1.10, they may be imposed as standalone consequences by application of proportionality.

773. Having regard to these competing arguments, and conscious of the desire to ensure that this Award provides finality to this dispute, the Panel has decided to impose an exclusion on Russian Athletes and Athlete Support Personnel, but limit that exclusion to Athletes or Athlete Support Personnel who are subject to suspension, restriction, condition or exclusion from existing or future proceedings imposed by a competent authority which exist at the time of the specified event to which the exclusion applies. As those Athletes or Athlete Support Personnel would already be prevented (by their extant restrictions) from participating in the specified event, the Panel acknowledges that its exclusion is one of form rather than substance. However, having imposed that exclusion, the Panel is satisfied that the ISCCS expressly provides a basis for the Panel to then impose conditions of neutral participation.

774. As a separate question, even where the ISCCS permits the imposition of conditions of neutral participation, the Panel is required to consider submissions made principally by RUSADA and the 33 Athletes Group that the Neutral Participation Implementation Criteria ("NPIC") proposed by WADA are invalid and unenforceable because they go beyond the scope of the WADA Executive Committee decision and the CRC Recommendation.

775. The NPIC is the relief sought by WADA in paragraph 301.7 of its Reply to RUSADA's Response (as first set out at paragraph 132 of its Statement of Claim). The NPIC includes:

a. the name Russia shall not appear in the designation of the Athlete;

b. Russian athletes shall participate in a neutral uniform;

c. Russian athletes shall not display the flag; and

d. the Russian national anthem shall not be played.

776. The Panel accepts that the Signatory Consequences sought by WADA in these proceedings must be consistent with those proposed by the WADA Executive Committee in its formal notice of non-compliance. This is a consequence of Article 23.5.6 of the 2018 WADC and Article 10.4.1 of the ISCCS, by which WADA is required to file a formal notice of dispute with the CAS if a Signatory disputes Signatory Consequences proposed in WADA's formal notice of non-compliance.

777. The Signatory Consequences proposed in the formal notice of non-compliance must be consistent with the CRC Recommendation, unless WADA remits the matter back to the CRC to provide a second recommendation: ISCCS Article 10.2.2. Therefore, if the CRC Recommendation does not address a proposed Signatory Consequence and

WADA has not remitted the matter to the CRC (which did not occur in the present procedure), that proposed Signatory Consequence cannot be sought in subsequent proceedings before the CAS.

778. In that regard, none of the NPIC were expressly set out in the CRC Recommendation, which only provided (at paragraph 54.3) that the Russian flag may not be flown at certain events. In those circumstances, the Panel is required to consider whether it is permissible for WADA to seek the imposition of the NPIC.

779. To that end, the Panel refers to paragraph 54.5 of the CRC Recommendation, which provided that (emphasis added, footnotes removed):

> *Russian athletes and their support personnel may only participate in or attend* [the specified events] *… where they are able to demonstrate that they are not implicated in any way by the non-compliance**, in accordance with strict conditions defined by WADA** (or the CAS, if it sees fit), pursuant to the mechanism foreseen in ISCCS Article 11.2.6. The ExCo (or the CAS, if it sees fit) will specify the mechanism to be used by Signatories (which may include the involvement of representatives of appropriate Athlete Committees) to determine whether a particular athlete meets the conditions and so should be permitted to participate in the event(s) in question …*

780. With respect to the "strict conditions defined by WADA", the CRC Recommendation contained a footnote to that phrase (footnote 29), which provided a list of conditions, but did not include conditions contained in the NPIC. However, that list was expressly stated to be "without limitation" and therefore was not an exhaustive list of possible conditions. In the Panel's view, the CRC Recommendation therefore permitted conditions, such as the requirement to compete in a neutral capacity (which is expressly mentioned in Article 11.2.6 of the ISCCS), at the discretion of WADA.

781. Turning then to the decision of the WADA Executive Committee and the formal notice of non-compliance, when the WADA Executive Committee endorsed the CRC Recommendation on 9 December 2019, it issued a press release asserting that Russian Athletes who could satisfy the specified criteria "may not represent the Russian Federation" (Exhibit ROC-6). The Panel is not able to locate any exhibit which records the actual decision of the WADA Executive Committee but considers that it was presumably accurately set out in that press release. The formal notice of non-compliance issued by WADA to RUSADA and copied to Minister Kolobkov, also of 9 December 2019 (Exhibit C-10), did not use that phrase but rather referred to the CRC Recommendation. The Panel notes, however, that the Annex to that notice was not included in the evidence.

782. The Panel is satisfied that both the CRC Recommendation and WADA's formal notice of non-compliance permitted – as a means of mitigating the severity of an exclusion on Athletes – a condition that, if they are permitted to compete, they do so in a neutral capacity. The clarification of the meaning of 'in a neutral capacity' by WADA in setting out the NPIC in paragraph 132 of its Statement of Claim dated 10 February 2020 does not, in the Panel's view, go beyond the scope of the WADA Executive Committee decision or the CRC Recommendation. Therefore, the Panel finds that the NPIC are not invalid or unenforceable.

ii. *Consideration*

783. The consequence sought in paragraph 54.5 of the CRC Recommendation involved athletes and their support personnel assuming the onus of proving that they were not implicated in any way by non-compliance. The view of the Panel is that such an order would probably lead to lengthy investigations and subsequent litigation as to whether an athlete has been able to discharge the burden. It would potentially involve athletes being required to access the massive amount of data involved in this case (which was at least 23 terabytes), perhaps in a fruitless and time-consuming search to discover whether they are implicated or even mentioned in the database or the circumstances of the non-compliance. There was no evidence or submission by WADA as to the process by which an athlete would be able to undertake the task of establishing that they were not implicated by the non-compliance, nor as to the cost and time involved in such an exercise.

784. Further, the Panel considers it relevant that WADA has had access to the 2015 LIMS copy since October 2017 and to the Moscow Data since January 2019. In circumstances where the data has been available to WADA for some time, and WADA therefore could have been in a position to share any such data with the respective Signatory responsible to pursue an alleged ADRV, the Panel is not persuaded that an exclusion placing the onus on athletes to prove they were not implicated by RUSADA's non-compliance would be appropriate. This can be distinguished from exclusions and restrictions on Russian athletes imposed for the 2016 Rio Olympic and Paralympic Games and the 2018 PyeongChang Olympic and Paralympic Games, where WADA did not have access to either the 2015 LIMS copy or the Moscow Data (or both).

785. A number of Russian athletes provided statements and gave evidence at the hearing. They were all elite competitors in their chosen field, with unchallenged drug free records, and with ambitions to represent their country for the first or subsequent times at future Olympic Games, Paralympic Games and World Championship events. There was no cross examination of any of the athletes. Much of their evidence was addressed to the potential consequence of their exclusion from events. However, given that they are presumed to be unaffected by any anti-doping violations, and in light of the modified neutrality consequence to be imposed by the Panel, it is only necessary to consider those parts of their evidence which concerns the neutrality criteria. All of the athletes express an understandable desire to compete under their national flag and colours and accompanied by the national anthem at medal ceremonies. They all express, in differing terms, the disappointment that they would feel if they were not able to do so. Many of them express concerns that they may lose sponsorship or other financial support if they are required to complete as neutral athletes.

786. For the 33 Athletes Group, the following representative witnesses provided statements and gave evidence at the hearing.

a. Evgenija Davydova is an equestrian athlete in the discipline of dressage who has been participating in international competitions since 2006. Her current horse, Awakening, is valued at around EUR 700,000. It is stabled in Italy. She is paid a salary by the Russian Ministry of Sport and the level of her salary depends on her competition results. She says that it would be an emotional low to be forced to

compete in a neutral uniform and not be permitted to listen to the national anthem and see the flag. She says that she thinks she would lose sponsorship if forced to compete as a neutral athlete, and fears that she would lose her salary from the Ministry of Sport.

b. Sayana Lee has been competing in international archery competitions since 2008. She is a member of the Buryat ethnic group, a Mongolian minority in Russia with a historic connection with archery, particularly in her home city of Chita. Archers in Russia are supported by the government and she receives such funding. Russia is known for the financial support it provides to athletes and she understands that past Olympic Games medallists have received cash bonuses and other incentives such as apartments. She knows of one athlete who was granted a bonus equivalent to eight times her annual salary when she won an Olympic silver medal.

c. Andrei Minakov is an 18-year-old swimmer who has been competing successfully at an international level for some years and hopes to complete at the Olympic Games. He has a personal website and hopes to grow his brand and take advantage of commercial opportunities.

787. For the 10 Athletes Group, evidence at the hearing was given by Elena Krutova and Viktoria Protopov. Ms Krutova is an archer and is the current World Champion and a dual Paralympic Champion. She has qualified for the next Paralympic Games. Ms Potopova is a vision-impaired judoka who also has qualified for the next Paralympic Games. Both witnesses spoke of the difficulty that they would have in complying with any regime which required them to attempt to establish that they were not implicated in the non-compliance.

788. Ms Sofia Velikaya gave evidence at the hearing. She is a triple Olympian, eight-time World Champion and an Olympic champion fencer. She is the Head of the Athletes' Commission of the Russian Olympic Committee. Counsel for the ROC put to her that, as Chair of the Athletes' Commission, she is the voice of the athletes and asked her to describe the financial impact of competing as a neutral athlete. She candidly admitted that she did not have any information as to the impact of neutral status on the salary of an athlete and said that she had not participated in competitions in a neutral status.

789. The fears expressed by many athletes as to potentially diminished performances under conditions of neutrality, and potential financial loss, have undoubtedly been given as the honest belief of each athlete. However, the objective evidence as to relative performance, in so far as it can be measured in any way, does not support the claim. As noted by WADA in closing submissions, records show that, at the 2010 Vancouver Winter Olympic Games, Russian athletes won 15 medals, while at the 2018 PyeongChang Winter Olympic Games, athletes competing in a neutral capacity as Olympic Athletes from Russia won 17 medals. It was obviously unnecessary to consider the performance of Russian athletes 2014 Sochi Winter Olympic Games as they were marked by events which ultimately led to these proceedings.

790. As to potential financial loss, there was no specific evidence led by RUSADA or any of the intervening parties. In the view of the Panel, it would have been open to those parties to produce such evidence of, for example, loss suffered by any athlete who competed at the 2018 PyeongChang Olympic Games under conditions of neutrality, if such evidence

were available. In particular, Ms Velikaya, as Chair of the Athlete's Commission, might have been expected to be a source of any such evidence. The absence of any direct evidence of loss confirms the view of the Panel that the fears expressed by the Athletes, although well-meaning and honestly given, do not withstand objective scrutiny so as to satisfy the Panel that the modified neutrality conditions proposed would cause any measurable loss by the athletes. Even assuming there would be an impact, it would be indirect, being the consequence of Signatory Consequences imposed following non-compliance by a NADO. That indirect impact does not counterbalance the need to effectively address RUSADA's non-compliance.

791. The Panel finds that it is appropriate to impose a modified and less restrictive version of the NPIC to that proposed by WADA. The Panel considers that the conditions under which Russian athletes may participate should allow some limited association with the name (for example, "Neutral Athlete from Russia") and colours of their homeland where necessary, but subject to restrictions as to the use of the Russian flag, national symbols and the Russian national anthem in a sport, recognition or awards capacity. This accommodates a balance between the WADA submission that the purpose of the consequences is that the athlete will not be associated with Russia, and the opposing concern that clean athletes should not be affected by neutrality conditions for any longer than is justified.

792. Further, in the event that it is necessary to decide the issue, the Panel prefers the opinion of Prof. Meyer that WADA ought to enjoy a margin of appreciation with regard to its obligations under the ECHR, to that of Prof. Mettraux, such that the NPIC are not in contravention of the ECHR.

iii. *Determination*

793. Having regard to the above, the Panel makes the following order:

> *Any Athlete from Russia and their Athlete Support Personnel may only participate in or attend on any of the following events during the Two-Year Period, on the conditions set out below.*
>
> *The specified events are:*
>
> *i. The Olympic and Paralympic Games (winter or summer);*
>
> *ii. Any World Championships organised or sanctioned by any Signatory. For these purposes, a "World Championship" is any event or one or more of a series of events that determines the world champion for a particular sport or discipline in a sport, but does not include qualifying events.*
>
> *The conditions are:*
>
> *iii. The Athlete/Athlete Support Personnel shall not be subject to suspension, restriction, condition or exclusion imposed by a competent authority in any past or future proceedings which remains in force at the time of the specified event.*

> *iv. Russian Athletes/Athlete Support Personnel shall participate in a uniform to be approved by the relevant Signatory which shall not contain the flag of the Russian Federation (current or historical), or any national emblem or other national symbol of the Russian Federation. If the uniform contains or displays the name 'Russia' (in any language or format), the words 'neutral athlete' (or an equivalent) must be displayed in English in a position and size that is no less prominent than the name 'Russia'. For the avoidance of doubt, the uniform may contain the colours of the flag of the Russian Federation (current or historical) (collectively or in combination).*
>
> *v. Subject to order (iv), Russian Athletes/Athlete Support Personnel shall not display publicly the flag of the Russian Federation (current or historical), the name 'Russia' (in any language or format), or any national emblem or other national symbol of the Russian Federation, including without limitation, on their clothes, equipment or other personal items or in a publicly visible manner at any official venues or other areas controlled by the Signatory or its appointed Event organiser.*
>
> *vi. The Russian national anthem (or any anthem linked to Russia) shall not be officially played or sung at any official event venue or other area controlled by the Signatory or its appointed event organiser (including, without limitation, at medal ceremonies and opening/closing ceremonies).*
>
> *For the avoidance of doubt, this order does not impose restrictions in respect of any events other than the specified events.*

f. Signatory Consequence 6: Notice to Signatories

794. As the Panel has determined it is not necessary to require athletes to prove that they are not implicated in RUSADA's non-compliance, it is not necessary for the Panel to endorse the Notice to Signatories (which concerned WADA's proposed mechanism for athletes to prove they were not affected by the non-compliance). The Panel, therefore, does not impose Signatory Consequence 6.

g. Signatory Consequence 8: Fine

i. *Legal Basis*

795. Under Article 11.1.1.6 of the ISCCS, the Panel has power to impose a fine as a Signatory Consequence for cases which involve (i) non-compliance with critical requirements; and (ii) aggravating factors.

796. The term "fine", as it appears in the ISCCS, is defined in Article 4.3 as follows:

> ***Fine:*** *Payment by the Signatory of an amount that reflects the seriousness of the non-compliance/Aggravating Factors, their duration, and the need to deter similar conduct in future, but in any event the fine shall not exceed the lower of*

> *(a) 10% of the Signatory's annual income and (b) US$100,000. The fine will be applied by WADA to finance further Code Compliance monitoring activities.*

797. The phrase "Aggravating Factors", as it appears in the ISCCS, is defined in Article 4.3 as follows:

> ***Aggravating Factors:*** *Applicable only in cases involving noncompliance with one or more Critical requirements, this term encompasses a deliberate attempt to circumvent or undermine the Code or the International Standards and/or to corrupt the anti-doping system, an attempt to cover up non-compliance, or any other form of bad faith on the part of the Signatory in question; a persistent refusal or failure by the Signatory to make any reasonable effort to correct Non-Conformities that are notified to it by WADA; repeat offending; and any other factor that aggravates the Signatory's failure to comply with the Code and/or International Standards.*

798. It is the clear finding of the Panel that the manipulations to the Moscow Data involved a deliberate attempt to cover up non-compliance with the WADC and were themselves a circumvention of requirements imposed under the ISCCS.

799. However, no case was put that RUSADA itself caused the manipulations and therefore, although the Panel has found RUSADA non-compliant with the Post-Reinstatement Data Requirement, it does not follow that the above matters were (having regard to the definition of 'aggravating factors') a "*form of bad faith on the Part of*" RUSADA.

800. Nonetheless, the Panel finds that RUSADA has engaged in "*a persistent refusal or failure … to make any reasonable effort to correct Non-Conformities that are notified to it by WADA"*. This is demonstrated by:

a. RUSADA's denial that any improper manipulations took place, despite clear admissions by its Director General (in his 30 September 2019 letter at Exhibit C-55) and the clear and compelling evidence presented by the WADA forensic experts as early as May 2019.

b. The fact that, despite having access to the Moscow Data and the 2015 LIMS copy since at least February 2020, there is no evidence that RUSADA engaged any expert to review that data for the purpose of assessing the conclusions of WADA's forensic experts (RUSADA expressly stated that Messrs Kovalev and Silaev were only called as factual witnesses and not experts).

801. Therefore, the Panel finds that there are "Aggravating Factors" in respect of RUSADA's non-compliance. For reasons addressed earlier in this Award, the Panel has found that the Post-Reinstatement Data Requirement was validly categorised as a "critical" requirement under the ISCCS. Accordingly, the Panel concludes that it has the power to impose a fine.

ii. *Consideration and Determination*

802. Given the seriousness of RUSADA's non-compliance as addressed above, the Panel considers it is appropriate to impose a fine at the full amount permissible under the ISCCS. The Panel therefore makes the following order:

> *RUSADA is to pay a fine to WADA of 10% of its 2019 income or USD 100,000 (one hundred thousand United States dollars) (whichever is lower).*

4. Other matters relating to Signatory Consequences

803. In view of the conclusions set out above, it is unnecessary to deal with a number of remaining issues raised by the parties concerning the Signatory Consequences. The submissions of the parties have already been summarised in the early part of this Award. A brief reference to those issues is set out below.

a. Equal treatment

804. The 33 Athletes Group asserts a violation of the right to equal treatment by referring to steps taken by WADA in relation to the NADOs of Nigeria and North Korea (WADA's press releases in respect of those instances of non-compliance were at Exhibits C-85 and C-86). In 2018, the WADA Executive Committee dealt with non-conformity in relation to the implementation of the testing program in each country. In each case, consequences imposed involved ineligibility to serve in offices, ineligibility to host events and participate in WADA programs, and restriction of WADA funding. No exclusion or neutrality conditions were imposed in relation to athletes.

805. There is no need to deal with this issue given the conclusion which the Panel has reached. In any event, the WADA submissions are preferred. First, it is inappropriate to invoke the principle of equal treatment based on two precedents alone. Second, as recognised in Article 11.2.10 of the ISCCS, the Signatory Consequences to be imposed in respect of non-compliance will depend on the specific facts and circumstances of the case. No evidence was provided regarding that nature of the non-compliance of the NADOs of Nigeria and North Korea, other than that their respective testing programs were noncompliant. In those circumstances, it is neither possible nor appropriate to compare the scope, nature and severity of the non-compliance in those cases to the present case.

b. Legitimate expectations

806. The 33 Athletes Group also asserts a violation of the athletes' legitimate expectation that, if they complied with their anti-doping obligations, they would not face sanctions or be treated less-favourably than non-Russian athletes.

807. Even if athletes' legitimate expectations were a basis to prevent the imposition of specific sanctions (which was not a matter substantively addressed in submissions), the Panel does not accept that this issue arises where the framework established by the 2018 WADC and ISCCS expressly provides for Signatory Consequences which may impact athletes.

c. Human rights

808. It has already been noted that Article 4.4.2 of the ISCCS acknowledges that its drafting considered the principles of respect for human rights, proportionality, and other applicable legal principles. RUSADA relies upon an opinion of Prof. Mettraux which asserts that the core minimum of rights and due process safeguards should include the presumption of innocence, the prohibition on collective punishment, the right to be heard and the right to an adversarial process, protection against arbitrariness, access to court/justice and legal certainty, and the requirement of proportionality.

809. In oral evidence, Prof. Mettraux asserted that the right to be heard in this case involved providing any potentially affected person or party an opportunity to impact and influence the decision of the CRC and the WADA Executive Committee (T3 10-11, RUSADA Response [763]-[768]). The impracticability of this suggestion is self-evident but, in any event, it was apparent that the opinion assumed that any consequence to be imposed was a sanction, as acknowledged by Prof. Meyer (T3 33-34). The RUSADA submissions, as well as those of the ROC, RIHF, RPC and 10 Athletes Group, proceeded on the same assumption.

810. WADA refers to CAS precedent[3] which establishes that the ECHR does not apply directly to CAS or WADA, but that regard should be had to the ECHR as certain fundamental tenets of it may be considered within the context of any review by the Swiss Federal Tribunal. The Panel is satisfied that the requirement to compete as neutral athletes, in the manner determined by the Panel (which permits use of national colours and the name Russia on a limited basis), does not violate the human dignity or any other right of Russian athletes. The neutrality requirements set by the Panel do not exceed the high threshold required to constitute such an infringement (to the extent that such rights are even applicable in the circumstances, as was addressed by Prof. Meyer at [174], [179] and [184] of his report at Exhibit CE-2).

811. With respect to the question of collective punishment, this is primarily a principle of international humanitarian law or criminal law, and there is no specific prohibition on collective punishment in the ECHR. The Panel does not accept that *Sõro v. Estonia*, no. 22588/08, ECtHR 2015 (which was relied upon by RUSADA) is authority that prohibition of collective punishment exists through other rights in the ECHR, such as the right to private and family life in Article 8. The Panel does, however, accept that Article 8 of the ECHR requires measures to be proportionate. The Signatory Consequences imposed by the Panel meet have been determined having regard to the principle of proportionality.

d. Discrimination

812. RUSADA submits that restrictions on officials and athletes are discriminatory in accordance with Article 14 of the ECHR. Any difference in treatment must relate to a legitimate objective and must be a proportionality between the means employed and the objective sought. The ROC submission acknowledges that the CAS, an arbitral tribunal sitting in Switzerland, will pay due consideration to human rights. The Panel accepts

[3] CAS 2011/A/2384 & 2386 *UCI & WADA v. Alberto Contador Velasco & RFEC*; CAS 2011/A/2433 *Amadou Diakite v. FIFA.*

that the position is accurately summarised by Prof. Meyer, who said that WADA had implemented a sufficient legal basis for the Signatory Consequences, lawfully established procedures and safeguards, gone beyond what many national legal systems and State courts provide, and complied with procedural safeguards and substantive fundamental rights when recommending and endorsing Signatory Consequences.

e. Competition law

813. The submissions of the RPC (at [531]-[561]) are based on the proposition that, if all the measures sought by WADA were granted, it would be a violation of competition law and the sanctions were grossly disproportionate. The submissions for the 10 Athletes Group (at [411]-[450]), relying upon the opinion of Prof. Bovet and Dr Kellezi, proceed on the same assumption.

814. The Panel accepts the opinion of Prof. Tuytschaever that competition law does not apply to WADA but, even if it did, the Signatory Consequences have a legitimate objective, are proportionate, as adjusted by the Panel, to the aims pursued by WADA, and do not constitute an unlawful boycott within the meaning of competition law.

815. The Panel notes in fact that, for Article 101 TFEU to apply, several conditions need to be satisfied: (i) the WADC and the ISCCS should qualify as an "*agreement between undertakings*", a "*decision of an association of undertakings*" or a "*concerted practice*"; (ii) they should "*affect trade between Member States*"; and (iii) they should "*have as their object or effect the prevention, restriction or distortion of competition within the internal market*": in other words, the prohibition would apply if they were anti-competitive "*by object*" or "*by effect*".

816. With respect to the first condition, the Panel notes that the European Court of Justice ("ECJ") ruled in the *Meca-Medina* case that the IOC was an "*association of undertakings*", or more precisely "*as an association of international and national associations of undertakings*" within the meaning of Article 101.1 TFEU (then Article 81 of the EU Treaty) (ECJ, 18 July 2006, Case C-519/04P, *Meca-Medina and Majcen v Commission* at [38]). Following that jurisprudence, the Panel doubts that WADA falls under the qualification of an "*associations of undertakings*", insofar as it does not consist of national associations which themselves are undertakings in the meaning of Article 101 TFEU. The WADC and the ISCCS, therefore, adopted by WADA, as well as the Signatory Consequences based on them, do not appear intended to regulate the manner in which Signatories conduct their economic activities or constitute a "*decision by associations of undertakings*" within the meaning of Article 101 TFEU.

817. But if this first condition were satisfied, the Panel would deny the satisfaction of the third condition.

818. The Panel finds that the WADC and the ISCCS do not have as their object the restriction or distortion of competition: their object, in respect of the provisions relevant in this arbitration, is the compliance by the Signatories with the obligations they undertook, which do not include, on their face, measures the object of which is to restrict or distort competition. The Panel is not persuaded that the object of the (relevant provisions of the) 2018 WADC and the ISCCS would be to favour or disfavour certain Signatories;

rather, their purpose is to prevent Signatories from breaching the obligations to which they are bound.

819. The question, therefore, is whether the WADC and the ISCCS, or the Signatory Consequences, have "*the effect*" of restricting competition. The Panel notes that there was no detailed economic analysis or empirical evidence of the impact of the WADC and the ISCCS, or the Signatory Consequences, on competition and the market. Therefore, it has not been demonstrated that the WADC and the ISCCS, or the Signatory Consequences, have the actual effect of restricting competition.

820. In any case, the Signatory Consequences imposed by the Panel are inherent and proportionate to the achievement of the result sought.

f. Personality rights

821. The submissions on this issue[4] have been summarised above, and it is unnecessary to deal with them in view of the conclusions reached by the Panel.

g. Double jeopardy

822. The ROC submits that it, and its affiliated athletes and officials, have already been severely sanctioned by the IOC for the past failures of the Russian anti-doping system and Moscow Laboratory to ensure an efficient fight against doping in sport. The 5 December 2017 decision of the IOC Executive Board (Exhibit C-26) involved *inter alia* suspension of the ROC, only athletes who were considered clean were permitted to compete at the 2018 Winter Olympic Games and they were required to do so in a neutral capacity, reimbursement of costs incurred by IOC in its investigations and a contribution of USD 15,000,000 towards establishment of the International Testing Agency to build the capacity and integrity of the global anti-doping system

823. The ROC submits that the issue at stake in the present case, namely allegedly unreliable data from the Moscow Laboratory, is related to the same factual nexus as led to the earlier orders, so that any further sanction against ROC would breach the principle of double jeopardy, noting also that a disciplinary procedure is pending against the Moscow Laboratory for the same allegations (Exhibit ROC30).

824. There is no merit in this submission. Double jeopardy does not apply in these proceedings. First, the consequences found by the Panel are not sanctions, and thus the principle of double jeopardy does not apply. Secondly, even if it did apply, WADA correctly submits that it requires an identity of parties, subject matter and object, none of which are present in this case. As to parties, it is WADA, and not the IOC that is seeking consequences be imposed by CAS, and the object of the compliance proceedings is RUSADA, not ROC. The subject matter of this case is the data manipulation activities that took place in the Moscow laboratory in December 2018 and

[4] At WADA Reply to interveners at [41]-[45]; WADA reply to RUSADA at [261]-[268]; ROC submissions at [430]-[434], RPC submissions at [516]-[530], RIHF submissions at [258]-[275], 33 Athletes Group submissions at Sections 8 and 17 and 10 Athletes Group submissions at [353]-[369].

January 2019, which is a completely different matter to that which led to the exclusion of ROC from the 2018 PyeongChang Olympic Games.

5. Reinstatement Conditions

825. Article 12.2.1 of the ISCCS provides (emphasis added):

> *In accordance with* [2018 WADC] *Article 23.5.4, in the formal notice that it sends to the Signatory, setting out the Signatory's alleged non-compliance and the proposed Signatory Consequences, WADA shall also specify the conditions that it proposes the Signatory should have to satisfy in order to be Reinstated, which* ***shall be*** *as follows …*

826. Articles 12.2.1.1 to 12.2.1.5 of the ISCCS then set out the various conditions that 'shall be' satisfied. These include specific conditions as well as a "catch-all" in Article 12.2.1.5, being "*any other conditions that WADA's Executive Committee may specify (on the recommendation of the CRC) based on the particular facts and circumstances of the case."*

827. Where proposed Reinstatement Conditions are disputed by a Signatory (as is the case here), the CAS is empowered to determine whether the proposed conditions are necessary and proportionate (Article 12.2.2). It follows that, if the Panel considers the proposed conditions are not necessary or proportionate, it can impose less severe conditions.

828. The Reinstatement Conditions sought by WADA in these proceedings were substantively identical to those contained in paragraph 58 of the CRC Recommendation and adopted by WADA in its formal notice of non-compliance.

829. Of the Reinstatement Conditions sought by WADA in its prayers for relief, the only conditions challenged by RUSADA (on the basis that WADA was successful in establishing breach) were those relating to restitution of costs. Those Reinstatement Conditions are conditions 1 and 8 of those set out in WADA's amended prayers for relief in its 24 June 2020 Reply:

> *1) RUSADA shall pay all of the costs incurred by WADA and any other Anti-Doping Organizations from January 2019 to the date of the CAS Award in investigating the authenticity of the data retrieved by WADA from the Moscow laboratory in January 2019*
>
> *8) WADA must have been paid in full all of the costs and expenses that it has reasonably incurred from the date of the CAS Award until the date of RUSADA's reinstatement, including (without limitation) the costs and expenses reasonably incurred in implementing the above consequences (including the costs of supervising the neutral athlete mechanism(s)), and the costs of monitoring compliance with the consequences and with the reinstatement conditions.*

a. Investigation Costs

i. *Legal Basis*

830. RUSADA submits that the requirement that it pay the costs incurred by WADA from January 2019 in investigating the authenticity of the Moscow Data is not permitted under the ISCCS. Relevantly, it refers to Article 12.2.1.4(a) of the ISCCS, which provides that the Panel may impose, as a Reinstatement Condition, a requirement on the non-compliant Signatory to pay in full:

> *(a) any specific costs and expenses reasonably incurred by WADA in Special Monitoring actions (i.e., outside WADA's routine monitoring activities) that identified the Signatory's non-compliance (e.g., the costs of any specific investigation conducted by WADA's Intelligence and Investigations Department that identified such noncompliance);*

831. RUSADA notes that "Special Monitoring" actions is defined in Article 4.3 of the ISCCS as:

> ***Special Monitoring****: Where, as part of the Signatory Consequences imposed on a non-compliant Signatory, WADA applies a system of specific and ongoing monitoring to some or all of the Signatory's Anti- Doping Activities, to ensure that the Signatory is carrying out those activities in a compliant manner.*

832. Having regard to that definition, it is clear that Special Monitoring is monitoring conducted *after* a finding of non-compliance and imposition of Signatory Consequences. As conceded by WADA, there is an inconsistency within Article 12.2.1.4(a) of the ISCCS in permitting an order for costs of Special Monitoring actions (which can only occur after a finding of non-compliance and imposition of Signatory Consequences) in respect of activities that identified the non-compliance (which necessarily occurs prior to the finding of non-compliance). WADA submits that the use of the defined term "Special Monitoring" should be read broadly or ignored such that Article 12.2.1.4(a) permits an order for WADA's costs of investigating the Moscow Data.

833. The Panel expresses its doubts as to whether this "mistake" (to adopt the expression used by WADA) in the drafting of the ISCCS can be ignored or read out in this way so as to expand the ambit of Article 12.2.1.4(a), particularly where the condition concerns an order to make a payment of money.

834. However, it is not necessary for the Panel to determine this matter. As identified by WADA, even if the proposed condition were not permissible under Article 12.2.1.4(a) of the ISCCS, it would be permissible under the "catch all" in Article 12.2.1.5. The Panel accepts this submission. As the proposed condition was recommended by the CRC and adopted by the WADA Executive Committee in its formal notice of non-compliance, it is permissible under Article 12.2.1.5.

ii. *Consideration*

835. Having determined the legal basis for imposing such a reinstatement condition, the Panel is then required to consider whether it is necessary and proportionate. In the Panel's view, it is. There is no dispute between the parties that the costs of WADA's investigation are likely to have been substantial. RUSADA submits that they could amount to millions of dollars.

836. At every stage of these proceedings, RUSADA has denied the manipulations alleged by WADA. Therefore, notwithstanding the fact that no allegation has been made that RUSADA itself was responsible for the manipulation, it was necessary for WADA to incur the significant investigation costs in order to establish RUSADA's non-compliance. For that reason, and noting that the Panel has accepted that the manipulations alleged by WADA did in fact occur, it is appropriate that WADA be reimbursed those costs as recommended in the CRC Recommendation.

837. However, the Panel does not consider it appropriate to make an open-ended order regarding the quantum of those costs. The costs for which WADA seeks reimbursement are costs that have been incurred and therefore could have been quantified by WADA. Further, Article 12.2.1.4(a) refers to payment of "*specific costs and expenses reasonably incurred*".

838. WADA did not make any direct submissions regarding the quantum, though it did submit during its closing that investigation of the various elements of this case "*has been a huge drain on its precious resources*".

839. The direct evidence in support of WADA's claim for its investigation costs is that, up to the date of the WADA I&I report dated 6 September 2019 (Exhibit CF-2, page 7):

> *… the Intelligence and Investigations Department has committed at least 6000 hours to investigating the LIMS data and expended over $1.27 million USD. Much of the expenditure (approximately $400,000USD) was spent on the services of digital forensics experts and authentication of the Moscow Data.*

840. This amount was not challenged or questioned by RUSADA and neither did it advance any alternative figures.

841. Separately, a WADA document titled 'RUSADA Non-Compliance—Questions and Answers' dated 3 February 2020 (Exhibit C-49) suggested that the costs by that stage were "*approximately USD 2 million"*, but there was no detail provided in relation to that estimate. The Panel accepts that the costs of investigation were likely in excess of the amount specified by September 2019, as the scope of the investigations was extensive and the process continued for some months (with many of the reports prepared after September 2019). However, in the absence of any further direct evidence as to costs, it is not appropriate to order that RUSADA reimburse any more than the specific amount set out in the 6 September 2019 report.

842. Accordingly, the Panel considers it appropriate to impose as a Reinstatement Condition an order that RUSADA pay a contribution to WADA's investigation costs in the amount of USD 1.27 million.

843. Although RUSADA's ability to meet such an order is not expressly stated to be a material consideration in the Panel's exercise of its discretion to impose this reinstatement condition, the Panel has been impressed by the extent of resources made available to RUSADA to put its case in these proceedings and it is confident that RUSADA will similarly be able to secure funding for purposes of meeting its reinstatement conditions and to secure its important mission for sports.

b. Costs of Implementing and Monitoring Compliance of Signatory Consequences

844. RUSADA submits that WADA cannot seek reimbursement of the costs of implementing and monitoring compliance of Signatory Consequences under Article 12.2.1.4(b) of the ISCCS in circumstances where the CRC has not recommended any Special Monitoring of RUSADA's anti-doping activities. Article 12.2.1.4(b) of the ISCCS provides that the Panel may impose, as a Reinstatement Condition, a requirement on the non-compliant Signatory to pay in full:

> *the costs and expenses reasonably incurred by WADA and/or Approved Third Parties from the date on which the decision that the Signatory was non-compliant became final until the date of the Signatory's Reinstatement, including (without limitation) costs and expenses reasonably incurred in implementing the Signatory Consequences (including the costs referred to in Articles 11.1.1.3 and 11.1.1.4 and the costs of monitoring the Signatory's compliance with the Signatory Consequences) and the costs and expenses reasonably incurred in assessing the Signatory's efforts to satisfy the Reinstatement conditions*

845. The Reinstatement Condition sought by WADA is consistent with the wording of Article 12.2.1.4(b) of the ISCCS. Although it can extend to costs of Special Monitoring or of takeover of a non-compliant Signatory's anti-doping activities, it is not limited to those matters. The Panel considers it appropriate to impose such a condition.

c. Other conditions

846. As stated above, the other reinstatement conditions sought by WADA were not the subject of challenge by RUSADA. Nonetheless, the Panel has itself considered whether those proposed conditions are necessary and proportionate.

847. Notably, a number of the proposed reinstatement conditions concern not only the conduct of RUSADA but also the conduct of third parties. These include proposed reinstatement conditions 5, 6 and 7 in WADA's amended prayers for relief in its 24 June 2020 Reply. They relevantly provide:

> *5) WADA must remain satisfied, throughout the four year period during which the consequences are in place, that RUSADA's independence is being respected and there is no improper outside interference with any aspect of its anti-doping activities …*
>
> *6) There must be no interference with the efforts of other Anti-Doping Organizations and their delegates (e.g., the International Testing Agency, IDTM, PWC, etc.) to test and/or investigate athletes in Russia.*

> *7) All consequences imposed for RUSADA's non-compliance must have been respected and observed in full by the Russian authorities throughout the throughout the four year period during which the consequences are in place.*

848. Although these proposed conditions go beyond the conditions specified in Articles 12.2.1.1 to 12.2.1.4 of the ISCCS, there is no legal impediment to imposing them. This is because they were recommended by the CRC and adopted by the WADA Executive Committee in its formal notice of non-compliance. They are therefore permissible under Article 12.2.1.5 of the ISCCS.

849. In the context of RUSADA's non-compliance, being the manipulation of the Moscow Data while the Moscow Laboratory was under the control of the Russian Investigative Committee, WADA's reasoning for seeking such conditions is clear. It is imperative that anti-doping activities in Russia be conducted legitimately and without any improper influence or interference by the State or any other third parties.

850. However, the Panel considers it more appropriate for the reinstatement conditions to be limited to matters which are expressly within the control of RUSADA. This promotes certainty regarding the scope of the reinstatement conditions, reduces the potential for further litigation arising from these proceedings and, in the Panel's hope, will promote reconciliation to encourage RUSADA (and, with it, the Russian Federation) to be reinstated as a compliant Signatory and respected member of the international sporting community.

851. The Panel also notes that interference with NADOs is already addressed in existing provisions of the 2018 WADC. For example, Articles 20.4.3 and 22.6 provide that National Olympic Committees, National Paralympic Committees and governments are to respect the autonomy of NADOs and not interfere with its operational decisions and activities.

852. The reinstatement conditions imposed by the Panel are set out in complete fashion in the operative section of this Award.

VIII. COSTS

853. Article R64.5 of the CAS Code provides:

> *In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties.*

854. In these proceedings, WADA has successfully established RUSADA's non-compliance with the WADC and, accordingly, Signatory Consequences and Reinstatement Conditions have been imposed. Therefore, WADA has been successful in obtaining

relief in these proceedings. However, not all Signatory Consequences sought by WADA have been imposed by the Panel.

855. In the course of closing submissions, both WADA and RUSADA stated that their legal costs in these proceedings exceeded CHF 1,000,000. Further, both invited the Panel to depart from the general practice in CAS proceedings of granting only moderate costs and instead requested costs orders in the order of 'multiples' of CHF 100,000.

856. These proceedings have been an outlier when compared to the general nature and complexity of CAS proceedings. The volume of materials (some 48,000 pages in total), complexity of issues and associated costs are likely to indeed be multiples of those generally seen in CAS proceedings. Further, unlike many CAS proceedings which involve athletes who may only have limited financial resources, it is clear that both Parties in these proceedings have significant means. This is, unquestionably, a unique and an isolated set of circumstances.

857. Having regard to the above matters, the Panel considers it appropriate to make the following orders as to costs:

a. The costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne in the following proportions:

   i. 80% to be borne by RUSADA; and

   ii. 20% to be borne by WADA.

b. RUSADA is ordered to pay WADA a total amount of CHF 400,000 as contribution towards the expenses incurred by WADA in connection with these arbitration proceedings.

c. RUSADA and each Intervening Party shall bear its own costs and other expenses incurred in connection with this arbitration.

IX. CONCLUDING REMARKS

858. The saga that has followed the exposure of systemic doping practices in Russian sport, including the matters which are the subject of this arbitration, has considerably damaged the history of Russian and international sport.

859. This Panel has found that, despite having an opportunity to come clean and draw a line under this scandal by providing access to the Moscow Data, Russian authorities engaged in an extensive manipulation of that data. This conduct is likely to thwart or at least substantially hinder the ability to identify those athletes who participated in the doping scheme.

860. Having further found that RUSADA failed to comply with the Post-Reinstatement Data Requirement, this Panel has accordingly imposed consequences to reflect the nature and seriousness of the non-compliance and to ensure that the integrity of sport against the scourge of doping is maintained.

861. The consequences which the Panel has decided to impose are not as extensive as those sought by WADA. This should not, however, be read as any validation of the conduct of RUSADA or the Russian authorities. In making its orders, the Panel is limited by the powers granted under the applicable law, in particular the WADC and the ISCCS. It has considered matters of proportionality and, in particular, the need to effect cultural change and encourage the next generation of Russian athletes to participate in clean international sport.

862. It is the Panel's hope that this Award will mark a new path towards reconciliation and allow Russian athletes a fresh start to contribute to their otherwise proud sporting history.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Request for Arbitration filed by the World Anti-Doping Agency ("WADA") dated 9 January 2020 is partially upheld.

2. The Panel has jurisdiction to determine this matter.

3. The Russian Anti-Doping Agency ("RUSADA") is found to be non-compliant with the World Anti-Doping Code ("WADC") in connection with its failure to procure that the authentic LIMS data and underlying analytical data of the former Moscow Laboratory was received by WADA.

4. The orders below come into effect on the date of this Award and remain in effect until the second anniversary of that date (the "Two-Year Period").

    a. Subject to the provisos set out below, representatives of the Government of the Russian Federation in the categories set out in order 4(b) below (the "Government Representatives"):

        i. May not be appointed to sit, and may not sit, as members of the boards or committees (including sub-committees) of any Signatory (or its members) or association of Signatories during the Two-Year Period.

        ii. May not be issued accreditation by or for any Signatory for any of the following events held during the Two-Year Period:

            1. The Olympic and Paralympic Games (winter or summer);

            2. Any World Championships organised or sanctioned by any Signatory. For these purposes, a "World Championship" is any event or one or more of a series of events that determines the world champion for a particular sport or discipline in a sport, but does not include qualifying events.

        iii. May not be permitted by any Signatory to participate in or attend the following events held during the two-year period:

            1. The Olympic and Paralympic Games (winter or summer);

            2. Any World Championships organised or sanctioned by any Signatory. For these purposes, a "World Championship" is any event or one or more of a series of events that determines the world champion for a particular sport or discipline in a sport, but does not include qualifying events for a World Championship.

    The provisos to this order are:

iv. this order does not apply to a Government Representative who, in their personal capacity only, is an IOC/IPC member or is otherwise elected to an IOC/IPC body or appointed by the IOC/IPC to sit on IOC/IPC bodies;

v. this order does not apply to a Government Representative who is invited to a specified event by the Head of State or Prime Minister (or equivalent) of the host country of that specified event;

vi. orders (ii) and (iii) do not apply to a Government Representative who is required to be accredited for and participate in a specified event in their capacity as an Athlete or legitimate Athlete Support Personnel;

vii. any Signatory to the World Anti-Doping Code cannot be deemed non-compliant with this order unless it is established that that Signatory knowingly contravened the order.

b. Government Representatives includes any person who, as of the date of this Award or during the Two-Year Period, met or meets one or more of the following categories:

i. The following members of the executive government: Deputy Ministers, Ministers, Deputy Prime Ministers, the Prime Minister and the President of the Russian Federation (whatever their formal title).

ii. Members of the Federal Assembly of the Russian Federation, including both the Upper House (the Federation Council) and the Lower House (the State Duma).

iii. The Heads and Deputy Heads (whatever their formal title, e.g., Directors and Deputy Directors) of the Federal Services and Agencies, and of the Centre for Sports Preparation.

iv. All persons working for the Administrative Directorate of the President of the Russian Federation and/or for the Russian Investigative Committee.

c. The Russian Federation (or any Russian Signatory or Russian national federation) may not host in the Two-Year Period, or bid for or be granted in the Two-Year Period the right to host (whether during or after the Two-Year Period), any editions of:

i. The Olympic and Paralympic Games (winter or summer);

ii. Any World Championships organised or sanctioned by any Signatory. For these purposes, a "World Championship" is any event or one or more of a series of events that determines the world champion for a particular sport or discipline in a sport, but does not include qualifying events.

Where the right to host any such event in the Two-Year Period has already been awarded to the Russian Federation, the Signatory in question must withdraw that

right and re-assign the event to another country, unless it is legally or practically impossible to do so.

d. Subject to the provisos set out below, the flag of the Russian Federation (current or historical) may not be flown or displayed in any official venue or area controlled by a Signatory or event organiser appointed by the Signatory at any of the following events during the two-year period:

    i. The Olympic and Paralympic Games (winter or summer);

    ii. Any World Championships organised or sanctioned by any Signatory. For these purposes, a "World Championship" is any event or one or more of a series of events that determines the world champion for a particular sport or discipline in a sport, but does not include qualifying events.

    The provisos to this order are:

    iii. This order does not require a Signatory to prevent spectators from bringing the flag of the Russian Federation (current or historical) into official venues of an Olympic Games, Paralympic Games or any World Championships venue;

    iv. This order does not require a Signatory to prevent the flag of the Russian Federation (current or historical) from being displayed (if necessary) for the identification of Russian nationals who are technical officials or technical delegates at the Olympic Games, Paralympic Games or any World Championships;

    v. A Signatory cannot be deemed non-compliant with this order unless the Signatory knowingly permitted the flag of the Russian Federation (current or historical) to be let fly or displayed in official venues or areas under the Signatory's control at a specified event.

e. Any Athlete from Russia and their Athlete Support Personnel may only participate in or attend any of the following events during the Two-Year Period, on the conditions set out below.

    The specified events are:

    i. The Olympic and Paralympic Games (winter or summer);

    ii. Any World Championships organised or sanctioned by any Signatory. For these purposes, a "World Championship" is any event or one or more of a series of events that determines the world champion for a particular sport or discipline in a sport, but does not include qualifying events.

    The conditions are:

    iii. The Athlete/Athlete Support Personnel shall not be subject to suspension, restriction, condition or exclusion imposed by a competent

authority in any past or future proceedings which remains in force at the time of the specified event.

iv. Russian Athletes/Athlete Support Personnel shall participate in a uniform to be approved by the relevant Signatory which shall not contain the flag of the Russian Federation (current or historical), or any national emblem or other national symbol of the Russian Federation. If the uniform contains or displays the name "Russia" (in any language or format), the words "neutral athlete" (or an equivalent) must be displayed in English in a position and size that is no less prominent than the name "Russia". For the avoidance of doubt, the uniform may contain the colours of the flag of the Russian Federation (current or historical) (collectively or in combination).

v. Subject to order (iv), Russian Athletes/Athlete Support Personnel shall not display publicly the flag of the Russian Federation (current or historical), the name "Russia" (in any language or format), or any national emblem or other national symbol of the Russian Federation, including without limitation, on their clothes, equipment or other personal items or in a publicly visible manner at any official venues or other areas controlled by the Signatory or its appointed Event organiser.

vi. The Russian national anthem (or any anthem linked to Russia) shall not be officially played or sung at any official event venue or other area controlled by the Signatory or its appointed event organiser (including, without limitation, at medal ceremonies and opening/closing ceremonies).

For the avoidance of doubt, this order does not impose restrictions in respect of any events other than the specified events.

5. RUSADA is required to satisfy the following reinstatement conditions during the Two-Year Period (or any shorter period as agreed between WADA and RUSADA) in order to be reinstated as a compliant Signatory:

a. RUSADA shall pay to WADA a contribution of USD 1,270,000 (one million, two hundred and seventy thousand United States dollars) in respect of the costs incurred by WADA from January 2019 to the date of this Award in investigating the authenticity of the data retrieved by WADA from the Moscow Laboratory in January 2019.

b. RUSADA shall, under supervision of the WADA Intelligence and Investigations department (WADA I&I) or the Athletics Integrity Unit (AIU) of World Athletics (as applicable), conduct investigations into any cases impacted by the deletions and/or alterations of the Moscow Laboratory data, as notified by WADA, including doing everything possible to locate the complete and authentic data from the Moscow Laboratory relating to those cases, so as to rectify in full the tampering that has impacted those cases;

c. RUSADA shall, as soon as possible and in good faith, provide any other support (including locating and providing any further data or information, and/or carrying out interviews or other investigative measures) as required by WADA or any other Anti-Doping Organisation to assist in determining whether Russian Athletes whose samples are listed in the Moscow Laboratory LIMS database provided to WADA by a whistle-blower in or around October 2017 have a case to answer for breach of the anti-doping rules. This includes, without limitation, providing authentic and complete hard and/or soft copies of the following documents relating to those samples: (a) doping control forms; (b) chain of custody forms; and (c) electropherograms and other records of the results of analysis of samples for EPO or related substances.

d. RUSADA shall, where requested by the WADA I&I, conduct results management in respect of adverse analytical findings identified by the targeted re-analysis of the samples obtained by WADA I&I from the Moscow Laboratory in April 2019.

e. An international observer must remain on RUSADA's Supervisory Board and RUSADA's Director General must provide quarterly reports to WADA confirming that RUSADA's independence has been fully respected by the Russian authorities and no attempt has been made to interfere in any of its operations.

f. RUSADA must not interfere with the efforts of other Anti-Doping Organisations and their delegates (e.g., the International Testing Agency, International Doping Tests & Management, Professional Worldwide Controls, etc.) to test and/or investigate athletes in Russia.

g. All consequences imposed for RUSADA's non-compliance must have been respected and observed in full by RUSADA throughout the Two-Year Period during which the consequences are in place.

h. WADA shall be paid in full the costs and expenses that it has reasonably incurred from the date of this Award until the date of RUSADA's reinstatement, including (without limitation) the costs and expenses reasonably incurred in implementing the above consequences and the costs of monitoring compliance with the consequences and with the reinstatement conditions.

6. RUSADA is to pay a fine to WADA of 10% of its 2019 income or USD 100,000 (one hundred thousand United States dollars) (whichever is lower) within 90 (ninety) days from the notification of the present arbitral award. Such amount shall accrue interest at a rate of 5% *per annum* in case of non-timely payment.

7. The costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne 80% by RUSADA and 20% by WADA.

8. RUSADA is ordered to pay WADA a total amount of CHF 400,000 (four hundred thousand Swiss francs) as contribution towards its legal and other expenses incurred in connection with these arbitration proceedings within 90 (ninety) days from the date the

present award. Such amount shall accrue interest at a rate of 5% *per annum* in case of non-timely payment.

9. RUSADA and each Intervening Party shall bear its own legal costs and other expenses incurred in connection with this arbitration.

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

Seat of arbitration: Lausanne, Switzerland
Date: 17 December 2020

THE COURT OF ARBITRATION FOR SPORT

Judge Mark L. Williams SC
President of the Panel

Prof. Avv. Luigi Fumagalli
Arbitrator

Dr Hamid Gharavi
Arbitrator

Mr Alistair Oakes
Ad hoc Clerk