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**RUSADA Comments on the CAS
Award in WADA v. RUSADA
(CAS 2020/O/6689)**

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General comments

On 17 December 2020, the CAS Panel rendered its reasoned award in the matter CAS 2020/O/6689 WADA v. RUSADA (**CAS Award**). The full unredacted CAS Award was published by the CAS on 14 January 2021.

Despite the publication of the CAS Award with the full reasoning of the Panel, WADA issued a "Legal Note" purporting to provide additional explanations regarding the background of the dispute and the content of the CAS Award. However, the WADA "Legal Note" fails to provide a balanced summary of the Panel's findings: instead, it sets out a one-sided and largely redundant summary of the Parties' disagreements, elaborating on numerous issues outside of the scope of the dispute while at the same time presenting certain selective excerpts taken out of context from the CAS Award that are favorable to WADA's case. In light of the above, RUSADA deems it necessary to provide some context and to clarify a few of the issues raised by WADA in its "Legal Note".

As RUSADA has already stated publicly, it strongly disagrees with the findings in the CAS Award regarding the alleged data manipulations, which – in RUSADA's view – are based on a flawed and one-sided assessment of the facts and were not sufficiently proven. RUSADA regrets that the Panel did not take into account the detailed submissions and evidence submitted by RUSADA and the intervening parties over the course of the arbitral proceedings, as detailed below.

RUSADA further regrets that it has been deemed non-compliant with the World Anti-Doping Code (**WADC**) exclusively due to the fact that WADA had not allegedly been able to receive an authentic copy of the data of the Moscow antidoping laboratory to which RUSADA never had any access. Essentially, RUSADA is punished for violating an obligation that in principle it could not fulfill.

This decision not only contravenes basic principles of fairness, but is also unwarranted in light of the significant progress made by RUSADA during the

reinstatement process, which has been expressly acknowledged by WADA. Therefore, and for the reasons set out further below, RUSADA considers the sanctions imposed by the CAS Panel to be unjustified.

At the same time, RUSADA fully supports the Panel's rejection of a number of measures requested by WADA. The CAS Award makes it clear that the Panel did not condone and refused to endorse WADA's attempt to collectively and indiscriminately punish Russian athletes and Russian sport. Resisting significant public pressure by WADA, its stakeholders, and certain media, the Panel rejected and/or substantially limited the measures requested by WADA and, among others, took the following decisions:

- WADA had requested the imposition of measures over a four-year period. The Panel reduced this to a period of two years from the date of the CAS Award (CAS Award, ¶¶743-745).
- WADA had requested a blanket ban on all Russian athletes and support personnel from all covered events, requiring them to prove that they were not mentioned in incriminating circumstances in the relevant anti-doping data, that there were no indications of manipulation, alteration or deletion of relevant anti-doping data relating to them and that they had undergone adequate testing prior to the relevant event. The Panel considered that these requirements were excessively burdensome as well as disproportionate and refused to impose an independent ban against Russian athletes and support personnel (CAS Award, ¶¶766-773).
- WADA had requested that any Russian athletes and support personnel admitted to covered events would have to participate as neutral athletes in a uniform that could contain neither the name "Russia" nor the Russian flag and colors and that Russian athletes and support personnel could not display any flags, colors, emblems or symbols of the Russian Federation. The Panel refused to endorse this measure and held that Russian athletes will be able to wear the colors of the Russian flag and the name "Russia" on their uniforms during covered events, and that the prohibition of the Russian flag would not apply to spectators (CAS Award, ¶¶760-764).
- The Panel reduced the scope of events affected by the measures to the Olympic and Paralympic Games as well as to World Championships and refused to extend the measures to the Youth Olympic Games as well as to events organized by Major Event Organizations (such as the FIFA Football World Cup), as requested by WADA (CAS Award, ¶¶730-738).
- WADA had requested that the Panel impose restrictions on officers and executives of the Russian Olympic Committee and the Russian Paralympic Committee and ban them from attending the Olympic and Paralympic Games, the Youth Olympic Games, World Championships and other major sporting events. The Panel refused altogether to endorse WADA's request (CAS Award, ¶765).

- WADA had requested a broad collective ban against Russian government officials attending the Olympic and Paralympic Games, the Youth Olympic Games, World Championships and other major sporting events. The Panel substantially limited the number of government officials targeted by the measures sought by WADA and clarified that (i) Russian government representatives may attend covered events upon personal invitation by a head of state and that any measures will not apply to (ii) individuals that were members or office holders within the International Olympic Committee or the International Paralympic Committee in a personal capacity as well as to (iii) individuals requiring accreditation as athletes or support personnel (CAS Award, ¶¶746-753).

In light of these important rulings by the Panel rejecting or significantly reducing the excessive sanctions requested by WADA, and putting the interests of Russian athletes and Russian sport first, as well as taking into account the need for legal certainty, RUSADA has made the decision not to challenge the CAS Award before the Swiss Supreme Court, despite the fact that it disagrees with many of the central findings and statements contained in the award's reasoning. At the same time, the CAS proceedings and WADA's subsequent actions have made it clear that the centralized sanctions system that WADA had sought to create with the introduction of the ISCCS and the revised 2018 WADC has significant flaws and shortcomings, among others because the reforms unilaterally enacted by WADA were rushed through with a view to "punishing" Russia, and without properly considering the resulting legal and practical consequences. The Panel's refusal to endorse significant parts of the measures requested by WADA is a direct consequence of these shortcomings. Moreover, the fact that WADA moved the main provisions from the ISCCS – which were in dispute in the present matter – to the 2021 WADC in the wake of RUSADA's challenge clearly demonstrates that the legal arguments raised by RUSADA in the arbitral proceedings, the most significant ones of which are summarized below, were justified.

Comments regarding human rights and due process rights

The Panel made it clear that human rights and due process rights applied – including by virtue of Article 4.4.2 of the ISCCS – and imposed binding obligations both on WADA and on the Panel itself (CAS Award, ¶¶545, 721, 808).

The Panel confirmed that "*[p]roportionality is a fundamental tenet of natural justice and cannot be excluded without clear words.*" (CAS Award, ¶721) and found that many of the measures suggested by WADA were not proportionate. The Panel did not accept the submissions of WADA that the principle of proportionality either did not apply or was already "built into" the ISCCS (CAS Award, ¶720). The Panel rather either rejected or significantly reduced and amended the measures sought by WADA based expressly on considerations of proportionality (CAS Award, ¶¶719-726; 732-733; 739-745; 751-753; 771-772; 811; 827). In particular, the Panel reduced

the period during which these measures would apply from four to two years and refused to impose a blanket ban on Russian athletes and support personnel.

During the CAS proceedings, RUSADA had also explained in detail how the measures sought by WADA violated further human and due process rights and guarantees. RUSADA notably pointed out that the measures sought by WADA constituted sanctions and that their nature as sanctions required WADA (and the Panel) to afford minimum procedural and substantive protections to those affected by them. RUSADA further showed that the measures sought by WADA violated the procedural rights (and in particular the right to be heard) of those affected by them as well as the presumption of innocence and would, if imposed, have amounted to discriminatory collective punishment.

It is regrettable that the Panel did not discuss these arguments in more detail in the CAS Award and failed to engage with several issues raised in RUSADA's submissions and by RUSADA's experts, including that the measures requested by WADA violated the presumption of innocence and would have amounted to discriminatory collective punishment of Russian sport, and in particular Russian athletes. However, this may be because the Panel had already refused to endorse a number of the measures requested by WADA and thus presumably saw no need to enter into a detailed discussion of issues that were rendered less acute by its decision. The decision makes it clear that WADA's intention to "punish" Russia and to "hurt Russia's pride" as well as the presumption of guilt and the system of collective punishment, that is at the basis of the measures that WADA had sought to impose, are contrary to the spirit of international sport and violate the most basic notions of fairness and natural justice. It was therefore largely not endorsed by the CAS Panel.

Comments regarding the applicability of the ISCCS

As the Panel rightly observed, "[o]ne 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" (CAS Award, ¶546). Regrettably, despite acknowledging the importance of this issue, the Panel only engaged in a rather superficial analysis and failed to address many of the key questions that arose under Swiss law.

RUSADA's position was that WADA's unilateral adoption of the 2018 WADC and the ISCCS constituted a fundamental departure from the system that had been put in place since the WADC's adoption in 2003, as these new provisions granted WADA overly broad sanctioning powers over both Athletes and Signatories. Indeed, until WADA unilaterally enacted these new rules, any consequences imposed in case of non-compliance under the WADC were to be decided by the relevant Signatories, such as the IOC, International Federations and/or Major Events Organizations.

RUSADA's position was that consent was required in order for the new system adopted by WADA to become binding on an individual Signatory, such as RUSADA. Indeed, the Signatories could never have anticipated that WADA would unilaterally seize the wide-ranging powers conferred to it under the ISCCS.

As a matter of fact, many of the stakeholders who commented on the draft 2018 WADC and ISCCS in 2017 expressed grave concerns on the paradigm shift envisaged by WADA. RUSADA regrets that the Panel ignored, and in fact did not mention, any of the criticism that had been expressed by many stakeholders at the time.

That being said, RUSADA notes that the Panel appears to have accepted that a Signatory's consent is indeed necessary in order for the 2018 WADC and the ISCCS to become binding. In this regard, RUSADA's position was that it never consented to the 2018 WADC and the ISCCS. Unfortunately, despite acknowledging that "*under Swiss law, silence per se cannot be interpreted as consent*" (CAS Award, ¶550), the Panel nevertheless went on to interpret RUSADA's silence to the 2018 WADC and the ISCCS as consent.

RUSADA is disappointed that, instead of conducting a thorough review of the extensive factual, legal and expert evidence filed on the record, the Panel appears to have ignored many elements and tailored its reasoning to reach a pre-determined outcome. As a result, the Panel's reasoned decision on the (in)applicability of the 2018 WADC and the ISCCS is legally unsatisfactory and at odds with the facts.

RUSADA welcomes WADA's decision, in the context of the 2021 revision of the WADC, to require Signatories to sign a written declaration confirming their commitment to ensure that their anti-doping policies and rules conform with the 2021 WADC and the International Standards. The fact that WADA decided to require Signatories to sign a written declaration confirming their commitment to conform with the WADC and the International Standards only confirms that RUSADA's legal position regarding application of the ISCCS is right. The Panel unjustifiably did not pay due consideration to.

Comments regarding the alleged data manipulations

RUSADA finds it regrettable that it was found non-compliant with the WADC on the grounds of the alleged data manipulations, although neither WADA nor the Panel asserted that RUSADA committed or had any involvement in the alleged manipulations. A brief and objective recapitulation of the main underlying facts is necessary.

WADA allegedly received an extract of the Moscow Laboratory's LIMS (Laboratory Information Management System) data from a whistleblower in October 2017, which related to samples obtained in the period from January 2012 to August 2015 (**Whistleblower's LIMS Copy**). This data was said to include potential adverse analytical findings made on the initial testing of doping samples which had not been reported in WADA's official reporting system or followed up with confirmation testing. WADA considered that this corroborated the findings in the First McLaren Report of the so-called "*disappearing positive methodology*".

On 20 September 2018, the WADA Executive Committee decided to reinstate RUSADA as a WADC-compliant organization provided *inter alia* that RUSADA

would "*procure*" that the authentic LIMS data of the Moscow Laboratory would be received by WADA no later than 31 December 2018. WADA conducted a pre-data retrieval mission visit on 28 November 2018 and, on 17 December 2018, a WADA technical team travelled to Moscow to access and copy the data. Eventually, between 10 and 17 January 2019, a WADA expert team entered the Moscow Laboratory and made copies of the Moscow Data. Over 23 terabytes of data were obtained, including a copy of the LIMS database, which was "*a massive amount*" (CAS Award, ¶783) (**Moscow Data**).

In the course of the CAS proceedings, RUSADA learnt that WADA was not properly prepared for the mission and in fact did not follow best forensic practices and proper methodology for data extraction. In particular, WADA failed to protocol or even give any specific instructions to the Moscow Laboratory personnel as to the necessary preparations for the data extraction and related required operation of the LIMS system prior to its pre-retrieval visit of 28 November 2018 and its data extraction mission of January 2019. In fact, WADA was unprepared and staffed its team with people who lacked knowledge of the Moscow LIMS, its features and specifics of its operation. It did not conduct interviews and technical discussions with the Moscow Laboratory personnel and, as was revealed, was not even aware of the amount of data that needed to be retrieved. Regardless of the obvious lack of knowledge of how the system works and how the data has to be copied to avoid any loss of information, WADA did not follow the guidance of the Moscow Laboratory personnel who were the only ones to know the functioning of the Moscow LIMS.

As a result, the Moscow laboratory personnel, who did not receive any guidance from WADA, continued to operate the live LIMS in its usual way, where certain operations had to be performed on a daily basis (including the ongoing work with files that required their modification or deletion as necessary, and that, importantly, did not even concern sample analysis because the LIMS covers not only the files that concern sample analysis). The modification and deletion of files, which were caused by the regular operation of the live file management system – LIMS – was interpreted or presented by WADA as intentional massive deletion and modification of the Moscow Data files. Further, because WADA personnel did not follow instructions from the Moscow laboratory personnel before and during the retrieval process, the files were not copied properly.

After the Moscow Data had been obtained, WADA, together with its team of forensic experts from the Institute of Forensic Science of the University of Lausanne, compared the Moscow Data to the Whistleblower's LIMS Copy. Any discrepancies between the two data sets were interpreted in favor of the Whistleblower's LIMS Copy as if it was an absolute truth. However, the origin, the nature and the content of the Whistleblower's LIMS Copy raises a number of justified questions, which were unfortunately not sufficiently investigated and paid attention to by the Panel. In particular, almost nothing is known about the origin of the Whistleblower's LIMS Copy, it is not known where it originated from, whether it was modified and at which point in time, WADA did not submit any evidence demonstrating that it had conducted proper verification of the authenticity and integrity of the Whistleblower's

LIMS Copy. RUSADA's legitimate questions and concerns, supported by its forensic expert, as to the authenticity and integrity of the Whistleblower's LIMS were unfortunately not properly addressed by WADA. In contrast, the Kaspersky Lab was able to establish that there were no traces of the existence of the Whistleblower's LIMS copy on the Moscow Laboratory servers. In other words, it never existed on the Moscow Laboratory servers and was created separately, outside the Moscow laboratory. WADA did not dispute the findings of the Kaspersky Lab. In this regard, it is worth mentioning that the Moscow LIMS was accessed remotely from the United States by the users "tim-sobolevsky" and "oleg.migachev", the former employees of the Moscow Laboratory, who moved to the United States shortly before Mr Rodchenkov fled there as well, over 350 times until June 2016, i.e. before WADA received the Whistleblower's LIMS Copy in October 2017.

In circumstances where the authenticity and reliability of the Whistleblower's LIMS Copy had not been ascertained, RUSADA is disappointed that the Panel upheld WADA's submission that any discrepancy between the Whistleblower's LIMS Copy and the Moscow Data was systematically interpreted as a proof of malevolent data manipulations. It is also troublesome that the Panel ignored the explanations of RUSADA's technical experts and witnesses. In this regard, RUSADA regrets that the Panel made gratuitous remarks towards some of the witnesses appearing for RUSADA. RUSADA considers these comments unjustified and that they represent the Panel's subjective views, which do not reflect an objective picture of the hearing process.

While comparing the two sets of data – the Whistleblower's LIMS and the Moscow LIMS – the "Raw Data", that WADA obtained in full, was not taken into consideration. The raw data is the automatically generated result of the Initial Testing Confirmation Procedure at the Moscow Laboratory underlying LIMS entries that are, by contrast, made manually. This is very concerning due to the fact that "Raw Data" is the key evidence, as was also admitted by WADA during the proceedings, because it is automatically generated by the testing equipment and is impossible to manipulate. In this regard, it is important that the experts engaged by WADA did not find any traces of manipulations of the raw data as confirmed in their report. Another disturbing example is that there has been no analysis of the consistency between the Moscow LIMS and the Whistleblower's LIMS Copy with the actual doping samples from the Moscow Laboratory that RUSADA provided to WADA in April 2019. RUSADA is disappointed that the Panel decided to ignore these crucial elements without any proper justification and instead exclusively relied on the LIMS data which was highly unreliable and was restored several times from various backups created by unknown persons in different time periods.

Finally, the CAS proceedings highlighted an additional important facet. RUSADA was forced to respond to a number of factual allegations before the CAS, while at the same time not being granted a fair opportunity to properly do so. As mentioned, WADA extracted and analyzed "*a massive amount*" of data. WADA took approximately 10 months and more than 6,000 hours to complete its investigation of the alleged data manipulations. RUSADA, on the other hand, was afforded only a

fraction of that time to analyze and rebut the detailed allegations WADA had advanced, which showed a clear inequality of arms between the parties to the detriment of RUSADA. Further, and importantly, WADA refused to produce crucial files underlying the Whistleblower's LIMS Copy on the ground of a purported confidentiality undertaking between WADA and the whistleblower. As a result, RUSADA was unable to verify the authenticity and integrity of the data received from the whistleblower on which WADA relied to support its case. Without access to the same data and time resources as WADA, RUSADA thus had no choice but to limit its efforts to underlining the flaws and unproven assumptions in WADA's methodology.

Conclusion

In sum, and in spite of the disagreements and reservations with regard to the Panel's findings summarized in these Comments, RUSADA considers that this chapter has now been closed and is looking forward and committed to working with WADA with a view to fully restoring RUSADA's membership status. RUSADA trusts that this process will be constructive and based on a transparent and realistic road map in line with RUSADA's obligations under the WADC. RUSADA remains fully committed to the fight against doping but will continue to defend the rights of clean Russian athletes and to oppose any form of discrimination against Russian sport. It is RUSADA's hope that WADA will in time view the dispute and the CAS proceedings as an opportunity to learn and as a chance to create an international compliance system together with its Signatories, not against them.
