Arbitration CAS ad hoc Division (OG London) 12/007 International Canoe Federation (ICF) v. Jan Sterba, award of 6 August 2012

Panel: Mr Efraim Barak (Israel), President; Mr Ricardo de Buen Rodríguez (Mexico); Mr Thomas Lee (Malaysia)

Canoe
Doping (ß-methylphenylethylamine)
BM as a specified stimulant
Application of Art. 10.5.2 in a case where Art. 10.4 applies
Measure of the sanction

1. **By virtue of the written and oral evidence given by the different experts, the nature of the substance ß-methylphenylethylamine (BM) has been established to the satisfaction of the hearing panel as being a stimulant. The clear way the supplement is presented by its manufacturer also supports this conclusion. It follows that, under the clear wording of the 2012 Prohibited List, BM is a prohibited substance. However, BM is not expressly listed in Art. S6a of the prohibited list under Non-Specified Substances. As the final sentence of S6a provides that a stimulant not expressly listed in this section is a Specified Substance, BM is therefore a Specified Substance.**

2. **Arts. 10.5.1 and 10.5.2 of the ICF Anti-Doping Rules are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases. Art. 10.5.2 should not be applied in cases where Arts. 10.3.3 or 10.4 apply, as those articles already take into consideration the athlete's degree of fault for purposes of establishing the applicable period of ineligibility.**

3. **The facts that an athlete has established how the Specified Substance entered his or her body, that he acted from the very beginning in the utmost of good faith, that it is undisputed that he did not seek to gain a competitive advantage, that he compared the ingredients of the nutritional supplement with the 2012 Prohibited List, that he then sought the advice of an independent, qualified practitioner, that he declared the supplement on his Doping Control Form and that he is a senior athlete with a long-term clean anti-doping record, show to the requested comfortable degree of satisfaction of the hearing panel, a degree of fault to be so small that it justifies the full reduction of the period of ineligibility to no period, and the sanction of a reprimand.**

The Applicant, the International Canoe Federation (ICF), is the worldwide governing body of Canoe sport and is recognised as such by the International Olympic Committee (IOC).

The Respondent, Mr Jan Sterba, is an Athlete of Czech nationality, competing in Canoeing, as part of the K4 and K2 crews.

The Interested Parties are the Czech Olympic Committee (COC) and the IOC.

The COC is the national Olympic Committee in the Czech Republic. As such, and pursuant to the Olympic Charter, Chapter 4, Rule 27.7.2, the COC has *"the right to send competitors, team officials and other team personnel to the Olympic Games in compliance with the Olympic Charter"*.

The IOC is an international not-for-profit organisation, in the form of an association with the status of a legal entity, recognized by the Swiss Federal Council. The seat of the IOC is in Lausanne, Switzerland. The object of the IOC is to fulfil the mission, role and responsibilities as assigned to it by the Olympic Charter. One of the paramount roles of the IOC is *"to ensure the regular celebration of the Olympic Games"* (Art. 2(3) Olympic Charter).

The elements set out below are a summary of the main relevant facts as established by the Panel on the basis of the submissions of the parties. Additional facts may be set out, where relevant, in the legal considerations of the present award.

The Respondent was qualified to compete in the XXX Olympiad ("London 2012") based on his results and achievements during the ICF World Championship, which was held in Szeged, Hungary in 2011.

On 17 May 2012, during the ICF European Qualifier competition held in Poznan, Poland, the Respondent (who was competing in the Canoe Sprint) was selected for in-competition doping testing. Consequently, and pursuant to the testing procedure under the International Standard for Testing, he was requested to fill out a Doping Control Form before taking the sample. On this form he recorded his usage of Vitamin 4, Energezye Napoje, Star Life and Shotgun ("the Supplement").

The Supplement, the full commercial name of which is "NO SHOTGUN", is a nutritional supplement. It is presented on its manufacturer's website as *"… the first muscle building supplement of its kind to use a superior synergistic blend of effective compounds combined with a cutting-edge pharmaceutical delivery system that yields mind blowing, skin bursting effects"*.

The urine "A" sample taken from the Respondent (No. 2661670) was received at the WADA-approved laboratory at the Institute of Sport, Department of Anti-Doping Research, in Warsaw, Poland on 22 May 2012, and the Analysis was performed on 14 June 2012. The Analysis revealed the presence of ß-methylphenylethylamine ("BM").

The report of the laboratory report, dated 14 June 2012 and addressed to the Polish Commission Against Doping in Sport, further submits that *"According to "the WADA 2012 Prohibited List" Beta-methylphenylethylamine is included in the group S6 – Stimulants and it is prohibited in sport in competition"*. Therefore the *"Status"* of the finding was categorized by the laboratory as an *"AAF – Adverse Analytical Finding" ("the Finding")*.

Having established that there was no apparent departure from the International Standards for Testing or Laboratory Analysis and that the sample had been identified as the sample collected from the Respondent, by letter dated 14 June 2012, the ICF notified the Czech Canoe Union (CCU) of an Adverse Analytical Finding concerning the Respondent's *"A"* sample. The letter further stated that due to the findings, the ICF must suspend the Respondent from all competitions and canoeing activities immediately.

Consequently, by means of the abovementioned letter, the Respondent was provisionally suspended as of 14 June 2012.

In same letter, the ICF also instructed the CCU as follows:

> *"As this athlete was part of the Czech Olympic qualifying team the ICF must instruct the Czech Canoe Union not to select him for the Olympic Games until the doping case is finalized"*.

By letter of 25 June 2012 addressed to the ICF, counsel for the Respondent requested the performance of a B-Sample analysis as well as a copy of the laboratory analysis report. He also requested, in same letter, the lifting of the provisional suspension.

By letter dated the same day, CCU informed ICF that the Respondent had requested a preliminary hearing, to be convened within four days, and a Final Hearing, to take place in the first week of July 2012.

By a further letter dated the same day, ICF forwarded to the Respondent an email of 20 June 2012 from Dr. Olivier Rabin, Science Director of the World Anti-Doping Agency (WADA), which explained that, in WADA's view, BM was considered to fall under category S6b (Specified Stimulants) of the 2012 Prohibited List which came into force on 1st January 2012 (*"2012 Prohibited List*"). He stated that this was the case because BM was structurally related to amphetamine, a substance expressly proscribed by category S6a of the 2012 Prohibited List, and that BM was also presented as having stimulatory properties.

On 28 June 2012, the Respondent sought further clarification from ICF of the category of Prohibited Substances under which BM was considered to be included. The ICF responded on the same day that the substance had to be considered as included under the clause, *"any other substances with similar chemical structure and similar biological effect(s)"* (*"the Similarity Prohibition Clause"*), as expressed in the final sentence of category S6b of the 2012 Prohibited List.

On 3 July 2012, the results of the B-Sample analysis were received, which confirmed the A-Sample analysis of the presence of BM and thus confirmed the adverse analytical finding.

On 4 July 2012, a Final Hearing of the ICF DCP took place at the ICF headquarters in Lausanne, Switzerland.

The ICF DCP found that BM, because it differed structurally from amphetamine only by virtue of the position of the methyl group on the alphatic chain, was similar to amphetamine (a Non-Specified

Stimulant listed under category S6a of the 2012 Prohibited List) and because BM also had similar biological effects to amphetamine it was caught under the Similarity Prohibition Clause and was therefore a Specified Prohibited Substance.

On 9 July 2012, the ICFDCP ruled that:

1. *The [Respondent] is guilty of the offence of using a prohibited substance under ICF Anti-Doping Rules as per article 2.1.*
2. *The following sanctions shall be imposed on the [Respondent]:*

   The ICF imposes a sanction of six months from the date of provisional suspension commencing 14 June 2012 until 14 December 2012 ("the ICF DCP Decision").

On 16 July 2012, the Respondent filed an appeal against the decision of the ICF DCP and on 23 July 2012, a hearing took place before the ICF Court of Arbitration (ICFCA) at the ICF headquarters in Lausanne, Switzerland.

At that hearing, ICFCA found that the A and B Sample analyses performed by the WADA-approved Warsaw Laboratory had provided sufficient and acceptable evidence of BM in the Respondent's urine sample.

The decision of the ICFCA was that the ICF had not established that the substance detected, BM, was to be considered a Prohibited Substance under the 2012 Prohibited List. Their reasoning for this was that, despite the chemical structural similarity between BM and amphetamine, the Similarity Prohibition Clause was, on its true construction, only applicable to substances similar to S6b Specified Stimulants and not those similar to S6a Non-Specified Stimulants. They further found that any ambiguity in wording or interpretation of the S6 category may not be to the disadvantage of the Respondent and, therefore, had to be interpreted in his favour.

On those grounds, on 24 July 2012, ICFCA granted the Respondent's appeal and set aside the decision of the ICF DCP, replacing it with a decision stating that *"No anti-doping rule violation has been committed by Mr Jan Sterba"* (*'the ICFCA Decision'*). This decision was notified to the parties on 24 July 2012 and the reasons were communicated to them on 29 July 2012.

Explaining that he considered the ICF to be moving slowly to give effect to the ICFCA Decision while it considered its position and decided whether or not to bring an appeal before the CAS, and further explaining the time pressures which he faced with regard to approval for his entry to London 2012, on 28 July 2012 the Respondent lodged a pre-emptive application with the CAS (CAS OG 12/005). In this Application, the Respondent sought to confirm the ICFCA Decision before the final jurisdictional body so that, if confirmed, the ICF would be obliged to issue its approval of his taking part in London 2012. By an award of 29 July 2012, the CAS found that the Respondent did not have standing to bring the appeal as he was not seeking to challenge the ICFCA Decision but to have it confirmed instead (The full award in CAS OG 12/005 was notified to the parties on 30 July 2012).

On 29 July 2012, at 22:41, the Applicant submitted an application by means of an application form to the CAS ad hoc Division. The Applicant informed the CAS court office that the full Application with the arguments and supporting evidence would be served by 16:00 on 30 July 2012.

On 30 July 2012, the President of the CAS ad hoc Division for the Games of the XXX Olympiad in London, nominated a Panel composed of Mr. Efraim Barak (Israel), as President, Mr. Thomas Lee (Malaysia) and Mr. Ricardo de Buen Rodríguez (Mexico), as Arbitrators, to deal with the application. On the same date, Mr Darragh O'Sullivan, barrister in London, was appointed *ad-hoc Clerk* to the Panel.

The Application was lodged against Mr Sterba as Respondent while the COC and the IOC were referred to as *"Other Parties"*. Accordingly, in the Summons to Appear issued by the President of the Panel, the CAS Court Office communicated the application to Mr Sterba as Respondent, and to the COC and the IOC as Interested Parties.

The Panel granted the Respondent and the Interested Parties until 10am on 31 July 2012 to file an answer if they chose to do so. Pursuant to Art. 15 c) of the Arbitration Rules for the Olympic Games, a hearing was set for 31 July 2012 at 6pm in London.

On 30 July 2012 the Applicant submitted to the CAS Court Office a document considered as a Statement of Appeal and named by the Applicant as the Appellant's Argument, which included 26 exhibits ("Statement of Appeal").

On 31 July 2012, the Respondent submitted his Answer to the CAS, and requested the appointment of an interpreter of the Czech language to allow the Respondent to participate in the hearing. In his Answers, the Respondent requested, *inter alia*, that the Panel take into consideration all of his arguments expressed in CAS OG 12/005.

Also on 31 July 2012, the COC submitted its observations on the Application and referred also to the observations they submitted in CAS OG 12/005. In addition the COC submitted further comments specifically about the current proceedings.

Also on 31 July 2012, the CCU submitted its observations on the matter, which fully supported the Respondent.

The IOC submitted a letter on 31 July 2012, in which it stated that the IOC was of the opinion *"that such case is a matter to be resolved between the ICF and Mr. Sterba. The IOC does not have any evidence or arguments to submit in this case, and respectfully declines to appear before the Panel"*.

In § 7 of the Statement of Appeal, the Applicant requested that the CAS *"set aside the decision of the ICF Court of Arbitration dated 24 July 2012 and restore the decision of the ICF Doping Control Panel dated 9 July 2012 imposing on Mr Sterba a ban of 6 months from 14 June 2012"*. Alternatively, the CAS was invited to *"find Mr Sterba guilty of an anti-doping rule violation and ban him for at least three months from 14 June 2012"*.

After analysing the submissions of the parties and pursuant to Art. 15 c) of the Arbitration Rules for the Olympic Games, the Panel issued a further procedural order inviting the Applicant and the Interested Parties to make further submissions on any points raised in the proceedings in CAS OG 12/005, which arguments were incorporated by reference in paragraphs 2 and 34 of the Respondent's Answer, by 3.30pm on 31 July 2012.

Neither the Respondent nor any of the Interested Parties filed further submissions.

The hearing took place on 31 July 2012, starting at 6pm.

The Applicant, as an organisation, was represented in person by its Secretary General, Mr Simon Toulson and was represented legally by Mr Julian Pike and Mr Tom Rudkin of Farrer & Co, solicitors and Mr Daniel Saoul, barrister at the Bar of England and Wales.

The Respondent appeared in person represented by Dr Jan Šťovíček, Attorney-at-Law at the Czech and Slovak Bar of Attorneys. He was assisted by Ms Lenka Pyszkova, a language services volunteer for the London Organizing Committee of the Olympic Games who kindly attended to interpret for him.

The COC was represented in person by Mr Jiří' Kejval, Vice President of the Czech Olympic Committee.

The Panel was assisted at the hearing by Ms Estelle de La Rochefoucauld, Counsel to the CAS.

At the beginning of the hearing the President of the Panel asked the parties if they were satisfied with the composition of the Panel. All stated that they were. The Respondent raised an objection to the presence of Mr Toulson on behalf of ICF at the hearing as he had been a member of the ICF DCP Panel, the tribunal of first instance which dealt with and issued the first decision in this matter. Finally, after both parties explained their positions in respect of the objection, it was agreed between the parties to accept the Panel's proposal that Mr Toulson would remain in attendance in his capacity as an observer on behalf of ICF but would not make representations on its behalf.

At the hearing, the panel heard opening and closing submissions from the Applicant, Respondent, the COC and heard evidence from Dr. Olivier Rabin, Science Director of WADA; Dr José A. Pascual, Deputy-Head of the Doping Control Laboratory of Barcelona and Dr Thomas Hudzik, a toxicologist at Abbott Laboratories, Illinois, USA by telephone and from the Respondent, Mr Sterba, in person. Two other expert opinions were submitted by the parties (Statements by Dr. Audrey Kinahan for the Applicant and by Dr. Opletal for the Respondent). It was decided by the parties, each one deciding in relation to its own witness, not to call either of these experts to give oral evidence before the Panel, however their statements are both part of the evidence in the CAS file which was considered by the Panel.

Each person heard by the Panel was invited by its President to tell the truth subject to the consequences provided by the law and was examined and cross-examined by the Parties as well as by the Panel.

At the conclusion of the hearing, the parties confirmed that they did not wish to raise any objection with the Panel as to the equality of the parties or their right to be heard in an adversarial proceeding.

The Panel clarifies that the following short summaries of the parties' positions are only roughly illustrative and do not purport to detail all of the submissions made by the parties. The Panel has, however, thoroughly considered in its deliberation all of the evidence and arguments submitted by the parties, even if there is no specific or detailed reference to that evidence or those arguments in this award.

The Applicant submitted that BM is a Prohibited Substance and advanced four alternative arguments for the same:

- BM is a stimulant. The wording of S6 of the 2012 Prohibited List starts, "*All stimulants […] are prohibited*". BM is, therefore, prohibited.
- BM is similar (in terms of the Similarity Prohibition Clause) to amphetamine. Amphetamine is itemised in S6a of the 2012 Prohibited List as a Non-Specified Stimulant. On a purposive interpretation of S6 and, in particular, the Similarity Prohibition Clause, it is absurd that substances similar to Specified Stimulants in S6b should be prohibited but that substances similar to Non-Specified Stimulants in S6a should not. This is because testing positive for the S6a Non-Specified Stimulants leads to an automatic 2-year ban under the World Anti-Doping Code (*"the Code"*), whereas an athlete testing positive for a S6b Specified Stimulant could seek to invoke Article 10.4 of the Code to have his sanction reduced if he succeeded in satisfying the Panel that the requirements under Article 10.4 had been met. It follows that the prohibited substances in S6a are more serious and that the authors of the Code cannot have intended for the Similarity Prohibition Clause to apply only to the less serious substances. By virtue, therefore, of the Similarity Prohibition Clause, and BM's similarity to amphetamine, BM is a prohibited non-specified substance. It was this result which was achieved at first instance in the ICF DCP Decision.
- BM is similar to Phenpromethamine. Phenpromethamine is itemised in S6b of the 2012 Prohibited List as a Specified Stimulant. If the Panel is not satisfied that the purposive interpretation of S6b is the correct one, then on a literal interpretation BM is still a prohibited substance by virtue of its similarity to the S6b substance, Phenpromethamine. It is this literal interpretation that was adopted in the ICFCA Decision.

  Regardless of which of the three above routes is the correct one, by virtue of the final sentence of S6a (*"A stimulant not expressly listed in this section is a Specified Substance"*), it follows that, by any of the routes, BM is a Specified Stimulant.
- Alternatively, in the event that none of S6 possibilities is found to apply to BM, because BM has not been approved by a current governmental regulatory authority for human therapeutic use, under S0 of the 2012 Prohibited List, BM is prohibited.

In light of the Respondent's submission at the hearing, it is now accepted by both parties that BM is similar to both amphetamine and phenpromethamine so, applying any of the above routes, it is clear that an anti-doping rule violation has occurred.

In the circumstances, it is accepted by Applicant that the Respondent did not intend to cheat. It is accepted that he has an unblemished 10-year history of doping control tests and that he has acted *bona fide*. It is further accepted that he has not tried to conceal or mislead the anti-doping authorities and that he was honest when completing the Doping Control Form. Accordingly, it is agreed that, because BM is a Specified Substance, Art. 10.4 of the Code (*Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances*) applies in this case. It is not agreed, however, that Art. 10.5.1 (*No Fault or Negligence*) or Art. 10.5.2 (*No Significant Fault or Negligence*) applies; these are reserved only for the most unusual circumstances (such as sabotage or emergency medical treatment) and must only be invoked *in extremis*.

It was submitted that the sanction banning the Respondent for 6 months from 14 June 2012 was a reasonable one which should not be interfered with. In terms of fault, the Applicant submitted that the athlete was experienced (he had been competing internationally for over 10 years); was a regular user of nutritional supplements (and so should have known to take good care); was a sports science student and had not undergone any anti-doping training. It was also submitted that, by failing to consult the doctors at the CCU or the ICF and by not carrying out sufficient research on the internet, the Respondent had departed from the expected standard of behaviour.
The Respondent's Submissions

The Respondent's Counsel opened by expressing Mr. Sterba's sadness that this was the third judicial hearing that he had come before in relation to the same incident. He observed that neither the IOC nor WADA had wished to make representations and further suggested that it was contrary to the spirit of sport that the ICF was here appealing the decision of its own Court of Arbitration.

It is not accepted that BM is a stimulant. The reason for this is simple and was presented by the Respondent as a list of questions, leading, he said, to the conclusion that BM should not be regarded as a stimulant. Firstly, what is a stimulant? There is no universally agreed definition. The fact that the Respondents advanced three different plausible possibilities similarity of BM to three different substances (Amphetamine, Lev-Methamfetamine and Phenpromethamine) listed in S6 of the 2012 Prohibited List illustrates the confusion caused. Who should decide whether a substance is prohibited? Should it be done by the international federation; by WADA; by a group of experts; or by a non-scientifically trained athlete?

The Respondent phrased a further submission as *"How is an athlete to decide whether the substance before him is a Prohibited Substance?"* Their job is competing in sport at the highest level, not analysing chemistry or law. The problem is that the 2012 Prohibited List and, in particular, the Similarity Prohibition Clause, are not explicit enough. It is simply not possible for an athlete to know with any certainty whether or not they are taking a substance which is prohibited by virtue of the Similarity Prohibition Clause.

Regardless of the outcome under S6, BM cannot be prohibited by virtue of S0. S0 is expressed to apply only to pharmacological substances. This must mean substances which are medicines or drugs. Indeed, in the Respondent's opinion, the examples given in S0 (drugs under pre-clinical or clinical development or discontinued, designer drugs, veterinary medicines) support this interpretation.

The Respondent does not dispute the structural similarity of MB to the substances specifically mentioned in the list. However he submits that, while the structural similarity of BM to both amphetamine and phenpromethamine is not disputed, by virtue of Art. 4.3 of the ICF ADR and the jurisprudence of the CAS 2004/A/726, in order for a substance to be prohibited under the Similarity Prohibition Clause, at least two of the three criteria mentioned in Art 4.3 of the Code must be satisfied. Those criteria are:

1) that it has the potential to enhance or enhances sports performance;

2) that it represents an actual or potential health risk to the Athlete and

3) that its use violates the spirit of sport described in the introduction to the Code.

There is no reliable evidence to support the substance fulfilling either of the first two of the criteria. It is for the Panel to decide whether or not use of BM violates the spirit of sport.

In terms of the sanction given to the Respondent, this is not reasonable. There was simply nothing more that the Respondent could have done. His position can be summarised as follows:

a) The Athlete has a 10 year clean record of anti-doping test results. He has tested negative in all his previous Anti-Doping tests which includes 13 times on a national level and a further 3-4 times on an international level;

b) Having already secured a place in the Czech team for London 2012 in 2011, he had no need to gain a competitive edge in order to be selected. He had nothing to gain by using a prohibited substance but on the contrary, he had everything to lose;

c) He purchased the Supplement online and, having compared each of its circa. 50 ingredients with the substances in the 2012 Prohibited List, he found no match;

d) He then took the list of ingredients to his doctor, Dr Holes. Dr Holes reached the same conclusion; none of the listed ingredients were on the 2012 Prohibited List. He cleared the Respondent to use the Supplement;

e) Subsequently, the Respondent used the Supplement to aid recovery and as a meal substitute when training; and

f) When asked to give a sample and complete the Doping Control Form, he openly declared his use of the Supplement because he was sure and confident that the supplement did not contain any prohibited substances.

Despite the fact that 5 individual experts have submitted their reports to the Panel on the similarity and effect of BM, there is little consistency in their findings in respect of the abovementioned criteria and, in particular, in respect of the potential health risk of using it. This is because the issue is not simple. If that many experts cannot agree, how is an athlete to know?

In the observations submitted to the Panel in the present case, the COC observed that it was regrettable that, despite the volume of scientific evidence submitted before the Panel, it remained unclear whether or not BM was a prohibited substance. Furthermore, the COC observed that in its

opinion it was for the WADA List Committee to include the substance on the Prohibited List after careful consideration and scientific discussion, not for athletes like the Respondent to be penalised when they couldn't have known.

In the observations submitted to the Panel for the CAS OG 12/005, which the COC requested the Panel should also review, it was observed that the Respondent was a longstanding member of the Czech national canoeing team with no history of doping, and that, as the holder of several awards from the CCU, he was an example to younger athletes. Additionally they observed that, as well as being an athlete, he also acted as a coach for other, younger crew members. In any event, they believed that he should be able to participate at London 2012.

The CCU, in their observations submitted to the Panel, observed that the Respondent was known as an honest athlete, example and coach for younger competitors and had never previously violated the Anti-Doping Rules. They further observed that the arbitrators working at the ICF Court of Arbitration are reputable experts with experience in law and anti-doping matters and that it was not clear why the ICF was contesting what amounted to its own decision.

LAW

Jurisdiction

1. The jurisdiction of the CAS Ad hoc Division, which is undisputed, derives from Rule 61.2 of the Olympic Charter which provides as follows:

   "61 Dispute Resolution

   [...]

   2. Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration".

2. These proceedings are therefore governed by the CAS Arbitration Rules for the Olympic Games (the *"CAS ad hoc Rules"*) enacted by the International Council of Arbitration for Sport (ICAS) on 14 October 2003. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (*"PIL Act*"). The PIL Act applies to this arbitration as a result of the fact that the seat of the CAS is in Lausanne, Switzerland (cf. Art. 7 of the CAS ad hoc Rules) and that neither of the parties is domiciled nor habitually resident in Switzerland.

Applicable Law

3. Under Art. 17 of the CAS ad hoc Rules, the Panel shall rule on the dispute *"pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate"*.

4. The Panel considers the Anti-Doping Rules of ICF (*"ICF AD*R") to be the applicable regulations in this case. More specifically, the applicable rules are the Anti-Doping Rules of ICF (*"ICF ADR"*) in the version (Based upon the revised 2009 WADA Code) which entered into force on 1 January 2011. This conclusion was not disputed by the parties.

5. The provisions set in the ADR ICF which are relevant in these proceedings include the following:

ARTICLE 1 DEFINITION OF DOPING

Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.8 of these Anti-Doping Rules.

ARTICLE 2 ANTI-DOPING RULE VIOLATIONS

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

The following constitute anti-doping rule violations:

2.1 The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample

2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.

[…]

10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.

To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the ICF Doping Control Panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance. The Athlete or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.

10.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances

10.5.1 No Fault or Negligence

10.5.2 No Significant Fault or Negligence

Scope of the Review

6. Under Art. 16 of the CAS ad hoc Rules, *"the Panel shall have full power to establish the facts on which the Application is based".*

Merits

7. The Presence of the Substance, BM, in the Respondent's samples was not disputed. Nor was disputed the structural similarity of BM to substances included in the 2012 Prohibited List at S6b (Levmetamfetamine and Phenpromethamine).

8. It follows that, the issues to be decided by the Panel are:

   a) Is BM a Prohibited Substance?

   b) Had the Respondent violated the Anti-Doping Rules?

   c) If so, what, in the circumstances of this specific case, should the appropriate sanction be?

A. Is BM a Prohibited Substance?

9. Having had the opportunity to consider the parties' detailed submissions on the interpretation of S6 of the 2012 Prohibited List, it is clear that on the plain meaning of the words (the literal interpretation), all stimulants are prohibited.

10. The standard of the burden of proof is stipulated in Art. 3.1 ICF ADR as follows:

    "The standard of proof shall be whether the ICF or its National Federation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made".

11. By virtue of the fact that all five of the experts who gave evidence, both written and oral, before the Panel agreed that BM is a stimulant, it follows that the panel is comfortably satisfied that BM is a stimulant. This conclusion is also supported by the clear way the supplement is presented by its manufacturer and by the fact that this possibility was not totally ruled out in the expert opinion of Dr. Opletal which was submitted by the Respondent.

12. It follows that, under the clear wording of the 2012 Prohibited List, BM is a Prohibited Substance.

13. BM is not expressly listed in Art. S6a of the prohibited list under Non-Specified Substances. Given that it is a stimulant, therefore, BM is a Specified substance. This was also the submission of the Applicant.

14. Both parties made substantial submissions, both written and oral, in respect of the issue of the similar chemical structure of BM to substances on the 2012 Prohibited List. Once this Panel came to the conclusion, however, that BM was a stimulant and therefore a prohibited specified substance, there was no need to consider its similarity to other substances or whether or not it satisfied the Similarity Prohibition Clause.

15. In conclusion the Panel finds that BM is a Specified Stimulant and, as such, is a prohibited substance.

B. Had the Respondent violated the Anti-Doping Rules?

16. The definition of *"doping"* under the ICF ADR is to be found at Art. 2 of the ICF Anti-Doping Rules:

> *Athletes and other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.*
>
> *The following constitute anti-doping rule violations:*
>
> ***2.1 The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample***
>
> *2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.*

17. The rules regarding the burden and standard of proof in relation to allegations of doping are set out in Arts. 3.1 and 3.2 of the ICF Anti-Doping Rules:

> ***3.1 Burdens and Standards of Proof***
>
> *The ICF and its National Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the ICF or its National Federation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt […].*
>
> ***3.2 Methods of Establishing Facts and Presumptions***
>
> *Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases:*

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

If the Athlete or other Person rebuts the preceding presumption by showing that a departure from the International Standard occurred which could reasonably have caused the Adverse Analytical Finding, then the ICF or its National Federation shall have the burden to establish that such departure did not cause the Adverse Analytical Finding".

18. The ICF Anti-Doping Rules incorporate the 2012 Prohibited List in Arts 4.1 and 4.3:

4.1 Incorporation of the Prohibited List

These Anti-Doping Rules incorporate the Prohibited List which is published and revised by WADA as described in Article 4.1 of the Code. The ICF will make the current

Prohibited List available to each National Federation, and each National Federation shall ensure that the current Prohibited List is available to its members and constituents.

4.3 Criteria for Including Substances and Methods on the Prohibited List

As provided in Article 4.3.3 of the Code, WADA's determination of the Prohibited Substances and Prohibited Methods that will be included on the Prohibited List and the classification of substances into categories on the Prohibited List is final and shall not be subject to challenge by an Athlete or other Person based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk or violate the spirit of sport.

19. In light of the above, the Panel finds that the Respondent has committed an Anti-Doping violation under Art. 2.1 of the ICF Anti-Doping Rules.

C. If so, what, in the circumstances of this specific case, should the appropriate sanction be?

20. The period of ineligibility given as a sanction for testing positive for the presence of Prohibited Substances is set out in Art. 10.2 of the ICF Anti-Doping Rules:

10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods

The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:

First violation: Two (2) years' Ineligibility.

21. It was not disputed that this is a case to which Art. 10.4 of the Code should apply. The Panel is also of this opinion. Art. 10.4 provides:

10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the use of a performance- enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.

To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the ICF Doping Control Panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance. The Athlete or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.

22. The Respondent has established how the Specified Substance entered his body through his use of the Supplement. It was accepted by the Applicant that the Respondent did not intend to cheat. It is the Respondent's first violation.

23. With regard to justification by the Respondent of the absence of an intention to enhance sporting performance or to mask the use of a performance-enhancing substance, the Panel notes and adopts the submissions of the Applicant to that effect, and the observations of the COC and the CCU to support them. Furthermore the Panel fully accepts the submissions of the Respondent under which the fact that he already qualified in 2011 for the Olympic Games supports his assertion that he had no intention to enhance his sporting performance.

24. Thus it is open to the Panel to replace the period of ineligibility found in Art. 10.2 of the Code with anything from two years of ineligibility to a reprimand. The Applicant submitted that a period of 6 months was both reasonable and supported by jurisprudence of the CAS and the UK National Anti-Doping Panel Appeal Tribunal. The wording of Art. 10.4 provides that the Panel shall consider the Respondent's degree of fault in assessing any reduction of the period of ineligibility. Accordingly, the Panel reviewed the specific circumstances of the Respondent's positive doping result in the light both of the jurisprudence which the Applicant invited the Panel to consider and of the general CAS jurisprudence.

25. The Panel first considered its powers under Art. 10.5.1 of the Code. The notes to this Article are very clear. This power is to be used to exonerate an athlete who did absolutely everything in their power to avoid using a Prohibited Substance:

10.5.1 No Fault or Negligence

If an Athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is

eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.7.

26. The circumstances envisaged for the valid application of Art. 10.5.1 include sabotage by a fellow competitor. The notes further explain that, for example, a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement would not allow for a sanction to be completely eliminated. It follows that on the present facts, the Panel was not convinced that it is appropriate to apply Art. 10.5.1.

27. The Respondent, in his written submissions, asked the Panel to eliminate the period of ineligibility under Art. 10.5.2, which provides:

10.5.2 No Significant Fault or Negligence

If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

28. The notes to that rule are equally clear. Arts. 10.5.1 and 10.5.2 are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases. The notes also provide that Art. 10.5.2 should not be applied in cases where Arts. 10.3.3 or 10.4 apply, as those Articles already take into consideration the Athlete's degree of fault for purposes of establishing the applicable period of ineligibility.

29. In the circumstances it is not contested that the Respondent did not intend to enhance his sporting performance, it is also not contested that the Respondent did not intend to cheat. It is accepted by the Applicant that the Respondent has an unblemished 10-year history of doping control tests and that he has acted *bona fides*. It is further accepted that he has not tried to conceal or mislead the anti-doping authorities and he was honest when completing the Doping Control Form. What, then, is the appropriate reduction?

30. The Applicant urged the Panel in the strongest possible terms to consider the case of the United Kingdom's Anti-Doping Panel Appeal Tribunal Case No. 120036 dated 10 January 2011. This was, he conceded, not binding, but was so analogous to the current circumstances as to require serious consideration. In that case, Mr Duckworth had his sanction reduced to six months under Art 10.4.1.

31. The Panel cannot agree with this submission. Like the present case, Mr Duckworth's case concerned a sports nutritional supplement he purchased on the internet. He, too, checked every ingredient shown on the packet against the Global Drug Reference website (which is based on the Prohibited List in force at the time), but received no warning. His nutritional supplement contained methylhexaneamine ("MHA"), a Prohibited Substance. The analogous nature of the case, however, ends there.

32. r Duckworth did not seek the advice of a medical practitioner as to the potential consequences of taking this nutritional supplement. Instead he sought the advice of the website from which he had bought it. They, for reasons of their own, told him that the supplement *"conforms to all the regulations so you will have no problems if you are tested"*. Regrettably for Mr Duckworth that did not transpire to be the case.

33. The three most poignant distinctions between Mr Duckworth's situation and the Respondent's in the present case are the following:

- Mr Duckworth did not seek independent, qualified advice before taking the supplement;
- Mr Duckworth did not mention that he was taking the nutritional supplement in question on his Doping Control Form;
- Most importantly, the Prohibited Substance in Mr Duckworth's case was <u>expressly listed</u> on the relevant Prohibited List at the time. This was not a case where the Similarity Prohibition Clause was said to apply, or the substance was prohibited simply by virtue of being a stimulant. That it was a prohibited substance was very clear.

34. It follows, with the benefit of hindsight, of course, that there was a lot that Mr Duckworth could have done to avoid departing from the expected standard of behaviour.

35. The only matters that the Panel needs to consider are the appropriate fault of the individual athlete and the appropriate sanction viewed in the light of that degree of fault (see CAS 2011/A/2495, 2496, 2497 & 2498 at 8.23). This Panel has not found the Respondent to be without fault. Plainly there were medical professionals working for the CCU and the COC that could have been consulted as to the possibility of the Supplement containing a Prohibited Substance.

36. On the other hand, however, the evidence given before this panel by experts for the Applicant revealed that BM was known to the Anti-Doping governing bodies (expressly, WADA) for many years as a stimulant and there had even been discussions within these bodies on the issue of whether or not expressly to list the substance on the Prohibited List, which they finally decided not to do.

37. The Panel has no doubts that the use of this substance by the Respondent, in light of the steps that he took in order to check whether or not it was safe for him to use, could have been avoided if indeed the substance had been expressly included on the Prohibited List or in any other data base that can be easily accessed with modern technology and the internet. This, of course, does not change the fact that the Anti-Doping violation occurred, but the Panel considers this fact to be important and relevant in respect of assessing and examining the level of the fault of the Respondent and the consequential sanction.

38. As in CAS 2011/A/2495 *et seq.* at 8.26, the Respondent could, of course, have refrained from using nutritional supplements at all. Adopting the reasoning of the Panel in that case, however,

it can hardly be a *"fault"* (or at least a significant one) to use a substance of the type (nutritional supplements) which is in widespread use by the athlete's peers.

39. The Applicant submitted that the Respondent could have done more extensive research on online forums and consulted the nutritional supplement website FAQ's. He produced for the Panel printouts which feature the word "stimulant" in the text. It is difficult to reconcile how such research could lessen the fault of an athlete who had actually consulted a medical practitioner when, in Mr. Duckworth's case, which the Applicant submitted that the Panel should follow, relying on the website which sold the nutritional supplements instead of consulting a medical professional increased the level of fault.

40. In conclusion, when considering the Respondent's degree of fault, the Panel is comfortably satisfied that the Respondent has acted from the very beginning in the utmost of good faith; that it is undisputed that he did not seek to gain a competitive advantage; that he compared the ingredients of the Supplement with the 2012 Prohibited List; that he then sought the advice of an independent, qualified practitioner; that he declared the Supplement on his Doping Control Form and that he is a senior athlete with a long-term clean anti-doping record, and so considers the Respondent's degree of fault to be so small that it justifies the full reduction of the period of ineligibility to no period, and the sanction of a reprimand.

The ad hoc Division of the Court of Arbitration for Sport rules:

1. The Application filed by the International Canoe Federation is partially upheld.

2. The decision of the International Canoe Federation Court of Arbitration of 24 July 2012 is set aside.

3. The Respondent, Mr Jan Sterba, is found guilty of the offence of using a Prohibited Substance under the International Canoe Federation Anti-Doping Rules.

4. The sanction of a reprimand is imposed on the Respondent, Mr Jan Sterba.

5. All other requests or motions for relief are rejected.