



Arbitration CAS 2017/A/4984 Nesta Carter v. International Olympic Committee (IOC), award of 31 May 2018

Panel: Mr Ken Lalo (Israel), President; Prof. Philippe Sands QC (United Kingdom); Prof. Massimo Coccia (Italy)

Athletics (4x100m relay)

Re-analysis of a sample within the limitation period revealing an ADRV

Violation constituted by the presence of methylhexaneamine (MHA) in the athlete's sample

Scope of authority of the accredited laboratory to re-test the athlete's sample

Scope of the IOC's policy related to the re-analysis program

Absence of prejudice suffered by the athlete due to delay

Absence of breach of the principle of legal certainty

- 1. The possibility of the re-analysis of an athlete's sample within the applicable deadline of eight (8) years in the context of a global process of re-analysis of the samples collected at the Olympic Games can be exercised by the IOC. While not mentioned by name during 2008, methylhexaneamine (MHA) was nevertheless already covered under class S6 Stimulants, as a substance with a similar chemical structure or similar biological effect(s) to an expressly listed stimulant (tuaminoheptane), and it was therefore already prohibited as a stimulant. Since the validity of the results of the analysis of the athlete's sample is unchallenged, they thus establish the presence of MHA, a prohibited substance, in the athlete's sample and, therefore, an anti-doping rule violation (ADRV) within the meaning of Article 2.1 IOC Anti-Doping Rules (ADR).**
- 2. According to article 6.5 of the IOC ADR what truly counts is not whether a substance is detected or not in a specific analysis performed at a given time in a given laboratory but whether it is present or not. Article 6.5 of the IOC ADR does not limit the types of tests to be conducted on samples within the "statute of limitation" period. Therefore, apart from departures from clearly written international standards (either ISL or IST) which are stated within the rules to be fundamental and can easily be identified and applied and subject to specific bias towards the athlete, or bad faith or ill intentions and to any express provision to the contrary, there appears to be neither limitation nor reservation on the scope of the analysis. The wording of article 6.5 of the IOC ADR is broad, indicating that samples establishing the presence of any prohibited substance form the basis for an "any anti-doping rule violation". In this regard, a method validated and "fit for purpose" e.g. capable of detecting the prohibited substances in an economical and effective way in accordance with Article 5.2.4.2.2 of the International Standard for Laboratories (ISL) shall be considered valid. Likewise, the IOC is not limited by its own instruction letter to the laboratory and is not setting limits to its own possibility to extend the re-analysis as it would deem fit.**

3. A new analysis performed during the limitation period is not limited by the analysis already performed. The initial analysis does not act as a “*re-analysis threshold*”. The rules do not exclude from the scope of the re-analysis prohibited substances which the first anti-doping laboratory could have effectively or theoretically discovered given the then existing state of science. In any event, the re-analysis program is meant to protect the integrity of the competition results and the interests of athletes who participated without any prohibited substance and not the interests of athletes who were initially not detected for any reason and are later and within the statute of limitation period found to have competed with a prohibited substance in their bodily systems.
4. The WADA Code 2004 provided for a limitation period of eight years between the date of an alleged violation and an action being commenced. The rules do not form an obligation on the IOC to perform re-analysis at all, or to do so as early as possible, when any new testing method becomes available. Therefore, the argument of the athlete regarding the alleged prejudice suffered due to “delay” cannot be accepted. In this respect, the difficulties to gather evidence including of the possible source of the MHA are inherent to an application of a long statute of limitation period.
5. MHA was already prohibited under the WADA 2008 Prohibited List as a stimulant having a similar structure and effects as one of the listed stimulants (tuaminoheptane). Therefore no dismissal of a claim against the athlete should apply based on the principle of a lack of legal certainty.

I. INTRODUCTION

1. On 22 August 2008, Mr Nesta Carter (the “Athlete”) participated in the Men’s 4 x 100 meters relay final at the 2008 Olympics Games in Beijing (the “Race” and the “Beijing Games”, respectively), together with Michael Frater, Usain Bolt and Asafa Powell. Following the race he provided a urine sample, which was analysed by the National Anti-Doping Laboratory in Beijing (“the Beijing Laboratory”) within a few days, with negative results. Nearly eight years later, between April and June 2016, the Athlete’s sample was re-tested by “Le Laboratoire d’Analyses du Dopage à Lausanne” – LAD, a WADA accredited laboratory (the “Lausanne Laboratory”). The Athlete was subsequently charged with an anti-doping rule violation (“ADRV”), namely, “*presence of a Prohibited Substance*” pursuant to Article 2.1 of the IOC Anti-Doping Rules applicable to the Games of the XXIX Olympiad, Beijing 2008 (the “IOC ADR”) and/or “*use of a Prohibited Substance*” pursuant to Article 2.2 of the IOC ADR.
2. This appeal is brought by the Athlete against the decision of the Disciplinary Commission (the “DC”) of the International Olympic Committee (the “IOC”), dated 25 January 2017, which found that the Athlete had committed an ADRV pursuant to the IOC ADR and thereby disqualified the Athlete and the Jamaican Team from the Race and ordered the return of the corresponding medals, medallist pins and diplomas (the “Appealed Decision”). Further sanctions were neither sought by the IOC nor imposed by the DC.

II. PARTIES

3. The Athlete is a Jamaican sprinter who specializes in the 100 meters event. The Athlete was born on 11 October 1985.
4. The IOC is the international non-governmental organization leading the Olympic Movement under the authority of which the Olympic Games are held. The IOC has its seat in Lausanne, Switzerland.

III. FACTUAL BACKGROUND

5. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion below. While the Panel has considered all the facts, evidence, allegations and legal arguments submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.
6. On 22 August 2008, the Athlete competed for Jamaica in the Race. Following the Race, which the Jamaican team won, being awarded the gold medal, he was subject to doping control immediately after midnight and on 23 August 2008.
7. The Athlete stated on the Doping Control Official Record form that during the previous seven days he had taken Cell Tech (a creatine supplement) and Nitro Tech (a whey protein supplement).
8. On 27 August 2008, the Beijing Laboratory produced an Analytical Report for Negative Results in respect of the Athlete's sample.
9. On 14 October 2008, a total of 4,072 A & B samples, including the Athlete's sample, were couriered from the Beijing Laboratory to the Lausanne Laboratory.
10. On 24 March 2016, Dr Richard Budgett, IOC Medical and Scientific Director, wrote a letter ("Dr Budgett's Letter") to the Lausanne Laboratory's Director as follows:

"Reanalysis – Beijing Samples

Please find attached a list of 433 samples from Beijing 2009 for reanalysis.

Please immediately begin the analysis of all A samples in the attached list for long-term metabolites of AAS, HIF-stabilisers, SARMS and small peptides (GNRH, LHRH, Desmopressin, etc.)

Once the above mentioned analysis has been conducted, the IOC and LAD will agree on which samples should be selected for ESA analysis and/or IRMS screening, and the order of priority.

Instructions will be provided regarding the next steps should a presumptive AAF be reported.

Please include all negative results in ADAMS.

Please begin the reanalysis immediately so that the IOC can be advised of any presumptive AAF before the end of April”.

11. On 31 March 2016, an initial testing procedure was carried out on the Athlete’s A sample and on 25 April 2016 a confirmation procedure was carried out. On 4 May 2016, a Doping Control Report was issued which identified a presumptive Adverse Analytical Finding (“AAF”) based on a presumptive presence of methylhexaneamine (“MHA”).

12. On 18 May 2016, the IOC Legal Affairs Department notified the Athlete of a presumptive AAF, stating:

“The analysis of the above sample (based exclusively on the A-Sample) performed in 2008 by the Beijing laboratory, with the detection methods applied by the laboratory and then available, did not produce at that time an Adverse Analytical Finding”.

13. On 1 June 2016, the B sample was opened and split. Following an analysis of the first half of the B sample, a Doping Control Report was issued on 2 June 2016 identifying the presence of MHA in the sample. On 3 June 2016, the Athlete was notified of an AAF pursuant to Article 7.2.5 of the IOC ADR.

14. The Athlete did not accept the AAF and the matter was referred to the DC which held a hearing on 17 October 2016 in Lausanne.

15. On 25 January 2017, the DC issued the Appealed Decision confirming that the Athlete had committed an ADRV pursuant to the IOC ADR. The Appealed Decision reads in its operative part as follows:

I. The Athlete, Nesta CARTER:

(i) is found to have committed an anti-doping rule violation pursuant to the IOC Anti-Doping Rules applicable to the Games of the XXIX Olympiad in Beijing in 2008,

(ii) is disqualified from the Men’s 4×100m relay event in which he participated upon the occasion of the Olympic Games Beijing 2008,

(iii) has the medal, the medallist pin and the diploma obtained in the Men’s 4×100m relay event withdrawn and is ordered to return same.

II. The Jamaican Team is disqualified from the Men’s 4×100m relay event. The corresponding medals, medallist pins and diplomas are withdrawn and shall be returned.

III. The IAAF is requested to modify the results of the above-mentioned event accordingly and to consider any further action within its own competence.

IV. The Jamaica Olympic Association shall ensure full implementation of this decision.

V. The Jamaica Olympic Association shall notably secure the return to the IOC, as soon as possible, of the medals, the medallist pins and the diplomas awarded in connection with the Men’s 4×100m relay event to the Athlete and his teammates.

VI. *This decision enters into force immediately*”.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

16. On 15 February 2017, the Athlete filed his statement of appeal at the Court of Arbitration for Sport (the “CAS”) against the IOC, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the “Code”) challenging the Appealed Decision. In his statement of appeal, the Athlete nominated Prof Philippe Sands QC as arbitrator. In his statement of appeal, the Athlete also requested a stay of execution of the Appealed Decision, stating that no prejudice shall result if such stay pending the appeal is confirmed.
17. On 17 February 2017, the Athlete filed an application for disclosure, seeking the disclosure of numerous documents.
18. On 23 February 2017, the CAS Court Office advised that the IOC nominated Prof Massimo Coccia as an arbitrator.
19. On 3 March 2017, the IOC clarified that “[w]ithout prejudice to the fact that the decision of the IOC Disciplinary Commission is executory and there is no reason to grant a stay as the anti-doping rule violation is established, this is to confirm that the IOC will not seek the return of the medals, diplomas etc. from the Appellant and/or any of the other members of the concerned relay team pending a decision of the CAS in these proceedings”. Thus no formal order for a stay of execution of the Appealed Decision was required.
20. On 6 March 2017, the IOC filed its position in regard to the application for disclosure filed by the Athlete.
21. On 28 March 2017, following an agreed extension, the Athlete filed his appeal brief in accordance with Article R51 of the Code. In the appeal brief the Athlete renewed his application for disclosure and sought to reserve the right to amend and/or supplement the appeal brief once such disclosure is received.
22. On 19 April 2017, the CAS Court Office advised on behalf of the President of the CAS Appeals Arbitration Division and pursuant to Article R54 of the Code that the Panel appointed to decide these proceedings is constituted as follows:

President: Mr Ken Lalo, Attorney-at-Law in Gan-Yoshiyya, Israel
Arbitrators: Mr Philippe Sands QC, professor and barrister in London, United Kingdom
Mr Massimo Coccia, professor and attorney-at-law in Rome, Italy

The Panel was assisted in these proceedings by Mr William Sternheimer, Deputy Secretary General of the CAS.
23. On 3 May 2017, following an agreed extension, the IOC filed its answer in accordance with Article R55 of the Code.

24. On 4 May 2017, the CAS Court Office advised the parties that they shall not be authorized to supplement or amend their requests or their arguments, nor to produce new exhibits, nor to specify further evidence on which they intend to rely, after the submission of the appeal brief and of the answer, pursuant to Article R56 of the Code.
25. On 4 May 2017, the IOC indicated that in its view the matter could be decided without a hearing. On 10 May 2017, the Athlete indicated that he considered a hearing necessary, *“in order to give proper consideration to the important issues raised in this case”* and, further, to *“be given the opportunity to put questions to the other party’s witnesses and experts”*.
26. On 17 July 2017, and following numerous exchanges regarding an acceptable date for a hearing, the CAS Court Office advised the parties that the hearing in this appeal will be held on 15 November 2017.
27. On 2 and 24 August 2017, the IOC and the Athlete, respectively, signed and returned the Order of Procedure in this appeal.
28. On 4 September 2017, following several exchanges between the parties relating to the requests for disclosure made by the Athlete, the IOC provided the Athlete with certain documents relating to (i) the 2009 re-analysis of the 2008 samples; (ii) the 2012 re-analysis of the 2004 samples; and (iii) the 2013 re-analysis of the 2006 samples. The IOC indicated that its position continues to be that those documents are not relevant for the present proceedings but has still agreed to provide the same in order to avoid additional filings and proceedings relating to disclosure. With these disclosures the matters raised by the Athlete in his application for disclosure appeared to have been satisfied.
29. On the days preceding the hearing certain exchanges were made regarding the timetable and order of testimony of the various witnesses at the hearing. All scheduling matters were finally concluded and agreed at the start of the hearing.
30. On 15 November 2017, a hearing was held at the CAS Court Office in Lausanne. The Panel was assisted by Mr William Sternheimer, Deputy Secretary General of the CAS, and joined by the following persons:

For the Athlete:

Mr Nesta Carter, Athlete
Ms Kate Gallafent QC, Athlete’s Counsel
Mrs Kendrah Potts, Athlete’s Counsel
Mr Paul Scott, expert witness (by Skype)

For the IOC:

Mr Jean-Pierre Morand, Counsel for the IOC
Ms Tamara Soupiron, IOC representative
Mr Nicolas Français, IOC representative

Dr Richard Budgett, IOC representative, witness

Dr Tia Kuuranne, expert witness

Prof Martial Saugy, expert witness

31. At the outset of the hearing, the parties confirmed that they had no objection to the composition of the Panel.
32. At the start of the hearing the Panel confirmed that it accepts into evidence all documents provided by the parties, including the more recent filings by the Athlete. The Panel noted that while Article R56 of the Code limits the ability to file any documents or submissions post the filing of the appeal brief and of the answer, the newly filed “bundles” by the Athlete included in the main part the same exhibits and authorities already filed, merely arranged in a different order, and only supplemented these with new documents provided to the Athlete by the IOC on 4 September 2017 in connection with the request for disclosure as well as correspondence between the parties and WADA and IOC public statements which followed the filing of the appeal brief.
33. During the hearing, the Panel heard evidence from the witnesses (including expert witnesses) listed above and from the Athlete, in addition to the detailed submissions of counsel.
34. At the conclusion of the hearing, the Parties indicated that they were satisfied that their right to be heard has been duly respected and that they have been treated fairly and equally during the arbitration proceedings.
35. On 31 January 2018, in accordance with the directions of the Panel at the conclusion of the hearing and in a letter of 16 November 2017 and following certain granted extensions, the parties submitted post-hearing briefs.
36. The Panel has carefully taken into account in its decision all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarised or referred to in the present arbitral award.

V. SUBMISSIONS OF THE PARTIES

A. The Athlete

37. The Athlete’s submissions, in essence, may be summarized as follows:
 - **The case should be dismissed since the Lausanne Laboratory did not have any authority to re-test the Athlete’s sample for any substances other than those identified in Dr Budgett’s Letter.**
 - Under Article 6.5 of the IOC ADR the ownership of samples taken during the period of the Olympic Games is vested in the IOC for the period provided for under the Statute of Limitations in the WADA Code (eight years for samples taken until 1 January 2015, ten years thereafter). The Lausanne Laboratory stored the

samples at the IOC's direction and could not itself have decided unilaterally to undertake any form of reanalysis.

- The analysis carried out by the Lausanne Laboratory on the Athlete's sample was neither requested nor authorized by Dr Budgett's Letter. The Lausanne Laboratory was only authorized to test the Athlete's sample for the substances specified in Dr Budgett's Letter. It did not have any authority to test the sample for MHA, which was not one of the substances specified in Dr Budgett's Letter.
- The testing of the Athlete's sample for MHA was the equivalent of testing a sample not included on the list attached to Dr Budgett's Letter. This was wholly impermissible and not in accordance with the World Anti-Doping Code International Standard for Laboratories ("ISL"), being a mandatory international standard developed as part of the World Anti-Doping Program.
- The Lausanne Laboratory carried out on the sample its standard "Dilute and Shoot" process (which is its standard screening test for initial analysis because it tests for a large number of substances), which is not an optimal method to search for the specific substances identified in Dr Budgett's Letter.
- The contention that the Lausanne Laboratory was merely to prioritise or focus on the four groups of substances identified in Dr Budgett's Letter was neither the IOC's intention, nor the Lausanne Laboratory's understanding of the letter at the time.
- The Lausanne Laboratory simply carried out its standard "Dilute and Shoot" process without any form of prioritisation at all.
- The Lausanne Laboratory appears to have ignored the terms of Dr Budgett's Letter, not only by failing to test for the substances in Dr Budgett's Letter, but also in proceeding to carry out a confirmation procedure on the A Sample (which gave rise to an AAF), without first reporting the presumptive AAF to the IOC despite Dr Budgett's express instruction that it should do so.
- Following the presumptive AAF, the Lausanne Laboratory conducted a confirmation test by gas chromatography mass spectrometry looking for MHA, instead of reporting the presumptive AAF to the IOC and awaiting instructions.
- Even the DC could not accept the IOC's arguments in this respect. It found that *"the general written instructions given to the Lausanne Laboratory appear not to include the substance at stake and are worded in a specific manner. Having noted the explanations of Dr Budgett, the Disciplinary Commission observes that it would indeed have been preferable to have issued clearer instructions"*. The DC can only have meant by this that if Dr Budgett had wished for a full analysis to be undertaken for all prohibited substances he should, and very easily could, have said so, which, however, he did not.
- However, the DC simply ignored the failure of the Lausanne Laboratory to abide by the scope of the IOC's instructions to it.
- This approach breaches the common law principle *nullus commodum capere potest ex sua injuria propria* (no one can derive an advantage from his own wrong).

- The position is akin to the situation in which an athlete's right to attend the opening and analysis of his B sample has not been respected, in which case the B sample analysis must be disregarded (CAS 2002/A/385 at paras. 22-34).
- An athlete's right that his sample will not be tested in the absence of lawful authorisation by the IOC is even more fundamental than the right to attend the opening and analysis of the B sample, and the consequence of not respecting that right must be the same: the results of the A sample analysis must be disregarded.
- The DC's conclusion "*that it would be good practice for laboratory to include in the screening analysis all Prohibited Substances which can be detected through the applied screening method, even those which have not been specifically listed by the Testing Authority*" is misplaced. It patently cannot be good practice for a laboratory to conduct tests for which it has no authority.
- Dr Budgett's Letter placed clear limits on the scope of authorisation for re-testing. Of all the Beijing samples which have been re-tested and which resulted in a finding of an ADRV, the majority were in respect of anabolic steroids and therefore fell within the scope of authorisation. Only two – those of the Athlete and Yarelys Barrios – concerned a substance which fell outside the scope of the authorisation.
- **The case should be dismissed since the re-testing of the Athlete's sample was contrary to the IOC's publicly stated policy on re-testing.**
 - The IOC retesting regime was expanded in scope prior to the Turin Winter Games. Article 6.5 used in those games was replicated in the 2008 Anti-Doping Procedures for the Beijing Games.
 - The scope of, and justification for, the policy was publicly explained by the IOC in October 2008 when it announced its completion of further analysis of samples taken during the Beijing Games:

As part of its zero-tolerance policy against doping, the IOC is storing samples collected during the Olympic Games for eight years. This allows the IOC to analyse samples retroactively should new fully validated tests to detect new prohibited substances / methods become available.
 - In other words, retroactive analysis would be permissible should new fully validated tests become available, i.e. in the event that such tests do become available.
 - This IOC's policy was articulated by it in a series of public statements.
 - The IOC has therefore repeatedly, and consistently, explained the rationale for keeping samples collected during Olympic Games for eight years (as it was at the time of the Athlete's sample collection) as being to enable re-testing where scientific methods have developed since then such that a prohibited substance or method could be detected by those methods where it could not have been previously. Further, the reason for having that policy is clear, namely, that a relevant change in circumstances is required in order to justify such an extensive intrusion on the rights of individuals such as re-testing up to eight years after the event.
 - So far as MHA is concerned, the methods used to detect it (including gas or liquid chromatography) have remained unchanged since they were first introduced. The Athlete therefore contends that the testing of his sample for MHA in 2016, nearly eight years after it was provided, and during which period there had not been any

relevant scientific developments or new methods identified for its detection, was not in accordance with the IOC's publicly stated policy on re-testing.

- As such, the IOC has not acted in accordance with the general principles of law that all sporting institutions must abide by. In particular, the IOC has acted contrary to the legitimate expectation of all athletes that re-testing would only be conducted on historic samples where scientific developments justified it (or doubts were raised as to the laboratory) and then in a timely manner; the IOC has not applied its rules openly and honestly and therefore not in good faith; and the IOC has acted disproportionately by going further than was reasonably necessary to pursue a legitimate aim (the testing of historic samples where scientific advances justified it).
- **The IOC's delay in bringing these proceedings is of such magnitude that the charge should be dismissed by reason of the prejudice caused to the Athlete.**
 - The 2004 Code of the World Anti-Doping Agency (respectively, "WADA" and "WADA Code") provided for a limitation period of eight years between the date of an alleged violation and an action being commenced. Nevertheless, in the present case the facts are such that the prejudice caused by the delay is overwhelming, notwithstanding that the action was commenced just a couple of months before the expiry of the limitation period.
 - While there is also a public interest in an Anti-Doping Organisation being able to re-test samples where scientific developments would enable the detection of a prohibited substance or method that was not previously possible, in the present case it is clear that MHA was tested for by the Lausanne Laboratory by at least September 2008. It has never been suggested by the IOC that there has been recent development prior to March 2016 that would justify retesting for MHA using a more sophisticated or enhanced analytical technique.
 - It is clear that MHA was being tested for routinely, not just by the Lausanne Laboratory, by at least 2010, when it formed part of the testing procedures at the Commonwealth Games. As a result, the onus was on the IOC at that time (2010), at the very latest, to re-test samples taken at the Beijing Games two years earlier, for MHA.
 - There could be no justification for the IOC delaying re-testing to 2016 on the grounds of the management of the quantity of urine.
 - As for the prejudice suffered by the Athlete, the passage of time over the last seven and a half years prior to re-testing has significantly affected his ability to defend this case.
 - The Athlete's evidence is that he has taken Cell Tech and Nitro Tech every day since September 2005 and through the Beijing Games. During the relevant period in 2008 he recalls also taking a multi- vitamin, although he is now unable to recall its name. Were he to have been charged in 2008 or soon thereafter then it is likely that, in particular, (a) he would have been able to recall the name of the multi-vitamin; (b) it would have been possible to test those multi-vitamins and the two supplements to ascertain whether they contained MHA; and (c) he would have been able to recall with greater clarity the steps that he had taken to ascertain whether

they contained any prohibited substances. The Athlete would have then been in a position to identify possible contamination sources which must have caused a positive test result.

- Accordingly, in the particular circumstances of the Athlete's case, the prejudice caused to him by the IOC's avoidable delay is very substantial. As a result, the charge against the Athlete should be dismissed.
- It is well-established that an anti-doping tribunal has the power to dismiss on this basis. For example, in the case of *Amar Muralidharan v. NADA* (CAS 2014/A/3639, award of 8 April 2015), Mr Michele Bernasconi summarised the position in the following terms: "*the Sole Arbitrator could foresee a situation where an athlete's right to a timely and fair hearing in the first instance procedure was so fundamentally violated that such omissions in the underlying procedure results in an automatic dismissal of a violation*".
- In this case it is not suggested that the IOC delayed proceedings once it became aware of the AAF; however, the delay on the part of the IOC of nearly 8 years in identifying the AAF was avoidable. The right to a fair trial and the principle of equal treatment were therefore manifestly disregarded to a far greater extent in the Athlete's case: if an athlete is not in a position to answer questions precisely because of a delay of six months he is, a fortiori, not in a position to do so after nearly eight years.
- **The charge against the Athlete breaches the principle of legal certainty.**
 - The Athlete had argued in front of the DC that the IOC's refusal to disclose whether the Beijing Laboratory had in fact tested for MHA gave rise to procedural unfairness. The IOC repeatedly refused to disclose this information prior to the hearing before the DC, and maintained its position at the hearing that it was irrelevant.
 - By a letter dated 28 February 2017 from the Beijing Laboratory it was confirmed that MHA had not been included in the analytical menu of substances for which it tested in 2008, and it was not therefore analysed for in respect of the samples collected during the period of the Beijing Games.
 - As at August 2008, MHA was not one of the substances listed by name on the Prohibited List. If an athlete chose to take a product which listed MHA as one of its ingredients, and exercised the utmost care by looking up the Prohibited List to check whether MHA was a prohibited substance, he would have been reassured that it was not. Unless he commissioned a chemical analysis of MHA, and all the identified substances at section 6 of the Prohibited List, he would not have been aware that MHA was "*similar to*" any of the identified prohibited substances.
 - The Beijing Laboratory was not aware that MHA was a prohibited substance. If the Beijing Laboratory had carried out a test on an athlete's sample it would have reported a negative result for prohibited substances (as indeed it did for the Athlete's A Sample).
 - WADA did not include MHA on the Prohibited List until 2010.
 - The Prohibited List states that, "*Stimulants include... and other substances with a similar chemical structure or similar biological effect(s)*". As at the summer of 2008, the Athlete

could not have reasonably been expected to be able to learn that MHA was prohibited (by virtue of its similarity to a named prohibited substance).

- By contrast, if an athlete took, for example, a designer drug such as THG then he would have known that such a substance was prohibited as it was precisely because of its similarity in effect to prohibited substances that he was taking it. Accordingly, a finding of a lack of legal certainty in the case of a stimulant such as MHA (which was subsequently recognised by WADA to be particularly susceptible to non-intentional anti-doping rule violations) in no way undermines the fight against doping insofar as designer drugs are concerned.
- A finding of a lack of legal certainty reflects the fundamental unfairness that would otherwise arise were the Athlete to be sanctioned for the presence of a substance that he did not know, and could not reasonably have known, was a prohibited substance at the time.
- The charge against the Athlete should, therefore, also be dismissed on this point of principle.

38. In his statement of appeal, the Athlete requests the following:

“For reasons that shall be set out in the Appellant’s Appeal Brief, the Appellant seeks the following by way of determination on appeal:

- I. *to uphold the Appellant’s appeal against the Decision; and*
2. *to set aside the Decision of the IOC Disciplinary Commission, in particular the finding that the Appellant committed an anti-doping violation pursuant to the Rules.*

And by way of Relief:

3. *to set aside the decision to disqualify the Appellant and the Jamaican Team from the Men’s 4x100m Relay at the 2008 Olympic Games and the consequences of that decision including directions (i) that the Jamaican Team return the medals, medallist pins and diplomas, and (ii) that the LAAF modify the results of the event and consider further action;*
4. *to reinstate the corresponding medals, medallist pins and diplomas to the Jamaican Team; and*
5. *to order the Respondent to pay the legal expenses incurred by the Appellant”.*

B. The IOC

39. The IOC’s submission, in essence, may be summarized as follows:

- The scope of the appealed decision is strictly limited to the consequences related to the Beijing Games. They do not bear on nor concern consequences beyond the Olympic Games, including ineligibility or disqualification of other events. Accordingly, issues, which do not bear on the existence of an objective ADRV and their specific consequences related to the Beijing Games are not relevant in these proceedings.
- This is notably the case for issues linked with fault or negligence, whether significant or not.

- The IOC ADR expressly and clearly provide that the IOC can decide to submit the samples to a new analysis as long as the statute of limitation has not expired (in this case 8 years).
- The meaning of the above wording is clear and unambiguous. There is no limitation, nor reservation in the scope of the analysis. On the contrary, the wording is expressly broad: “*any anti-doping rule violation*”, meaning the established presence of any prohibited substance.
- Re-testing may and should be conducted to the fullest extent needed for its purpose, which is to establish the presence of any prohibited substance.
- When re-analysis is communicated to a broader audience, this is however done in a simplified way manner. The focus is then naturally on the application of new methods.
- From a global perspective, the conduct of large re-analysis programs is justified by the fact that the time brings not only a progressive improvement of the average performance level of the laboratories but leads to significant breakthroughs. These are normally associated with the application of new analytical methods, which allow to establish the presence substances, or significantly increase the detection window of substances through new metabolites. The increased sensitivity of equipment plays also a major role, equivalent to leaps in the detection capacity.
- On this background, the communication on re-analysis does naturally focus on the aspects of re-analysis, which are both the easiest and, effectively, the main ones. It is therefore not surprising and effectively adequate that results obtained through complete new methods are put forward, when re-analysis is communicated or presented.
- Communication and presentation of the main features and objectives of the re-analysis are however neither meant to nor can have the effect of limiting the effective scope of the re-analysis as clearly defined by the applicable provisions.
- The global re-analysis of the samples collected in Beijing in 2008 was accordingly planned and performed in 2016 close to the end of the 8 year window.
- Based on the specific rules the Athlete, as a participant at the Beijing Games, should have known and expected that his sample collected then could be re-analysed during 8 years to detect any ADRV.
- The analytical validity of the analysis and the fact that the analysis does validly confirm the presence of MHA in the Athlete’s sample is not challenged by the Athlete. An ADRV was thus established.
- In accordance with Article 6.5 of the IOC ADR, the IOC was entitled to re-analyse the samples of the Athlete during 8 years.
- As participant of the Beijing Games and by the execution of the entry form, the Athlete has expressly agreed to the application of the IOC ADR providing that possibility in simple and clear terms.
- The process was not directed against the Athlete in particular. The Athlete’s sample was only one amongst the 433 samples collected in Beijing selected for a new analysis.

- The analysis of the Athlete's sample was performed in the exact same way and process as all other samples. It established the presence of a MHA.
- Since the Athlete's sample was collected in competition, this ADRV leads necessarily to automatic disqualification of the Results in application of Article 8.1 of the IOC ADR, with all the resulting consequences (withdrawal of medal, diploma, medallist pin).
- The disqualification of the Athlete's results also leads to the automatic disqualification of the team's results as a consequence of the combined application of Article 10.1 §3 and Rule 39.2 of the IAAF Competition Rules 2008.
- In regard to the Athlete's argument that the analysis not covered by the scope of the instructions of the IOC:
 - Dr Budgett expressly acknowledges that the wording used in Dr Budgett's Letter was too narrow. However, the understanding between the IOC and the Lausanne Laboratory was that, whilst focusing on the expressly designated substances, which priority substances were ones most likely to be newly detected in view of the improvements in methods and equipment, was meant to also cover other substances part of the in competition menu.
 - This was in line with two prior similar programs.
 - Once the question regarding the prohibited status of MHA had been clarified in consultation with WADA, the IOC had no hesitation in instructing the laboratory to proceed to the confirmation analysis in the split B-Sample.
 - The Athlete cannot build any entitlement nor expectations from the content of instructions which were not addressed to him and were relevant only for the two parties concerned.
 - The application of the "Dilute & Shoot" method, a screening method used by the Lausanne Laboratory since 2011, on the Athlete's sample was adequate. It necessarily led to the detection of MHA, as this substance is one of the target compounds.
 - The IOC in any event required the Lausanne Laboratory to proceed with the relevant analysis in the split B-Sample, which was a specific request and instruction concerning the Athlete's sample.
 - Even assuming that the Lausanne Laboratory went beyond the instructions of the IOC, the principle that laboratories are authorised to perform analysis going beyond the ones specified by the testing authority is provided in Article 6.4.3 WADC.
- In regard to the Athlete's argument that the scope of the analysis was restricted by the IOC policy:
 - According to Article 6.5 of the IOC ADR, samples may be re-analysed during 8 years and any ADRV detected as a consequence thereof shall be acted upon.
 - The IOC ADR could not be clearer and their interpretation and corresponding application does not raise any difficulty.

- There is no limitation to the scope of the re-analysis and this is not only intended to discover prohibited substances detected by “newly validated methods”.
- The content of the communication relating to re-analysis in presenting it to a broader audience refers to elements which are striking, positive and easily understandable, such as an emphasis on “newly validated methods” or to the fact the re-analysis would include the methods, which were not available at the time of the initial analysis. But this does not limit the application of the re-analysis.
- To apply the level of detectability as a kind of “re-analysis threshold” would be very complex to implement and is without any justification.
- Athletes’ expectation, which Article 6.5 of the IOC ADR sets, is simply and clearly that samples may be re-analysed during 8 years and cannot be based on public statements regarding the re-analysis program.
- Re-analysis is meant to protect the integrity of the competition results and the interests of athletes, who effectively participated without any prohibited substance, not the interests of athletes who initially escaped detection.
- Whilst it is true, that the Beijing Laboratory had the appropriate technical equipment, which would have allowed to detect MHA, it did not have at the time another element essential to detect MHA, i.e. the corresponding reference substance.
- In regard to the Athlete’s argument that the IOC has waited too long to perform the re-analysis of his sample and that this delay limited his ability to defend his case:
 - The re-analysis was done within the period of the statute of limitation and there is no obligation to do it earlier such as when a new method is first established.
 - Given the limited amount of urine available this could lead to a situation, in which re-analysis would no longer be possible.
 - This would be a completely inefficient and not cost effective way to perform re-analysis, requiring multiple re-analysis on the same sample.
 - The policy of the IOC is to conduct general re-analysis program towards the expiry of the statute of limitation, which is the appropriate solution to maximise the possibility to obtain materially significant results, proportionate to huge logistical operation, which the re-analysis of several hundred samples represents.
 - The Appealed Decision rests on the sole finding of an ADRV which is not challenged by the Athlete, without deciding any consequences beyond the Beijing Games. Therefore, the Athlete was not prejudiced by the lapse of time and his inability to prove the source of the substance.
- In regard to the Athlete’s argument that he suffered a procedural unfairness in regard to the IOC failure to provide information in regard of the issue of inclusion of MHA in the analytical menu and that the process lacked legal certainty:
 - There is no reason to doubt that the Beijing Laboratory would have known that all stimulants were prohibited and that it would have consequently known that MHA being a stimulant was prohibited, even if it did not target MHA any more than any

of the other numerous stimulants, which were not relevantly used in sport at that time and therefore not targeted in the analytical menus.

- MHA was already prohibited under the WADA 2008 Prohibited List as a stimulant having a similar structure and effects as one of the listed stimulants (tuaminoheptane). This has been specifically confirmed in the award CAS 2009/A/1805.

40. In its requests for relief, the IOC seeks the following:

“In light of the above, the Respondent [the IOC] respectfully requests that the CAS Panel issues an award as follows:

- I The Appeal is dismissed.*
- II IOC is granted an award for costs”.*

VI. JURISDICTION

41. Article R47 of the Code provides as follows:

“An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body”.

42. The Athlete asserts that the jurisdiction of the CAS derives from Article 12.2 of the IOC ADR which provides that a decision that an ADRV was committed, a decision imposing consequences of an ADRV, a decision that no ADRV was committed, a decision that the IOC lacks jurisdiction to rule on an alleged ADRV or its consequences, and a decision to impose a provisional suspension may be appealed exclusively as provided in Article 12.2 IOC ADR.

43. Article 12.2.1 of the IOC ADR provides that in all cases arising from the Olympic Games the decision may be appealed exclusively to the CAS. The Athlete is one of the parties entitled to appeal under Article 12.2.1 of the IOC ADR.

44. The IOC did not object to CAS jurisdiction. Moreover, both parties confirmed CAS jurisdiction by executing the Order of Procedure. The Panel concludes that the CAS has jurisdiction in this appeal.

45. As a principle, Article R57 of the CAS Code provides that *“(t)he Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance”.*

VII. ADMISSIBILITY

46. Article R49 of the Code provides as follows:

“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late”.

47. The time to file an appeal to CAS is within 21 days from the date of receipt of the decision by the appealing party. The Athlete submitted his statement of appeal on 15 February 2017, within the prescribed time period following receipt of the Appealed Decision dated 25 January 2017.
48. The IOC did not object to the admissibility of the Athlete’s appeal.
49. The Panel agrees, for those reasons, that the appeal is admissible.

VIII. APPLICABLE LAW

50. Article R58 of the Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

51. The applicable regulations in this case are contained in the IOC ADR. Article 16.1 of the IOC ADR provides that the IOC ADR are governed by the Olympic Charter, by the WADA Code and by Swiss law. Article 16.5 of the IOC ADR provides that the IOC ADR *“have been adopted pursuant to the Code and shall be interpreted in a manner that is consistent with the applicable provisions of the Code. The comments annotating various provisions of the Code may, where applicable, assist in the understanding and interpretation of these Rules”.*
52. Therefore, the applicable law, accordingly to which the Panel will decide the present appeal, is the IOC ADR and, subsidiarily, Swiss law given that the IOC is an associations according to Article 60 of the Swiss Civil Code.
53. The Athlete submits that *“as a matter of fact and since (a) WADA is a foundation established under Swiss law and having its legal seat in Lausanne, Switzerland, (b) a great number of international sports federations are associations according to Article 60 of the Swiss Civil Code, including the IOC, (c) the CAS is an institution located in Switzerland and subject to the Swiss lex fori, and (d) decisions of CAS Panels are subject to final review by the Swiss Federal Tribunal (Art. 190 Swiss Private International Law Act) the jurisprudence of CAS related to the interpretation of anti-doping rules which are based on the WADA Code is predominantly influenced by Swiss law principles of good faith, which is enshrined in Article 2 of the Swiss Civil Code. Article 2 provides, ‘Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations’”.* The Panel accepts that subject to specific provisions of the laws to be applied in this case, its decision should also respect principles of good faith in the exercise of rights and performance of obligations.

IX. RELEVANT LAW

54. At the time the Athlete's sample was collected and underwent the first test the relevant anti-doping rules were the IOC ADR (2008) applicable at such time which provided, insofar as relevant:

ARTICLE 2 ANTI-DOPING RULE VIOLATIONS

2.1 *The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Specimen.*

[...]

2.2 *Use or Attempted Use of a Prohibited Substance or Prohibited Method.*

[...]

ARTICLE 3 PROOF OF DOPING

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 may rebut this presumption by establishing that a departure from the International Standard occurred, which could reasonably have caused the Adverse Analytical Finding.*

[...]

ARTICLE 4 THE PROHIBITED LIST

4.1 *Incorporation, Publication and Revision of the Prohibited List*

The Prohibited List is the list published and revised by WADA pursuant to the Code. [...]

ARTICLE 6 ANALYSIS OF SAMPLES

6.2 *Substances subject to detection*

Doping Control Samples shall be analysed to detect Prohibited Substances and Prohibited Methods identified on the Prohibited List and other substances as may be directed by WADA pursuant to the Monitoring Program described in Article 4.5 of the Code.

6.4. *Standards for Sample Analysis and Reporting*

The laboratory shall analyze Doping Control Samples and report results in conformity with the International Standards for Laboratories.

6.5. *Storage of Samples and delayed analysis*

Samples shall be stored in a secure manner at the laboratory or as otherwise directed by the IOC and may be further analysed. Consistent with Article 17 of the Code the ownership of the samples is vested in the IOC for the eight years. During this period the IOC shall have the right to re-analyse samples (taken during the Period of the Olympic Games). Any anti-doping rule violation discovered as a result thereof shall be dealt with in accordance with these Rules. After this period, the ownership of the samples shall be transferred to the laboratory

storing such samples, provided that all means of identification of the Athletes will be destroyed and the proof of this destruction shall be provided to the IOC.

ARTICLE 9 SANCTIONS ON INDIVIDUALS

9.1 Disqualification of Olympic Games Results

An Anti-Doping Rule violation occurring during or in connection with the Olympic Games may lead to disqualification of all of the Athlete's results obtained in the Olympic Games with all consequences, including forfeiture of all medals, points and prizes, except as provided in Article 9.1.1.

9.1.1 If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's results in the other Competition shall not be Disqualified unless the Athlete's results in Competitions other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the Athlete's anti-doping rule violation.

[...]

16.5 These Rules have been adopted pursuant to the applicable provisions of the Code and shall be interpreted in a manner that is consistent with applicable provisions of the Code.

APPENDIX 1 – DEFINITIONS

[...]

Prohibited Substance Any substance so described on the Prohibited List

APPENDIX 3 – TECHNICAL PROCEDURES RELATING TO DOPING CONTROL

1. Outline of Beijing 2008 Olympic Games Doping Control Program

[...]

Generally, negative results will be provided in 24 hours and it is expected that the positive results will be provided in 48 hours, with the exception of the EPO test results, which will be provided in 72 hours.

[...]

5. Urine Sample Collection Procedure

[...]

The DCO shall inform the Athlete of the procedures that are about to be undertaken, as follow: ... He/She shall then select a sealed collection vessel, visually check that it is clean and intact, proceed to the toilet and urinate a minimum of 75 ml or 110 ml, if the Athlete has been selected for an EPO test, a minimum of 110 ml into the collection vessel under the direct observation of a Witness DCO ...

[...]

The Athlete shall pour approximately one third (minimum 25 ml and 40 ml for an EPO Test Sample) into the B bottle and two thirds (minimum 50 ml and 70 ml for an EPO Test Sample) of the urine in the collection vessel into the A bottle, as directed by the DCO. If more urine is provided, first the A bottle then the B bottle will be filled as much as possible, as directed by the DCO. A few drops of urine shall remain in the collection vessel.

11. Sample Analysis

The analysis of each A Sample shall be performed as soon as possible after its arrival at the laboratory.

The B Sample shall be kept sealed at the Laboratory and be opened only with the authorisation of the Chair of the IOC MC. The analysis of a Sample shall be carried out in accordance with the International Standard for Laboratories.

55. The ISL in force during the period of the Beijing Games in 2008 (Version 5.0, January 2008) provided:

5.2.4 Analytical Testing

5.2.4.2 Urine Initial Testing Procedure

5.2.4.2.1 The Initial Testing Procedure(s) shall detect the Prohibited Substance(s) or Metabolite(s) of Prohibited Substance(s) or Marker(s) of the Use of a Prohibited Method for all substances covered by the Prohibited List for which there is a method that is Fit-for-purpose. WADA may make specific exceptions to this section for specialized techniques that are not required to be within the scope of accreditation of all Laboratories.

5.2.4.2.2 The Initial Testing Procedure shall be performed with a Fit-for-purpose method for the Prohibited Substance or Prohibited Method being tested. [...]

5.2.4.3 Urine Confirmation Procedure

[...]

5.2.4.3.1.1. A Presumptive Analytical Finding from an Initial Testing Procedure of a Prohibited Substance, Metabolite(s) of a Prohibited Substance, or Marker(s) of the Use of a Prohibited Substance or Prohibited Method shall be confirmed using an additional Aliquot(s) taken from the original A Sample.

5.2.4.3.1.2 Mass spectrometry (MS) coupled to either gas (GC) or liquid chromatography (LC) is the analytical technique of choice for confirmation of Prohibited Substances, Metabolite(s) of a Prohibited Substance, or Marker(s) of the Use of a Prohibited Substance or Prohibited Method. GC or High Performance Liquid Chromatography (HPLC) coupled with MS or MS-MS are acceptable for both Initial Testing Procedures and Confirmation Procedures for specific analyte. [...]

5.2.6 Documentation and Reporting

5.2.6.1 The Laboratory shall have documented procedures to ensure that it maintains a coordinated record related to each Sample analyzed. In the case of an Adverse Analytical Finding or Atypical Finding, the record shall include the data necessary to support the conclusions reported. In general, the record should be such that in the absence of the analyst, another competent analyst could evaluate what tests had been performed and interpret the data.

[...]

5.2.6.5 Reporting of "A" Sample results should occur within ten (10) working days of receipt of the Sample. The reporting time required for specific Competitions may be substantially less than ten days. The reporting time may be altered by agreement between the Laboratory and the Testing Authority.

56. The applicable ISL applicable at the time of the testing by the Lausanne Laboratory in 2016 was the 2015 version (version 8.0, dated 20 March 2014). This provides, so far as relevant:

5.2.2.12 Long-term storage of Samples

5.2.2.12.1 At the direction of the Testing Authority, any Sample may be stored in long-term storage for up to ten years. Guidance on the process for long-term storage is found in the document entitled Guidelines for Long Term Storage.

5.2.2.12.2 The Testing Authority should retain the Doping Control official records pertaining to all stored samples for the duration of Sample storage.

5.2.2.12.3 The Laboratory should retain all chain of custody and other records pertaining to a stored Sample for the duration of Sample storage.

[...]

5.2.2.12.8 Samples held in long-term storage may be selected for Further Analysis at the discretion of the Testing Authority. WADA may also direct the Further Analysis of stored Samples at its own expense. The choice of which Laboratory shall perform the Further Analysis will be made by the Testing Authority or WADA. Guidance on which Samples should be subject to Further Analysis is found in the Guidelines for Long-Term Storage.

X. MERITS

A. Overview of the Panel's Legal Analysis

57. It is common ground between the parties that:
- (i) the Athlete's sample taken following the Race and re-analysed in 2016 contained MHA, a prohibited substance, which constitutes an ADRV pursuant to Article 2.1 IOC ADR;
 - (ii) MHA was not expressly listed by name in the prohibited list applicable during the Beijing Games, but it was nevertheless already covered by the list under S6 Stimulants, as a substance with a similar chemical structure or similar biological effect(s). It has been expressly listed from 2010 and it is still on the prohibited list;
 - (iii) this ADRV has been established within the eight (8) years period during which a sample may be re-analysed and "any anti-doping rule violation discovered as a result thereof shall be dealt with in accordance with the Rules", pursuant to Article 6.5 of the IOC ADR;
 - (iv) this period of 8 years corresponds to the statute of limitation provided for in the then applicable WADA Code (2003), which has thus been observed;
 - (v) as a consequence of the commission of this ADRV, the IOC sought and the DC imposed a disqualification of the individual results of the Athlete at the Race in accordance with Article 8.1 of the IOC ADR and of the entire Jamaican Team in the 4X100 m relay at the Race pursuant to Article 10.1 §3 of the IOC ADR in combination with Rule 39 of the IAAF Competition Rules (2008);

- (vi) the scope of the Appealed Decision is strictly limited to the consequences related to the Beijing Games and do not bear on nor concern consequences beyond the Beijing Games, including ineligibility or disqualification of other events and accordingly issues, which do not bear on the existence of an objective ADRV and their specific consequences related to the Beijing Games (such as issues linked with fault or negligence), are not relevant in these proceedings.

B. Main Issues

58. The following are the main issues which arise in this appeal:

- (i) Is the identification of the presence of MHA on the re-analysis of the sample during 2016 covered by the scope of the instructions given by the IOC to the Lausanne Laboratory, and, if not, does it nevertheless form a valid basis upon which disciplinary proceedings could be based?
- (ii) Is the scope of the re-analysis of samples restricted by the “policy” of the IOC?
- (iii) Was there a delay in the re-analysis of the sample which would require the dismissal of these proceedings as being unfair to the Athlete in view of the specific circumstances of this case?
- (iv) Is the establishment of an ADRV based on MHA in violation of the requirement of legal certainty, since MHA was not a listed substance in 2008?

C. Positive Finding of MHA

- 59. As a background to the review of the Athlete’s arguments it is relevant to briefly touch on the testing of the Athlete’s samples in 2008 and in 2016, the resulting findings and the meaning of such findings, subject to the Athlete’s arguments which would be considered in the following paragraphs.
- 60. The Athlete participated at the Beijing Games. Similarly to all other participants, the Athlete expressly accepted the rules applicable to this event by signing the applicable entry form. The entry form included a specific agreement to comply with the event rules and, as part thereof, specifically with the IOC ADR. The entry form also included a confirmation that the Athlete had full knowledge of the corresponding provisions.
- 61. Article 6.5 of the IOC ADR provides that *“the ownership of the samples is vested in the IOC for the eight years. During this period the IOC shall have the right to re-analyse samples (taken during the Period of the Olympic Games). Any anti-doping rule violation discovered as a result thereof shall be dealt with in accordance with these Rules”*.
- 62. The IOC has exercised the possibility of the re-analysis of the Athlete’s sample within the applicable deadline of eight (8) years in the context of a global process of re-analysis of the samples collected at the Beijing Games.

63. Such process was not directed against the Athlete in particular. The Athlete's sample was only one amongst the 433 samples collected at the Beijing Game and selected for a new analysis.
64. The analysis of the Athlete's sample was performed at the Lausanne Laboratory in the exact same way and process as all other samples. It established the presence of MHA.
65. The analysis of the Athlete's sample by the Beijing Laboratory some eight years earlier returned negative results. The Beijing Laboratory performed the initial screening analysis of the sample using the methods, then applicable and considered to be adequate. The Beijing laboratory did not then detect the presence of MHA in the Athlete's sample because MHA was not part of the analytical menu of the Beijing Laboratory, since it was then not a substance expressly listed by name in the applicable WADA 2008 Prohibited Substance List. The method of mass spectrometry used by laboratories looks for specific signals (ion values) established by comparison between the value obtained from the substance tested with the value of the corresponding reference substance and therefore does not focus on substances for which a reference value is not provided.
66. The WADA 2008 Prohibited List included "*all stimulants*" as substances prohibited in competition at section S6, including the stimulants identified at that section "*and other substances with a similar chemical structure or similar biological effect(s)*". MHA was not specifically listed in section S6 of the Prohibited List.
67. Stimulants are numerous in number and new stimulants can easily be developed. For this reason, for this particular class of substances, the WADA Prohibited List is not a closed list and does not provide an exhaustive enumeration, but establishes the principle that all stimulants are prohibited. The list expressly identifies examples of stimulants and states that substances of similar chemical structure or similar biological effects are also stimulants within the scope of class S6.
68. While not mentioned by name during 2008, MHA was nevertheless already covered under class S6 Stimulants, as a substance with a similar chemical structure or similar biological effect(s) to an expressly listed stimulant (tuaminoheptane), and it was therefore already prohibited as a stimulant.
69. The use of MHA by name began to be known shortly after the Beijing Games.
70. On 22 September 2009, MHA was found by a CAS panel to be a substance similar to a prohibited substance (tuaminoheptane) and therefore prohibited as being a substance "*with a very similar chemical structure*" and with "*similar biological effects to it*" (CAS 2009/A/1805 & 1847).
71. In the Prohibited List 2010, MHA was expressly identified under section S6(a) as a non-specified stimulant.
72. In the Prohibited List 2011 (and all subsequent years), MHA was included under section S6(b) as a specified stimulant. In the WADA 2017 Prohibited List, which was applicable when the

appeal was heard, MHA was still listed on the list of specified stimulants and remains listed also in the current WADA 2018 Prohibited List. This list remains non exhaustive.

73. The IOC provided indications obtained from WADA, according to which the number of recorded cases of MHA was 31 in 2009 (when MHA was still not expressly listed) and then rapidly increased from 2010 (when it was first expressly listed) to reach almost 300 in 2011/2012. Cases involving MHA have been decreasing since 2013 to a level of approximately 50 cases per year in the last three years.
74. The validity of the results of the analysis of the Athlete's sample is unchallenged. They thus establish the presence of MHA, a prohibited substance, in the Athlete's sample and, therefore, an ADRV within the meaning of Article 2.1 IOC ADR.
75. Should the Athlete's arguments fail and since the sample was collected in competition, this ADRV would necessarily lead to automatic an disqualification of the results in application of Article 8.1 of the IOC ADR with all the resulting consequences (withdrawal of medal, diploma, medallist pin) and additionally to an automatic disqualification of the results of the Jamaican Team at the Race, as a consequence of the combined application of section 3 of Article 10.1 of the IOC ADR and Rule 39.2 of the IAAF Competition Rules 2008.
76. The Athlete argues that due to any one or more of the failures by the IOC, the ADRV should not result in any consequence to the Athlete or to the Jamaican team.

D. Should this case be dismissed on the ground that the Lausanne Laboratory did not have an authority to re-test the Athlete's sample for any substance other than those identified in Dr Budgett's Letter?

77. The Athlete argues that one of his fundamental rights was breached in that his sample was tested by the Lausanne Laboratory outside the scope and specific instructions of the IOC, which was the sole owner of the sample at the time such tests were conducted. The Lausanne Laboratory tested for products which it was not requested to test, used a test which was neither specifically designed for nor primarily placed to detect the products which the IOC requested it to test for and went on to conduct a confirmation procedure on the A Sample by gas chromatography mass spectrometry searching for MHA, without first reporting the presumptive AAF to the IOC as specifically instructed.
78. According to the Athlete, the Lausanne Laboratory was limited by specific instructions provided by the IOC, which translated in this case to the instructions contained in Dr Budgett's Letter. The Lausanne Laboratory was only authorized to test the Athlete's sample for the substances specified in such letter which did not include MHA. Since the analysis of the Athlete's sample carried out by the Lausanne Laboratory was neither requested nor authorized by Dr Budgett's Letter, the test results should be disregarded.
79. Thus, the Athlete argues, the testing of the Athlete's sample for MHA was the equivalent of testing a sample not included on Dr Budgett's list, which is wholly impermissible and not in accordance with the 2015 ISL.

80. The Athlete further claims that the Lausanne Laboratory carried out on the sample its standard “Dilute and Shoot” screening process, which, according to the testimony of Mr Paul Scott, is not an optimal method to search for the specific substances identified in Dr Budgett’s Letter.
81. The Athlete claims that the contention that the Lausanne Laboratory was merely to prioritise or focus on the four groups of substances identified in Dr Budgett’s Letter was neither the IOC’s intention, nor the Lausanne Laboratory’s understanding of the letter at the time and that the Lausanne Laboratory simply carried out its standard “Dilute and Shoot” process without any form of prioritisation at all.
82. The Athlete claims that an additional departure from the clear IOC instructions transpired when the Lausanne Laboratory further ignored the terms of Dr Budgett’s Letter in proceeding to carry out a confirmation procedure on the A Sample by gas chromatography mass spectrometry looking for MHA, without first reporting the presumptive AAF to the IOC, despite Dr Budgett’s express instruction that it should do so.
83. The DC found in this respect that *“the general written instructions given to the Lausanne Laboratory appear not to include the substance at stake and are worded in a specific manner. Having noted the explanations of Dr Budgett, the Disciplinary Commission observes that it would indeed have been preferable to have issued clearer instructions”*. The DC went on to state *“that it would be good practice for laboratory to include in the screening analysis all Prohibited Substances which can be detected through the applied screening method, even those which have not been specifically listed by the Testing Authority”*.
84. The Athlete argues that this approach breaches the common law principle *nullus commodum capere potest ex sua injuria propria* (no one can derive an advantage from his own wrong) and further that it cannot be good practice for a laboratory to conduct tests for which it has no authority.
85. The Athlete compares the position to the situation in which an athlete’s right to attend the opening and analysis of his B sample has not been respected, in which case the B sample analysis must be disregarded (referring to CAS 2002/A/385 at §§22-34).
86. The Athlete’s position is that an athlete’s right for his sample not to be tested in the absence of lawful authorisation by the IOC is even more fundamental than the right to attend the opening and analysis of the B sample, and the consequence of not respecting that right must be the same for both; namely, that the results of the A sample analysis must be disregarded.
87. The Panel accepts that that the ownership of samples taken during the Beijing Games vested in the IOC for eight years pursuant to Article 6.5 of the IOC ADR and, therefore, the Lausanne Laboratory could not itself have decided unilaterally to undertake the re-analysis of the stored Beijing samples.
88. The Panel cannot accept, however, that this general premise taints the test as conducted by the Lausanne Laboratory. Article 6.5 of the IOC ADR provides a broad and discretionary power to the IOC to test for any and all prohibited substances at any time within the statute of limitation period which, in relation to samples from the Beijing Games, stood at eight years.

89. Obviously, as with the application of any discretionary power by sporting organisations, such power has to be applied in good faith, without prejudice or bias and not in an arbitrary or capricious manner. However, it is not alleged, let alone supported, that any of these apply to the case at hand; not in regard to the IOC's instructions and actions and not in regard to the activities of the Lausanne Laboratory.
90. While it is admitted by the IOC and accepted by the DC that clearer and better directed instructions should have been given, it is not suggested that the Lausanne Laboratory acted capriciously, in bad faith or with any bias in conducting the tests on the Athlete's sample.
91. On the contrary, the testimonies provided by Dr Richard Budgett, Prof Martial Saugy and Dr Tia Kuuranne make it quite clear that the Lausanne Laboratory did not follow the instructions in Dr Budgett's Letter since these were different from the Lausanne Laboratory's regular testing process, conducted on numerous occasions in the past and most relevant for dealing with a large volume of samples, which was the "Dilute and Shoot" method. The method was applied to all the Beijing Games' samples brought for re-analysis, since the Lausanne Laboratory has applied it in the past and considered it to be the relevant method of testing. It was clarified that this re-analysis was the third time that a broad re-analysis program was performed.
92. It was confirmed by the experts' evidence at the hearing that the finding of MHA in the screening analysis was effectively made as a necessary consequence of the application of the "Dilute and Shoot" method, which the Lausanne Laboratory chose to use because it covered substances expressly included in Dr Budgett's Letter, and because it is recognised to be relevant, economical and efficient. It was clarified and confirmed that this method was logically used as adequate screening method in the initial analysis of all samples subject to re-analysis.
93. Mr Scott testified that had he been commissioned to conduct the re-analysis he would have established and validated an *ad hoc* more specific screening method focusing only on the substances listed in Dr Budgett's Letter. The Panel understands that the Lausanne Laboratory found it easy and convenient to use a method it was familiar with and often used rather than to develop an *ad hoc* method, albeit, arguably, better fit for purpose. Additionally, Mr Scott did not deny that the "Dilute and Shoot" method could also be adequate, even if, in his view, not the most efficient for the purposes detailed in Dr Budgett's Letter.
94. Dr Kuuranne indicated that the "Dilute and Shoot" method covers a wide range of some 160 substances. Among others, it covers and is used to screen SARMS and HIF-stabilisers, which were expressly mentioned in Dr Budgett's Letter. The "Dilute and Shoot" method is to be applied in its validated format, and it would have been inadequate and incorrect to deliberately restrict the application of the method so as not to detect certain substances.
95. According to Article 5.2.4.2.1 of the ISL 2016, the Lausanne Laboratory had to apply a "*fit for purpose*" method capable of detecting the prohibited substances. Subject thereto, the Lausanne Laboratory had the choice of the methods it applied. The "Dilute and Shoot" method is a screening method used by the Lausanne Laboratory since 2011. It uses little urine, a very relevant aspect in the context of re-analysis, and does not require urine preparation. It allows to detect the substances covered with adequate sensitivity. The "Dilute and Shoot" method thus

fully satisfies the ISL requirements and was adequate. There may have been other adequate methods, but the Panel is satisfied that the “Dilute and Shoot” method was an adequate one and that there was no reason to apply other methods instead of a proven and efficient method, fully adequate at the screening stage and regularly used by the Lausanne Laboratory.

96. The Panel finds that the Lausanne Laboratory adequately used a method validated and fit for purpose in accordance with Article 5.2.4.2.2 of the ISL, a method which is also efficient, uses little urine and is economical.
97. Dr Budgett expressly acknowledged that the wording used in his letter was too narrow but claimed that this wording did not reflect an understanding between the IOC and the Lausanne Laboratory that the expected analysis, whilst focusing on the expressly designated substances (which priority substances were ones most likely to be newly detected in view of the improvements in methods and equipment), was meant to also cover as a matter of course other substances which are part of the in-competition menu.
98. The testimony indicates that neither the IOC nor the Lausanne Laboratory ascribed to Dr Budgett’s Letter the meaning of a legal instruction to specifically and only search for the substances specifically mentioned in that letter, or to exclude any other analysis.
99. On the basis of the evidence before it, the Panel is satisfied that there was not an intention on the part of the IOC to prevent the Lausanne Laboratory to report any prohibited substance which was part of the in-competition menu. In any event, the subsequent IOC’s ratification of the Lausanne Laboratory’s conduct clearly superseded the earlier IOC’s instructions and any possible restrictive interpretation thereof.
100. The Panel is satisfied that the Lausanne Laboratory acted in good faith based on its understanding that the full in-competition menu should be followed using the “Dilute and Shoot” method. This may not have followed the precise wording of Dr Budgett’s Letter, but it was in general accord with the two prior “mass” re-testing programs, with the Lausanne Laboratory’s regular testing menu and using a method which it typically uses and which is cost effective when multiple samples are analysed and there is a need to preserve urine for further tests.
101. The Panel is satisfied that in view of the broad language of the rule covering re-testing, there is no question that the test result must have been reported by the Lausanne Laboratory. Indeed it would have been unfair to other competitors at the Beijing Games had the positive result been ignored or not acted upon.
102. The Panel accepts that once WADA had confirmed that MHA was a prohibited substance (as a related substance), the IOC had effectively no other option than to instruct the Lausanne Laboratory to proceed with the analysis process of the split B-Sample and to report and address this ADRV. Fairness to other competitors so requires.
103. The Panel further notes that the instructions in Dr Budgett’s Letter are a matter between the IOC and the Lausanne Laboratory, are not addressed to the Athlete and cannot as such establish

a legitimate expectation of the Athlete or provide any limiting factor regarding the re-testing program. The Athlete was aware of the relevant rules relating to re-testing and could only have a legitimate expectation based upon the application of those rules, rather than on correspondence regarding processes between an IOC representative and the Lausanne Laboratory. The Athlete's expectation was based on the authorisation to retest samples contained in Article 6.5 of the IOC ADR, which is broadly worded, and not on the specific instructions directed to the Lausanne Laboratory.

104. Furthermore, the IOC did not use the results of the A-Sample analysis to report an AAF but as a preliminary indication to then proceed to full analysis on the basis of split B-Sample. This decision has been made by the IOC based on the specific permission contained in Article 5.2.2.12.10 of the ISL. The Panel believes that had there been an issue with the initial instructions to the Lausanne Laboratory, these later instructions relating to the Athlete's sample cured any such failures.
105. The decisive part of the analysis relating to the re-analysis of the Athlete's sample is the analysis of the split B-Sample (double confirmation analysis in the B1-Sample and then the B2-Sample, equivalent to a confirmation analysis in A-Sample and B-Sample). At this stage, the instructions to the Lausanne Laboratory to conduct the necessary analysis on the Athlete's sample for MHA were thus in any event specifically issued by the IOC.
106. The IOC refers to Article 5.2.4.2.5 of the ISL which provides: "*Irregularities in the Initial Testing Procedure(s) shall not invalidate an Adverse Analytical Finding when the Confirmation Procedure adequately compensates for such irregularities*". Thus, even had the initial part of the process been problematic in not following the instructions, which is not the case here, this would not affect the essential part of the analysis covered by the specific instructions from the IOC.
107. The IOC also notes that the Lausanne Laboratory would in any event have had the authority to decide to specifically search for substances, which the IOC did not include in its requested analytical menu, noting that this possibility is expressly provided in Article 6.4.3 of the WADC which specifies that the "*Results from any such analysis shall be reported and have the same validity and Consequence as any other analytical result*".
108. The Panel agrees that also for this reasons the findings of MHA, which concerned the Athlete, were validly made and reported by the Lausanne Laboratory.
109. The Panel concludes that the DC was right in concluding that, while clearer instructions are preferable, the governing and decisive matter is the clear regulation on point. Article 6.5 of the IOC ADR does not limit the types of tests to be conducted on samples within the "statute of limitation" period. The Athlete knew or could have known that, as a participant at the Beijing Games, his samples could be retested at any time during the following eight years, and under any applicable method for any substance. He had no grounds to rely on a communication between the IOC and the Lausanne Laboratory which was not addressed to nor known by him. The IOC was not limited by its own instruction letter and was not setting limits to its own possibility to extend the re-analysis as it would deem fit. In any event, as said, the subsequent

IOC's ratification of the Lausanne Laboratory's procedure superseded for all purposes its own prior instructions.

110. The Athlete did not argue that the tests conducted by the Lausanne Laboratory, allegedly outside the scope of Dr Budgett's Letter, were made due to a specific bias towards him, or with bad faith or ill intentions. On the contrary, it was made in a way in which the Lausanne Laboratory usually acts, under a normal methodology applied by it and designed to analyse a large number of samples in an economical and effective way. Thus the Athlete's arguments on this point must fail.

E. Should this case be dismissed on the ground that the re-analysis conducted on the Athlete's sample exceeded the scope of the IOC's "policy" on the re-analysis program?

111. The Athlete claims that the scope of re-analysis of samples is restricted by the "policy" of the IOC on the detection of substances which could not have been detected at the time of the initial analysis. Since MHA was technically detectable at the time of the initial analysis by the WADA-accredited laboratory in Beijing, it could not be a substance legitimately detected in a later re-analysis.
112. The Athlete argues that, in accordance with the IOC's (and WADA's) repeatedly stated policy, the rationale and therefore justification for the re-testing regime is to enable re-testing where scientific methods have developed since the time of the original test such that a prohibited substance could be detected by those methods where it could not have been previously. As a result, it was impermissible, as being in breach of that policy and contrary to the Athlete's legitimate expectations, to test his sample for MHA in circumstances where MHA could have been detected by methods available at the time of the original test. The Athlete defines this ground as being his "central case".
113. The Athlete argues that the Beijing Laboratory had the ability to detect MHA in August 2008. He argues that since MHA has the same molecular weight as tuaminoheptane, which was a named prohibited substance in the 2008 Prohibited List (S.6 Stimulants), where MHA is present two peaks would appear in the 'window' for tuaminoheptane which should have attracted attention in a detailed review.
114. The Athlete argues that the Beijing Laboratory should have acted in the same way as the Lausanne Laboratory did on 2 October 2008, a short time after the Beijing Games, when it reported an AAF for MHA for the first time (the case of the athlete Josephine Onyia). The Lausanne Laboratory also needed to obtain a reference standard and was able to do so and detect MHA in a sample taken and analysed just a few weeks after that of the Athlete using the methods for detection which existed at the Beijing Games.
115. The Athlete refers to Professor Saugy's acceptance that the Beijing Laboratory had, at that time, the analytical technology to detect MHA.
116. The Athlete argues that the duty to detect substances on the Prohibited List necessarily encompasses a duty to detect both those substances which are specifically identified on the

Prohibited List (such as tuaminoheptane) and those which are covered by the Prohibited List by virtue of being substances with a similar chemical structure or similar biological effect(s). This is what must be expected from a prominent IOC laboratory and under section 5.2.4.2.1 of the ISL, which provided that:

“The Initial Testing Procedure shall detect the Prohibited Substance(s) or Metabolite(s) of Prohibited Substance(s) or Marker(s) of the Use of a Prohibited Substance or Prohibited Method for all substances covered by the Prohibited List for which there is a method that is Fit-for-purpose. WADA may make specific exceptions to this section for specialized techniques that are not required to be within the scope of accreditation of all Laboratories”.

117. The IOC argues that MHA was not capable of being detected by the Beijing Laboratory since as an Olympic laboratory acting under time pressure with a large number of samples it could only check for substances already known and specifically identified and searched for. Professor Saugy’s evidence was that the Beijing Laboratory “*should not investigate a new peak*” as “*its only duty was to apply the rules and detect substances on the Prohibited List*” whereas the Lausanne Laboratory investigated this peak because “*it is always researching*”.
118. The IOC’s second, but related, argument is that the Beijing Laboratory did not have the time and resources to investigate the double peak because it needed to obtain the reference standard, which took the Lausanne Laboratory a few months, and therefore could not have been done during the period of the Beijing Games.
119. The Athlete argues that the Beijing Laboratory had a duty to search and report positive substances whether named or not and that the lack of time is not a reason since cases may be reported following the Games.
120. The Athlete argues that even if the Beijing Laboratory did not have the resources to obtain a reference standard then, it could have reported an atypical finding, that is, a report which requires further investigation as provided for by the ISL, prior to the determination of an AAF. Accordingly, there is simply no basis for the IOC’s suggestion that the Beijing Laboratory could not have detected MHA, by contrast with the Lausanne Laboratory, at the time the Athlete’s sample was tested in August 2008.
121. The Athlete, therefore, argues that if there have not been any scientific developments, and the substance was detectable at the time of the original test, then there is no point in re-testing it unless other grounds exist for re-testing of specific samples such as substantial doubts about a testing program (such as in Sochi) or specific intelligence reports about this specific Athlete or sample.
122. The Athlete argues that his ability to defend himself was severely compromised by the long-time which passed between the date of the alleged ADRV and the date upon which he is called to provide an explanation for it. The public policy requires a speedy resolution of anti-doping charges. This policy may be required to yield to the countervailing public interest of an anti-doping authority being able to bring such charges where it was previously unable to do so. But

where, as here, it was previously able to do so, then the public interest in the Athlete's right to a speedy hearing in order to defend himself must prevail.

123. The issues raised are not without their difficulties, but on balance the Panel is more persuaded by the IOC's arguments on point. The IOC introduced regulations explicitly providing for re-analysis after the 2004 Olympics. Since then, the rules applicable to each successive edition of the Olympic Games include a corresponding regulatory basis. These rules send a message to all participants at the Olympic Games, that they have the fundamental duty not to use any prohibited substance and to ensure that no prohibited substance is effectively present in their systems and in their samples. If they fail to do so, they will not be entirely safe until the expiration of the statute of limitation, which was eight (8) years during the relevant period to this case, and has now been extended to ten (10) years.
124. This is an absolute duty and is not linked with the detectability of the substance. Therefore, a failure to discover the substance during an earlier period (a negative test), or by one laboratory, is not a guarantee against a later finding of an ADRV, provided it is within the period of limitation, also considering the well-known possibility of so-called "false negatives".
125. The program tries to avoid an injustice to the athletes performing within the rules, by limiting the chance of athletes who have failed to ensure that they compete without prohibited substances in their bodily systems to escape detection and enjoy the benefit of results unduly obtained. The intention is to correct, to the extent possible, including in the face of technological and testing developments, that prejudice and injustice.
126. The more time which elapses between the sample collection and the retest, the more significant the improvements in the detection capabilities may indeed be.
127. In the end, what truly counts is not whether a substance is detected or not in a specific analysis performed at a given time in a given laboratory but whether it is present or not. In Article 6.5 of the IOC ADR this objective is expressed in clear and unambiguous terms:

"Samples shall be stored in a secure manner at the laboratory or as otherwise directed by the IOC and may be further analysed. Consistent with Article 17 of the Code the ownership of the samples is vested in the IOC for the eight years. During this period, the IOC shall have the right to re-analyse samples (taken during the Period of the Olympic Games). Any anti-doping rule violation discovered as a result thereof shall be dealt with in accordance with these Rules".
128. Therefore, subject to any express provision to the contrary, there appears to be neither limitation nor reservation on the scope of the analysis. The wording is broad, indicating that samples establishing the presence of any prohibited substance form the basis for an "*any anti-doping rule violation*".
129. Moreover, a new analysis is not limited by the analysis already performed. The initial analysis does not act as a "*re-analysis threshold*". The rules do not exclude from the scope of the re-analysis prohibited substances which the first anti-doping laboratory could have effectively or theoretically discovered given the then existing state of science.

130. The Athlete argues that there is no reason to treat him any differently than athletes in a number of positive tests for clenbuterol arising from the 2016 re-testing of samples from the Beijing Games regarding which WADA and the IOC recognized the prejudice to athletes by significant delays in retesting, and the inappropriateness of bringing charges in those circumstances.
131. In the case of clenbuterol, WADA expressly recognised in some of the Beijing re-analysis cases, *“eight years later, athletes could not reasonably be expected to recall where and what they ate, which may have led to their consuming the substance”*, and no charges were therefore brought as the levels in these re-analysis cases were in the range of potential meat contamination.
132. The Athlete argues that MHA, like clenbuterol, is also a prohibited, non-threshold, substance. It is also a substance in respect of which it has long been recognised that inadvertent ingestion is an issue. The policy justifications for “reason to prevail” in a case involving MHA are just as great as in the case of clenbuterol. Thus the same arguments regarding the need of effectively levelling of the playing field should also apply here. The Athlete argues that these are similar cases which should be treated in a similar way, and the IOC and WADA are effectively discriminating against the Athlete without any justification. Thus, the Athlete argues, this inconsistency of approach by WADA should, in fairness, result in the dismissal of the charges against the Athlete.
133. The IOC is adamant that the issue which arose in respect with the findings of clenbuterol are entirely distinguishable from the Athlete’s case. Since 2011 it is acknowledged that in certain countries, such as China or Mexico, meat contamination with clenbuterol is virtually endemic. Accordingly, low level clenbuterol cases (below 1 ng/ml) occurring in this environment are handled in a particular way by result management authorities. In the vast majority of the cases, once it has been ascertained that the meat contamination is the likely cause of the results, the cases are closed. Some result management authorities do, however, conduct the result management process and issue decisions of ‘no fault’ (which raises the question of disqualification).
134. Dr Budgett confirmed at the hearing that the decision to proceed with the case against the Athlete was made in full consultation with WADA. This stands in contrast with WADA’s decision not to proceed with cases of low levels of clenbuterol in China or Mexico since 2011.
135. The Panel highlights that the basic rule requires the processing of cases in which samples indicate a finding of a prohibited substance. Very low levels of clenbuterol, found in particular in some countries are likely the result of meat contamination. Thus, a process of consultation with WADA exists and this process assists in assessing the scientific meaning of the positive findings. MHA might result from contamination but is not a product which is susceptible to virtually endemic proportions of contamination (in some specific countries) from a basic product such as meat. No evidence supporting such a proposition was presented during the proceedings. The Panel has not been made aware of a single case in which WADA treated MHA in a similar way to the way low level clenbuterol cases were treated. Thus, the Panel concludes that this decision of the IOC to act on a finding of MHA, a substance with respect to which there exists no issue comparable to the one discussed in connection with clenbuterol, and following a consultation with WADA, was appropriate.

136. The Athlete further refers to the CAS decision in CAS 2014/A/3487, in which the panel took note: “... of the CAS jurisprudence that recognises the existence of certain international standards which are considered to be so fundamental to the fairness of the doping control regime and so central to ensuring the integrity of the sample collection and testing process that any departure from them will result in the automatic invalidation of the outcome of the testing procedure”.
137. The Athlete refers to decisions in which athletes had been deprived of their right to be present or represented during the testing of the B Sample (CAS 2012/A/385; CAS 2008/A/1607; and CAS 2010/A/2161). Referring to those cases, the panel in CAS 2014/A/3487 at para. 152 concluded that “certain IST departures will be treated as so serious that, by their very nature, they will be considered to undermine the fairness of the testing process to such an extent that it is impossible for a reviewing body to be comfortably satisfied that a doping violation has occurred”.
138. The Athlete argues that the fundamental departure from international standards in his case occurred prior to the application of any international standards relating to the analysis of his sample. The departure occurred by the actual re-test of his sample which, in itself, was a breach of and a departure from the IOC’s policy and his legitimate expectation, in reliance on this policy, that his sample will not be tested for MHA. The Athlete argues that there is no more fundamental breach than testing a sample when there was no lawful basis upon which to test it.
139. The Panel highlights that the principle in CAS 2014/A/3487 refers to departure from clearly written international standards (either ISL or IST) which are stated within the rules to be fundamental and can easily be identified and applied. The Panel further highlights that in this case there was no departure from any such standard. In essence, the applicable rule was followed and the re-analysis was in conformity with Article 6.5 of the IOC ADR, which sets the Athlete’s expectation, rather than later general public releases regarding the re-analysis program and its main rationale, which public releases did not in any event purport to impose technical standards.
140. The Panel highlights that the re-analysis program is meant to protect the integrity of the competition results and the interests of athletes who participated without any prohibited substance and not the interests of athletes who were initially not detected for any reason and are later and within the statute of limitation period found to have competed with a prohibited substance in their bodily systems.

F. Should this case be dismissed due to the IOC’s delay in bringing these proceedings which allegedly prejudiced the Athlete?

141. The Athlete argues that he was prejudiced by a delay of years in retesting his sample only months before the expiry of the period of limitation.
142. The Athlete claims that MHA was tested for by the Lausanne Laboratory by at least September 2008, was tested routinely by at least 2010 and that there have not been recent developments prior to March 2016 that would justify retesting for MHA using a more sophisticated or enhanced analytical technique. The sample could have been re-tested for MHA in 2008 and in any event by 2010.

143. The Athlete argues that as a result of the passage of time of over seven and a half years from sample collection to re-test, the Athlete's ability to defend this case, such as recalling and testing products taken by him and finding the source of MHA, was significantly affected. The Athlete claims that it follows that the charge against him should be dismissed. The Athlete cites CAS 2014/A/3639 (award of 8 April 2015), in which the Sole Arbitrator indicated that he: "*could foresee a situation where an athlete's right to a timely and fair hearing in the first instance procedure was so fundamentally violated that such omissions in the underlying procedure results in an automatic dismissal of a violation*".
144. The Athlete argues that in the present case the delay on the part of the IOC of nearly eight (8) years in identifying the AAF was avoidable. This resulted according to the Athlete in manifest disregard to his right to a fair trial and the principle of equal treatment since he is now not in a position to answer questions regarding the source of the substance or any other matters which may assist him in addressing the charge.
145. The Panel is not persuaded by this argument. The WADA Code 2004 provided for a limitation period of eight years between the date of an alleged violation and an action being commenced. It is an adequate exercise of the right to re-analyse provided for in Article 6.5 of the IOC ADR. The rules do not form an obligation on the IOC to perform re-analysis at all, or to do so as early as possible, when any new testing method becomes available.
146. The Panel notes that there is logic in conducting a large scale re-analysis of a large number of samples towards the expiry of the statute of limitation period: this may maximise the possibility to obtain materially significant results, proportionate to the huge logistical operation and substantial costs, which the re-analysis of several hundreds of samples represents. This makes best use of the limited amount of urine available and maximizes the effects of the advances in research and technology over time.
147. The Panel can also not accept the Athlete's arguments regarding the alleged prejudice he suffered due to the "delay", claiming difficulty to gather evidence including of the possible source of the MHA. The Panel highlights that these difficulties are inherent to an application of a long statute of limitation period. Moreover, under the applicable anti-doping rules, the disqualification of results automatically occurs even when it is ascertained that an athlete, without any fault on his or her part, had a prohibited substance in his or her body at the time of the competition (the "no fault" defence being only relevant to avoid the period of ineligibility).
148. Indeed, the Appealed Decision rests on the sole finding of an objective ADRV based on the presence of a prohibited substance in the Athlete's sample and is strictly limited to the consequences related to the Beijing Games. Issues linked with fault or negligence, whether significant or not, are not relevant and other than the disqualification from the Race, with all it entails, sanctions such as ineligibility or disqualification from other events are not at stake. The Panel thus finds no merit in the Athlete's argument regarding an alleged prejudice he suffers due to "delay".

G. Should this case be dismissed as it allegedly breaches the principle of legal certainty in reference to the Athlete?

149. The Athlete argues that there would be a fundamental unfairness were he to be sanctioned for the presence of a substance that he did not know, and could not reasonably have known, was a prohibited substance at the time. The Athlete argues that a charge against him should therefore be dismissed based on the principle of a lack of legal certainty.
150. The Athlete contends that the fact that MHA was not expressly listed on the WADA 2008 Prohibited List, had not been included in the analytical menu of substances for which the Beijing Laboratory tested in 2008, was not analysed for during the Beijing Games, and was therefore not a substance that the Athlete, even having exercised his utmost care, could have avoided (unless he commissioned a chemical analysis of MHA and all the identified substances at section 6 of the Prohibited List), would not allow to base a finding of ADRV on that substance.
151. The Athlete clarifies that in making this submission he does not seek to argue that it is impermissible in principle for a substance to be prohibited even if it is not identified by name on the Prohibited List. However, the Athlete argues, in the case of MHA, as at the summer of 2008, the Athlete could not have reasonably been expected to have been able to learn that MHA was prohibited.
152. The Panel highlights that all stimulants were and are prohibited. There is a great number of stimulants, and they cannot all be listed by name. Therefore, the list of prohibited stimulants provides a list of named stimulants, which are typically the ones often detected, as well as a “hold all basket”. When and if a stimulant is identified as being in regular use, it becomes listed. This is exactly the process which was followed in respect of MHA. In 2008 it was prohibited as a stimulant without being listed. In 2010 it was first listed by name, initially as non-Specified, and then from 2011 as a Specified stimulant.
153. The Panel concludes that it is clear that MHA was already prohibited under the WADA 2008 Prohibited List as a stimulant having a similar structure and effects as one of the listed stimulants (tuaminoheptane). This has been confirmed in the award CAS 2009/A/1805. The Athlete was required to ensure that no stimulants were present in his bodily systems, named or unnamed. This is the legal framework which was set in order to ensure a more equal playing field to sporting competitors. It was a legal framework of which he was aware.
154. The Panel agrees with the IOC that the function of laboratories is only to conduct analysis, not to determine which stimulants should expressly be on the list or not or which stimulants are effectively used or not. Therefore, what is relevant is what substance, and which stimulant, was present in the Athlete’s systems, and not what was looked for by the Beijing Laboratory at the time.
155. This said, there is no finding that the Athlete took the substance intentionally or was negligent to any degree. It is possible that the substance found its way to the Athlete’s systems through contamination, which could or could not have been avoided with the exercise of utmost care. These questions are not relevant to an objective determination of an ADRV which must remain

under the applicable rules of the anti-doping regime which has been determined to be necessary for an effective fight against doping in sport, and which this Panel is called upon to apply.

H. Conclusion

156. Since the Panel concluded, on the specific circumstances of this case, that: (i) the re-analysis of the Athlete's sample collected following the Race at the Beijing Games confirmed the presence of MHA, (ii) it cannot accept any of the arguments raised by the Athlete contending that the test results should be ignored or the case should otherwise be dismissed for certain alleged failures, (iii) there was a finding of an objective ADRV based on the presence of a prohibited substance in the Athlete's sample, and (iv) this case is strictly limited to the consequences related to the Beijing Games and issues linked with fault or negligence are not relevant since sanctions such as ineligibility or disqualification from other events are not at stake; the Panel concludes that the Athlete's appeal is dismissed and the Appealed Decision is upheld.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 15 February 2017 by Mr Nesta Carter against the decision of the Disciplinary Commission of the International Olympic Committee dated 25 January 2017 is dismissed.
2. The decision of the Disciplinary Commission of the International Olympic Committee in the matter of Nesta Carter dated 25 January 2017 is upheld.
3. (...).
4. (...).
5. All other or further motions or prayers for relief are dismissed.