Arbitration CAS 2019/A/6574 World Anti-Doping Agency (WADA) v. Romanian National Anti-Doping Agency (RNADA) & Sorin Mineran, award of 24 July 2020

Panel: Prof. Jan Paulsson (France), President; Prof. Jens Evald (Denmark); Judge Jean-Paul Costa (France)

Athletics (marathon race)
Doping (higenamine)
Standing to be sued
Res judicata
Meaning of the applicability of decision "worldwide" pursuant to the World Anti-Doping Code
Accredited laboratories' duty to report any adverse analytical findings
Higenamine covered by the World Anti-Doping Agency prohibited list

1. **National anti-doping organizations (ADOs), are as a matter of course summoned before CAS to answer for the handling of doping cases at the national level. The ADO is asked to appear in all cases given its responsibility to answer for the outcome at the national level, and this cannot vary from case to case depending on differences in the relationship between the disciplinary body and the ADO.**

2. **The fact that the World Anti-Doping Agency (WADA) did not appeal the decision of a first instance adjudicating body in another case that it has not been proven that higenamine is on WADA's prohibited list does not imply acquiescence by WADA of the conclusion adopted this adjudicating body regarding the non-inclusion of the prohibited substance on its prohibited list. WADA is entitled to appeal, but is equally in a position not to do so without being deemed to consent to the outcome before that body let alone to create a precedent or *res judicata,* especially where the well-known criteria for *res judicata* i.e. identity of parties, claims, and object, are not present. WADA has limited resources, and must on occasion, like law enforcement agencies elsewhere, chose among the cases it could possibly prosecute.**

3. **The proposition that decisions are applicable worldwide as provided by Article 15.1 of the World Anti-Doping Code (WADC) means that their adjudication of the rights and obligations between the litigants should not be disturbed. It does not mean that findings of fact or pronouncements as to abstract propositions are subsequently binding on third parties everywhere, or indeed opposable by third parties to one of the litigants.**

4. **WADA accredited laboratories are required to report any adverse analytical findings within their range of detection capability, and although this capability varies from one laboratory to another, athletes do not have the right to insist that they cannot be sanctioned for an infraction because many laboratories would not have been able to**

detect it. In any event, the argument does not present a serious issue of lack of legal certainty.

5. **A substance does not need to be expressly listed in the WADA prohibited list to be considered a prohibited substance in sport once "representative samples" of individual substances are listed in a class category. The list is an open list and need not be exhaustive. This is compatible with international human rights standards. Indeed, the ECHR's judgments require that rules be sufficiently precise to satisfy the need for legal certainty on the part of those who are subject to it and seek to comply. In any event, when a pattern of consistent cases interprets a rule, the ECHR is less demanding as regards the precision of the law. Moreover, the ECHR is more "indulgent" when the sanctions are in the disciplinary rather than criminal domain.**

I. THE PARTIES

1. The World Anti-Doping Agency ("WADA" or the "Appellant") is the independent international anti-doping agency, constituted as a private law foundation under Swiss Law. WADA has its registered seat in Lausanne, Switzerland, and its headquarters in Montreal, Canada. WADA's aim is to promote and coordinate the fight against doping in sport internationally.

2. The Romanian National Anti-Doping Agency ("RANAD" or "First Respondent") is the national anti-doping agency for Romania, and is affliated to WADA.

3. Mr Sorin Mineran (the "Athlete" or "First Respondent") is a long-distance runner of Romanian nationality.

4. WADA, RANAD, and the Athlete are accordingly referred to as the "Parties".

II. FACTUAL BACKGROUND

5. This Award contains a concise summary of the relevant facts and allegations based on the Parties' written submissions, correspondence and the evidence adduced. Additional facts and allegations found in the Parties' written submissions, correspondence and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has carefully considered all the facts, allegations, legal arguments, correspondence and evidence submitted by the Parties and treated as admissible in the present procedure, it refers in this Award only to the matters necessary to explain its reasoning and conclusions.

6. On 9 October 2016, the Athlete participated in the Romanian National Marathon Championship in Bucharest. His in-competition doping control revealed the presence of

higenamine, a specified substance prohibited and listed under S3 (beta-2 agonists) on WADA's 2016 Prohibited List.

7. On 16 November 2016, RANAD notified the Athlete of the positive finding and asserted an anti-doping rule violation ("ADRV").

8. On 30 January 2017, the RANAD first-instance Hearing Panel declared the Athlete ineligible for a period of eight years commencing 9 October 2016.

9. On 18 September 2017, the RANAD Appeal Panel provisionally suspended the Athlete's sanction pending further review.

10. On 11 March 2018, the RANAD Appeal Panel set aside the Hearing Panel's finding and acquitted the Athlete of the ADRV (the "Appealed Decision"). The Appealed Decision is under consideration before this Panel.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

11. On 5 November 2019, WADA filed its Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the Appealed Decision in accordance with Article R47 et seq. of the Code. In its statement of appeal, WADA nominated Prof. Jens Evald as arbirator.

12. On 15 November 2019, WADA requested an extension of time to file its appeal brief and in doing so, in accordance with Article 32 of the Code, sought an interim suspension of its deadline until a decision was rendered in this regard.

13. On 20 November 2019, the Second Respondent objected to any extension and objected to the admissibility of Appeal Brief. A discussion on the Second Respondent's objection to the admissibility is set out below.

14. On 3 December 2019, the First Respondent proposed the Hon. Michael Beloff QC as arbitrator. On 5 December 2019, the Second Respondent objected to the First Respondent's proposal of Hon. Beloff, and in turn proposed the nomination of Judge Jean Paul Costa as arbitrator.

15. On 12 December 2019, First Respondent objected to the Second Respondent's proposal of Judge Costa.

16. On 20 December 2019, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division who considered the Respondents' respective nominations and preferences, preferred to defer to the Second Respondent's nomination as he was most impacted by the ultimate decision in this procedure and confirmed Judge Costa as the Respondents' nominated arbitrator.

17. On 29 January 2020, following confirmed extensions of time, the Appellant filed its appeal brief in accordance with Article R51 of the Code. WADA's appeal brief contained an expert report,

namely that of Dr. Thomas J. Hudzik, a pharmacologist with significant experience in research and an impressive number of scientific publications to his credit. WADA also filed a written statement by Dr. Olivier Rabin, its own Senior Executive (Sciences and International Partnerships), who is a qualified pharmacologist and neuro-toxicologist. They have remained unrebutted.

18. On 14 February 2020, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, confirmed the Panel as follows:

President: Professor Jan Paulsson, Manama, Bahrain

Arbitrators: Professor Jens Evald, Aarhus, Denmark

Judge Jean-Paul Costa, Strasbourg, France

19. On 19 February 2020, following confirmed extensions of time, the Second Respondent files his answer in accordance with Article R55 of the Code.

20. In his answer, the Second Respondent requested that Mr. Mamadou Sakho be joined to this procedure in accordance with Article R41.4 of the Code.

21. Separately, the Athlete also contended that RANAD *"was not entitled to choose an arbitrator"*. It is unclear whether he questions the composition of the present Panel, but for the avoidance of doubt such an objection is inadmissible under Article R34 of the Code. In the first place, challenges of that nature should be addressed to the CAS Challenge Commission, not to the Panel itself. Above all, it must be made *"within seven days after the ground for the challenge has become known"*, and this the Athlete did not do

22. On 28 February 2020, following confirmed extensions of time, the First Respondent filed its answer in accordance with Article R55 of the Code.

23. On 9 & 10 March 2020, the CAS Court Office, on behalf of the Panel, confirmed the Parties' agreement that this procedure be decided based solely on the Parties' written submissions, without a hearing.

24. On 19 March 2020, after considering the Parties' respective comments, the Panel dismissed the Athlete's request that Mr. Sakho be "joined" to the case, given the failure of both of the conditions required under Article R41.4 of the Code: namely, a third party may join only if *"it is bound by the arbitration agreement or if it and the other parties agree in writing"*.

25. On 6 April 2020, the CAS Court Office, on behalf of the Panel confirmed that the Panel deemed itself sufficiently well informed to decide this appeal based solely on the Parties' submissions, without a hearing.

26. On 6, 7, and 8 April 2020, the Appellant, Second Respondent and First Respondent signed and returned the Order of Procedure.

27. On 17 April 2020, the Panel invited Mr. Sahko, following a request from Mr. Sahko's counsel, to comment on the Second Respondent's request that he join this procedure.

28. On 24 April 2020, Mr. Sahko filed his response to the Second Respondent's request for joinder.

29. On the same day, 24 April 2020, the CAS Court Office, on behalf of the Panel, denied Mr. Mineran's request to join Mr. Shako on the basis that there is neither a jurisdictional basis for joinder nor an agreement to that effect between the Parties.

IV. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

A. WADA

30. WADA's Statement of Appeal states categorically: *"Higenamine is a specified substance prohibited at all times under S3 (Beta-2 agonists) of the 2016 Prohibited List"*.

31. In its Appeal Brief, WADA points out that a number of athletes were found guilty of ADRVs in connection with the presence of higenamine in their samples in 2016. WADA gives the number of reported cases of higenamine in 2016 as 55. (That amounts to 32% of the 172 "occurrences" of detected substance in the entire category of Beta-2 agonists.)

32. WADA observes that *"the Athlete effectively did not dispute the findings of WADA's experts, did not produce any counter-evidence or exhibit relating to the merits, and did not call any expert or witness"*.

33. As to the sanction to be imposed, WADA noted the Athlete committed an ADRV in 2011, when he was suspended for two years after the revelation on the occasion of an in-competition test of the administration of testosterone. He did not appeal that decision. He is now guilty of a second offense. WADA accepts in favor of the Athlete that his violation was not intentional, but considers that he cannot be absolved of fault or negligence since he has not showed how the prohibited substance entered his body, and he *"most certainly did not exercise the utmost caution"*. Accordingly the standard sanction for a second offence must be pronounced, namely twice the period of suspension that would be applicable if this had been a first violation. That is four years, with a deduction for the time he was provisionally suspended.

34. WADA concludes its Appeal Brief (reiterating the conclusion of its Statement of Appeal) by requesting the Panel to rule as follows:

    1. *The Appeal of WADA is admissible.*

    2. *The decision dated 16 March 2018 rendered by the Appeal Panel of RANAD in the matter of Sorin Mineran is set aside.*

    3. *Sorin Mineran is found to have committed an anti-doping rule violation.*

    4. *Sorin Mineran is sanctioned with a four-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of provisional suspension or ineligibility effectively served by Sorin*

Mineran before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.

5. *All competitive results obtained by Sorin Mineran from and including 9 October 2016 are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).*

6. *The arbitration costs shall be borne by RANAD or, in the alternative, by the Respondents jointly and severally.*

7. *WADA is granted a contribution to its legal and other costs.*

B. The Athlete

35. The Answer consists of five sections, the first of which is entitled "JOINDER" and seeks to secure the participation of Mr. Mamadou Sakho in this case. (This application is rejected, as noted above.) Each of the other four sections is presented under the title of a separate "OBJECTION". The first three of these sections are devoted to issues said to relate to "admissibility". Only the last four pages of the 35-page Answer confront the merits, in a section called "FOURTH OBJECTION – Nonmutual defensive collateral estoppel". This unexpected nomenclature is apparently derived from research on the Internet, resulting in little more than a reference to the Supreme Court of the State of Virginia in the United States (as having identified four kinds of res judicata) and the description of the Athlete's particular objection as being one of "nonmutual defensive collateral estoppel", taken from a passage found at https://www.upcounsel.com/issue-preclusion.

36. These references are obviously inapposite inasmuch as they lack any connection to the applicable law, but the Athlete's argument becomes clear enough in his Answer, where he contends that since WADA was involved in the *Sakho* case (described below) *"the issues of facts already and actually litigated and resolved"* in that case, and in particular the *"determination"* that *"it has not been proven that Higenamine is on WADA's prohibited list"* and *"significant doubt exist as to whether Higenamine is even a B2-Agonist",* are *"directly opposable to WADA in the present case"*.

37. The Athlete's defence consists essentially in relying on (1) what he sees as the persuasiveness of the Appealed Decision and (2) the decision of the UEFA Control, Ethics, and Disciplinary Body (the "UEFA/CEDB") in the *Sakho* case. The Appealed Decision referred to the latter in these terms, as quoted translation in the Athlete's Answer*: "it is relevant to note that, had the sample collected from the athlete Mahmadou Sakho been analyzed by the WADA accredited laboratory in Lausanne, no charges of ARDV would have been held against him, and the litigation ruled upon by the UEFA/CEDB via its decision of 01/01/2016 would not have occurred"*.

38. The Appealed Decision immediately goes on (still in translation) as follows:

"Essentially, these are no differences in terms of the merits of the case between the circumstances of the athlete Mahmadou Sakho and those of the athlete Sorin Mineran. In between the date of the CEDB-UEFA ruling (07.07.2016) and that of the reporting of the asserted ADRV held against Mr. Mineran (09.19.2016), no significant information was made public with an aim to clarify the status of higenamine, there were only evolutions

in the internal procedures of WADA with regard to the modification of Section S3. – meant to expressly categorize its substance with the said Section -- which did not meet the requirement for the publicity. Under these circumstances it appears obvious that 'mere internet search' could not have informed, with a reasonable degree of security, those interested in the status of higenamine as Beta-2 agonist".

39. The Athlete also prominently quotes the following passage from the UEFA-CEDB decision acquitting Mr. Sakho:

"48. To conclude, the CEDB determines that:

- *it has not been proven that higenamine is on WADA's prohibited list;*
- *indeed, significant doubts exist as to whether higenamine is even a B2-Agonist;*
- *there has been a clear lack of communication from WADA, something which left even its own accredited laboratories unsure about the status of higenamine; and*
- *the fact that the majority of WADA accredited laboratories do not test for higenamine is inconsistent with the principle of legal certainty".*

40. The Athlete maintains that the UEFA-CEDB has the effects set forth in Article 15.1 of the World Anti-Doping Code ("WADC") as follows:

"Subject to the right to appeal provided in Article 13, testing hearing results or other final adjudications of any Signatory which are consistent with the Code and are within that Signatory's authority shall be applicable worldwide and shall be recognized and respected by all other Signatories".

41. In sum, without contesting that higenamine was present in his sample, the Athlete contends that it could not qualify as a Prohibited Substance justifying the Appealed Decision, and requests the finding that:

"the appeal declared by WADA in my case is manifestly unlawful, in contradiction with the provisions of Article 15.1 of the WADA Code, and to the principle of res judicata, and it should be rejected as inadmissible".

C. RANAD

42. RANAD takes the position that the appeal should prosper but has otherwise taken a passive role. In many aspects, RANAD's position mirrors that of WADA.

43. In its answer, RANAD requests the following relief:

A. To uphold the appeal lodged by the Appellant against the Decision rendered on 16 March 2018 by the RADA Appeal Committee;

B. To amend RADA Appeal Committee's decision accordingly;

C. To order the Second Respondent to pay all costs, expenses and legal fees relating to the arbitration proceedings before CAS encumbered by the First Respondent.

V. JURISDICTION OF CAS

44. 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 CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.

45. Pursuant to Articles 74(1) and 76(1) of the Romanian Law No. 227/2006, WADA has the right to appeal to CAS against decisions of the RANAD Appel Panel.

46. No Party has per se objected to CAS jurisdiction. The Panel, therefore, confirms jurisdiction to decide this appeal.

47. Nothwithstanding the foregoing, the Panel takes note of the Athlete's assertion that the RANAD is not a proper party to this appeal and is in contraction to the Second Respondent. In this respect, it is true that RANAD accedes to WADA's rejection of the Appealed Decision of RANAD's Appeal Panel. But national anti-doping organizations ("ADOs"), are as a matter of course summoned before CAS to answer for the handling of doping cases at the national level. Whether an ADO agrees or not with the outcome of the national disciplinary proceedings, it may be ordered to contribute to the costs incurred in the appeal to CAS, and possibly to cover them entirely, if such national decisions are found not to have complied with international regulations.

48. Thus, in each of the cases CAS 2017/A/5369 and CAS 2017/A/5260 cited by the Second Respondent, the CAS Panel refused the request of SAIDS (the South African ADO) to be *"removed"* from the CAS arbitrations, holding that the SAIDS *"had the result management responsibility"* and *"was in charge of the hearing"*, and thus *"the Decision can be considered as a ruling for which SAIDS has the responsibility"*.

49. The Athlete seeks to distinguish his situation from the South African situation on the grounds that the disciplinary body there was independent of the ADO, whereas (so he contends) the RANAD Appeal Panel is not. In the first place, this makes no difference; the ADO is asked to appear in all cases gives its responsibility to answer for the outcome at the national level, and this cannot vary from case to case depending on differences in the relationship between the disciplinary body and the ADO. Moreover, and at any rate, it makes no sense that an ADO which is said to have established disciplinary bodies that are not independent should be *less* answerable than an ADO which like the South African SAIDS refers ultimate disciplinary decisions to a body which is independent. In sum: WADA properly identified RANAD as a Respondent in this case.

VI. ADMISSIBILITY OF THE APPEAL AND THE STATEMENT OF APPEAL

50. 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 in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties.*

51. Article 76(2) of the Romanian Law No. 227/2006 gives WADA a deadline of 21 days after its receipt of the complete file relating to the Appealed Decision. WADA received the case file on 15 October 2019; the appeal filed on 5 November 2019 was, therefore, contrary to the Athlete's submission, timely.

52. The Athlete also challenges the timeliness of the subsequent Appeal Brief. The Appeal Brief was filed within the deadline prescribed in Article R51 of the Code. For cause shown, and given the absence of prejudice to the Athlete (because he had been acquitted by the Appealed Decision), the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, extended the Appellant's time limit to file the appeal brief – all in accordance with Article R52 of the Code. The Athlete's formalistic assertions that the CAS Court Office violated Article R52 of the Code, notably by asserting that the decision to extend the deadline was not taken at the proper level of CAS, are rejected out of hand. The Panel has received the relevant correspondence and finds no basis to criticise the handling of the request for extension.

VII. APPLICABLE LAW

53. Article R58 of the Code provides as follows:

> *The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*

54. In their submissions, the Parties relied on aspects of the Romanian Law and the WADC. Following the Parties' positions in this respect, the Panel decides this dispute pursuant to the Romanian law No. 227/2006 regarding doping in sport, in conjunction with the WADC.

VIII. MERITS

55. The starting point on the merits is the fact that the presence of higenamine is undisputed by the Athlete. Nevertheless, he makes three assertions which he says should lead to the conclusion that he did not commit a doping violation: (A) his sanction was precluded by *res judicata*; (B)

higenamine was not on the 2016 Prohibited List, because it was not known to be a Beta-2 agonist; and (C) not all WADA-accredited laboratories tested for higenamine in 2016. Of these, the first and third require very little detailed examination and are therefore dealt with first.

A. Res Judicata

56. The well-known criteria for *res judicata* – identity of parties, claims, and object – are not present. It cannot be said that WADA consented to the *Sakho* panel's conclusion that higenamine was not on the 2016 Prohibited List. WADA was entitled to appeal, but was equally in a position not to do so without being deemed to consent to the outcome before the UEFA/CEDB -- let alone to create a precedent or *res judicata*. WADA has limited resources, and must on occasion, like law enforcement agencies elsewhere, chose among the cases it could possibly prosecute. Mr. Sakho had been suspended for one month; his degree of fault was considered to be light; and WADA may have considered that his light punishment had fit his light fault. The fact that WADA did not appeal the UEFA/CEDB decision does not imply acquiescence by WADA.

57. The Athlete's invocation of Article 15.1 of the WADC is wholly unsustainable; the proposition that decisions are applicable worldwide mean that their adjudication of the rights and obligations adjudicated between the litigants should not be disturbed. It does not mean that findings of fact or pronouncements as to abstract propositions are subsequently binding on third parties everywhere, or indeed opposable by third parties to one of the litigants.

58. In any event, the fact is that the UEFA-CEDB decision did not actually find that higenamine is not a prohibited beta-2 agonist. What the Board wrote was instead that there was *"significant doubt"* in the matter and that is was *"not clear"* that higenamine was a beta-2 agonist. Notably, WADA points out that the Board in that case did not hear any expert explanation of the bases on which doping authorities have determined that such categorization is justified.

B. The Variable State of Preparedness of WADA-Accredited Laboratories to Test for Higenamine

59. Perhaps inspired by the UEFA-CEBD's comment that *"the fact that the majority of WADA accredited laboratories do not test for higenamine is inconsistent with the principle of legal certainty"*, the Athlete adopts the same argument here. It has not found favor in CAS; the aforementioned award CAS 2009/A/1805 & 1847 memorably compared it to *contending "that a thief should be let off because if he had not been chased by the quickest policeman in the force he would have escaped"*. The text continues, less colorfully but perhaps more pertinently, to point out that laboratories are required to report any adverse analytical finds within their range of detection capability, and although this capability varies from one laboratory to another, athletes do not have the right to insist that they cannot be sanctioned for an infraction because many laboratories would not have been able to detect it: *"To hold otherwise would be to align all 35 WADA-accredited laboratories with the least capable one"*.

60. It would of course be another matter if a particular laboratory or set of laboratories refused to test for a given substance as a matter of the conviction of its head officer that there is no reason to do so. That might be relevant to a debate among experts as to the effects of a given substance

and lend credence to the notion that it is not generally accepted that the substance in question should be considered to fall within a proscribed category of substances. The evidence does not show a reluctance of laboratories to test for higenamine, and to the contrary an expansion of their capability to conduct such testing as the use of that substance has proved to be wide spread. In any event, the argument does not present a serious issue of lack of legal certainty; by a parity of reasoning, a motorist cannot make that objection to justify ignoring stop signs on the ground that the rule is enforced so seldom in a particular place that he can reasonably conclude that the signs do not mean what they say.

C. Whether the 2016 Prohibited List included Higenamine

61. This question requires consideration of two sub-issues: (i) the adequacy of "open categories" and (ii) higenamine's classification as a Beta-2 agonist.

a) The adequacy of open categories

62. According to the uncontradicted report of Dr. Olivier Rabin, *the class* of Beta-2 agonists has been banned since the first WADA prohibited list in 2003. But the elevated number individual substances that belong to such a class, and what Dr. Rabin refers to as the *"almost weekly release of potential new ones"*, make it unrealistic to do anything but provide "representative samples" of individual substances. Dr. Rabin believes that a full listing of all prohibited stimulants would probably have to include *"900 or more"* individual substances. Accordingly higenamine must be understood as covered by the categorical reference to Beta-2 agonists which at the time of the Athlete's asserted ADRV was worded as follows:

"All beta-2 agonists, including all optical isomers, e.g. d- and I- where relevant, are prohibited".

63. WADA's categorical statement above that *"higenamine is a specified substance prohibited at all times under S3 (beta-2 agonists) of the 2016 Prohibited List"* begs the question as to the meaning to be read into the word "specified", which clearly is something different than "identified" in the sense of an express mention by name. But this is not a new debate, and it is well settled in the jurisprudence of CAS. Indeed, it features in the case of *Nesta Carter v. IOC,* CAS 2018/A/4984.

64. Mr. Carter was the lead-off runner on Jamaica's 4x100 meter relay team in the Beijing Olympics in 2008 which dominated the race and shattered the world record. Following the race, Mr. Carter tested negative for any prohibited substances at the WADA-acredited laboratory in Beijing. His sample was one of 4072 samples that were send to Lausanne two weeks after the conclusion of the Beijing Games.

65. Eight years later, however, just before the tolling of the statute of limitations in the WADC, his sample was selected as one of 433 to be retested. The result this time was positive. The Jamaican team was disqualified and ordered to return all four gold medals.

66. The test revealed the presence of methylhexanamine ("MHA"), which was *not mentioned* in the prohibited list in effect in 2008, but had a similar structure and effect as tuaminoheptane, which

was forbidden by name. MHA was therefore considered to be covered as a S6 stimulant. (MHS was later expressly listed as from 2010.)

67. The general public might well wonder how an athlete is expected to watch out for prohibited substances called things like tuaminoheptane, even if expressly mentioned, let alone products like MHA which are not mentioned at all. (On the Doping Control Official Record Form he signed in Beijing, Mr Carter had listed his ingestion of two supplements which he identified not by their chemical composition but by their brand names, Cell Tech and Nitro Tech, creatine and whey protein supplements, respectively.) The answer is this, in the words of the arbitrators appointed in the *Carter* case: *"stimulants are numerous in number and new stimulants can easily be developed … substances of similar structure of similar biological effects are also stimulants within the scope of class S6"*. In common parlance, the anti-doping effort would be severely obstructed if designer drugs were tolerated. The burden is on the athlete (which in many cases practically means team officials) to see to it, as a counterpart of the privilege of competing, that they respect the right of other athletes to a "clean" competition, i.e. a competition in which all participants manage to comply with the rules.

68. In fact, the *Carter* case did no more than confirm existing case law. Indeed, the bulk of the award dealt with other issues of no relevance here (notably the authority of the laboratory to conduct *re-testing* in the way that it did). The point of requisite specificity of the Prohibited List had already been resolved nine years previously, in CAS 2009/A/1805 & 1847, where MHA had already been found to be a sufficient cognate of tuaminoheptane to be prohibited although not explicitly mentioned. That award stated plainly that a substance *"does not need to be expressly listed in the WADA Prohibited List to be considered a prohibited substance in sport"* and added:

"The List is an open list. It would be impractical to cite all stimulants because of the large number of compounds available on the market. Further, an open list allows the inclusion of those designer drugs created only for doping purposes".

69. Similarly, in *CAS OG 12/007,* the substance detected was B-methylphenethylamine (BM), yet another stimulant which did not figure expressly on the 2012 Prohibited List, but was nevertheless held to conclude that the athlete had committed an ADRV.

70. In a section of the *Carter* award examining the athlete's claim of breach of the principle of certainty, the arbitrators stated as follows:

149. 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.

150. 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.

151. 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.

152. 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.

153. 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.

154. 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 is sport, and which this Panel is called upon to apply.

71. The Athlete in this case does not engage with this jurisprudence. In support of his effective disagreement with the established regime, he relies instead on the conclusions of the UEFA/CEDB decision in the *Sakho* case and that of the RANAD Appeals Body (that is to say the Appealed Decision in his own case) to the effect that: *"It has not been proven that Higenamine is on WADA's prohibited list"* and *"significant doubts exist as to whether Higenamine is even a B2-Agonist"*. These two statements have no weight before this Panel as they have the nature of *ipse dixit*. As already established, the *Sakho* decision does not bind WADA, let alone the present Panel, and this is a fortiori true of the Romanian decision which is the very subject of this plenary appeal.

72. In other words, to prosper, the Athlete's case must be based on evidence and arguments that convince the Panel that the settled jurisprudence should either be distinguished or (more ambitiously) overruled. The Athlete might have sought to call experts and other witnesses - indeed possibly the very same who gave statements before UEFA/CEDB Body and the RANAD Appeal Panel – to be confronted by WADA and to respond to the questions of the arbitrators. He did not do so.

73. WADA, on the other hand, presented the statement of Dr. Rabin, who demonstrated that at the initiative of the WADA List Expert Group higenamine was listed by name as a prohibited substance on the Global Drug Reference Online in 2013. Further, the substance has been on the agenda of the WADA List Expert Group meetings several times, all with the same outcome: higenamine is a beta-2 agonist.

74. The first method for detecting higenamine may, as suggested by the fact that there were no reported cases on higenamine in the WADA Testing Report prior to 2016, was the one revealed in February 2016 by the Ghent laboratory. On 10 August 2016, all WADA-accredited laboratories received official notification from WADA requiring that higenamine be reported.

75. WADA asserts that a significant number of athletes were found guilty of ADRVs in connection with the presence of higenamine in their samples in 2016. The WADA 2016 testing report refers to 55 cases of higenamine. It also notes: *"This report compiles data as recorded in ADAMS on 7 April 2017 (plus supplemental ADAMS data compiled up to 13 Sept 2017)"*. No breakdown permits the reader to distinguish between pre- and post- 1 January 2017 cases. At any rate, as noted all WADA-accredited laboratories were on official notice from WADA to report higenamine cases.

b) Higenamine's classification as a Beta-2 agonist

76. According to WADA's official testing figures for the year 2016, there were 172 instances of detection of prohibited substances falling in the Beta-2 agonist category, and of them 55 (or 32%) involved higenamine. The startling implication of the present claim is none of them should have been declared positive.

77. Dr. Hudzik's report is of particular significance in this respect. It examines in detail the physiological effects of beta-2 agonists on receptors in the human body, and explains the reason for their being prohibited ever since the first WADA Prohibited list in 2003, given their anabolic and stimulant properties. He concludes his review of the evidence of higenamine as an agonist at B2 receptors by writing that there are *"strong data in support of higenamine's activity through B2 receptors"*. He also explains why it would make no sense to allow non-selective beta-2 agonists while prohibiting selective beta-2 agonists since they may have the same physiological effects. His report serves to confirm that the WADA List Expert Group was right to consider higenamine as a beta-2 agonist in the first place (2012-13). His significant conclusions were neither rebutted nor even disputed by the Athlete, whose argument therefore is reduced to the unfounded postulate that the *Sakho* decision is a *res judicata* and therefore WADA can no longer contend *in any doping case* that higenamine is in fact a beta-2 agonist.

78. The present Panel, therefore, concludes that higenamine, although not explicitly named, was present on the 2016 Prohibited List. As seen above, CAS jurisprudence has established and confirmed that a list of prohibited substances need not be exhaustive.

79. The Panel has considered the compatibility of this case law with international human rights standards. It observes that the ECHR's judgments require that rules be sufficiently precise to satisfy the need for legal certainty on the part of those who are subject to it and seek to comply.

However, when a pattern of *consistent* cases interprets a rule, the ECHR is less demanding as regards the precision of the law (*Dogru v. France*, 4 December 2008, § 59, and other authorities). Moreover, the ECHR is more "indulgent" when the sanctions are in the disciplinary rather than criminal domain. The ECHR deems sport sanctions not to be criminal in nature (see *Platini v. Switzerland*, 2 March 2020, especially §§ 44-49).

D. The Proper Sanction

80. The Panel accepts WADA's position as set out above. The Athlete's explanation of his ADRV is weak. He claimed in the hearing that led to the Appealed Decision that he had consumed a supplement called Rich Piana 5150 for about two months in order to gain energy for training, and took it on the day of the race when he was tested. He alleged that it was recommended to him by a physician, but the physician he named refused to testify. (Indeed someone identifying himself as that physician apparently called RANAD in response to the summons issued to him, declining to testify on the grounds that he was not in fact the Athlete's doctor.) He provided no evidence of his purchase of Rich Piana 5150, and did not list it on the Doping Control Form on the day of the race. The product, as WADA has shown, is a potent supplement used by body-builders to increase their capacity to sustain extraordinary intensive training and marketed in a manner *("mega-dosed pre-workout"*, *"insane pumps and vascularity"*, *"loaded with stimulants for maximum focus"*) that should make any user extremely wary. Mr Piana himself was a well-known American body builder who died at the age of 46 in circumstances that led to reports of a drug overdose.

81. All of these troubling circumstances can be contrasted by what WADA considers to be the ready availability "by a basic Internet search" of the fact that higenamine is a beta-2 agonist, and recognized as such by many sources from 2013 onwards, notably on the Global Drug Reference Online ("Global Dro") website which is the product of collaboration among various national ADOs and provides athletes and support personnel with information about the status of particular substances.

82. The Panel concludes that the Athlete's sanction is neither aggravated by intentionality under Article 57 of Law No 227/2006 nor mitigated by an absence of fault or negligence under Articles 63 and 64. The two-year period of ineligibility pursuant to Article 57 must be doubled under Article 72 given that this is a second ADRV.

ON THESE GROUNDS

The Court of Arbitration for Sport rules as follows:

1. The appeal filed on 5 November 2019 by the World Anti-Doping Agency against the Romanian National Anti-Doping Agency and Sorin Mineran with respect to the decision issued on 11 March 2019 by the Appeal Panel of the Romanian National Anti-Doping Agency is upheld.

2. The decision issued on 11 March 2019 by the Appeal Panel of the Romanian National Anti-Doping Agency is set aside.

3. Mr Sorin Mineran is found to have committed an anti-doping rule violation and is therefore sanctioned with a four-year period of ineligibility, commencing on the date of the entry into force of the present award, subject to the proviso that the length of provisional suspension or ineligibility he has already served shall be credited against the total period of ineligibility to be served.

4. (…).

5. (…).

6. All other and further motions or prayers for relief are dismissed.