**CAS 2019/A/6148 World Anti-Doping Agency v. Sun Yang & Fédération Internationale de Natation**

# ARBITRAL AWARD

**delivered by the**

# COURT OF ARBITRATION FOR SPORT

**sitting in the following composition**

President: The Hon. Franco Frattini, Judge, Rome, Italy

Arbitrators: Mr. Romano F. Subiotto Q.C., Avocat, Brussels, Belgium, and Solicitor-Advocate, London, Great Britain

Prof. Philippe Sands Q.C., Barrister, London, Great Britain

*Ad hoc* Clerk: Mr. Dennis Koolaard, Attorney-at-Law, Arnhem, the Netherlands

**in the arbitration between**

**World Anti-Doping Agency (WADA)**, Lausanne, Switzerland

Represented by Mr Richard R. Young, Mr Brent E. Rychener and Ms Suzanne Crespo, Attorneys-at-Law, Bryan Cave Leighton Paisner LLP, Colorado Springs, Colorado, United States of America

**Appellant**

**and**

**Mr Sun Yang**, People's Republic of China

Represented by Mr Qihuai Zhang, Attorney-at-Law, Beijing Lanpeng Law Firm, Beijing, Ms Luo Xiaoshuang, Attorney-at-Law, Hunan Xunyi Law Firm, Changsha, People's Republic of China, Mr Fabrice Robert-Tissot, Attorney-at-Law, Bonnard Lawson Law Firm, Geneva, Switzerland, and Mr Ian Meakin, Barrister, XIV Old Buildings, Lincoln's Inn, London, United Kingdom, and Of-Counsel, Bonnard Lawson Law Firm, Geneva, Switzerland

**First Respondent**

**Fédération Internationale de Natation (FINA)**, Lausanne, Switzerland

Represented by Mr Serge Vittoz, Attorney-at-Law, CPV Partners, Lausanne, Switzerland

**Second Respondent**

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## 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. Mr Sun Yang (the "Athlete" or "First Respondent") is an elite swimmer of Chinese nationality.

3. The Fédération Internationale de Natation ("FINA" or the "Second Respondent") is the International Federation governing the sport of Aquatics. FINA has its registered office in Lausanne, Switzerland.

4. WADA, the Athlete and FINA are jointly 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 the reasoning and conclusions.

6. The events that occurred at the Athlete's residence during the night of 4-5 September 2018 are contested and form a central element in the dispute. Surveillance cameras recorded certain events that unfolded outside the Doping Control Station, including the destruction of the blood container. The contentious factual elements are addressed in more detail in the merits section below.

### A. The Collection Attempt

7. On the evening of 4 September 2018, an attempt was made to collect blood and urine samples from the Athlete at his residence compound in Hangzhou, People's Republic of China. This was an out-of-competition ("OOC") sample collection mission. The Athlete was accompanied by his mother. FINA had results management authority and authorised the mission as the Testing Authority. The company International Doping Tests and Management ("IDTM") was the Sample Collection Authority. IDTM, by means of a female Doping Control Officer (the "DCO"), a female Blood Collection Assistant (the "BCA") and a male Doping Control Assistant (the "DCA") (jointly referred to as "IDTM's Sample Collection Personnel") [1], attempted to collect blood and urine from the Athlete between 22h00 and 23h00, in accordance with the Athlete's time preference as

[1] As agreed between the Parties, the Panel does not reveal the names of IDTM's Sample Collection Personnel in this Arbitral Award for confidentiality reasons, but their names are known to the Panel.

indicated in his Whereabouts information. IDTM's Sample Collection Personnel was accompanied by a fourth unidentified individual who drove the car of the team.

8. The DCO, who was already known to the Athlete, having previously collected samples from him, presented him with a copy of her IDTM-issued ID card, and a generic Letter of Authority from FINA to IDTM. This letter stated, *inter alia*, that "[IDTM] *is appointed and authorized by* [FINA] *to collect urine and blood samples from athletes in the frame of the doping controls organized as part of the FINA Unannounced out-of-Competition Testing Programme*". The DCA presented the Athlete with his government-issued ID card. The BCA presented the Athlete with a copy of her Specialized Technical Qualification Certificate for Junior Nurses (the "STQCJN").

9. The Athlete claims that he questioned the documentation shown to him at this early stage, although that is contested. Nevertheless, he was apparently sufficiently satisfied with the documents shown to him, as he signed the Doping Control Form and cooperated in providing two blood samples. These were sealed in glass containers and stored in a storage box.

10. At some point shortly thereafter, the Athlete discovered that the DCA had taken, or was taking, one or more photographs of him. The Athlete did not consider this to be professional, and it seems to have prompted him to re-review the documentation presented by IDTM's Sample Collection Personnel in more detail, in particular the credentials of the DCA. Because the Athlete considered the information provided by the DCA insufficient, the DCA was removed from the testing mission upon the initiative or with the consent of the DCO. Because the DCA was the only male member of the testing team, no urine sample could be collected from the Athlete.

11. The Athlete now raised concerns about the documentation presented by the DCO and BCA. The Athlete and his mother then contacted the Athlete's support staff for advice, by telephone. Shortly thereafter, Dr Ba Zhen, the Athlete's medical doctor, came over to the Athlete's residence. Dr Ba Zhen in turn consulted his superior, Dr Han Zhaoqi, Chief Doctor of the School where Dr Ba Zhen works, and Chief Doctor in Affiliated Sports Hospital of Zhejiang College of Sport, by telephone. Mr Cheng Hao, Team Leader of the Chinese national swimming team, was also consulted by telephone.

12. Dr Ba Zhen and Dr Han Zhaoqi then discussed with the DCO the accreditation and authorisation presented by IDTM's Sample Collection Personnel. The Athlete's support staff then informed the Athlete and the DCO that the documents shown did not comply with the required standards, and decided that the collected blood samples could not be taken away by the DCO. This caused the Athlete and his entourage to take steps to recover the Athlete's blood samples.

13. In response to these efforts, the DCO sought to warn the Athlete that any removal of the blood samples could be considered as a failure to comply with the sample collection process, and that such action might give rise to serious consequences. Under pressure from the Athlete, the DCO or BCA took the glass containers from the storage box and handed them to the Athlete.

14. When the DCO indicated to the Athlete that no IDTM material could be left behind, the Athlete instructed his entourage to break one of the glass containers with the purpose of

extracting the blood sample so that the DCO could take back the broken container but not the blood sample. The glass container containing the blood vessel was destroyed with a hammer by a security guard. The Athlete assisted the security guard by illuminating the blood container with the flashlight of his mobile phone. The blood vessel remained intact, and was retrieved by the Athlete.

15. As a consequence of these events, no blood or urine samples were collected that evening, and none could be made available for analysis. To the Panel's knowledge, the collected blood vessels remain in the possession of Dr Ba Zhen (although they are no longer eligible to be tested because the chain of custody was broken).

16. Thereafter, in the presence of the DCO, the Athlete destroyed the Doping Control Form that he had previously signed by tearing it up.

17. Upon the request of the Athlete, Dr Ba Zhen put his comments to the collection process on a separate sheet of paper. This document was signed by Dr Ba Zhen, the Athlete, the DCO, DCA and BCA. It stated, in an English translation that is not disputed:

> "*On the night of September 4, 2018, 4 persons of FINA conducted urine test and blood test to Mr. SUN Yang. One of the four persons was the drive who was unrelated. The rest of three persons entered into the room. Among the three persons,* [the DCO] *(Card No.* […]*) possessed and provided and showed the certification of Doping Control Officer.* [The Athlete] *actively cooperated with the testing. However, in the following process of blood and urine sample collection,* [the Athlete] *found that* [the BCA]*, Blood Collection Officer, only provided her Nurse Qualification Certificate (Number* […]*) but did not provide any other proof of certification for Blood Collection Officer.* [The DCA] *(classmate of* [the DCO]*), the Doping Control Officer for urine test, only provided his resident ID card (*[…]*) and did not provide any other certification of Doping Control Officer for urine. They were unrelated personnel. Under our repeated inquiries, among them, only* [the DCO] *(Card No.* […]*) provided the certification of Doping Control Officer, and the rest two could not provide Doping Control Officer certification and any other relevant authority. Therefore, the urine test and blood test cannot be completed. (The blood sample that has been collected could not be taken away.)*"

## B. The Aftermath

18. Shortly after the events in question, IDTM reported to FINA that the requested samples (blood and urine) could not be collected.

19. On 6 September 2018, the Athlete offered his explanations to FINA and complained about the conduct of IDTM's Sample Collection Personnel.

20. By mid-September 2018, following additional investigation, FINA received various additional reports and explanations from IDTM.

21. On 19 September 2018, FINA formally requested an explanation from the Athlete about IDTM's failure to collect the desired urine and blood samples.

22. On 26 September 2018, the Athlete provided FINA with a statement setting out his position.

## C. The Proceedings before the FINA Doping Panel

23. On 5 October 2018, FINA formally asserted violations of Article 2.3 (Refusing or Failing to Submit) and 2.5 (Tampering or Attempted Tampering with Any Part of Doping Control) of the FINA Doping Control Rules against the Athlete (the "FINA DC"). In response, the Athlete filed extensive written submissions in his defence, which FINA answered.

24. On 3 January 2019, the FINA Doping Panel issued its decision (the "Appealed Decision"), with the following operative part:

> "*7.1* [The Athlete] *has not committed an anti-doping rule violation under FINA DC 2.3 or FINA DC 2.5.*
>
> *7.2 This award shall not be made public pursuant to FINA DC 14.3.3, unless and until the Athlete consents to such disclosure.*
>
> *7.3 All costs of this case shall be borne by CSA in accordance with FINA DC 12.3.*
>
> *7.4 Any appeal against this decision may be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland not later than twenty one (21) days after receipt of the complete and reasoned judgement (FINA Rule C 12.11.4 and DC 13).*"

25. The Appealed Decision summarises the underlying reasoning as follows:

> "*The "official documentation" provided by the Sample Collection Authority (covering the critical components of identification, appointment and authorization) held by officials who are Sample Collection Personnel could be some combination of (or all of) the following: a badge or Card with a photo and details of the official; a specific hard-copy Authorization From with the name and logo of the Sample Collection Authority and the details of the official; digital identification, photo and authorization of the official on a website; digital links that include Mission Order details.* ***At a minimum, the "official documentation" from the Sample Collection Authority must provide "evidence" of a clear link between the Sample Collection Authority, the official involved and the testing mission being undertaken where the athlete will provide a sample.***
>
> *It is not sufficient to rely on a known IDTM DCO (as in the case at hand) to state verbally to the Athlete with reference to an attending DCA or a BCA (who have no official documentation from IDTM whatsoever), in effect: "they are with me, I will be in charge – everything is OK." Showing the Athlete the contents of the IDTM DCO Portal might have established (with a photo) that the DCA was in IDTM's 'pool' of qualified officials for 2018, but that step provided no evidence of an authorization from IDTM to take part in the OOC*

*mission on September 4, 2018 when the sample was to be collected from the Athlete.*

*The Doping Panel finds that the OOC sample collection session conducted by IDTM on behalf of FINA on September 4, 2018 was not properly commenced. The lack of "official documentation" from IDTM for the DCA and the BCA meant that the Athlete was not properly notified. The request to provide a urine sample was not properly accomplished. The blood that was initially collected (and subsequently destroyed) was not collected with proper authorization and thus was not properly a "Sample" as that term is used in the ISTI and defined in the FINA DC. As a result, the sample collection session initiated by IDTM on September 4, 2018, is invalid and void. No FINA DC rule violations can result therefrom.*

***Additional Grounds:***

*If the Doping Panel were inclined to the view that the described deficiencies in the notification procedure were serious, but were not enough to invalidate the sample collection session, there are other grounds for concluding that the Athlete did not breach the FINA DC.*

***With regard to the attempt to collect urine**: The Doping Panel is satisfied that the DCA did surreptitiously take pictures and/or videos of the Athlete using his personal cell phone. He took more photos than described by the DCO in her testimony. The Doping Panel heard believable and compelling evidence from various witnesses that there were pictures on the DCA's phone that contained images of the Athlete. The Athlete witnessed their deletion. Critically, the DCA provided no evidence or testimony whatsoever. He was the best person to disprove the serious allegations against him that were raised - but he failed to do so. In the result, none of the Athlete's direct evidence regarding the DCA taking pictures and videos of him during the mission was effectively challenged.*

*This conduct on the part of the DCA is highly improper and extremely unprofessional. This should never happen. Chaperoning an athlete is a sensitive, personal and serious matter. It is not for 'fans'. The Athlete was initially suspicious and eventually discovered that there were photos of him on the DCA's phone. The pictures were deleted. Proof of this conduct by a DCA prior to the Athlete providing a chaperoned urine sample is unquestionably reason to immediately suspend the DCA's involvement in the testing mission. With no other male DCA's to perform this role – the mission with regard to urine collection must be abandoned. Such facts, once established, are a compelling justification for the Athlete to refuse to have any further personal and sensitive contact with the DCA.*

***With regard to the collected blood**:* […]

*Of substantive concern, the Athlete led evidence from various witnesses that the IDTM BCA did not produce documentation demonstrating that she was*

*qualified to draw blood in the location where the test took place. This is a requirement in the ISTI.*

*The ISTI in Annex E, demands that blood be collected by "a suitably qualified person". Annex E.4 provides that "Procedures involving blood shall be consistent with the local standards and regulatory requirements regarding precautions in healthcare settings where those standards and requirements exceed the requirements set out below" (emphasis added).*

[…]

*The BCA may well have been properly licensed and the holder of a Practice Certificate – the Doping Panel will never know based on the record before it. What is certain is that she did not produce unequivocal evidence of her qualifications to draw blood from the Athlete, as required in the ISTI. Blood collected by an individual not possessing proper qualifications and not in a position to show these qualifications to the Athlete is a proper ground to abandon the blood collection session.*

*Blood taken by a BCA or BCO without proper authorization or proper qualifications is not a "Sample" as defined in the FINA DC. As the improperly collected blood cannot be used for Doping Control purposes, it is not a "Sample" as that term is defined. Such blood is merely biological material taken from an athlete that has become medical waste.*

***Failure to Comply Consequences – blood and urine**: There was certainly much discussion and heated debate over what was proper and allowed pursuant to the ISTI and what was not. It is abundantly clear that the DCO tried constantly to explain why the complaints and deficiencies raised by the Athlete were not valid, in her view. It is equally clear that the Athlete and his entourage were insistent that their views were correct. This debate continued all night and the parties were at a stand-off. Unfortunately, the ongoing debate had the result that the consequences of the Athlete's proposed course of conduct became 'lost in the noise'.*

*The debate between the DCO and the Athlete (and his entourage) inevitably focused on who was 'right' and whether there could be a Failure to Comply or a risk of a violation in that evolving situation. The Athlete consistently denied that this was ever a possible outcome. The ISTI is clear in Annex A 3.3.a) that the DCO must tell the Athlete, in a language he can understand, the consequences of a possible Failure to Comply. Explaining the risks that certain conduct might lead to a violation is not sufficient. The DCO must go further and clearly articulate that she **is treating** the Athlete's conduct as a Failure to Comply and that the following consequences **will apply**.*

*This critical message to the Athlete regarding the consequences of his conduct, while attempted many times by the DCO, never got through. The Athlete, and every witness for the Athlete, testified they were never told by the DCO the consequences that would apply. This is likely true. All that was 'heard' from the DCO in the ongoing debate regarding whose interpretation*

*of the rules was 'correct' was the message that certain conduct might constitute a rule violation. This message would be immediately denied.*

*There was no clarifying and crystalizing moment (a metaphorical "bang") ensuring that the Athlete clearly knew, in the face of the identified conduct, that his conduct was being treated by the DCO as a Failure to Comply and that serious consequences would apply.*

*This is the very reason that Refusal Forms are utilized by many Sample Collection Authorities. They provide clear evidence to the athlete (when pulled out to be signed at the critical moment by a DCO) that the DCO considers the athlete's conduct to be a breach of the rules and the consequences specified will apply. There is no room for ambiguity. While use of such a Refusal Forms is not mandatory, this clarity was never achieved at the testing mission on September 4, 2018. In contrast, the Athlete and his entourage all testified that as the evening ended they believed, perhaps naively, that they had been successful in the debate regarding who was 'right'. They believed that they had eventually convinced the DCO and IDTM to back down and accept the Athlete's position. There was absolutely no "bang" involved.*" (emphasis in original)

## III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

26. On 14 February 2019, WADA lodged a Statement of Appeal against the Appealed Decision with the Court of Arbitration for Sport (the "CAS"), pursuant to Article R48 of the CAS Code of Sports-related Arbitration (edition 2019) (the "CAS Code"), naming the Athlete as the sole respondent. In this submission, WADA further nominated the Honourable Michael J. Beloff M.A. Q.C., Barrister in London, Great Britain, as arbitrator.

27. On 18 February 2019, WADA filed an *amended* Statement of Appeal, which also included FINA as a respondent.

28. On 28 February 2019, the Athlete nominated Prof. Philippe Sands Q.C., Barrister in London, Great Britain, as arbitrator. FINA consented to the Athlete's nomination of Prof. Sands.

29. On 11 March 2019, the Athlete challenged the nomination of Hon. Beloff.

30. On 18 March 2019, upon being invited to provide their positions in respect of the challenge, FINA indicated that it wished to rely on the appreciation made by the Challenge Commission of the International Council of Arbitration for Sport (the "Challenge Commission"), whereas WADA and Michael Beloff Q.C. requested the challenge to be dismissed.

31. On 22 March 2019, the Athlete submitted that WADA's deadline to file its Appeal Brief elapsed on 20 March 2019 and that, because WADA failed to comply with this deadline, the appeal was to be deemed withdrawn based on Article R51(1) CAS Code, and, in the

alternative, that the Panel should declare the Appeal Brief inadmissible. Later that same date, FINA joined the Athlete's objection to the admissibility of the appeal.

32. On 26 March 2019, WADA filed its comments to the objections as to admissibility of its appeal filed by the Athlete and FINA.

33. On 28 March 2019, the Athlete and FINA filed a reply submission on the admissibility of WADA's appeal.

34. On 29 March 2019, WADA filed its sur-reply on the admissibility of its appeal.

35. On 3 April 2019, WADA filed its Appeal Brief in accordance with Article R51 CAS Code.

36. On 9 April 2019, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, informed the Parties as follows:

> "*(1) a decision on the Respondents' objection to admissibility is deferred to the Panel, once constituted. The Panel will be provided with the parties' submissions in this respect and more information will follow at that time; and*
>
> *(2) the Respondents' request for bifurcation is denied.*"

37. On 16 April 2019, the CAS Court Office, on behalf of the Challenge Commission, informed the Parties that the petition for challenge of the appointment of Michael Beloff Q.C. was dismissed.

38. On 1 May 2019, pursuant to Article R54 CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter was constituted as follows:

| | |
|---|---|
| President: | The Hon. Franco Frattini, Judge in Rome, Italy |
| Arbitrators: | The Hon. Michael Beloff M.A. Q.C., Barrister in London, Great Britain |
| | Prof. Philippe Sands Q.C., Barrister in London, Great Britain |

39. On 9 May 2019, the Athlete raised two issues to be decided by the Panel as a preliminary matter (and in any event, before he filed his Answer): i) "*Admissibility of the Appeal and/or Jurisdiction of CAS in View of the (Non-) Compliance with the Deadline to Appeal by WADA*"; and ii) "*Withdrawal From the Case by WADA's Counsel and/or Admissibility of the Appeal and/or Jurisdiction of CAS in View of the Existence of a Conflict of Interest on WADA's (counsel) Side*".

40. On 15 May 2019, FINA supported the Athlete's request for bifurcation of the proceedings, whereas WADA indicated to object to the Athlete's request for bifurcation of the proceedings and addressed the substance of the Athlete's second preliminary objection to the proceedings.

41. On 19 May 2019, the CAS Court Office, *inter alia*, informed the Parties as follows:

> "***Admissibility of Appeal Brief:*** *The objection to the admissibility of WADA's appeal brief filed by Mr. Yang and FINA is denied. The Panel considers that WADA's statement of appeal and appeal brief were timely filed in accordance with Articles R49 and R51 of the Code of Sports-related Arbitration. The reasons for such decision will be set out in the final award.*
>
> ***Bifurcation and Answer:*** *As a result of the Panel's decision on the admissibility of WADA's statement of appeal and appeal brief, the request for bifurcation filed by Mr. Yang and FINA as it relates to the timing of their answers is denied as moot.* […]
>
> ***Challenge to Mr. Young:*** *The Panel notes the submission filed by Mr. Yang dated 16 May 2019 in support of his challenge to Mr. Young. In consideration of this submission, both Mr. Young/WADA and FINA are invited to respond* […]. *More information will then follow in this respect in due course.*"

42. On 27 May 2019, the Athlete filed a second challenge against Michael Beloff Q.C. based on new information that had recently come to his attention.

43. On 29 May 2019, the Athlete filed a "*Request for Disqualification of WADA's Counsels*" and an "*Objection to the Admissibility of the Appeal and Challenge of CAS's Jurisdiction*".

44. On 3 and 4 June 2019 respectively, Michael Beloff Q.C. and WADA responded to the Athlete's second challenge to Mr. Beloff, whereas FINA deferred any decision in this regard to the Challenge Commission.

45. On 6 June 2019, the CAS Court Office informed the Parties that Mr Dennis Koolaard, Attorney-at-Law in Arnhem, the Netherlands, had been appointed as *Ad hoc* Clerk.

46. On 7 June 2019, the Athlete filed reply comments on his challenge to Mr. Beloff and sought the suspension of this procedure until such time as the Challenge Commission rendered its decision and until CAS had rendered an arbitral award in a pending arbitration that allegedly concerned similar legal issues.

47. On 11 June 2019, the Athlete informed the CAS Court Office that he had filed setting aside applications with the Swiss Federal Tribunal (the "SFT") in respect of the following "*decisions/awards*" and requested the proceedings be stayed until final decisions be rendered by the SFT:

> "*Setting aside application filed by* [the Athlete] *on 31 May 2019 with the* [SFT] *against the decision rendered by the* [Challenge Commission] *dated 16 April 2019 (and notified to the Parties on 30 April 2019) with respect to the challenge of Honorable Beloff filed by* [the Athlete]*;*
>
> *Setting aside application filed by* [the Athlete] *on 11 June 2019 with the* [SFT] *against the decision rendered by the CAS Panel on 19 May 2019 related to the admissibility of the appeal brief filed by the World Anti-doping Agency in the present arbitration.*"

48. On 12 June 2019, WADA reiterated its request that the Athlete's second challenge of Hon. Beloff be dismissed and it objected to a stay of the proceedings.

49. On the same date, FINA reiterated that it relied on the outcome of the decision by the Challenge Commission regarding the second challenge of Mr. Beloff and did not object to the Athlete's request for a stay of the procedure.

50. On 18 June 2019, the CAS Court Office informed the Parties that in accordance with Article R32 CAS Code, the Panel had decided, *inter alia*, as follows:

> "*1)* [The Athlete's] *request to suspend this procedure* […], *which was joined by FINA but objected to by WADA, is* *denied* *on the grounds that* [the outcome of any other CAS decision] *is not binding on the Panel and moreover, this Panel is tasked with examining the facts and circumstances of this case on an individual basis. In addition, this Panel does not know when the* [other] *case will be published and has no control over its publication, and such delay based on uncontrollable factors is not warranted.*
>
> *2)* [The Athlete's] *request to suspend this procedure pending a decision on its appeals to the* [SFT], *which is joined by FINA but objected to by WADA is* *denied*. *The Panel will reconsider its decision only to the extent the* [SFT] *instructs the Panel otherwise.*
>
> *3)* [The Athlete's] *second challenge to Hon. Beloff, which FINA defers to the* [Challenge Commission] *and is objected to by WADA, will be resolved in due course by the* [Challenge Commission] *and is not under the purview of the Panel.*"

51. On 20 June 2019, the Athlete identified the persons who would attend the hearing on his behalf and requested WADA to confirm the attendance of four IDTM employees (the DCO, the BCA, the DCA and the IDTM Testing Coordinator) at the hearing, failing which the Athlete requested the Panel to order these witnesses to appear or seek the assistance of the competent state court to compel such evidence, if necessary through an international rogatory commission, based on Article 184(2) of Switzerland's Private International Law Act (the "PILA"). The Athlete also requested that in case such persons did not testify, their (supplementary) reports be struck from the record and that the Panel would draw the appropriate adverse inferences.

52. Separately, in response to WADA's assertions (as set out in his Appeal Brief), the Athlete denied that he was responsible for any threats of intimidation against witnesses in this procedure. The Athlete, however, confirmed that his mother (Ms Ming Yang) had approached the BCA and the DCA in order to "*gather information about the case and seek assistance from them*", but that she never sought to intimidate and/or threaten them.

53. On 24 June 2019, WADA requested an order from the Panel "*prohibiting further contact, direct or indirect, by the Respondents and their counsel and family members and agents with the sample collection personnel who are material witnesses in this case*". WADA provided witness statements from the DCO and the BCA, indicating that they had been contacted by the Athlete's entourage and were "*concerned for their physical and*

*economic well-being, and for the well-being of their family members*". *They indicated to be* "*fearful that, if they would agree to testify in this proceeding, they would suffer significant retaliation in some form from the* [Athlete] *and/or his entourage and supporters*". WADA further indicated that without such order there would be little or no chance that IDTM's Sample Collection Personnel would be willing to testify.

54. On 26 June 2019, WADA filed its response to the Athlete's challenge of WADA's counsels, requesting that it be dismissed.

55. On 28 June 2019, the CAS Court Office informed the Parties that, in an effort to maintain the efficient running of this procedure and so as to not protract from the matters at hand, Mr. Beloff had decided to step down from the Panel. He made clear that he was doing so solely to assist in an expeditious hearing, and not because the challenge had any merit whatsoever.

56. On 1 July 2019, FINA supported WADA's request for an order to prohibit further contact with the witnesses requesting such protection but denied that there was evidence on file suggesting that the DCA had been contacted by the Athlete's entourage. FINA indicated that it considered the testimony of these witnesses of the utmost importance. At the same time, FINA argued that it did not see any exceptional circumstances in the meaning of Article R51 CAS Code to take into consideration any witness statements and/or other documents filed by WADA regarding the concerned witnesses' testimonies, should WADA not be able to have them heard at the hearing.

57. On 5 July 2019, WADA nominated Mr Romano F. Subiotto Q.C., Avocat in Brussels, Belgium, and Solicitor-Advocate in London, Great Britain, as arbitrator in place of Mr. Beloff.

58. On 12 July 2019, the Athlete challenged the nomination of Mr Subiotto as arbitrator.

59. On the same date, 12 July 2019, the CAS Court Office referred the Parties to Article R59 CAS Code, reminding them of the confidentiality of the proceedings and requesting them to be mindful of this procedural requirement and take care when disseminating any documents to members of their respective team or otherwise. This would be one of many express requests of this nature made by the Panel.

60. On 16 July 2019, the Athlete informed the CAS Court Office that urgent steps should be taken in order to make sure that the DCO, the BCA and the DCA would attend the hearing and requested the Panel to postpone the hearing until all witnesses could be available to testify in person. The Athlete indicated that, failing such confirmation from WADA and/or FINA, he requested the Panel to seek the assistance before the competent court(s) and/or authorize the Athlete to seek assistance from said competent courts in order to obtain the testimony from the DCO, the BCA and the DCA, if necessary through a rogatory commission.

61. On 17 July 2019, WADA and Mr Subiotto requested that the Athlete's challenge of Mr Subiotto be dismissed.

62. On 19 July 2019, the Athlete requested a public hearing to be held, in accordance with Article R57 CAS Code.

63. On 21 July 2019, FINA indicated that it deferred to the Challenge Commission concerning the challenge against Mr Subiotto.

64. On 22 July 2019, FINA indicated that it was important that all witnesses called by the Parties be heard in these proceedings, that any contact with witnesses that have requested to be "protected" was only to be made in accordance with the Panel's instructions, and that it would be ready, upon specific instructions from the Panel, to liaise with IDTM or directly with the concerned witnesses, in order for the latter to be heard in an appropriate manner. Further, FINA indicated that it had no objection to the Athlete's request that the hearing be public.

65. On 24 July 2019, WADA indicated that it did not object to a public hearing.

66. On 26 July 2019, the CAS Court Office, on behalf of the Challenge Commission, dismissed the Athlete's challenge to the appointment of Mr Subiotto.

67. On the same date, 26 July 2019, the CAS Court Office informed the Parties as follows:

> "*On behalf of the Panel, who has considered the First Respondent's "Request for Disqualification of WADA's Counsels" dated 29 May 2019, as well as the submissions of FINA and WADA dated 29 May and 26 June 2019, respectively, the Parties are advised that the Panel has decided to dismiss the First and Second Respondents' requests in full.*
>
> *The parties are invited to note as follows:*
>
> - *The Panel finds that a motion to disqualify a counsel in international arbitration proceedings is to be admitted restrictively. One should only exceptionally interfere with a party's choice of counsel and only when solid grounds for such challenge are established. Accordingly, the threshold for disqualification is high. The burden of proof to establish that a concrete conflict of interest exists lies with the challenging party.*
>
> - *The Panel finds that this high standard is not met here because no concrete facts or circumstances have been established by the First and/or Second Respondent indicating that Mr Young acquired any procedural or substantive benefit for the present proceedings from his past membership with the FINA Legal Committee, a non-adjudicatory advisory body within the Second Respondent's organisation. Mr Cornel Marculescu, the Second Respondent's Executive Director, specifically indicated that the "FINA Legal Committee is usually not involved in proceedings with regard to anti-doping rule violations" and that, to the best of his knowledge, Mr Young "had not received any information from FINA with regard to Mr. Yang's case". Accordingly, the Panel finds that it has not been established that the equality of arms of the parties involved in the present proceedings is prejudiced.*

- *Any general knowledge about FINA's Anti-Doping Regulations acquired by Mr Young due to his involvement in the drafting process of these rules is not considered pertinent by the Panel. Mr Young was involved in the draft of the World Anti-Doping Code prior to and during his membership of FINA's Legal Committee. It has not been established by the First and/or Second Respondent that the provisions of the FINA Anti-Doping Regulations pertinent for the present proceedings deviate from the mandatory provisions of the World Anti-Doping Code that had to be incorporated in the FINA Anti-Doping Regulations verbatim, or that any deviation therefrom justifies the conclusion that Mr Young was conflicted, or that Mr Young's knowledge of the drafting process enabled him to use his knowledge against FINA in the present proceedings.*

- *Finally, although the content of the telephone call between Mr Young and FINA's Executive Director on 4 February 2019 is disputed and while FINA's Executive Director had previously objected to Mr Young acting against FINA, the Panel considers it important that FINA's Executive Director did not rebut Mr Young's interpretation of this telephone call in his email dated 7 February 2019 ("Thank you for your call on Monday confirming that FINA sees no conflict in my representation of WADA in connection with its potential appeal in the SY case"), while answering on 8 February 2019 ("[…] I think now it is clear: you don't want to work for FINA anymore and it's nothing to do with independence!!").*

- *As a corollary of the Panel's finding that Mr Young is not considered to have a conflict of interest, Mr Rychener also does not have a conflict of interest.*

*As a consequence of the above findings, the Panel concludes that counsels for WADA are not to be disqualified from the present proceedings and that their involvement in the present proceedings as counsels for the Appellant neither impact on the jurisdiction of CAS to adjudicate and decide on the present dispute nor on the admissibility of the Appellant's (amended) Statement of Appeal or Appeal Brief.*"

68. On 7 August 2019, the CAS Court Office, on behalf of the Panel, informed the Parties as follows:

> "***a) Witnesses***
>
> *In accordance with Article R44.3* [CAS Code], *the Panel hereby orders WADA to produce* [the DCO], [the BCA], [the DCA], *and Mr Tudor Popa (IDTM) for examination at the hearing or as otherwise suggested below.*
>
> *While the Panel understands that such witnesses are not under the custody or control of WADA, the Panel notes the testimony of these witnesses and the evidence derived therefrom is relied upon by WADA in its written submissions. The Panel considers, therefore, that such testimony and*

*evidence is necessary and relevant, and should be made available for cross-examination by the Panel and other Parties.*

*Given the concerns expressed by these witnesses (or at least as it concerns* [the DCO, the BCA and the DCA]*) about travelling to Lausanne and testifying at the hearing, the Panel proposes to hear these witnesses in the form of deposition testimony, which could take place in a confidential location in China (exact location to be decided upon by the Panel), in advance of the hearing, with limited attendees present. During these depositions, counsel will be permitted to ask their cross-examination questions to the witnesses. The witnesses' responses will be transcribed by a court reporter and maintained as part of the record before the Panel. The President of the Panel will preside over the deposition, in person or by telephone, and may ask questions to the witnesses as he deems necessary.*

[…]

*Finally, the Panel confirms the agreement of the Parties to hold a public hearing. Given this particular situation and considering the difficulty to anticipate the number of persons wishing to attend the hearing, it is likely that such hearing be broadcast on the CAS website (live streaming). More details will follow in this respect in due course.*"

69. On 13 August 2019, following an exchange of correspondence by the Parties, the CAS Court Office informed the Parties, *inter alia*, as follows:

"*1. The Panel acknowledges that the* [DCO] *has committed to testify by way of confidential deposition on or around 26 August 2019 in a location to be determined within Europe.* […]

*2. The Panel directs WADA to produce Mr. Popa for testimony in person at the hearing.*

*3. The Panel understands that the* [BCA] *will not make herself available for testimony either in advance of the hearing by way of deposition or at the hearing (in any form). The Panel is not inclined to accept the post-hearing examination of this witness at this time.*

*At issue is whether the Panel should accept as evidence her statement dated 18 June 2019 when her unavailability precludes any party from examining her on the contents therein. In this respect, the Parties are advised that the Panel hereby admits the statement of* [the BCA] *in accordance with Article R44.1 of the CAS Code, but in doing so notes that it does so without prejudice to the question of its probative value, if any, a matter that may be addressed during the hearing.*

*4. As for* [the DCA] *the Panel appreciates that* [the DCA] *did not produce any written statement in this appeal. This said, the Panel would like* [the DCA] *to attend the hearing (in person or by telephone/video) and would invite FINA to use its best efforts to secure* [the DCA's] *testimony at the*

> *hearing. To the extent FINA is unable to make contact with* [the DCA], *the Panel will proceed without prejudice to the value, if any, of evidence as it concerns him.*"

70. On 14 August 2019, the Athlete, "*in view of the fact that it now appears that* [the BCA] *refuses to testify before this Panel and since the Panel has decided to admit her statement*" and in accordance with Article 184(2) PILA, requested the Panel's consent "*to request the assistance of the state judge at the seat of the arbitral tribunal in order to obtain the testimony of* [the BCA] *through a rogatory commission*". The Athlete also requested that the proceedings be stayed until such application was filed.

71. On the same date, the Athlete and FINA filed their Answers, in accordance with Article R55 CAS Code. The Athlete's Answer contained a request for production of documents addressed to WADA. The Athlete requested that he be provided with the "*original metadata of the iPad or alike used by* [the DCO] *during the test of 4-5 September 2019* [sic], *together with a hardcopy of the relevant documents, related to the documents that* [the DCO] *asked* [the DCA] *to sign during said test as seen on the video surveillance recordings* […]".

72. On 15 August 2019, WADA asserted that the Athlete's request for a stay of the proceedings was merely an attempt to delay a hearing on the merits and/or create another ground for appeal. WADA reiterated that it did not oppose the Athlete's request to the extent the Panel considers that it has the ability to invoke the assistance of competent state courts to compel the production of evidence without causing an overly lengthy delay to the conclusion of the hearing, while expressing concerns as to whether granting such request would allow the Panel sufficient time to issue a reasoned final award well before the next major international competition, i.e. the 2020 Tokyo Olympic Games.

73. On 16 August 2019, FINA indicated that it did not oppose the Athlete's request to obtain the assistance of state authorities for the taking of the BCA's evidence. FINA also indicated no objection to a cancellation/postponement of the hearing, as long as the award would be issued before the start of the 2020 Tokyo Olympic Games on 24 July 2020.

74. On the same date, WADA indicated that Mr Richard Young, its lead counsel, had been hospitalized for a significant medical emergency and that this would prevent him from travelling for the next 3-4 weeks. WADA therefore requested that the hearing scheduled for 4 September 2019 be adjourned. WADA also indicated that, should the adjournment be granted, it would make another inquiry as to whether the BCA would be willing to testify voluntarily.

75. On 19 August 2019, considering Mr Young's sudden medical intervention, the Panel decided to adjourn the hearing scheduled for 4 September 2019, on an exceptional basis.

76. On 23 August 2019, the CAS Court Office informed the Parties that the DCO's deposition would take place in Stockholm, Sweden on 5 September 2019. The Parties were also provided with procedural directions with regard to such deposition.

77. On 28 August 2019, WADA stated that it had produced a paper copy of the documents responsive to the Athlete's document production request, and that WADA had been informed by IDTM that no metadata of the type requested was currently recoverable.

78. On 2 September 2019, following a request from WADA, the Panel again expressly reminded the Parties of the confidentiality of the procedural aspects of this case and that the disclosure of any information or evidence obtained at the deposition to any non-party or non-counsel to the procedure would not be tolerated and would have to be reported to the Panel without delay.

79. On 5 September 2019, the DCO testified by way of deposition in Stockholm, Sweden. The Parties' counsels attended the deposition which, on agreement of the Parties, the President of the Panel chaired.

80. On 11 September 2019, WADA informed the Panel that the BCA would be willing to provide testimony by video-conference, subject to the same protective measures applicable to the deposition of the DCO.

81. On the same date, FINA informed the Panel that it was in contact with the Athlete and WADA with regard to the participation of the DCA at the hearing and that it would keep the Parties and CAS informed of further developments in this regard.

82. Also on 11 September 2019, the Athlete asserted that the DCO had been too prepared by WADA and IDTM prior to her deposition and that she was very uncooperative during the deposition. Therefore, Athlete indicated his preference for certain conditions to be applied to any testimony that the BCA ultimately provide.

83. On 19 September 2019, FINA supported the conditions set out by the Athlete as it concerned the deposition of the BCA.

84. On the same date, WADA indicated that there had been "*another act of intimidation taken against the BCA in this case, an act that WADA believes was taken by someone closely connected to this proceeding and intended to influence whether or how the BCA might testify*". WADA indicated that these acts explain the BCA's reluctance to testify and requested a renewed order from CAS prohibiting any further acts of intimidation or disclosure of the personal information of the DCO or BCA and granting any other protective measures deemed reasonable to deter similar conduct in the future.

85. On 23 September 2019, FINA and the Athlete objected to any assertion directed at them as the cause of any acts of intimidation against the BCA, or leaks of private information.

86. On 27 September 2019, on behalf of the Panel, the CAS Court Office informed the Parties, *inter alia*, as follows:

> "*The Panel has taken careful note of WADA's letter dated 19 September 2019, and is concerned about the matters raised therein. It wishes to reiterate that parties, counsel and anyone associated with them are strictly prohibited from intimidating or contacting (save for organisational matters)* [the BCA] *and are prohibited from disclosing any personal information or the modalities of her testimony. Any perceived breach of this order is to be reported to the Panel without delay. The Panel further wishes to stress that it is free to draw inferences from any intimidation of* [the BCA] *(or any other witness), which may bear on its assessment of the evidence before it. It wishes*

> *to make clear that it is not in the interests of any part to engage in, condone or otherwise contribute to the intimidation of any witness.*
>
> *The Panel has decided it wants to hear* [the BCA] *in person during the public hearing, and understands that she is unwilling to participate by any other means than skype (under the conditions set out in WADA's letter).*
>
> *Should* [the BCA] *not feel comfortable to testify in person or in public, the Panel considers it appropriate to implement stringent protective measures to safeguard* [the BCA's] *free testimony* […]."

87. On 7 October 2019, WADA informed the CAS Court Office that the BCA had indicated through an intermediary that she was not willing to testify in person or in public at the hearing on 15 November 2019. She would, however, be willing to testify via video-conference on 14 November 2019. Following an enquiry of the Panel, WADA also indicated that it was willing to waive calling Ms Johannesson and Mr Kemp at the hearing and would instead rely on their witness statements and, for Ms Johannesson, on her prior testimony at the FINA hearing.

88. On the same date, 7 October 2019, the Athlete and FINA indicated that only witnesses who had filed proper reports and/or witness statements should testify during the hearing and that any statement by a witness, who failed to attend the hearing, such as Ms Johannesson and Mr Kemp, should, in principle, be removed from the file and the evidence ignored. The Athlete also provided the CAS Court Office with a proposed list of witnesses.

89. On 10 October 2019, the CAS Court Office confirmed that the Panel was prepared to examine the BCA on 14 November 2019.

90. On 18 October 2019, the CAS Court Office, *inter alia*, informed the Parties that they should confer and agree on a translation company to provide simultaneous translation into English, given that some of the witnesses were not prepared to testify in English.

91. On 21 October 2019, the Athlete confirmed that the Parties would secure the services of a translation company and would revert to the CAS Court Office in due course.

92. On the same date, FINA informed the CAS Court Office that the DCA had contacted FINA by means of two emails on 18 October 2019, including his written position with regard to his implication in the events at stake (with a translation into English). The DCA indicated that he was not willing to provide oral testimony. FINA suggested to the Panel that it would propose to the DCA that the same protective measures as for the DCO be put in place.

93. On 24 October 2019, following comments received from WADA, the Athlete provided the CAS Court Office with a new translation of the DCA's 18 October 2019 statement, highlighting certain points of disagreement with the text provided by FINA.

94. On 26 October 2019, WADA informed the CAS Court Office that it would no longer seek to call Mr Ricketts as a witness, but would call Mr Kemp to testify in person about

all topics described in WADA's Appeal Brief and in rebuttal to issues raised by the Respondents in their Answers.

95. On 28 October 2019, following an appeal filed by the Athlete against the Panel's decision to dismiss the Athlete's "*Request for Disqualification of WADA's Counsels*" dated 26 July 2019, the SFT decided to declare the Athlete's appeal on this issue inadmissible.

96. On 29 October 2019, on behalf of the Panel, the CAS Court Office provided the Parties with a hearing schedule after considering the Parties' respective positions in this respect and advised the Parties, *inter alia*, as follows:

> "*1. Ms. Jenny Johannesson: The Panel notes that WADA is content to narrow its witness list such that Mr. Neal Soderstrom will testify in lieu of Ms. Jenny Johannesson. In this respect, the Panel notes the Respondents' objection to the admission of Ms. Johannesson's witness statement. In consideration of the Parties' positions, the Panel had decided to admit the witness statement of Ms. Johannesson to the file and will weigh the evidentiary value of the statement, as necessary.*
>
> *2.* [The DCA]*: The Panel notes the* [DCA's] *letter/statement dated 16 October 2019 (the "Statement") and the Parties' contradicting (in limited part) translation of the Statement. As with the statement of Ms. Johannesson, the Panel admits the Statement to the file and will weigh the evidentiary value of the statement as necessary. In this respect, the Panel reserves the right to seek, if ultimately determined necessary by the Panel, the assistance of a third party translation service to produce a certified translation of the disputed passage in question. Separately, and notwithstanding the foregoing, to the extent a Party is able to secure* [the DCA's] *testimony with special conditions (by videoconference, confidential, etc.), please inform the Panel accordingly.*
>
> […]"

97. On 30 October 2019, WADA informed the CAS Court Office that another act of intimidation had occurred against the BCA, that it believed such action was taken by someone closely connected to this proceeding, and that it was intended to influence how the BCA and DCA might testify. On this basis, WADA requested a renewed order from CAS prohibiting any further acts of intimidation or disclosure of the DCO's, BCA's or DCA's personal information and granting any other protective measures deemed reasonable to deter similar conduct in the future.

98. On 31 October 2019, the Athlete informed the CAS Court Office that the Parties had agreed on the use of a translation company.

99. On 1 November 2019, with reference to WADA's letter dated 30 October 2019, the Athlete and FINA denied that they were the source of the leaked information and acts of intimidation against the BCA.

100. On 4 November 2019, on behalf of the Panel, the CAS Court Office again reiterated the confidentiality of the procedure.

101. On 5 November 2019, the Athlete provided the CAS Court Office with the names of the interpreters that would be available during the deposition of 14 November 2019 and/or the hearing of 15 November 2019.

102. On 10 November 2019, FINA informed the CAS Court Office that the DCA had now provided it with a second written statement by email on 8 November 2019. The DCA asked, *inter alia*, whether he could now be called by telephone to testify and in doing so, attached certain conditions to his participation. FINA also sought to include certain conditions to assist in taking the DCA's testimony.

103. On 12 November 2019, the CAS Court Office, on behalf of the Panel, informed the Parties, *inter alia*, as follows:

> "*As an initial matter, the Panel takes note of the comments provided by* [the DCA] *in his letter to FINA. However, given what seems to be a continued reluctance from* [the DCA] *to testify, the Panel is not inclined to force him to provide testimony (to the extent the Panel would have such authority in this respect). Moreover, at this juncture, some 3 days before the hearing, the Panel is not able to accommodate his* [conditions to testify]. *The Panel does not find this approach helpful. As a result, the Panel will accept the statement provided by* [the DCA] *and weigh such evidence accordingly. The Panel's decision in this regard accords its earlier decision as it concerned the evidence of Ms. Johannesson.*"

104. On the same date, following a request from the CAS Court Office, the Athlete provided an overview of his procedural objections:

> "*1. He maintains his challenge against Mr Romano Subiotto QC and, accordingly, his objection that the arbitral tribunal is not properly constituted* […].
>
> *2. The* [Athlete] *maintains his objection against the jurisdiction of CAS based on the following grounds:*
>
> - *The appeal was not timely filed by WADA. Accordingly, the appeal is not admissible and, as a result, the CAS has no jurisdiction ratione temporis* […]*;*
>
> - *In view of Mr Richard Young and Mr Brent Rychener's conflict of interest, the appeal filed by WADA is not admissible and, as a result, the CAS has no jurisdiction ratione temporis* […]."

105. On 12 and 13 November 2019 respectively, WADA, the Athlete and FINA returned duly signed copies of the Order of Procedure to the CAS Court Office. The Athlete and FINA made certain hand-written comments on the Order of Procedure.

106. On 13 November 2019, FINA informed the CAS Court Office that the DCA had provided it with a third written statement by email on 12 November 2019. The DCA asked whether he was supposed to testify and at what time, while indicating that he was now available on 14 and 15 November 2019.

107. On the same date, 13 November 2019, the Athlete referred to the letter from the CAS Court Office dated 12 November 2019 "*informing the Parties that the Panel refuses to hear* [the DCA]". The Athlete insisted on the importance of hearing the testimony of the DCA, even if only after the hearing of 15 November 2019 and that this was necessary in order to ensure the Parties' right to be heard.

108. On 14 November 2019, the BCA testified by video conference in the form of a deposition that took place in Lausanne, Switzerland. The deposition was attended by the Parties' counsel and the Panel.

109. Later that day, on 14 November 2019, the Panel informed the Athlete that it was not refusing to hear the DCA's testimony. The Panel reminded the Athlete that, for the past several months, it had invited the DCA's testimony and sought the Parties' assistance in securing his testimony. But, for unknown reasons and only days before the hearing, the DCA suddenly made himself available subject to certain conditions. The Panel informed the Parties that it did not find such offer from the DCA to be appropriate on the eve of the hearing.

110. On the same date, the CAS Court Office acknowledged receipt of the Athlete's procedural objections filed on 12 November 2019, and indicated that the Panel had taken due note of the stated objections and that they were incorporated into the record of this procedure.

111. On 15 November 2019, a public hearing was held in Montreux, Switzerland. The hearing was also broadcast live on the internet. At the outset of the hearing, the President of the Panel referred to the Athlete's procedural objections as set out in his letter dated 12 November 2019 and acknowledged that the Parties reserved their rights accordingly.

112. In addition to the Panel, Mr Matthieu Reeb, CAS Secretary General, Mr Brent J. Nowicki, Managing Counsel to the CAS, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing:

For WADA:

1) Mr Julien Sieveking, Director Legal Affairs;
2) Ms Tharinda Puth, Manager Legal Affairs;
3) Ms Ying Cui, WADA Manager;
4) Mr Richard R. Young, Counsel;
5) Mr Brent E. Rychener, Counsel;
6) Ms Suzanne Crespo, Counsel.

For the Athlete:

1) Mr Sun Yang, the Athlete;
2) Mr Qihuai Zhang, Counsel;
3) Ms Luo Xiaoshuang, Counsel;
4) Mr Fabrice Robert-Tissot, Counsel;
5) Mr Ian Meakin, Counsel.

For FINA:

1) Mr Serge Vittoz, Counsel.

113. The Panel heard testimony/evidence in person from the following persons, in order of appearance:

1) The Athlete;
2) Mr Stuart Kemp, WADA Deputy Director Standards and Harmonization, expert called by WADA;
3) Mr Tudor Popa, IDTM Testing Coordinator, witness called by WADA;
4) Mr Neal Soderstrom, IDTM Client Relations & Business Development Manager, witness called by WADA;
5) Ms Ming Yang, the Athlete's mother, witness called by the Athlete;
6) Dr Han Zhaoqi, Chief Doctor of the School where Dr. Ba Zhen works, Chief Doctor in Affiliated Sports Hospital of Zhejiang College of Sport, witness called by the Athlete;
7) Mr Cheng Hao, Team Leader of the Chinese national swimming team, witness called by the Athlete;
8) Dr Ba Zhen, the Athlete's doctor, witness called by the Athlete;
9) Prof. Pei Yang, Associate Professor, Law School, Beijing Normal University, expert called by the Athlete.

114. All witness and experts were instructed by the President of the Panel to tell the truth as to the facts, and to avoid impression or speculation. The Parties and the Panel had the opportunity to examine and cross-examine the witnesses and experts in accordance with the hearing schedule.

115. As indicated by letters from the CAS Court Office dated 29 October and 12 and 14 November 2019, the DCA and Ms Jenny Johannesson, IDTM's Legal Counsel, witnesses called by WADA, were not heard. Their written statements are admitted to the file and the Panel weighed the evidentiary value of their written statements accordingly.

116. The Parties were afforded full opportunity to present their case, submit their arguments and answer the questions posed by the members of the Panel.

117. At the end of the hearing, the Parties expressly stated that they did not have any objection with the procedure adopted by the Panel and that their right to be heard had been respected.

118. On 5 December 2019, WADA informed the CAS Court Office that there had been a breach of the Panel's order dated 27 September 2019, which prohibited any intimidation or contact with witnesses in these proceedings. More specifically, WADA indicated that a video recorded by the Athlete's mother had been publicly released that depicted the DCO and BCA, an action that could only have been done by the Athlete or someone on his behalf. Also, WADA indicated that it was informed that someone on the Athlete's behalf contacted the supervisory body of the hospital where the BCA works with the purpose of requesting a meeting with her. On this basis, WADA requested an order from the Panel "*that all attempts by* [the Athlete] *or anyone on his behalf to contact the DCO*

*or BCA or to release personal information about them, or to intimidate or retaliate against them in any other fashion, cease immediately*".

119. On 9 December 2019, the CAS Court Office informed the Parties that the Panel was concerned by the content of WADA's letter dated 5 December 2019 and that, if proven true, these actions were not only disrespectful to the legal process but in direct contradiction of the Panel's order dated 27 September 2019. The Parties were, again, expressly cautioned against acts of intimidation and the disclosure of confidential aspects of this procedure and that the Panel could take adverse inferences from such actions.

120. On the same date, 9 December 2019, the Athlete and his counsel indicated that they had never made any attempts to intimidate the DCO, BCA and DCA or any other witness through other means, nor the supervisory body of the hospital where the BCA works.

121. On 17 December 2019, the Parties' provided the Panel with an agreed-upon transcript of the Athlete's testimony during the hearing, professionally translated.

122. On 20 December 2019, WADA alleged that the Athlete had committed an act of intimidation and retaliation against the DCO on social media, which was denied by the Athlete. The Athlete emphasised that the English translation of the social media post provided by WADA was incorrect. According to the Athlete, the post complained of did not mention the name of the DCO and could therefore not be considered as an attempt to intimidate or retaliate against the DCO despite previous orders from CAS.

123. The Panel confirms that it carefully heard and considered in its discussions and subsequent deliberations 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 award.

## IV. TRANSLATIONS AND INTERPRETATIONS

124. As agreed upon from the outset of this appeal, the language of this procedure is English (see Article R28 CAS Code). Pursuant to Article R44.2 CAS Code, the Parties were invited to call any such witnesses and experts specified in their written submissions, and any Party requiring the assistance of an interpreter for any such witness or Party were expressly required to arrange for the attendance of an independent, non-interested interpreter, retained at the expense of the Party requiring the interpreter.

125. The Parties bore the onus of providing clear and accurate translation/interpretation. Indeed, the Parties, at the Panel's request, jointly agreed in the letter of 18 October 2019 on the interpretation company to be used at the hearing. It is understood that the Athlete's team (which includes native Chinese speakers) took the lead in selecting the company and the interpreters, who were ultimately agreed upon by WADA and FINA.

126. The Panel is bound to note that it was extremely disappointed with the quality of the translation and interpretation, in particular at the beginning of the hearing. Recognizing the apparent problems in interpreting the Athlete's testimony, the Panel instructed the Parties to rectify the interpretation problems immediately. Noting that both the Athlete and WADA had native Chinese speaking counsel/interpreters present in the room, the Parties were invited to agree on using one of their own counsel/interpreters to interpret

for the remainder of the hearing. Without reservation or hesitation, the Parties agreed on a new interpreter who diligently interpreted the remaining witnesses, to the satisfaction of the Panel and Parties.

127. Following the conclusion of the hearing, and with the agreement of the Parties, the examination of the Athlete (which had been recorded) was submitted to an independent translation service, which transcribed and translated his testimony during the hearing. In this respect, the Panel is comforted by the fact that the Athlete's testimony before the Panel was virtually the same as before the FINA Doping Panel. In other words, and most importantly, despite the poor translation in the course of the hearing, the Athlete's testimony has been correctly translated and fully considered and understood in this procedure.

## V. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

### A. The Appellant

128. WADA's submissions, in essence, can be summarised as follows (partially based on a summary provided by WADA in its Appeal Brief, which is reproduced *verbatim*):

- "*This case involves a disputed sample collection process carried out by* [IDTM] *as the Sample Collection Authority for FINA. The IDTM sample collection team included a female* [DCO]*, a female* [BCA] *and a male* [DCA]. *The IDTM sample collection team in this case was tasked by FINA with collecting out-of-competition blood and urine samples from a well-known Chinese swimmer,* [the Athlete]. *IDTM had collected numerous samples from the Athlete over the past few years. In accordance with the whereabouts information that IDTM had on file for the Athlete, IDTM decided to carry out this "no-advance notice" sample collection session on the night of 4 September 2018.*

- *The Athlete has been an elite swimmer for many years, competing in his first Olympic Games in 2008 and winning his first Olympic gold medal in 2012. He has been included in FINA's Registered Testing Pool for many years and, as a result, has been subject to the mandatory whereabouts requirements of the World Anti-Doping Code ("Code") and the International Standard for Testing and Investigations ("ISTI"), including the requirement to identify one hour each day during which the Athlete guarantees that he will be at a specific location. For 4 September 2018, the Athlete had guaranteed he would be at his residence between 10 p.m. and 11 p.m.*

- *The IDTM team arrived at the Athlete's residence shortly before 10 p.m., but waited nearly an hour before the Athlete arrived home. Upon his arrival, the DCO notified the Athlete and introduced the IDTM team. They moved to a clubhouse room near the Athlete's villa to begin the sample collection session. The Athlete provided a blood sample without objection. But then things took a severe turn.*

- *When asked by the DCO to provide a urine sample, the Athlete questioned the DCA's authorization and documentation to serve as a chaperone to observe the Athlete provide the sample. The Athlete refused to provide a urine sample in the DCA's presence. The Athlete and his growing entourage (his mother and personal doctor were present at the clubhouse, and two other Chinese sport officials participated by telephone) steadfastly insisted that the DCA had not presented sufficient documentation so no urine sample would be provided.*

- *But the Athlete and his entourage then took a step further. Although the Athlete had already provided his blood sample without objection, they now took the position that the BCA also had not presented sufficient documentation of her authorization, and therefore the Athlete's blood sample was invalid.*

- *Much argument ensued between the IDTM team and the Athlete, who was egged on by his support team. The stalemate eventually ended with blows from a hammer – specifically, with a security guard taking one of the Athlete's blood sample containers outside to break it with a hammer. As the security guard recalls, "Then a man who was not very tall handed me a bottle and told me to use the hammer to open the bottom of the bottle." The Athlete crouched next to the security guard during the hammering process, illuminating the blood sample container with the flashlight on his cell phone. In the end, the IDTM team left the clubhouse without any blood or urine samples.*

- *While there are many factual disputes about what happened during the sample collection session, and who said what to whom, two critical points are not disputed. First, while the Athlete initially cooperated by providing blood samples (A and B blood tubes), it is undisputed that the Athlete and his entourage, individually and collectively, would not allow the DCO to take away the blood samples that the Athlete had provided. Second, it is undisputed that the Athlete never provided a urine sample as requested by the DCO based on the Athlete's contention (a misguided contention as explained below) that the DCA failed to provide adequate documentation of his authority to be involved in the sample collection process.*

- *With respect to the actions by the Athlete and his entourage in blocking the DCO from taking his blood samples, their own words tell the story. The Athlete acknowledges, "I complained and told them that they were not entitled to take away the collected blood samples", and "I therefore insisted on keeping the blood sample." The Athlete's personal doctor (Dr. Ba Zhen, who had previously committed an anti-doping rule violation by giving a prohibited substance to the Athlete, and then had breached his period of ineligibility by continuing to serve as an Athlete Support Person for the Athlete) arrived on the scene and, in his own words, "I told* [the DCO] *that she could not take the blood samples away" and then "I reiterated our position that the blood samples could not be taken away." The Athlete's mother recalls that Dr. Ba "strongly opposed" the IDTM team's "taking away the blood samples" and that yet another member of*

*the Athlete's entourage, Dr. Han Zhaoqi, "made it clear that* [the BCA] *could not take blood samples away."*

- *Thus, even before taking a hammer to the blood container, the Athlete and his support team had interfered with and obstructed the DCO's performance of her doping control duties.*

- *The Athlete's egregious behavior during the sample collection process – including his failing and refusing to provide a urine sample, his preventing the DCO from taking away his blood sample, his breaking the blood sample container and his ripping up the Doping Control Form that he had signed – violates the Code as incorporated in FINA's Doping Control Rules. The Athlete's contention that the DCA and BCA failed to provide adequate documentation does not constitute a valid defense under the Code, nor can the Athlete justify his conduct by saying he relied on advice from his entourage.*"

- On this basis it is submitted that the Athlete committed a violation of Article 2.5 FINA DC (Tampering or Attempted Tampering with Any Part of Doping Control) by: i) refusing to allow the DCO to remove the blood samples after collection; ii) breaking or assisting in breaking one of the blood sample containers; iii) refusing, when requested by the DCO, to return the damaged container and the undamaged container with the blood samples; iv) urinating without a chaperone or authorisation from the DCO; v) destroying the Doping Control Form containing the Athlete's signature acknowledging notification for collection of the blood samples; vi) withdrawing his consent to the collection of his blood samples after his personal doctor arrived at the sample collection.

- "*The FINA Doping Panel never examined the tampering issue because it found that the BCA failed to provide proper documentation proving her authority from IDTM, and thus the blood collection session was "invalid and void". The FINA Doping Panel erred in two respects.*

- *First, the ISTI does not require the DCA or BCA to provide separate documentation of their authority where, as here, the DCO (not the DCA) made the initial contact with the Athlete, carried out the notification process and provided the documentation required by Articles 5.4.2 and 5.3.3.* […]

- *Second, even if the FINA Doping Panel's analysis were correct in the abstract, it does not support the conclusion that the Athlete did not violate FINA DC 2.5 here. In this case, the Athlete provided blood samples without objection and signed the Doping Control Form as having been notified. As soon as the samples were collected, they were owned by FINA, as the Testing Authority, under Article 10.1 of the ISTI ("Samples collected from an Athlete are owned by the Testing Authority for the Sample Collection Session in question.").*"

- The Athlete also committed a violation of Article 2.3 FINA DC (Evading, Refusing or Failing to Submit to Sample Collection) for the same reasons as set out above.

- Article 10.3.1 FINA DC provides that a violation of Article 2.5 FINA DC shall be sanctioned with a four year period of Ineligibility. There is no provision under the FINA DC that provides any basis for the Athlete in this case to argue for any reduction in the four-year period of Ineligibility for Tampering.

- Article 10.3.1 FINA DC provides that a violation of Article 2.3 FINA DC shall be four years unless, in the case of failing to submit to Sample Collection, the Athlete can establish that the commission of the anti-doping rule violation was not intentional (as defined in Article 10.2.3) in which case the period of Ineligibility shall be two years. The Athlete's actions in failing and refusing to provide a urine sample cannot be anything other than intentional conduct. The Athlete can also not establish that the sanction should be reduced based on "No Significant Fault or Negligence" as defined in Article 10.5.2.

- In June 2014, the Athlete received a three-month period of Ineligibility for the presence of Trimetazidine in one of his samples. As a result, a violation of Article 2.3 or 2.5 FINA DC in this case would constitute a second violation. In accordance with Article 10.7.1(c) FINA DC, the period of ineligibility to be imposed on the Athlete for the second anti-doping rule violation treated as if it were a first violation, should therefore be multiplied by two.

- "*In the event this CAS Panel finds that the Athlete committed a violation of FINA DC 2.3 or 2.5, WADA submits that, under FINA DC 10.11, the period of Ineligibility shall start on the date of the CAS Panel's final decision.*"

129. On this basis, WADA submitted the following prayers for relief:

"*1. The appeal of WADA is admissible.*

*2. The Decision of the FINA Doping Panel rendered on 3 January 2019 is set aside.*

*3. Mr. Sun Yang is sanctioned with an appropriate period of Ineligibility based on the Panel's findings with respect to the anti-doping rule violations charged, starting on the date of the final CAS decision in this matter, as follows:*

*a. If the Panel finds a Tampering violation under FINA DC 2.5, or a "refusal" or intentional "failing to submit" violation under FINA DC 2.3, an eight (8) year period of Ineligibility;*

*b. In the alternative, if the Panel finds a "failing to submit" violation under FINA DC 2.3, and finds that the violation was not "intentional" under FINA DC 10.3.1, a four (4) year period of Ineligibility;*

*c In the further alternative, if the Panel finds a "failing to submit" violation under FINA DC 2.3, and finds that the Athlete established No Significant Fault or Negligence under FINA DC 10.5.2, a period of Ineligibility in the range from a two (2) year period of Ineligibility, at a minimum, to a four (4) year period of Ineligibility, at a maximum.*

*4. All competitive results obtained by Mr. Sun Yang from 4 September 2018 through the commencement of the applicable period of Ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.*

*5. Awarding to WADA its arbitration costs and an appropriate contribution towards its legal fees and expenses incurred in connection with the proceedings.*"

## B. The First Respondent

130. The Athlete's submissions, in essence, can be summarised as follows (partially based on a summary provided by the Athlete in his Answer, which is reproduced *verbatim*):

- "*According to the well-settled CAS's case law,*

  *"Doping is an offense which requires the application of strict rules. If an athlete is to be sanctioned solely on the basis of the provable presence of a prohibited substance in his body, it is his or her fundamental right to know that the Respondent, as the Testing Authority, including the WADA-accredited laboratory working with it, has strictly observed the mandatory safeguards. Strict application of the rules is the* quid pro quo *for the imposition of a regime of strict liability for doping offenses" (CAS 2009/A/1752 & CAS 2009/A/1753; CAS 2014/A/3487 para. 146).*[2]

- *Although this is not a case of Adverse Analytical Finding ("AAF"), the* [Athlete] *submits that the same rationale should apply to any anti-doping rule violation provided by the FINA DC, including FINA DC 2.3 ("Evading, Refusing or Failing to Submit to Sample Collection") and FINA DC 2.5 ("Tampering or Attempted Tampering with any part of Doping Control") since these provisions also impose a strict regime of strict liability.*

- *Therefore, as part of the above-mentioned quid pro quo, IDTM and FINA must have strictly complied with the notification requirements during the*

[2] CAS 2009/A/1752, paras. 252 *et seq*.

*test of 4-5 September 2018, as set out in of the applicable rules, in particular the ISTI (discussed below).*

- *This point is further confirmed in the Appealed Decision:*

> *"The Athlete (and every athlete) is held strictly accountable to the provisions in the World Anti-Doping Code and the FINA DC. The Doping Panel must insist that IDTM and FINA also strictly comply with the requirements in the ISTI. The Doping Panel rejects any argument or claim that the deficiencies in the notification procedure which it has identified are minor, do not impact the integrity of the blood sample that was collected and should not serve to invalidate an entire testing […]*
>
> *[…] Notification processes contained in the ISTI go to the very heart of assuming jurisdiction over an athlete and thereby acquiring the authority to impose onerous obligations and penalties. Notification is something that must be done correctly. Notification is the 'gateway' into a realm of onerous obligations and responsibilities – all falling on an athlete. The FINA Doping Panel insists that FINA members must know with certainty under whose authority they are being tested and that every official attending at the sample collection session has been properly trained, appointed and authorized by the Sample Collection Authority. The fact that the Athlete in this instance did elect to engage in very troubling conduct regarding the collected blood samples […] does not serve to eliminate the requirements resting on IDTM and FINA to comply with the provisions contained in the ISTI."*

- *Article 5.1 ISTI also defines the purpose of the rules on the notification of athletes as follows:*

> *"5.0 Notification of Athletes*
> *5.1 Objective*
>
> *The objective is to ensure that an Athlete who has been selected for Testing is properly notified of Sample collection as outlined in Article 5.4.1, that the rights of the Athlete are maintained, that there are no opportunities to manipulate the Sample to be provided, and that the notification is documented."*

- *Accordingly, in order to establish a violation of FINA DC 2.3 and FINA DC 2.5,* [WADA] *must first establish that the Testing Authority (i.e. IDTM, by delegation from FINA), including the IDTM Sample Collection Personnel, strictly complied with the above-mentioned mandatory safeguards during the test of 4-5 September 2018.*

- *In order to prove that the Athlete was not properly notified, WADA cannot rely on some alleged "customary practice" of doping agencies (the existence of which is, in any event, not proven; see infra* […]*).*

- *Nor can WADA seriously claim that strict compliance with the applicable requirements is not granted on the ground that the* [Athlete's] *reading of the ISTI would be "hyper technical" (!) To the contrary,* [the Athlete] *is entitled to request that IDTM strictly comply with the plain wording the applicable regulations, in particular Article 5.4 and Article 5.3.3 of the ISTI discussed below.*

- *Finally, WADA argues that it was for the* [Athlete] *to immediately raise (and/or second guess) during the test of 4-5 September 2018 all possible rules and standards that were not complied with. The* [Athlete] *had no duty to advise the doping officers about the requirements that must be met to properly notify the Athlete. It is for the doping officers and, more generally, for IDTM and FINA to make sure that the doping officers strictly comply with the requirements set forth in the ISTI. As shown below, WADA's own instructions provide that the DCO must show his/her Letter of Authorisation to the Athlete and the required complementary identification documents* […].

- *As correctly stated by CAS:*

> *"The fight against doping is arduous, and it may require strict rules. But the rulemakers and the rule-appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorised bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders."*[3]

- *It is the* [Athlete's] *case that IDTM (by delegation from FINA) did not comply with the strict requirements of the ISTI when testing* [the Athlete].

- *Failing strict compliance with the applicable requirements, IDTM and FINA have not validly assumed jurisdiction over the Athlete during the test of 4-5 September 2018, i.e. there no* [sic] *obligations and penalties that can arise upon the Athlete with respect to this specific test if the condition precedent of proper notification has not been fulfilled. As a consequence, failing any proper notification, there cannot be any violation of FINA DC 2.3 and DC 2.5 on the part of the Athlete.* […]

- *Therefore,* [the Athlete] *cannot be sanctioned for any violation of the FINA DC during the anti-doping test of 4-5 September 2018.*"

- "*The concept of personality rights aims at protecting individuals from interference with their private sphere and freedom and is anchored in civil law jurisdictions and particularly in Switzerland. Swiss law protects both*

[3] CAS 94/129, para. 34.

*private and professional development under Articles 27 and 28 of the* [Swiss Civil Code (the "SCC")]*, which constitutes "mandatory law" for associations notwithstanding their autonomy. It is not enough for sports governing bodies to respect its own rules but their regulations cannot infringe their members' personality rights, unless such infringement is legitimate.* […]

- *Article 28 of the SCC protects any person whose personality rights are unlawfully infringed by giving them the right to apply to the court for protection. The infringement is unlawful unless (i) the person whose rights are infringed consents thereto, or (ii) there is an overriding private or public interest, or (iii) the law authorised the infringement of the personality rights concerned. Therefore, the infringement of the personality rights is, as a matter of principle, unlawful unless the association in question can prove that one of the three aforementioned justifications (i.e. exceptions) are met. However, even if one of these exceptions is fulfilled, the infringement of the personality rights (i.e. the sanction imposed by the sports governing body against the athlete) must comply with the fundamental principle of proportionality.* […]

- *In the event that* [the Athlete] *is sanctioned with a 8-year (or, in the alternative, a 4-year) period of ineligibility, as requested by WADA, it is clear that his personality rights would be significantly infringed upon since the Athlete would be unable to compete and his reputation tarnished.*"

- None of the possible exceptions justifying such infringement mentioned above are satisfied, i.e. there is no overriding (private) interest to sanction the Athlete in such circumstances as per Article 28(2) SCC. Any sanction ordered against the Athlete would, as a consequence, be null and void.

- "*Assuming that an anti-doping authority is able to establish a justifiable aim, the tribunal must then assess whether the sanction exceeds "that which is reasonably required in the search of the justifiable aim". If it does, then it is disproportionate and therefore unlawful. Whether or not a particular sanction is proportionate depends on the <u>particular circumstances of the case at hand</u>.*" (emphasis in original)

- "*Contrary to what WADA contends, in view of the truly exceptional circumstances of the case described above* […]*, the Athlete bears No Significant Fault or Negligence and thus, if any sanction should be imposed (quod non), said sanction should be reduced in accordance with* [Article 10.5.2 FINA DC]."

131. On this basis, the Athlete submitted the following prayers for relief:

"*<u>On the admissibility of the appeal:</u>*

*1. The appeal of WADA is inadmissible;*

*<u>On the jurisdiction of CAS:</u>*

*2. CAS has no jurisdiction over the present matter;*

*On the merits:*

*3. The appeal of WADA shall be dismissed.*

*4. Mr. Sun Yang shall be granted an award for his legal costs and other expenses pertaining to these appeal proceedings before CAS.*

*5. WADA shall bear the costs of the arbitration.*"

## C. The Second Respondent

132. FINA's arguments in support of the Appealed Decision and the description of its role in the present appeal arbitration proceedings are as follows:

- "*FINA has been named by WADA as Respondent in the present arbitration procedure as the International Federation which has issued the Appealed Decision. The latter was rendered by the FINA Doping Panel, which is a judicial body of FINA composed of impartial individuals with experience and knowledge of anti-doping matters and the* [FINA DC].

- *In the case at hand, the FINA Doping Panel has conducted a remarkable and comprehensive analysis of factual and legal issues at stake and issued a decision which, in FINA's opinion, cannot be seriously criticized. Indeed, although the behavior of the Athlete and his entourage in the course of the doping control which took place on 4 September 2019 may have been more measured in some respects, the serious violations by the doping control team of the applicable formal requirements in the context of an out-of-competition doping control shall necessarily lead to the invalidity of the latter.*

- *In the course of the of the* [sic] *proceedings before the FINA Doping Panel, the parties filed voluminous materials and were afforded to submit several written submissions. During an extraordinary twelve-hour hearing which took place on 19 November 2018, the parties had the opportunity to present their cases, examine and cross-examine no less than ten witnesses and make final oral pleadings.*

- *Having conducted an in-depth analysis of the applicable regulations, in particular* [the ISTI], *and the facts of the case, the FINA Doping Panel held that two out of the three of the members of the testing team who present themselves to test the Athlete on the evening of 4 September 2018 did not have proper accreditation from the sample collection authority and that, therefore, the Athlete had not been notified in accordance with the applicable rules and that the sample collection session was null and void. In these circumstances, the FINA Doping Panel concluded that the Athlete did not commit any anti-doping rule violation, in particular of Articles 2.3 and 2.5 of the* [FINA DC].

- *FINA entirely supports the FINA Doping Panel's analysis and conclusions. FINA will not restate each and every argument made by the FINA Doping Panel and respectfully refers the Panel to the latter. FINA will focus its attention on the main elements of the Appealed Decision and complete the latter, where necessary, in the light of the – contested – arguments developed by WADA in its Appeal Brief.*"

133. On this basis, FINA submits the following prayers for relief:

> "*<u>On the admissibility of the appeal:</u>*
>
> *1. Declare that the appeal of WADA is inadmissible;*
>
> *<u>On the admissibility of the appeal</u>* [sic]*<u>:</u>*
>
> *2. Declare that CAS has no jurisdiction to decide on the appeal filed by WADA;*
>
> *<u>On the merits:</u>*
>
> *3. Dismiss the appeal filed by WADA;*
>
> *4. Confirm the decision rendered on 3 January 2019 by the FINA Doping Panel in the case of Mr. Sun Yang;*
>
> *5. Order WADA to pay the full amount of the arbitration costs, if any.*
>
> *6. Order WADA to pay a significant contribution towards the legal costs and other related expenses of the Fédération Internationale de Natation in connection with these proceedings.*"

## VI. JURISDICTION OF CAS

134. Article R47 CAS Code provides that:

> "*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."*

135. Article 13.2 FINA DC provides that:

> "*A decision that* […] *no anti-doping rule violation was committed* […] *may be appealed exclusively as provided in this DC 13.2 – 13.7.*"

136. The Parties do not dispute that the Athlete is an "International-Level Athlete", meaning that Article 13.2.1 FINA DC is applicable. This provides that:

> "*In cases arising from participation in an International Competition or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court.*"

137. Article 13.2.3 FINA DC provides that:

> "*In cases under DC 13.2.1, the following parties shall have the right to appeal to CAS:* […] *(f) WADA.*"

138. The Respondents objected to the jurisdiction of CAS and the admissibility of the appeal, because i) WADA did not comply with the time-limit to file its Appeal Brief; and ii) because counsels for WADA had an alleged conflict of interest.

139. The Panel finds that, if upheld, these two objections would not affect the jurisdiction of CAS because the jurisdiction of CAS to rule on disputes involving WADA and an "International-Level Athlete" is provided for in the above-cited provisions. The Respondents' objections are of admissibility. If the Respondents' objections were upheld, the Panel would only be prevented from addressing the merits of the case. The Panel will, therefore, address these issues in the context of the admissibility of the appeal below.

140. Based on the provisions set out above, the Panel is satisfied that CAS has jurisdiction to adjudicate and decide on the present dispute.

## VII. ADMISSIBILITY OF THE APPEAL

141. Article R49 CAS Code determines that:

> "*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.*"

142. Article 13.7.1 FINA DC provides that:

> "*The deadline to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party. The above notwithstanding, the following shall apply in connection with appeals filed by a party entitled to appeal but which was not a party to the proceedings that led to a decision being appealed:*
>
> *a) Within a deadline of fifteen (15) days from receipt of the decision, the party/ies entitled to appeal can request a copy of the complete case file from the body that issued the decision, including the motivation of the decision and, if the proceedings took place in another language, a translation in one of FINA's official languages (English or French) of the decision and of the motivation, as well as of any document which is necessary to understand the content of the decision.*

*b) If such a request is made within the fifteen-day period, then the party making such request shall have twenty-one (21) days from the receipt of the full file, including translations, to file an appeal to CAS.*

*The above notwithstanding, the filing deadline for an appeal filed by WADA shall be the later of:*

*a) Twenty-one (21) days after the last day on which any other party in the case could have appealed, or*

*b) Twenty-one (21) days after WADA's receipt of the complete file relating to the decision.*

*Similarly, the filing deadline for an appeal by FINA shall be in any event the later of:*

*a) Twenty-one (21) days after the last day on which any other party (except WADA) could have appealed before CAS; or*

*b) Twenty-one (21) days from the day of receipt of the complete file relating to the decision.*"

143. The Athlete objects to the admissibility of the appeal on two grounds, which the Panel addresses separately below.

## A. WADA's Compliance with the deadline for appeal

144. On 9 April 2019, the CAS Court Office advised the Parties on behalf of the President of the Appeals Arbitration Division that "*a decision on the Respondents' objection to admissibility is deferred to the Panel, once constituted*".

145. On 1 May 2019, the Panel in its previous composition was constituted.

146. On 19 May 2019, the CAS Court Office, *inter alia*, informed the Parties that the Panel had decided to reject the Athlete's objection to the admissibility of WADA's appeal noting that the reasons for such decision would be set out in the final award.

147. Accordingly, the Panel, with the express agreement of Mr Subiotto, who was not a member of the Panel in its previous composition that decided to reject the objections of the Athlete and FINA, reconfirms its decision on the grounds set out below.

148. The Appealed Decision was issued on 3 January 2019 and notified to the Athlete on the same day. The Appealed Decision was then notified to WADA and CHINADA on 7 January 2019.

149. Article 13.7.1 FINA DC makes clear that the deadline for WADA to file its Statement of Appeal is 21 days after the last day on which any other party (except WADA) could have appealed before CAS. The Appealed Decision was issued on 3 January 2019 and notified to the Athlete on the same day. It was then notified to CHINADA (a party with a right of appeal) on 7 January 2019.

150. WADA filed (i) its Statement of Appeal on 14 February 2019, i.e. exactly 21 days after the last day upon which the Athlete was entitled to file his appeal, and (ii) its amended Statement of Appeal on 18 February 2019, i.e. exactly 21 days after the last day upon which CHINADA (another party with a right to appeal) was entitled to file its appeal.

151. The Panel therefore finds – on the plain and simple reading which is not disputed by the Parties – that both the Statement of Appeal and amended Statement of Appealed were timely filed on the basis of Article 13.7.1 FINA DC.

152. Turning its attention to the timely filing of the Appeal Brief, the Panel observes that the Appeal Brief was filed on 3 April 2019 and that the Parties exchanged extensive written submissions on this topic, which are summarised below.

### *1. The submissions of the Parties*

153. WADA asserts that it filed its Statement of Appeal on 14 February 2019 "*out of an abundance of caution*" because it had allegedly still not received the complete file related to the Appealed Decision and therefore the 21-day deadline to challenge the Appealed Decision on the basis of Article 13.7.1.§2(b) FINA DC had not even commenced.

154. In this respect, the Panel notes that, on 20 March 2019, WADA sent a letter to the CAS Court Office by means of which it provided "*notice of its calculation of the deadline to file WADA's appeal brief, and to request that CAS grant an extension of time to confirm the date calculated*", indicating that it had only received the complete file relating to the Appealed Decision on 21 February 2019 (the date on which FINA provided WADA with the audio recordings of the hearing conducted on 19 November 2018 by the FINA Doping Panel). WADA submitted that its deadline to appeal on the basis of Article 13.7.1. §2(b) FINA DC was 14 March 2019 (21 days after receipt of the complete file). The Appeal Brief would therefore be due on 24 March 2019. Given that the CAS Court Office granted an additional 20-day extension, WADA's Appeal Brief would be due on 13 April 2019.

155. In the same letter, WADA also provided an alternative calculation. It submitted that CHINADA was also entitled to challenge the Appealed Decision. Since CHINADA was only provided with the Appealed Decision on 7 January 2019, CHINADA's deadline to appeal expired on 28 January 2019. Under Article 13.7.1 §3 FINA DC, FINA could file an appeal against the Appealed Decision 21-days after the last day on which CHINADA could file an appeal. FINA's deadline to appeal was therefore 18 February 2019. It then follows that WADA's deadline to appeal expired 21-days after FINA's deadline, i.e. 11 March 2019. The Appeal Brief would therefore in principle be due on 21 March 2019, but considering the additional 20-day extension granted, the deadline for filing the Appeal Brief would expire on 10 April 2019.

156. On 22 March 2019, the Athlete objected to WADA's contentions because he considered that WADA's extended deadline to file its Appeal Brief expired on 20 March 2019 and that since WADA failed to comply with this time limit, its appeal was to be deemed withdrawn.

157. The Athlete submitted that WADA and CHINADA were provided with the Appealed Decision with the complete file on 7 January 2019. Audio recordings of a hearing are not "*document[s]*" within the meaning of Article 13.7.1 §1 FINA DC. Only on 19 February

2019, i.e. after WADA had already filed its Statement of Appeal and the *amended* Statement of Appeal, it requested FINA to provide it with the audio recordings of the hearing of 19 November 2018, which were provided to WADA on 21 February 2019. The Athlete maintained that this request was made after the 15-day deadline set in Article 13.7.1 §1 FINA DC and was therefore late. Another interpretation of this provision would mean that WADA would be in a position to effectively obtain endless extensions of the deadline to file the Appeal Brief by belatedly requesting the production of additional material.

158. Also, on 22 March 2019, FINA objected to WADA's contentions because it considered that WADA's extended deadline to file its Appeal Brief expired on 20 March 2019 and that since WADA failed to do so, the appeal was to be deemed withdrawn, and that a termination order was to be issued.

159. FINA further submitted that WADA was provided with the Appealed Decision and the complete case file on 7 January 2019. On the basis of Article 13.7.1. §2(b) FINA DC, the 21-day deadline to file the Statement of Appeal therefore expired on 28 January 2019. Audio recordings of a hearing are not part of a case file and the request to be provided with the recordings was made outside the relevant 15-day deadline. FINA further noted that the purpose of requesting the complete case file is to allow such party to evaluate the opportunity of filing an appeal. In the present case, the appeal was already filed before the request was made.

160. FINA further maintained that, on the basis of Article 13.7.1 §2(a) FINA DC, WADA's deadline to file its Appeal Brief in principle expired on 28 February 2019 (7 January 2019 + 21 days + 21 days + 10 days). Considering however that WADA obtained an extension of 20 days, WADA's time limit to file its Appeal Brief expired on 20 March 2019.

161. On 26 March 2019, WADA responded to the contentions of the Athlete and FINA. WADA maintained that the audio recordings contained witness testimony and the Parties' arguments that were heard by and relied upon by the FINA Doping Panel. There would be no question that a written transcript, had one been prepared, would be considered part of the complete file. Absent such transcript, there is no reasonable argument that the audio recordings should not be part of the "complete file". Moreover, the file sent to WADA by FINA on 7 January 2019 did not contain the CCTV video that the Parties had shown, relied on, and discussed extensively in the FINA Doping Panel proceedings; WADA requested this video on or about 4 February 2019 and FINA provided it on 11 February 2019. WADA further argued that the 15-day deadline to request missing parts of the case file did not apply to it, which is made clear by the fact that the section of Article 13.7.1 FINA DC applicable to WADA starts with "[t]*he above notwithstanding*". This reading is also consistent with the World Anti-Doping Code (the "WADA Code") because the latter does not place any time restrictions on WADA's right to obtain the complete file, and this is one of the provisions of the WADA Code that must be implemented "without substantive change". WADA further argued that the hypothetical extreme circumstances of WADA being able to extend its appeal deadline indefinitely are not present in this case. WADA and its counsel acted promptly in requesting additional parts of the file when they discovered the file FINA provided lacked critical items.

162. WADA further observed that the Athlete and FINA did not even address a significant part of its alternative calculation (i.e. that CHINADA could have filed an appeal at least until 28 January 2019, which means that FINA could have filed an appeal until 18 February 2019, and WADA's deadline to appeal was 11 March 2019, which, including the 20-day extension, means that WADA could have filed its Appeal Brief until 10 April 2019.

163. On 28 March 2019, the Athlete replied to WADA's response. The Athlete submitted that WADA did not explain why it requested the CCTV video only 28 days after receipt of the file by WADA, in violation of the principle of good faith. Besides, the 20-day extension granted by the CAS Court Office was based on inaccurate statements, because it was premised on the need for a translation of the recordings of the hearing, while such recordings had not even been requested from FINA at that stage. The recordings of the hearing before the FINA Doping Panel were only requested 43 days after receipt of the file by WADA. The reference in Article 13.7.1 FINA DC to "[t]*he above notwithstanding*" refers only to the "filing deadline". There is no indication that this deadline should not apply to WADA. WADA cannot seriously contend that the *rationale* of Article 13.7.1 FINA DC is that WADA would be entitled to postpone indefinitely the deadline to file its Statement of Appeal by requesting additional information and/or material and by its own volition fix the *dies a quo*. At some point, there must be a limit. This would be in violation of Swiss public policy. Contrary to WADA's contentions, the Athlete's position is not based on "*hypothetical extreme circumstances*" because WADA belatedly requested the production of the CCTV video and of the audio recordings. WADA and its counsel did not act promptly.

164. WADA's alternative calculation that the Statement of Appeal could be filed 21 days + 21 days + 21 days after receipt of the Appealed Decision on the basis of Article 13.7.1 §2(a) FINA DC is ill-founded. The word "*similarly*" at the start of Article 13.7.1 §3 FINA DC confirms that FINA shall have exactly the same deadline as WADA to challenge the Appealed Decision. If this contention were to be followed, Article 13.7.1 §3 FINA DC should have come before Article 13.7.1 §2 FINA DC. This interpretation would also not comply with the WADA Code because no such "cascade" of deadlines can be found there. Third, as a matter of Swiss law, there is no instance in which a party may have (at least) 63 days, i.e. more than two months, to contest a decision. Fourthly, WADA's position is inconsistent with its previous submission submitted in its Statement of Appeal.

165. Also on 28 March 2019, FINA replied to WADA's response. FINA contends that the 15-day deadline for requesting the complete file applies to all parties entitled to appeal but that were not part of the proceedings that resulted in the decision being appealed. The following paragraph, i.e. Article 13.7.1 §2 FINA DC sets forth special rules regarding the "*filing deadline*" only.

166. As to WADA's alternative calculation, FINA submits that FINA's legislator decided that FINA's time limit to file an appeal would be the exact same as WADA's. The term "*[s]imilarly*" leaves absolutely no doubt in this regard. WADA's first interpretation (in its (*amended*) Statement of Appeal is actually consistent with this approach.

167. On 29 March 2019, WADA filed its sur-reply on the issue of the admissibility of the appeal. WADA argued that, sometime between 8 and 11 February 2019, its counsel had requested the hearing transcript in a telephone call with the counsel who had represented

FINA in the proceedings before the FINA Doping Panel and that this request was answered by email dated 11 February 2019. WADA's contention that it had inquired about the audio recordings before 14 February 2019 was therefore accurate. WADA furthermore reiterated that the WADA Code does not place any time restriction on WADA's right to obtain the complete file, which provision must be adopted *verbatim* by each Anti-Doping Organization, such as FINA. The exceptional procedural rights for WADA in this respect are justified by WADA's unique function of harmonizing the application and enforcement of the WADA Code. WADA further reiterated that the requests were made within a reasonable period of time.

168. As to the alternative calculation, WADA argues that FINA now submits that its deadline to appeal runs co-extensively with WADA's deadline, so that WADA is not granted 21 days after FINA could have appealed. The Athlete and FINA did not make this argument when they addressed this very calculation in their letters dated 22 March 2019. Their belated arguments cannot be squared with the plain language of Article 13.7.1 FINA DC. Article 13.7.1 §2 FINA DC, consistent with Article 13.2.3 WADA Code, gives WADA 21 days "*after the last day on which any other party in the case could have appealed*". FINA fits within the category of "*any other party in the case*" and could have challenged the Appealed Decision. WADA is the chief harmonizer of the WADA Code and needs to decide whether to expend its resources on an appeal after seeing whether any other party has appealed. The contentions of the Athlete and FINA would therefore be inconsistent with the WADA Code. The argument that under Swiss law the time limit to contest a decision is one month is rejected. The Athlete and FINA agree that FINA's deadline to appeal was 18 February 2019, which is already 46 days after FINA received the Appealed Decision. Finally, while WADA indeed noted in its Statement of Appeal that it had filed it within 21 days after CHINADA's deadline to appeal expired, this takes nothing away from the fact that WADA could have waited to file its Statement of Appeal until 21 days after the last day on which FINA could have appealed.

### *2. The findings of the Panel*

169. The Parties did not dispute that CHINADA could challenge the Appealed Decision. Considering that CHINADA is the Athlete's National Anti-Doping Organisation, this follows from Article 13.2.3.d FINA DC, which provides that:

> "*In cases under DC 13.2.1, the following parties shall have the right to appeal to CAS:* […] *(d) the National Anti-Doping Organisation of the Person's country of residence or countries where the Person is a national or license holder;* […]."

170. Given that the Appealed Decision was notified to CHINADA on 7 January 2019, pursuant to Article 13.7.1 §1 FINA DC, the 21-day deadline to file an appeal for CHINADA expired on 28 January 2019.

171. It is further not in dispute that, based on Article 13.7.1 §3 FINA DC, FINA had an additional deadline of 21-days to file an appeal, i.e. until 18 February 2019.

172. The main question to be addressed by the Panel is therefore whether WADA's deadline to appeal was identical to FINA's deadline, or whether it had an additional period of 21 days to appeal following expiration of FINA's deadline to appeal.

173. The Panel finds that the wording of Article 13.7.1 §2(a) FINA DC does not leave any doubt in this respect. In accordance with the wording of the WADA Code, this provision provides WADA with a deadline to file an appeal of 21 days after "*the last day on which **any other party** in the case could have appealed*" (emphasis added).

174. The Panel finds that the reference to "*any other party*" is applicable also to FINA and that WADA was, therefore, afforded an additional period of 21 days to appeal after the deadline to appeal for FINA expired.

175. The Panel in particular finds the reasoning of WADA compelling, namely that, as the main harmonizer of the WADA Code, it needs to decide which decisions to appeal and that a relevant consideration in this respect could be whether any other party with a right to do so has already filed an appeal. The Panel finds that such function and the *rationale* of Article 13.2.3 WADA Code and Article 13.7.1 §2(a) FINA DC would be obstructed if FINA were to be granted an identical time limit to appeal as WADA, for in such case WADA would have been required to decide whether to challenge the Appealed Decision without knowing if FINA would do so.

176. The existence of a special provision, applicable only to WADA, does not violate the general principle of parity of all the Parties. The special status and unique function of WADA serves in the general interest to prevent and counter doping-related violations in sport, and in doing so, it pursues one of the key objectives of the Olympic Charter. The WADA Code's intention to recognize in some aspect that special status is made clear by the "*ad hoc*" paragraph proceeded by "*The above notwithstanding*", so as to clarify that the previous paragraph's provisions are not applicable to the paragraph concerning WADA's deadline.

177. Accordingly, since FINA could challenge the Appealed Decision until 18 February 2019, WADA had an additional 21 days to challenge the Appealed Decision, i.e. until 11 March 2019. The Appeal Brief was to be filed within 10 days following the deadline to file an appeal, i.e. until 21 March 2019. Finally, considering that WADA was granted an additional 20-day extension, the Appeal Brief was to be filed by 10 April 2019.

178. Considering that the Appeal Brief was filed on 3 April 2019, the Panel finds that the Appeal Brief was filed in a timely manner.

179. In view of the above conclusion, the Panel need not consider whether WADA also complied with the deadline to appeal as set out in Article 13.7.1 §2(b) FINA DC.

180. Consequently, the objections of the Athlete and FINA on the "*Admissibility of the Appeal and/or Jurisdiction of CAS in View of the (Non-) Compliance with the Deadline to Appeal by WADA*" are dismissed.

## B. The Alleged Conflict of Interest of Counsels for WADA

181. On 26 July 2019, the CAS Court Office informed the Parties, *inter alia*, that "[…] *the Panel concludes that counsels for WADA are not to be disqualified from the present proceedings and that their involvement in the present proceedings as counsels for the Appellant neither impact on the jurisdiction of CAS to adjudicate and decide on the*

*present dispute nor on the admissibility of the Appellant's (amended) Statement of Appeal or Appeal Brief*".

182. The reasoning for such decision was set out in the CAS Court Office letter dated 26 July 2019, in principle part, as follows:

- "*The Panel finds that a motion to disqualify a counsel in international arbitration proceedings is to be admitted restrictively. One should only exceptionally interfere with a party's choice of counsel and only when solid grounds for such challenge are established. Accordingly, the threshold for disqualification is high. The burden of proof to establish that a concrete conflict of interest exists lies with the challenging party.*

- *The Panel finds that this high standard is not met here because no concrete facts or circumstances have been established by the First and/or Second Respondent indicating that Mr Young acquired any procedural or substantive benefit for the present proceedings from his past membership with the FINA Legal Committee, a non-adjudicatory advisory body within the Second Respondent's organisation. Mr Cornel Marculescu, the Second Respondent's Executive Director, specifically indicated that the "FINA Legal Committee is usually not involved in proceedings with regard to anti-doping rule violations" and that, to the best of his knowledge, Mr Young "had not received any information from FINA with regard to Mr. Yang's case". Accordingly, the Panel finds that it has not been established that the equality of arms of the parties involved in the present proceedings is prejudiced.*

- *Any general knowledge about FINA's Anti-Doping Regulations acquired by Mr Young due to his involvement in the drafting process of these rules is not considered pertinent by the Panel. Mr Young was involved in the draft of the World Anti-Doping Code prior to and during his membership of FINA's Legal Committee. It has not been established by the First and/or Second Respondent that the provisions of the FINA Anti-Doping Regulations pertinent for the present proceedings deviate from the mandatory provisions of the World Anti-Doping Code that had to be incorporated in the FINA Anti-Doping Regulations verbatim, or that any deviation therefrom justifies the conclusion that Mr Young was conflicted, or that Mr Young's knowledge of the drafting process enabled him to use this knowledge against FINA in the present proceedings.*

- *Finally, although the content of the telephone call between Mr Young and FINA's Executive Director on 4 February 2019 is disputed and while FINA's Executive Director had previously objected to Mr Young acting against FINA, the Panel considers it important that FINA's Executive Director did not rebut Mr Young's interpretation of this telephone call in his email dated 7 February 2019 ("Thank you for your call on Monday confirming that FINA sees no conflict in my representation of WADA in connection with its potential appeal in the SY case"), while answering on*

> *8 February 2019 ("[…] I think now it is clear: you don't want to work for FINA anymore and it's nothing to do with independence !!!").*"

183. Consequently, the objections of the Athlete and FINA on the "*Withdrawal From the Case by WADA's Counsel and/or Admissibility of the Appeal and/or Jurisdiction of CAS in View of the Existence of a Conflict of Interest on WADA's (counsel) Side*" are dismissed.

### C. Conclusion as to the Admissibility of the Appeal

184. It follows that WADA's appeal is admissible, since the objections of the Athlete and FINA to the admissibility of the appeal are dismissed and because the appeal complied with all other requirements of Article R48 CAS Code, including the payment of the CAS Court Office fee.

## VIII. APPLICABLE LAW

185. The Panel notes that the Parties agree that the regulatory framework applicable to the matter at hand is comprised of the FINA DC (edition 2017) and the ISTI (edition 2017).

186. Article 20.1 FINA DC provides that:

> "*Except as provided in DC 20.4, these Anti-Doping Rules shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes.*"

187. Article R58 CAS Code provides that:

> "*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.*"

188. The Panel agrees that the FINA DC (edition 2017) and the ISTI (edition 2017) govern these proceedings.

## IX. MERITS

### A. The Main Issues

189. WADA's primary submission is that the Athlete violated Article 2.5 FINA DC (Tampering or Attempted Tampering with Any Part of Doping Control). Its subsidiary submission is that the Athlete violated Article 2.3 FINA DC (Evading, Refusing or Failing to Submit to Sample Collection).

190. The distinction is relevant because Article 10.3.1 FINA DC provides that a violation of Article 2.5 (and refusal violations under Article 2.3) results in a period of ineligibility of four years, with no possibility available to the Athlete to argue for any reduction of this

period. For violations of Article 2.3, on the other hand, the period of ineligibility is four years "*unless, in the case of failing to submit to Sample Collection, the Athlete can establish that the commission of the anti-doping rule violation was not intentional in which case the period of Ineligibility shall be two years*".

191. Accordingly, based on the sanctioning regime incorporated in the FINA DC, a violation of Article 2.5 is perceived as more severe than a violation of Article 2.3. The Panel will, therefore, first examine whether the Athlete violated Article 2.5 FINA DC. It will consider Article 2.3 FINA DC only if such violation has not been established.

192. As to the burden and standard of proof, Article 3.1 FINA DC provides as follows:

> "***Burdens and Standards of Proof***
>
> *FINA and its Member Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether FINA or the Member Federation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.*"

193. WADA must therefore establish that the Athlete violated Article 2.5 FINA DC. It must do so to the comfortable satisfaction of the Panel. No strict liability principle applies for violations of Article 2.3 and 2.5 FINA DC.

194. The main issues to be resolved by the Panel are the following:

1. Did the Athlete commit an anti-doping rule violation?
2. What is the appropriate sanction if the Athlete committed an anti-doping rule violation?

### *1. Did the Athlete commit an anti-doping rule violation?*

195. Article 2.5 FINA DC provides as follows:

> "*Tampering or Attempted Tampering with any part of Doping Control*
>
> *Conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, intentionally interfering or attempting to interfere with a Doping Control official, providing fraudulent information to an Anti-Doping Organisation, or intimidating or attempting to intimidate a potential witness.*"

196. The term "Doping Control" is defined in Appendix 1 to the FINA DC:

> "***Doping Control:*** *All steps and processes from test distribution planning through to ultimate disposition of any appeal including all steps and processes in between such as provision of whereabouts information, Sample collection and handling, laboratory analysis, therapeutic use exemptions, results management, and hearings.*"

197. The term "Tampering" is defined in Appendix 1 to the FINA DC:

> "***Tampering:*** *Altering for an improper purpose or in an improper way; bringing improper influence to bear; interfering improperly; obstructing, misleading or engaging in any fraudulent conduct to alter results or prevent normal procedures from occurring.*"

198. It is not contested that the Athlete instructed a security guard to destroy a glass container containing a blood vessel with blood he had previously provided. Nor is it contested that the Athlete tore up the Doping Control Form that he had signed at the outset of the sample collection session. It is not in dispute that the actions of the Athlete, together with his support staff, prevented the DCO from taking the blood samples she had collected with her in order to be sent to a laboratory for sample analysis, and from taking a urine sample.

199. As an initial matter, the Panel notes that the arguments raised by the Athlete in the proceedings before CAS to justify his behaviour differ significantly from those made in the comments drafted by Dr Ba Zhen during the night of 4-5 September 2018. The Panel notes that the arguments now raised are, in effect, made retroactively.

200. Nevertheless, on the basis of the evidence that is now before it, the Panel is satisfied that certain issues arose (such as the taking of pictures of the Athlete by the DCA, and the precise circumstances surrounding the breaking of the blood sample container) that were not mentioned in Dr Ba Zhen's statement, although the Athlete and his entourage raised them during the night in question, and those individuals present were aware of the issues. For this reason, the Panel is willing to take into account the arguments raised in the comments of Dr Ba, and those made subsequently. It proceeds on the basis that Dr Ba's statement was not a complete or adequate account of the events that occurred.

201. The Athlete argues that there was no intent or fraudulent conduct to tamper, as he had nothing to hide. Rather, the Athlete maintains that he relied on the instructions and advice of Mr Cheng Hao, Dr Ba Zhen and Dr Han Zhaoqi, who are said to have informed him that the DCO could not conduct the testing because of the lack of accreditation and authorisation. Moreover, the Panel notes that the DCO had, in effect, decided to discontinue the doping control process in the face of those events, which meant that the doping control process concluded when the blood was removed from the containers.

202. The Athlete also submits, with reference to CAS 2013/A/3279 (the "*Troicki* case"), that the DCO did not comply with her duties in informing the Athlete of the possible consequences of a failure to comply with the sample collection process. More specifically, the Athlete argues that the DCO invited the Athlete to retrieve the blood from the containers so that she could take the containers with her, and that she failed to inform the Athlete of the legal consequences of such actions in case they were characterised as tampering under Article 2.5 FINA DC. The Athlete concludes that he had compelling reasons to forego the test.

203. The Athlete also maintains that, for the reasons set out above as well as WADA's protection of privacy and personal information, the blood sample collected from the Athlete was not a genuine blood "sample", but that it was mere blood waste that could not fall within the ambit of Articles 2.5 and 2.3 FINA DC.

204. The Panel addresses these arguments in detail below, but finds that there can be little doubt that the Athlete's actions amount, in principle, to a clear obstruction of the sample collection process: the Athlete prevented normal procedures from being followed, namely that the DCO would take the blood samples away with her and then have them sent to a laboratory for sample analysis. Accordingly, the Panel finds that, in principle, the Athlete subverted the Doping Control process and thereby violated Article 2.5 FINA DC.

205. The references to "in principle" in the previous paragraph are important because the Panel finds that the Athlete might not have been found to have violated Article 2.5 FINA DC if he could have established, on a balance of probability, a compelling justification that entitled him to act to prevent the Doping Control process from proceeding ("compelling justification" is within the meaning of Article 2.3 FINA DC (Evading, Refusing or Failing to Submit to Sample Collection)).

206. In this respect, it is consistent CAS jurisprudence that "*the logic of anti-doping tests and of the DC Rules demands and expects that, whenever physically, hygienically and morally possible, the sample be provided despite objections by the athlete. If that does not occur, athletes would systematically refuse to provide samples for whatever reasons, leaving no opportunity for testing.*" (CAS 2005/A/925, para. 75 (the "*Azevedo* case"). The same logic is reflected in CAS 2012/A/2791, CAS 2013/A/3077, CAS 2013/A/3342 and CAS 2016/A/4631)

207. In particular, the Panel does not agree with WADA's argument that, regardless of whether IDTM's Sample Collection Personnel have been properly authorised and accredited, and have properly identified themselves, the Athlete will commit a tampering violation in all circumstances if he or she refuses to allow the DCO to remove the collected blood samples for delivery to the relevant laboratory. On WADA's case, an athlete can never be allowed to take matters into his or her own hands by preventing the DCO from completing the sample collection process, and an athlete must always allow the samples to be collected, subject to making a protest and documenting any objections to preserving the athlete's rights.

208. In the view of the Panel, it cannot be excluded that serious flaws in the notification process, or during any part of the Doping Control process, could mean that it might not be appropriate to require an athlete to subject himself to, or continue with, a sample collection session. Rather, they could invalidate the sample collection process as a whole, so that an athlete might not be perceived as having tampered with the Doping Control, or as having failed to comply with the sample collection process. In the view of the Panel, this could only be in the most exceptional circumstance.

209. On the other hand, the Panel is conscious that as a general matter, athletes should not take matters into their own hands, and if they do they will bear the risk of serious consequences. The proper path for an Athlete is to proceed with a Doping Control under objection, and making available immediately the complete grounds for such objection.

In the view of the Panel, it must be emphasised that any athlete who questions whether notification requirements have been properly complied with would be well-advised not to refuse or abort the sample collection process, but rather to complete the sample collection process under protest and document the reasons of such objection in as much detail, and as early, as possible.

210. In this respect, the Panel fully agrees with the reasoning of the FINA Doping Panel in paras. 6.55 and 6.56 of the Appealed Decision:

> "*The Athlete's success ultimately hinged on the Doping Panel's interpretation of what "official documentation" was required to be provided by the Sample Collection Authority. The Athlete's entire athletic career hung in the balance – on what amounted to, essentially, a gamble that the Athlete's assessment of the complex situation would prevail. That strikes the Doping Panel as foolish in the extreme.*
>
> *As many CAS awards have stated, it is far more prudent to comply with the directions of a DCO and provide a sample in every case, even if provided "under protest". Subsequently, all manner of complaints and comments can be filed, rather than risk any chance of an asserted violation when an aspect of the doping control process becomes a concern. Staking an entire athletic career on being correct when the issue is complex and contentious is a huge and foolish gamble.*"

211. Accordingly, although it would have been far more prudent for the Athlete to comply with the sample collection process under protest, it is a given that the Athlete did not do so. He instead opted to act in such a way as to bring the Doping Control to a premature end, by interfering with its conduct.

212. In the view of the Panel, these proceedings turn on the ability of the Athlete to establish, to the comfortable satisfaction of the Panel, that there existed a compelling justification such as to allow him to take the steps he did. The Panel will proceed with such analysis below.

**a) Did IDTM's Sample Collection Personnel notify the Athlete as required under the ISTI?**

213. The Athlete argues a violation of Article 2.5 or 2.3 FINA DC can only be found if WADA first establishes that IDTM, including IDTM's Sample Collection Personnel, strictly complied with the notification requirements set out in the applicable regulations, in particular Article 5.4 and 5.3.3 ISTI. The Athlete submits that he was not properly notified. In this respect, the Athlete raises three main alleged failures:

- No (specific and individual) Authorisation Letter was presented to the Athlete by the IDTM Sample Collection Personnel.
- The (specific and individual) Authorisation Letter must mention the names of the DCO, BCA and DCA.
- The DCO, BCA and DCA individually did not properly identify themselves towards the Athlete.

214. WADA maintains that IDMT's Sample Collection Personnel properly identified themselves and notified the Athlete in accordance with the ISTI.

***i) Did IDTM's Sample Collection Personnel have to provide the Athlete with a (specific and individual) Authorisation Letter besides the (generic) Letter of Authority?***

215. The applicable regulatory framework for the IDTM's Sample Collection Personnel to comply with begins with Article 5.4.1 ISTI, which provides as follows:

> "*When initial contact is made, the Sample Collection Authority, DCO or Chaperone, as applicable, shall ensure that the Athlete and/or a third party (if required in accordance with Article 5.3.8) is informed:*
>
> […]
>
> *b) Of the authority under which the Sample collection is to be conducted;*
>
> […]"

216. Article 5.4.2 ISTI provides as follows:

> "*When contact is made, the DCO/Chaperone shall:*
>
> […]
>
> *b) Identify themselves to the Athlete using the documentation referred to in Article 5.3.3;*
>
> […]"

217. Article 5.3.3 ISTI provides as follows:

> "*Sample Collection Personnel shall have official documentation, provided by the Sample Collection Authority, evidencing their authority to collect a Sample from the Athlete, such as an authorisation letter from the Testing Authority. DCOs shall also carry complementary identification which includes their name and photograph (i.e., identification card from the Sample Collection Authority, driver's license, health card, passport or similar valid identification) and the expiry date of the identification.*"

218. In considering the meaning of Article 5.3.3 ISTI, it is relevant to bear in mind that FINA is the Testing Authority and IDTM is the Sample Collection Authority.

219. In his submissions, the Athlete argues that a distinction must be made between two types of letters. The first is a "(generic) Letter of Authority", that is to say a letter issued by a Testing Authority to a Sample Collection Authority authorising the latter to collect samples on behalf of the former. The second is a "(specific and individual) Authorisation Letter" from the Testing Authority to the Sample Collection Personnel, evidencing that each of the DCO, BCA and DCA have the individual authority to collect a sample from a specific athlete, within a specific period of time and under a specific mission order.

220. The Panel is prepared to accept the Athlete's distinction between a (generic) Letter of Authority and a (specific and individual) Authorisation Letter and will use such terminology in its analysis.

221. It is not in dispute that the DCO provided the Athlete with a (generic) Letter of Authority from FINA to IDTM, indicating, *inter alia*, that "[IDTM] *is appointed and authorized by* [FINA] *to collect urine and blood samples from athletes in the frame of the doping controls organized as part of the FINA Unannounced out-of-Competition Testing Programme*".

222. The question is whether Article 5.3.3 ISTI also required IDTM's Sample Collection Personnel to provide the Athlete with a (specific and individual) Authorisation Letter in order to notify the Athlete properly.

223. The Panel finds that the wording of Article 5.3.3 ISTI indicates that presenting only the (generic) Letter of Authority from FINA to IDTM (plus identification of the DCO, which is discussed separately below) will be sufficient. Indeed, presenting this document is specifically referred to in Article 5.3.3 ISTI ("[…] *official documentation,* […] *such as an authorisation letter from the Testing Authority*").

224. The Panel finds that it cannot be understood from the plain meaning of the language of Article 5.3.3 ISTI that it is a mandatory notification requirement that Sample Collection Personnel should also notify an athlete with a (specific and individual) Authorisation Letter.

225. Such meaning also appears to be consistent with practice under Article 5.3.3 ISTI. The Athlete introduced no evidence to show that on the many occasions on which he was previously subjected to a Doping Control that a (specific and individual) Authorisation Letter was always, often or at all provided (with one exception as discussed below). Moreover, the Athlete had previously been subject to a Doping Control by this DCO, and he provided no evidence that on such occasion she had provided such (specific and individual) Authorisation Letter.

226. The Panel is aware that there are a large number of Sample Collection Authorities, such as IDTM. Indeed, it appears from the figures provided in Mr Kemp's written statement that between 2012 and 2019 the Athlete provided 180 samples, and that these samples were collected by 11 different Sample Collection Authorities. As explained by Mr Kemp, each of such Sample Collection Authorities may have different protocols in place to notify athletes. Mr Kemp testified that it may be best practice to include individual details (as set out in WADA's Urine Sample Collection Guidelines and Blood Sample Collection Guidelines – "WADA's Guidelines"), but that it is not a requirement under the ISTI. Mr Kemp also testified that the (generic) Letter of Authority provided to the Athlete by the DCO was sufficient under the ISTI to test the Athlete.

227. The Panel does not dispute Mr Kemp's testimony and fully adheres to his logic that WADA's Guidelines are not binding. Such Guidelines are merely intended to promote best practices, whereas binding provisions are only set out in the ISTI. This hierarchy follows from the "*Introduction*" sections in WADA's Guidelines, providing specifically that "[t]*he processes outlined in this document promote good practice moving forward* […]".

228. The status of WADA's Guidelines is specifically addressed at page 12 of the WADA Code:

> "***Models of Best Practice and Guidelines***
>
> *Models of best practice and guidelines based on the Code and International Standards have been and will be developed to provide solutions in different areas of anti-doping.* ***The models and guidelines will be recommended by WADA*** *and made available to Signatories and other relevant stakeholders,* ***but will not be mandatory****. In addition to providing models of anti-doping documentation, WADA will also make some training assistance available to the Signatories.*" (emphasis added by the Panel)

229. This is notably different from the status of international standards such as the ISTI, as set out on page 11 of the WADA Code:

> "***International Standards***
>
> *International Standards for different technical and operational areas within the anti-doping program have been and will be developed in consultation with the Signatories and governments and approved by WADA. The purpose of the International Standards is harmonization among Anti-Doping Organizations responsible for specific technical and operational parts of anti-doping programs.* ***Adherence to the International Standards is mandatory*** *for compliance with the Code.* […]" (emphasis added by the Panel)

230. In fact, the Panel notes that it is explicitly stated on page 10 of the Sample Collection Personnel Recruitment, Training, Accreditation and Re-Accreditation Guidelines (the "Sample Collection Personnel Guidelines") that "[i]*n the absence of a Sample Collection Authority-issued photo ID, the DCO may use a government-issued photo ID accompanied by an authorization letter from the Sample Collection Authority*".

231. This provision is telling, as it is the only reference in the Sample Collection Personnel Guidelines to the existence of an "authorization letter from the Sample Collection Authority (i.e. IDTM), which is different from the (generic) Letter of Authority issued by FINA, i.e. a (specific and individual) Authorisation Letter. The Panel notes that no reference is made to such letter in the notification process described in the ISTI. The Panel finds that this makes clear that, even if the Sample Collection Personnel Guidelines would have been directly applicable, *quod non*, no such (specific and individual) Authorisation Letter was required to be shown to the Athlete. This is because – as is not disputed – the DCO showed the Athlete a copy of her IDTM-issued ID card. That is plainly sufficient, together with a (generic) Letter of Authority, even under WADA's Guidelines.

232. Further, the mere fact that a Sample Collection Authority such as CHINADA may, on occasion or even often, provide a (specific and individual) Authorisation Letter to athletes in accordance with WADA's Guidelines, does not mean that Sample Collection Authorities are required to do so under the ISTI.

233. Indeed, Dr Han Zhaoqi indicated in his written statement that he attended annual training courses provided by CHINADA, which addressed the "*legal requirements for doping control testing, including the matters related to accreditation*". Dr Han Zhaoqi may have based his advice as to the documentation required by IDTM's Sample Collection Personnel on the training received from CHINADA, while this information differed from the mandatory (minimum) requirements set out in the ISTI. Indeed, the documentation referred to by Dr Han Zhaoqi in his written statement that he considered necessary to be shown finds no basis in the ISTI:

> "*I would like to add that for DCO, it is required to have 1) accreditation and 2) authorization to conduct the test. And for BCO, in order to validly collect blood, you also need 1) accreditation; and 2) authorization for this specific test. For the urine Chaperone, we need 1) proper training and 2) authorization. Everybody must have a resident ID card.*"

234. It is to be noted that during the proceedings before the FINA Doping Panel, Dr Han Zhaoqi indicated in his written statement that everybody must have "*an ID card*". In the proceedings before the CAS, however, he changed his statement to a "*resident ID card*", i.e. excluding the possibility that reference may have been made to IDTM-issued ID cards. The difference is not considered material by the Panel, as the ISTI does not require any form of ID card being presented by the DCA and BCA, as addressed in more detail below.

235. Also, Mr Cheng Hao referred to CHINADA's practice in his written statement and that it was CHINADA's practice "*to show DCO certificate of all officers involved and authorization letter* […]" and that "[i]*t is important for the officers to prove their connection to IDTM and that they are employed by IDTM*". Again, such requirements do not find any basis in the ISTI, but appear to be a protocol implemented by CHINADA that is not binding upon IDTM.

236. FINA also provided evidence taken from WADA's Anti-Doping Administration and Management System ("ADAMS"), which established that FINA had instructed IDTM to conduct an OOC doping control on the Athlete in China between 29 March and 30 September 2018, which mentioned the name of the DCO as Lead Doping Control Officer. In accordance with the reasoning above, it was not necessary for the DCO to show such mission order to the Athlete. The document is, however, relevant insofar it proves that the DCO was properly authorised to collect samples from the Athlete on the evening of 4 September 2018. As testified by Mr Soderstrom, such mission order is necessary for the DCO to obtain authority to act, but it is not necessary for such document to be shown to an athlete.

237. The Panel also took note of the fact that Mr Soderstrom testified that IDTM had over approximately the last 6 years consistently used the same notification protocol as was used in the present matter, and that it was never part of the protocol to present athletes with a (specific and individual) Authorisation Letter such as the mission order mentioned in the previous paragraph. Mr Soderstrom and Mr Popa also testified that FINA was aware of IDTM's protocol, and that FINA never complained about it.

238. Mr Simoes, another IDTM DCO, mentioned in a written statement provided before the FINA Doping Panel that he had, *inter alia*, shown an "*Individual authorization*" to the

Athlete for a sample collection process on 28 October 2017. Mr Soderstrom testified that this was possible, but that this was not required by IDTM's protocol. The Panel finds that the mere fact that an IDTM DCO may, on one occasion, have presented more documentation than was required under the ISTI is not inconsistent with IDTM's protocol that there is no requirement to do so.

239. The Athlete testified that for all other 59 OOC sample collection processes undertaken by IDTM on him since 2012, the Sample Collection Personnel always showed him "*documentation and credentials*". It was notable that the Athlete did not testify, in response to questions by the Panel, that he had been presented with a (specific and individual) Authorisation Letter on any previous occasion in which he was tested.

240. On the basis of the evidence before it, the Panel is satisfied that IDTM consistently notified athletes only with a (generic) Letter of Authority and not with a (specific and individual) Authorisation Letter, as contended by the Athlete. In this respect, the Panel also notes that Dr Ba Zhen testified that he attended many anti-doping control tests of the Athlete, but was unable to recall whether any such tests were performed by IDTM. However, it remained uncontested that 60 out of the 180 anti-doping controls performed on the Athlete between 2012 and 2019 were performed by IDTM. The Panel found Dr Ba Zhen to be evasive in his testimony. That testimony fell well short of corroborating the Athlete's statement that the documents shown by IDTM's Sample Collection Personnel on 4 September 2018 were materially different from material presented to him during previous IDTM anti-doping controls.

241. Moreover, the Panel finds that the Athlete's recollection was undermined by the testimonies of Mr Popa and Mr Soderstrom. It appears to the Panel that the Athlete may have been confused between the documentation presented to him in the past by IDTM and by other Sample Collection Authorities such as CHINADA.

242. The Athlete's argument that there must always be a (specific and individual) Authorisation Letter was persuasively rebutted by Mr Kemp. He made it crystal clear that a Testing Authority (i.e. FINA) issues a (generic) Letter of Authority to itself when it does not engage a Sample Collection Authority.

243. There is a further point to be made with regard to the consequences of the Athlete's position as to the documentation that is required. The evidence before the Panel indicates that tens of thousands (or more) samples have been collected by IDTM's Sample Collection Personnel without a (specific and individual) Authorisation Letter. If the Athlete is correct, then it would appear that such samples are, potentially at least, at risk of being invalidated, on the basis that a (generic) Letter of Authority is somehow insufficient. The Athlete's counsel offered no helpful response as to how to avoid such a consequence.

244. For the reasons set out above, the Panel disagrees with the Athlete's contention that IDTM was required to carry and show to him a (specific and individual) Authorisation Letter.

245. The Panel considers it unlikely that a large Sample Collection Authority such as IDTM would consistently have been non-compliant with the notification requirements set out in the ISTI in circumstances in which there is no evidence before the Panel of a consistent

practice among Sample Collection Authorities in this regard. The Panel concludes that the documentation shown to the Athlete on the evening of 4 September 2018 was consistent with the requirements of Article 5.3.3 ISTI, and what the Athlete had been shown by IDTM on previous occasions. The documentation shown to the Athlete did not deviate from that generally shown to athletes by IDTM. IDTM itself plainly understood the documentation to comply with the requirements set out in the ISTI.

246. Consequently, the Panel finds that in presenting the Athlete with a (generic) Letter of Authority, the DCO acted in compliance with Article 5.3.3 ISTI.

***ii) Did the DCO, DCA and BCA individually require a (specific and individual) Authorisation Letter mentioning their names?***

247. The Athlete further submits that IDTM's Sample Collection Personnel had a duty to hold a (specific and individual) Authorisation Letter evidencing that each member of the team (i.e. the DCO, BCA and DCA) had the authority to collect a sample from the Athlete on 4 September 2018. The Athlete maintains that this requirement derives from the use of the word "*their*" in Article 5.3.3 ISTI.

248. In view of the conclusion above, i.e. that IDTM's Sample Collection Personnel was not required to show a (specific and individual) Authorisation Letter, it is difficult to see on what basis the DCO, BCA and DCA must each hold a document that indicates that each is individually authorised to participate in a testing mission. Nevertheless, this is the argument of the Athlete.

249. The Panel notes that the evidence taken from ADAMS proving that FINA had instructed IDTM to conduct an OOC doping control on the Athlete in China between 29 March and 30 September 2018 (with the DCO as Lead Doping Control Officer), does not refer specifically to the DCA and the BCA. The Athlete submits that it should have done so, and that accordingly the DCA and BCA were not authorised to take part in the mission.

250. As set out below, the DCO had trained the DCA and BCA herself, and this was formalised by means of signing a "Statement of Confidentiality", whereby the DCO acknowledged to have trained the DCA and BCA, and whereby the DCA and BCA acknowledged having been trained by the DCO. These "Statements of Confidentiality" were on IDTM's letterhead and were stored in IDTM's records. By signing such document, the DCO also acknowledged that "*it is my responsibility to ensure that each person I engage in a Sample Collection Session has signed and has a valid Statement of Confidentiality on file*". The Panel finds that IDTM acted properly in delegating the selection of a DCA and BCA to the DCO, as long as they signed a "Statement of Confidentiality which showed they complied with ISTI requirements.

251. This notwithstanding, it may be best practice for a Testing Authority to specifically indicate which BCA and DCA are authorised to collect a sample from the Athlete, as provided for in WADA's Guidelines. However, as acknowledged by Mr Kemp, who has served as a member of the ISTI drafting team since 2009, this is not an ISTI formal requirement. He stated that this task is typically delegated because it is almost impossible to know in advance of whom the team would be comprised, or to name the athlete that is to be tested. Given the large number of tests conducted worldwide, on a daily basis, the Panel understands the logic of this approach.

252. When asked by counsel for WADA whether the BCA and DCA required any documentation to link them back to IDTM, Mr Kemp indicated that they only needed a (generic) Letter of Authority. Such document would apply to all Sample Collection Personnel because the role of the DCA and BCA in the sample collection process is very limited. Mr Kemp stated that the mission order extracted from ADAMS in this case refers to the name of the DCO, but that many of such letters do not. The ISTI requires that the name of the Sample Collection Authority be mentioned - not the names of individuals performing the test - so that complaints are directed to the Sample Collection Authority.

253. The Athlete's argument with respect to individual authorisation being required for each member of the Sample Collection Personnel is entirely premised on the use of the word "*their*" in Article 5.3.3 ISTI. The Panel accepts Mr Kemp's approach which concludes that this merely refers to all Sample Collection Personnel involved and not to each member of the team individually. This interpretation is credible, because, had the intention of the drafter been as the Athlete argues, it would have been easy to use clear language requiring each individual member to be authorised for a specific testing mission, as is done in WADA's Guidelines.

254. Consequently, the Panel concludes that the DCO, DCA and BCA did not require a (specific and individual) Authorisation Letter mentioning their names individually.

***iii) Did the DCO, DCA and BCA identify themselves to the Athlete in accordance with the ISTI and did they have the required training?***

255. The Athlete submits that none of the members of IDTM's Sample Collection Personnel complied with their identification requirements during the notification process on 4 September 2018. WADA maintains that the notification process was in accordance with the mandatory requirements under the ISTI. The Panel assesses the identification requirements for each member of IDTM's Sample Collection Personnel separately below.

**i) The DCO**

256. Article 5.3.3 ISTI requires a DCO to "*carry complementary identification which includes their name and photograph (i.e., identification card from the Sample Collection Authority, driver's license, health card, passport or similar valid identification) and the expiry date of the identification.*"

257. The Athlete submits that the copy of the IDTM-issued ID card presented to him on the evening 4 September 2018 was not sufficient to prove the DCO's authority to collect a sample from him, having regard to the ISTI requirements and WADA's Guidelines.

258. The Panel notes that the matter is to assessed by reference to the requirements set out in the ISTI, since WADA's Guidelines are not mandatory.

259. The identification requirement for DCOs set out in Article 5.3.3 ISTI is that it must contain the DCO's name and photograph. The IDTM-issued ID card complies with these requirements. It was shown to the Athlete. No other identification was needed.

260. The Athlete further submits that the DCO lacked the ISTI impartiality requirements because the Athlete had previously complained about the DCO with respect to sample collection sessions on 28 October 2017. The Athlete argues that it was reasonable for him to have concerns about the DCO's impartiality.

261. Article H.4.2 ISTI provides as follows:

> "*The Sample Collection Authority shall ensure that Sample Collection Personnel that have an interest in the outcome of a Sample Collection Session are not appointed to that Sample Collection Session. Sample Collection Personnel are deemed to have such an interest if they are:*
>
> *a) Involved in the administration of the sport for which Testing is being conducted; or*
>
> *b) Related to, or involved in the personal affairs of, any Athlete who might provide a Sample at that session.*"

262. The Panel finds that the mere fact that an athlete has previously complained about a specific DCO cannot as such mean that such DCO should no longer collect samples from this athlete. In order for a conflict of interest (or even a reasonable basis) to exist, specific circumstances need to be established that would render it inappropriate for such DCO to collect samples from this athlete. Otherwise, an athlete could seek to disqualify a DCO simply by raising a complaint against an officer otherwise known to be scrupulous or rigorous.

263. The Panel finds that the Athlete has failed to identify such circumstances. Indeed, the record before the Panel does not indicate the Athlete was uncomfortable with the involvement of the DCO on 4 September 2018. The Athlete did not mention this issue in the comments to the Doping Control Form drafted by Dr Ba Zhen. Rather, the alleged impartiality of the DCO appears to be an argument made retroactively, as the Athlete sought reasons to justify his actions.

264. Consequently, the Panel finds that the DCO complied with the ISTI identification requirements, that she was properly accredited and authorised to act.

**ii) The DCA**

265. The Athlete accepts that, pursuant to WADA's Guidelines, Chaperones are not required to provide name or photo identification. They are, however, required to produce official authorisation documentation from the Testing Authority or the Sample Collection Authority.

266. The Panel deems it helpful to clarify terminology. The term "DCA" or "Doping Control Assistant" does not appear in the WADA Code, the FINA DC, the ISTI, or any of WADA's Guidelines. It is a term used internally by IDTM. The role of the DCA during the sample collection process on 4 September 2018 was simply to witness the Athlete passing urine in the collection vessel. This role is set in the ISTI:

> "***Chaperone**: An official who is trained and authorized by the Sample Collection Authority to carry out specific duties including one or more of the*

> *following (at the election of the Sample Collection Authority): notification of the Athlete selected for Sample collection; accompanying and observing the Athlete until arrival at the Doping Control Station; accompanying and/or observing Athletes who are present in the Doping Control Station; and/or witnessing and verifying the provision of the Sample where the training qualifies him/her to do so.*"

267. Articles 5.4.1 ISTI provides:

> "*When initial contact is made, the Sample Collection Authority, DCO or Chaperone, as applicable, shall ensure that the Athlete and/or a third party (if required in accordance with Article 5.3.8) is informed:*
>
> […]
>
> *b) Of the authority under which the Sample collection is to be conducted;*
>
> […]"

268. Article 5.4.2 ISTI provides:

> "*When contact is made, the DCO/Chaperone shall:*
>
> […]
>
> *b) Identify themselves to the Athlete using the documentation referred to in Article 5.3.3;*
>
> […]"

269. Article H.5.4 ISTI provides:

> "*Only Sample Collection Personnel who have an accreditation recognised by the Sample Collection Authority shall be authorised by the Sample Collection Authority to conduct Sample collection activities on behalf of the Sample Collection Authority.*"

270. It follows from these provisions that an athlete is to be notified either by the DCO or by the DCA/Chaperone. In this case, the DCO notified because the DCA's role was limited to witnessing the passing of urine, not notification of the Athlete. This limited the documentation the DCA had to present to the Athlete.

271. As concluded above, the DCA did not have to present a (specific and individual) Authorisation Letter mentioning his name. Neither did the ISTI require the DCA to present an IDTM-issued ID card to the Athlete, as he was not a DCO.

272. This was confirmed by Mr Kemp during his testimony. Counsel for the Athlete asked whether it was correct that a Chaperone must have an IDTM-issued ID card or be included in the (specific and individual) Authorisation Letter. Mr Kemp said that this may be mentioned in WADA's Guidelines but that it is not required under the ISTI. The

Panel adopts the same interpretation, as the ISTI prevails and the WADA Guidelines impose no obligation.

273. It is not disputed that the DCA provided the Athlete with a government-issued ID card. It plainly met the ISTI identification requirements.

274. The Athlete further argues that the DCA lacked the required training and authorisation from IDTM. The ISTI requires that a Chaperone must be "*trained and authorized*" by IDTM, which, pursuant to Article H.4.3.3 ISTI, shall include studies of all relevant requirements of the sample collection process. Further, pursuant to Articles H.4.1.b.1 and H.4.2 ISTI, a Chaperone must not be a minor or have an interest in the outcome of the Sample Collection Session.

275. The DCA was not a minor, and it was not argued that he had a conflict of interest. As to whether the DCA had been "*trained and authorized*" by IDTM, the evidence conflicts.

276. The file contains a document signed by the DCO on 26 January 2018, entitled "Statement of Confidentiality", on IDTM's letterhead. The authenticity is not disputed by the Respondents. He states:

> "*I hereby declare that I have been trained by* [the DCO], *who is a Doping Control Officer (DCO) trained and certified by* [IDTM]. *I have been trained and requested to act as* […] *Assistant* […] *in Sample Collection Sessions under the responsibility of the above mentioned DCO during 2018.*
>
> […]
>
> ***I hereby declare that I understand my responsibilities and I will keep this information confidential*** *even after the Sample Collection Session has been completed and I have been dismissed from my duties assisting the Sample Collection Personnel.*
>
> ***This statement of confidentiality is valid for all missions performed with the DCO mentioned in this document during 2018.***
>
> ***Please indicate contact details where you can be contacted if necessary.***
>
> [full contact details and signature of the DCA in handwriting, dated "*2018.01.26*"]
>
> ***I hereby confirm that I have trained and authorised the person mentioned above to act as part of the Sample Collection Personnel for the Sample Collection Sessions that I will carry out during 2018.*** *I understand that it is my responsibility to ensure that each person I engage in a Sample Collection Session has signed and has a valid Statement of Confidentiality on file.*
>
> *Date and Place: 2018.01.26*
>
> [name and signature of the DCO in handwriting]" (emphasis in original)

277. Long after the events of September 2018, the DCO provided another written statement, dated 21 October 2019. He wrote that he was

> "*just the one who was requested to temporarily drove* [sic] [the DCO] *from where she came and to where she went. I was not any kind of Doping Control Officer.* […] *The DCO was my middle school classmate.* […] *There are something* [sic] *I want to make clear. 1/. I was not the Doping Control Assistant sent by any company to conduct a test. I was just a builder. At that night I was only the driver who picked up* [the DCO] *and drove her to some place. 2/. No one had ever trained me regarding doping test, and it was not necessary for me to accept any training as I was only a builder.* […]"

278. The Panel notes the conflict between the two statements. The Panel considers the earlier document, the "Statement of Confidentiality", to be the more reliable, since it was prepared seven months before the events of 4 September. It confirms that the DCA received proper training from the DCO. The mere fact that the DCA may be a construction worker in his daily life does not make this any different. The Panel does not find it inconceivable that Chaperones ordinarily have day-to-day jobs unrelated to anti-doping and only perform the role of Chaperone on a part-time basis. It is perfectly feasible that, for example, a construction worker performs the occasional role of Chaperone.

279. Mr Popa testified that the DCA had been involved in previous Sample collection sessions in January 2018 and probably also in February 2018.

280. The DCO testified during her deposition that she had worked with the DCA on about 10-20 previous sample collections prior to 4 September 2018, and that she had personally trained the DCA to perform his duties as a DCA. She also indicated that she had completed an IDTM-form verifying that she had trained the DCA and that he understood his duties. The form was kept in IDTM's records.

281. In the light of the above, the Panel is satisfied that the DCA complied with the notification requirements set out in the ISTI and was properly "*trained and authorized*" by IDTM. The Panel regrets the DCA's sudden unwillingness to testify on the eve of the hearing, having avoided efforts by the Parties and Counsel to secure his participation over the preceding months. The Panel draws no inferences, and relies on the statement he signed, which confirms an accreditation recognised by IDTM in accordance with Article H.5.4 ISTI. Since this provision does not require such documentation to be presented to an Athlete, it was sufficient that such document was available in IDTM's records.

282. Consequently, the Panel concludes that the DCA complied with the identification requirements under the ISTI. He was duly accredited and authorised to be involved in collecting samples from the Athlete.

**iii) The BCA**

283. With respect to the BCA, the Athlete submits that she should have carried evidence of accreditation in the form of an IDTM-issued ID card or a (specific and individual) Authorisation Letter. The Athlete further maintains that the BCA should have carried evidence of her qualification to collect blood samples. On this view, the Specialized

Technical Qualification Certificate for Junior Nurses (STQCJN) presented to the Athlete was not sufficient to demonstrate that she was qualified to collect blood samples in China. In particular, the Athlete submits that the BCA should have shown a Practice Nurse Certificate (the "PNC").

284. Again, the Panel deems it useful to clarify the terminology. The term "BCA", or "Blood Collection Assistant", does not appear in the WADA Code, the FINA DC, the ISTI, or any of WADA's Guidelines. IDTM employs this term internally. The intended role for the BCA during the sample collection process in respect of the Athlete on 4 September 2018 was to draw blood from the Athlete by performing venipuncture. This role falls within the definition of "BCO" in the ISTI:

> "***Blood Collection Officer (or BCO)****: An official who is qualified and has been authorized by the Sample Collection Authority to collect a blood Sample from an Athlete.*"

285. The Panel is not persuaded by the Athlete's argument in respect of the need for the BCA to carry an IDTM-issued ID card or a (specific and individual) Authorisation Letter, for the same reasons that relate to the DCA. The Athlete relies heavily on the WADA Guidelines which are not, as noted above, of mandatory effect. The BCA did not possess an IDTM-issued ID card, but was not required to by the ISTI, as she was not a DCO.

286. In respect of the BCA, the evidence before the Panel includes a "Statement of Confidentiality" on IDTM letterhead. It provides:

> "*I hereby declare that I have been trained by* [the DCO], *who is a Doping Control Officer (DCO) trained and certified by* [IDTM]. *I have been trained and requested to act as* […] *Blood Collection Officer* […] *in Sample Collection Sessions under the responsibility of the above mentioned DCO during 2018.*
>
> […]
>
> ***I hereby declare that I understand my responsibilities and I will keep this information confidential*** *even after the Sample Collection Session has been completed and I have been dismissed from my duties assisting the Sample Collection Personnel.*
>
> ***This statement of confidentiality is valid for all missions performed with the DCO mentioned in this document during 2018.***
>
> ***Please indicate contact details where you can be contacted if necessary.***
>
> [full contact details and signature of the BCA in handwriting, dated "*9/1/2018*"]
>
> ***I hereby confirm that I have trained and authorised the person mentioned above to act as part of the Sample Collection Personnel for the Sample Collection Sessions that I will carry out during 2018.*** *I understand that it is my responsibility to ensure that each person I engage in a Sample Collection Session has signed and has a valid Statement of Confidentiality on file.*

*Date and Place: 9/1/2018* (date added in handwriting)

[name and signature of the DCO in handwriting]" (emphasis in original)

287. The Panel considers that this "Statement of Confidentiality" amounts to a confirmation of accreditation recognised by IDTM, in accordance with Article H.5.4 ISTI. This provision does not require such documentation to be presented to an Athlete. It was sufficient that the document existed and was available in IDTM's records.

288. As to the BCA's qualification and authorisation to collect a blood sample from the Athlete, the Panel notes that Article H.4.1.b.ii ISTI requires that "*BCOs shall have adequate qualifications and practical skills required to perform blood collection from a vein*". Furthermore, pursuant to Articles H.4.1.b.1 and H.4.2 ISTI, BCOs shall not be minors or have an interest in the outcome of the Sample Collection Session.

289. It is accepted that the BCA was not a minor, and is not argued that she had a conflict of interest or was subject to complaints about her practical skills. The Panel is therefore required only to assess whether the BCA had "*adequate qualifications*".

290. The Panel observes that it is not in dispute that the BCA possessed both the STQCJN and the PNC, although she only presented the former to the Athlete on the evening of 4 September 2018. Prof. Pei Yang confirmed in his testimony that the STQCJN is a precondition for the PNC.

291. The ISTI requires the BCA to have "*adequate qualifications*", but does not require the BCA to demonstrate, at the time a blood sample is taken, that she had such *qualifications*. On the basis of the plain language of the ISTI, the Panel concludes that it was sufficient that evidence of the BCA "*adequate qualifications*" was held by IDTM.

292. Insofar as the Athlete argued during the hearing that the BCA's PNC was only valid in Shanghai, China, but not in Hangzhou, China (where the events of 4 September 2018 took place), the Panel finds that this was not sufficiently corroborated by material evidence. In any event, there is no evidence on file suggesting that such alleged procedural flaw was ever raised or addressed on the night of 4-5 September 2018, or that this was, at the time, considered to be a reason for the Athlete to stop the sample collection session. Rather, the Panel considers this to be an *ex post facto* argument that has a formal quality, but which cannot be said at the time, or subsequently, to impact the drawing of blood.

293. Consequently, the Panel finds that the BCA complied with the identification requirements under the ISTI. She was duly accredited and authorised to be involved in collecting samples from the Athlete. There was no question at the time or subsequently that she did so inadequately.

***iv) Conclusion***

294. The Panel finds that IDTM's Sample Collection Personnel complied with all applicable notification requirements as set out in the ISTI.

295. Moreover, the Panel notes that, following the initial notification, i.e. before the controversy as to the taking of pictures by the DCA arose, the Athlete signed the Doping Control Form. This is significant, given Article 5.4.3 ISTI, which provides:

> "*The Chaperone/DCO shall have the Athlete sign an appropriate form to acknowledge and accept the notification. If the Athlete refuses to sign that he/she has been notified, or evades the notification, the Chaperone/DCO shall, if possible, inform the Athlete of the Consequences of refusing or failing to comply, and the Chaperone (if not the DCO) shall immediately report all relevant facts to the DCO. When possible the DCO shall continue to collect a Sample. The DCO shall document the facts in a detailed report and report the circumstances to the Testing Authority. The Testing Authority shall follow the steps prescribed in Annex A – Investigating a Possible Failure to Comply*."

296. By signing the Doping Control Form the Athlete in effect acknowledged and accepted that he had been duly and properly notified. It was only later that he revisited his initial acceptance and tore up the signed Doping Control Form. The Panel concludes that this confirms its view that up to that point the notification process, and the documentation shown to the Athlete, was treated as correct.

297. Consequently, the Panel finds that IDTM's Sample Collection Personnel complied with all notification requirements set out in the ISTI.

**b) Did the Athlete have any other valid justification to fail to comply with the sample collection process?**

***i) The alleged taking of pictures of the Athlete by the DCA***

298. The Athlete submits that the DCA and the driver that accompanied IDTM's Sample Collection Personnel were fans who came to see him and that the DCA, without the Athlete's permission, sought to take photographs of him on his mobile phone, an act that he argues was strictly prohibited. When the Athlete discovered this, the DCA was invited to leave the doping control area and the Athlete asked the DCA to delete all videos and photographs of him from the mobile phone. The Athlete argues that this incident caused him to lose confidence in all of IDTM's Sample Collection Personnel. It was this, he argues, followed by the subsequent failure to provide requisite accreditation and authorisation documents, that caused him to act as he did, and the DCO to refrain from pursuing the testing.

299. The Panel notes that the evidence in relation to these matters is not entirely clear. The Athlete submits that the DCA took photographs and videos of him in the room. The Athlete's mother indicated in her written statement that the DCA "*had been taking photographs and videos of* [the Athlete] *without his permission by his own mobile phone*". The DCA submits that he took two or three blurred pictures of the Athlete from behind, but does not admit to have made any video recordings. The DCO submits that she instructed the DCA to take pictures of herself and the BCA in front of the Athlete's house prior to the arrival of the Athlete to serve as evidence that they had been there in case the Athlete did not show up. The evidence before the Panel includes surveillance videos in the Athlete's house: these do not establish that the DCA took pictures of the

Athlete, but do appear to show that the Athlete requested the DCA to delete certain images from a mobile phone.

300. The Panel considers that it would be totally inappropriate and unprofessional for a Chaperone/DCA to take any photographs or videos of an athlete in the course of a sample collection process, unless there are compelling reasons to do so, such as the gathering of evidence or for reasons of record keeping. Mr Kemp testified to this effect.

301. In his written statement dated 16 October 2019, the DCA stated as follows:

> "*I was very excited to see* [the Athlete] *at close range, so I quietly set my mobile phone to photo mode and took two or three pictures of* [the Athlete] *from behind.* [The Athlete] *walked very fast, so the photos were taken blurred.*"

> "*When they arrived in the test room, they sat down one after another. I sat on the left side of* [the Athlete]. *I was holding my cell phone towards* [the Athlete].[4] [The Athlete] *looked at me instinctively. He thought I was taking pictures of him, so he reminded me not to take pictures. He told me that if I took any pictures, I would have to leave the room. Then* [the Athlete] *asked everyone to identify themselves. I showed him my ID card.* [The Athlete] *told me that I was not qualified to stay in the test room, that was probably what he meant. And then he asked me to go out. I left the test room and walked out of the clubhouse. Then the girl who came with* [the DCO], *ran to tell me that* [the Athlete] *asked me to delete the photos if there were some. Subsequently,* [the Athlete] *and* [the DCO] *and other also came over.* [The Athlete] *asked to check my mobile phone and to have a look at the photo album. Outside the clubhouse, I deleted the two or three blurred photos mentioned above, and then showed my cell phone to them.*"

302. The DCA did not testify in person and was not examined/cross-examined. The Panel concludes that the DCA's written statement is confirmed by the testimonies of the Athlete, the Athlete's mother and the DCO. Accordingly, the Panel finds that that the DCA took at least three photographs of the Athlete during the sample collection process.

303. The issue before the Panel concerns the consequences of the finding. In particular, was the Athlete still required to provide a urine sample, or did the inappropriate actions of the Chaperone/DCA constitute a compelling justification to abort the doping control?

304. As set out above, there is a line of consistent CAS jurisprudence to the effect that "*the logic of anti-doping tests and of the DC Rules demands and expects that, whenever physically, hygienically and morally possible, the sample be provided despite objections by the athlete*" (CAS 2005/A/925, para. 75, i.e. the *Azevedo* case; the same logic being applied in CAS 2012/A/2791, CAS 2013/A/3077, CAS 2013/A/3342 and CAS 2016/A/4631).

305. The Panel considers that the evidence before it does not allow it to reach a conclusion on this point. Whether it was on the initiative of the DCO, or with her consent, the evidence

[4] The translation of this sentence from Chinese to English is disputed, but the Panel does not consider it pertinent for the adjudication of this case.

establishes that the DCA was excluded from the urine sample collection process. Further, the Panel does not consider it to be established, on the basis of the evidence before it, that the DCO warned the Athlete that his failure to provide a urine sample, in the circumstances that pertained, could result in a potential failure to comply. It rather appears that the DCO understood the Athlete's objection to the acts of the DCA, and considered it appropriate to exclude him from the testing mission. In the circumstances, the Panel considers that the DCO acted reasonably.

306. Because the DCA was the only male member of IDTM's Sample Collection Personnel that evening, there was no other person available to witness the Athlete passing urine in the collection vessel. Further, the evidence before the Panel shows, and it is not disputed, that the Athlete suggested that he should await the arrival of another DCA to be able to provide his urine samples. Accordingly, the Panel considers that it cannot be concluded that the Athlete failed to provide a urine sample.

307. Accordingly, the arguments submitted by the Parties as to whether the Athlete urinated with or without the permission of the DCO need not be addressed any further.

308. This is not, however, the end of the matter. The question arises as to whether the premature ending of the urine sample collection process has any impact on the blood sample collection process, one in which the DCA had no role to play, and did not play any role. Indeed, by the time the urine sample collection process had ended, the Athlete had already provided a blood sample.

309. The Athlete claims that he lost trust in IDTM's Sample Collection Personnel because of the incident with the taking of photographs by the DCA. The Panel is willing to accept that the acts of the DCA may have offered a reason for the Athlete to revisit the documentation provided by the DCO, the BCA and the DCA. However, as concluded above, and contrary to the opinion of the Athlete and his support staff, the documentation presented by each individual member of IDTM's Sample Collection Personnel complied with the requirements of the ISTI. This new concern, assuming it genuinely existed, on which the Panel expresses no view on the basis of the evidence before it, could not constitute a compelling justification for the Athlete's failure to proceed with the blood sample collection process. Moreover, it certainly did not justify the Athlete's decision to take matters into his own hands by taking steps (i) to have the container with the blood vessel destroyed by a security guard, (ii) to tear up the Doping Control Form, and (iii) to prevent the DCO from leaving with the blood samples already collected from the Athlete.

310. Consequently, the Panel finds that the mere fact that the DCA acted inappropriately in taking at least three photographs of the Athlete did not, as such, warrant the Athlete to abort the entire (blood and urine) testing mission. Nor could it, of itself, in any way justify the acts taken by the Athlete, as described in the previous paragraph. The correct course of action, in the view of the Panel, would have been for the Athlete to record his objection as to the entire process, at the time (and, if necessary, subsequently), and to allow the DCO to leave with the blood samples already collected.

***ii) The alleged failure of the DCO to warn the Athlete about the consequences of a failure to comply***

311. The Panel notes that the DCO plays an important role in the sample collection process, and is required to inform an athlete of his or her rights and duties, in particular as to the possible consequences in case of a threatening potential failure to comply.

312. The Panel notes that the CAS panel in the *Troicki* case stated as follows:

> "*In this connection, the Panel recalls the recommendations to the DCOs in the IDTM training material that she (he) should "always ensure that there is no possible misunderstanding involved" and that she (he) should "always encourage the athlete to proceed with the doping control" by making him understand "perhaps with some persuasion … the importance of following the procedures". Dr Gorodilova failed to heed these recommendations in the present case. While the IDTM training material is not a mandatory anti-doping rule or policy within the meaning of Article 8.7.3 of the Programme, it nevertheless informs the Panel's decision.*
>
> *These acts and omissions of Dr Gorodilova, in the view of the Panel, explain why both the Athlete and Mr Reader, when they left the DCS* ["doping control station"], *said to Mr Bratoev that they believed everything would be alright.*
>
> *However, notwithstanding the reasons for the misunderstanding which the Panel has set out, the Panel finds that whether the Athlete had a compelling justification for failing to provide a blood sample needs to be determined objectively. The question is not whether the Athlete was acting in good faith, but, whether objectively, he was justified by compelling reasons to forego the test.*
>
> *As noted earlier, the Panel has found that the Athlete was informed by Dr Gorodilova that he could face sanctions if he did not take the test and was told by her that it was not the DCO's decision as to whether there would be consequences if he failed to provide a blood sample. Objectively therefore, in the circumstances, the Athlete did not have a compelling justification to forego the test and his subjective interpretation of the events which led to the misunderstanding cannot amount to a compelling justification.*
>
> *The Panel therefore finds that the Athlete committed a doping offence under Article 2.3 of the Programme.*" (CAS 2013/A/3279, paras. 9.13-9.17)

313. The Panel accepts the reasoning in the *Troicki* case, and it notes the testimonies of the Athlete, his mother and Dr Ba Zhen, to the effect that the DCO did not warn the Athlete of possible legal consequences. However, on the basis of the evidence before it the Panel concludes that the DCO repeatedly warned, or at least attempted to warn, the Athlete about the consequences of a failure to comply with the blood sample collection process. This factual conclusion was also reached by the FINA Doping Panel:

> "*It is abundantly clear that the DCO tried constantly to explain why the complaints and deficiencies raised by the Athlete were not valid, in her view*."

314. The Panel agrees with the FINA Doping Panel that such warning may well have been lost in the noise of the events. However, and contrary to the conclusions of the FINA Doping Panel, the Panel concludes that if this happened it was due to the actions of the Athlete, and was his responsibility. The Athlete was required to respect the authority of the DCO, who was experienced and known to the Athlete, and it is abundantly clear on the basis of the evidence that he failed to do so. The Panel is satisfied that the evidence tends to support the conclusion that the DCO gave warnings, and the Athlete then failed to heed those warnings. On the basis of the evidence before it, the Panel cannot conclude that the DCO is responsible in some way for the Athlete's failure to listen to such warnings as were given, or that he and his support staff, as well as his mother, who seems to have played a most unhelpful role to her son, were entitled to disregard the DCO's observation that the situation unfolding was a potential failure to comply.

315. The Panel is satisfied that the DCO did repeatedly warn the Athlete. This is based on the testimony of the DCO and the BCA, which the Panel finds credible, and also on the written statement of Mr Cheng Hao, who confirmed that he "*specifically indicated to* [the DCO] *that the word refusal should not be used, because earlier that year, one CHINADA DCO asked one athlete "do you mean you are refusing the test" and then this DCO was fired by CHINADA because of this leading and inducing question*". Although Mr Cheng Hao denied during his testimony that he made this statement in response to a warning of the DCO, the Panel finds that the exchanges he described are likely to have unfolded only after the DCO had referred to the consequences of a potential failure to comply, as mentioned in Mr Cheng Hao's written statement.

316. The testimonies of the DCO and the BCA are further corroborated by the testimony of Mr Popa. He explained that he was frequently on the telephone with the DCO on the evening of 4 September 2018, and testified that he actually heard the DCO warn the Athlete as to consequences while he was on the phone with her.

317. In this regard, and on the basis of the evidence before it, including the witness testimony, the Panel is unable to share the view expressed by the FINA Doping Panel at para. 6.52 of the Appealed Decision:

> "[…] *The ISTI is clear in Annex A 3.3.a) that the DCO must tell the Athlete, in a language that he can understand, the consequences of a possible Failure to Comply. Explaining the risks that certain conduct might lead to a violation is not sufficient. The DCO must go further and clearly articulate that she is treating the Athlete's conduct as a Failure to Comply and that the following consequences will apply.*
>
> *This critical message to the Athlete regarding the consequences of his conduct, while attempted many times by the DCO, never got through.* […]
>
> *There was no clarifying and crystalizing moment (a metaphorical "bang") ensuring that the Athlete clearly knew, in the face of the identified conduct, that his conduct was being treated by the DCO as a Failure to Comply and that serious consequences would apply.*"

318. The Panel concludes, as a matter of law, that it was not for the DCO to decide whether or not there was a failure to comply. Rather, her duty was, pursuant to Article 5.4.3 ISTI

and Article A.3.2.a of Annex A to the ISTI, (i) to inform the Athlete of the consequences of a possible failure to comply, (ii) to document the facts in a detailed report, and (iii) to report the circumstances to IDTM. Pursuant to Article A.4.2 of Annex 1 to the ISTI, it was ultimately for the Testing Authority (i.e. FINA) to determine whether or not there was a failure to comply.

319. Consequently, the Panel finds that the DCO duly informed the Athlete about the consequences of a failure to comply.

***iii) The alleged decision of the DCO to terminate the sample collection session and her alleged suggestion to take and destroy the blood samples***

320. The Athlete argues that the DCO eventually decided to stop the doping control process, i.e. first the urine and then the blood collection, and she invited the Athlete to retrieve the blood from the containers. The Athlete maintains that, under such circumstances, there cannot be any failure to cooperate on his part, alternatively that he had compelling reasons not to cooperate.

321. As to the alleged cessation of the sample collection session by the DCO, as indicated above, the Panel is prepared to accept on the basis of the evidence before it that the urine sample collection process was terminated by or with the consent of the DCO once the DCA had been excluded from the testing mission. This, however, can have no impact on the blood sample collection process.

322. First, insofar as the Athlete relies on the comments added to the Doping Control Form drafted by Dr Ba Zhen, the Panel finds that the signatures affixed to such document by the DCO, BCA and DCA do not mean that they necessarily agreed with the comments set out therein. They merely signed the document as witnesses, which was their duty under Article 4.4.6 ISTI:

> "*At the conclusion of the Sample Collection Session the Athlete and DCO shall sign appropriate documentation to indicate their satisfaction that the documentation accurately reflects the details of the Athlete's Sample Collection Session, including any concerns expressed by the Athlete. The Athlete's representative (if any) and the Athlete shall both sign the documentation if the Athlete is a Minor. Other persons present who had a formal role during the Athlete's Sample Collection Session may sign the documentation* ***as a witness of the proceedings***." (emphasis added)

323. Further, the Panel is not convinced by the Athlete's claim that the DCO on her own initiative suggested that he take and then destroy the blood containers containing the blood samples he had provided.

324. Dr Han Zhaoqi stated in his written statement that he had told the DCO and Dr Ba Zhen that the blood samples collected by the BCA could not be taken away for testing, and that this was confirmed by Dr Ba Zhen. Dr Ba Zhen then testified that he himself had also informed the DCO that the blood samples could not be taken away.

325. Based on these statements, the Panel finds that the initiative to prevent the blood sample collection process from being completed was not taken by the DCO, but by the Athlete, either on the initiative, or with the active concurrence, of his support staff.

326. Dr Han Zhaoqi testified that the DCO then stressed that the doping control equipment should be taken away. This was confirmed by the DCO and Dr Ba Zhen.

327. Even if the recollection of the Athlete and his mother is entirely correct – which is far from established, in the view of the Panel - and the DCO told the Athlete "*if you are able to take the blood sample, go ahead*" and "*you find your way*", this would not be sufficient to establish that it was the DCO who suggested the Athlete should destroy the blood samples, or that the blood sample collection session was ended on the DCO's initiative. It rather indicates that, following long and intense discussions and after having repeatedly tried to warn the Athlete about potential consequences, the DCO felt she had no option but to comply with the Athlete's demand to be given back the blood samples he had provided. In this regard, the Panel notes that the Athlete appears to have a forceful personality, and seems to have an expectation that his views should be allowed to prevail. This was apparent during the hearing.

328. The Panel considers that there are limits as to what can be expected from a DCO in trying to persuade an athlete to continue with a sample collection process when the athlete no longer wishes to cooperate. The evidence establishes that the Athlete, based on advice given by Dr Ba Zhen, who in turn relied on the advice of Dr Han Zhaoqi, was determined to recover the blood samples he had given and ensure that they should not leave his home. In such circumstances, the Panel does not find it unreasonable that the DCO, being in the athlete's house, in the presence of his body guards and collaborators, may have felt that she had no option but to accept the Athlete's impositions. In such circumstances, the duty of the DCO was to warn the Athlete about the possible consequences of his actions. As set out above, she complied with that duty.

329. The Athlete maintains that the DCO informed him that she had to take the sample collection material with her, and this prompted him to take the far-reaching step of destroying the blood container. However, Mr Popa testified that this only occurred after the situation had escalated to another level, by which point it had become apparent that the Athlete and his entourage were determined to recover the blood samples. It was Mr Popa who instructed the DCO to tell the Athlete that she could not leave anything behind as a last attempt to take the blood samples with her.

330. The DCO indicated in her written statement that she informed the Athlete that no material could be left behind. She further stated that when the Athlete and his support staff suggested that the container should be opened and the blood sample removed, so that the container and blood vessel could be taken away by her, she expressed the view that the container could not be opened once it was fixed, and that the Athlete was not allowed to keep an intact sample, or an opened sample, and that such act could be considered as an anti-doping rule violation.

331. On the basis of the evidence before it, the Panel finds that the most likely scenario is that the Athlete and his entourage broke the container with the purpose of removing the blood vessel so that the DCO could leave with the broken container, allowing the Athlete and his entourage to keep the blood sample. The Panel finds it difficult to understand why

the broken container would have to be given back to the DCO, but not the blood vessel. It would have been more logical if the blood would have been taken from the blood vessel and that all broken equipment would be handed back to the DCO. This, however, did not happen. Be that as it may, the Panel finds that by causing the container to be broken, the Athlete prevented the DCO from taking away collected and sealed blood samples, for the purposes of testing. By breaking the glass container, the integrity of the samples was violated.

332. The Panel considers that it is not relevant that the samples remain in the custody of Dr Ba Zhen: the chain of custody having been broken, the samples can no longer be validly tested.

333. For all these reasons, the Panel concludes that the Athlete failed to establish that the DCO aborted the sample collection session, or that it was her suggestion to take and destroy the blood samples.

334. The Panel further concludes that the Athlete's subsidiary reasoning, that the blood collected from the Athlete was mere medical waste, because of the DCO's alleged failure to warn the Athlete about the consequences in accordance with the IST, and the DCO's alleged decision to discontinue the test, is also to be dismissed.

335. With reference to the tests mentioned in the *Azevedo* and *Troicki* cases, the Panel finds that, on any reasonable and objective basis, the situation faced by the Athlete did not amount to a compelling justification to allow him to take the steps he did to prevent the DCO from leaving his home with the blood samples had provided.

**c) Conclusion**

336. For the reasons set out, the Panel has concluded that the Athlete failed to establish that he had a compelling justification to act as he did and forego the Doping Control. It follows that necessary elements of a tampering violation under Athlete 2.5 FINA DC are established. This leaves one final aspect to be addressed, namely the question of whether the requisite element of intent is present. The Athlete argues that such element is lacking.

337. It is not in dispute that the element of intent is required in order to conclude that a tampering violation under FINA DC has been established. Article 2.5 provides:

> "*Tampering or Attempted Tampering with any part of Doping Control*
>
> *Conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, intentionally interfering or attempting to interfere with a Doping Control official, providing fraudulent information to an Anti-Doping Organisation, or intimidating or attempting to intimidate a potential witness.*"

338. The Athlete defines the term "*subvert*" as meaning "*to undermine authority (of an established institution)*". The Panel notes the situation that arose in *CAS 2013/A/3341*, where the sole arbitrator articulated "*a certain surprise in noting the circumstances surrounding the destruction of two urine sample collection containers"*, but found that

on the facts of that case the requisite intent of the Athlete was not established and he was found not to be responsible for "Tampering". The facts of the present case are distinguishable, so that the Panel is comfortably satisfied that the Athlete did "intentionally interfere" with the Doping Control process. Despite the DCO's repeated warnings, the Athlete persisted in demanding that the sealed blood samples be returned to him, so as to allow him to prevent her from leaving with them. The evidence before the Panel clearly establishes that he intentionally sought to interfere with the process by (i) destroying an external container and (ii) tearing up the Doping Control Form, with the intention to prevent the DCO from leaving the premises with the blood samples that had already been collected. The Panel finds that such actions necessarily comprise intent.

339. The claim by the Athlete that he had legitimate doubts about the validity of the test, in relation to the collection of his blood samples, because the DCA who was present to assist in the taking of the urine sample, inappropriately took photographs of him, is, on the facts before the Panel, not plausible or established. The DCA was excluded from the urine sample collection process, upon the initiative or with the consent of the DCO, and had no role in the blood sample collection process. The Athlete's concerns about the DCA were addressed by the DCO, and it cannot reasonably be concluded that the DCA's inappropriate behaviour had any impact on the blood sample collection process that had already been completed or the integrity of the sample. The Panel finds without hesitation that the DCA's behaviour could not justify the subsequent actions of the Athlete.

340. Equally implausible is the effort by the Athlete to seek to shift blame to his support staff, he having suggested in the course of his testimony during the hearing that he was advised to act as he did by his support staff. It may well be the case that the Athlete relied in good faith on advice of his support staff, as noted above, particularly in relation to the accreditation and authorisation of the personnel who attended the Doping Control. That said, the Athlete was highly experienced in these matters, and in the face of repeated efforts by the DCO to take the completed blood samples with her, the evidence before the Panel makes clear that it was ultimately his decision to prematurely end the blood sample collection session.

341. The principle that an athlete is responsible for his or her own actions, and cannot deflect responsibility to his support staff, is well-established in CAS jurisprudence. It pertains even in situations where the support staff threatens an athlete with consequences in case of disobedience with the wishes of support staff, a situation which is not the case in the matter at hand. As one Panel put it:

> "*Generally speaking, the Panel finds that the fact of an athlete feeling obliged to avoid an anti-doping test due to having received instructions to do so from a coach and/or a manager and/or another member of his/her entourage and/or an official whose authority he/she must normally respect – under the threat that any disobedience would lead to reprisals affecting the athlete's rights to train and compete in a normal manner – cannot, in principle, be deemed a compelling justification, since an athlete will normally be able to and should take the responsibility of denouncing such threats to a superior authority at national and/or international level.*
>
> *The anti-doping system codified by the World Anti-Doping Code is predicated on the personal responsibility of individual athletes, which encompasses the*

> *responsibility of understanding anti-doping rules and resisting any undue pressures to violate them in any manner. If this personal responsibility of athletes were not systematically and strictly enforced, it would leave room for persons in their entourage and/or dishonest officials to attempt exercising undue pressures which ultimately would harm the athletes and encroach upon their freedom, and would also risk inciting unscrupulous athletes to attempt using members of their entourage or other persons as scapegoat for under actions of their own.*" (CAS 2012/A/2791, paras. 8.1.5-8.1.6)

342. The Panel finds further comfort in its conclusions on the consequences of the facts established in this case in the decision rendered by the British Anti-Doping Panel in the case *SR/NADP/782/2017 Rugby Football Union v. McIntosh*. Here, an athlete was convicted for a tampering violation because he withdrew his consent to the processing of a urine sample that he had already provided on the ground that he was retired. Contrary to the view of the Athlete in relation to that decision, the Panel does not consider that the present case is fundamentally different. Here, the Athlete had provided a blood sample and only then withdrew a consent he had already given, for reasons that the Panel has concluded are not compelling. In this case Athlete went even further, by destroying the container with the blood vessel and tearing up the Doping Control Form.

343. The Athlete and his support staff were – or should have been - mindful that serious consequences could follow in case the blood sample collection process was prematurely ended without compelling justification. Nonetheless, he and they persisted in obtaining control of the blood samples with a view to destroying them. It is one thing, having provided a blood sample, to question the accreditation of the testing personnel while keeping intact the samples in the hands of the testing authorities while awaiting the next procedural step(s); it is quite another thing, after lengthy exchanges and warnings as to the consequences, to act in such a way that results in one of your bodyguards destroying the sample containers, with the consequence that the possibility of proceeding to test the sample is eliminated. The actions of the Athlete were wholly inappropriate. There was no justification, whether compelling or otherwise, for him to act as he did.

344. Consequently, in view of all the above, the Panel has no hesitation in concluding, to its comfortable satisfaction, that the Athlete violated Article 2.5 FINA DC.

### *2. What is the appropriate sanction if the Athlete committed an Anti-Doping Rule Violation?*

345. Article 10.3.1 FINA DC provides as follows:

> "*The period of Ineligibility for anti-doping rule violations other than as provided in DC 10.2 shall be as follows, unless DC 10.5 or 10.6 are applicable:*
>
> > ***DC 10.3.1*** *For violations of DC 2.3 or DC 2.5, the Ineligibility period shall be four years unless, in the case of failing to submit to Sample collection the Athlete can establish that the commission of the anti-doping rule violation was not intentional (as defined in DC 10.2.3), in which case the period of Ineligibility shall be two years.*"

346. It follows from Article 10.3.1 that the Panel, having concluded that the Athlete violated Article 2.5 FINA DC, has no discretion with regard to the consequences that follow: the period of ineligibility shall be four years, unless the Panel finds that Article 10.5 (Reduction of the Period of Ineligibility based on No Significant Fault or Negligence) or 10.6 (Elimination, Reduction, or Suspension of Period of Ineligibility or other Consequences for Reasons Other than Fault ) FINA DC are engaged.

347. It is not in dispute between the Parties that the Athlete did not provide any substantial assistance in discovering or establishing anti-doping rule violations or admit to the anti-doping rule violation. Accordingly, Article 10.6 FINA DC offers the Athlete no assistance.

348. The Athlete does, however, invoke Article 10.5.2 FINA DC in submitting that the sanction to be imposed on him should be reduced in accordance with such provision. Article 10.5.2 FINA DC provides:

> "*If an Athlete or other Person establishes in an individual case where DC 10.5.1 is not applicable that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in DC 10.6, the otherwise applicable period of Ineligibility may be reduced based on the Athlete or other Person's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this rule may be no less than eight years.*
>
> *[Comment to DC 10.5.2: DC 10.5.2 may be applied to any anti-doping rule violation except those rules where intent is an element of the anti-doping rule violation (e.g., DC 2.5, 2.7, 2.8 or 2.9) or an element of a particular sanction (e.g., DC 10.2.1) or a range of Ineligibility is already provided in a rule based on the Athlete or other Person's degree of Fault.]*"

349. Since intent is an element of Article 2.5 FINA, the concept of "No Significant Fault or Negligence" set out in Article 10.5.2 FINA DC is not, in the view of the Panel, capable of being engaged. As a consequence, this provision cannot assist the Athlete.

350. It follows that there is no regulatory possibility to reduce the sanction to be imposed on the Athlete to lower than four years of ineligibility. All arguments advanced by the Athlete in trying to have the default four-year period of ineligibility reduced are to be dismissed for this reason alone.

351. Notwithstanding the above, the Athlete argues that WADA cannot seriously contend that he should have submitted to sample collection under protest and that, failing any proper notification, IDTM's Sample Collection Personnel had no jurisdiction over the Athlete. This argument fails, for the simple reason that the Panel has concluded, on the basis of the evidence before it, and its interpretation and application of the legal requirements of the ISTI, that IDTM's Sample Collection Personnel properly identified themselves.

352. The Athlete further relies on what he describes as an "*exceptional circumstance*", namely that pursuant to the principle of proportionality any period of ineligibility should be reduced, if not eliminated.

353. To this end, the Athlete invokes the following circumstances: (i) the DCA surreptitiously took pictures and videos of him; (ii) he was advised by his support staff that IDTM's Sample Collection Personnel did not have proper accreditation documents showing that they had the authority to conduct a test on him; (iii) he requested the test to be continued with properly accredited doping officers, but such request was denied without valid reason; (iv) the DCO induced him to take the blood out of the container; (v) the DCO never warned him about the possible adverse legal consequences; and (vi) the DCO decided to discontinue the test in view of the lack of accreditation (and authorisation) of the doping officers.

354. For the reasons set out above, which the Panel will not here repeat, it concludes that none of these circumstances have been established as justifying the cations taken. The Panel finds no merit in this argument, which is not supported by the evidence before it or the legal principles that are applicable.

355. In the circumstances, the Panel concludes that a four-year period of ineligibility is not disproportionate in the light of the egregious actions of the Athlete, who has committed a serious offence. Indeed, even absent a warning from the DCO (which, however, is not the case since proper warnings were given) the Athlete, being a person experienced with anti-doping controls as he has participated in literally hundreds of them, must have realised that he was taking a huge risk by withdrawing a consent he had already given to cooperate in the blood sample collection session. Having refused to allow the sample collection process to be completed, he decided to take matters into his own hands by destroying a blood container, tearing up the Doping Control Form and refusing to let the DCO leave his house with the blood samples.

356. It was striking that, in the course of his testimony, at no point did the Athlete express any regret as to his actions, or indicate that, with the benefit of hindsight, it might have been preferable for him to have acted differently. Rather, as the proceedings unfolded, he dug his heels in and, eventually, sought to blame others for the manifest failings that occurred.

357. The Panel notes that during the hearing, and in particular during his final words at the end of the hearing, the Player continued to rely on formalistic legal arguments related to the proper accreditation and authorisation of IDTM's Sample Collection Personnel. He sought to shift the blame to the DCO, the BCA and the DCA, and at no point, in the appreciation of the Panel, did he confront the possibility that he might have overreacted in his actions.

358. The Panel further noted that, in the course of the hearing, as occurred during the sample collection process on 4 September 2018, the Athlete sought to take matters into his own hands: unexpectedly, in the course of the closing statement he was invited to give by the Panel, he invited an unknown and unannounced person from the public gallery to join him at his table and act as an impromptu interpreter. He did not seem to deem it necessary to seek the permission of the Panel, or to otherwise act in a manner which suggested that he respected the authority of others, or of established procedures. The Athlete is a world-class athlete, with an impressive list of sporting achievements; he is not, however, above the law or legal process. The rules apply to him as they do to all athletes, and he is required to comply with them.

359. Consequently, the Panel finds that, in accordance with the rules that it has found to be applicable, a four-year period of ineligibility necessarily follows.

**a) Second anti-doping rule violation**

360. This said, the Panel is bound to note that this is not the first anti-doping rule violation committed by the Athlete. In June 2014, the Athlete received a three-month period of ineligibility. Accordingly, the Athlete's violation of Article 2.5 FINA DR constitutes the Athlete's second anti-doping rule violation.

361. WADA submits that, under Article 10.7.1(c) FINA DC, if the Panel would find a "Tampering" violation under Article 2.5 FINA DC, the period of ineligibility would be four years multiplied by two, or eight years. This argument was reiterated by WADA during the hearing.

362. Despite this argument having been made by WADA, the Athlete and FINA made no written or oral submissions on the application of Article 10.7.1 FINA DC. Nor did they object to the application of the principle prescribing a multiplication of the period of ineligibility to be imposed in case of a second anti-doping rule violation. The Athlete merely argued that any period of ineligibility would infringe his personality rights under Swiss law.

363. Article 10.7.1 FINA DC provides as follows:

> "*For an Athlete or other Person's second anti-doping rule violation, the period of Ineligibility shall be the greater of:*
> *(a) six months;*
> *(b) one-half of the period of Ineligibility imposed for the first anti-doping rule violation without taking into account any reduction under DC 10.6;*
> *(c) two times the period of Ineligibility otherwise applicable to the second anti-doping rule violation treated as if it were a first violation, without taking into account any reduction under DC 10.6.*"

364. Considering that a four-year period of ineligibility is to be imposed for the Athlete's second anti-doping rule violation if it were to be treated as a first violation, this period is to be doubled pursuant to Article 10.7.1 FINA DC. That provision allows for no flexibility or exceptions.

365. The Panel notes that an eight-year period of ineligibility does seem harsh. That said, the violation committed by the Athlete is, in the view of the Panel, all the more serious because following his first anti-doping rule violation, the Athlete should have been even more careful in seeking to avoid a second anti-doping rule violation.

366. The Panel is bound to apply the rules as they have been written. These appear to be intended to give rise to an overriding public interest in maintaining a level playing field among competitors. The sports movement appears to have decided that it must be strict with athletes in respect of anti-doping rule violations, in particular with those who intentionally commit anti-doping rule violations or are repeat offenders. Regrettably, the Athlete falls into both categories. The Panel finds that the infringement of the Athlete's

personality rights, in particular the imposition of an eight-year period of ineligibility, is justified in the matter at hand.

367. Consequently, the Panel concludes that it has no discretion in the matter, such that an eight-year period of ineligibility is to be imposed on the Athlete.

368. The Panel notes that the new edition of the WADA Code, which enters into force on 1 January 2021, provides for additional exceptions to potentially reduce the period of ineligibility for violations of Article 2.5 WADA Code below four years, as well as for second anti-doping rule violations. The 2021 edition of the WADA Code is, however, not applicable to the present proceedings, so the Panel is barred from applying such exceptions.

369. Nevertheless, as indicated by WADA during its closing submissions, it may be relevant for the Athlete to take note of Article 27.3 WADA Code (2021 edition), which provision allows him to apply to FINA for a reduction of the period of ineligibility imposed on him as soon as the 2021 edition of the WADA Code enters into force.

370. Since the Athlete has not served and is not serving any provisional suspension, the eight-year period of ineligibility shall start on the date of the present arbitral award.

**b) Consequences besides imposition of period of ineligibility**

371. WADA submitted that all competitive results obtained by the Athlete from 4 September 2018 through to the commencement of the applicable period of ineligibility should be disqualified, with the consequence that any medals, points and prizes from those results should be forfeited. In making that argument it did not specifically refer to any particular provision of the FINA DC.

372. In this regard, the Athlete argued only that no sanction should be imposed on him at all, on the grounds that he did not commit an anti-doping rule violation, and that, in case he would be found to have committed an anti-doping rule violation, any sanction would infringe upon his personality rights and be disproportionate.

373. FINA made no submissions in this regard.

374. Article 10.8 FINA DC provides as follows:

> "*In addition to the automatic Disqualification of the results in the Event which produced the positive Sample under DC 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.*"

375. The Athlete has been found by the Panel to have committed an anti-doping rule violation on 4 September 2018. It follows in principle from Article 10.8 FINA DC that all competitive results of the Athlete as from that date until the commencement of his period of ineligibility are to be disqualified, unless fairness requires otherwise.

376. The Panel considers that an eight-year period of ineligibility is, although justified in application of the rules for the reasons set out above, a severe sanction. Adding to this a disqualification of all the Athlete's results over the past year and a half, including results such as the Athlete's world titles on the 200 and 400 meter freestyle at the 2019 FINA World Championships in Gwangju, South Korea, in July 2019, requires the Panel – in application of the rules - to assess whether fairness allows for the disqualification of results. The Panel notes that it is, under the rules, afforded a discretion to disallow the disqualification of results if fairness requires otherwise.

377. First, it is established in CAS jurisprudence that the disqualification of results is in itself a severe sanction and, in certain respects, can be equated to a period of ineligibility (CAS 2016/A/4481). The Panel notes such statement and finds that it should therefore carefully assess whether the disqualification of results over a period of one and a half years in combination with an eight-year period of ineligibility might be said to result in a disproportionate sanction being imposed.

378. Second, the Panel notes that doping tests performed on the Athlete shortly before (15, 19, 20, 21 and 24 August 2018) and after (28 September 2018), the night the Athlete committed the anti-doping rule violation, were negative. There is no evidence before the Panel that the Athlete may have engaged in doping activity between 4 September 2018 and the date of the present arbitral award, including on the occasion of the FINA World Championships in Gwangju, South Korea in July 2019.

379. Third, the Panel notes that FINA refrained from seeking the imposition of a provisional suspension on the Athlete when charging him with an anti-doping rule violation, as it could have done in accordance with Article 7.9.2 FINA DC. The Panel finds that the Athlete could, therefore, legitimately presume that he was free to continue to compete and keep the results obtained, particularly after he was acquitted by the FINA Doping Panel on 3 January 2019.

380. The Panel has carefully considered the above elements, and its responsibility to apply a standard of fairness. The correct conclusion is not entirely clear, having regard to the rules it is required to apply. Nevertheless, having regard to the gravity of the sanction going forward, on balance the Panel concludes that the results in the period prior to the sanction taking effect should not be disqualified.

## B. Conclusion

381. The Panel has noted the considerable public interest in these proceedings, a reflection no doubt of the Athlete's reputation and success in his chosen sport. The Panel has proceeded on the basis that its role is to establish the facts, on the basis of the record before it, and to interpret and apply the applicable rules to those facts. This is the rule of law, now of singular importance in the field of sport, and applicable to all athletes, irrespective of their background or status, their standing or success. The application of the rule of law in the domain of sport requires all to be treated equally.

382. On the basis of the factual record before it, and the rules that it is required to apply, the Panel finds that:

i. the Athlete violated Article 2.5 FINA DC;

ii. the Athlete is sanctioned with an 8-year period of ineligibility under the above-mentioned Articles 2.5, 10.3.1 and 10.7.1(c) FINA DC, and the period of ineligibility will commence on the date of the present arbitral award.

## X. COSTS

383. Article R65 CAS Code provides the following:

> "*R65.1 This Article R65 applies to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body.* […]
>
> *R65.2 Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of the CAS are borne by CAS.*
>
> *Upon submission of the statement of appeal, the Appellant shall pay a non-refundable Court Office fee of Swiss francs 1,000.- without which CAS shall not proceed and the appeal shall be deemed withdrawn.* […]
>
> *R65.3 Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.*
>
> *R65.4 If the circumstances so warrant, including the predominant economic nature of a disciplinary case or whether the federation which has rendered the challenged decision is not a signatory to the Agreement constituting ICAS, the President of the Appeals Arbitration Division may apply Article R64 to an appeals arbitration, either ex officio or upon request of the President of the Panel.*"

384. Since the present appeal is lodged against a decision of an exclusively disciplinary nature rendered by an international federation, no costs are payable to CAS by the Parties beyond the Court Office fee of CHF 1,000 paid by WADA prior to the filing of its Statement of Appeal, which is in any event retained by the CAS.

385. Furthermore, pursuant to Article R65.3 CAS Code and in consideration of the complexity and outcome of the proceedings, including the numerous interlocutory motions and challenges filed by the Respondents, as well as the conduct and the financial resources of the Parties, the Panel rules that the Athlete and FINA shall each pay a contribution towards WADA's legal fees and other expenses incurred in connection with these arbitration proceedings in an amount of CHF 15,000.

# ON THESE GROUNDS

**The Court of Arbitration for Sport rules:**

1. The appeal filed on 14 February 2019 by the World Anti-Doping Agency against the decision issued on 3 January 2019 by the Doping Panel of the Fédération Internationale de Natation is upheld.

2. The decision issued on 3 January 2019 by the Doping Panel of the Fédération Internationale de Natation is set aside.

3. Mr Sun Yang is sanctioned with an 8 (eight) year period of ineligibility, commencing on the date of the present arbitral award.

4. This arbitral award is pronounced without costs, except for the Court Office fee of CHF 1,000 (one thousand Swiss Francs) paid by the World Anti-Doping Agency, which is retained by CAS.

5. Mr Sun Yang and the Fédération Internationale de Natation shall bear their own costs and are ordered to each pay to the World Anti-Doping Agency an amount of CHF 15,000 (fifteen thousand Swiss Francs) as a contribution towards the legal fees and other expenses incurred in connection with these arbitration proceedings.

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

Seat of arbitration: Lausanne, Switzerland
Date: 28 February 2020

# THE COURT OF ARBITRATION FOR SPORT

Franco Frattini
President of the Panel

Romano F. Subiotto Q.C.
Arbitrator

Philippe Sands Q.C.
Arbitrator

Dennis Koolaard
*Ad hoc* Clerk