CAS 2019/A/6148 World Anti-Doping Agency v. Mr Sun Yang & Fédération Internationale de Natation (FINA)

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President:	Dr. Hans Nater, Attorney-at-Law, Zürich, Switzerland
Arbitrators:	Prof. Jan Paulsson, Attorney-at-Law, Manama, Bahrain
	Prof. Bernard Hanotiau, Attorney-at-Law, Brussels, Belgium
Ad hoc Clerk:	Mr. Philipp Kotlaba, Attorney-at-Law, Washington, D.C.

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

SUN YANG, People's Republic of China

Represented by Dr. Christopher Boog, Mr. Philippe Bärtsch, and Dr. Philip Wimalasena, Attorneys-at-Law, Schellenberg Wittmer Ltd, Zürich, Switzerland; Mr. Fabrice Robert-Tissot, Attorney-at-Law, Bonnard Lawson Law Firm, Geneva, Switzerland; and Mr. Fei Ning and Ms. Zhao Fang, Attorneys-at-Law, Hui Zhong Law Firm, Beijing, People's Republic of China

- 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 international anti-doping agency, constituted as a private law foundation under Swiss law. WADA has its registered seat in Lausanne, Switzerland and has its headquarters in Montreal, Canada.

2. Mr. Sun Yang (the "Athlete" or the "First Respondent") is an international-level Chinese swimmer.

3. The Fédération Internationale de Natation ("FINA" or the "Second Respondent") is the world governing body for aquatic sport. Its registered seat is in Lausanne, Switzerland.

II. NATURE OF THE CASE

4. An attempt was made to collect blood and urine samples from the Athlete on 4 September 2018 in circumstances that will be more fully set out in Section III. A remarkable controversy ensued which led FINA to bring proceedings against the Athlete, asserting that he had violated Articles 2.3 (Refusing or Failing to Submit) and 2.5 (Tampering or Attempted Tampering) of the FINA Doping Control Rules. It was heard before a FINA Doping Panel, which on 3 January 2019 acquitted the Athlete.

5. Athletes may appeal adverse decisions from FINA Doping Panels to the Court of Arbitration for Sport (the "CAS"). On the other hand, WADA, as the ultimate international anti-doping authority, also has a right to appeal. In this case WADA filed a Statement of Appeal against the FINA Doping Panel's decision (dated 14 February 2019) naming the Athlete as the sole respondent. Four days later, WADA amended its appeal to add FINA as a second respondent.

6. The Parties were informed on 1 May 2019 of the appointment of three arbitrators to constitute the CAS panel, two of them having been nominated by the Parties respectively. The arbitrator nominated by WADA had previously been challenged by the Athlete. That issue was deferred to the Challenge Commission of the International Council of Arbitration for Sport, which dismissed the challenge on 16 April 2019. The Athlete renewed the challenge based on new information on 27 May 2019, whereupon the arbitrator resigned, asserting that he did so in the interest of expedition rather than because there was any merit in the challenge. He was replaced by a new nominee on 5 July 2019, who was also challenged by the Athlete on 12 July. That challenge was dismissed by the Challenge Commission, thus leaving the CAS panel in its final composition.

7. Meanwhile, the Athlete had raised two preliminary objections: (1) the appeal should be dismissed as inadmissible for tardiness and (2) owing to a conflict of interest among WADA's counsel, the appeal should be found inadmissible as it was filed by counsel with no authority to represent WADA. These objections were deferred to the CAS panel. Both were dismissed.

8. A public hearing was conducted in Montreux, Switzerland, on 15 November 2019.

9. On 28 February 2020, the original panel rendered its award, setting aside the FINA Doping Panel's decision and imposing an eight-year ineligibility on the Athlete, declaring that the duration was mandatory given his status as a repeat offender. (The Athlete had been found guilty of a doping offense in 2014. This exposed him, under the rules applicable at the time, to a mandatory doubling of any period of ineligibility that would result from any second offense.)

10. The Athlete exercised his right of recourse to the Swiss Federal Tribunal (the country's highest court). He requested that the arbitral award be set aside on the ground that there was evidence of bias on the part of the presiding arbitrator by reasons of prior comments the presiding arbitrator had made, notably on social media. On 22 December 2020, the Athlete's petition was accepted and the award was consequently annulled.

11. In the wake of the Federal Tribunal's judgment, and following requests from the Athlete's legal representatives that they do so, the two remaining, party-appointed arbitrators on the CAS panel withdrew. The Federal Tribunal's judgment has resulted in the constitution of a second CAS panel (henceforth simply "the Panel"), with an all-new membership, charged with rehearing this case.

12. The present Panel is comprised of individuals unacquainted with the arbitrator found to have been biased. Its members have considered the contentions and the evidence in this dispute afresh, indifferent to whether or not their own views coincide with the conclusions of the arbitral award of 28 February 2020, or indeed with any other of the prior tribunal's rulings.

13. It remains to be observed that FINA, in the first instance, evidently concluded that the Athlete was guilty under the FINA Doping Code of both "Refusal or Failure to Comply" and "Tampering," and took that position before the FINA Doping Panel. In these proceedings, FINA is aligning itself with the Doping Panel, and thus allying itself with the Athlete.

III. BACKGROUND FACTS

14. The information detailed in this section is a summary of relevant facts as provided by the Parties in their written pleadings and factual and legal exhibits attached thereto. This section serves solely for the purpose of factual synopsis. To the extent they are necessary or relevant, additional facts may be set out below, in particular in the Analysis of the Merits. The present Award only refers to such evidence and arguments to the extent necessary to explain its reasoning; the Panel has, however, considered all facts, claims, and legal arguments put before it.

15. The Athlete is the holder of world records in swimming and a multiple gold medalist in consecutive Olympic Games. Given his prominence, he has been far more frequently subjected to doping controls than most competitors.

16. The present proceedings revolve around a failed sample collection. On the evening of 4 September 2018, a three-member team authorized by FINA came to the Athlete's residence (a villa inside a compound) to conduct an OOC (out of-competition) blood and urine sample collection at a time slot between 10 and 11 p.m. of which he had prior knowledge. That much is uncontroversial, but what took place in the course of several hours, into the early hours of the following day, is a matter of controversy. Yet the simple fact is that the mission was a failure: no sample was ever analyzed.

17. The FINA Doping Panel's decision of 3 January 2019, which acquitted the Athlete and which both the Athlete and FINA now seek to uphold, puts it as follows:

> *"No blood or urine samples were ever analysed as a result of the OOC mission conducted by IDTM. Blood was collected but the blood container was destroyed and the collected blood was never sent to the relevant WADA accredited laboratory. The blood remains in the possession of the Athlete's doctor. No urine sample was provided by the Athlete. It is safe to describe the entire OOC mission as problematic, highly unusual and, at times, confrontational. Both FINA and the Athlete offer vastly different explanations regarding what happened, why the evening unfolded as it did and, critically, what consequences must result."*

18. The Doping Panel Decision consists of 59 single-spaced pages. Hundreds of pages of documents have been presented in the various iterations of the dispute. What is most relevant for present purposes, and not in dispute, is that the Athlete took issue with the conditions of the sample collection, and challenged, in particular, the credentials proffered by the sample collection team, as well as their conduct. The ensuing standoff, which lasted for several hours, ultimately ensured that no sample could be retrieved and made available for laboratory analysis.

A. SAMPLE COLLECTION: PROCESS AND ACTORS

19. The background, hinging as it does on the Parties' contentions as to the procedural requirements governing blood and urine sample collection, will be better understood if reference is made to the International Standard for Testing and Investigations ("ISTI"). The ISTI, part of WADA's World Anti-Doping Code, governs the sample collection process. It provides the following definitions:

> ***Testing Authority:*** *The organization that has authorized a particular Sample collection, whether (1) an Anti-Doping Organization (for example, the International Olympic Committee or other Major Event Organization, WADA, an International Federation, or a National Anti-Doping Organization); or (2) another organization conducting Testing pursuant to the authority of and in accordance with the rules of the Anti-Doping Organization (for example, a National Federation that is a member of an International Federation).*
>
> ***Sample Collection Authority:*** *The organisation that is responsible for the collection of Samples in compliance with the requirements of the International*

> *Standard for Testing and Investigations, whether (1) the Testing Authority itself; or (2) another organization (for example, a third party contractor) to whom the Testing Authority has delegated or subcontracted such responsibility (provided that the Testing Authority always remains ultimately responsible under the Code for compliance with the requirements of the International Standard for Testing and Investigations relating to collection of Samples).*
>
> ***Sample Collection Personnel:*** *A collective term for qualified officials authorized by the Sample Collection Authority to carry out or assist with duties during the Sample Collection Session.*

20. In this case, the "Testing Authority" was FINA, the international aquatics federation. As for the "Sample Collection Authority," WADA had assigned this task to International Doping Tests and Management ("IDTM"), an entity which operates with a global network of 500 Doping Control Officers. IDTM, which collected more than 13,500 samples for FINA in 2016–2018—and at least 50 from the Athlete himself—was responsible for authorizing and sending its team of "Sample Collection Personnel" to Mr. Sun on 4 September 2018.

21. Finally, "Sample Collection Personnel," per the ISTI, includes the following individuals:

> ***Doping Control Officer (or DCO):*** *An official who has been trained and authorized by the Sample Collection Authority to carry out the responsibilities given to DCOs 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.*
>
> ***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.*

22. These positions were all purportedly represented among the IDTM-authorized Sample Collection Personnel involved in the unsuccessful collection on the night of 4–5 September 2018. Specifically, the team included:[1]

[1] A fourth individual (the DCA's wife) was also in the car, apparently to serve as a backup driver. She remained outside the doping control station and did not participate in the Sample Collection, however.

(i) the female Doping Control Officer ("DCO"), whose direct supervisor, Mr. Tudor Popa, was at all relevant times in Sweden (where IDTM is headquartered) but who was consulted by the DCO by telephone once difficulties arose;

(ii) a female Blood Collection Officer ("BCO"), which in IDTM's usage is referred to as the Blood Collection Assistant ("BCA"); and

(iii) a male Chaperone, which in IDTM's usage is referred to as the "DCA," to observe the Athlete providing a urine sample.

23. For their own protection, and pursuant to the agreement of the Parties, these individuals are not named in this Award. Instead, the Panel refers to them by their IDTM titles.

24. The DCO had been trained and certified by IDTM, which moreover kept on file Statements of Confidentiality signed by the BCA and DCA, certifying that they had themselves been trained by the DCO on their respective responsibilities. In these statements, the BCA and DCA declared as follows:

> "*I have been trained by* [the DCO], *who is a Doping Control Officer (DCO) trained and certified by International Doping Tests & Management (IDTM). I have been trained and requested to act as: [check box for respective position]*."

25. At the bottom of each of the two Statements of Confidentiality, the DCO signed and confirmed that she had "*trained and authorised the person mentioned above to act as part of the Sample Collection Personnel*" for the Sample Collection Sessions that she would carry out "*during 2018*."

B. THE ATTEMPTED COLLECTION OF 4–5 SEPTEMBER 2018

26. The Sample Collection was scheduled by IDTM for 4 September 2018 at the Athlete's residence in Hangzhou, Zhejiang Province, China. It was planned to occur within a 60-minute timeframe, between 10:00 and 11:00 p.m., in accordance with the Athlete's whereabouts designation. According to uncontested testimony of the DCO, the Sample Collection Personnel arrived by car and, not finding the Athlete yet at the premises, were rerouted by a security guard to wait outside the entrance to the complex.

27. The Athlete arrived near 11:00 p.m., having not long before returned to the complex to drop off his parents. He was now accompanied by his mother. It was agreed that the Sample Collection would take place not in the Athlete's home, but in a nearby clubhouse.

28. The Athlete requested and the IDTM team presented its credentials. The DCO presented a copy of her IDTM card identifying her as such.[2] The BCA provided a junior nurse's certificate. The DCA showed his national identity card, although the Parties appear to differ as to whether this was done at the outset or after the collection of the blood sample.

29. The DCO also presented a "Letter of Authority" signed by FINA's Executive Director which provided:

> ***LETTER OF AUTHORITY 2018***
>
> *It is hereby confirmed that*
>
> ***International Doping Tests & Management (IDTM)***
>
> *is appointed and authorized by the Fédération Internationale de Natation (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.*
>
> *IDTM will ensure that all doping controls are conducted in accordance with the provisions of the FINA Doping Control Rules and the WADA International Standards for Testing*.

30. The blood samples were collected without any apparent initial difficulty. (Blood collection does not require the presence of a Chaperone, who accompanies the subject when urine is collected.) These blood samples were placed by the BCA in secure containers inside a cool box.

31. The Athlete, at this point, (again) questioned the DCA's credentials. A lengthy and difficult discussion ensued.

32. The DCO explained that she had appointed the DCA and instructed him as to how he would witness the passing and collection of urine. Since 2018, she alleged, national identification cards were deemed sufficient credentials for DCAs to carry on missions. Both the BCA and the DCA, moreover, had signed IDTM documents confirming their training and agreeing to standard confidentiality provisions. But the DCO did not have those documents with her; they were on file with IDTM. The DCO did show the Athlete an excerpt from her digital "DCO portal," which contained the DCA's contact details but lacked a photo, and so was rejected.

33. At one point, calls were made to the head of the Chinese National Swimming Team, Mr. Cheng Hao (who did not attend the gathering at the clubhouse). Mr. Cheng insisted that formal authorizations emanating from IDTM were necessary for each member of

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[2] The card was signed by IDTM's Managing Director and stated: "*It is hereby certified that the holder of this card* [name of DCO] *is a certified Doping Control Officer (DCO) and is authorized to conduct Doping Controls on behalf of International Doping Tests & Management (IDTM). Valid Until: April 30, 2019.*"

the IDTM team; the DCO's vouching for her subordinates, he told her, was not satisfactory.

34. Apart from all this, doubts arose as to the DCA's conduct. Much has been made in the course of this extended dispute of certain photographs that were evidently taken by the DCA on his phone. It is common ground that the DCA had a phone camera and used it to take photos. In the proceedings before its own Doping Panel, FINA (then arguing for the Athlete's guilt) put forward its understanding that, once the IDTM team had arrived and spent the better part of an hour waiting for the Athlete, "*the DCA took several photos of the villa and the complex to be able to prove, if needed, that the testing team were at the right location at the correct time*." The Athlete, on the other hand, asserted (and asserts) that he had reason to suspect that the DCA surreptitiously took numerous photos and videos of him without his permission, and that he (the Athlete) protested and procured the DCA's agreement to delete the images. The Athlete and his mother then observed the DCA making deletions from his device. The DCO did not. The Athlete testified before the FINA Doping Panel that he saw images of himself on the phone and believed that about 10 images were deleted. The DCO believed that the only photos deleted were from outside the Athlete's villa and that none were taken of Mr. Sun himself.

35. At one extreme, the contention of the Athlete (supported by some of his entourage) seems to be that the DCA was in effect acting as an annoying fan, if not a paparazzi, infringing on the Athlete's privacy or even engaging in a kind of harassment. At the other, it may be that the DCA saw no harm in what he was doing, assumed that the Athlete (who was certainly used to public attention) did not mind, was ultimately embarrassed at the reaction he provoked, and thereafter removed the images from his phone. What is an objective fact is that the DCA was excluded from the process with the result that the urine test could not be carried out—since he was the sole available Chaperone.

36. Although no urine sample could be collected, there remained the question of the outstanding blood samples, which had been placed in secure containers in the Sample Collection Personnel cool box.

37. Through all this, the Athlete and his entourage continued to question the credentials of the entire Sample Collection Personnel team. On their view, *no* samples could be transported out of the compound, as they had been collected under conditions which fell short of procedural requirements, i.e., in the absence of sufficient documentation.

38. At one point the Athlete needed to urinate. The DCO suggested that the DCA could observe, either in the presence of the Athlete's mother or with the proviso that the sealed collection vessel would remain in the Athlete's custody pending resolution of the issue of principle as to the requisite authorization. The Athlete refused, insisting moreover that his refusal of what he considered an invalid notification was not a doping offense. In WADA's account, the DCO explicitly warned the Athlete that his refusals may constitute a rule violation.

39. Consideration may have been given to the possibility of identifying an available alternative DCA, but this alternative did not materialize. The urine sample collection effort was therefore abandoned.

40. This left the blood samples. As to these, the Athlete signed the standard Doping Control Form, but indicated that the "comments" section of the form would be completed by his personal physician, Dr. Ba Zhen, who had often accompanied the Athlete in the course of prior controls and was now on his way to the clubhouse.

41. Dr. Ba reached the scene nearly an hour after midnight. He re-reviewed the authorization documents that had been shown to the Athlete. The DCO explained to him why, in her view, the IDTM team as a whole was properly authorized. Dr. Ba disagreed. He took the position that not only the DCA, but *also* the BCA, lacked proper authorization to perform her assigned task. (The latter, he asserted, had not provided proof of proper qualification, under Chinese rules, to extract blood.) Dr. Ba therefore did not agree that the DCO could remove the already collected samples. Calls were made also to his colleague Dr. Han Zhaoqi, Chief Doctor at the sport hospital of the Zhejiang College of Sports, who reiterated that the blood samples could not be taken.

42. After calling and consulting with her boss Mr. Tudor Popa in Stockholm, the DCO proposed the solution of sending the blood to the WADA-accredited laboratory in Beijing pending resolution of the issue of authorization. This was refused by the Athlete's side. The Athlete, for his part, offered that Dr. Ba take the samples to his hospital and dispose of them there. The DCO refused.

43. This had now become a standoff. The Athlete insisted that he was complying with the rules and was prepared to wait ("*till the morning*" if necessary) until a properly authorized DCO would arrive. The DCO found this solution to be unacceptable.

44. The Athlete and Dr. Ba insisted that a way be found to keep the blood samples in their possession; the DCO responded that the intact vessels in the cool box had to leave the premises with her. Following further exchanges on how to "*separate*" the blood sample from the containers, the Athlete and Dr. Ba then indicated that they wished to break the blood collection vessels with a hammer. Conferring by telephone with Mr. Popa, the DCO heard the sound of glass breaking outside the clubhouse; upon arrival, she found the Athlete holding his phone as a flashlight while a guard broke one of the secure vessels with a hammer. In the DCO's account, she was then asked to destroy the second sample, but refused to do this. The DCO also asked to photograph the broken packaging. This was denied by the Athlete, who stated that she had "*no right to take pictures*" because she lacked "*the authorization for the test*."

45. There remained inside the clubhouse a hard copy of the Doping Control Form. The Athlete took the paper and tore it up.

46. Dr. Ba prepared his own record of events in a handwritten note signed by himself and the Athlete. The note was presented it to the DCO, who (along with her IDTM colleagues) signed it. The note read:

> *"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. 386) possessed and provided and showed the certification of Doping Control Officer. Mr. SUN Yang actively cooperated with the testing. However, in the following process of blood and urine sample collection, Mr. SUN Yang found that* [the BCA]*, Blood Collection Officer, only provided her Nurse Qualification Certificate (Number 09092081) 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 (410205198902081010) 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. 386) 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.)*
>
> *In the morning of September 5, 2018 2:50AM"*

47. The clubhouse was cleared sometime after 3:00 a.m. The Athlete's mother collected the refuse of the abandoned samples, and the IDTM team left with their equipment. The remaining, second blood sample bottle was taken into Dr. Ba's custody.

IV. THE FINA PROCEEDINGS

48. The IDTM team that had attempted to collect samples on 4 September reported to FINA, the international swimming federation in its capacity the Testing Authority (i.e., "the organization that has authorized a particular Sample collection"), that they had been unable to complete their mission. For his part, the Athlete sent a written explanation to FINA on 6 September, wherein he complained about the conduct of the IDTM personnel.

49. On 5 October 2018, FINA wrote to the Athlete informing him that he was found to have committed a violation of the FINA Doping Control Rules ("FINA DC"), specifically of two rules: "Refusing or Failing to Submit" (FINA DC 2.3) and "Tampering or Attempted Tampering" (FINA DC 2.5), which are set out below along with the then-applicable rules' definition of Tampering. The materials provided to FINA by IDTM were also disclosed to him.

> ***DC 2.3 Evading, Refusing or Failing to Submit to* Sample *Collection by an* Athlete**
>
> *Evading* Sample *collection, or refusing or failing to submit to* Sample *collection without compelling justification after notification by a duly authorized* Person.
>
> ***DC 2.5* Tampering *or* Attempted Tampering *with any part of* Doping Control *by an* Athlete *or Athlete Support* Person**
>
> *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.*

50. The matter was then brought to the three-member FINA Doping Panel constituted for this case, which received evidence and written submissions and conducted a hearing on 19 November 2018. There is no dispute as to the jurisdiction and particular composition of that Panel. The present CAS Panel, however, has plenary appellate authority and is therefore not bound by any of the FINA Doping Panel's conclusions.

51. On 3 January 2019, the FINA Panel ruled in favor of the Athlete, determining that he had not committed an anti-doping rule violation, and ordering the Chinese Swimming Association (a FINA member) to bear all costs.

V. PROCEEDINGS BEFORE THE CAS

52. A brief history of the initial CAS proceedings is summarized at paragraphs 6 to 10 above, and is set out in greater detail in the annulled arbitral award of 28 February 2020. This section will recapitulate only certain key dates in the initial proceedings, before examining the history of the present proceedings, i.e., beginning with the decision of the Swiss Federal Tribunal on 22 December 2020.

A. THE FIRST CAS PROCEEDINGS

53. On 14 February 2019, the Appellant filed a Statement of Appeal with the CAS, invoking Article 13.7 of the FINA DC and Article R48 of the CAS Code of Sports-related Arbitration (the "CAS Code"). WADA likewise named as arbitrator the Hon. Michael Beloff QC, Barrister in London, the United Kingdom.

54. On 18 February 2019, WADA filed an amended Statement of Appeal, this time naming FINA alongside the Athlete as a respondent.

55. On 28 February 2019, the Athlete named as arbitrator Prof. Philippe Sands QC, Barrister in London, the United Kingdom.

56. On 11 March 2019, the Athlete challenged the nomination of Mr. Beloff.

57. On 22 March 2019, the Athlete, joined by FINA, contended that the deadline for the filing of WADA's Appeal Brief had lapsed; given that WADA had failed to file by the deadline, the appeal was to be deemed withdrawn pursuant to Article R51 of the CAS Code. In the alternative, the Respondents took the view that the Appeal Brief should be deemed inadmissible. Replies and sur-replies followed, as did confirmation from the CAS that the Respondents' challenges on admissibility would be deferred for decision by the arbitral panel, once fully constituted.

58. On 3 April 2019, WADA filed its Appeal Brief.

59. On 16 April 2019, the Challenge Commission dismissed the Athlete's arbitrator challenge.

60. On 1 May 2019, pursuant to Article R54 of the CAS Code and on behalf of the President of the Appeals Arbitration Division, the CAS Court Office informed the Parties that a panel (the "First Panel") had been appointed to decide the present matter as follows:

President:	Hon. Franco Frattini, Judge in Rome, Italy
Arbitrators:	Hon. Michael Beloff QC, Barrister in London, the United Kingdom
	Prof. Philippe Sands QC, Barrister in London, the United Kingdom

61. The First Panel was assisted by Mr. Dennis Koolaard, Attorney-at-Law in Arnhem, the Netherlands, as *ad hoc* clerk.

62. On 9 May 2019, the Athlete submitted a comprehensive pleading on his objections to admissibility in which he elaborated upon the alleged tardiness of the Appeal Brief with the First Panel, and additionally submitted that a conflict of interest on the part of two members of WADA's legal counsel team was such as to merit their disqualification from the proceedings or, alternatively, to deem the appeal inadmissible on grounds of said conflict of interest ("*irrecevabilité pour défaut de la capacité de postuler*").

63. On 19 May 2019, the First Panel dismissed the Respondents' admissibility objection insofar as it deemed the Appeal Brief timely filed. It invited comment from FINA and WADA in respect of the second objection, relating to the alleged conflict of interest.

64. A second challenge against Mr. Beloff was filed on 27 May 2019. The Athlete also filed a renewed "*Request for Disqualification of WADA's Counsels*" and an "*Objection to the Admissibility of the Appeal and Challenge of CAS's Jurisdiction*" on 29 May 2019. There followed comments from the other Parties and, in respect of the arbitrator challenge, also from Mr. Beloff.

65. On 11 June 2019, the Athlete informed the CAS Court Office that he had lodged proceedings before the Swiss Federal Tribunal—the Swiss Confederation's highest court—seeking the setting-aside of the First Panel's decision in respect of the Appeal Brief's admissibility and of the Challenge Commission's decision in respect of the arbitrator challenge.

66. On 18 June 2019, following the receipt of yet more comments, the CAS Court Office informed the Parties, in accordance with Article R32 of the CAS Code, that the Panel, *inter alia*, denied suspending the proceedings pending a decision from the Swiss Federal Tribunal.

67. Questions of alleged witness intimidation and harassment, which WADA had raised in its Appeal Brief, were addressed by the Athlete in a communication dated 20 June 2019. Among other things he denied having engaged in witness intimidation or harassment, while noting that Mr. Sun Yang's mother, Ms. Ming Yang, had approached the BCA and DCO in order to amicably "*gather information about the case and seek assistance from them.*" WADA responded on 24 June 2019, requesting that the Panel issue an order "*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*." WADA's submission was accompanied by statements from the DCO and BCA, expressing "*concern* […] *for their physical and economic well-being, and for the well-being of their family members*," in light of alleged contact from the Athlete's entourage.

68. On 28 June 2019, the Parties were informed that Mr. Beloff had decided to withdraw from the proceedings. He asserted that he did so in the interest of expedition rather than because there was any merit in the challenge. On 5 July 2019, WADA named his replacement, Mr. Romano Subiotto QC, Avocat in Brussels, Belgium and Solicitor-Advocate in London, the United Kingdom.

69. On 12 July 2019, the Athlete challenged the nomination of Mr. Subiotto.

70. On 26 July 2019, the Challenge Commission dismissed the challenge to Mr. Subiotto's appointment. On the same date, the Panel dismissed in their entirety the Athlete's "*Request for Disqualification of WADA's Counsels*" and his "*Objection to the Admissibility of the Appeal and Challenge of CAS's Jurisdiction*."

71. A public hearing was conducted in Montreux, Switzerland, on 15 November 2019.

72. On 28 February 2020, the First Panel rendered its award, setting aside the FINA Doping Panel's decision and imposing an eight-year ineligibility on the Athlete, declaring that the duration was mandatory given his status as a repeat offender. (Given that the Athlete had been found guilty of a doping offense in 2014, this exposed him to a mandatory doubling of any period of ineligibility that would result from a second offense.)

73. The Athlete appealed to the Swiss Federal Tribunal. He requested that the arbitral award be set aside on the ground that there was evidence of bias on the part of the presiding arbitrator by reasons of prior comments he had made, notably on social media. On 22 December 2020, the Athlete's petition was accepted and the award was annulled.

B. THE "SECOND" CAS PROCEEDINGS

74. On 25 December 2020, the Athlete's representatives submitted letters to each of the two party-appointed arbitrators on that panel, Mr. Romano Subiotto QC and Prof. Philippe Sands QC. Citing the decision of the Swiss Federal Tribunal, the Athlete requested each to "*voluntarily recuse* [him]*self and to formally resign as a member of the panel*" by 28 December 2020, failing which they would be formally challenged.

75. On 26 December 2020, the Athlete addressed the Swiss Federal Tribunal's decision in a letter directed to the International Council for the Arbitration of Sport (the "ICAS"), the body responsible for the administration of the CAS. He requested, in particular, that the ICAS direct that the CAS "*appoint a President of the* [new] *Panel who does not have an Anglo-Saxon background, and ensure that the Panel is composed in a manner that guarantees cultural diversity*."

76. On 28 December 2020, the CAS Court Office acknowledged receipt of the Athlete's letters, and invited WADA and FINA's responses. The CAS confirmed that, "*following the Swiss Federal Tribunal's decision of 22 December 2020, this procedure is now re-opened*."

77. Formal challenges to Messrs. Sands and Subiotto were submitted to the ICAS on 30 December 2020. The CAS Court Office acknowledged these, and invited comments from WADA and FINA. The CAS indicated that Messrs. Sands and Subiotto would likewise be invited to respond with respect to their challenges.

78. On 30 and 31 December 2020, respectively, FINA wrote to support the Athlete's position that the re-opened proceedings continue with three newly-appointed arbitrators, whereas WADA expressed its opposition.

79. On 31 December 2020, Mr. Koolaard stepped down as *ad hoc* clerk and confirmed he would not seek any renewed mandate in these proceedings. He stated that he did so in the interest of expedition of the procedure.

80. On 15 January 2021, the Swiss Federal Tribunal published its full, reasoned decision.

81. On 19 January 2021, the Athlete drew attention to the publication of the Swiss Federal Tribunal's reasoned decision, and maintained his earlier request to ICAS in respect of the cultural makeup of any newly constituted panel.

82. On 19 January 2021, the CAS addressed the Athlete's request to the ICAS by noting that, under Article R54 of the CAS Code, it is the President of the Appeals Arbitration

Division, and not the ICAS, who is responsible for the appointment of a President. The CAS noted that the Athlete's request would therefore be forwarded to him, and not to the ICAS, absent objection.

83. On 20 January 2020, Prof. Sands withdrew from the case.

84. On 21 January 2021, Mr. Subiotto, too, withdrew from the case. Both men indicated that they did so in the interest of expedition of the procedure.

85. Also on 21 January 2021:

1) the CAS notified the parties of the aforementioned resignations and invited WADA to nominate an arbitrator;

2) WADA nominated Prof. Jan Paulsson, Attorney-at-Law in Manama, Bahrain, as arbitrator; and

3) the Athlete submitted a letter in which he took issue with the CAS's proposed referral of his request as to panel selection to the President of the Appeals Arbitration Division, noting that, in accordance with Article S6 No. 10 of the CAS Code, the request should be "*put to all members of the ICAS as requested.*"

86. On 22 January 2021, the CAS Court Office confirmed that the Athlete's correspondence directed to the ICAS had been forwarded to the ICAS Board, and that the ICAS was aware of the Swiss Federal Tribunal judgment, but that the ICAS Board wished to remind the Parties that it "*remain*[s] *independent from the Parties and cannot be involved in the arbitration process, which shall be conducted in accordance with the applicable regulations*."

87. On 27 January 2021, the Athlete and FINA jointly nominated Prof. Bernard Hanotiau, Attorney-at-Law in Brussels, Belgium, as arbitrator. They proposed, moreover, that the presiding arbitrator be appointed by the co-arbitrators, rather than by the President of the Appeals Arbitration Division.

88. On 28 January 2021, WADA was invited to comment on the Respondents' proposal with respect to the appointment of the presiding arbitrator, and it did so, opposing it.

89. On 29 January 2021, the CAS Court Office, noting lack of consensus among the parties to depart from the default procedure at Article R54 of the CAS Code, confirmed that the presiding arbitrator would be appointed by the President of the Appeals Arbitration Division.

90. On 5 February 2021, pursuant to Article R54 of the 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 composed as follows:

President: Dr. Hans Nater, Attorney-at-Law in Zürich, Switzerland

Arbitrators: Prof. Bernard Hanotiau, Attorney-at-Law in Brussels, Belgium
Prof. Jan Paulsson, Attorney-at-Law in Manama, Bahrain

91. On 9 February 2021, the Parties submitted comments on their preferred procedural approaches for the continuation of the procedure, including on questions of the repetition of the taking of evidence and the manner in which the Panel should address preliminary objections submitted by the Athlete before the initial (annulled) proceedings.

92. On 10 February 2021, the Athlete drew attention to certain disclosures made by the President of the Panel in his "Statement of Disclosure" accompanying his Acceptance and Statement of Independence form. Specifically, the Athlete requested that the President confirm that he "*has not been appointed in any other matter by* [WADA] *within the past three years.*" In a letter of the same date, the CAS Court Office advised the parties that the President of the Panel confirmed the same.

93. On 11 February 2021, WADA and the Athlete each requested leave to provide additional comments to the other's submission of 9 February 2021, and the CAS noted that the requests would be forwarded to the Panel for a decision.

94. On 12 February 2021, the Parties were advised that the Panel granted them leave to submit additional comments by 15 February 2021. The Appellant and both Respondents each submitted comments between 14–15 February 2021.

95. On 15 February 2021, the Panel issued procedural directions with respect to certain of the Athlete's preliminary objections, raised in the initial (annulled) proceedings and maintained in the present one, along with directions with respect to their future conduct:

- **Objections on Admissibility**: with respect to questions as to the admissibility of the appeal by reason of alleged tardiness of WADA's Appeal Brief and a conflict of interest by Mr. Young and one other member of WADA's legal counsel, the Parties were invited each to file a brief, complementary submission addressing these issues by 19 February 2021.

- **Complementary Submissions on the Merits**: within 15 days of the issuance of the Panel's decisions on the foregoing issues, the Parties were invited to file 20-page submissions on the merits of the dispute.

- **Hearing**: the Panel proposed that a hearing, by videoconference, be held in the week of 26 April 2021.

- **Witness Examination**: the Panel noted the Parties' concerns with respect to the taking of evidence from certain witnesses, and indicated that it would issue further directions in due course.

96. On 17 February 2021, the Athlete provided comments with respect to the Panel's procedural directions, among other things requesting a short extension with respect to the complementary submission on the Athlete's objections on admissibility.

97. On 18 February 2021, the Panel extended this deadline to 23 February, and invited WADA's and FINA's comments as to the remainder of the Athlete's letter.

98. On 19 February 2021, WADA and FINA submitted their comments.

99. On 24 February 2021, the CAS confirmed receipt of the Parties' submissions and advised them that the Panel was deliberating as to the Athlete's objections on admissibility.

100. On 25 February 2021, the Athlete requested clarification as to an earlier request to put on record the Parties' submissions before the Swiss Federal Tribunal.

101. On 26 February 2021, the Panel, by means of a letter from the CAS Court Office and *inter alia*:

1) dismissed (with reasons to follow in the final award) the Athlete's objections on admissibility. Specifically, the Panel affirmed that WADA's Appeal Brief had been timely filed in accordance with R49 and R51 of the CAS Code, and (ii) determined that neither Mr. Young nor Mr. Rychener, both of WADA's legal counsel, were considered to have a conflict of interest with FINA;

2) invited the Athlete to submit a copy of his filing to the Swiss Federal Tribunal, thereby placing it on the record;

3) extended the deadline for the Parties' merits submissions to 19 March 2021; and

4) taking into account the Parties' availabilities, confirmed a video hearing would be held in the week of 25-28 May 2021 and requested the Parties to provide a complete list of hearing witnesses.

102. On 5 March 2021, the Panel expressed its expectation that each Party would take the necessary steps to secure the participation of relevant witnesses.

103. On 10 March 2021, the CAS advised the Parties of the appointment of Mr. Philipp Kotlaba, Attorney-at-Law in Washington, D.C., USA, as *ad hoc* clerk.

104. On 15 March 2021, the CAS acknowledged receipt of the Athlete's transmission of the Swiss Federal Tribunal file, which would be shared with the Panel.

105. On 19 March 2021, the CAS received the Parties' complementary submissions on the merits, as well as a hearing witness list from the Appellant and First Respondent.

106. On 24 March 2021, WADA provided an e-mail update as to the potential willingness and availability of the BCA to testify. In a letter enclosed to its e-mail, WADA alleged

a number of incidents of harassment and intimidation of the BCA, during the initial CAS proceedings and after them, and alleged that "*the previous protective measures put in place did nothing to protect her and her family, and did not deter Mr. Yang from posting confidential material and publicly attacking her*." WADA accordingly sought leave from the Panel to file a motion for (new) protective measures to "*protect the BCA and DCO from further intimidation or disclosure of confidential information*."

107. On 25 March 2021, the CAS acknowledged receipt of WADA's e-mail and letter, and invited the Respondents to provide any comments by 29 March 2021, following which the Panel would decide on the request for leave to file a motion for protective measures.

108. On 29 March 2021, the Athlete and FINA submitted their comments, *inter alia* denying that the Athlete had engaged in intimidation or harassment of witnesses, or of the disclosure of confidential information. While not opposing the institution of protective measures per se, the Athlete additionally requested that the Panel: (i) take measures to secure the participation of the DCO, BCA, and DCA; and (ii) confirm that the Parties will be offered an adequate opportunity to question them.

109. The CAS Court Office acknowledged receipt on 30 March 2021.

110. In a letter dated 7 April 2021, the CAS Court Office, on behalf of the Panel, advised the Parties with respect to a number of outstanding procedural issues, *inter alia* requesting that the Parties privately liaise and agree on a video hearing service and a joint hearing schedule. The Panel also granted WADA's motion for leave to file, while noting:

> *"As a matter of course, the Panel fully expects all parties to refrain from any such harassment, and to take all appropriate steps to ensure its non-occurrence."*

111. On 8 April 2021, the Athlete provided comments on the organization of the hearing, requested additional time for opening and closing statements, and requested leave to reply to WADA's motion, once submitted. The Athlete also asked the Panel to confirm that the CAS Hearing Centre in Shanghai, China would be made available for the hearing, in particular "*for the examination of the witnesses located in China*."

112. On 12 April 2021, WADA submitted its motion for protective measures.

113. On 13 April 2021, the Panel, *inter alia*, noted the Athlete's comments of 8 April 2021 and made minor adjustments to the hearing schedule in order to accommodate a member of the Athlete's legal team. It declined, however, to extend time limits for opening and closing statements or to direct "*any witness to testify from a particular location*." If necessary, the CAS could however make available its Shanghai hearing center to any witness needing a remote location for providing testimony.

114. On 16 April 2021, the Athlete provided his reply. While denying the factual allegations of WADA insofar as they sought to implicate the Athlete or his associates in witness intimidation, unauthorized disclosures, etc., he nevertheless undertook the following:

> *"For the sake of good order, the Athlete nevertheless undertakes that he will not disclose any confidential information or any part of the arbitral record for the duration of the arbitration and will continue not to engage in or encourage any intimidation, harassment or other prohibited conduct against any individual involved in the proceedings, including in particular the DCO and BCA."*

115. Also on 16 April 2021, FINA provided its comments on the motion, and counsel for the Athlete informed the CAS Court Office that the Parties had agreed to engage a third-party service provider to assist with the logistics of the hearing.

116. On 19 April 2021, the CAS confirmed receipt of the Athlete's reply with respect to WADA's motion for protective measures.

117. On 21 April 2021, the CAS informed the Parties that the Panel had carefully considered the Parties' respective submissions, as well as the Athlete's undertaking, and had decided as follows:

> *"The Panel relies on the Parties' best efforts to ensure that the confidentiality of the proceedings is respected and safeguarded for the entire duration of the procedure, and after its conclusion, as required by Article R59 (7),* in fine*, of the Code. At the same time, the Panel reiterates its appeal to the responsibility of the Parties to resolve all questions and issues related to the appearance of the Witnesses…"*

118. In view of this, the Panel determined that it would "*not issue any specific order in response to WADA's application for protective measures.*"

119. On 10–11 May 2021, the Parties respectively submitted: (i) a list of hearing attendees; (ii) their availability for a pre-hearing test session; (iii) information relating to hearing bundles and interpreters; and (iv) in respect of the Athlete, a summary of all procedural objections and motions submitted to date.

120. By letter of 13 May 2021, the Athlete informed the CAS Court Office that "*the Parties have liaised and agreed to proceed*" with the third-party service provider and that "*the associated costs will be borne by the Parties*."

121. On 17 May 2021, the CAS enclosed for the Parties' attention and signature an Order of Procedure, accompanied by a hearing schedule, hearing protocol, and terms and directions regarding witness testimony.

122. On 18 May 2021, the Athlete reiterated an earlier request for a copy of the audio recording of the DCO's former deposition, which had taken place in Stockholm, Sweden during the proceedings before the First Panel (on 5 September 2019).

123. On 19 May 2021, the CAS Court Office noted that the deposition of the DCO was only to be transcribed by a court reporter and that this had been sent to the Parties on 17

September 2019. The letter also noted the Parties' confirmation of the execution of a contract with the external service provider engaged by the Parties for the management of the hearing.

124. The Appellant and the First Respondent each provided signed copies of the Order of Procedure on 21 May 2021, subject, in the Athlete's case, to certain remarks and edits including an objection to the publication of the Award. The CAS Court Office responded in a letter of the same date, and in respect of the objection, invited the other Parties' comments.

125. FINA signed the Order of Procedure on 22 May 2021.

126. On 23 and 24 May 2021, WADA and FINA respectively objected to the Athlete's request that the Award be kept confidential.

127. From 25–27 May 2021, a hearing was held under the auspices of the Court of Arbitration for Sport, by videoconference. At the outset of the hearing, the President of the Panel referred to the Athlete's procedural objections and acknowledged that the Parties reserved their rights.

128. In addition to the Panel; Mr. Philipp Kotlaba, *Ad hoc* Clerk; Mr. Giovanni Maria Fares, Counsel to the CAS; and technical staff, the following persons attended the hearing:

For WADA:

(1) Mr. Julien Sieveking;
(2) Ms. Tharinda Puth;
(3) Mr. Richard Young;
(4) Mr. Brent Rychener;
(5) Ms. Suzanne Crespo;
(6) Ms. Ying Cui;
(7) Mr. Roger Holtzen;
(8) Mr. Chad Thompson;

For the Athlete:

(1) Mr. Sun Yang (the Athlete);
(2) Mr. Christopher Boog;
(3) Mr. Philippe Bärtsch;
(4) Mr. Philip Wimalasena;
(5) Mr. Fabrice Robert-Tissot;
(6) Mr. Ning Fei;
(7) Ms. Fang Zhao;
(8) Mr. Shengchang Wang;
(9) Mr. Ruowen Wang;
(10) Mr. Ruochen Yao;
(11) Mr. Luka Groselj;

(12) Mr. Marco Vedovatti;
(13) Mr. Alvin Tan;
(14) Mr. Alexander Laute;
(15) Mr. Andrew Dawrant (Interpreter);
(16) Ms. Chongfang "Carol" Fan (Interpreter);
(17) Mr. Rex Chen (Interpreter);

For FINA:

(1) Mr. Justin Lassard;
(2) Mr. Serge Vittoz.

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

(1) The DCO;
(2) The BCA;
(3) Mr. Stuart Kemp;
(4) Mr. Tudor Popa;
(5) Mr. Neal Soderstrom;
(6) The DCA;
(7) Mr. Cheng Hao;
(8) Dr. Ba Zhen;
(9) Dr. Han Zhaoqi;
(10) Prof. Pei Yang;
(11) Ms. Yang Ming;
(12) Mr. Sun Yang.

130. All witnesses were instructed by the President of the Panel to tell the whole truth and nothing but the truth, subject to penalties of perjury under Swiss law. The Parties and the Panel had the opportunity to examine and cross-examine the witnesses and experts in accordance with the schedule and witness protocol.

131. The Parties were given the opportunity to present their cases, to make their submissions and arguments, and to answer questions asked by the Panel. At the opening of the hearing, the Parties confirmed that they had no objection to the composition of the Panel. No Party objected to the procedure adopted by the Panel. The Respondents reserved their rights in respect of certain procedural objections, which the President of the Panel noted for the record.

132. On 28 May 2021, pursuant to their oral agreement at the hearing, the Panel invited the Parties to provide written comments on the relevance for these proceedings of the CAS panel decision in *Salmond v. IIHF*, their submissions on costs, and corrections to the hearing transcript.

133. In a letter dated 31 May 2021, the Athlete *inter alia* requested that the Panel render its final Award no later than 25 June 2021, in light of the deadline for athletes' registrations for the 2021 Summer Olympic Games. The Parties were thereafter informed, on 3 June 2021, that the time limit to communicate the Award had been extended to 25 June 2021.

134. On 7 June 2021, the Parties submitted their comments on the *Salmond* award.

135. On 10 June 2021, the Appellant and the First Respondent filed, within the time-limit granted by the Panel, their submissions on costs. FINA followed suit on 18 June 2021, albeit beyond the time-limit granted by the Panel.

VI. POSITIONS OF THE PARTIES AND REQUESTS FOR RELIEF

136. The positions of the parties may be essentially summarized as below. This section principally reproduces the parties' arguments in their complementary submissions of 23 February 2021, on questions of admissibility, and of 19 March 2021, on the merits.

A. FIRST RESPONDENT

137. The Athlete's submissions can be summarized in the following arguments (adopted in part from the summary provided by Mr. Sun Yang in his complementary submissions on admissibility and the merits, portions of which are reproduced below *verbatim*):

On admissibility

- *"WADA failed to submit its Appeal Brief within the time limit stipulated in Art. R51 CAS Code. Since no Appeal Brief was filed within the time limit, the Statement of Appeal is deemed to be withdrawn. Therefore, the appeal is inadmissible and the Panel lacks jurisdiction* ratione temporis.

- *WADA's counsel when purportedly filing the Statement of Appeal and the Appeal Brief was under a severe conflict of interest owing to Mr Young (and, by extension, his partner, Mr Rychener) serving on FINA's Legal Committee until his resignation on 1 February 2019, a mere two weeks prior to the purported filing of the Statement of Appeal. Counsel was immediately put on notice of such conflict, but refused to step down. As confirmed by the unrebutted expert evidence of Prof. François Bohnet, WADA's counsel did not have the requisite power to represent WADA when making the submissions in question. Consequently, WADA's Statement of Appeal and Appeal Brief are inadmissible and the Panel lacks jurisdiction to hear the appeal."*

On the merits

- *"This case concerns the blatant failure of a Sample Collection Authority (IDTM) to comply with the International Standard for Testing and Investigations established by WADA for the purpose of doping controls and sample collection.*

- *This regime involves (i) infringement of athletes' fundamental human rights to physical integrity, privacy and dignity and (ii) subjecting them to strict liability. Both are permissible only if there is (i) a clear legal basis authorizing restrictions of their rights and setting out the conditions under which such restrictions may*

lawfully be imposed, (ii) those rules are strictly complied with by WADA and its agents, such as IDTM, (iii) the athlete consented to that regime, as well as that (iv) any resulting restriction upon their fundamental rights is necessary and proportionate to the legitimate aim being pursued.

- *In the present case, the purported sample collection came nowhere near meeting these standards: instead, mandatory rules set by WADA itself in the ISTI were breached. The Athlete's rights were gravely violated and the sample collection attempt in its entirety was null and void. The Athlete cannot therefore be found to have committed an Anti-Doping Rule Violation ("ADRV").*

- *[W]hat is at issue is an attempted doping test by individuals (i) unable to provide evidence of their accreditation in accordance with the ISTI, (ii) without the requisite medical qualifications to take blood samples and (iii) who, in addition, conducted themselves in an utterly unacceptable manner and in violation of the Athlete's fundamental rights, including by bringing along persons who had no right to be anywhere near a purported doping test and surreptitiously taking pictures and videos of the Athlete during the sample collection process. . . ."*

- First, with respect to the aforementioned failure of the Sample Collection Personnel to "provide evidence of their accreditation in accordance with the ISTI," the Athlete elaborates:

    - Article 5.3.3 ISTI requires Sample Collection Personnel to provide "*official documentation . . . evidencing their authority to collect a Sample from the Athlete*." Article 5.4.1(b) further requires that athletes be informed "*of the authority under which the Sample collection is to be conducted.*" Finally, Article 5.4.2(b) requires the DCO or Chaperone to "*[i]dentify themselves to the Athlete using the documentation referred to*" in Article 5.3.3.

    - Read together, these provisions mean that the IDTM team was obligated to provide two pieces of evidence: first, a "Letter of Authority" from FINA appointing IDTM as its agent, and second, an "Authorization Letter" for the Sample Collection Personnel on an *individual* level, confirming that they are agents of IDTM, and have the delegated authority (and qualifications) to test the Mr. Sun Yang *specifically*. On 4 September 2018, the IDTM team provided a Letter of Authorization, but not an Authorization Letter. Moreover, the DCO and BCA had incomplete identification, and the DCA did not have [any] identification at all. Therefore the Athlete had no way of knowing that he had actually been selected to undergo testing, nor that the Sample Collection Personnel were legitimately acting on behalf of IDTM, and were qualified to do so, on the night in question.

- Second, on "*requisite medical qualifications*," the Athlete asserts that the BCA lacked the necessary qualifications, since she lacked a valid evidence of her ability to take blood samples. Article E.4.1 ISTI requires that procedures involving the

drawing of blood be consistent with "*local standards and regulatory requirements*." Under applicable Chinese law, this required that the BCA carry a valid Practicing Nurse Certificate. She did not have one on hand.

- Third, the Athlete submits that the DCA, whose lack of appropriate identification should have disqualified him from taking part in the Sample Collection to begin with, further violated his fundamental rights by surreptitiously taking photographs of him and his surroundings without notification or permission.

- The above conclusion, the Athlete adds, cannot be displaced by WADA's reference to the existence of a customary practice by IDTM (such as requiring Sample Collection Personnel to carry with them only a Letter of Authority from FINA, and not an Authorization Letter listing the specific mission and individual team members). Customary practice cannot override from the mandatory requirements of the ISTI.

- *"The consequence of IDTM's failure to observe the mandatory ISTI rules is that the sample collection attempt was null and void, because IDTM could not validly assume jurisdiction over the Athlete given that (i) Sample Collection Personnel were unable to show their authority to test the Athlete on that date, (ii) two out of three members of Sample Collection Personnel were unable to prove their affiliation with IDTM and (iii) the BCA was not qualified to collect blood samples.*

- *It follows that the Athlete could not have violated Articles 2.3 and 2.5 FINA DC for this reason alone: in the absence of a "Sample Collection Session" or a "Sample" within the meaning of the WADC and the ISTI, the Athlete could neither have failed to submit to sample collection (Article 2.3 FINA DC) nor tampered with the doping control process (Article 2.5 FINA DC).*

    - *As regards Article 2.5 FINA DC, there was moreover no (attempted) interference with the doping control process by the Athlete: this is confirmed by the conduct of the DCO who (i) never "ran after" anyone or acted surprised, but rather accepted that the testing attempt had failed for lack of proper notification and thus let further matters take their course and (ii) never properly advised the Athlete of the consequences of keeping the purported blood sample, as would have been her obligation. To make matters worse, the Athlete was led to believe by the DCO that everyone was in agreement that the attempted sample collection had been aborted and that the only option was to destroy the case in which the blood sample was put, so that the DCO could 'take the equipment back', as she claimed she was obliged to (but which she ultimately left on site). And finally, the Sample Collection Personnel acknowledged in a written document signed at the end of the sample collection attempt that the latter had been abandoned because the doping officers did not have the proper accreditations to conduct that test. The Athlete was not given an indication that he was regarded as having willfully failed to subject himself to an otherwise valid process. The Athlete*

clearly had no (fraudulent) intent to (attempt to) tamper with the doping control process; he followed the instructions of his medical support staff and in doing so was encouraged by the DCO, who instead of warning him against the proposed course of action necessary to keep his blood samples actually induced it by (wrongly) claiming that she needed to take the casing materials with her and then stood by and watched as matters unfolded.

- *As regards Article 2.3 FINA DC, at a minimum, the Athlete had compelling justification to refuse to continue the attempted sample collection. This follows from an application of the basic rules and principles that govern the application of the ISTI and the WADC, on which the FINA DC are based. . . . In the present case, the procedure foreseen in the ISTI was not complied with in terms of required documentation (team as a whole and DCA and BCA individually), actual qualification (BCA) and required standards of professional conduct (whole team)."*

- In conclusion, the sample collection attempt by IDTM beginning on 4 September 2018 was null and avoid, such that no consequences may be imposed on the Athlete.

- *"Alternatively, and in any event, the Athlete's conduct was justified in the circumstances, including the conduct displayed by and the severe rule violations committed by IDTM Sample Collection Personnel, and he cannot be found to have committed an ADRV. In any event, and considering the very severe transgressions by IDTM Sample Collection Personnel in this case, the imposition of any sanctions on the Athlete would violate the principle of proportionality."*

* * *

138. In his request for relief, the Athlete requests the Panel to rule that:

(i) the appeal of WADA is inadmissible;

(ii) CAS has no jurisdiction over the present matter;

(iii) the appeal of WADA shall be dismissed;

(iv) Mr. Sun Yang shall be granted an award for his legal costs and other expenses pertaining to these appeal proceedings before CAS; and

(v) based on his submission on costs of 10 June 2021, that the CAS bear the costs of the proceedings, that WADA bear its own costs and expenses, and that WADA pay a "fair contribution" toward the Athlete's costs and expenses.

B. SECOND RESPONDENT

139. FINA's submissions can be summarized in the following arguments (adopted in part from the summary provided by FINA in its complementary submissions on admissibility and the merits, portions of which are reproduced below *verbatim*):

On admissibility

- *"The clear wording of Article 13.7.1 §1 FINA DC, read together with Article 13.2.3 §1 FINA DC, leads to the conclusion that each 'party entitled to appeal but which was not a party to the proceedings that led to a decision being appealed', including WADA, is bound by the fifteen-day period to request the case file (lit. b) should it wish to benefit from the extended time limit to file its appeal upon receipt of the case file. Nothing in the wording or the structure of this provision, or any other provision of the FINA DC, suggests that WADA would have any discretion to request for the case file at a different and undefined time. . . . As WADA did not request the case file within the fifteen-day time limit in the case at hand, it cannot benefit from the extended deadline applicable in such a case.*

- *Based on the literal interpretation of Article 13.7.1 §2 (a) FINA DC ('any other party'), the original Panel concluded that WADA benefits from an additional 21-day deadline after FINA's time limit to appeal would have expired. This – simple – literal interpretation is in contradiction with (I) the use of the word 'similarly' in Article 13.7.1. §3 FINA DC which demonstrates that FINA and WADA are put in a similar situation in this particular case and (ii) the fact that FINA is not a 'party' referred to in Article 13.7.1 §2, as it is subject to a specific and separate filing deadline as per Article 13.7.1 §3 FINA DC."*

On the merits

- *"FINA's position as to the merits of the case is first and foremost that the Sample Collection Personnel did not show proper identification/authorization documentation to the Athlete during the Sample Collection Session, which lead to the invalidity of the latter, irrespective of the nature of the events which took place subsequently the night in question."*

- As the interpretation of Article 5.3.3 ISTI is at the heart of the dispute, and considering that neither the FINA DC nor the ISTI itself contain methods or rules to be used for their interpretation, Swiss law applies. In this regard, FINA cites to the arbitral award in CAS 2013/A/3047, *FC Zenit St. Petersburg v. Russian Football Union (RFU)*, which identified four methods of legal interpretation permitted under Swiss law: the grammatical, systematic, historical, and teleological methods.

- In this regard, FINA submits that although various WADA Guidelines relevant in the context of this dispute may not be directly applicable, they should be used to cast light upon the interpretation of the ISTI. The First Panel failed to engage with the

WADA Guidelines, which represent WADA's own interpretation of its regulations, including the ISTI. As recognized by other CAS panels, the Guidelines are a key resource.

- Each of the four aforementioned methods of interpretation support the Respondents' position, FINA asserts. Teleologically, the purpose of Article 5.3.3 is to provide athletes with assurances that there was a clear link between the Sample Collection Personnel, the Sample Collection Authority, and the Testing Authority. Historically, the 2003 version of the ISTI was "*absolutely clear*" in its requirement that the individual members comprising the Sample Collection Personnel each were required to have official documentation naming the anti-doping organization which authorized them.

- *"In view of all the above, as well as the development made in its Answer, FINA considers that the minimum authorisation documents which shall be carried by the members of the Sample Collection Personnel are, respectively, as follows.*

    - *The DCO shall carry: a Doping Control Authorisation Letter from the Testing Authority which identify the DCO by name and provides all the details of the test. The DCO shall carry complementary identification, including name, photograph and expiry date.*

    - *The BCO shall carry: an Accreditation/Authorisation Letter from the Sample Collection Authority including a description of his/her assigned duties and the expiry date of the accreditation. The BCO shall also carry an official documentation attesting his/her professional training in the collection of blood samples in accordance with the local standards.*

    - *The Chaperone shall carry: an Accreditation/Authorisation Letter from the Sample Collection Authority including a description of his/her assigned duties and the expiry date of the accreditation."*

- Ensuring that the Athlete is provided evidence that the above conditions have been met respects the "*normative and the ratio legis*" of the FINA DC.

* * *

140. In its prayer for relief, FINA requests the Panel to:

(i) declare that the appeal of WADA is inadmissible;

(ii) declare that CAS has no jurisdiction to decide on the appeal filed by WADA;

(iii) dismiss the appeal filed by WADA;

(iv) confirm the decision rendered on 3 January 2019 by the FINA Doping Panel in the case of Mr. Sun Yang;

(v) order WADA to pay the full amount of the CAS arbitration costs, if any; and

(ii) 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.

C. APPELLANT

141. WADA's submissions can be summarized in the following arguments (adopted in part from the summary provided by WADA in its complementary submissions on admissibility and the merits, portions of which are reproduced below *verbatim*):

On admissibility

- *"FINA DC 13.7.1 gives FINA a deadline to appeal up to 21 days after the last day any other party (except WADA) could have appealed, and gives WADA an additional 21 days after FINA's deadline. Since it is undisputed that CHINADA could have appealed at least up to 28 January 2019, that means FINA could have appealed up to 18 February 2019, and WADA's deadline to appeal was 21 days after the last day FINA could have appealed, or 11 March 2019. Including the 20-day extension granted by CAS, WADA's deadline to file its appeal brief was 10 April 2019. WADA timely filed its appeal brief on 3 April 2019."*

- Concerning the Respondents' assertion that the Appeal Brief was not filed by authorized counsel owing to a conflict of interest: *"The Respondents concede that disqualification of a party's chosen counsel would be warranted, if at all, only in 'compelling circumstances.' As stated in a case relied upon by Mr. Yang, disqualification of counsel '[cannot be based] on mere appearances since to prevent a party from having access to its chosen counsel cannot depend upon a nebulous foundation, but rather must flow from clear evidence of prejudice.' The Respondents fail to meet this heavy burden, as they have not produced any evidence that Mr. Young obtained confidential information relevant to the issues in this case.*

- *[T]he facts in this case do not support any finding that Mr. Young had or has a conflict of interest that prevents his representation of WADA in this matter, and certainly do not present the 'compelling circumstances' that would justify this Panel's taking the extraordinary step of disqualifying a party's chosen counsel for the first time in the history of CAS."*

On the merits

- *"This case involves a sample collection process carried out by International Doping Tests & Management AB ("IDTM") as the Sample Collection Authority for FINA. Prior to this sample collection, IDTM had served as the Sample Collection Authority for FINA and other anti-doping organizations for many years. During the years 2016 through 2018, IDTM acted as the Sample Collection Authority for the*

collection of more than 60,000 samples recorded in WADA's ADAMS database. For FINA alone, IDTM collected more than 13,500 samples during 2016-2018.

- *[E]ven before taking a hammer to the blood container, the Athlete and his support team interfered with and obstructed the DCO's performance of her doping control duties. The Athlete's egregious behavior during the sample collection process—including failing and refusing to provide a urine sample, preventing the DCO from taking away his blood samples, breaking the blood sample container and ripping up the Doping Control Form that he had signed—violates the Code as incorporated in FINA's Doping Control Rules.*

    - Article 2.5 FINA DC: "*It is important to note the scope of the Tampering article. It prohibits any interference or obstruction, as well as any attempt to interfere or obstruct, a Doping Control official at any point in the Doping Control process. The Code and FINA's Rules define "Doping Control" broadly to include all steps and processes from test planning through the disposition of any appeal, including all processes related to "Sample collection and handling." So the issue here is whether the Athlete obstructed or interfered, or attempted to obstruct or interfere, with any aspect of the sample collection process. In this case, the Athlete committed several acts of tampering by interfering with and obstructing the DCO's attempts to complete the sample collection process.*"

    - Article 2.3 FINA DC: "[T]*he Athlete failed and refused to provide a urine sample despite the DCO's repeated requests, and the Athlete and his entourage refused, without compelling justification, to allow the Athlete's blood samples to be taken by the DCO.*"

- *"The Athlete's primary defense throughout this proceeding has been that he was not obligated to submit to sample collection because the IDTM team allegedly had not complied with the notification requirements contained in the ISTI. Although the relevant provisions of the ISTI could fit on a single page, the Athlete devoted more than 70 pages of his CAS brief, and nearly all of his closing argument in the CAS hearing, to various convoluted arguments about how the ISTI should be interpreted. These theories of interpretation were each designed to show that the ISTI does not really mean what it says. All of the Athlete's arguments lack merit."*

- *The term 'Sample Collection Personnel' is defined in the ISTI as, 'A collective term for qualified officials authorized by the Sample Collection Authority to carry out or assist with duties during the Sample Collection Session' (emphasis added). Thus, under the ISTI, the IDTM sample collection team, as a collective unit, was required to provide official documentation evidencing the team's authority to collect a sample from the Athlete. The IDTM team satisfied this requirement."*

* * *

142. WADA's prayer for relief requests the Panel to rule that:

(i) the appeal of WADA is admissible;

(ii) the Decision of the FINA Doping Panel rendered on 3 January 2019 is set aside;

(iii) 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 with credit for the period of ineligibility served;

(iv) 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; and

(v) awarding to WADA its arbitration costs and an appropriate contribution towards its legal fees and expenses incurred in connection with the proceedings.

* * *

143. The following sections, on Jurisdiction, Admissibility, and the Merits, set out the Parties' arguments in greater detail, followed by the Panel's analysis. The Panel's recapitulation of the Parties' positions serves the purpose of synopsis only and does not necessarily include every submission advanced by the Parties in their pleadings. The Panel has, however, considered all arguments advanced before it in deciding the present Award.

VII. JURISDICTION

144. Article R47 of the 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."*

145. CAS jurisdiction in these proceedings resulted from Article 13.1 of the FINA Doping Control Rules ("FINA DC"), which provided that decisions made under the FINA DC, i.e., including those of the FINA Doping Panel, "*may be appealed as set forth below in DC 13.2 through 13.7 or as otherwise provided in these Anti-Doping Rules, the* Code

or the International Standards." Article 13.2 of the rules in force at the time WADA initially brought its appeal[3] stated, in relevant part:

> *13.2 "A decision that […] no anti-doping rule violation was committed […] may be appealed exclusively as provided in this DC 13.2 – 13.7.*
>
> *13.2.1 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."*

146. The Athlete in this case is an International-Level Athlete, and it is therefore possible to appeal the decision of the FINA Doping Panel in accordance with Article 13.2.1 of the FINA DC.

147. The Panel notes that, although certain of the Respondents' preliminary objections have been characterized as concerning both "*admissibility*" and "*jurisdiction* ratione temporis," these objections in substance challenge the admissibility of the Appeal Brief; they are accordingly treated in the section on Admissibility. As far as jurisdiction is concerned, no party contests the availability or application of Article 13.2 of the FINA DC as such.

148. The Panel is satisfied that Article 13.2 FINA DC provides for appeal to CAS in cases, such as the present one, concerning an appeal from a decision by the FINA Doping Panel in respect of alleged anti-doping rule violations by an International-Level Athlete. Accordingly, the Panel deems that the CAS has jurisdiction in this appeal, as confirmed by the Parties' signature of the Order of Procedure.

VIII. ADMISSIBILITY

A. THE RESPONDENTS' POSITION

149. The Respondents have raised a number of preliminary objections in these proceedings, namely that WADA's appeal is inadmissible (and the CAS lacks jurisdiction) because:

- the Appeal Brief was not timely filed; and
- WADA's appeal was not filed by counsel with authority to represent.

150. In addition, the First Respondent contends that certain procedural decisions by the Panel in connection with his objections violated his due process rights, namely the right to be

[3] Namely, the 2015 FINA DC. See paragraphs 206 et seq. for a discussion of the evolution of the FINA DC and the applicable law.

heard and the right to equal treatment. The Athlete's summarization of his position in this respect is hereby reproduced for the record:

> *"The Panel has decided the Athlete's challenge to admissibility and jurisdiction without having considered the Athlete's arguments set out in the Swiss Supreme Court proceedings, although the Athlete had requested on numerous occasions that those submissions be admitted to the file and considered by the Panel prior to making a decision; and*
>
> *The Panel decided to exclude new evidence and new arguments and, at the same time, limited the length of the merits submission to 20 pages (12 pt font, double spaced), which rendered it impossible for Respondent 1 to properly present his case. This curtailment of the Athlete's due process rights was exacerbated by insufficient time at the hearing to make adequate factual and legal submissions. In particular, the Panel limited the Opening Statements to 15 minutes, the Closing Arguments to 60 minutes and the overall duration of the hearing to two days only, which is not sufficient."*

1. Objection as to the timeliness of the Appeal Brief

151. The Athlete submits that the present appeal is inadmissible on two grounds. The first of these is the alleged tardiness of the submission of WADA's Appeal Brief. The nature of the challenge will be more understandable if reference is had to the following provisions.

152. Article R51 of the CAS Code requires that:

> *"Within ten days following the expiry of the time limit for the appeal, the Appellant shall file with the CAS Court Office a brief stating the facts and legal arguments giving rise to the appeal* […] *The appeal shall be deemed to have been withdrawn if the Appellant fails to meet such time limit* […]*"*

153. The "time limit for the appeal," in this case, is governed by the FINA DC. Specifically, Article 13.7 FINA DC, titled "Time for Filing Appeals," provides:

> ***DC 13.7.1 Appeals to CAS***
>
> *"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."*

154. Of note, WADA also received a 20-day extension of the usual time limit in a letter from the CAS on 22 February 2019.

155. Taking into account the applicable law and WADA's 20-day extension, the Respondents submit that the Appeal Brief should have been either 27 February 2019 or, in the alternative, 20 March 2019. Since the Appeal Brief was filed on 3 April 2019, it was tardy under either scenario. Per Article R51 of the CAS Code, the appeal should be "*deemed to have been withdrawn*."

156. The first scenario is calculated as follows:

- on 3 January 2019, the FINA Doping Panel issued its decision;
- on 7 January 2019, WADA was provided with the "complete case file," triggering the 21-day time limit for filing an appeal (notably, the Athlete argues that the audio recording and CCTV video cited as missing by WADA are not part of a "complete case file," because neither is a "document" necessary to understand the decision);

- on 28 January 2019, twenty-one days passed since WADA's receipt of the complete case file, triggering the deadline;
- per Article R51 of the CAS Code, WADA had "ten days" more to submit its Appeal Brief, i.e., until 7 February 2019; and
- taking into account the CAS's 20-day extension, the final deadline fell on 27 February 2019.

157. The alternative deadline is calculated as follows: 7 January 2019 + 21 days (other parties' deadline) + 21 days (FINA and WADA deadlines) + 10 days + 20 days = 20 March 2019.

* * *

158. Two further points of divergence are to be noted. First, even acknowledging WADA's argument that it had *not* received the complete case file on 7 January 2019, the Respondents submit that the 21-day deadline would nevertheless bind WADA unless it had requested the outstanding documents within 15 days of 7 January 2019 (per Article 13.7.1 § 1(a)). WADA did not.

159. In response to WADA's assertion that the 15-day window does not bind it, the Respondents assert that WADA is undermined both by a textual reading of Article 13.7.1, and by its own conduct in other CAS proceedings. Indeed, WADA has previously acknowledged that it is bound by the 15-day time limit for requesting additional documents (in order to benefit from further extensions of time). The Respondents also deem WADA's references to the World Anti-Doping Code irrelevant, as the Code cannot circumvent the plain requirements of the FINA DC. Finally, allowing WADA to "*artificially*" extend its deadlines by citing incomplete documents—only *after* having submitted its Statement of Appeal—is "*against the principle of good faith*." At some point, "*there must be a limit*."

160. The second point of divergence, apparent also in the calculations at paragraphs 156 to 157, is that the Respondents consider FINA's and WADA's deadlines to run concurrently. They therefore reject WADA's claim that it benefits from an *additional* 21 days, beginning from the expiration of FINA's own, 21-day deadline to appeal, and submit that WADA's interpretation is contradicted *inter alia* by its own Statement of Appeal.

2. Objection as to WADA counsel's conflict of interest

161. The second ground for the Athlete's challenge on admissibility revolves around the contention that the Appeal Brief was not filed by counsel with the authority to represent WADA, owing to a conflict of interest on the part of its counsel.

162. In particular, the Athlete refers to the appointment of Mr. Richard Young to FINA's Legal Committee. The First Respondent raised the issue on 9 March 2019, when he wrote to Mr. Young, citing the latter's "*patent conflict of interest and breach of the applicable Rule of Professional Conduct*." (FINA sent a similar letter two days later.) But the issue goes back farther than that. In conversations beginning on 31 January 2019 with FINA's Executive Director, Mr. Cornel Marculescu, Mr. Young was told, "*You are independent but not to act against FINA.*" Later, in response to an e-mail from Mr. Young thanking him for confirming that FINA saw no conflict, Mr. Marculescu replied: "*Maybe my words were not adequate but I think a Committee member must respect the ethics code. You as a lawyer should know this.*" These exchanges, the Respondents submit, show that FINA neither "waived" the conflict nor did it downplay the existence of one.

163. The Athlete relies on an expert opinion attached to his challenge of Prof. François Bohnet, Professor at the Université de Neuchâtel, who concludes that a conflict exists given the nature of the FINA Legal Committee's work. Prof. Bohnet observes that:

- the FINA Legal Committee "*has global knowledge of the management of legal affairs in FINA (including possible proceedings before the FINA Doping Panel)*"; and

- it "*advises on matters referred to CAS* […] *which means that it is familiar with FINA's conduct of proceedings before the CAS (and possibly before the FINA Doping Panel).*"

164. These assertions are supported in a statement by Mr. Marculescu, attached to FINA's pleading on the same issue, in which Mr. Marculescu notes that FINA "*has from the very beginning opposed*" Mr. Young's retention by WADA in this matter. In terms of timing, the Athlete adds, Mr. Young served on the Committee for more than five years (2013–2019) and maintained his position until 1 February 2019, a "*mere two weeks prior to the purported filing of the Statement of Appeal*." His resignation is therefore insufficient to dispel the conflict of interest.

165. In short, Mr. Young's access to "*knowledge of FINA's legal strategy*," particularly in relation to the present proceedings, grants him, and by extension his colleagues, an illicit advantage. On that basis, Mr. Young's presence on WADA's legal team infringes the principle of equality of arms which this Panel is bound to uphold.

166. Swiss, U.S., and international law, in the Athlete's view, provide a remedy: the lawyer must withdraw from the case. Moreover, under Swiss law, a lawyer who is in such a conflict lacks the "*capacité de postuler*," i.e., the capacity to act. Mr. Young's signature on WADA's Appeal Brief is therefore void and the submission is inadmissible.

B. THE APPELLANT'S POSITION

167. WADA opposes both of the Appellant's objections to the admissibility of the appeal.

1. The Appeal Brief was filed on time

168. WADA submits that its Appeal Brief, filed on 3 April 2019, was timely.

169. As noted above, Article 13.7.1 § 1 FINA DC (set out in paragraph 153, above) generally provides that parties wishing to appeal have 15 days to "*request a copy of the complete case file from the body that issued the decision, including … 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*." So long as this is done, the 21-day time limit for filing an appeal only begins to run *after* the receipt of the complete case file.

170. First, as a preliminary matter, WADA submits that the file provided to it by FINA on 7 January 2019 was not "complete," insofar as it did not include (i) the audio recording of the hearing and (ii) a CCTV video from the Athlete's clubhouse. Given that the FINA Doping Panel hearing was without a written transcript, possession of the audio recording was key, as was the video. The video was requested on 4 February and received on 11 February 2019. The audio recording was requested on 19 February and (evidently) received on 21 February 2019.

171. Second, WADA, in contrast to the Respondents, submits that the 15-day deadline for requesting the complete file does not bind it. Indeed, it submits that the FINA DC specifically exclude WADA from the requirement that a party request the complete case file within 15 days of the decision against which appeal is sought in order to benefit from the extension of time which obtains (i.e., by triggering the 21-day time limit only upon actual receipt of the requested, "*complete case file*.")

172. WADA submits that its reading of the 15-day requirement is bolstered both by the text of the FINA DC rules and by the WADA Code. With respect to the FINA DC, the relevant heading introducing the rules for appeals by WADA in Article 13.7.1 notes "[t]*he above notwithstanding*," which in WADA's view excludes the application to it of the more general requirements—including the 15-day deadline for requesting the complete case file—which appear in the preceding section. The 15-day requirement governs the timing of appeals by "*any other party in the case*," but not WADA. This is also consistent with the WADA Code (the relevance of which, WADA argues, is grounded in the fact that FINA was under an obligation to adopt it verbatim into its own rules). The WADA Code does not provide any temporal conditions on WADA's ability to obtain the complete case file. Neither, therefore, does Article 13.7.1 § 2 FINA DC.

173. Third and finally, WADA takes the position that because its deadline for appeal only begins to run after FINA's expires, the Respondents have sold it short by 21 days. WADA considers the following deadlines to apply:

- *for all parties except FINA and WADA* – 21 days after the receipt of the decision by the appealing party, or 21 days after the "*receipt of the complete file*" (if requested within 15 days);

- *for FINA* – 21 days after the last day on which any other party (except WADA) could have appealed, or 21 days after the "*receipt of the complete file*"; and

- *for WADA* – 21 days after the last day on which any other party (including FINA) could have appealed, or 21 days after the "*receipt of the complete file*."

In other words, FINA's and WADA's deadlines for appealing do not run co-extensively; FINA first has 21 days to appeal, and only upon the expiry of that deadline does WADA's begin to run. This, too, is in line with the WADA Code.

174. WADA accordingly calculates that its 21-day deadline for filing the Appeal Brief would begin to run only after the expiry of either:

- under **Article 13.7.1 § 2(a)**, 21 days after receipt of the "*complete case file*," plus any applicable extension. Accordingly, the deadline for filing WADA's Appeal Brief is calculated as: 21 February 2019 (receipt of the audio recording) + 21 days + 20 days (CAS extension) = 13 April 2019; or

- under **Article 13.7.1 § 2(b)**, 21 days for an appeal by CHINADA (which, along with FINA and WADA, had that right), plus an *additional* 21 days for any appeal by FINA. Accordingly, the deadline for filing WADA's Appeal Brief is calculated as: 7 January 2019 (transmittal of decision) + 21 days (other parties' deadline) + 21 days (FINA's deadline) + 21 days (WADA's deadline, ordinarily) + 20 days (CAS extension) = 10 April 2019.

175. Under either scenario, WADA's Appeal Brief, dated 3 April 2019, was timely.

2. WADA's counsel does not have a conflict of interest

176. As a preliminary matter, WADA notes that the disqualification of a party's chosen counsel is warranted only in "*compelling circumstances*."

177. WADA adds that FINA is "*only a nominal respondent in this case*," and that the substantive issues at issue in these proceedings are in any event unrelated to FINA per se. FINA was named "*solely for the purpose of ensuring that any award against Sun Yang would be enforceable and to avoid any argument that FINA is an indispensable party*." It was also well aware at the time that Mr. Young joined the Committee that he has a long record (since 2000) of representing WADA, including at the CAS.

178. There is, in any event, no conflict of interest in this case. First, Mr. Young no longer sat on the Legal Committee at the time that the proceedings were instituted. Second, and in any case, the position did not entail access to information or insights that would prejudice the Respondents in these proceedings. Third, this was confirmed in Mr. Young's conversations with FINA around the time of his resignation.

179. The FINA Legal Committee, in WADA's view, is a purely advisory body. As noted by FINA's Executive Director, Mr. Cornel Marculescu, the Committee "*is usually not*

involved in proceedings with regard to anti-doping rule violations" and, as conceded by FINA itself, Mr. Young "*had not received any information from FINA with regard to Mr. Yang's case*."

180. Although Mr. Young was involved in the drafting of the World Anti-Doping Code both before and during his Committee membership (he was the lead drafter of the 2003 Code and its amendments in 2009, 2015, and 2021), the Respondents have not shown that Mr. Young's involvement entailed any special insights specific to this case, much less a conflict justifying his disqualification as counsel. Similarly, while Mr. Young likely did gain *general* knowledge of FINA's Anti-Doping Regulations, this falls short of specific insights or information, confidential or otherwise, as to doping proceedings against Mr. Sun specifically. Statements by the Athlete's legal expert, Prof. Bohnet, that it "could also be possible" that Mr. Young had access to information about this case is unsupported conjecture.

181. Finally, Mr. Young's conversations with FINA at the time confirm the absence of a conflict. In a call between Mr. Young and FINA's Executive Director, Mr. Cornel Marculescu, the latter "*informed Mr. Young that FINA saw no conflict in Mr. Young's representation of WADA*" in this case. WADA asserts that Mr. Young nevertheless resigned from the FINA Legal Committee prior to rendering any advice to WADA in this matter. At the time, Mr. Young:

> *"had not had any conversations with FINA, and possessed no information from FINA, regarding FINA's position with respect to the Doping Panel's decision or whether FINA intended to appeal from the Doping Panel's decision. . . . During the time that Mr. Young had served on FINA's Legal Committee, except for rare occasions . . ., the Legal Committee had nothing to do with whether FINA brought forward or prosecuted anti-doping rule violation cases."*

182. Specific details of Mr. Young's interactions with Mr. Marculescu are set out in a table listed in a "Supplemental Statement of Mr. Richard Young" dated 26 June 2019. The main thrust of these interactions, from WADA's perspective, is that although Mr. Marculescu was ambivalent or even antagonistic regarding Mr. Young's resignation from the Committee, he did not rebut Mr. Young's e-mails stating that his retention as counsel for WADA did not constitute a conflict—and on at least one occasion, he directly denied one existed. Mr. Marculescu's witness statement in these proceedings changes nothing, since the "knowledge" that Mr. Young is said to have accrued would not create a conflict.

183. In sum, Mr. Young resigned his position on the Committee, which in any event did not grant any insights into this matter. Therefore a conflict does not exist, and the standard for Mr. Young's disqualification is not met. The Appeal Brief was filed by an authorized representative and is admissible.

C. THE TRIBUNAL'S ANALYSIS

1. The application to deny the appeal on grounds of tardiness

184. On 7 January 2019, the FINA Doping Panel decision was transmitted to WADA. On one iteration of the First Respondent's calculation, this started the clock on any party's deadline to appeal, which expired on 28 January 2019. With thirty more days (to take into account the CAS Code and CAS's one-time extension), he asserts that WADA's Appeal Brief fell due on 27 February 2019.

185. This calculation appears entirely to ignore that the plain text of Article 13.7.1 of the FINA DC, which provides a special regime for appeals by FINA and WADA. Under Article 13.7.1 § 2, WADA is permitted to appeal within "*Twenty-one (21) days after the last day on which any other party in the case could have appealed.*"

186. The core of the dispute on timeliness is not whether WADA's deadline is the same as that of "any other party"—plainly it is not—but rather whether its deadline runs together with FINA's, or afterward. WADA argues that its deadline begins to run only after FINA's *separate* deadline (which also benefits from a special provision) expires; the Respondents argue that the two deadlines run concurrently, and therefore expire simultaneously.

187. Pursuant to Article 13.7.1 § 2, WADA receives 21 days to appeal "*after the last day on which any other party*" could appeal. In the Panel's view, the reference to "*any other party*" includes FINA, since FINA is without a doubt among the parties that can appeal from the FINA Doping Panel's decision. On a plain reading, therefore, WADA's deadline would run after the expiry of the last day on which *FINA* could appeal.

188. Not only the text of Article 13.7.1, but also its conspicuously tripartite structure support such a reading. Had the drafters of the FINA DC intended to impose the same deadline on WADA and FINA alike—something which, WADA has argued, would have violated FINA's obligations to craft its rules consistent with the World Anti-Doping Code—then there would have been no need to separate out FINA's and WADA's deadlines into two independent subsections of the rules.

189. The Second Respondent deems the above, "*literal*" reading of the text overly simplistic; it notes that FINA's own deadline in Article 13.7.1 § 3 is prefaced with the word "*similarly*" (which it takes to mean: "similarly to WADA"), and adds that WADA's deadline in Article 13.7.1 § 2 does not identify FINA. Neither point is particularly persuasive. The positions of FINA and WADA are indeed "similar"—they both enjoy more time than *other* parties, such as the China Anti-Doping Agency ("CHINADA")—but their positions are not identical. Under the rules, FINA can appeal after the expiry of the deadline for appeal by any other party, *except WADA*. WADA, in contrast, can appeal after *any* other party—*including* FINA. The commonality is that FINA and WADA are each excepted from the general rule. It does not follow that the two

exceptions are identical in all respects. The opposite conclusion seems more in keeping with the text, structure, and purpose of Article 13.7.1.

190. Accordingly, FINA receives 21 days to appeal after the expiry of deadlines for parties such as CHINADA; WADA receives 21 days more. Accordingly, WADA had 93 days within the receipt of the FINA Doping Panel decision on 7 January 2019 in order to file its Appeal Brief. This period of time takes into account the FINA DC deadlines for appeal for CHINADA and FINA, the 10-day period set out in Article R51 of the CAS Code, and the extension of time provided by the CAS Court Office. The Panel calculates WADA's deadline as follows: 7 January 2019 + 21 days + 21 days + 21 days + 10 days + 20 days (extension) = 10 April 2019. The Appeal Brief was filed a week earlier, and was therefore timely.

191. Given the foregoing analysis, the Panel is not required to address and does not rule upon the question of any additional extension(s) of time to which WADA may have been entitled in connection with its putative request for "*a copy of the complete case file*."

2. The challenge to WADA's counsel

192. This motion concerns the law firm representing WADA, but *in particular* is directed to the conduct of Mr. Young.

193. The Athlete has of late emphasized that his application is not for the Panel to disqualify WADA's counsel per se, but rather to declare that Mr. Young *is* disqualified by the automatic operation of Swiss law. Hence the passive construction of the Athlete's submission that "*WADA's appeal was not filed by counsel with authority to represent*."[4] In any case, the relief sought is a declaration from the Panel that Messrs. Young and Rychener "*are disqualified*" based on a conflict of interest the existence of which the Panel is asked to adjudge, taking into account the Respondents' references to arbitral decisions and applicable law. This is what the Panel will proceed to do.

194. As a preliminary matter, it is not obvious that a CAS tribunal sitting in Switzerland has the authority to disqualify (or declare the disqualification of) a U.S. lawyer chosen by a party as its representative because of a conflict of interest. But even assuming that it does (as an inherent power to protect the integrity of the process under applicable law), FINA's expert Dr. Bohnet, on whose expert opinion the Athlete relies, accepts on page 26 of his opinion that disqualification of counsel is warranted only in "compelling" or "serious" circumstances.

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[4] *See also* Letter from the Athlete dated 3 March 2021 ("*Furthermore, the Athlete notes the Panel's decision that Mr Young and Mr Rychener* 'are not disqualified from the present proceedings*'. The Athlete has not sought disqualification of WADA's counsel but a declaration that the appeal be found inadmissible because it was filed by counsel with no authority to represent.*"). *But see* Athlete's Letter dated 29 May 2019, ¶¶ 49 ("*Accordingly, Respondent 1 hereby requests the CAS to disqualify Mr. Young and Mr. Rychener from the present arbitration proceedings.*"), 197 (request for relief).

195. The key fact is that Mr. Young was a member of FINA's Legal Committee until he resigned shortly before appearing as counsel to WADA in this case, which has an advisory role within FINA. Under the FINA Constitution,

> ***C 21.10.1*** *"The powers and duties of the Legal Committee are:*
>
> *a) to provide legal expertise to the Bureau and to give recommendations regarding legal matters whenever needed,*
>
> *b) to assist the Bureau, FINA Committees and the commissions in drafting amendments to the Constitution, FINA Rules and regulations,*
>
> *c) to conduct administrative reviews regarding whereabouts violations referred to the Legal Committee,*
>
> *d) to advise, if necessary, on matters referred to CAS by FINA, and*
>
> *e) to advise, if necessary, on agreements between FINA and third parties."*

196. Dr. Bohnet opines that "*this situation* can *give rise to a conflict of interests*" and that there is a "*risk*" that Mr. Young could have known about the present case.

197. Being a member of the Legal Committee does not per se create a lawyer-client relationship. Nor does it mean that the member will even be aware of *all* matters referred to the CAS by FINA; that happens only "*as necessary*." (As a matter of fact the Constitution does not explicitly refer to giving advice with respect to matters, like the present one, referred to the CAS *against* FINA.)

198. Perhaps a bar association might be concerned that even lawyers who volunteer to give occasional advice to an organization without a mandate of representation nevertheless fall short of the *délicatesse* expected of its members if they appear in court as opposing counsel to that organization. (Mr. Young's response would presumably be, as per WADA's letter of 26 June 2019, that he has represented WADA since 2000 by serving as the lead drafter of the initial Code and all subsequent revisions to the Code, by acting for WADA in a number of high profile cases before CAS, and generally by advising WADA on anti-doping matters; that he served on WADA's Foundation Board for two terms; and that, at the time Mr. Young was nominated by USA Swimming to serve on the FINA Legal Committee, FINA was well aware that Mr. Young had already represented WADA for many years.) But that is not of concern of this Panel, which rather has a duty to react if the legitimacy of the process is compromised and adversely affects a party.

199. Mr. Young has affirmed that he was never asked to advise FINA with respect to the present case, indeed that he had no knowledge of FINA's anti-doping proceeding against Sun Yang until he was contacted by WADA. If that were not true, one would

expect FINA to be able to prove, in writing or by a witness declaration, that he was indeed asked for such advice. But FINA has not done so, nor even simply asserted that he is lying. There is nothing but the statement that the situation *could have* been such, and that it *could have* led to a conflict of interest in some unspecified way.

200. To the contrary, FINA has in fact admitted that the FINA Legal Committee was never involved in Mr. Sun's case and that Mr. Young "*had not received any information from FINA with regard to Mr.* [Sun]*'s case*." All that one can therefore conclude is that while the situation *could* indeed have involved Mr. Young's possession of confidential information, it is accepted by FINA that it did not occur.

201. As for the idea that Mr. Young's participation on the FINA Legal Committee might have given him some unfair advantage in terms of understanding FINA's approach to "whereabouts" or "missed test" cases, WADA rebuts this suggestion with ease, again in its letter of 26 June 2019:

> *"The Sun Yang case was never forwarded to the FINA Legal Committee as a filing failure or missed test case for administrative review because that is not what happened. Any information that Mr. Young may have gained in the administrative review of unrelated FINA whereabouts or missed test cases is wholly irrelevant to the issues of this case. Moreover, even as to whereabouts failure and missed test cases, any expertise which Mr. Young possesses in that area is the product of serving as the lead draftsperson for the Code and as outside counsel prosecuting anti-doping cases for a number of other anti-doping organizations. His experience on the FINA Legal Committee evaluating a handful of filing failure and missed test cases added nothing to that expertise."*

202. The Athlete's core premise, that there exists a conflict of interest which disqualifies WADA's counsel and therefore the appeal, is hopeless. His application is hereby rejected.

203. Counsel to WADA wrote as follows in their letter of 26 June 2019:

> *"FINA's counsel in this proceeding never suggested that Mr. Young should withdraw from representing WADA until 11 March 2019 (twenty-five days after WADA filed its appeal), and even then only after the First Respondent had sent its letter to Mr. Young dated 9 March 2019.*
>
> *"Mr. Young immediately responded to FINA by letter dated 12 March 2019, explaining Mr. Young's position that no conflict of interest existed and requesting that FINA provide justification for its position. FINA responded a week later but declined to provide any factual or legal justification for its position. Nor did FINA indicate that it had any intention to pursue the matter with its Ethics Panel which, under FINA's*

> *rules, "shall investigate, hear and determine any alleged violation of the FINA Code of Ethics."*
>
> *After declining to provide any factual and legal justification for its position, FINA then waited until 29 May 2019, 79 days after its initial letter and 100* days *after WADA filed its amended notice of appeal naming FINA as an additional respondent, to submit its request for disqualification to CAS, and even then did so only after the First Respondent had submitted its request for disqualification on 9 May 2019 (which itself was more than 60 days after the First Respondent's initial letter to Mr. Young and more than 80 days after WADA filed its appeal). The Respondents clearly made a strategic decision to delay filing their request for disqualification with CAS until after WADA had submitted its appeal brief.*
>
> *On the timeliness issue, the Panel may consider that principles of Swiss law applicable to arbitrator disqualification should apply, mutatis mutandis, to disqualification of counsel. Under Swiss law, a party which intends to challenge an arbitrator must invoke the grounds for disqualification as soon as it becomes aware of them. If a party waits before making a request for disqualification, its behavior may be considered an "abusive manoeuvre." The same principles, applied here, support the Panel's rejecting the request for disqualification.*
>
> *Under these circumstances, WADA respectfully submits that the Panel should deny the Respondents' request for disqualification as abusive and untimely."*

204. Notwithstanding these plausible arguments, the Panel, given the manifest insufficiency of the application for disqualification on the merits—contrasting with the intensity with which it has been pursued—has preferred to dismiss it substantively rather than procedurally.

IX. APPLICABLE LAW

205. Article R58 of the CAS Code provides:

> *"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."*

206. In principle, the Parties are in agreement as to the applicable law, namely the FINA DC and the ISTI, and subsidiarily Swiss law. Notably, however, a new edition of the FINA DC has come into force (as of 2021) since the date of the First Panel's arbitral award on 28 February 2020. (This development reflects the promulgation of a new, 2021 edition of the World Anti-Doping Code.) The Parties have not, before this Panel, addressed the applicable law from an inter-temporal perspective, although it bears noting that WADA has continued to cite the older version. In keeping with the principle of *iura novit curia*, the Panel will examine the question as follows.

207. The previous version of the FINA DC, effective as of 2015, provided in Article 20.6.2:

> *"*[W]*ith respect to any anti-doping rule violation case which is pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an anti-doping rule violation which occurred prior to the Effective Date, the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred unless the panel hearing the case determines the principle of* lex mitior *appropriately applies under the circumstances of the case."*

208. Because the 2015 FINA DC were in effect as of the date on which an anti-doping violation case was brought by FINA against the Athlete, it is these rules which in principle govern. An exception exists, however, to the extent that the Panel determines that the principle of *lex mitior* applies.

209. The principle of *lex mitior* occupies a central place in sports law. It prevents the "*continued applicability of a disciplinary rule after it has been replaced by a more lenient one, and reflects, in favour of the accused, the evolution of a legislative policy*." Pursuant to *lex mitior*, the "*set of rules most favorable as a whole is to be applied.*" *CAS 2015/A/4005, IAAF v. ARAF, Sergey Kirdyapkin & RUSADA,* ¶ 115; *CAS 2020/A/6755 Cruzeiro EC v. FIFA,* ¶ 51.

210. The 2021 FINA DC offer more favorable terms to athletes with respect to the imposition of sanctions for violations of Article 2.5. Equally, the new rules afford considerably greater flexibility in connection with the consequences to be drawn from a finding of multiple anti-doping rule violations (see Section X(C)(3) of this Award).

211. In the Panel's view, the 2021 FINA DC constitute the more favorable set of rules, and the principle of *lex mitior* therefore supports their application. Accordingly, the FINA DC (2021 edition) and the ISTI (2017 edition) govern, and unless otherwise indicated, citations in this Award to the FINA DC refer to the 2021 edition.

X. MERITS

A. THE RESPONDENTS' POSITION

212. The Respondents submit that the attempted sample collection on 4–5 September 2018 violated numerous provisions of the ISTI, violated the Athlete's fundamental human rights, and were therefore null and void. These defects fully justified the Athlete to refuse to submit to a defective and unjust process.

213. For clarity, and given that FINA has in nearly all respects aligned itself with the Athlete in these proceedings, this section treats the two Respondents' arguments jointly. Where the Respondents' respective positions diverge, the Panel will endeavor to reflect relevant differences in their submissions, as appropriate.

1. The Sample Collection fell short of ISTI requirements

214. Strict compliance with the Sample Collection process, in the Athlete's view, is paramount. Mr. Sun Yang notes that sample collection entails an infringement of athletes' fundamental human rights to physical integrity, privacy and dignity. The severity of the infringement is also evident in the system's use of a regime of "*strict liability*" for athletes found guilty of an anti-doping rule violation.

215. This infringement is necessary and justified in order to safeguard the integrity of sport, the Athlete acknowledges. Given the severity of the infringement, however, the Sample Collection process can only proceed if:

> *"there is (i) a clear legal basis authorizing restrictions of their rights and setting out the conditions under which such restrictions may lawfully be imposed, (ii) those rules are strictly complied with by WADA and its agents, such as IDTM, (iii) the athlete consented to that regime, as well as that (iv) any resulting restriction upon their fundamental rights is necessary and proportionate to the legitimate aim being pursued."*

216. Given the stakes, there can be no corner-cutting. Accordingly, compliance with the ISTI "*goes to the very core*" of the relationship between WADA, sporting federations, and their agents (such as IDTM) on the one hand and athletes on the other. An athlete, cognizant of clear deficiencies in the Sample Collection, cannot be expected to submit (with the attendant infringements on his fundamental rights) to such a process.

217. The Athlete's arguments regarding the content of mandatory requirements of the ISTI will be better understood if reference is had to the following provisions:

> **5.3 Requirements prior to notification of *Athletes***
>
> 5.3.3 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 licence, health card, passport or similar valid identification) and the expiry date of the identification.
>
> **5.4 Requirements for notification of *Athletes***
>
> 5.4.1 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 . . .
>
> 5.4.2 When contact is made, the DCO/Chaperone shall:
>
> b) Identify themselves to the *Athlete* using the documentation referred to in Article 5.3.3 . . .

218. The Respondents interpret these provisions to collectively require Sample Collection Personnel, in connection with attempted Sample Collections, to have and show:

- a "*Letter of Authority*" from the Testing Authority, e.g., FINA appointing IDTM as its agent; and
- an "*Authorization Letter*" for the Sample Collection Personnel themselves. on an *individual* level, confirming that they are agents of IDTM, and have the delegated authority (and qualifications) to test the Mr. Sun Yang *specifically*.

219. These two elements are drawn from the text of Articles 5.4.1(b) and 5.4.2(b) ISTI. The former requires documentation of "*authority under which the Sample Collection is to be conducted*." That limited criterion, it is submitted, may be satisfied by a Letter of Authority of the sort provided on 4 September 2018.

220. But that is not enough. Article 5.4.2(b) ISTI additionally requires that when "*contact is made*," the "*DCO/Chaperone shall . . . identify themselves to the* Athlete *using the documentation referred to in Article 5.3.3*." For the Respondents, the plural reference to "*DCOs*" identifying "*themselves*" cannot refer to the DCA (or Chaperone) alone, and so encompasses the entire Sample Collection Personnel. The *renvoi* to Article 5.3.3 reinforces this interpretation, since Article 5.3.3 refers to "*their authority to collect a Sample*"—i.e., apart from questions of IDTM's authorization by FINA, Article 5.3.3 *also* requires documentation of the individual authority of *each* IDTM team member.

221. In the Athlete's view, these requirements cumulatively work to accomplish an important policy goal: they provide a "*clear link*" between the relevant actors: FINA, the Sample Collection Authority, the Sample Collection Personnel, and the Athlete himself. An

"*uninterrupted chain of authority*" helps to ensure the integrity of the process, and provides assurances to athletes—who are, after all, asked to tolerate an invasive procedure that infringes upon their fundamental rights—that the process is legitimate and secure.

222. The Letter of Authority, then, creates a link from the Testing Authority (FINA) to the Sample Collection Authority (IDTM); an Authorization Letter extends the chain by linking IDTM and the Sample Collection Personnel to the *specific* athlete sought to be tested. The Authorization Letter may also confirm the "*individual authority and qualifications*" of the Sample Collection Team, that is, to show that they enjoy delegated authority from IDTM and are qualified to take samples. (If the Authorization Letter does not do this, then some other document must.)

223. On 4–5 September 2018, nearly each part of the chain was missing. Indeed, other than establishing that IDTM (as an entity) was authorized by FINA to act (in general) as Sample Collection Authority, the IDTM team failed to satisfy any of the aforementioned requirements.

i. The failure to provide an individual Authorization Letter

224. First and perhaps foremost, no Authorization Letter was provided linking IDTM to the specific Sample Collection planned for 4 September 2018.

225. In the Respondents' submissions, Article 5.3.3 requires that an Authorization Letter, linking the specific Sample Collection Personnel to the specific athlete to be tested, be provided as part of that athlete's notification. This interpretation of the ISTI is supported by the plain text of the rules, their object and purpose, applicable guidance and model documents from WADA, the practice of other doping control agencies and Testing Authorities, and even IDTM.

226. In terms of WADA's practice, the Athlete cites WADA's standard Letter of Authority. That generic letter provides, in relevant part:

> *"This letter confirms that the World Anti-Doping Agency (WADA) has authorized the [Sample Collection Authority] to conduct in and/or out-of-competition doping controls on [country of athletes] athletes during the period specified above, in the sport of [list sport] . . .*
>
> *Athletes should verify that the DCO requesting a sample holds a letter of authorization or similar from [Sample Collection Authority] as well as other identification."*

227. The model letter, the Athlete submits, expressly identifies a duty of the Sample Collection Personnel to show an Authorization Letter to the athlete as part of the notification process. WADA also provides a model Authorization Letter, which includes

data fields including the name of the Sample Collection Authority; the name of the DCO, BCO (BCA), and Chaperone (DCA); the name of the athlete; and so on.[5]

228. Additionally, WADA's own guidelines for the collection of blood and urine samples stipulate that a DCO must show an Authorization Letter upon notifying the athlete. The ISTI Urine Sample Collection Guidelines of October 2014 (version 6.0), for instance, state under the heading "*2.1 Testing Authority / Sample Collection Authority*":

> *"Provide official documentation to Sample Collection Personnel validating their authority to collect a* Sample *from the* Athlete*, e.g. an authorization letter from the Testing Authority."*

Similarly, Article 3.4 ("*Sample Collection Personnel Briefing*") provides:

> *"During the briefing, the DCO presents official documentation (e.g. an authorization letter from the* Testing *Authority) to* Sample *Collection Personnel that details the DCO's authority to collect a* Sample *from the* Athlete*."*

Doping Control authorization letters, the guidelines note, "*can be automatically generated from* ADAMS."

229. Other testing authorities, such as CHINADA, routinely issue Authorization Letters. So do other doping agencies. These letters uniformly and specifically indicate which officers are authorized to conduct a specific mission, for a specific athlete, during a specific period of time. By way of example, a CHINADA Authorization Letter dated 1 April 2019 provides:

> *"Number: Doping Control Test No. 15325*
>
> ***Letter of Authorization of Doping Control Test***
>
> *Doping Control Officers [named individuals], 3 people are authorized to conduct the Doping Control Mission.*
>
> *The Doping Control Officers shall present the Doping Control Officer's certificate and Letter of Authorization to the athlete.*
>
> *Doping Control Mission shall be conducted in accordance with World Anti-Doping Code and International Standards for Testing and Investigation issued by World Anti- Doping Agency, Regulations of Anti-*

[5] The full list, according to the Athlete, is: "*(i) The name of the Sample Collection Authority; (ii) The name of the DCO; (iii) The name of the BCA (or, more accurately, the name of the BCO since the term "BCA" used by IDTM is unknown to the ISTI); (iv) The name of the DCA (or, more accurately, the name of the Chaperone since the term "DCA" used by IDTM is unknown to the ISTI); (v) The name of the specific Athlete to be tested; (vi) The timeframe within which this specific Athlete should be tested; (vii) Which kind of test should be made; and (viii) The mission order for this specific anti-doping test to be conducted on the athlete concerned.*"

Doping issued by the State Council and relevant rules of General Administration of Sport of China.

Authorization Period: April 1, 2019 to April 30, 2019.

Control Office CHINADA of General Administration of Sport of China"

230. In a letter addressed to the Athlete's counsel and exhibited with his pleadings, CHINADA confirmed that its practice is to require DCOs to show athletes (i) a "Doping Control Authorization" (as excerpted above) as well as (ii) a CHINADA-issued certificate held by the DCO and (iii) a Letter of Authorization, also known as a "mission letter" (which, in contrast to the generic one shown by the IDTM team, is test-specific).

231. Other doping agencies, too, incorporate Authorization Letters into their doping control processes. Detailed information, including a specific "Mission Order" number, appears in the International Testing Agency's "Doping Control Authorization" forms.

232. The need for specific Authorization Letters, the Respondents assert, was even acknowledged by IDTM. Mr. Mario Artur dos Santos Simoes, an IDTM Doping Control Officer who had previously conducted a sample collection with the Athlete on 28 October 2017, testified before the FINA Doping Panel as follows:

Q. "So I'd just like you to concentrate on individual authorization by FINA.

A. Okay.

Q. Can you explain that?

A. Okay. If I can explain what is individual authorization?

Q. Yes, please.

A. Yes. The individual authorization is [a] document that is downloaded from the WADA page from ADAMS, what we call ADAMS, where we check the whereabouts. So it's something that is released together with the number of the mission that has everything related to that mission. That document is issued by WADA.

So it mainly says the target, the names of the athletes that will be tested in that mission number, which kind of test we are supposed to do, if blood, urine, both, and also all the rest . . . ."

233. Incidentally, DCO Simoes's sample collection of 28 October 2017—in which he was accompanied by the present DCO (then serving as a Chaperone)—featured extensively in the FINA Doping Panel hearing. There, the Athlete had argued that the then-Chaperone's conduct during the 2017 mission was unprofessional and that he had

lodged a formal complaint against her; given their history, he also expressed shock that IDTM assigned the same individual of which he had complained one year earlier to test him on 4 September 2018. (Upon questioning from this Panel, Mr. Sun had occasion to reiterate his views on the matter.) DCO Simoes, for his part, had testified against the Athlete, and in a written statement submitted after the 2017 mission, had accused him of aggressive and erratic behavior vis-à-vis his junior colleague, whom he defended. Leaving the contested facts of this earlier sample collection aside, what is most relevant, from the perspective of the Athlete's arguments as to the requirements of the ISTI, is DCO Simoes's admission that he had included an "Authorization Letter" as part of his own notification of the Athlete. IDTM's own practice, the Athlete argues, suggests that it knew it was required to proffer such a (specific) letter under Article 5.3.3, and IDTM's repeated run-ins with athletes in disputes over documentation suggests that IDTM "*either does not know the rules or does not care to follow them*."

234. The Respondents add that the need for a specific Authorization Letter is also evident when one considers that Testing Authorities (such as FINA) often also act as the Sample Collection Authority. Where a Testing Authority conducts its own sampling of athletes, there is no "transfer" or delegation of authority to an agent; a generic Letter of Authority, like the one from FINA to IDTM, will be superfluous. In such circumstances, "*authorization*" in Article 5.3.3 ISTI must, as a matter of logic, refer to something other than generic authorization of a third-party agent. It must refer to specific authorization of the Sample Collection Personnel themselves (and to a specific athlete/test). Otherwise, "*no authorisation at all would be required*"—an absurd outcome which the Respondents' interpretation (*versus* WADA's) avoids.

235. One source the Respondents do *not* view as a useful lodestar to interpreting the ISTI, however, is the arbitral decision dated 6 March 2020 in *World Anti-Doping Agency (WADA) v. International Ice Hockey Federation (IIHF) & Scott Salmond*, *CAS 2018/A/5885*, which is relied upon by WADA (see paragraph 276).

236. In his post-hearing brief on the issue, the Athlete argued that the *Salmond* case is inapposite to these proceedings. He gives thirteen reasons why this is so. First, that case concerned a sporting official, not an athlete and his fundamental human rights. Second, the case addressed the documentation to be shown by a DCO specifically, and did not address the documentation of a BCO or Chaperone. This is especially relevant because, in contrast to *Salmond*, which featured a DCO of the same gender as that of the tested athlete, here the DCO was incapable of standing in for either the BCA or the DCA; and the test took place at a private residence, not a setting "where such testing could reasonably be expected." Third, in *Salmon*, the DCO's supervisor spoke directly with the athlete on the phone and confirmed the DCO's authority to the athlete, unlike Mr. Popa (who never spoke with Mr. Sun or his associates due to the language barrier). The Athlete points to several additional reasons which allegedly distinguish the *Salmond* case from the highly unusual factual background in this one, such as the fact that IDTM had previously shown Mr. Sun an Authorization Letter on 28 October 2017; that the DCO in that case did not "*abandon*" the test, whereas this DCO spent more than two

hours outside; and that, unlike in *Salmond*, here the DCO signed on to the Athlete's version of events as recorded in Dr. Ba's note. FINA, for its part, criticizes the *Salmond* decision on the basis that the panel in that case interpreted the ISTI according to English common law rules rather than Swiss law, which requires judges to "choose those methodological arguments" which best approximate the *ratio legis* of the rule.

*

237. The generic Letter of Authority provided by the IDTM team on 4 September 2018 was, the Athlete submits, manifestly insufficient. That letter (see paragraph 29 above) only stated that IDTM had been "*appointed and authorized*" by FINA to collect urine and blood samples from athletes as part of FINA's doping control program. This satisfied Article 5.4.1(b). It did not show, as an Authorization Letter should, "*that* each member *of the Sample Collection Personnel was* individually authorized *by the Sample Collection Authority to collect urine and blood samples* from the Athlete."

238. Accordingly, the Sample Collection Personnel failed to show the Athlete necessary "*official documentation*" as that term is understood in Articles 5.3.3 and 5.4.2(b) ISTI. In consequence, the Athlete had no way of knowing that he had legitimately been selected to undergo testing.

ii. <u>The failure by the DCO, BCA, and DCA to show their IDTM-issued identification cards</u>

239. The Sample Collection Personnel failed to show documents linking them to IDTM. This, too, constitutes "*official documentation*" which the ISTI requires Sample Collection Personnel to provide upon notifying athletes of an out-of-competition test. Proper identification is part of the quid pro quo for athletes agreeing to the infringement of their fundamental rights through invasive blood and urine sampling.

240. On a textual level, Article 5.4.2(b) requires the DCO or Chaperone to "[i]*dentify themselves to the Athlete using the documentation referred to*" in Article 5.3.3. The reference to "*identify themselves*" in the plural indicates that the identification in question concerns the individual Sample Collection Personnel (all of them):

> *"This cannot mean just showing to the Athlete the DCO's complementary identification referenced in the second sentence in Article 5.3.3. It cannot refer to the generic FINA Letter of Authority. The DCO and the Chaperone, and indeed all other attending officials (each of whom by definition must have been "*authorized*" by the Sample Collection Authority), must "*identify themselves*" by showing "*official documentation*" provided by the Sample Collection Authority and must evidence their individual authority to collect a sample from the Athlete."*

241. Additionally, Article 5.3.3 ISTI refers to "*official documentation*" being provided by the Sample Collection Authority (IDTM), not the Testing Authority (FINA). This further rules out the Letter of Authority as a means of satisfying this requirement, since

the Letter of Authority was issued by FINA, not IDTM. The Letter of Authority may satisfy Article 5.4.1(b) ISTI, but not Article 5.4.2(b).

242. In this case, the Sample Collection Personnel each were under an obligation to show, but lacked, original IDTM-issued documents. The BCA and DCA had no IDTM-issued documents whatsoever. The DCO presented a copy of her (purported) IDTM card, but not the original. In consequence, the Athlete was not assured that the individuals who arrived to test him on 4 September 2018 were duly authorized representatives of the Sample Collection Authority.

243. The Respondents acknowledge that the BCA and DCA showed their national identity cards. These, however, are insufficient to satisfy the ISTI. In particular, Article 5.3.3 distinguishes between (i) "*official documentation . . . evidencing their authority to collect a Sample*" and (ii) "*complementary identification*," which is the category that may include nationally issued documents such as driver's licenses, passports, etc. National identification cards may therefore satisfy the secondary requirement of "*complementary*" documentation in the article, but they do not suffice the primary obligation.

244. WADA's interpretation holds that only the DCO herself needed to have an IDTM-issued card, but the Respondents submit this interpretation overlooks the plain text of Article 5.3.3 and would undermine the rules' policy logic. Article 5.3.3, after all, refers to "*DCOs*" in the plural; so it necessarily encompasses the BCA and DCA as well. (This maintains a certain symmetry with the first clause, which indisputably governs the entire Sample Collection Personnel team.) What is more, WADA's contrary interpretation would lead to an absurdity:

> *"Otherwise, if one were to follow WADA's (flawed) interpretation of Article 5.3.3, anyone could be picked up on the street to collect blood and urine samples from an athlete, the only requirement being that these persons should have an ordinary ID with them, without the need to provide an individual Letter of Authorisation stating that these persons are accredited and authorized to conduct this specific test, with a complementary identification documents issued by IDTM."*

iii. The failure by the DCA and BCA to show credentials

245. Third, the Sample Collection Personnel also failed to demonstrate that they had the requisite qualifications to take samples. The Respondents' contentions in this respect focus on the BCA and DCA in particular.

246. Generally speaking, the Respondents argue that the ISTI require that Sample Collection Personnel receive adequate training for their responsibilities, and be qualified in accordance with local regulations:

- Article 5.3.2 ISTI states: "*The Sample Collection Authority shall appoint and authorize Sample Collection Personnel to conduct or assist with Sample Collection Sessions who have been trained for their assigned responsibilities*"; and

- Article E4.1 ISTI states: "*Procedures involving blood shall be consistent with local standards and regulatory requirements.*"

247. To the extent that neither the BCA nor the DCA could show IDTM-issued photo identification or an Authorization Letter, the Respondents submit, *a fortiori* they could not show that they had been "*appoint*[ed]," "*authorize*[d]," and "*trained*" under Article 5.3.2.

248. As for the DCA specifically, both his unprofessionalism during the night in question (described as a "*turning point in the deterioration of relations*") and his subsequent statement to the press, in which he acknowledged a complete lack of experience with anti-doping controls—having been drafted by the DCO (his former classmate) to assist with monitoring the urine collection at the eleventh hour—confirm that he was neither appointed nor trained by IDTM to do the job.

249. The BCA, for her part, failed to show credentials required under applicable Chinese law and regulations for the taking of blood. Regulations applicable to Zhejiang Province, China, where the attempted sample collection took place, require that nurses obtain (i) a nurse qualification certificate and (ii) a Practicing Nurse Certificate ("PNC"). The requirement for a PNC is confirmed both by CHINADA and in a legal opinion by Professor Pei Yang, which confirms that "[i]*f* [the BCA] *didn't hold a valid PNC, she is unquestionably not qualified to collect blood*." The BCA showed a nurse qualification certificate during the Sample Collection, but not a PNC.

250. The First Respondent more or less acknowledges that the BCA did hold a valid PNC, a copy of which was later provided as an exhibit to WADA's Appeal Brief on 3 April 2019. This, however, is not enough. The logic underlying the ISTI requires that Sample Collection Personnel not merely *possess* the necessary qualifications, but also *present* them to athletes as part of the notification process. Prof. Pei adds that certificates such as the PNC "*have the function of publicity*," and that from the perspective of protecting stakeholders and assuring them that they are dealing with a qualified medical professional, "*there is no essential difference*" between a blood collector who holds a valid PNC but fails to show it, and one who lacks it entirely. Finally, the requirement that documents not only exist but are *made known* to the athlete is consistent with the Respondents' contentions that nothing less than maximum transparency and rigor can sustain and justify the infringements of athletes' fundamental rights inherent in the anti-doping system.

251. Under the ISTI and applicable Chinese law, therefore, the BCA was required to carry and show a valid Practicing Nurse Certificate. She did not.

*

252. Taken together, these factors indicate that the Sample Collection Personnel breached numerous mandatory rules, set by WADA itself, in the ISTI.

253. Finally, none of the above breaches are remedied or erased by WADA's references to an allegedly contrary, more liberal "*customary practice*" by IDTM (such as requiring Sample Collection Personnel to carry only a Letter of Authority, and not an Authorization Letter listing the specific mission and team members, etc.). Customary practice cannot displace the mandatory requirements of the ISTI. In any event, WADA has failed to prove the existence of a countervailing practice under Swiss law. Indeed, WADA's model documents and guidelines (described above) suggest that the prevailing practice is fully in line with the Respondents' view.

2. The Sample Collection was null and void

254. Mandatory rules concerning notification, the Respondents assert, are "*conditions precedent*" for the Sampling Collection Personnel—and ultimately the Testing Authority—to "*assume jurisdiction over an athlete and thereby acquire the authority*" to test him.

255. This was recognized in the FINA Doping Panel decision, which noted that the notification process goes "*to the very heart of assuming jurisdiction over an athlete*" and thereby "*acquiring the authority to impose onerous obligations and penalties*" in the event that he refuses to take part (or commits another anti-doping rule violation). A regime of strict compliance with the rules is necessary to justify the anti-doping regime, which imposes substantial burdens upon athletes' fundamental rights.

256. According to the Respondents, a failure to comply with the ISTI causes the sample collection attempt to become "*null and void*." Stated differently, since the Athlete was not properly notified, there was no Sample Collection, and no obligation to submit to one.

257. Having demonstrated the grave deficiencies in the Sample Collection of 4–5 September 2018, Mr. Sun Yang considers it "*null and void*." The Athlete was fully justified in refusing to take part, and such refusal cannot itself constitute an anti-doping rule violation. Indeed, no athlete can be sanctioned for insisting that the rules be strictly complied with. The Athlete "*cannot therefore be found to have committed an Anti-Doping Rule Violation.*"

258. The Respondents oppose WADA's suggestion that, whatever doubts he may have had, the Athlete could still have provided his samples "*under protest*" and lodged a complaint in due course. In the Athlete's view, the aforementioned defects in the Sample Collection provided "*compelling justifications*" not to continue the process.

259. WADA suggests that the DCO put the Athlete on notice that his actions might constitute an anti-doping rule violation. The Respondents assert precisely the opposite. In the Athlete's account, the DCO's conduct was on the whole erratic and opaque. In the end, however, the DCO agreed with the destruction of the blood samples and the abandonment of the sample collection attempt. She even went so far as to sign off on the Athlete's version of events, as recounted in Dr. Ba's handwritten note of 5 September 2018.

260. The fact that the Athlete had been tested multiple times by IDTM before, for its part, only strengthens his position. The Athlete's long experience with Sample Collections, including with IDTM, equipped him to recognize flaws in the process and to lodge prompt objections, as appropriate, thus safeguarding his rights.

261. It follows that the Athlete could not have violated Articles 2.3 and 2.5 FINA DC for the mere reason of his refusal to acquiesce in an unauthorized sample collection attempt. In the absence of a "Sample Collection Session" or a "Sample" within the meaning of the WADC and the ISTI, the Athlete could neither have failed to submit to sample collection (Article 2.3 FINA DC) nor tampered with the doping control process (Article 2.5 FINA DC). As arguments in the alternative, however, the Athlete adds that his conduct was justified in the circumstances. In any event, the "*severe transgressions*" of the IDTM team were such that the imposition of any sanctions on him would violate his personality rights along with the principle of proportionality.

B. THE APPELLANT'S POSITION

262. The Appellant submits that the attempted sample collection on 4–5 September 2018 complied with all relevant provisions of the ISTI. Upon meeting the Athlete, the DCO notified Mr. Sun by showing a Letter of Authority from FINA, as well as a copy of her IDTM Doping Control Officer card. Although they were not required to do so under the ISTI, the DCA and BCA also showed valid identification documents.[6] The DCO's documents sufficed, in WADA's view, to establish that the Sample Collection Personnel, under her leadership, was duly authorized and credentialed. The Athlete's refusal to be tested despite having been properly notified by the DCO placed him in violation of Articles 2.3 and 2.5 of the FINA DC.

1. The Sample collection comported with the ISTI

263. WADA submits that the Sample Collection comported with all requirements of the ISTI. In WADA's view, Article 5.3.3 ISTI requires two things as part of the athlete notification process:

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[6] These were a national identification card for the DCA and in the BCA's case, a junior nurse's certificate. WADA does not believe the ISTI require that nurse certificates be shown, but IDTM's own practice was to show this. A letter from IDTM dated 9 November 2018 states: "*The BCO/BCA must carry this with her/him to verify that the she/he is a qualified blood drawer and should be shown upon the athlete's request.*"

- that the Sample Collection Personnel team establish that, *as an entity*, they are authorized to collect samples, for example by providing a "Letter of Authority" issued by the Testing Authority to the Sample Collection Authority; and

- that DCOs carry individual identification.

264. The above two elements roughly resemble the concepts of a "Letter of Authority" and an "Authorization Letter" per the Respondents' taxonomy,[7] although in WADA's reading they serve rather different functions. First, in WADA's view, the Letter of Authority authorizes the testing team as a *collective unit*, not on an individual level. Second, the *personal* authorization requirement pertains only to DCOs, not anybody else on the team. (If notification of the Athlete had fallen to a Chaperone, Article 5.4.2 would have extended that requirement to him; in this case, however, the DCO notified the Athlete.)

265. In any event, the above is all that the ISTI require to adequately notify an athlete and impose on him the obligation to submit to testing. In this connection, WADA disputes that the ISTI require authorizations or qualifications concerning or emanating from individual Sample Collection Personnel members. Nor was there any need, under the ISTI, to present for the Athlete's personal inspection additional documents, such as the Statements of Confidentiality and the BCA's Practicing Nurse Certificate, as a precondition for the Sample Collection to proceed.

i. Interpretation of Article 5.3.3 of the ISTI

266. As a preliminary matter, WADA addresses the Athlete's assertion that certain "mandatory safeguards" must be strictly complied with in order to sustain the infringements on his fundamental rights. In WADA's view, this is circular insofar as the only "*mandatory safeguards alleged by the Athlete are the requirements of the ISTI.*" The ISTI, WADA continues, does not require the highly specific, individualized presentation of documentation which the Athlete has sought to introduce as artificial preconditions to Sample Collection.

267. The crux of WADA's interpretive arguments on the ISTI is that the requirement in Article 5.3.3 of authorization for the Sample Collection Personnel operates on a collective level, i.e., it need only prove that FINA designated *IDTM* as its Sample Collection Authority, and not that FINA designated each individual IDTM team member. WADA considers that the text of Article 5.3.3, the purpose of the ISTI, and CAS jurisprudence all support its interpretation.

268. On a textual level, WADA notes that the first sentence of Article 5.3.3 refers to the team writ large, or as a whole: it addresses the "*Sample Collection Personnel*" and "*their*" authority to collect samples (rather than "his" or "her" authority). This is consistent with

[7] IDTM itself refers to the generic document as a "Letter of Authorization," not a "Letter of Authority." To avoid unnecessary confusion, the Panel refers to the "LOA" as the Letter of Authority throughout this Award.

the ISTI's characterization of the Sample Collection Personnel as a "*collective term for qualified officials authorized by the Sample Collection Authority*." The Appellant therefore rejects the Respondents' submission that a plain reading of Article 5.3.3 requires each individual member of the Sample Collection Personnel to establish that IDTM personally authorized him or her vis-à-vis the Athlete.

269. The second half of Article 5.3.3 provides that "*DCOs shall also carry complementary identification which includes their name and photograph (i.e., identification card from the Sample Collection Authority, driver's licence, health card, passport or similar valid identification) and the expiry date of the identification.*" WADA interprets this provision as binding only DCOs, not other members of the Sample Collection Personnel team.[8] Therefore, only the DCO was required to provide (and did provide) individual documentation of her association with and authorization by IDTM.

270. WADA submits that its interpretation is consonant with the objective of the ISTI, that is, to ensure that athletes who are approached for a sample can be satisfied that they are dealing with a *bona fide* agent of the Testing Authority. This objective can be satisfied by a generic Letter of Authority, combined with proof of authority of the DCO. These two elements establish a chain of authority starting with FINA, through IDTM, and ending at the DCO. The DCO, in turn, vouches for the rest of the Sample Collection Personnel—in writing (on the Statements of Confidentiality) and orally (at the outset of the Sample Collection itself). This is enough for athletes to understand that they are dealing with the right people.

271. A structural comparison between Article 5.3.3 and other parts of the ISTI provides additional support, WADA argues. Apart from Article 5.3.3, the ISTI imposes additional (and quite different) requirements for documentation concerning individual Sample Collection Personnel members. For example:

- Annex H.5.4 provides that "*only Sample Collection Personnel who have an accreditation recognised by the Sample Collection Authority shall be authorised by the Sample Collection Authority*";

- Annex H.4.4 provides that the "*Sample Collection Authority shall maintain records of education, training, skills and experience of all Sample Collection Personnel*"; and

- the ISTI defines a Blood Doping Officer (BCO) as "[a]*n official who is qualified and has been authorized by the Sample Collection Authority to collect a blood Sample from an Athlete.*"

[8] The Panel notes that, in IDTM's practice, BCAs (acting as BCOs under the ISTI) were also trained and qualified DCOs. Moreover, in IDTM's practice, DCOs were to show two separate documents from the parenthetical list of examples of "*complementary identification*" in Article 5.3.3: an IDTM card and separate national identification.

272. None of the above provisions contain any requirement that such documentation be presented to athletes. In WADA's view, therefore, the ISTI distinguishes between the documentation encompassed by Article 5.3.3 (and which must be presented to athletes), and the documentation relating to the identity, authority, training, etc. of individual Sample Collection Personnel in other parts of the ISTI (which is merely kept on file). The latter category of documents includes the "Statements of Confidentiality" signed by the BCA and DCA, as well as the BCA's medical certificates. There was and is no requirement in the ISTI to show these to the Athlete as part of the notification process.

273. WADA next turns to the Respondents' reliance on its model letters and guidelines—specifically WADA's standard Letter of Authority. These, WADA argues, are irrelevant to interpreting the ISTI and in any event do not say what the Respondents say they do.

274. First, while model documents indicate "best practices," they are not mandatory. This is confirmed explicitly in the WADA Code, which notes:

> *"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."*

275. Even if model documents were relevant in determining the minimum requirements of the ISTI, however, WADA argues that its model Letter of Authority does not, in fact, serve to establish individual authority to test specific athletes. In this respect, WADA relies on testimony of Mr. Stuart Kemp, its erstwhile Deputy Director of Standards and Harmonization, who described the model letter at the hearing before the First Panel as follows:

> *"[I]t's a general authorisation letter that is not specific about the doping control personnel who'll be collecting the sample because WADA would sub-contract the test. We don't conduct testing ourselves, and therefore we have no idea who the doping control officer will be that will conduct these tests, only that they'll do so in accordance with our agreement, which includes adherence to the ISTI."*

276. WADA adds that its interpretation of Article 5.3.3 is also supported by the fact that the drafters of the ISTI in 2017 would have been well aware that some Sample Collection Authorities, including IDTM, used only a (generic) Letter of Authority during notifications of athletes. Since the drafters knew that such documentation was widely used to establish the authorization of the Sample Collection Personnel, they could not have "*intended to create a new rule*" that would "*invalidate this customary practice without explicitly noting that such a major change was required.*"

277. Finally, WADA considers that its interpretation of Article 5.3.3 finds support in CAS jurisprudence. In particular, WADA refers to a decision dated 6 March 2020 in *World*

Anti-Doping Agency (WADA) v. International Ice Hockey Federation (IIHF) & Scott Salmond, CAS 2018/A/5885. That case, which addressed the validity of an IDTM sample collection attempt with an identical array of documents as those presented to the Athlete, determined that a "*DCO will have satisfied this requirement under the ISTI by carrying an authorization letter from the testing authority as well as an identification which includes his name, photograph, and the expiry date of the identification.*" The decision thereby endorses WADA's reading of Article 5.3.3 and in particular its submission that a "*generic*" Letter of Authority suffices to establish the Sample Collection Personnel's authority vis-à-vis athletes. WADA considers the *Salmond* award to have persuasive value insofar as it raises "*nearly identical*," indeed "*indistinguishable*" issues and invites the Panel to give it due consideration.

ii. Evaluation of the Sample Collection of 4–5 September 2018

278. Having set out its interpretation of Article 5.3.3, WADA submits that the IDTM team met all applicable requirements on the night of 4–5 September 2018.

279. The DCO showed the Letter of Authority (at paragraph 29). In addition, she showed her IDTM-issued credential, which alongside her name and photograph stated that she was "*a certified Doping Control Officer and is authorized to conduct Doping Controls on behalf of*" IDTM (paragraph 28). Although the card was a copy, shown from the DCO's phone, WADA takes the view that this is no less valid than had she presented a hard-copy original. In this regard, too, it relies on the *Salmond* panel's decision, which found that there was "*no specific rule*" in the ISTI restricting documentation to paper identification only.

280. In respect of the BCA, WADA considers that there was no obligation for her to provide a copy of her Practicing Nurse Certificate to the Athlete as part of the notification process. Even if the ISTI did require a PNC, in fact the BCA did possess one; the original was filed with her accrediting hospital, such that she was not able to physically present it to the Athlete or his entourage—but she did have a copy on her phone, which the Athlete never asked her to show. WADA also disputes the Respondents' assertion that the validity of PNCs is geographically circumscribed, such that the BCA's PNC was allegedly invalid in Hangzhou. WADA considers that the Respondents failed to adduce evidence that Chinese law actually prohibits BCAs from operating outside of the "*place of practicing*" listed on PNC certificates, and even such a local prohibition were established, WADA takes the view that the ISTI constitutes an autonomous instrument and is not displaced by domestic law.

281. In respect of the DCA, WADA likewise considers that he was not bound by any requirement to produce documentation or identification, at least where it is the DCO who makes initial contact and carries out the duties (i.e., of notification) set out in Article 5.4.2(b) of the ISTI. In other words, although the ISTI undoubtedly requires that DCAs be properly trained and authorized by the Sample Collection Authority,

documentation of said training and authorization is properly kept on file; it does not need to be shown to an athlete during notification.

2. The Athlete violated Articles 2.3 and 2.5 FINA DC.

282. WADA submits that the Athlete's conduct violated Article 2.3 and Article 2.5 of the FINA DC. (Because WADA's Appeal Brief was submitted nearly two years prior to the entry into force of the current, 2021 edition of the rules, WADA cites the previous version (in force as of 2015). The Panel has determined, in paragraph 211, that the principle of *lex mitior* merits the application of the 2021 version of the FINA DC; accordingly, the Panel also notes the 2021 edition of the FINA DC in tandem with its summary of WADA's submissions below.)

i. Article 2.5 FINA DC ("Tampering")

283. Article 2.5 of the FINA DC (2015 edition) prohibits conduct that subverts with the doping control process, including "*intentionally interfering or attempting to interfere with a Doping Control official*" or "*intimidating or attempting to intimidate a potential witness.*" Additionally, the FINA DC (2015 edition) identified the following conduct as constituting 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."*

284. The 2021 edition of the rules does not contain language regarding improper influence. However, it provides a similar overall definition of Tampering: "[i]*ntentional conduct which subverts the Doping Control process*," including "*preventing the collection of a Sample, affecting or making impossible the analysis of a Sample*."

285. The Athlete's conduct, WADA submits, is readily captured within the broad definition of tampering set out in the FINA DC. WADA draws special attention to the following:

- *"Refusing to allow the DCO to leave with the blood samples after collection and after the Athlete had signed the Doping Control Form acknowledging he had received proper notification.*
- *Withdrawing his consent for the collection of his blood samples.*
- *Breaking or assisting in breaking one of the blood sample containers.*
- *Refusing, when requested by the DCO, to return either the damaged container or the undamaged container with the Athlete's blood samples.*

- *Destroying the Doping Control Form containing the Athlete's signature acknowledging notification for collection of the blood samples."*

286. In WADA's view, "[b]*ut for the interference and obstruction by the Athlete and his team*," blood and urine samples would have been successfully obtained and sent to a laboratory for analysis. This is enough to find the Athlete guilty of Tampering, which calls for the imposition of a four-year period of ineligibility.

ii. Article 2.3 FINA DC ("Evading, Refusing, Failing to Submit")

287. Article 2.3 FINA DC, in turn, concerns "*Evading, Refusing or Failing to Submit to Sample Collection*." The 2015 edition prohibits:

> *"Evading* Sample *collection, or without compelling justification, refusing or failing to submit to* Sample *collection after notification as authorized in these Anti-Doping Rules or other applicable anti-doping rules."*

288. The 2021 edition is essentially identical.[9]

289. In WADA's view, the Athlete's refusal to provide a urine sample, and his subsequent insistence that the blood samples not be transported to a laboratory for analysis (and his entourage's destruction of those samples), also constituted a violation of Article 2.3. The Athlete proceeded with his conduct notwithstanding repeated instruction by the DCO regarding the potential consequences of a refusal.[10] His violation was therefore manifestly intentional.

290. A key point of contention with respect to Article 2.3 concerns whether or not the Athlete had a "compelling justification" in connection with his refusal, since, under this provision, the existence of such a justification may negate a finding of "Refusing or Failing to Submit." WADA submits that the Athlete lacked a compelling justification for his course of conduct. First, as an objective matter, the Sample Collection Personnel complied with the ISTI. Second, as a subjective matter, the Athlete should have appreciated that his notification on the night in question was routine and entirely rules-compliant. Indeed, the Athlete would have been familiar with IDTM's procedures; he had, after all, been tested numerous times by Sample Collection Personnel acting on behalf of IDTM, and had been presented—on 60 prior occasions, without objection—the same documentation that was shown to him on 4–5 September 2018. Additionally,

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9 The 2021 edition differs only in referring to notification "…*by a duly authorized* Person."

10 A report drafted by the DCO after the failed Sample Collection, which served as one of the primary exhibits detailing her perspective on the events in question, states: "[W]*hen I mentioned it might be considered as a refusal, he shouted that please do not use that word and that's DCO's responsibility for this failure to comply with nonauthorized assistant.*" Further: "*I received refusal instructions and claimed that you may be charged as a refusal. Then the athlete stood up quickly and rushed to me shouting you can't use that word. It's not a refusal but it's DCO's false. I explained that you didn't give any sample/material to DCO."*

Mr. Sun signed the Doping Control Form initially presented to him by the DCO, thus acknowledging and accepting that "*he had been properly notified*."

291. In any event, it cannot be the case that an athlete may simply thwart a Doping Control Officer from completing a Sample Collection, e.g., by preventing him from transporting samples from the doping control station, on the bare assertion of some purported technical deficiency. Allowing any athlete to "*take matters . . . into his own hands*" whenever there is a procedural dispute would upend the anti-doping control process. The correct approach, in cases where an athlete has a good-faith concern regarding a particular Sample Collection Session, is to "*allow the samples to be collected under protest*," while simultaneously "*documenting any objections and preserving the athlete's rights*." Indeed, WADA notes that this is precisely what Mr. Sun did in relation to a disputed Sample Collection Session in 2017 (described at paragraph 233).

292. WADA accordingly submits that the Athlete did not have a valid basis on which to resist the sample collection attempt. His arguments related to the alleged invalidity of the Sample Collection cannot serve to mitigate his violation of Article 2.3. Additionally, the Athlete's conduct was such that he cannot credibly claim to have acted "not intentionally," a defense which might otherwise serve to reduce the default four-year period of ineligibility to two years. In the circumstances, a four-year base period of ineligibility should attach.

C. THE TRIBUNAL'S ANALYSIS

1. Preliminary Observations regarding the Record

293. In para 4.34, the Doping Panel Decision summarized the position that FINA was taking at that time thus: "*FINA maintains that pursuant to the ISTI, the various documents shown to the Athlete by the DCO, the DCA and the BCA were proper and complete authorizations from IDTM to permit urine and blood to be collected from the Athlete by these officials.*" The Decision continues, in para. 4.40:

> *"FINA believes that the purpose of ISTI Article 5.3.3 is to satisfy the Athlete that 'the people doing the test are authorized to test him/her.' This is accomplished, in FINA's view, by (i) showing the Athlete the 2018 generic Letter of Authority from FINA to IDTM that delegated to IDTM the authority to be the Sample Collection Authority, and (ii) ensuring the DCO has proper identification and IDTM accreditation (the DCO Card/badge). As far as it concerns the DCA and the BCA, it is FINA's view that no additional official authorization documentation from IDTM is required to be shown to the Athlete."*

294. As for the DCA and the BCA, FINA referred to them as "*members*" of a pool of potential "*IDTM officials*" who could be used on testing missions each year, their status as Sample Collection Personnel being manifested by their signature on Statements of

Confidentiality which are "*internal documents of IDTM*." These were indeed in the possession of IDTM at the relevant time, as concerns the BCA and the DCA in question.

295. The two Respondents are in effect seeking to confirm the Doping Panel Decision. Given that the CAS Award had been annulled, and in particular that the reason for annulment was possible bias on the part of its presiding member, the present Panel pays no heed to the qualitative assessment of the earlier CAS arbitrators with respect to the conduct of the individuals at the center of the events of 4–5 September 2018.

296. But no such cloud hovers over the Doping Panel Decision, which reached the outcome now defended by FINA as well as by the Athlete.

297. Although FINA now affirms, in paragraph 4 of its Answer of 24 August 2019, that "*the serious violations by the doping control team of the applicable formal requirements*" invalidate the Sample Collection, it also comments that "*the Athlete and his entourage in the course of the doping control which took place on 4 September 2019 may have been more measured*." This is an astonishing understatement when compared with what the Doping Panel actually wrote with respect to the Athlete's conduct. A hint of this comes already in paragraph 6.29 of the Doping Panel Decision, where reference is made to "*the troubling and rather aggressive 'self-help' conduct of the Athlete and his entourage*."

298. The Doping Panel's explanation of the expression "*aggressive 'self-help'*" comes much later, only after reaching the conclusion that no rule violation occurred.

299. The essential rationale for the Doping Panel's invalidation of the doping control of 4 September 2018 is to be found in these passages:

> *6.50 "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.*
>
> *6.51 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.*

> *6.52 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.*
>
> *6.53 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."*

300. This was, in sum, the basis on which the Athlete won his appeal to the FINA Doping Panel. But the very next line of the Decision introduces a curious section under the title "*A Caution to the Athlete*." As will be seen immediately, it begins with an explicit admission by the Doping Panel that it was straying beyond the scope of its duty to hear and decide the case. The applicable rules do not recommend, let alone require, that doping panel members give *advice* to disputants; they are there to resolve a dispute about the application of rules which are of interest to thousands of competitors and millions of their supporters. The section states:

> *6.54 "Although not required to decide the case, the Doping Panel feels compelled to point out its very significant concerns regarding the conduct of the Athlete and his entourage. Avoiding an anti-doping rule violation in this matter should not be equated with the Doping Panel condoning such a strategy in future situations. While ultimately successful, it was a close-run thing.*
>
> *6.55 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.*
>
> *6.56 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.*

> *6.57 In fact, the Doping Panel rejected many of the Athlete's contentions and positions as being unfounded and invalid. The Athlete and his entourage were not correct regarding many aspects of the sample collection session. That should be a sobering lesson to the Athlete."*

301. The Doping Panel Decision then gives examples of the errors of the Athlete and his entourage: the signature on Dr. Ba's "Declaration" did not attest agreement with it (merely receipt); the time of the testing mission was "*perfectly appropriate*"; the Athlete's entourage demanded accreditations and related authorizations which are "*absolutely not required*"; the Athlete wrongfully accused the DCO of conflict of interest and complained about the lack of interest paid to his "*testing history*" and "*latest negative test result*" which were simply irrelevant.

302. The present Panel observes that FINA's current expression of mild reproach of behavior which "*may have been more measured*" certainly diverges from the critique ("*foolish in the extreme*") made by the Doping Panel members whose decision FINA is now defending here.

303. The Athlete's conduct merits a closer look; a comparison is essential between the ultimate leniency (notwithstanding its criticism of his conduct) with which he was treated by the Doping Panel, on the one hand, and the stringency with which that same Panel judged the WADA control process, on the other hand. It should never be forgotten that there are many invisible parties who are highly and legitimately interested in the process of enforcing doping rules, namely the athletes who compete loyally against violators and fans who idolize champions and should not themselves be tempted to win at any cost.

2. Did the Athlete commit an anti-doping rule violation?

304. In light of what they allege were fatal deficiencies in the Sample Collection Personnel's documentation, qualifications, and professionalism, the Respondents have submitted that the Sample Collection itself was void *ab initio*. In determining whether the Athlete committed an anti-doping rule violation, the Panel therefore first addresses whether the Sample Collection was valid. To do so, it examines whether the documentation displayed to the Athlete by IDTM's Sample Collection Personnel was sufficient in order to notify him under the ISTI. Next, the Panel considers whether the Sample Collection Personnel possessed the necessary training and qualifications in order to carry out their mandate. Answering both questions in the affirmative, the Panel finally considers whether the Athlete's conduct on 4–5 September 2018 was justified in light of the circumstances.

i. Did the Sample Collection Personnel comply with ISTI requirements for authorization and identification?

305. The Panel first addresses whether the Sample Collection Personnel showed adequate documentation of their authority to undertake the mission, along with adequate

identification of any specific team members. The Parties agree that the DCO provided the Athlete with a "Letter of Authority" evidencing IDTM's authorization by FINA. The central contention is whether the ISTI requires more than this.

306. The key legal provisions are Articles 5.3.3, 5.4.1(b), and 5.4.2(b) of the ISTI (see paragraph 217). The Respondents take the position that, read together, these required that Sample Collection Personnel not only provide a Letter of Authority authorizing the team as a whole, but also show documentation that: (i) names each individual Sample Collection Personnel member, (ii) identifies a specific testing mission, and (iii) lists the specific athlete(s) to be sampled. In other words, they say that the ISTI require that each and every member of the Sample Collection Personnel be individually identified *and* authorized to partake in the mission. WADA, in contrast, argues that a (generic) Letter of Authority suffices to establish the team's authority as a whole, and that only the DCO was required to document her personal identity when notifying the Athlete at the outset of the Sample Collection.

307. The Panel finds it useful to bifurcate its discussion so as to maintain a distinction between the separate concepts of authorization and identification. The first concept, as per the ISTI's defined terms section, concerns whether the Sample Collection Personnel "*has been authorized*" by the Sample Collection Authority to carry out the respective duties of a DCO, BCO (for blood collection), and Chaperone (in this case, for witnessing and verifying the passage of urine). In order to establish such authorization, Article 5.3.3 of the ISTI requires Sample Collection Personnel to have "*official documentation, provided by the* Sample *Collection Authority*, *evidencing their authority to collect a* Sample *from the* Athlete."

308. At the outset, the Panel notes that a CAS panel has recently had opportunity to address the "*official documentation*" requirement in Article 5.3.3 ISTI. In *Salmond v. IIHF*, CAS 2018/A/5885 & 5936, the CAS held that "*a DCO will have satisfied this requirement under the ISTI by carrying an authorization letter from the testing authority as well as an identification which includes his name, photograph, and the expiry date of the identification.*" Concerning the Letter of Authorization, that panel observed:

> *"The Letter of Authorization is a document used to show that the sample collection personnel has the authority to collect* the *sample. . . . The Panel observes that Mr. Barut showed Mr. Kozun and Mr. Salmond a letter of authorization from the IIHF. This letter was on IIHF letterhead and was signed by the IIHF Sport Director Dave* Fitzpatrick *and confirmed that: 'the International Doping Tests & Management (IDTM) has been appointed as a Sample Collection Agency for the International Ice Hockey Federation (IIHF). IDTM Doping Control Officers (DCOs) are authorized to collect urine and blood samples on behalf of the IIHF. The samples may be collected in any country. Sample collection will be in accordance with the IIHF Anti-Doping Rules and the WADA International Standard for Testing. This Authorization is valid from January 1, 2017 to December 31, 2017.'"*

309. Evidently, the letter before the *Salmond* panel was similar to the Letter of Authority shown to the Athlete in this case. In its own assessment, the *Salmond* panel concluded that such a letter "*satisfies the requirement of Article 5.3.3 of the ISTI*," because it "*proves the authority of* [the DCO] *to collect a sample*" from athletes in the Testing Authority's registered testing pool.

310. Although the *Salmond* case featured similar IDTM documentation to that at issue here, the Panel nonetheless observes that the case arose in a rather different context. One also notes that the tribunal's legal analysis was not principally focused on Article 5.3.3 of the ISTI, which features only briefly in the decision. For these reasons, the Panel does not rely on *Salmond* decision. It is not necessary to further treat the Parties' contentions about that case, except to note that the outcome in that case is not inconsistent with the decision rendered in this Award. The Panel proceeds to interpret the ISTI *de novo*.

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311. On a textual level, even the most casual reader is bound to notice that Article 5.3.3 explicitly identifies an "*authorisation letter from the Testing Authority*" as an example of a document which can satisfy the requirement of "*official documentation*." The Respondents' position, that a (generic) letter is necessary *but not sufficient* to establish the Sample Collection Personnel's authority, therefore immediately runs into difficulties.

312. The contention that the ISTI requires individual authorization for each and every member of the team is further undercut by a holistic reading of Article 5.3.3, including its second part. Whereas the first sentence in Article 5.3.3 requires "*official documentation*" of the authority of the Sample Collection Personnel, the second sentence specifically addresses "*DCOs*"—these must "*also carry complementary identification which includes their name and photograph*." Of note, the DCO-specific requirement includes as an example an "*identification card from the* Sample Collection Authority"—i.e., just the kind of person-specific document which the Athlete suggests is encapsulated in the previous section's reference to "*official documentation*." Yet the requirement of complementary identification is plainly separate from the "*official documentation*" set out in the first part. The Respondents' contention that "*official documentation*" sets out person-specific requirements runs headlong into the fact that the only time that Article 5.3.3 expressly addresses person-specific documentation is in its second part, and *only* for DCOs.

313. The Respondents point to Article 5.4.2(b). That provision requires the "DCO/Chaperone" to "[i]*dentify themselves to the* Athlete *using the documentation referred to in Article 5.3.3*." Because Article 5.4.2(b) uses the pronoun "*themselves*," it purportedly extends to the entire team, not just to the DCO. What is more, Article 5.4.2(b) directs that identification use "*the documentation referred to in Article 5.3.3*." This *renvoi*, it is said, confirms that the meaning of "*official documentation*" in Article 5.3.3 is in the nature of a person-specific requirement. WADA disagrees and, among

other things, its witness Mr. Kemp argued that "*themselves*" refers to the DCO or Chaperone, as either one may in theory notify an athlete.

314. The Panel rather doubts that Article 5.4.2(b) has much to say on the central question of what "*official documentation*" in Article 5.3.3 really means. Notably, Article 5.4.2(b) does not impose obligations on the entire sampling team. Indeed, it addresses one person only: *either* the DCO *or* the Chaperone (hence the phrasing "*DCO/Chaperone*"), depending on which one of them notifies the athlete during initial contact. All that Article 5.4.2(b) accomplishes, therefore, is to reiterate that certain documentation must be shown, and to clarify that the DCO (or the Chaperone) must be the one to show it. Article 5.4.2(b), in short, answers the question of *who*, not *what*. The substantive content of any documentation requirement is evidently the preserve of Article 5.3.3, and it is here that one must look for answers. And, as explained above, Article 5.3.3 whether read in isolation or in context with other parts of the ISTI seems to resist the Respondents' preferred reading.

315. Here the Panel considers it prudent to examine the ISTI's object and purpose, particularly given the Athlete's urging that the ISTI be interpreted in conformity with his fundamental human rights. The objective of the ISTI's notification requirements, as stated in Article 5.1, is fourfold: "*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*."

316. These objectives represent a careful balancing of countervailing interests. On the one hand, respect for athletes' rights must be maintained, including through proper notification; for example, Article 1.0 reaffirms the ISTI's commitment to "*due consideration to the principles of respect for human rights, proportionality, and other applicable legal principles*." Similarly, the World Anti-Doping Code "*has been drafted giving consideration to the principles of proportionality and human rights*." These interests, however, do not exist in a vacuum. They occupy a common space with others: in particular the elimination of opportunities for Sample manipulation and, more broadly still, the goal of eliminating the scourge of doping from international sport. Such countervailing interests undoubtedly impinge upon the athletes' rights, including their privacy and personality rights, insofar as they require athletes to provide, repeatedly and with limited control over the process, their bodily fluids for testing. Yet this is the quid pro quo necessary to satisfy "*all athletes' fundamental right to participate in doping-free sport and, thus, promote health, fairness and equality worldwide*," *CAS 2005/C/976 & 986, FIFA & WADA*, ¶ 150.

317. To strike a balance among these interests, the ISTI imposes a specific threshold for notification. The threshold seeks to ensure that an athlete understand that a demand for his samples is legitimate and duly authorized—all the while avoiding the imposition of unnecessarily burdensome administrative criteria or the creation of yet more opportunities for gamesmanship by bad actors. In so doing, the ISTI embodies a hard-earned consensus—arrived at after formal consultations with a wide degree of

stakeholders including sporting federations, national sporting authorities, and of course athlete representatives—as to the minimum process required in order to sustain both in- and out-of-competition sampling and testing.

318. As Mr. Kemp put it in his testimony, the balance struck by the ISTI represents a "*one size fits all approach*," capable of accommodating all possible sampling scenarios. In certain cases, process above and beyond the minimum required may be feasible and advisable. In others, it may not. Mr. Kemp enumerated a series of such scenarios. For example, because out-of-competition testing is intended to catch a tested athlete unawares, providing him with detailed documentation that identifies the names of athletes and their prospective test dates would be self-defeating. Likewise, since the "*typical*" mode for authorizing Sample Collections is through a blanket authorization to the Sample Collection Authority, the identities of individual Sample Collection Personnel may not be known in advance of the mission, and so cannot be provided on the Letter of Authority. Authorizations for in-competition tests, in turn, may be issued before even knowing the identities of the athletes, much less the individuals (and possibly chaperones) who will sample them. Certain of these scenarios may not describe Mr. Sun's attempted sampling on the night of 4–5 September 2018. But that is precisely the point: given a variety of factual circumstances, and in light of the range of interests which the doping control process must accommodate, the ISTI adopts a flexible approach, not a bespoke one. It seeks to accommodate many different scenarios while ensuring a basic level of protection for athletes through mandatory documentation and identification requirements.

319. Here the Panel considers it appropriate to address a central criticism of the Athlete, namely that it is unreasonable and indeed a violation of his rights to require athletes to place their trust entirely on the representations of one person, the DCO, without the ability to verify that the remainder of the Sample Collection Personnel is appropriately documented. As the Athlete put it, WADA's assertion that he "*should have simply trusted the word*" of the DCO is something which "[n]*o reasonable athlete would accept*." FINA suggested that WADA's interpretation "*would mean that any IDTM DCO in the world could freely decide – without any instructions/authorisation from his/her Testing/Sample Collection Authority – to collect a Sample from any athlete*," anywhere in the world.

320. In the Panel's view, this undervalues the detailed documentation and information which the Athlete was in fact provided on 4–5 September 2018. The DCO verified that the Testing Authority had appointed IDTM for the time period including the Sample Collection. She provided detailed information from her DCO complementary identification. A reasonable athlete, including Mr. Sun, can be expected to accept a duly authorized DCO's documentation and representations concerning her personnel. As for the specter of impostor DCOs, the Athlete's address was private and viewable only within the ADAMS system through which FINA entered a Mission Order and made it visible to IDTM. The Sample Collection Personnel themselves appeared at a location and within a specific 60-minute window which the Athlete himself had elected as the

time during which he could be available for sample collections. A "rogue" team would have none of these details to hand, nor any of the paperwork which the DCO proffered.

321. The Athlete has cited a number of additional documents extraneous to the ISTI, including WADA-issued guidelines and CHINADA-specific practice (see paragraphs 228–229). The relevance of these in interpreting the minimum requirements of the ISTI is far from clear, particularly if one accepts that it is possible to go above and beyond what the law requires in certain circumstances. This is exactly the premise of the WADA Guidelines, which are plainly characterized in the World Anti-Doping Code as "[m]*odels of best practice*." They are to be striven for insofar as they represent an ideal, not because compliance with them is mandatory. Guidelines are (as their name suggests) recommendations, not law, and they do not alter the minimum requirements of the ISTI.

322. Similarly, the fact that CHINADA's practice appears to conform to models of best practice—by including a mission- and athlete-specific letter and "*unified certificates*" for Sample Collection Personnel—is praiseworthy, but largely irrelevant. CHINADA's practice may well have served as a basis for the conception of the anti-doping system held by certain members of the Athlete's entourage, and it may go some way toward explaining the advice the Athlete was given on 4–5 September 2018. But the mere fact that an actor commits to a high level of documentation does not, in and of itself, say anything as to the mandatory minimum that applies under the law. Even IDTM, on at least the one other Sample Collection which has been documented in the record (on 28 October 2017), provided Mr. Sun with a mission-specific document which would appear to satisfy the Respondents' idea of an "Authorization Letter," although WADA's witnesses suggested that this was truly exceptional. Supposing one could call it that, this "practice" could support the thesis of either side, and therefore serves neither.

323. Having regard to the text, structure, and purpose of the ISTI, the Panel concludes that the requirement for "*official documentation*" was met. To establish authorization, the first sentence of Article 5.3.3 requires that the DCO (or DCA) show an athlete general documentation that the Sample Collection Personnel is acting under the authority of the Testing Authority. This requirement is mirrored in Article 5.4.1(b), which requires that such a letter be shown to the Athlete "[w]*hen initial contact is made*." This requirement was satisfied when the DCO showed Mr. Sun the LoA issued by FINA to IDTM.

324. Because the Panel considers that the plain text of the ISTI, as well as its structure and purpose, supports the Appellant's interpretation, it is not necessary for the Panel to resolve the Parties' further submissions regarding a potential "customary practice" that might inform the ISTI, such as an alleged practice on the part of IDTM and others with respect to DCOs' identification. With respect to IDTM's practice in particular, the Panel moreover considers that it has not been provided enough evidence to establish the existence of a custom; indeed, although Mr. Sun has been tested some 180 times, including 60 times by IDTM teams, none of those other sample forms were furnished to the Panel. DCO Simoes's statements that he included an "Authorization Letter" as part of his notification on 28 October 2017 is the only other semi-direct data point in

the record as to IDTM's practice vis-à-vis the Athlete. This is not enough to evince the existence of a practice, much less its recognition as law (*opinio necessitatis*).

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325. The Panel next turns to the requirement of identification. This requirement is set out in Article 5.4.2(b) ("*the DCO/Chaperone shall*…") and is met by showing the "*complementary identification*" in Article 5.3.3 ("*DCOs shall also carry*…"). Self-evidently, since she handled notification, this requirement concerned only the DCO.

326. The Parties agree that, in terms of personal identification, the Sample Collection Personnel provided the following documents:

- the DCO provided a copy of her IDTM-issued employee card;
- the BCA provided her junior nurse's certificate; and
- the DCA provided his national identity card.

327. Since the DCO notified the Athlete, only she was required to provide "*complementary identification*," such as an "*identification card from the Sample Collection Authority*." This she did. In so doing, she satisfied the ISTI's identification obligations. As for the physical form of the DCO's card, the Panel agrees with the *Salmond* panel that the ISTI draw no distinction between paper and electronic versions of identification; given its increasingly ubiquitous use and in the absence of any prohibition, electronic identification is satisfactory for the purposes of Article 5.3.3.

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328. In sum, the (generic) Letter of Authority issued by FINA to IDTM fulfilled the requirement that Sample Collection Personnel show "*official documentation . . . evidencing their authority to collect a* Sample *from the* Athlete." Similarly, the DCO's copy of her IDTM-issued employee card satisfied her obligation to show the Athlete "*complementary identification*" with "*name and photograph*." The Panel is comfortably satisfied that the ISTI do not require documentation above and beyond that of a generic Letter of Authority on behalf of the Sample Collection Personnel as a whole, plus identification of the individual conducting the notification. The Respondents' arguments to the contrary are rejected.

ii. Were the DCO, BCA, and DCA adequately credentialed?

329. The Panel next turns to whether the Sample Collection Personnel were adequately trained, credentialed, and qualified in order to conduct the Sample Collection. For the avoidance of doubt, the question is simply whether the Sample Collection Personnel were capable of doing the job, not whether they adequately documented this to the Athlete; the Panel has already found that, as far as notification was concerned, the documents shown by the DCO to the Athlete, and her representations to him, sufficed.

330. The Respondents argue that, with the exception of the DCO herself, the team lacked the necessarily qualifications, with the consequence that they were unable to act as Sample Collection Personnel. This, too, voided the Sample Collection. WADA maintains that all three members were qualified to undertake their respective duties. The Panel considers the qualifications of the DCO, BCA, and DCA in turn below.

- ***The DCO***

331. The DCO has acted in that capacity since late 2017. Her training for the role is documented in her IDTM-issued badge (see paragraph 28), which states: "*It is hereby certified that the holder of this card* [name of DCO] *is a certified Doping Control Officer (DCO) and is authorized to conduct Doping Controls on behalf of International Doping Tests & Management (IDTM).*" The DCO estimated that, prior to the night in question, she had taken part in approximately 20 Sample Collections. None of the Parties contested her official credentials to act as DCO.

332. The Panel is comfortably satisfied that the DCO had the appropriate training in order to lead sample collections on behalf of IDTM as Sample Collection Authority.

- ***The BCA***

333. The BCA's professional credentials have come into question at various stages of the proceedings. Before the FINA Doping Panel, the Athlete argued that the BCA appeared to lack a Practicing Nurse Certificate ("PNC"), a document which is required under Chinese law to draw blood. This argument was accepted in the first instance, with the FINA Doping Panel concluding that the BCA "*did not produce unequivocal evidence of her qualifications to draw blood*" and expressing doubt as to whether such a PNC even existed. As a valid PNC has since been submitted into the record, the Panel considers this aspect moot.

334. Following WADA's submission of the BCA's PNC into the CAS record, the Athlete, including through his legal expert Professor Pei, has laid greater emphasis on the "*publicity*" function of a PNC; the certificate must be physically *shown*, not merely possessed, in order to satisfy blood-givers that they are dealing with a qualified BCO. After the submission of Professor Pei's report, the Athlete raised an additional objection relating to alleged geographical limitations on the BCA's PNC. This objection is premised on the idea that the BCA was only authorized to draw blood within the "place of practice/practicing" listed on the PNC, i.e., "*Changhai Hospital, No. 2 Military Medical Science University*" (the People's Liberation Army Second Military Medical University in Shanghai). This restriction would not have allowed her to draw blood at the Athlete's residence in Hangzhou, Zhejiang Province.

335. The Athlete's first argument, in essence, holds that the ISTI's goal of ensuring adequate notification of athletes requires that technical qualifications be shown, not merely possessed somewhere on file. Such an expectation is not altogether unreasonable, and the Panel notes that the BCA did in fact provide a copy of at least one professional

credential: her Specialized Technical Qualification Certificate for Junior Nurses ("STQCJN").[11] The BCA even suggested in her testimony that she had a copy of her PNC on her phone and would have been willing to show it, but was not asked to. But this is not required by the ISTI. As the Panel has already found, the ISTI require only two documentary elements to be included as part of any notification: authorization of the Sample Collection Personnel as a whole, and identification of the DCO as such (e.g., through a card issued by the Sample Collection Authority). Both of these were provided on 4 September 2018. As for the other two Sample Collection Personnel, not only their identities but also their qualifications are matters in which the DCO essentially serves as a kind of guarantor. As the individual responsible for the training of her subordinate colleagues, the DCO vouches for them—in writing, as on the Statements of Confidentiality; and orally, as part of a notification. Under the ISTI, the DCO speaks for the Sample Collection Personnel as a whole. Accordingly, the Athlete was no more entitled to personally examine the BCA's medical credentials than he was to physically viewing the BCA's and DCA's Statements of Confidentiality.

336. Much ink was spilled in the proceedings on what Chinese law has to say regarding a requirement to *show* a PNC, and how such law might inform the ISTI in light of the latter's commitment, in Annex E.4.1, to consistency "*with the local standards and regulatory requirements*." The Panel considers it sufficient, for present purposes, to dispose of the matter by reference to Professor Pei's concession that "[n]*o explicit provisions on* [the question] *are found in Chinese law, regulation or diagnosis and treatment norms*."

337. Because the ISTI only require a Letter of Authority and proof of a DCO's identity in order to notify athletes, it follows that there was no requirement for the BCA to "*produce unequivocal evidence*" of her qualifications to draw blood, or indeed of any other evidence. It was enough that her qualifications (e.g., the PNC and the BCA's Statement of Confidentiality) in fact exist, be kept on file, and be affirmed by the DCO. Professor Pei's report is not inconsistent with this conclusion.[12]

338. More complicated is the Athlete's assertion that the BCA's PNC was geographically limited, i.e., invalid in Hangzhou, and therefore would not have sufficed as a valid professional credential even if it had been shown. This assertion is a relative latecomer to these proceedings. The Athlete's expert on Chinese law, Professor Pei, acknowledged on cross-examination that he had not been asked to address this issue, and his report does not speak to it. The only provision of Chinese law annexed to his expert report which the professor mentioned during his live testimony as potentially bearing on the issue merely requires that nurse have a PNC before "*engag*[ing] *in nursing at the registered practice place*." Left unclear was the article's scope, for example whether

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[11] The DCO, on cross-examination, asserted that prior to Dr. Ba's involvement the BCA had showed not one but two specialized technical qualification certificates—one junior, as documented in Dr. Ba's photo, and an unphotographed, intermediate-level certificate.

[12] After admitting that Chinese law does not explicitly address doping, Professor Pei asserts, without citation to any relevant Chinese law, that the PNC "*might*" have a public service function.

Chinese law considers blood collection as part of a doping control to be "engagement in nursing." The Panel was also presented with certain evidence as to certain exceptions to this restriction, such as emergency deployments of nurses to address public health emergencies, etc. Yet other provisions that may bear on the issue, in particular parts of the Chinese Nurse Regulations, were fleetingly noted by Professor Pei on direct examination but were neither included in his expert report nor otherwise submitted into the record.

339. For her part, the BCA, when confronted with the Athlete's objection, was unequivocal:

> *A. "Let me think about it. Are you saying that as the certificate shows, the place of practising is the Second Military Medical University, and then the nursing work can only be performed in the Second Military Medical University?*
>
> *Q. Yes.*
>
> *A. Then I do not agree."*

Following further questioning by the Athlete's counsel, the BCA conceded that she was aware of a "*restriction on cross jurisdiction rescue activities*" specifically, but maintained that she was either unfamiliar with or could not agree to the blanket proposition advanced by the Respondent to the effect that Chinese law disallowed her engagement as BCO in Hangzhou.

340. The Panel recalls that the Party advancing a proposition bears the burden of proof. In CAS proceedings, that burden is the "comfortable satisfaction" greater than a balance of probabilities but lower than beyond a reasonable doubt. The Panel does not consider that either of the Respondents has presented adequate evidence establishing that Chinese law prohibits the engagement of a nurse to draw blood for the purposes of a doping control. The BCA, whose testimony the Panel finds credible, earnest, and forthright, specifically rejected the Athlete's thesis; his legal expert, in turn, conceded that he had not addressed the question in his report, and that Chinese law on blood collection does not specifically address doping controls. This is simply not enough. In light of the circumstances, the Athlete has not met his burden of establishing the content of Chinese law, nor its in-context application, much less how any potential conflict under local law might inform the interpretation or application of the ISTI.

341. As documented in the BCA's Statement of Confidentiality for 2018, the BCA was instructed and trained to act as Blood Collection Officer by the DCO (who had also viewed her credentials). A registered nurse, she possessed all relevant medical qualifications to carry out her duties, in particular an STQCJN and a PNC; in the absence of evidence to the contrary, the latter is presumed to have been valid for doping controls throughout the People's Republic of China. The BCA, in short, possessed the necessary training and qualifications to act as BCO on 4–5 September 2018.

- ***The DCA***

342. Article 3.2 of the ISTI defines a Chaperone as follows:

> *"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."*

343. The sole written evidence of the DCA's training is encapsulated in the Statement of Confidentiality, signed by him and counter-signed by the DCO. That statement documents that the DCA was trained for the job of "Assistant"[13] and that he understood what was expected of him—which, in this case, was limited to observing the passage of urine.

344. The DCA made remarks in his testimony before the Panel which called into question his level of training. Among other things, the DCA stated that he had "*no idea*" as to what work he should have done in preparation for witnessing the Athlete; was never educated regarding hygiene, the Athlete's clothing, or the proper maintenance of urine once collected; and had "*never been trained*" to supervise an athlete. On the one hand, the DCA remembered signing the Doping Control Form, but on the other, he did not seem to remember his Statement of Confidentiality (although he did confirm the validity of his signature when the document was shown to him). He also recalled accompanying the DCO as Chaperone once before, in late January 2018. Generally speaking, the DCA's testimony gave the impression of someone who had been recruited at little notice, had been given minimal instruction, was swiftly excluded from the Sample Collection after being confronted by the Athlete regarding his unauthorized photography, and preferred to leave the entire episode behind him.

345. This does not indicate a high level of training under even the most charitable of views. Judging by the testimony of WADA's witnesses, it appears this phenomenon is not limited to the DCA in question. Mr. Kemp, for instance, stated that "*in many cases these chaperones are volunteers after an event so to expect professional conduct is a challenge*," adding that "*their conduct absolutely should be of sufficient calibre to meet the requirements*." This is far from a resounding vote of confidence in the sophistication to be expected from Chaperones.

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[13] In his testimony, Mr. Tudor Popa clarified that IDTM's internal nomenclature departs from the ISTI insofar as it distinguishes between a "Chaperone" and an "Assistant." The former is used to describe individuals who assist with in-competition tests and their only duty is notification and bringing athletes to the doping control stations. In contrast, in IDTM's parlance, an "Assistant" is a "witnessing chaperone," i.e., he witnesses the passage of urine.

346. Be that as it may, the Panel is mindful that training should be commensurate to the nature of the job. In this regard, it bears noting that the role of the Chaperone under the ISTI is an extremely limited one. In the case of a Blood Collection Officer, advanced medical certifications as well as a detailed familiarity of the blood collection process are required. A Chaperone, in contrast, typically has a few basic tasks, and this DCA had just one: observation of the passage of urine, to ensure there be no manipulation of the urine sample. WADA's claim at the hearing that a DCA's training could be encapsulated in "*fifteen seconds*" rather overstates the case, but it is nonetheless true that monitoring the passage of urine is not a high art, and does not require an advanced degree. In many sample collections there is no need for the presence of a Chaperone at all, particularly where the DCO is of the same gender as the athlete and is therefore in a position to fulfill both roles.

347. Clearly every role in Sample Collection requires training. What constitutes adequate training, however, depends on the complexity of the assigned task. In the Panel's view, even relatively brief training by a DCO may suffice for preparing a Chaperone to observe the passage of urine, so long as it covers the essentials.

348. The DCA confirmed that he had been told that his duties would be to "*supervise Sun Yang to pass urine*," and that he signed papers to that effect. The DCO, for her part, confirmed that she had personally trained the DCA for the job. In the Panel's view, this was adequate to act as Chaperone under the ISTI.

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349. In light of the foregoing, the Panel is comfortably satisfied that the DCO, BCA, and DCA possessed the necessary qualifications and credentials to fulfill their respective roles under the ISTI.

iii. Did the Athlete have a compelling justification in light of the conduct of the Sample Collection Personnel?

350. The Panel has found that the Sample Collection Personnel appropriately notified the Athlete under the ISTI, and that each member possessed the necessary qualifications for his or her role. It remains to be seen whether the Athlete is able to justify his conduct by reference to other circumstances, so as to avoid the finding of an anti-doping rule violation.

351. Some of the Athlete's submissions in this regard can be immediately rejected, as they were by the FINA Doping Panel in paragraph 6.57 of its decision. For example, the Athlete argues that the blood samples were mere "*medical waste*," since they had not been collected in accordance with the ISTI. However, the Panel has found that he was notified in accordance with the ISTI, that he dealt with duly trained and qualified Sample Collection Personnel, and that the blood collection itself proceeded without issue. Moreover, the ISTI make no distinction between "waste" and valid "samples"; indeed, the latter are defined in its Article 3.1 as "*any biological material collected for the*

purposes of Doping Control." The Athlete's argument that the ISTI itself contemplated the destruction of an allegedly dubious sample is without merit.

352. Equally untenable is the Athlete's attempt to portray Dr. Ba's note as the authoritative and undisputed account of the evening. Article 7.4.4 of the ISTI provides that DCOs are to furnish athletes "*with the opportunity to document any concerns he/she may have about how the Sample Collection Session was conducted*." This can be done on the Doping Control Form itself, but Article 7.4.6 of the ISTI makes clear that any "*appropriate documentation*" will do. Dr. Ba chose to write a separate handwritten note; DCOs are instructed to acknowledge such statements by signing them. Doing so does not suggest agreement with the substance. The DCO's statements both before and after the note was signed suggests she very much did not.

353. Other of the Athlete's submissions, however, require careful consideration. The Athlete's overall account of the night paints a picture in which ambiguity, unprofessionalism, and outright misconduct of the DCA and DCO contributed to an atmosphere in which the Sample Collection was ultimately abandoned on the basis of (allegedly) mutual agreement. With respect to the DCA, the Athlete addresses especially his unauthorized photography of the Athlete and his residence, leading to his exclusion—again by unanimous consent—from the Sample Collection. Second, the Athlete submits that the DCO carries responsibility for the failure of the Sample Collection, and indeed that it was she who suggested its abandonment and encouraged the destruction of the blood vials. The Panel addresses the DCA and DCO in turn below.

- **The DCA**

354. The Athlete contends that the unprofessional conduct of the DCA invalidated at least the urine sample. Following his expulsion from the clubhouse room where the relevant parties were gathered, the DCA was excluded from further involvement in the Sample Collection and returned only to sign off on Dr. Ba's handwritten account at the end of the night.

355. Taking pictures of an athlete without permission while on duty during a Sample Collection is, in the Panel's view, unquestionably unprofessional and inappropriate. Sample collection requires discretion on all sides, including from Chaperones. The DCA's conduct undermined the Athlete's faith in the integrity of the Sample Collection, such that the Athlete's request that the DCA be excluded from further involvement was, in the circumstances, reasonable.

356. The Panel should note that there was considerable divergence in the Parties' accounts of why the DCA was excluded; the DCO noted that the Athlete and his entourage never complained (at least in her presence) of the photos. Nor was this particular plot point included in Dr. Ba's handwritten narration. But noted or not, the issue quite likely underlay the marked agitation with which the Athlete and his mother viewed the DCA. To the DCO's credit, she agreed to the removal of the DCA from the doping control station so that passions could cool. There were further attempts at coming to an

arrangement regarding the taking of a urine sample, but none were mutually acceptable to both sides.

357. After the departure of the DCA, the fact is that there was no other male member of the Sample Collection Personnel who could monitor the passage of the Athlete's urine. The Panel considers that any attempt at urine collection on 4–5 September 2018 was therefore aborted, not by mutual agreement per se but out of necessity. The Panel's finding in this regard is highly fact-specific, hinging on the particular context of the DCA's exclusion (and the DCA's own testimony) as well as the lack of a same-gender substitute. In these unusual circumstances, the Athlete cannot be considered to have committed an anti-doping rule violation in connection with the failure to collect a urine sample.

358. By the same token, however, the DCA's conduct, however regrettable, cannot be blamed for the failure of the blood sample collection. His exclusion from the doping control station removed one arguable obstacle to the orderly completion of the remaining aspects of the Sample Collection: the collection and transportation of the Athlete's blood samples from the clubhouse.

- **The DCO**

359. The conduct of the DCO on 4–5 September 2018, particularly in its last few hours, is central to the Athlete's contention that the Sample Collection was aborted with the consent of, and even upon instigation from, the DCO:

> *"Accordingly, there could not be any intentional interference (or attempt to interfere) with a Doping Control official on the part of Mr. Sun Yang since the blood was retrieved from the container based on* [the DCO's] *instructions and under her supervision, as confirmed by the numerous witnesses who were on site and by the video*[-]*surveillance recordings of the premises in which the test took place."*

360. In the Athlete's version, after taking numerous calls from members of the Athlete's network,[14] the DCO came to understand that the Sample Collection could not proceed, and that the biological material already collected could not leave the premises. From that point onward, the DCO played a central role in the events leading to the blood samples' destruction. It is alleged that the DCO:

- "*voluntarily returned*" the blood containers to the Athlete;

[14] The Athlete's counsel also at times suggested that the DCO "*abandoned*" her duties by leaving the room and thereby failing to maintain direct visual contact with the Athlete, as required under Article 5.4.2(a) of the ISTI. During the DCO's cross-examination, Athlete's counsel characterized her conduct as "*loitering outside, making phone calls, chit-chatting, and going for strolls*." In fact, these comings-and-goings appeared to relate to the DCO fielding the Athlete's objections, accepting calls from his contacts, and consulting with Mr. Popa. On cross-examination, the DCO asserted that for these periods she entrusted the observation of the Athlete to the BCA, who remained in the doping control station to observe the Athlete.

- told the Athlete that she had to return with the storage container, thus implanting in the Athlete's mind the idea that he could only keep his biological material by physically removing it from the vials;

- told the Athlete that, "*if you are able to take the blood sample, go ahead*," and "*you find your way*";

- appeared calm at all times, including on video surveillance footage as the Athlete's entourage and a security guard broke each of the two blood sample bottles; and

- signed off on Dr. Ba's handwritten account of the events of the night, thus evincing her agreement with the Athlete.

361. The Athlete's account therefore essentially reduces to the contention that he and his entourage acted on the initiative of the DCO, under a common understanding that the Sample Collection was void.

362. The Panel disagrees.

363. Before examining specific actions of the DCO, it is worth recalling the broader context. The Sample Collection Personnel arrived at the Athlete's residence around 21:45 and left nearly six hours later. By the time that the DCO was told by Dr. Ba that the BCA's credentials were supposedly inadequate, such that no blood sample could leave the premises, she had been on site for more than three hours. Throughout this period, the evidence suggests that the DCO had repeatedly advised the Athlete that her team was duly authorized and adequately credentialed to take his samples; that she was "in control" of the process and vouched for her team; and that the parties could consider certain alternative arrangements to satisfy the Athlete's concerns, such as shipping the samples to a laboratory while putting any analysis on hold pending the resolution of the Athlete's complaints. By all indications, these assertions and suggestions were rebuffed.

364. In this context, one must make certain allowances. For example, the Panel views as inartful and obviously unfruitful the DCO's gambit that "*all materials have to be retrieved*"—suggested by Mr. Popa from Stockholm, supposedly to convince the Athlete to let the samples go. In the circumstances, however, the offer, coming as it did on the heels of pleas, suggestions, and other proposals which had been rejected, is better seen as a last-ditch attempt to secure the blood samples' safe passage. Given the DCO's conduct up to that point, the Panel sees little if any evidence for the proposition that the DCO meant (or could seriously be seen as encouraging) their destruction.

365. Much was made during the hearing of the DCO's pace of walking or running to and from the doping control station, particularly during the destruction of the first blood vial. The Athlete alleges that the DCO was unusually calm under the circumstances, in the sense that she did not act as one would expect an incensed, outraged, or shocked DCO to behave. The video footage is indeed ambiguous on this front. On the one hand, the DCO appears to move at a somewhat heightened pace, albeit well short of a sprint,

through the clubhouse lobby *en route* to the doping control station, where according to her testimony she had heard sounds of the first blood container being struck. On the other hand, the DCO is seen behind the Athlete and guard, calmly video-taping the ultimate destruction of the container outdoors. The DCO's former deposition and WADA's closing arguments both claimed that this was an attempt to covertly gather evidence of something which she condemned, but which the Athlete's entourage would not have allowed her to capture openly. That may or may not be true. Ultimately, it will not be necessary for the Panel to psychoanalyze the DCO's gait.

366. The Panel is convinced that the DCO's mannerisms do not serve the Athlete's cause. The events of 4–5 September 2018 would stretch any DCO to the limits, and it is a credit to this DCO that she apparently remained calm under pressure. That she did not exert herself with ever-greater pathos as the night wore on might disappoint some, but this may not be a reasonable standard to expect of an individual who has spent hours debating an athlete and his entourage on an increasing number of technical challenges as to the validity of the sampling mission. Her supposed lack of vigor does not discredit her testimony, nor establish that she acquiesced in the very things—the interruption of the Sample Collection or its abortion—with which she repeatedly and explicitly disagreed.

367. In this connection, the Panel does not consider that a phrase such as "*find your way*" necessarily indicates that the DCO had a sudden change of heart. It is of course conceivable that a statement like this indicates apathy or, going further, tacit agreement with the Athlete's course of action. Alternatively, and setting aside the possibility of an imperfect translation from what was said in Chinese, the statement can also be understood as the exasperated resignation of someone who knows she is defeated, outnumbered, and will simply be overruled, come what may.

368. Undoubtedly the record falls short of providing a comprehensive view of what exactly transpired on 4–5 September 2018. The footage is piecemeal. The accounts of what was said and how it was said diverge widely. Certain events, such as the Athlete's tearing up of the paper Doping Control Form at the end of the night—whether it was seized from the DCO or merely found abandoned on a table and appropriately disposed of, etc.—are impossible for the Panel definitively to reconcile. On issues like this, the Panel draws no conclusions.

369. Under Annex A.3.3(a) of the ISTI, as a member of the Sample Collection Personnel the DCO was to inform the Athlete "*of the* Consequences *of a possible* Failure to Comply." The FINA Doping Panel construed this as meaning that a DCO must state outright "*that she* ***is treating*** *the Athlete's conduct as a Failure to Comply and that the following consequences* ***will apply***." But nothing in Annex A.3.3(a) requires a DCO, on the spot, to proclaim a definitive anti-doping rule violation. The Panel therefore has no hesitation in disavowing this artificially high threshold. It is enough for Sample Collection Personnel to tell an athlete, in a language he can understand, the consequences of a *possible* failure to comply. As to whether an *actual* violation has occurred, this is for

the Testing Authority to determine and prosecute; such a proclamation is not within any DCO's competence.

370. The DCO appears to have tried, on several occasions, to inform the Athlete of the potential consequences of his refusal to submit to the Sample Collection. According to her testimony, she was shouted down, first by Dr. Han Zhaoqi, and then by members of the Athlete's entourage present in the clubhouse. Given this context, the Panel disagrees with the FINA Doping Panel on the question of whether the Athlete was clearly warned. It appears that the only reason there was no "*metaphorical 'bang,'*" to borrow the Doping Panel's phraseology, is because the Athlete and his entourage themselves prevented the DCO from finishing. *Ex injuria jus non oritur*. Nor does such a belligerent reaction bode well for the notion that the DCO was happily bearing witness to the samples' destruction by hammer.

371. Professional athletes are presumptively familiar with the doping control process. They are also well aware of the consequences of refusing to submit to a sample or of interfering in the process, and of the weighty sanctions that may befall should they be found guilty of an anti-doping rule violation. Mr. Sun, who has been tested at least 180 times, is certainly no exception. The Panel would expect an athlete as experienced as he to exercise the highest duty of care when disputing the validity of a Sample Collection. The Doping Control Form's "comments" field provides just such an opportunity. In it, athletes may lodge complaints or reservations to the process—as indeed the Athlete did during a previous Sample Collection featuring the DCO (then acting as Chaperone) in October 2017, and as he was invited to do by the DCO on 5 September 2018. Similarly, there is nothing preventing an athlete, after sample collection, from contacting the Testing Authority in order to ensure that his concerns are addressed.

372. The uncontroverted facts are these. The Athlete was told numerous times the samples had to leave with the DCO. He refused this. A last-ditch bid at persuading the Athlete's entourage, perhaps ill-advised, ended in a sample's destruction. The DCO multiple times tried to notify the Athlete of the potential consequences that this could entail. At the very least, these facts should have created questions in the Athlete's mind whether his chosen course of action was correct. That he pressed forward undeterred was, as the FINA Doping Panel held, "*foolish in the extreme*."

373. The Sample Collection of 4–5 September 2018 was not pristine. Neither, however, was it of a kind whose illegitimacy was so manifest that the Athlete's dramatic conduct could find compelling justification in the World Anti-Doping Code. The FINA Doping Panel correctly diagnosed the Athlete's conduct as a "*gamble*." It was the wrong gamble to take.

* * *

374. In light of the foregoing analysis, the Panel is comfortably satisfied that the Athlete violated Article 2.5 of the FINA DC ("Tampering or Alleged Tampering with any Part

of Doping Control by an Athlete or Other Person"), at latest beginning with his refusal to allow the blood samples to leave with the Sample Collection Personnel.

375. Likewise, the Panel is comfortably satisfied that the Athlete violated Article 2.3 of the FINA DC ("Evading, Refusing or Failing to Submit to Sample Collection by an Athlete"). Consistent with the Panel's decision as to the applicable law in paragraph 211, its conclusions in this respect are made by reference to the 2021 FINA DC.

3. What is the appropriate sanction if the Athlete committed an anti-doping rule violation?

376. Having determined that the Athlete has violated Articles 2.3 and 2.5 of the FINA DC, the Panel now identifies the sanction to be applied.

i. The period of ineligibility

377. FINA DC Article 10.3.1 provides:

> *"For violations of DC 2.3 or DC 2.5, the Ineligibility period shall be four (4) years except (i) in the case of failing to submit to Sample collection, if the Athlete can establish that the commission of the anti-doping rule violation was not intentional, the period of Ineligibility shall be two (2) years; (ii) in all other cases, if the Athlete or other Person can establish exceptional circumstances that justify a reduction of the period of Ineligibility, the period of Ineligibility shall be in a range from two (2) years to four (4) years depending on the Athlete or other Person's degree of Fault . . ."*

378. This provision embodies a significant revision from the previous version of the rules: the 2021 FINA DC (and indeed the 2021 World Anti-Doping Code) provide a greater degree of mitigation in determining a period of ineligibility for violations of Article 2.5 (Tampering) for "exceptional circumstances," the presence of which may reduce the period of ineligibility down to two years. In this case, the Panel finds that exceptional circumstances merit the reduction of the Athlete's period of ineligibility for his violation of Article 2.5 of the FINA DC to two years.

379. Mitigation is also possible, in principle, for certain violations of Article 2.3 (Failing to Submit). Here, however, it is only available where an athlete is able to show that his commission of the anti-doping rule violation "*was not intentional*." The Athlete has not argued an absence of *mens rea* in any explicit sense, although his general assertion, that his actions were guided by the belief that the Sample Collection was unlawful and/or was abandoned, may be seen as making a similar point.

380. Although it does not directly apply to cases of Failing to Submit, Article 10.2.3 of the FINA DC defines "*intentional*" as including cases in which athletes "*knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule*

violation and manifestly disregarded that risk." The Panel's finding in paragraphs 370–373 is essentially one that the Athlete acted recklessly and in manifest disregard of the risk of the potential consequences of his actions. Accordingly, the Athlete cannot mitigate his violation of Article 2.3 of the FINA DC; the "base" period of ineligibility remains at four years.

381. In June 2014, moreover, the Athlete received a three-month period of ineligibility. The present violations therefore constitute his second offense. The Panel must therefore also consider the role of this previous violation on the calculation of the Athlete's final period of ineligibility.

382. Second-time violations are addressed in the FINA DC at Article 10.9:

> ***10.9.1*** *Second or Third Anti-Doping Rule Violation*
>
> ***10.9.1.1*** *For an Athlete or other Person's second anti-doping rule violation, the period of* Ineligibility *shall be the greater of:*
>
> (a) *a six (6) month period of* Ineligibility*; or*
>
> (b) *A period of* Ineligibility in the range between:
>
> (i) *the sum of the period of* Ineligibility *imposed for the first anti-doping rule violation plus the period of* Ineligibility *otherwise applicable to the second anti-doping rule violation treated as if it were a first violation, and*
>
> (ii) *twice the period of* Ineligibility *otherwise applicable to the second anti-doping rule violation treated as if it were a first violation.*
>
> *The period of* Ineligibility *within this range shall be determined based on the entirety of the circumstances and the* Athlete *or other* Person's *degree of* Fault *with respect to the second violation.*

383. This provision, too, represents a newly flexible approach. In the past, panels applying the FINA DC were bound to impose the harshest possible sanction. Under the 2021 rules, however, panel may select from a range based on their assessment of the "*entirety of the circumstances*."

384. Consistent with paragraph 378, the Panel considers that the circumstances surrounding the Sample Collection of 4–5 September 2018 merit a period of ineligibility at the lower end of the range: namely the addition of the 3-month period (from 2014) to the sanction that is "*otherwise applicable*" in this case. Consequently, the Panel concludes that a period of ineligibility of 4 years and 3 months (i.e., 51 months) is to be imposed on the Athlete.

385. Ordinarily, and since the Athlete has not and is not serving any provisional suspension, his period of ineligibility would run from the date of this Award. But this is not always

the case. Article 10.13.1 of the FINA DC, titled "*Delays not attributable to the* Athlete *or other* Person," states:

> *"Where there have been substantial delays in the hearing process or other aspects of* Doping Control*, and the* Athlete *or other* Person *can establish that such delays are not attributable to the* Athlete *or other* Person*, the body imposing the sanction may start the period of* Ineligibility *at an earlier date commencing as early as the date of* Sample *collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of* Ineligibility*, including retroactive* Ineligibility*, shall be* Disqualified*."*

386. The initial CAS award, which like the present Award concluded that the Athlete committed an ADRV, was issued on 28 February 2020; the present Award is rendered on 25 June 2021. But for the annulment of the first award by the Swiss Federal Tribunal, the Athlete's period of ineligibility would have begun to run nearly one-and-a-half years earlier than the date of the present Award. Such a delay is, without a doubt, substantial. As to attribution, the annulment proceedings were of course lodged by the Athlete; given their outcome, however, one cannot attribute the delay to the complainant but rather to the situation giving rise to his complaint.

387. In the circumstances, the Panel orders that the period of ineligibility shall commence as of 28 February 2020, that is, the date on which the annulled Award was originally rendered.

ii. Other consequences

388. WADA has submitted that, in the event that it prevails, 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 must be forfeited.

389. For his part, the Athlete has submitted that no sanction should be imposed on him, as he did not commit an anti-doping rule violation. In the alternative, the imposition of a sanction in light of the circumstances of the attempted Sample Collection would be disproportionate and would violate his personality rights under Swiss and human rights law.

390. FINA did not make submissions on the consequences of any finding on the merits against the Athlete.

391. None of the Parties has cited any part of the FINA DC which provides for disqualification of results, in particular in the context of a violation of Articles 2.3 or 2.5 during an out-of-competition test. This is unsurprising, since the FINA DC do not appear to address disqualification of results in this context.

392. Two provisions are at least tangentially relevant. Article 10.10 of the FINA DC states:

> *"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."*

393. That provision, in turn, refers to Article 9 of the FINA DC, which "*automatically leads to Disqualification of the result obtained in that Event with all resulting Consequences, including forfeiture of any medals, points and prizes*." Notably, however, Article 9 pertains to "*an anti-doping rule violation . . . in connection with an* In-Competition *test*."

394. The Sample Collection at issue in these proceedings was out-of-competition, so these proceedings do not concern an anti-doping rule violation in connection with an in-competition test. The FINA DC do not appear to contemplate disqualification of results outside that context.

395. The Panel considers it pertinent that there has been no allegation that the Athlete was doped on 4 September 2018. Indeed, given that Mr. Sun tested negative eight times in the prior two weeks, the likelihood that he *would have* tested positive, had the samples of 4–5 September 2018 been analyzed in Beijing, appears remote. It is far from clear whether Article 10.10 of the FINA DC, which deals with positive doping results obtained during a sporting event, is appropriately transposed to the facts of this case.

396. Even if Article 10.10 were deemed to apply by analogy, however, that article permits the Panel to avoid the disqualification of results preceding the period of ineligibility if "*fairness requires*." In this regard, it is noteworthy that FINA refrained from seeking a provisional suspension against the Athlete in the first-instance proceedings before the Doping Panel. In the Panel's view, this decision would have imbued the Athlete with a legitimate expectation that he was free to continue to participate in his sport while the dispute was pending, particularly following his acquittal by the FINA Doping Panel on 3 January 2019. The Panel considers that, were Article 10.10 here applicable, fairness considerations would nevertheless militate against any further disqualification of the Athlete's results.

397. Accordingly, the Panel declines to disqualify the Athlete's results obtained prior to the commencement of his period of ineligibility on 28 February 2020.

XI. COSTS

(…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Court of Arbitration for Sport has jurisdiction to hear the present dispute.

2. 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 admissible and is partially upheld.

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

4. Mr. Sun Yang is sanctioned with a period of ineligibility of 4 (four) years and 3 (three) months, beginning on 28 February 2020.

5. (…).

6. (…).

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

Seat of arbitration: Lausanne, Switzerland
Date: 22 June 2021

THE COURT OF ARBITRATION FOR SPORT

Hans Nater
President of the Panel

Jan Paulsson
Arbitrator

Bernard Hanotiau
Arbitrator

Philipp Kotlaba
Ad hoc Clerk