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## FINA DOPING PANEL 01/2019

3 January 2019

### FINA Doping Panel

Comprised of

**Robert Fox** (SUI) Chairman

**Farid Ben Belkacem** (ALG) Member

**David Lech** (CAN) Member

In the proceeding against:

The swimmer **SUN YANG** ("the Athlete")

Affiliated to **China Swimming Association** ("CSA")

Represented by: **Mr. LIU Chi and Mr. LI Mingtian, Legal Counsel, JunZeJun Law Offices, Beijing, China;**

And by: **Mr. Fabrice Robert-Tissot, Legal Counsel, Bonnard Lawson, Geneva, Switzerland;**

And by: **Mr. Ian Meakin, UK Barrister, Tenant at XXIV Old Buildings, London, UK.**

Brought by **FINA:**

Represented by **Mr. Jean-Pierre Morand, Legal Counsel, Kellerhals-Carrard, Lausanne, Switzerland;**

And by: **Mr. Romain Venard, Legal Counsel, FINA Legal Department, Lausanne, Switzerland.**

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## 1. THE PARTIES

1.1 The **FEDERATION INTERNATIONALE de NATATION (FINA)** is the International Federation governing the sport of Aquatics. FINA has established and is carrying out, *inter alia*, a doping control program, both for in-competition as well as out-of-competition testing.

1.2 **The CSA** is a member of FINA. CSA is required to recognize and comply with FINA's anti-doping rules which are set out in the FINA Doping Control Rules ("FINA DC"). The FINA DC is directly applicable and must be followed by Athletes, Athlete Support Personnel, coaches, physicians, team leaders, and club representatives under the jurisdiction of the CSA.

1.3 The Athlete is a member of the CSA and thus is subject to the jurisdiction of the FINA DC. The Athlete is not a minor.

## 2. NATURE OF THE CASE AND PROCEDURAL HISTORY

2.1 On the evening of September 4, 2018, an attempt was made to collect blood and urine samples from the Athlete at the Athlete's residence compound. This was an out-of-competition (OOC) sample collection mission. The mission was authorized by FINA as the Testing Authority. FINA has Results Management Authority. However, International Doping Tests and Management (IDTM) was the Sample Collection Authority. IDTM attempted to collect blood and urine from the Athlete during the Athlete's previously selected '60-minute' time slot from 10 p.m. to 11 p.m. on September 4, 2018. This much is agreed upon. The events that transpired at the Athlete's residence during the night of September 4, 2018 and into the early morning hours of September 5, 2018 are highly contentious and form the subject matter of this dispute.

2.2 No blood or urine samples were ever analysed as a result of the OOC mission conducted by IDTM. Blood was collected but the

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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.

2.3 Very soon after the events of September 4 and 5, 2018, IDTM wrote to FINA and offered its explanations for what had happened. IDTM reported to FINA that the requested samples (blood and urine) could not be collected. The Athlete also sent a short note to FINA on September 6, 2018, offering his explanations and a complaint regarding the conduct of the IDTM officials. By mid-September, 2018, FINA had received various additional reports and explanations from IDTM. On September 19, 2018, FINA wrote to the Athlete to formally request an explanation regarding IDTM's failure to collect the desired urine and blood samples.

2.4 On September, 22, 2018, Mr. Lui Chi and Mr. Li Mingtian wrote to FINA and advised that they had been retained as legal counsel to assist the Athlete. The Athlete also wrote to FINA on September 26, 2018, expressing his intent to cooperate and assist with the FINA investigation into what had happened.

2.5 FINA evaluated the reports and explanations provided by IDTM and the Athlete. FINA came to believe that the Athlete, without compelling justification, failed or refused to provide a urine sample after proper notification by the IDTM Doping Control Officer. FINA also believed that the Athlete, and others acting on his instructions, destroyed the collected blood sample container thereby tampering with and subverting proper doping control processes. In a letter sent to the Athlete on October 5, 2018, FINA formally asserted that the Athlete had committed a violation of FINA DC 2.3 (Refusing or Failing to Submit) and FINA DC 2.5 (Tampering or Attempted Tampering). Subsequently, there was full disclosure to the Athlete of the material that had been earlier provided to FINA by IDTM.

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2.6 The matter was forwarded by FINA to the FINA Doping Panel to resolve. On October 12, 2018, Mr. Robert Fox, the Chair of the FINA Doping Panel, wrote to the Athlete and proposed that a hearing be conducted on November 19, 2018, in Lausanne, Switzerland. Thereafter, various correspondences were exchanged between legal counsel and the Doping Panel to confirm the attendances of counsel and witnesses, to provide deadlines for the filing of all required materials and to confirm the composition of the Doping Panel that would hear the case.

2.7 In advance of the hearing on November 19, 2018, FINA and the Athlete, filed extensive Briefs which contained evidence, exhibits and submissions.

2.8 Prior to the formal commencement of the hearing in Lausanne, Switzerland, when questioned by Mr. Robert Fox, the Athlete and FINA confirmed (i) that each was satisfied with the Doping Panel's jurisdiction, (ii) there were no concerns regarding bias on the part of the Doping Panel members, (iii) the proposed manner of conducting the hearing was acceptable, and (iv) no outstanding procedural issues remained to be resolved. The Athlete and FINA wished to proceed.

### 3. JURISDICTION AND APPLICABLE RULES

3.1 The jurisdiction of the FINA Doping Panel arises out of the provisions of the FINA Rules C 22.8, C22.9 and FINA DC 8.1.

3.2 The applicable Rules in this case are the FINA DC in effect since January 1, 2015.

### 4. MOTIONS AND CONTENTIONS

4.1 The positions of each party, the Athlete and FINA, will be summarized below. All references to FINA's or the Athlete's position, version or perspective will mean, for ease of reference, the totality of the documents filed and the testimony tendered by individuals on their behalf.



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4.2 The summary is intended to provide background information and context for the main issues in dispute and, critically, to describe the positions of FINA and the Athlete on the relatively few factually contentious issues, as established by the evidence tendered and the submissions made. As will be clear, exactly what happened is not particularly in dispute (as opposed to what the consequences should be for what has happened). As voluminous materials were filed and there was much duplication of narrative by the various witnesses, the Doping Panel has elected to not repeat the events that transpired from each witness's perspective. Doing so would not assist in understanding the Doping Panel's final award.

4.3 While the summary does not contain every contention and allegation made by FINA and the Athlete, the Doping Panel has reviewed and carefully considered all of the written submissions and evidence offered by the parties, including those not specifically mentioned in the following summary.

#### FINA's Position:

4.4 FINA's version of events will be described first. The Doping Panel will then identify the most significant contentious issues from FINA's perspective.

4.5 FINA called 4 witnesses to testify at the hearing. Additional material was filed with the Doping Panel by Ms. Lin. FINA's witnesses were the following:

- **Mr. Mario Artur Dos Santos Simoes:** Mr. Simoes is an experienced IDTM Doping Control Officer from Portugal. Mr. Simoes testified by Skype at the hearing. Mr. Simoes tested the Athlete in China in 2017, and filed with the Doping Panel a Supplementary Report that he created for IDTM in 2017 associated with that earlier test of the Athlete.
- The **Doping Control Officer (DCO):** The DCO is a young woman who requested that she not be identified and that her name not be made public in the final award. The Doping Panel has agreed with this request and will hereafter refer to this FINA

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witness as DCO. DCO works for IDTM and had overall responsibility for the Athlete's sample collection session on September 4, 2018. She was present at all relevant times and testified at the hearing as to her direct and personal knowledge. The DCO testified by Skype and was visibly identified. In addition, she submitted two Supplementary Reports and conducted multiple phone conversations with Tudor Popa during the course of the sample collection session.

- **Tudor Popa:** Mr. Popa is an IDTM employee and testing coordinator. He is the DCO's direct supervisor. Mr. Popa was in Sweden at all relevant times. The DCO spoke on the phone numerous times with Mr. Popa during the night of September 4, 2018, seeking advice and instructions. Mr. Popa wrote two Supplementary Reports based on his understanding of the events that occurred (exclusively informed by his conversations with the DCO) which were filed with the Doping Panel. Mr. Popa testified by Skype at the hearing.
- **Jenny Johannesson:** Ms. Johannesson is the IDTM's Legal Counsel. This witness had no personal knowledge of the events that took place during the sample collection session on September 4, 2018. Ms. Johannesson testified by Skype at the hearing and provided a Report to the Doping Panel describing how IDTM interprets the International Standard for Testing and Investigations (ISTI) and, specifically, how IDTM interpreted the requirements contained in Article 5.3.2 and 5.3.3. The Report she provided also contained information relevant to the IDTM's typical authorization and notification procedures.
- **Huangfen Lin.** Ms. Lin was the IDTM Blood Collection Assistant (BCA). The BCA was present at the sample collection session on September 4, 2018 and filed a signed Supplementary Report. The BCA did not attend at the hearing in Lausanne and did not testify or answer questions.

4.6 For FINA, the obvious problems that occurred at the sample collection session on September 4, 2018, were foreshadowed by events that took place nearly a year earlier. Mr. Simoes described in his 2017 Supplementary Report, and in his

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testimony before the Doping Panel, his concerns (from the perspective of a non-Chinese speaker) regarding the general conduct of the Athlete during a testing session that Mr. Simoes conducted on the Athlete in 2017. Mr. Simoes was the IDTM Doping Control Officer for that testing mission. It was reported that the Athlete was extremely rude, abusive and uncooperative. Mr. Simoes reported that the Athlete was particularly rude to the IDTM Doping Control Assistant (DCA) who was in the process of being trained to be an IDTM Doping Control Officer by Mr. Simoes. The Athlete wrote comments on the doping control form that the DCA lacked proper accreditation and also lacked authorization to perform her assigned role. The DCA at the sample collection session in 2017 (who is now fully certified as a Doping Control Officer by IDTM) was the Doping Control Officer assigned by IDTM to conduct the testing mission on the Athlete on September 4, 2018.

4.7 On September 4, 2018, the DCO together with the BCA and a DCA (DCA being the IDTM term for a Chaperone) (together, the “testing team”), arrived by car at the residential complex where the Athlete had indicated on his Whereabouts filings he could be located. The test attempt was planned to occur in a specific 60-minute time slot, between the hours of 10 p.m. and 11 p.m. The three individuals sent by IDTM were led to the Athlete’s villa by a security guard. The Athlete was not at his home.

4.8 While waiting for the Athlete, prior to leaving the villa, 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 security guard insisted that the testing team not wait for the Athlete at the Athlete’s villa, but asked that they wait outside the residential block. The testing team complied.

4.9 At around 11 p.m., the Athlete arrived at the complex by car, together with family members. Instead of proceeding to the Athlete’s villa, it was mutually agreed that the sample collection session would take place at a nearby clubhouse. The notification of the Athlete took place at the clubhouse. A quiet room in the clubhouse became the doping control station.

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4.10 To commence the notification process, the DCO showed the Athlete her IDTM DCO Card, her personal identification and the generic letter issued by FINA to IDTM for 2018. The FINA Letter of Authority delegates from FINA to IDTM the role of Sample Collection Authority. As the Sample Collection Authority, IDTM is authorized to collect blood and urine samples from FINA members during 2018. The BCA provided a nurse's Certificate. The DCA showed his national identification card.

4.11 The Athlete was not satisfied with the DCA's identification card. The Athlete complained that this was not proper authorization for a DCA. The DCO explained repeatedly to the Athlete that she had appointed the DCA and that she had trained the DCA to perform the specific tasks that he was responsible for during this testing mission (to merely witness the passing and collection of urine). The DCO told the Athlete that the DCA had signed an IDTM document called a Statement of Confidentiality (SoC) confirming his appointment, the training he had received from the DCO and agreeing to standard confidentiality provisions. The BCA had signed a similar IDTM SoC. However, the SoC documents were considered internal IDTM documents and the DCO did not have them with her. Both of the signed SoC were filed with the Doping Panel.

4.12 The Athlete did not accept that the DCA was properly authorized by IDTM and insisted that the DCA leave the doping control station. Much discussion ensued. The Athlete took pictures of the DCA's identification card and sent the pictures to unknown persons. The Athlete's mother threatened the DCO, claiming that she had police contacts and could determine if the DCA was, in fact, properly authorized to test her son. In the result, at the Athlete's insistence, the DCA was excluded from the doping control station.

4.13 The DCO finished notifying the Athlete using a paperless system. The blood samples were successfully collected by the BCA. The process was completed by about 11:35 p.m. The Athlete took no issue, at the time, with the BCA's authorization from IDTM or her qualifications to draw his blood. The BCA placed the Athlete's collected blood samples in secure containers inside the cool box and this was placed on a table in the doping control station.

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4.14 Arguments continued regarding the lack of any authorization from IDTM for the DCA. None of the DCO's explanations (that she would control everything as the DCO; that the DCA was properly appointed and trained for his tasks; that the DCA had signed a SoC confirming his training and ensuring confidentiality; that it was obvious the DCA was attending the mission with the IDTM DCO, who was known to be a legitimate IDTM representative) were satisfactory to the Athlete. The DCO went so far as to open the DCO Portal on her tablet which contained the contact information of the DCA. This information matched the information on the DCA's identification document. This did not satisfy the Athlete as there was no photograph of the DCA on the DCO Portal. The Athlete was not satisfied that the DCA had been properly identified or properly authorized by IDTM to permit him to participate at the testing mission.

4.15 Calls made to Mr. Cheng failed to resolve the issue. Mr. Cheng is the team leader of the Chinese National Swimming Team. Mr. Cheng insisted that proper authorizations from IDTM were required for every member of the testing team. In the absence of such official documentation, establishing the connection between the DCA and the BCA to IDTM and this testing mission, the Athlete was not going to provide any further samples.

4.16 During the course of the evening the Athlete eventually needed to urinate. As there was no DCA available who was acceptable to the Athlete to witness the urine sample collection, the DCO proposed that the Athlete's mother watch/witness the DCA witnessing the Athlete passing urine. This was refused. Alternatively, it was proposed by the DCO that the Athlete urinate under the supervision of the DCA but the Athlete could retain custody of the collection vessel. This was also rejected. The DCO told the Athlete that urinating without being chaperoned, once notified, may be a Refusal violation. The Athlete replied that with no authorized male DCA, there could be no valid notification and thus no Refusal.

4.17 This 'stand-off' was reported in a phone call from the DCO to Mr. Popa of IDTM. The DCO refused to wait to complete the urine collection session until another DCA acceptable to the Athlete



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could be located. The DCO believed the urine collection should proceed with the IDTM personnel then available.

4.18 While the DCO was outside of the doping control station calling to IDTM, the Athlete went to the toilet with no permission from the DCO. He was not chaperoned. When this was discovered by the DCO, the DCO tried to follow the Athlete to warn him that his conduct was serious and most irregular. The Athlete quickly returned to the doping control station and informed the DCO that he had only partially emptied his bladder and had urine available to provide a sample, if an authorized DCA could be located.

4.19 Ultimately, on several occasions through the evening, the Athlete urinated without being chaperoned.

4.20 As no male DCA acceptable to the Athlete was present, there was no possibility to complete the urine sample collection. Accordingly, the DCO began to complete the doping control form for the blood samples, which had been collected. The Athlete signed the standard doping control form for the blood samples and indicated that the comment section on the doping control form would be filled in by his doctor, Dr. Ba, who was on his way to the clubhouse.

4.21 The Athlete suspected that the DCA had taken photos of him on his phone inside the doping control station. When the Athlete confronted the DCA, the phone was opened and certain pictures were deleted from the DCA's phone. The DCO believes the only pictures deleted from the DCA's phone were the few photos taken outside the villa earlier in the evening to prove the testing team was in attendance and at the correct location at the correct time. The DCO claims that no images of the Athlete were ever on the DCA's phone.

4.22 When Dr. Ba arrived at the doping control station at about 1:00 am on September 5, 2018, he reviewed all the authorization documents that had earlier been shown to the Athlete. Dr. Ba was told repeatedly by the DCO that the IDTM testing team was properly authorized by IDTM to collect urine and blood samples from the Athlete. Her authority as an IDTM DCO was explained. The DCO insisted that she had appointed and trained the DCA



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and that the BCA was properly authorized and qualified to draw blood. Dr Ba believed that both the DCA and the BCA were not properly authorized by IDTM. Further, Dr. Ba insisted that the nurse's Certificate the BCA had provided was not evidence of proper qualification to collect blood in China. As a result of this conclusion, he refused to permit the DCO to take away and send for testing the blood samples that had been previously collected from the Athlete.

4.23 Dr. Ba was in communication by phone with a colleague, Dr. Han, who confirmed the assessment of Dr. Ba and Mr. Cheng. Dr. Han told the DCO that both the DCA and the BCA were not properly authorized by IDTM to collect blood or urine from the Athlete. Drs. Ba and Han complained that no official authorization documentation from IDTM could be shown. They rejected the DCO's explanations (provided multiple times) that all officials were properly appointed and authorized by IDTM, all were trained and all were attending with her as an official IDTM DCO. The DCO constantly reiterated that she was in control of the mission. The position of the Athlete (and his entourage) was firm and unyielding: (i) without proper authorization from IDTM held by the DCA no urine was required to be provided and none would be collected and, (ii) the blood that had been collected had been collected by a non-authorized and non-qualified BCA, so the blood was not a valid sample and could not be removed by the DCO and sent to be analysed.

4.24 The DCO canvassed various options with Tudor Popa of IDTM regarding how to proceed in the course of several phone calls and email exchanges. The DCO discussed with the Athlete various scenarios which had been jointly created with Mr. Popa. At this point in the evening, the focus was what to do with the collected blood samples. It was very clear that no urine sample would be provided. The scenarios proposed by Mr. Popa and the DCO included sending the blood to the WADA accredited laboratory in China and to sort out the accreditation and authorization issues with FINA later. The Athlete refused this option. Alternatively, Dr. Ba could take the samples to his hospital and discard them there. This was not acceptable to the DCO.

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4.25 The DCO consistently warned the Athlete and Dr. Ba that if she did not leave the doping control station with the collected blood containers intact and suitable for analysis, this could constitute an anti-doping rule violation. The Athlete consistently stated that this was not a refusal or a Failure to Comply and the situation was entirely the DCO's fault for coming to test him with improper officials. The Athlete insisted that he was cooperating and would continue to do so and that he would wait at the doping control station until a properly authorized DCA arrived. The DCO refused to countenance this idea.

4.26 The advice provided to the DCO by Tudor Popa, speaking in English, was that the DCO should tell the Athlete very clearly the consequences for refusing to allow the collected blood to be taken away to be analysed. Refusal instructions were provided by Tudor Popa to the DCO. The DCO claims that she communicated the refusal instructions to the Athlete and to others who were at the doping control station.

4.27 The DCO and Mr. Popa discussed various explanations that could be offered to the Athlete to convince the Athlete that the blood samples must be removed from the doping control station by the DCO and sent to be analysed. None of the proposed scenarios were accepted by the Athlete.

4.28 The Athlete and Dr. Ba proposed that the secure blood container be broken with a hammer to access the blood vial and thus destroy the integrity of the blood samples that had been collected. The DCO was horrified. She repeated her warnings that the intact blood in the cool box had to leave the doping control station with her. The DCO repeated many times that this proposed course of conduct (to destroy the collected blood sample) could result in anti-doping rule violations. The DCO was in constant contact with IDTM and, together with Tudor Popa, the DCO attempted to create a strategy to deescalate the tension and try to ensure that the samples that had been collected could be removed and analysed.

4.29 The DCO was on the phone to Mr. Popa when she heard the sound of glass breaking. She went outside the clubhouse and discovered that the Athlete and a guard had broken one of the

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secure sample containers with a hammer. The Athlete was beside the guard using his phone as a flashlight. The DCO was asked to destroy the second blood sample container which she adamantly refused to do.

4.30 When it was apparent that the collected blood samples had been damaged and could not be taken away by the DCO to be analysed, the DCO attempted to create a paper version of the doping control form to record the events that had transpired. This was suddenly taken by the Athlete without permission and destroyed. Once again, the DCO told the Athlete that such conduct was improper and could result in an anti-doping rule violation.

4.31 Eventually, Mr. Popa's advice to the DCO was to end the testing mission safely and to document in detail, with notes and photographs, exactly what had happened at the doping control station.

4.32 Dr. Ba prepared his version of what had happened during the evening and presented these comments to the DCO on a separate document. The DCO, the DCA and the BCA treated this document as a form of Supplementary Report. IDTM trains its DCOs to sign and acknowledge the comments made on a doping control form in every case. This training was followed and the testing team all signed the document that had been prepared by Dr. Ba.

4.33 Thereafter, at about 3:15 a.m. on September 5, 2018, the Athlete's mother collected all the used and unused materials from the testing session, including damaged and used blood tubes, needles and the shredded doping control form and left the clubhouse. The IDTM testing team also departed from the clubhouse carrying the remaining doping control equipment.

4.34 From FINA's perspective, the events of September 4, 2018, raise the following significant issues:

- FINA maintains that pursuant to the ISTI, the various documents shown to the Athlete by the DCO, the DCA and the BCA were

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proper and complete authorizations from IDTM to permit urine and blood to be collected from the Athlete by these officials. This is central to the dispute and FINA led evidence from IDTM specifically on this point. It will be addressed in more detail below.

- FINA maintains that the notification of the Athlete was in all respects concluded properly.
- FINA maintains that after notification, the failure by the Athlete to provide any urine sample, to not be chaperoned at all times, to urinate without being chaperoned, to not permit the collected blood sample to be taken away to be analysed was a Refusal or a Failure to Comply as described in the FINA DC.
- FINA maintains that there was no compelling justification for the Athlete's conduct.
- FINA maintains that destroying the collected blood samples was Tampering with the doping control process described in the FINA DC.
- FINA maintains that the DCO clearly informed the Athlete of the anti-doping rule violations and the consequences that would flow from his various actions.

4.35 It is FINA's position that all proper and required authorizations from FINA and IDTM were shown to the Athlete. FINA claims that no additional documentation was required to be shown to the Athlete. The most relevant Articles of the ISTI are 5.3.2 and 5.3.3. These are inserted below with emphasis added for ease of reference:

Article 5.3.2 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, who do not have a conflict of interest in the outcome of the *Sample collection*, and who are not *Minors*.

Article 5.3.3 Sample Collection Personnel shall have official documentation, provided by the Sample Collection Authority.

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

4.36 FINA relies on the wording used in the ISTI and the evidence of Ms. Johannesson to support their position that all proper authorizations were held by the Sample Collection Personnel and were provided to the Athlete. FINA says that the provisions in the ISTI were fully respected.

4.37 Firstly, it is argued that the term "Sample Collection Personnel" in the ISTI is a defined term covering all members of the testing team. Sample Collection Personnel is "a collective term for qualified officials authorized by the Sample Collection Authority to carry out or assist with duties during the Sample Collection Session". It was urged by FINA that pursuant to both parts of ISTI Article 5.3.3, the Sample Collection Personnel (as a collective unit) must have (i) official documentation provided by the Sample Collection Authority evidencing their authority to collect a sample from the Athlete, such as an authorization letter from the Testing Authority; and (ii) the DCO must have valid identification. FINA believes both conditions have been met.

4.38 The heart of FINA's argument is that the ISTI does not require each member of the testing team to have authorization from IDTM, so long as the collective entity (the Sample Collection Personnel) holds such authority. FINA asserts that a single generic authorization letter held by the Sample Collection Personnel, as a team, is sufficient. FINA claims that the generic Letter of Authority provided to IDTM from FINA (effective for 2018) is the only authority the Sample Collection Personnel, as a whole, requires to collect blood and urine samples from the Athlete. FINA argues that such a letter from the Testing Authority is expressly referenced in the ISTI. In other words, the generic letter from FINA to IDTM is the "official documentation" and contains all the "authority" required for the Sample Collection



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Personnel to collect urine and blood samples from the Athlete. As the FINA Letter of Authority was shown to the Athlete, and proper identification was carried by the DCO, nothing further was required.

4.39 In support of this view, it is claimed that because the DCO is additionally and expressly required in ISTI Article 5.3.3 to hold complementary identification, if each member of the testing team was required to hold an individual authorization letter, this would also have been expressly stated in Article 5.3.3. As this is not expressly stated in Article 5.3.3, and as Sample Collection Personnel is defined as a collective term for the entire testing team, a single authorization letter for the entire testing team is sufficient.

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.

4.41 IDTM properly records the appointments and qualifications of its ‘pool’ of accredited Sample Collection Personnel. These are individuals who are eligible to conduct sample collection sessions on behalf of IDTM. The following documents are recorded and maintained by IDTM and some (but not all) must be carried to a mission and shown to a tested athlete, on request:

- The DCO Card is issued by IDTM and is proof that the DCO has been trained and authorized by IDTM to work on behalf of IDTM. It is valid for one year and must always be clearly visible at a mission.
- For every DCA and BCA participating at a testing mission, they must sign a SoC which records for IDTM that the DCA and the



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BCA have been appropriately appointed and trained by an IDTM DCO. This SoC is an internal document of IDTM, establishing for IDTM who is properly a member of the 'pool' of potential IDTM officials that may be used on testing missions each year. The SoC is valid for one year, stored at IDTM and need not be shown to an athlete at the testing mission. IDTM was in possession of the signed SoC for the DCA and the BCA involved with the Athlete on September 4, 2018.

- At IDTM, Blood Collection Officials (BSO) are also valid ITDM DCOs who have been trained and are qualified to draw blood. All BCOs are issued a DCO Card by IDTM. BCOs must possess and show valid DCO Cards and other identification required of a DCO at a testing mission.
- Both BCOs and BCAs must carry and show the athlete at every testing mission where blood is to be drawn, a valid Certificate or document demonstrating that he or she is qualified to draw blood in the geographic location of the test.
- All Sample Collection Personnel must carry and show the Athlete valid national identification.

4.42 Since FINA believes that all proper authorizations were shown to the Athlete by the Sample Collection Personnel, they contend that the Athlete's notification procedure was done correctly and was compliant with the ISTI. FINA contends that the events following the notification of the Athlete establish beyond any doubt the Failure to Comply violations of the FINA DC which have been asserted by FINA. FINA says that there are no compelling justifications or any other valid explanations for the Athlete's misconduct.

### The Athlete's position:

4.43 The Athlete's version of events is described below. There are many factual similarities with FINA's version. The summary will focus on deviations in the narrative. The Doping Panel will then identify the most significant contentious issues from the Athlete's perspective.

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4.44 The Athlete attended at the hearing in Lausanne. He answered questions regarding his testimony at the hearing and the material that he had previously filed with the Doping Panel. The Athlete called 4 witnesses to testify on his behalf at the hearing. Additional material was filed from Mr. Zhou. The Athlete's witnesses were the following:

- **Cheng Hao:** Mr. Cheng is the team leader for the Chinese National Swimming Team. Mr. Cheng knows and works closely with the Athlete. Mr. Cheng was called by the Athlete on September 4, 2018, as soon as the Athlete became concerned regarding the attempt by IDTM to collect samples from him. Mr. Cheng was never at the doping control station. Mr. Cheng testified by Skype at the hearing and provided a witness statement to the Doping Panel describing his interactions (by phone) with the Athlete and the DCO during the course of the testing mission. Mr. Cheng insisted that the required authorizations from IDTM were not held by the DCA and the BCA and were not provided to the Athlete. Until they were provided, his view was that the Athlete did not need to produce a blood or a urine sample. Further, he insisted that the Athlete was at all times cooperating with the DCO (and was certainly not refusing a sample collection attempt) and that the sample collection could proceed, as soon as proper authorization from IDTM could be shown by the DCA.
- **Ming Yang:** Mrs. Yang is the Athlete's mother. She was present at the doping control station and in the clubhouse at all relevant times on September 4, 2018. Mrs. Yang testified in person at the hearing and provided a witness statement to the Doping Panel describing her interactions with the IDTM Sample Collection Personnel during the course of the testing mission. Mrs. Yang testified that the DCA was taking pictures and videos of the Athlete, she described how the pictures were deleted and how the testing mission eventually ended with the blood samples being destroyed.
- **Dr. Ba Zhen:** Dr. Ba is the Athlete's personal doctor and has worked closely with the Athlete in his physical preparation for

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swimming competitions. Dr. Ba was often with the Athlete when the Athlete participated in previous doping controls. Dr. Ba was called when arguments regarding what was proper authorization escalated. He arrived at the doping control station at about 1 a.m. on September 5, 2018. Dr. Ba testified in person at the hearing and provided a witness statement to the Doping Panel describing his interactions with the IDTM Sample Collection Personnel during the course of the testing mission. Dr. Ba insisted that the required authorizations from IDTM were not provided to the Athlete for both the DCA and the BCA. Dr. Ba also provided written comments in a Declaration at the conclusion of the testing mission.

- **Dr. Han Zhaoqi:** Dr. Han is the Chief Doctor at the hospital where Dr. Ba also works. Dr. Han is the Deputy Director of the Zhejiang Anti-Doping Centre. Dr Han received a call from Dr. Ba early in the morning on September 5, 2018, regarding the testing mission then being conducted on the Athlete. Dr. Han was never at the doping control station. Dr. Han testified in person at the hearing and provided a witness statement to the Doping Panel describing his interactions with Dr. Ba and with the IDTM Sample Collection Personnel during the course of the testing mission. Dr. Han insisted that it was inappropriate for the DCA to be taking photos and videos of the Athlete, the required authorizations from IDTM were not provided for both the DCA and the BCA and, in addition, the BCA did not have the proper qualifications to collect blood. In the view of Dr. Han, the nurse's Certificate shown to the Athlete by the BCA was not evidence of proper qualifications to draw blood. It was not a current nurse's Practice Certificate, the document that Dr. Han insisted is required to legally draw blood in China. Dr. Han insisted that the required authorizations from IDTM were not provided to the Athlete for both the DCA and the BCA. Without the official IDTM authorization documentation, he would not permit the sample collection to proceed nor could the blood sample already collected be taken away by the DCO to be analyzed.
- **Zhou Meng:** Mr Zhou is the director of the security team at the Athlete's residential compound. Mr. Zhou was present for some of the events that occurred at the sample collection session on September 4, 2018. Mr. Zhou filed a signed witness statement

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with the Doping Panel. Mr. Zhou did not attend at the hearing in Lausanne and, although he was made available to testify, at the request of the Doping Panel he did not testify or answer questions. Mr. Zhou described in his filed statement the arrival of the IDTM testing team to the compound, the destruction of the blood sample with a hammer and the removal of the blood sample tube.

4.45 For the Athlete, FINA's version of events is not significantly disputed until the IDTM officials and the Athlete entered the clubhouse to begin the notification process. The blood sample was to be collected first. Once notification began, the Athlete asked to see the IDTM officials' accreditation and authorizations. What was provided to the Athlete is not in dispute. The DCO showed the Athlete her IDTM DCO Card, her identification and the FINA generic Letter of Authority. The Athlete knew the DCO as he had interacted (unhappily) with her a year previously. The Athlete certainly knew that the DCO worked for IDTM. The BCA showed her 'Certificate of Professional Skills in Nursing'. As the Athlete believed the BCA was properly qualified, he agreed to provide a blood sample.

4.46 During the blood collection process, the Athlete came to believe that the DCA, who was moving in and out of the doping control station, had been surreptitiously taking pictures and videos of him. This caused the Athlete significant concern and sparked his belief that the DCA was not well-trained and could not possibly be an appropriately certified IDTM official. As a result, the Athlete became generally suspicious of the DCA and asked to see the DCA's identification and authorization permitting him to be participating at the testing mission. The DCA only had his national identification, which was provided. The DCA had no further documentation to show. The DCO told the Athlete that since 2018, nothing more in terms of accreditation or authorization must be shown to the Athlete by a DCA. The Athlete rejected this explanation.

4.47 In consequence, the Athlete's mother contacted Mr. Cheng, the National Swimming Team's team leader. The situation was explained over the phone and Mr. Cheng informed the Athlete and the DCO that official documentation and authorization from

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IDTM must be shown by the DCA. He rejected the assertion, made by the DCO, that the Athlete was refusing the test. The Athlete's position was that he would be happy to provide a urine sample - so long as the IDTM officials could show official documentation and authorization from IDTM proving that each was permitted to be collecting a sample from the Athlete.

4.48 The Athlete eventually asked that the DCA leave the doping control station due to the Athlete's belief that pictures were being taken of him (which he considered highly improper) and the lack of proper authorization documentation from IDTM held by the DCA. The DCA did leave the doping control station. The Athlete's mother subsequently spoke with the DCA at another location in the clubhouse and the DCA confirmed that he was not a DCO and had no official authorization documentation from IDTM to provide. However, he made clear to Mrs. Yang that he had been asked by the DCO to assist with the urine sample collection and he understood that his role was to witness the urine sample being collected from the Athlete.

4.49 As some time had passed since the Athlete arrived at the doping control station, he needed to urinate. The DCO was told. As the DCA had been rejected, this was not possible to perform while being chaperoned. All suggestions made by the DCO that involved the DCA were rejected by the Athlete. The Athlete had to urinate, so he left the doping control station and went to the washroom unaccompanied. The DCO was not in the doping control station when the Athlete left to urinate as she was phoning her supervisor at IDTM. When the DCO discovered that the Athlete was out of the doping control station, unchaperoned and urinating, the DCO reacted angrily and insisted that he return. The Athlete's mother immediately went to the washroom and called back the Athlete. The Athlete returned and reported to the DCO that as he had been called back by his mother his bladder was only partially emptied.

4.50 The blood collection was eventually completed and the Athlete's blood samples were separated, secured and stored in the standard cool box in the doping control station.



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4.51 Later in the evening Dr. Ba, the Athlete's personal physician, arrived at the doping control station. He had been told about the dispute regarding whether proper authorizations from IDTM were held by the IDTM Sample Collection Personnel. He knew no urine sample had been provided. He asked to see all IDTM documentation and identification in the possession of the IDTM testing team. This was duly provided. His conclusions were the same as Mr. Cheng. As there was no "official documentation" from IDTM held by the DCA and the BCA which authorized their participation in the urine and blood collection session, the collection of urine and blood from the Athlete was not properly authorized by the Sample Collection Authority and could not proceed. Dr. Ba then took pictures of all the documents that had been provided.

4.52 Later in the evening the advice of Dr. Han was sought. Dr. Han is Chief Doctor at the Affiliated Sport Hospital of Zhejiang College of Sports – where Dr. Ba also works. Dr. Han also fully supported the conclusions of Dr. Ba and Mr. Cheng. In addition, he expressed the opinion, raised for the first time after the blood was collected, that the BCA was not properly qualified to draw blood – or at least she did not present suitable documentation or evidence to satisfy this requirement. This was an issue separate from her claimed lack of any official documentation from IDTM evidencing her authority. Dr. Han maintained that the 'Certificate of Professional Skills in Nursing' shown by the BCA was not a proper document to prove the necessary qualification to draw blood in the location where the blood collection had occurred.

4.53 Dr. Han's conclusions, in summary, were as follows: there was no proper authorization documents originating from IDTM shown by the DCA and the BCA to the Athlete so the sample collection session was not conducted pursuant to the ISTI; there was no ability to collect a urine sample as no properly authorized DCA was available; the DCA that did attend had acted improperly by taking photos and videos of the Athlete; the blood that was collected could not be taken away to be tested as the BCA was neither authorized by IDTM nor qualified (based on the documents shown) to draw blood in that region.



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4.54 The Athlete's position is that at all times he was prepared to provide urine and blood to properly accredited and authorized IDTM officials. The Athlete claims that he offered to "wait until the morning" at the doping control station to provide a sample with doping control officials who held proper credentials. The Athlete denies ever refusing to provide a sample to the IDTM DCO – he testified he was willing to wait as long as needed to provide a sample with proper officials attending.

4.55 Each witness for the Athlete testified that at no time were the consequences of a Failure to Comply violation made clear or explained by the DCO. The Athlete did not believe he was breaching the FINA DC. To the contrary, the Athlete and his entourage all believed that the outcome they were insisting on (due to the identified deficiencies in the documentation held by IDTM officials) was eventually accepted by the DCO. The DCO ceased discussing the need for the Athlete to provide a urine sample and appeared resigned to the fact that the blood samples could not be released for testing due to the lack of proper authorizations and qualifications held by the IDTM officials.

4.56 The Athlete, on various occasions through the evening, urinated with no supervision. This occurred to the DCO's knowledge. The DCO did not object to this occurring.

4.57 The Athlete wanted to remove the photos that contained his image that were on the DCA's phone. The Athlete asked the BCA to ask the DCA if he would delete all pictures and videos on his phone that contained images of the Athlete. The DCA agreed to do this. The Athlete's mother was also aware that pictures were being deleted from the DCA's phone but she did not see what images were on the phone. The DCO was speaking with Mr. Popa and did not see the photos on the DCA's phone or see what was deleted. The Athlete testified that he personally saw images of himself on the DCA's phone. The Athlete believed about 10 images were deleted from the DCA's phone. The Athlete witnessed the deletion of the photos.

4.58 The Athlete insists that the DCO absolutely refused to countenance waiting for other officials to arrive – either from IDTM or the Chinese anti-doping agency (CHINADA). As the

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Athlete and his entourage were not prepared to let the collected blood samples be removed for analysis and no other solution was proposed that was going to protect the blood from being analysed, the parties were at an impasse. Dr. Ba then asked that the DCO prepare an Unsuccessful Attempt Report. The DCO refused. The DCO then invited Dr. Ba to write out a report himself to describe what had happened.

4.59 Dr. Ba wrote out by hand a summary of the events of the evening. He described the documents that were provided by the DCO, the DCA and the BCA. Dr. Ba claimed these officials were “unrelated personnel” (with no evidence of a link to IDTM) and could not provide Doping Control officer certification, or any other relevant authority. He concluded that “the urine test and the blood test cannot be completed. The blood sample that has been collected could not be taken away”. All the IDTM testing team signed this document. The Athlete claims that their signatures, freely given, is evidence that they fully accepted and agreed with the contents of the document prepared by Dr. Ba.

4.60 The Athlete claims that the DCO told him that “if you are able to take away the blood sample, go ahead.” When the Athlete asked the DCO how to remove the blood from the secure container he was told “you find your way.” The DCO refused to take any part in removing and handling the collected blood samples, at any time. The Athlete claims the DCO and the BCA allowed him free access to the cool box to remove the collected blood samples. This was also seen by Dr. Ba and the Athlete’s mother. The DCO watched these proceedings and constantly placed calls to IDTM, but did not intervene in any way.

4.61 The Athlete’s mother asked a guard to bring a hammer into the doping control station. A guard arrived with a hammer and tried to break the secure container to gain access to the collected blood in the doping control room. He failed. Afraid that blood might spill, Mrs. Yang instructed the guard to take the container outside the building and attempt to break the secure container out there. This was successfully done by the guard and the Athlete, in an exterior courtyard.

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4.62 When the BCA took out the second secure container the DCO refused to handle it. She wanted to take pictures, which was refused.

4.63 The Athlete claims that the DCO eventually told Dr. Ba that he could take the second blood container with him, as well as the blood from the damaged container and, in addition, various collection tubing and other materials. At this point everyone was preparing to leave and go their separate ways.

4.64 The Athlete maintains that it was never explained to him by the DCO that if the evening ended with (i) no collected urine and (ii) with the collected blood samples destroyed and not suitable for analysis, this would be a breach of the FINA DC and would result in a violation and that certain serious consequences would result. To the contrary, when the evening ended the Athlete believed that the persistent and strongly articulated concerns he and others had raised about a lack of proper authorizations and the BCA's lack of qualification had been grudgingly accepted by the DCO. The Athlete believed that the sample collection session had been abandoned by the DCO because of the various identified deficiencies.

4.65 When the IDTM testing team was packing up to leave the doping control station the Athlete saw the partially completed paper version of the doping control form on the table. As the Athlete believed the entire session had been abandoned and that his personal information was still on the doping control form, he took the form and destroyed it.

4.66 Because the Athlete was very concerned how the sample collection session had been organized and conducted, the Athlete pre-emptively wrote to FINA on September 6, 2018 to express his concerns.

4.67 From the Athlete's perspective, the events on September 4, 2018, raise the following significant issues:

- The Athlete maintains that the DCA and the BCA did not provide him with proper documentation from IDTM to serve as evidence

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that they each had proper authority and authorizations to take part in the sample collection session. Without proper authorizations from IDTM, the Athlete claims the notification process was fatally flawed and therefore all steps taken subsequently are a nullity.

- The Athlete maintains that despite the DCO's denials, the DCA did take photos of the Athlete during the sample collection session and these photos and videos were subsequently deleted.
- The Athlete maintains that the BCA's documentation was not valid to demonstrate her qualification to legally draw blood at the location where the test was conducted.
- The Athlete maintains that despite near constant discussion and arguing regarding the need for additional documentation and authorizations, he was never unambiguously told by the DCO that his conduct and the conduct of his entourage (family, security guard, doctors, etc.) was considered by the DCO to be a breach of the anti-doping rules and the consequences that would apply.
- The Athlete maintains that he was never rude or uncooperative and never refused to comply with the DCO. The Athlete maintains that the DCO eventually abandoned the sample collection session due to the multiple identified deficiencies he and his entourage had identified – which the DCO over time grudgingly accepted.

4.68 The Athlete believes it was the DCO and IDTM that fell into error, acted improperly and ultimately breached the anti-doping rules – to his potential detriment. The Athlete's view is that he knew the required FINA DC rules and he was simply insisting on strict compliance with the FINA DC and the ISTI. It was the DCO and IDTM who were responsible for the failure to collect the urine sample and to analyse the collected blood samples on September 4, 2108. The basic contention of the Athlete is that the DCO and IDTM were at fault as they failed to send to the testing mission properly trained, properly qualified and properly

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authorized officials – who lacked official documentation from IDTM to provide evidence that they were, in fact, authorized by IDTM to take part in the sample collection session involving the Athlete.

## 5. LEGAL DISCUSSION

### A. THE LAW

#### From the FINA DC

#### ***DC 2.3 Evading, Refusing or Failing to Submit to Sample Collection***

*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.*

*[Comment to DC 2.3: For example, it would be an anti-doping rule violation of “evading Sample collection” if it were established that an Athlete was deliberately avoiding a Doping Control official to evade notification or Testing. A violation of “failing to submit to Sample collection” may be based on either intentional or negligent conduct of the Athlete, while “evading” or “refusing” Sample collection contemplates intentional conduct by the Athlete.]*

#### ***DC 2.5 Tampering or Attempted Tampering with any part of Doping Control***

*Conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited*

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*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.*

*[Comment to DC 2.5: For example, this article would prohibit altering identification numbers on a Doping Control form during Testing, breaking the B bottle at the time of B Sample analysis, or altering a Sample by the addition of a foreign substance. Offensive conduct towards a Doping Control official or other Person involved in Doping Control which does not otherwise constitute Tampering may result in proceedings before the FINA Disciplinary Panel and shall also be addressed in the disciplinary rules of FINA and its Member Federations.]*

**DC 14.3.3** *In any case where it is determined, after a hearing or appeal, that the Athlete or other Person did not commit an anti-doping rule violation, the decision may be Publicly Disclosed only with the consent of the Athlete or other Person who is the subject of the decision. FINA or the Member Federation with results management responsibility shall use reasonable efforts to obtain such consent. If consent is obtained, FINA or the Member Federation shall Publicly Disclose the decision in its entirety or in such redacted form as the Athlete or other Person may approve.*

**Definitions:**

**Sample/Specimen:** *Any biological material collected for the purposes of Doping Control.*



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*[Comment: It has sometimes been claimed that the collection of blood Samples violates the tenets of certain religious or cultural groups. It has been determined that there is no basis for any such claim.]*

**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*

**From the ISTI**

**Definitions:**

**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.*

**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 International Standard for testing and Investigations.*

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**Failure to Comply:** A term used to describe anti-doping rule violations under Code Articles 2.3 and/or 2.5.

**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.

**Sample Collection Session:** All of the sequential activities that directly involve the Athlete from the point that initial contact is made until the Athlete leaves the Doping Control Station after having provided his/her Sample(s).

**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).

## 5.0 Notification of Athletes

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## 5.1 Objective

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

**5.3.2** *The Sample Collection Authority shall appoint and authorise Sample Collection Personnel to conduct or assist with Sample Collection Sessions who have been trained for their assigned responsibilities, who do not have a conflict of interest in the outcome of the Sample collection, and who are not Minors.*

**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.*

**5.4.1** *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;*

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**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;

## 7.4 Requirements for Sample collection

(...)

**7.4.4** The DCO shall provide the Athlete with the opportunity to document any concerns he/she may have about how the Sample Collection Session was conducted.

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

## Annex A - Investigating a Possible Failure to Comply

**A 3.2** The DCO is responsible for:

a) informing the Athlete or other party of the Consequences of a possible Failure to Comply;

**A 3.3** Sample Collection Personnel are responsible for:

a) informing the Athlete or other party of the Consequences of a possible Failure to Comply;

## Annex E - Collection of Blood Samples

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## E.1 Objective

To collect an Athlete's blood Sample in a manner that ensures:

a) consistency with relevant principles of internationally recognized standard precautions in healthcare settings, and is collected by a suitably qualified person, so that the health and safety of the Athlete and Sample Collection Personnel are not compromised;

## E.4 Requirements

E.4.1 Procedures involving blood shall be consistent with the local standards and regulatory requirements regarding precautions in healthcare settings where those standards and requirements exceed the requirements set out below;

## Annex H - Sample Collection Personnel Requirements

### H.1 Objective

To ensure that Sample Collection Personnel have no conflict of interest and have adequate qualifications and experience to conduct Sample Collection Sessions.

### H.2 Scope

Sample Collection Personnel requirements start with the development of the necessary competencies for Sample Collection Personnel and end with the provision of identifiable accreditation.

### H.3 Responsibility

The Sample Collection Authority has the responsibility for all activities defined in this Annex H.

### H.4 Requirements - Qualifications and Training

H.4.1 The Sample Collection Authority shall:

a) determine the necessary competence and qualification requirements for the positions of DCO, Chaperone and BCO; and



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*b) develop duty statements for all Sample Collection Personnel that outline their respective responsibilities. As a minimum:*

- i) Sample Collection Personnel shall not be Minors; and*
- ii) BCOs shall have adequate qualifications and practical skills required to perform blood collection from a vein.*

*H.4.2 The Sample Collection Authority shall ensure that Sample Collection Personnel that have an interest in the outcome of a Sample Collection Session are not appointed to that Sample Collection Session. Sample Collection Personnel are deemed to have such an interest if they are:*

- a) Involved in the administration of the sport for which Testing is being conducted; or*
- b) Related to, or involved in the personal affairs of, any Athlete who might provide a Sample at that session.*

*H.4.3 The Sample Collection Authority shall establish a system that ensures that Sample Collection Personnel are adequately trained to carry out their duties.*

*H.4.3.1 The training program for BCOs shall include, as a minimum, studies of all relevant requirements of the Testing process and familiarization with relevant standard precautions in healthcare settings.*

*H.4.3.2 The training program for DCOs shall include, as a minimum:*

- a) Comprehensive theoretical training in different types of Testing activities relevant to the DCO position;*
- b) Observation of all Doping Control activities that are the responsibility of the DCO as set out in this International Standard for Testing and Investigations, preferably on-site; and*
- c) The satisfactory performance of one complete Sample Collection Session on site under observation by a qualified DCO*

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*or similar. The requirement related to the actual passing of a urine Sample shall not be included in the on-site observations.*

*H.4.3.3 The training program for Chaperones shall include studies of all relevant requirements of the Sample collection process.*

*H.4.3.4 A Sample Collection Authority that collects Samples from Athletes who are of a different nationality to its Sample Collection Personnel (e.g., at an International Event or in an Out-of-Competition context) should establish additional systems to ensure that such Sample Collection Personnel are adequately trained to carry out their duties in respect of such Athletes.*

*H 4.4 The Sample Collection Authority shall maintain records of education, training, skills and experience of all Sample Collection Personnel.*

**H.5 Requirements - Accreditation, re-accreditation and delegation**

*H.5.1 The Sample Collection Authority shall establish a system for accrediting and re-accrediting Sample Collection Personnel.*

*H.5.2 The Sample Collection Authority shall ensure that Sample Collection Personnel have completed the training program and are familiar with the requirements of this International Standard for Testing and Investigations (including, where Article H.4.3.4 applies, in relation to the collection of Samples from Athletes who are of a different nationality to the Sample Collection Personnel) before granting accreditation.*

*H.5.3 Accreditation shall only be valid for a maximum of two years. Sample Collection Personnel shall be required to repeat a full training program if they have not participated in Sample collection activities within the year prior to re-accreditation.*

*H.5.4 Only Sample Collection Personnel who have an accreditation recognised by the Sample Collection Authority shall be*

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*authorised by the Sample Collection Authority to conduct Sample collection activities on behalf of the Sample Collection Authority.*

*H.5.5 DCOs may personally perform any activities involved in the Sample Collection Session, with the exception of blood collection unless particularly qualified, or they may direct a Chaperone to perform specified activities that fall within the scope of the Chaperone's authorised duties.*

## 6. ANALYSIS

6.1 A fundamental issue to evaluate is whether the Athlete was properly notified by the IDTM testing team. This is mandated in ISTI Article 5.4. Specifically, whether the DCO and the DCA and the BCA provided to the Athlete, pursuant to the ISTI, proper official documentation from IDTM evidencing their authority to collect a sample from the Athlete.

6.2 The Athlete insists that proper authorizations were not shown by the DCA and the BCA. In contrast, FINA strenuously contends that the generic 2018 FINA Letter of Authority, which was shown to the Athlete, is all the authorization documentation required for the Sample Collection Personnel to show to the Athlete. FINA claims that the DCA and BCA are not required to show any additional authorization documentation to the Athlete when they are attending a sample collection session with a properly accredited and properly authorized IDTM DCO. The Doping Panel cannot agree with FINA's position. The totality of the "official documentation" provided by IDTM to evidence the

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Sample Collection Personnel's authority to collect a sample from the Athlete was deficient. The Athlete was not properly notified.

6.3 It is common ground that the ISTI contains the rules and procedural requirements that both the Athlete and FINA must comply with. The most relevant provisions in the ISTI dealing with the proper notification of an athlete are the definitions of Doping Control Officer, Blood Collection Officer, Chaperone, and Sample Collection Personnel. Also highly applicable are Articles 5.3.2 and 5.3.3. (Requirements Prior to Notification), Article 5.4 (Requirements for Notification of Athletes) and Annex H (Sample Collection Personnel Requirements).

6.4 It is important when analysing the ISTI requirements to keep distinct the difference between **proper identification** (who the official is), **proper appointment** (of the official to a specific role) and **proper authorization or authority** (to permit the official to perform the specifically appointed role, including having appropriate training and qualifications).

6.5 The definitions of BCO, DCO and Chaperone contained in the ISTI make clear that the individual officials, each performing in a particular capacity, must be individually authorized by the Sample Collection Authority. It is of particular interest to an athlete which organization is the Sample Collection Authority – as this could be an International Federation (IF), a private company like IDTM or a national anti-doping organization (NADO). For different tests in different locations on the same athlete, this will inevitably change. Precisely which organization

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is the responsible Sample Collection Authority will dictate what official documentation the athlete will look to have provided.

6.6 In the ISTI, “Sample Collection Personnel” is a collective term. In other words, Sample Collection Personnel is a term used to collectively refer to a group of one or more individually authorized and qualified officials (such as a DCO, BCO, DCA, etc.) who may all attend and work together at a sample collection session. The Sample Collection Personnel must be authorized by a Sample Collection Authority, like IDTM, to perform their respective duties during the sample collection session.

6.7 ISTI Article 5.3.2 is not specific to any particular testing mission. It makes no reference to collecting a sample from an athlete. Article 5.3.2 is a provision describing how the various Sample Collection Authorities shall “appoint and authorize” the individuals who can, at a later date, take on certain roles (their “assigned responsibilities”) at a sample collection session. These individuals, once appointed and authorized by a Sample Collection Authority (whether as a DCO or a DCA or a BCO), are eligible to participate at future sample collection sessions. Collectively, when assigned to and attending at a testing mission, they become Sample Collection Personnel.

6.8 Article 5.3.2 describes the method whereby the Sample Collection Authority develops a ‘pool’ of appointed and authorized individuals, each of whom (i) has been trained for their assigned responsibilities, (ii) do not have a conflict of interest in the outcome of the sample collection and (iii) are not minors.



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6.9 This interpretation of Article 5.3.2 is fully consistent with the clear direction contained in Annex H.2, whereby the Sample Collection Authority must develop the necessary competencies for the various roles performed by the Sample Collection Personnel (whether as a DCO or a DCA or a BCO). The details of this acquiring, tracking and recording of competencies are described fully in Annex H.

6.10 Annex H.4 and H.5 provide significant detail regarding how the Sample Collection Authority should go about determining the necessary competence, qualification and accreditation for this ‘pool’ of appointed and authorized individual officials. The Sample Collection Authority must maintain records of the education, training, skills and experience of all its Sample Collection Personnel. These records are obviously specific to each individual official.

6.11 Annex H.2 requires that the Sample Collection Authority must provide each of the officials who may in the future become Sample Collection Personnel “identifiable accreditation”. This accreditation must be kept up to date. The Doping Panel finds this refers to more than personal identification. The use of the word “accreditation” in the ISTI refers to a document that is generated by the Sample Collection Authority which demonstrates that the official (acting in whatever role is to be performed) has been suitably trained for their responsibilities by the Sample Collection Authority.

6.12 The Doping Panel believes that the IDTM SoC, which was signed by the DCA and the BCA and maintained in a file at IDTM

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headquarters, is fully compliant with the provisions of Article 5.3.2 and Annex H. As stated by Ms. Johannesson in her testimony, the signed SoC is an internal document and is used by IDTM to maintain at IDTM a ‘pool’ of individual officials (whether as a BCA or a DCA, etc.) who are trained, accredited and eligible to take part in testing missions on behalf of IDTM. All of this satisfies the general requirements in Article 5.3.2 whereby a ‘pool’ of eligible officials is maintained by IDTM. Each official so accredited by IDTM, in the role to which they have been trained, can now be appointed and authorized to conduct or assist with a specific sample collection session.

6.13 ISTI Article 5.3.3 is very different. It deals with the specifics of an actual testing mission when a sample will be collected from an athlete. Article 5.3.3 addresses what the IDTM officials who, as a group, comprise the Sample Collection Personnel, must have with them at the testing mission when they are sent by IDTM to collect a sample from a specific athlete.

6.14 The first sentence in Article 5.3.3 describes the required “official documentation” provided by the Sample Collection Authority “evidencing their authority” to collect a sample from the Athlete. The second sentence in Article 5.3.3 describes the additional “complementary identification” that must also be carried by the DCO. The question of what authorization documentation must be provided to an athlete during notification by an IDTM official can be answered by evaluating the ISTI as a whole, by interpreting the words actually used in Article 5.3.3, by considering that the ISTI also governs all testing missions where the Testing Authority

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is the Sample Collection Authority and by the specific notification requirements contained in Article 5.4.

6.15 The Doping Panel acknowledges that Sample Collection Personnel is a collective term referring to all qualified officials who have been authorized by the Sample Collection Authority to carry out or assist with duties during a testing mission. However, the Doping Panel does not agree with FINA that Article 5.3.3, read together with all other sections in the ISTI, only requires a single document to serve for all purposes as the official documentation evidencing proper authorization, for all officials.

6.16 Article 5.3.3 refers to “official documentation” provided by the Sample Collection Authority (such as IDTM), “evidencing their authority”. The word “their” clearly modifies Sample Collection Personnel. The ISTI definitions require that each individual official comprising the Sample Collection Personnel at a testing mission be previously “authorized” by IDTM to be in the IDTM ‘pool’. Further, each individual official will have been “appointed and authorized” by IDTM (pursuant to Article 5.3.2) and each individual official will have received “identifiable accreditation” from IDTM (pursuant to Annex H.2). Relying on this logical framework, the Doping Panel has concluded that “official documentation” from IDTM is needed to ‘evidence’ the authority of that individual official to collect a sample from the Athlete – and this documentation must be shown to the Athlete.

6.17 Article 5.3.3 refers to “official documentation”. This reference to “documentation” is plural. If a single document was all that was

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required to demonstrate that the Sample Collection Personnel (as a collective unit) were properly authorized by IDTM it would have stated that the Sample Collection Personnel must have “a document”.

6.18 The Doping Panel finds that in Article 5.3.3, the use of the words “official documentation...evidencing their authority to collect a sample from the athlete” means, when applicable, “official documentation” evidencing both (i) the authority conferred on IDTM to be the Sample Collection Authority and (ii) the authority from IDTM that must be granted to each individual official (drawn from the “pool” of IDTM officials created and maintained by IDTM, pursuant to Article 5.3.2), who are sent on a testing mission to collect a sample from the athlete.

6.19 FINA’s interpretation of Article 5.3.3 relies on the fact that FINA is the Testing Authority and IDTM is the Sample Collection Authority. The annually issued generic FINA Letter of Authority is absolutely needed for FINA to delegate to IDTM the role of Sample Collection Authority. It is true that such a delegating authorization letter from a Testing Authority is expressly mentioned in the ISTI in Article 5.3.3. However, this is not determinative.

6.20 In all cases where there is a need to transfer authority from a Testing Authority (say, an IF or a NADO) to a Sample Collection Authority (such as IDTM) a similar generic delegation of authority letter will be in existence. However, this is not the situation in many other testing scenarios where the Testing Authority is also the Sample Collection Authority. This will be the case when an IF

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conducts its own testing on athletes in that sport or when a NADO tests national athletes in that country. Absolutely no delegation of authority from a Testing Authority is required. There will be no “authorization letter from the Testing Authority” in such a scenario. If FINA’s interpretation of the required “authorization” in Article 5.3.3 prevails, no authorization at all would be required to be provided on a testing mission when a Testing Authority is also the Sample Collection Authority. This makes no sense.

6.21 The express reference in Article 5.3.3 to “such as an authorization letter from the Testing Authority” (emphasis added) is simply an example of the sort, class or type of “official documentation” that may be provided **in a single testing scenario**. The reference to an “authorization letter from the Testing Authority” is not an exhaustive list. It does not describe the totality of the official documentation that is required, **in every testing scenario**, to evidence the proper authorizations. In the present case, the FINA Letter of Authority is a needed and a necessary document to provide to the Athlete (as it demonstrates that IDTM is the delegated Sample Collection Authority), but it is not sufficient.

6.22 The further weakness in FINA’s argument is that Article 5.3.3 specifies that the “official documentation” must be provided by the Sample Collection Authority. The FINA 2018 generic Letter of Authority came from FINA, not IDTM. In no sense was the Letter of Authority provided by IDTM. IDTM merely passed it along to show it was acting as the proper Sample Testing Authority. In all aspects, the ISTI is clear that it is the Sample Collection Authority who shall appoint and authorize the

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individual officials who will form part of the collective Sample Collection Personnel that will actually collect a sample from the Athlete. In Article 5.3.3, the “official documentation” that must be shown to the Athlete must be provided by the Sample Collection Authority – in this case IDTM. Nothing was provided to the DCA and the BCA by IDTM and so nothing could be shown to the Athlete.

6.23 ISTI Article 5.4 provides a final point of clarity on this issue. This Article describes in detail what must happen during an athlete’s notification. As stated earlier, when applicable, both (i) the authority conferred on IDTM as the delegated Sample Collection Authority (pursuant to the 2018 FINA Letter of Authority) and (ii) the authority to collect a sample from an athlete granted by IDTM to each official in the “pool” of individuals created and maintained by IDTM, must be shown to the Athlete.

6.24 The Doping Panel is satisfied that ISTI Article 5.4.1 (b) can be satisfied by showing the Athlete the generic Letter of Authority provided by FINA to IDTM or provided by any Testing Authority to any Sample Collection Authority. Such a letter will provide the general authority under which the sample collection will be conducted.

6.25 In contrast, Article 5.4.2 (b) requires that the individual members of the Sample Collection Personnel – the DCO and/or the Chaperone, as applicable – “identify themselves”, which is a plural reference, using the “documentation referred to in Article 5.3.3”. This cannot mean just showing to the Athlete the DCO’s complementary identification referenced in the second sentence



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in Article 5.3.3. It cannot refer to the generic FINA Letter of Authority. The Chaperone, and indeed all other attending officials (each of whom by definition has been “authorized” by the Sample Collection Authority), must “identify themselves” by showing “official documentation” provided by the Sample Collection Authority which evidences their individual authority collect a sample from the Athlete.

6.26 One document (such as the generic 2018 FINA Letter of Authority) is not sufficient for the purpose of fulfilling both Article 5.4.1 (b) and Article 5.4.2 (b) in the ISTI. The ISTI contemplates various documentation being provided by attending officials to demonstrate evidence of their authority to act. Some documentation may come from a Testing Authority (where there is a delegation to a Sample Collection Authority) while others must be provided by the Sample Collection Authority. The notification requirements in the ISTI Article 5.4 make clear that the “official documentation” referred to in 5.3.3 cannot be limited to the generic letter delegating authority from a Testing Authority to a Sample Collection Authority. If this were so, both Article 5.4.1 (b) and Article 5.4.2 (b) would not be needed.

6.27 The Doping Panel does not agree with FINA’s position that a properly authorized individual DCO, holding the generic FINA Letter of Authority sent to IDTM, is adequate evidence of a DCA’s, a Chaperone’s or a BCA’s “authority” to collect a sample from the Athlete. Such reliance on the single FINA Letter of Authority does not comply with the requirements contained in the ISTI.

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6.28 The Doping Panel is satisfied that the Athlete was not properly notified by the DCO. The notification requirements in the ISTI were not met for the other attending Sample Collection Personnel. Proper authorizations contained in “official documentation” from IDTM were not provided to the Athlete in connection with the attendance of the DCA and the BCA.

6.29 The Athlete (and every athlete) is held strictly accountable to the provisions in the World Anti-Doping Code and the FINA DC. The Doping Panel must insist that IDTM and FINA also strictly comply with the requirements in the ISTI. The Doping Panel rejects any argument or claim that the deficiencies in the notification procedure which it has identified are minor, do not impact the integrity of the blood sample that was collected and should not serve to invalidate an entire testing mission – especially when held up against the troubling and rather aggressive ‘self-help’ conduct of the Athlete and his entourage.

6.30 Notification processes contained in the ISTI go to the very heart of assuming jurisdiction over an athlete and thereby acquiring the authority to impose onerous obligations and penalties. Notification is something that must be done correctly. Notification is the ‘gateway’ into a realm of onerous obligations and responsibilities – all falling on an athlete. **The FINA Doping Panel insists that FINA members must know with certainty under whose authority they are being tested and that every official attending at the sample collection session has been properly trained, appointed and authorized by the Sample Collection Authority.** The fact that the Athlete in this instance did elect to engage in very troubling conduct regarding the

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collected blood samples (which will be addressed below) does not serve to eliminate the requirements resting on IDTM and FINA to comply with the provisions contained in the ISTI.

6.31 While the DCO had proper documentation evidencing her authority from IDTM, the total absence of any official documentation from IDTM in the hands of the DCA and the BCA is not acceptable. The Doping Panel is not prepared to dictate what form the “official documentation” evidencing the needed “authority” should take. That is up to each Sample Collection Authority to determine. There will not be a single correct way to proceed.

6.32 The Doping Panel is mindful that appointing Chaperones present a unique situation. Chaperones (or DCAs) are often recruited, selected, trained and then authorized by a DCO at the actual event where they are needed. However, they must be trained prior to playing any role at a testing mission. This need not cause a problem. They can be considered very recent additions into the Sample Collection Authority’s ‘pool’ of properly accredited and authorized officials. This is entirely proper. The DCO is, of course, acting on behalf of the Sample Collection Authority when the DCO selects and trains the Chaperone. In this capacity, as an agent for the Sample Collection Authority, the DCO can easily provide the “official documentation” from the Sample Collection Authority to evidence the Chaperone’s training and authority to attend at the Sample Collection Session and act in a particular capacity. This documentation must then be shown to the athlete who is asked to provide a sample.

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6.33 The “official documentation” provided by the Sample Collection Authority (covering the critical components of identification, appointment and authorization) held by officials who are Sample Collection Personnel could be some combination of (or all of) the following: a badge or Card with a photo and details of the official; a specific hard-copy Authorization Form with the name and logo of the Sample Collection Authority and the details of the official; digital identification, photo and authorization of the official on a website; digital links that include Mission Order details. **At a minimum, the “official documentation” from the Sample Collection Authority must provide “evidence” of a clear link between the Sample Collection Authority, the official involved and the testing mission being undertaken where the athlete will provide a sample.**

6.34 It is not sufficient to rely on a known IDTM DCO (as in the case at hand) to state verbally to the Athlete with reference to an attending DCA or a BCA (who have no official documentation from IDTM whatsoever), in effect: “they are with me, I will be in charge – everything is OK.” Showing the Athlete the contents of the IDTM DCO Portal might have established (with a photo) that the DCA was in IDTM’s ‘pool’ of qualified officials for 2018, but that step provided no evidence of an authorization from IDTM to take part in the OOC mission on September 4, 2018 when the sample was to be collected from the Athlete.

6.35 The Doping Panel finds that the OOC sample collection session conducted by IDTM on behalf of FINA on September 4, 2018 was not properly commenced. The lack of “official documentation” from IDTM for the DCA and the BCA meant that the Athlete was

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not properly notified. The request to provide a urine sample was not properly accomplished. The blood that was initially collected (and subsequently destroyed) was not collected with proper authorization and thus was not properly a "Sample" as that term is used in the ISTI and defined in the FINA DC. As a result, the sample collection session initiated by IDTM on September 4, 2018, is invalid and void. No FINA DC rule violations can result therefrom.

### Additional Grounds:

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

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

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

6.39 ***With regard to the collected blood:*** This issue is raised merely to identify a point of confusion. Doping Panel is left with some uncertainty regarding the role an IDTM BCA can properly play in the collection of blood from an athlete. The ISTI does not refer anywhere to a BCA – it is apparently a term specific to IDTM. The ISTI only refers to a BCO. To cloud the issue, the evidence at the hearing made clear that IDTM does certify BCOs but only if they are also a DCO. In that event, IDTM provides the BCO/DCO with official documentation evidencing their authorization to collect a sample from an athlete which is similar to that which a DCO receives.

6.40 This begs the following questions. Why have both BCOs and BCAs? What is the role for an IDTM BCA when collecting blood from the Athlete? The Doping Panel can only assume that an



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IDTM BCA has precisely the same role and duties as a typical BCO with regard only to the drawing of blood. It is assumed that a BCA is simply an IDTM official who is authorized to collect blood from an athlete using a different designation. If so – why not provide to the BCA similar authorization documentation provided to an IDTM BCO? Greater clarity on this issue and compliance with the nomenclature found in the ISTI would likely avoid much confusion.

6.41 Of substantive concern, the Athlete led evidence from various witnesses that the IDTM BCA did not produce documentation demonstrating that she was qualified to draw blood in the location where the test took place. This is a requirement in the ISTI.

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

6.43 As the BCA drew the Athlete’s blood successfully on September 4, 2018, whether she knew how to do the medical procedure is not the issue. She apparently did it well. Rather, the issue is whether she (i) had proper qualifications to legally draw blood in that locality, and (ii) did she present documentation regarding her valid qualifications to the Athlete?

6.44 The BCA, who is a nurse, provided to the Athlete a professional technical certificate issued in 2009. In the Declaration written by

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Dr. Ba, it is described as “her Nurse Qualification Certificate, Number 09092081”. The Doping Panel assumes this Certificate is her foundation qualification to be a nurse. However, Dr. Han testified that what is required to draw blood from an athlete is a nursing Practice Certificate. Dr. Han testified that a nurse without a Practice Certificate issued by the health administration cannot collect blood. In his view, the relevant Regulations (No. 59 of the Ministry of Health of the Peoples Republic of China) require that nurses who wish to collect blood from athletes must have both a Nursing Practice Certificate and a “practicing registration license.” Neither were provided to the Athlete.

6.45 FINA called no evidence to rebut the serious contentions made by the Athlete regarding the BCA’s claimed lack of qualification. To be fair, the scheduling and order of production in this case did not allow FINA to learn of and assess this specific allegation from the Athlete, and then file material in response. All parties filed their materials at roughly the same time.

6.46 Ultimately, the BCA did not testify at the hearing or answer any questions from the Athlete. The BCA’s position regarding her qualification status is unknown. Her signed statement filed with the Doping Panel only confirmed that the Athlete and his entourage had expressed dissatisfaction (after the blood was collected) with what the BCA described as her “nurse’s certificate.” The only evidence before the Doping Panel was that the BCA was not properly qualified. There was no evidence to the contrary. The Doping Panel is left with significant doubt whether the BCA was properly qualified to draw blood from an athlete.

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

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

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

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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

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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.

**A Caution to the Athlete:**

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.

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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. The following are but examples;

- Signing the Declaration prepared by Dr. Ba was not evidence that the sample collection personnel agreed with its substantive contents. In contrast, it was a form of Report that any athlete may submit at the conclusion of a sample collection session (see ISTI Article 7.4.4). DCOs are instructed to sign any and all such athlete provided comments. Others may sign as a witness. ISTI Article 7.4.6 references the need to have the DCO sign the documentation to confirm that the comments provided by an athlete (or Dr. Ba) reflect the athlete’s concerns – not to confirm that the DCO is in agreement with them.
- The time of the testing mission (commencing at about 11 p.m.) was perfectly appropriate. That it continued so long into the night was unfortunate, but no ground to fault the conduct of IDTM or FINA. This was at the very end of the “60-minute” time period specifically identified by the Athlete when he would be available



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to be tested. Indeed, the Athlete narrowly avoided a potential Missed Test allegation as he arrived just as the 60-minute time period was ending.

- The Athlete’s entourage continually asserted that the IDTM DCA should have presented to the Athlete DCO accreditation and related authorizations. This is absolutely not required – despite testimony that in China it is standard for all individuals who attend at a sample collection session to be trained as DCOs. In the ISTI, and for all tests performed by other Sample Collection Authorities while in China, it is perfectly proper for DCAs or Chaperones to perform their limited roles and tasks with no DCO accreditation. This so-called “higher standard” claimed by the Athlete’s witnesses is not required in the ISTI, and is absolutely not a justification to refuse to accept the credentials of an otherwise properly authorized DCA, who is not a DCO.
- The events in 2017 involving the Athlete and the DCO (when she was in training to be a certified ITDM Doping Control Officer) did not give rise to a conflict of interest so as to disqualify the DCO from acting in her role at the sample collection session on September 4, 2018. Complaints were made and comments were written at the conclusion of the session in 2017, but in no way did that disqualify the DCO from continuing to test the Athlete, now or into the future. Likewise, the Athlete’s testing history and the latest negative test result were not relevant to the issues before this Doping Panel.

6.58 Finally, the Doping Panel desires to acknowledge the very significant efforts expended by the various legal counsel, and

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translators, to facilitate the actual hearing. The hearing was lengthy and contentious - but never acrimonious. All parties focused on providing the Doping Panel with the relevant information they possessed to assist in the decision-making process. This effort was much appreciated.

## 7. CONCLUSION

7.1 Mr. Sun Yang has not committed an anti-doping rule violation under FINA DC 2.3 or FINA DC 2.5.

7.2 This award shall not be made public pursuant to FINA DC 14.3.3, unless and until the Athlete consents to such disclosure.

7.3 All costs of this case shall be borne by CSA in accordance with FINA DC 12.3.

7.4 Any appeal against this decision may be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland not later than twenty one (21) days after receipt of the complete and reasoned judgement (FINA Rule C 12.11.4 and DC 13).

**Robert Fox**

**David Lech**

**Farid Ben Belkacem**

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Member

Member

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Uruguay

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ANDREY KRYUKOV  
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DR. MARGO MOUNTJOY  
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JUAN CARLOS ORIHUELA GARCETE  
Paraguay

DR. DONALD RUKARE  
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VLADIMIR SALNIKOV  
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DAVID SPARKES  
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DAICHI SUZUKI  
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Netherlands

JIHONG ZHOU  
China

**Honorary Life President**  
MUSTAPHA LARFAOUI  
Algeria

**Executive Director**  
CORNEL MARCULESCU

Signed on behalf of all three Panel members



**Robert Fox, esq.**

Chairman, FINA Doping Panel