UNION INTERNATIONALE DE PENTATHLON MODERNE - UIPM

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Decision of the UIPM Court of Arbitration regarding

Qian CHEN

Following:

(A) the decision dated 6 April 2017 of Mr. Efraim Barak as sole arbitrator, and

(B) the decision dated 1 September 2017 of the UIPM Doping Review Panel ("**Panel**"), composed by Prof. Hans Micheal Ockenfels (chair), Anthony Temple, QC, Tan Sri Dr. M. Jegathesan, Eduardo Henrique De Rose,

in proceedings relating to Ms. QIAN CHEN in cases CAS AD 16/09 and CAS AD 16/13 and having regard to the 2017 UIPM Anti-Doping Rules and the World Anti-Doping Code in force in 2016 the Court determines as follows.

*** ***

Introduction and facts

1. Ms. QIAN CHEN, born in China on 14/01/1987 (hereinafter, also the "**Athlete**") participated in the Rio Olympic Games in 2016 in the Women's individual modern pentathlon event.

2. For the reasons set out in his award of 6 April 2017 ('the **Award'**) the sole arbitrator concluded:

> *On the basis of the facts and legal arguments set forth above, the applications are determined as follows:*
> *1. The application CAS AD 16/09 is deemed withdrawn.*
> *2. The application CAS AD 16/13 is granted.*
> *3. The Athlete is found to have committed an anti-doping rule violation pursuant to Article 2.1 of the IOC ADR.*
> *4. The results obtained by the Athlete in the Women's Modern Pentathlon event at the Olympic Games Rio 2016, in which she finished 4th, are disqualified with all consequences, including forfeiture of her Olympic diploma.*
> *5. The Athlete is ordered to return her diploma.*
> *6. The Union Internationale de Pentathlon Moderne is requested to modify the results of the above-mentioned event accordingly and to consider any further action within its own competence.*

3. For the reasons set out in its award of 1 September 2017 (the "**Decision**") the Panel concluded:

> *In the light of the findings made above it is the duty of the Panel to consider what further sanctions, including any period of disqualification, are appropriate. The Panel has had full regard to all the matters before it. It decides that the Athlete shall be declared ineligible for a period of 4 years starting from 22.8.2016. 'Ineligibility' is used as defined in the 2017 UIPM Anti-Doping Rules and means the Athlete is barred on account of her anti-doping rule violation for 4 years from participating in any Competition or other activity or funding as provided in Article 10.12.1 of those Rules. This penalty is to run from 22.8.2016 (the effective date when the Athlete's provisional suspension started) until and including 21.8.2020.*
>
> *The Panel decided that is should not address the 'Financial Consequences' (a financial sanction imposed for an anti-doping rule violation) or to recover costs associated with the rule violation. It considers that*

'Public Disclosure' or 'Public Reporting' of the fact and terms of this decision to the general public is justified and authorizes it accordingly.

4. The Panel has had full regard to all the terms of the Award. It has noted the matters it established, which matters were unchallenged at the time of the arbitration and which matters the Award reserved for later determination. Given the importance of the terms of the Award the Panel sets out the passages of the Award quoted at length below. It refers to the paragraphs of the Award later in this decision by reference to square brackets, thus [x].

5. The Award says:

> ***I. FACTS***
>
> *[1] The elements set out below are a summary of the main relevant facts as established by the Sole Arbitrator by way of a chronology on the basis of the submissions of the parties. Additional facts may be set out, where relevant, in the other chapters of the present award.*
>
> *[2] Ms. CHEN QIAN Chen (the "Athlete") is a representative of the Chinese National Olympic Committee ("NOC"). Her sport is Modern Pentathlon. The Athlete competed in the 2016 Rio Olympic Games (the "Games") in the Modern Pentathlon Women's event (which is one event) on 18 and 19 August 2016, in which she finished in 4th place.*
>
> *[3] On 17 August 2016, one day prior to the start of event, the Athlete underwent an out-of-competition doping test (sample code 6222269) (the "First Doping Test").*
>
> *[4] On 19 August 2016, immediately after having finished her competition, the Athlete underwent another doping test, this time an in-competition test (sample code 6222536) (the "Second Doping Test").*
>
> *[5] On both doping control forms, the Athlete declared the use of Lidocaine and Betamethasone. The Athlete submits that both medications were administered to her on 29 July 2016 at a sports medicine hospital in Beijing. The injection of these products was conducted according to the IOC Needle Injection Policy.*

[6] The results of the analysis of the A-Sample of the First Doping Test revealed the presence of Hydrochlorothiazide (HCTZ), a diuretic or masking agent, prohibited under S5 of the WADA Prohibited List.

[7] HCTZ is a specified substance listed in the WADA Prohibited List under section S5.

[8] By letter dated 20 August 2016, the Athlete was informed of an adverse analytical finding ("AAF") in her A-sample as a result of the First Doping Test.

[9] The Athlete requested the opening of her B Sample.

[10] The analysis of the B Sample took place on 21 August 2016 and confirmed the results of the A Sample.

CAS AD16/09 and 16/13

[11] On 21 August 2016, the IOC filed an application with the CAS ADD seeking inter alia that the Athlete be found guilty of an anti-doping rule violation ("ADRV") in accordance with Article 2.2 IOC ADR, with all the resulting consequences. This application was registered under reference CAS AD 16/09 (the "First Application"). Although the analysis of the B Sample took place on the very same day, the First Application was submitted based on the result of the analysis of the A Sample only.

[…]

[20] On 4 October 2016, in consideration of the Second Application, the First and Second Applications were suspended pending a decision on the consolidation of both procedures.

[…]

[22] On 24 October 2016, the parties were informed that the President of the CAS ADD decided to consolidate the First and Second Applications.

[23] On 28 October 2016, the IOC informed the Athlete that the result of the analysis of her B Sample from the Second Doping Test confirmed the results of the A Sample.

[24] On 1 November 2016, the IOC filed the documentation packages for the Athlete's A and B samples for the Second Doping Test, following which the Athlete was invited to file her written answer.

[25] On 1 December 2016, the Athlete filed her answer to both the First and Second Applications.

[…]

[28] On 8 February 2017, following the completion of the submissions by the parties and various procedural matters, a hearing on the merits of the case took place at the CAS Court Office in Lausanne, Switzerland.

[…]

[30] At the hearing, the parties raised no objection as to the appointment of the Sole Arbitrator or the procedure, and at the conclusion of the hearing, both parties confirmed their satisfaction in respect to the right to be heard and that it had been fully respected.

II. PROCEDURAL PRELIMINARY ASPECTS

[31] Application 16/09 deals with an Out-of-Competition test leading to an AAF, while Application 16/13 deals with an In-Competition test leading to an AAF.

[…]

[38] Considering the agreement between the parties and the fact that in application 16/13 the facts related to the Out-of-Competition test was mentioned as part of the facts (article 2), the Sole Arbitrator grants the IOC's request and therefore, application 16/09 is deemed withdrawn.

[39] The award therefore is issued only in respect of Application 16/13, as amended.

III. LEGAL ASPECTS

JURISDICTION

[40] – […] [43] It follows that the CAS ADD has jurisdiction over the Application.

APPLICABLE LAW

[44] - […] [46] The Sole Arbitrator hereby confirms that he will apply primarily the IOC ADR, which under Art. 17.4 IOC ADR include as an integral part the World Anti-Doping Code and the International Standards that shall prevail in case of conflict between them and the IOC ADR. Furthermore, Art. 17.2 IOC ADR refers to Swiss Law and the Olympic Charter as the applicable law governing the IOC ADR and thus will apply, if needed, on a subsidiary basis.

[47] The Sole Arbitrator further confirms that these proceedings are governed by the CAS ADD Rules. Pursuant to Art. 7 of the CAS ADD Rules, these proceedings are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 ("PIL Act"). The PIL Act also applies to this arbitration as a result of the express choice of law contained in Article 17 of the CAS ADD Rules and as a result of the choice of Lausanne, Switzerland as the seat of the CAS ADD and the Sole Arbitrator, pursuant to Article 7 of the CAS ADD Rules.

LEGAL FRAMEWORK

[48] Within the context of this proceedings, the only questions to be determined are:
(a) whether an ADRV is established, and if so; (b) what are the applicable consequences considering the fact that the ADRV occurred within the framework of the Games.

[49] Therefore, considering the scope of the present arbitration, the most relevant articles of the Applicable Law for the discussion on the merits of this Application are the following:

[…]

III. MERITS

A) THE PRESENCE OF THE PROHIBITED SUBSTANCE IN THE ATHLETE'S BODY

[54] In her submissions and during the hearing, the Athlete did not dispute the results
of the analysis of her samples, thus admitting the presence of the prohibited substance in her body.

[55] The presence of the prohibited substance in the Athlete's body was established based on the Analysis of the A Samples as confirmed by the Analysis of the B Samples that took place at the request of the Athlete.

[56] The Sole Arbitrator, therefore, finds as a matter of fact that in the occasion of the Games, the presence of the prohibited substance in the body of the Athlete at the time of both anti-doping tests – Out-of-Competition (on August 17 2016) and In- Competition (on August 19 2016) - was established.

B) THE SUBMISSIONS OF THE PARTIES

[57] Although the Athlete does not deny the presence of the Prohibited Substance in her body as a result of an In-Competition doping test, the Athlete denies her responsibility for the consequences of the presence of the prohibited substance by asking the Sole Arbitrator to deny the IOC's request to disqualify the result of the Athlete at the Games.

[58] In support of her request, the Athlete brought forward the argument that a comparison of Art. 9 IOC ADR and CAS jurisprudence shows that it will would be completely disproportionate to apply Art. 9 IOC ADR to following arguments:

a. HCTZ does not increase sporting performance;

b. The intake and concentration of HCTZ found in the Athlete's samples was so low that it could not have possibly masked the intake of any performance-enhancing substance; and

c. The Athlete is the victim of an HCTZ-contaminated nutritional supplement, i.e. she does not bear any fault or negligence.

[59] In support of these assertions, the Athlete submitted various evidence including the result of positive findings of HCTZ found by two Chinese labs in fruit sugar tablets that she had used since 2015, including during the Games, at the advice and recommendation of Mr. Al Lei "a medical advisor at Jiangsu Research Institute of Science which is connected to Jiangsu Province Sports Bureau." The Athlete also provided an expert opinion of Dr. Laurent Rivier, an expert in forensic toxicology. According to his opinion, the concentration of HCTZ found in the Athlete's body could be consistent with her alleged intake of fruit sugar tablets. Dr. Rivier also stated that the concentration of HCTZ that was found in the Athlete's samples could not have a masking effect and thus could not mask any use of any other prohibited substance for the enhancement of her sporting performance.

[60] Answering the arguments of the Athlete, the IOC insists that Art. 9 IOC ADR is the clear expression of the regime of strict liability and as such does not provide any flexibility at all. Disqualification is an automatic consequence of an ADRV. The IOC reiterates that Art. 2.1.2 IOC ADR provides no room for the consideration of intent,
fault or negligence.

[61] The IOC further argues that disqualification is "the objective consequence of an objective fact: the established presence of a prohibited substance in the Athlete's body." As such and in effect "the automatic disqualification is nothing else than a condition of eligibility retroactively assessed". In support of this argument, the IOC refers to the difference between Art. 9 and Art. 10 IOC ADR and the fact that Art. 10 which is in nature a clear article dealing with sanctions is indeed not based on strict liability and thus provide for a range of flexibility in considering and imposing the sanction.
[62] The IOC submits that despite the fact that there is no question that the system of presumption and automatic disqualification in the specific case of an established ADRV following an In-Competition test is effectively harsh on Athletes, the system as such is necessary and accepted as it is. The consequences of its application cannot and will not therefore be considered as an invalid application of the proportionality principle of Art. 27 of the Swiss Civil Code.

[63] In response to the Athlete's explanations as to the possible circumstances that led to the AAF and in spite of these explanations being irrelevant in the opinion of the IOC, the IOC highlights that the tablets which were the alleged source of the prohibited substance were not reported on the Doping Control Forms - unlike the Athlete's other products. Furthermore, the IOC raises doubts in respect of the conditions in which the tablets were checked by the Chinese Labs and the qualification of labs. Although the IOC does not exclude the possibility and the right of the Athlete to try and convince the Sole Arbitrator otherwise, such line of argumentation of the Athlete is irrelevant in this case.

[64] Finally, the IOC provided an expert opinion of Dr. Martial Saugy, the Director of The Center for Research and Expertise in Anti-Doping Sciences (REDS) in the University of Lausanne, stating that the reports issued by the Chinese labs are "far from the standard of a WADA-accredited Laboratory" however assuming that the reports are reliable and commenting on the conclusion of Dr. Rivier, Dr. Saugy found a mistake in the calculations that the IOC considered "a major mistake" as

"Dr. Rivier would have applied as assumed level of contamination which appears to be the higher by a factor of 1000 than the one shown in the analysis on which the scenario is based".

[65] The correct calculations (which Dr. Rivier was very open to admit his mistake during the hearing) show that "even taking the best scenario for the Athlete (a dose of two time four tablets a day) none of the levels of the HCTZ could have given rise to the concentration found in the Athlete's urine". It follows, in the opinion of the IOC that even assuming that the Athlete's explanations were relevant to the case at hand, they are not supported by the evidence produced by the Athlete.

C) THE ALLEGEDLY CONTAMINATED FRUIT SUGAR TABLETS AS THE POSSIBLE SOURCE OF THE AAF AND ITS RELEVANCY IN THIS CASE

[66] During the hearing, the Athlete's submissions and evidences in respect of the possible source of the AAF were heard and examined. However, all those issues are totally irrelevant for the case at stake in which the Athlete is confronted with an AAF in connection with an In-Competition anti-doping test and the consequence of such finding pursuant to Art. 9 IOC ADR.

[67] Indeed, within the framework of this proceeding, as amended when the IOC withdrew Application 09/16 and amended Application 13/16, the Sole Arbitrator is still requested to decide that "The Athlete be found guilty of an anti-doping rule violation in accordance with Article 2.1 of the IOC Anti-Doping Rules applicable to the Olympic Games Rio 2016" in respect of the out of competition test as well. However, no specific sanctions are requested in respect of this violation – if indeed found – and in such case the consequences of such a violation are to be dealt with in accordance with prayer for relief that asks "The matter of the Athlete be referred to the UIMP to impose Consequences that extend beyond the Olympic Games Rio 2016 upon the Athlete".

[68] Therefore, the Sole Arbitrator finds that the submissions of the Athlete in respect of the possible source and the possible explanation for the existence of the prohibited substance in her body are irrelevant to the case at hand, however will be examined thoroughly and dealt with by her International Federation in the process of the result management in terms of sanctions beyond the Games.

D) THE ANTI-DOPING RULE VIOLATION

[69] Under Art. 2.1.1 and 2.1.2 IOC ADR (quoted above), the finding of the prohibited substance in the Athlete body is "Sufficient proof (for the establishment) of an antidoping violation under Art. 2.1".

[70] Under Art. 2.1.1 IOC ADR "it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an antidoping rule violation under Article 2.1"

[71] A strict and simple application of the anti-doping rules should thus lead to the conclusion that an ADRV was committed and the Athlete should be found responsible for the violation based on Art. 2.1.1. since "[i]t is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is used".

[…]

[80] Since an ADRV is established, the application of Art. 9 IOC ADR leads to the inescapable conclusion that the Athlete's result must be disqualified.

[…]

[85] The Sole Arbitrator is of the opinion that within the framework of Art. 9 IOC DRC, and as part of the anti-doping system and the need of the fight against doping in sports, the issue of proportionality has already been taken into account. Indeed, within this system the possibility exists that an athlete who bears no fault or negligence, nor she or he had a known intention to enhance the sportive performance will be automatically disqualified for an established anti-doping rule violation in connection with and In-Competition test. However, it is not a question of culpability, but a consequence of circumstances in which an athlete did not meet the equal standards applicable to all the participants in the competition. The mere participation of the athlete in a competition while a prohibited substance was present in his or her body by itself establishes a situation of non-equality between him or her and the other participants in the competition, regardless of the question of culpability or intention.

[86] In this specific case, the Sole Arbitrator was exposed to the details of the career of the Athlete. Indeed the findings of these proceedings are difficult for the Athlete who had a clean record and

remarkable achievements along her career. The findings in this case, however, should not be considered as a stain on her whole career. It only means that on a certain date, perhaps during a determined competition, the Athlete simply did not comply with the rules set out for all the participants by having a prohibited substance in her body. This objective fact leads to the inevitable result of this Application. As noted above, the subjective elements related to intent and culpability raised on her defence as submitted by the Athlete are still relevant and will be examined by her International Federation in a later proceeding.

6. The Panel has had also full regard to all the terms of the Decision. Given the importance of the terms of the Decision, the Court sets out the passages of the Decision quoted at length below. It refers to the paragraphs of the Decision later in this decision by reference to square brackets, thus [x].

7. The Decision says:

[9] The Panel considered that fairness required that the Athlete be specifically invited to engage with the process and to present her case. By letter dated 20 July 2017 it invited her active participation.

[10] In response the Athlete provided her statement dated 31 July 2017 and 4 accompanying exhibits to the Panel. The introductory paragraphs of this statement began as follows.

> *Personal Statement (Supplementary)*
> *Many thanks to the officer of the UIPM Doping Review Panel to take the time to read my Personal Statement (Supplementary). I am Quean CHEN, once a Modern Pentathlete from China. I am now 30 years old, and I have now retired. Frankly speaking, I will no longer have the chance to take part in the Games anymore. However, I still want to establish that I did not bear any fault or negligence to this affair.*
> *However, in the first place, I have to tell you I have decided to waive my right to the oral hearing. In fact, it is very hard for me to make this decision, I am very upset to waive my right, but I have to. I cannot afford any extra money to hire a lawyer or a translator anymore. In order to prove that I was guiltless to this affair, during the hearing held by CAS, I spent almost all my savings.*

[12]. The Panel notes the Athlete's clear choice not to participate in a video conference which would have addressed the matters now in issue.

[13]. The Panel has given appropriate weight to all the terms of the newly submitted statement and the exhibits. The balance of the statement says as follows.

> *I still cannot believe that my whole glorious sport career might be ended by this disaster. Please allow me to say this is a disaster, because I never potentially took any prohibited substance from the WADA List, but now I lost the chance to take part in the National Games took place recently.*

As an Athlete, to my personal knowledge, I promise the tablets, which were found with HCTZ were just as candies to me. I never thought they could be the source of HCTZ. I noticed that there is Food Production License on the container bottle (Exhibit 4, Page 13). The information on the container bottle indicates these tablets contain fructose, white sugar, vitamin C, food additives (synthetic flavours: taurine, anti-caking agent: trisodium phosphate, magnesium stearate). There was no indication of HCTZ in the container bottle of the tablets.
These tablets, the Jiangsu Research Institute of Sports Science purchased for us to recover the body after competition (this is why the concentration in-competition is higher than the concentration out-of-competition, after the competition I took more candies to recover) were made by a manufacturer called Beijing Tiantian Yikang Biotechnology Co., Ltd. (Exhibit 1,page 4-9).
In order to prove the tablets they sold contained no prohibited substance, the company Beijing Seeking Jarring science and trade Co., Ltd. provided us with the testing reports, one if which was issued by CHINADA (Exhibit 2 & 3). The CHINADA is the national laboratory in China, which is widely admitted by other states.
In order to prove I was guiltless, after I came back to China after the competition in Rio, I sent the candies to the lab named Shanghai Micro-Spectrum Chemical Technology Services for test, the tablets tested positive for HCTZ. To confirm the result, I sent them to the more professional institutions, the Institute of Forensic Science at the Chinese Ministry of Justice (Exhibit 4, the testing report about Zhang Wenxiu which issued by the Institute of Forensic Science was accepted by the CAS) and China Association for Instrumental Analysis (Exhibit 1, Page 12-17), however, the tablets tested positive for HCTZ as well.
As an experienced athlete who had attended 3 Olympic Games, I am definitely sure that I would be tested both out-of-competition and in-completion [sic – obviously 'in competition']. So, please trust me it is impossible for me to try any prohibited drug or substance to make myself in trouble. Actually, I continue to take this kind of tablets for more than 2 years, and the testing results during that period are all negative.
I respect and trust the law, I do believe the law will also give me a fair punishment. In fact, the prohibited substance did not have any effective performance-enhancing or masking effect to me, because I only got the fourth place finally and this place is not good to me, actually. Compared with the result during the World Championship three month ago, the result of this time retrogressed a lot. Overall, it is nearly 50 seconds slower in the running event. The result would not be like this if I took any prohibited substance.
In the end, I have to say this affair is not only matters to me, but also the people who behind me. They are just like me, all guiltless, however, their future and career may be strongly influenced by this affair.

[…]

Decision and reasons

[11] This statement (hereafter 'the Athlete's statement') is striking for several reasons.

[12] Though it makes general denials of responsibility (for example paragraph 4, first 3 lines; paragraph 7, first 7 words and paragraph 10, second sentence 'They are just like me, all guiltless,…') it fails to confront and explain the uncontested fact ([37], [54], [56], [72], [75], [86]) that the

Athlete had a prohibited substance in her body. The Award at [68] and [86] gave the Athlete the opportunity to explain how this came about. She has failed to do so.

[13] The Athlete's statement at paragraphs 5-7 refers to tests undertaken on the tablets which positively showed the presence of HCTZ in the tested tablets. However, the Athlete's statement does not begin to address how this presence came about. For example, the statement does not seek to address the following questions. What was the origin of the HCTZ found in the Athlete's body? This leads to the question, What level of HCTZ would the candies generate? The Award held at [68] and it is not disputed that Dr Rivier, the Athlete's expert, admitted to the Arbitrator that '…even taking the best scenario for the Athlete (a dose of two time four tablets a day) none of the levels of the HCTZ could have given rise to the concentration found in the Athlete's urine.' Nothing in the Athlete's statement begins to address this. She does not explain or contradict the concession made by Dr Rivier as the Athlete's expert.

[14] The fact that the Athlete's statement does not explain or contradict Dr Rivier's concession is important. The conclusion to be drawn from this concession is that the candies had no relevant part to play in the introduction of HCTZ in the Athlete's body. The Panel concludes they are irrelevant as an introductory source.

[15] This conclusion is no surprise. The concession fits in well with the probabilities. Leaving Dr Rivier's evidence to one side, if the candies contained appreciable levels of HCTZ one would expect (i) clear forensic evidence to this effect, (ii) evidence of use of the candies and consequent evidence of other failed tests, (iii) evidence of remedial action and (iv) evidence of an outbreak of publicity. There is no such evidence.

[16] The Athlete's statement at paragraph 8, last sentence, asserts that she took 'this kind of tablet' (which paragraph 4 of the Athlete's statement equates to 'candies') for more than 2 years, with only negative test results. If the candies were negatively tested as regards HCTZ for two years, how could they possibly innocently become positive – but only for the Athlete - at the time of the Rio Olympics? Without evidence of a compelling explanation this is an incredible idea. The Panel rejects it.

[17] If there was an innocent explanation it would surely have emerged from the expert evidence or some other evidence on the Athlete's behalf. No such explanation was offered.

[18] The overwhelming conclusion to be derived from the expert and other evidence before the Arbitrator, from the circumstances so far as they are known as to the use of the candies and from the Athlete's statement at paragraph 8 is that the candies were not the material origin of the HCTZ.

[19] This being so, there must have been another source of the prohibited substance. In the absence of a credible explanation – of which there is none – at the very least the real source could not have arisen without serious fault or negligence on the Athlete's part.

[…]

[25] The Athlete's statement does not engage even in the most general terms with the advice she received. All the Athlete's statement says about the part played by others is a bland, unpersuasive reference at paragraph 10 in the most general terms to the 'people behind me…'

Conclusions

[26] The Panel concludes that in the circumstances where the burden lies on the Athlete, she has presented no credible evidence innocently explaining the admitted presence of HCTZ in her body.

[27] The conclusion to be drawn from the admitted or proven circumstances, including the Athlete's failure to address these issues in her statement, is that she failed significantly to honor her personal duty to ensure that she was drug free.

[28] At the very least the combination of the failures identified above inevitably points to a high level failure by the Athlete to recognize and honor her duty. On any view she was a very experienced athlete who must have been aware of the dangers of doping and of her personal duty in that regard.

[29] Drawing these considerations together the Panel concludes:

i. *The tablets were not the origin of the established levels of HCTZ in the Athlete's body.*
ii. *The Athlete has not begun to offer a credible explanation for the presence of HCTZ in her body. Her statement, quoted above, makes no credible effort to address the facts found in the Award or the circumstances overall.*
iii. *Whether or not the Athlete was a knowing participant in the introduction (by some means other than the tablets) of the prohibited substance into her body, it is, at the least, certain that at the time of the Rio Games the Athlete was very seriously negligent and at fault by permitting the presence in her body of a prohibited substance. On any basis in effect she facilitated it.*

[30]It is noticeable that:

i. *The Athlete's breach of personal duty coincided with and took place at the highest level of sport.*
ii. *The introduction of HCTZ into the Athlete's body must at least have been directed by someone connected with the Athlete at unfairly winning a medal, as nearly occurred.*
iii. *This was an attempt at cheating, facilitated by the Athlete's fault and negligence.*
iv. *Cheating at the Olympic Games devalues the Olympic ideal.*
v. *The Athlete has expressed no regret for the presence of the HCTZ, for her fault and negligence or for any other circumstance for which she is responsible.*
vi. *There is no sign of co-operation with anti-doping agencies.*

[31] The Panel concludes from the foregoing that there is no mitigating explanation. The Athlete's breach of duty was serious.

8. The National Anti-doping Organization of China, CHINADA, filed on 28th March 2018 with this Court an appeal to the Decision, by means of a letter addressed to the UIPM Secretary General. Shortly afterwards, on 5th April 2018, by means of a letter anticipated via e-mail, CHINADA appointed one of the member of the Court;

9. Other members of the Court of the Courts have been appointed, respectively, on 5th April 2018 and 9th April 2018.

Jurisdiction and applicable rules

10. This Court affirms its jurisdiction over the case.

11. The above is based on applicable procedural rules sets out in the relevant documents, namely:

    a. 2016 UIPM anti-doping rules ("**ADR**")

    b. 2016 UIPM code of ethics ("**COE**")

    c. 2018 UIPM anti-doping procedures ("**ADP**")

More in detail, the following considerations can be made in order to maintain the above.

12. Preliminarily, this Court would like to highlight the existence of certain discrepancies in the three separate set of rules, which makes the uniform and coherent construction of the applicable legal framework not straightforward. Bearing that in mind, in the following paragraphs the Court will describe the rules and elements on which its jurisdiction can be based.

13. First of all, and for sake of clarity only, the Court remarks that the COE does not make reference to the jurisdiction of the Panel and relating procedures. Therefore:

    a. theoretically, general procedural rules over the UIPM Court of Arbitration (composition, members, seat etc.) can apply to the case at hand; while

    b. UIPM Procedural rules on the "appeal" seems not directly applicable, as they cover an entirely different set of rules which applies to other violations, not directly relating to anti-doping procedures and results management.

14. In such respect, it must be considered that the Code itself states at article 1.3 that its provisions cannot be invoked when the complaint "*is subject to the jurisdiction and pending determination of UIPM's Anti-Doping Rules and UIPM Anti-Doping Procedures*".

15. In light of the above, procedural rules have to be retrieved elsewhere. In such respect, the ADP (articles 15 ff.) is clear in setting up rules and procedures relating to sanctions and provisional suspension, which is the task of the Panel (art. 15.2). In such respect:

    a. Article 2 ADP indicates the scope and makes reference to "*Athletes … participating in … UIPM competitions listed in Article 1.7 UPIM Competition Rules*";

    b. Article 1.7 UPIM Competition Rules includes Olympic games among UIPM Category "A" Competition, and therefore ADP appears to be applicable to violations occurred during such events (of course, for any aspects relating to the status of the athlete under UIPM);

    c. Article 17 regulates appeal and states the following:

        i. Decisions of the UIPM Doping Review Panel are subject to appeal to the UIPM Court of Arbitration;

ii. the UIPM Court of Arbitration is bound by the UIPM Anti-Doping Rules and UIPM Anti- Doping Procedures and all other UIPM Rules;

iii. The UIPM Court of Arbitration makes its decision after an oral hearing within three months of its constitution. If the parties agree, the UIPM Court of Arbitration can waive the hearing;

iv. A decision of the UIPM Court of Arbitration may be appealed to the Court of Arbitration for Sports (CAS), Lausanne in accordance with Article 13 of the UIPM Anti-Doping Rules

16. The above is also confirmed by the following:

a. article 8.2 ADR on "*Decisions*" states that "*The decision may be appealed to the UIPM Court of Arbitration and thereafter to CAS as provided in Article 13 below and Article 17.3 UIPM Anti-Doping Procedures*";

b. article 13 ADR states that "*Decisions made under these Anti-Doping Rules [which, strikingly, includes those relating to Consequences, issued by the Panel] may be appealed as set forth below in Article 13.2 through 13.7 read together with Article 17.3 UIPM Anti-Doping Procedures [cross reference mistake: must be read as current article 17] or as otherwise provided in these Anti-Doping Rules*" and;

c. Appendix 3 (*Consent form*) to the ADR bears the following statement: "*I also acknowledge and agree that any dispute arising out of a decision made pursuant to the UIPM Anti-Doping Rules and UIPM Anti-Doping Procedures, after exhaustion of the process expressly provided for in the UIPM Anti-Doping Rules and UIPM Anti-Doping Procedures, may be appealed exclusively as provided in Article 13 of the UIPM Anti-Doping Rules and Article 17.3 UIPM Anti-Doping Procedures to an appellate body for final and binding arbitration, which in the case of International-Level Athletes is the UIPM Court of Arbitration and thereafter the Court of Arbitration for Sport (CAS)*".

17. We can therefore conclude that the Court of Arbitration has theoretically jurisdiction over an appeal proposed on a decision issued by the Panel, subject to all the above; if a party do not agree to the decision, there is a further right to appeal to CAS.

18. The content of the appeal is clearly stated in article 17.1 of the ADP:

    a. The appellant must lodge his/her appeal with the UIPM Court of Arbitration in writing by registered letter to the UIPM Secretary General;

    b. All appeals must set out briefly their nature and the facts relating thereto and must include the nomination of an arbitrator.

19. There are clearly two issues at stake:

    a. Content of the appeal: the letter from CHINADA to UIPM clearly indicates the reasons of the appeal, which are merely relating to the application of a certain substantial rules on the determination of *Consequences* instead of others. CHINADA also nominated an arbitrator thus clearly expressing its will to file for an appeal;

    b. Who the "appellant" is: this part appears to be less straightforward and in such respect the Court believes that a clarification might be worthwhile:

        i. the ADP does not specify who "*the appellant*" is. Reference clearly must be made to the athlete (see also artt. 17.6 and 17.8 ADP).;

        ii. In case of further appeal to the decision issued by this Court, however, the ADR also specify that such additional appeal is carried out according to the rules set under article 13, and article 13.2.3 clearly indicates, among others, the National Anti-doping Organization to which the Person relates.

20. As no clear indication arises from the applicable set of rules, this Court need to fill the gap relating to the definition of "*appellant*" by way of interpretation. In such respect, is seems reasonable to affirm that, if the appeal to the decision of the Panel, were attributed only to the Athlete, the right to judicial protection attributed to the NADO and other entities mentioned therein would be frustrated by the action of a third party. That is, if we denied the right to appeal to such entities with this Court, their autonomous right to request a review of a judicial decision might be frustrated by the decision of a third entity (i.e. the athlete deciding, for any reasons, not to appeal the decision).

21. This is above appears to be incoherent with the meaning of the mentioned set of rules and the underlying principles governing appeals to decisions, also bearing in mind that he NADO, as well as any other authorised entity, might have an autonomous interest in filing an appeal (in such case, for instance, CHINADA affirms that the application of a 4 year sanction might affect also other persons among its affiliates – in our case, the head coach of the Athlete, and therefore it might have an interest in appealing even if the athlete has retired).

22. Also considering that the ADP does not expressly exclude that the entities listed in article 13 ADP file an appeal in front of the Court of Arbitration, we must conclude that a National Anti-Doping Authority (in this case, CHINADA) is duly entitled to file an appeal with the Court of Arbitration, provided that all other conditions are met.

23. All parties have been involved in the procedure and given by this Court the possibility, depending on the case, to provide additional complaints relating to the matter, other than those already represented by means of the Letter, further representation, brief, evidence and/or any other information to be submitted to the Court, other than those already submitted in the course of the proceeding held in front of the Panel.

24. All parties have waived their right to in respect of the above; the Court, therefore, will issue its award on the basis of available facts and/or circumstances, already made available in relation to the previous procedures.

25. Finally, according to article 17.4 ADP, "*In case of necessity the President of the UIPM Court of Arbitration is authorised to decide upon provisional or conservatory measures*". This Court deemed any provisional or conservatory measure unnecessary, no measure has been requested and/or solicited in any manner and, therefore, no futher actions have been taken by the Court in such respect.

Motions and contentions

On the grading of Consequences – application of a base sanctions

26. The appeal filed by CHINADA clearly request the revision on the Decision on the basis of the following:

> "*We noted that CHEN Qian was declared ineligible for a period of four years by UIPM […] However, the period of ineligibility shall be four years where the anti-doping rule violation involves a specified substance and the Anti-Doping Organization can establish that the anti-doping rule violation was intentional under Art. 10.2.1 Code. Otherwise, the period of ineligibility shall be two years (Art. 10.2.2 Code). We reviewed your decisions carefully and found no statement that could prove the anti-doping rule violation was intentional. In the meantime, though we have tried for several times to communicate with you via Email we have never received any evidence or reference for the 4-year ineligibility […] It is our hope that you will provide with facts, evidence and reasons for the 4-year ineligibility on Ms. CHEN Qian's case in a timely manner. Or if it is not possible for you to prove the alleged ADRV was intentional, please revise the period of sanction as requested by Article 10.2.2 of the Code, so that we will better continue our subsequent process.*"

27. As a consequence of the above, the complaint from CHINADA clearly involves a review of the applicable legal framework, in order to establish which is the sanction that can be applied in respect of the Case of Ms. CHEN QIAN.

28. The case of Ms. Qian involves Adverse Analytical Findings in two connected occasions, occurred during the Rio 2016 Olympic Games, relating to the presence in its body of Hydrochlorothiazide (HCTZ), a diuretic or masking agent, prohibited under S5 of the WADA Prohibited List. HCTZ is a specified substance listed in the WADA Prohibited List under section S5.

29. The results of the tests are undisputed and shall be considered as a matter of fact. The presence of a specified substance constitutes, *per se*, a violation of the applicable anti-doping rules which led the first award by CAS and, in line with applicable rules, the matter has been then referred to the applicable International Federation, thus leading to the Decision.

30. The Decision of a 4 (four) year ineligibility period follows the application of article 10.2.1.2. ADR, which provides a basic sanction of 4 years in case of anti-doping rule violation involving a specified substance.

31. In the Opinion of this Court, the application of article 10.2.1.2 is not lawfully grounded for the following reasons.

32. In case of violation of articles 2.1, 2.2 or 2.6 ADR (like in the case at hand) involving the use of a *Specified Substance*, the applicable rules are the following:

    a. Article 10.2.1.2, determining the application of a 4 (*four*) year Ineligibility when "*UIPM Doping Review Panel can establish that the anti-doping rule violation was intentional";* and

    b. Article 10.2.2, imposing the application of a 2 (two) year Ineligibility when "when Article 10.2.1 does not apply.

33. The application of article 10.2.1 is triggered on the basis of a very specific element, that is the Panel assessing the intentionality of the anti-doping rules. There are two main elements to underline in such respect:

    a. The *burden of proof* is clearly put on the Panel and not on the Athlete; and

    b. The Panel must assess intentionality, which, in the words of article 10.2.3 ADR, requires that the Athlete or other Person "*engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk*"

34. In the words of scholars, therefore "*cases involving Specified Substances are rebuttably presumed to be the result of non-intentional violations*". In such cases, the competent Anti-doping Organization ("**ADO**") must determine intentionality based on a criteria of "*comfortable satisfaction*" which can be defined as "*greater than a mere balance of probability but less than proof beyond any reasonable doubt*". It is worth also mentioning that the concept of intentionality involves both direct and indirect intent, or "*recklessness*" (see *RIGOZZI ET AL., Breaking down the process for determining a basic sanction under the 2015 World Anti-Doping Code*, in *Int. Sports Law j. (2015) 15:3-48).*

35. Having said that, the shifting of the burden of proof on the ADO clearly determines the necessity for such entity to determine the *origin* of the substance and, depending on the case, provides evidences about the existence of intentionality. This might be self-evident when dealing with organized doping schemes, when the teams are involved, when positive evidence are retrieved in such respect. Also when assessing indirect intention, however, the ADO should provide evidence in such respect.

36. The issue of *intentionality* must be considered with great care by the Court, given that the applicable version of the ADR does not provide any degree of flexibility in determining the applicable sanction. That is, once *intentionality* is assessed, the applicable sanction is a fixed 4 year term and no mitigation can be applied other than a reduction for fault-related reasons.

37. The above is crucial for determining the behavior of the Court in respect of violations, also when their existence is undisputed: indeed, a 4 year sanction is likely to be a career-ending one, and it must be considered as *disproportionate* in case no aggravating circumstances can be proved in such respect (in this case, the role of "*aggravating circumstance*" must be necessary played by the assessment of intentionality carried out by the ADO) (see DUVAL ET AL., *The World Anti-Doping Code 2015: ASSER International Sports Law Blog Symposium, in Int Sports Law J (2016), 16:99-117*) .

38. In the opinion of this Court, the Decision issued by the Panel lacks any proof of intentionality (within the meaning described above) and therefore the application of the most severe sanction of 4 (four) years Ineligibility cannot be lawfully grounded.

39. In the words of the Decision itself, the Panel concluded that: "*The tablets were not the origin of the established levels of HCTZ in the Athlete's body*" and "*The Athlete has not begun to offer a credible explanation for the presence of HCTZ in her body. Her statement, quoted above, makes no credible effort to address the facts found in the Award or the circumstances overall*". These two statements, however, are *per se* not sufficient to determine the application of article 10.2.1.

40. Indeed, the Decision clearly shows that:

    a. The AAF have been not contested by the parties;

    b. The Athlete tried to provide justification for the AAF; namely, Ms. CHEN QIAN affirmed that a possible source of HCTZ might be certain contaminated fruit candies, used to recover from training;

    c. Such justification actually proved wrong as the analysis provided by the consultant assisting Ms. CHEN QIAN proved affected by a major calculation mistake.

    It is self-evident that the origins of the violation, even if not validly indicated by the Athlete, has not been proved in any other way; nor it is possible to determine intentionality (also in the form of recklessness) on the basis of the sole elements listed above.

41. In the opinion of this Court, the elements provided above are not sufficient to determine application of article 10.2.1; otherwise, if the application of article 10.2.1 would be based on the sole rebut of the Athlete's argument, article 10.2.2 would be virtually applicable to any case involving an AAF and, in practice, the burden of proof would be shifted again on the Athlete (and not the ADO).

42. On the basis of the above, the appeal is allowed and the *Consequence* must be reformed from 4 (four) years to (two) years of ineligibility in application of article 10.2.2 ADR.

43. The penalty therefore runs from 22nd August 2016 (the effective date when the Athlete's provisional suspension started) until and including 21st August 2020.

Other facts and circumstances relevant for the determination of Consequences

44. For sake of completeness, in order to complete its analysis, the Court has to assess if the applicable sanction can be reduced, due to fault-related reasons.

45. Indeed:

    a. under article 10.4 ADR, if an Athlete or other Person establishes in an individual case that he or she bears *No Fault or Negligence*, then the otherwise applicable period of Ineligibility shall be eliminated; and

    b. in case of Specified Substances, ineligibility can be reduced if the Athlete "*can establish No Significant Fault or Negligence*".

    It is worth noticing that in both cases the Athlete is required to "*establish how the Prohibited Substance entered his or her System*"

46. In the case at hand, however, the Decision clearly showed that it was not possible to assess, on the basis of available evidence and circumstances, the source of the violation.

47. As a consequence, no assessment on fault-related issues can be carried out and therefore the basic sanction indicated above has to be confirmed.

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Conclusion

Based on all facts, evidences and circumstances outlined above, the Courts declares the following.

48. In reform of the Decision by the UIPM Doping Review Panel, the applicable sanction to Ms. CHEN QIAN is revised, from 4 (four) years of ineligibility to 2 (two) years of ineligibility, commencing on 22nd August 2016 and ending at the conclusion of 21st August 2018.

49. The UIPM Court of Arbitration further acknowledge the Court of Arbitration for Sport Panel decision regarding the disqualification of Ms. CHEN QIAN's results obtained in the Olympic Games Rio 2016

50. The UIPM Court of Arbitration decided that is should not address the *'Financial Consequences'* (a financial sanction imposed for an anti-doping rule violation) or to recover costs associated with the rule violation. It considers that *'Public Disclosure' or 'Public Reporting'* of the fact and terms of this decision to the general public is justified and authorizes it accordingly.

51. Any appeal against this decision may be referred to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, not later than 21 (twentyone) days after receipt of this complete judgment.

Dr. Alfonso Parziale - President

Mr. Alexander Georgiev

Ms. Ana Luisa Almeida

Dated May 9h, 2018

Signed on behalf of all Members of the Court

Dr. Alfonso Parziale