

White Paper: CHINADA decision Chinese swimmers & the World Anti-Doping Code

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Executive Summary

The global anti-doping community seeks clarity and answers regarding the China case involving 23 Chinese swimmers. Because the World Anti-Doping Code was not enforced in this case, the anti-doping community needs to know from WADA how and why the Code is not always enforced. A World Anti-Doping Code analysis of the results management, compliance, and investigation aspects of this case is provided in the following document.

Anti-doping practitioners need to be provided with the reasoning and rationale behind WADA's approach so that we may better support, educate and protect the athletes in our countries. Trimetazidine (TMZ), the prohibited substance in this case, was treated as a known food contaminant without any awareness or knowledge held by the global anti-doping community to treat it as such. If the presence of a contaminant can be claimed, as it was in this case, without an investigation establishing a concrete and probable link between this contaminant and the environment in which it was claimed to be found, anti-doping practitioners need to know why applicable standards of proof and investigation are not always enforced. CHINADA's handling of this case, and WADA's subsequent response, did not adhere to the most essential rule in the Code: the principle of Strict Liability. In addition, WADA's statements about multiple precedents to the CHINADA decision have left the anti-doping community with more questions than answers.

Unequal treatment of athletes is not in line with the World Anti-Doping Code and does not serve the objective of the harmonisation of the rules and standards across the globe. The global anti-doping community needs clarity and answers in order to uphold the rules, restore trust, and to promote the global anti-doping system.

1. Introduction

1.1. The publications regarding allegations of doping among Chinese swimmers in early 2021 by the New York Times and ARD¹ has generated significant unrest and concern among athletes and the global anti-doping community. Following these publications and the responses thereto by WADA and others stakeholders, Doping Authority Netherlands' President² commissioned his Legal Director to assess the facts and events surrounding the reported 28 positive tests among Chinese swimmers, based on the global anti-doping rules established in accordance with the World Anti-Doping Code.³ This review is drafted in the form of a White Paper, i.e. an objective information piece.

1.2. It is important for Doping Authority Netherlands and other stakeholders to review:

- a. the decision by CHINADA⁴, taken on 15 June 2021, concerning the 28 Adverse Analytical Findings (AAFs) for the prohibited substance TMZ involving 23 Chinese swimmers; and
- b. WADA's actions and position regarding CHINADA's Results Management approach in this case.

¹ The ARD and New York Times reports were first published on 20 April 2024.

² Mr. Vincent Egbers.

³ Hereinafter also referred to as 'the Code'.

⁴ CHINADA: China Anti-Doping Agency.

The relevance of this assessment is that once we have reviewed the CHINADA decision based on the applicable mandatory requirements under the World Anti-Doping Code and the International Standards⁵, we can determine and identify which aspects and areas of the anti-doping rules, policies and/or system may have to be improved or amended.

1.3. Consequently, this White Paper will focus on the (procedural) rules and requirements under the World Anti-Doping Code that apply to the CHINADA decision. The document below will assess the following aspects: (i) Results Management, (ii) Code compliance, (iii) minors and (iv) investigation.

2. Results Management: Preliminary remarks

2.1. When looking into how the AAFs were handled by CHINADA and reviewed by WADA, i.e. the Results Management aspects of these AAFs, we recognise the following:

- a. It is probably fair to say that all Anti-Doping Organisations (ADOs) will want to assess all the circumstances of a possible anti-doping rule violation (ADRV) case *prior* to imposing any kind of measure that could have irreparable consequences for the athlete(s) involved.
- b. Imposing provisional suspensions in the lead-up to the Olympic Games may, depending on the timing, result in irreparable harm for the athlete(s) involved: it could result in athletes being unable to participate in Olympic qualifiers and thus being unable to compete in the Olympic Games *before* their cases are thoroughly and fully investigated.
- c. It is an established fact that ADOs at times explore, in good faith, the boundaries set by the World Anti-Doping Code in order to fully take into account the specific and unique circumstances of each individual case, especially AAFs where there is a genuine possibility of contamination or another form of unintentional doping.

2.2. Having said this, various issues regarding how CHINADA handled the Results Management process remain. We will identify and analyse these in the paragraphs below.

3. Results management: Strict Liability

3.1. The World Anti-Doping Code provides detailed rules regarding when and how an ADRV is established after a WADA-accredited laboratory has reported an AAF. These rules are based on the principle of Strict Liability, which has been accepted since 1994.⁶ Strict Liability has been a cornerstone of the Code since its first adoption in 2003.

3.2. As far as establishing whether a reported AAF constitutes an ADRV, the rules in the Code are simple and straightforward:

- An AAF that is unchallenged; or
- An AAF where the athlete did not establish the occurrence of a departure from an International Standard that which could reasonably have caused the AAF, shall in all cases lead to the determination that the athlete concerned committed the following violations: Presence (Article 2.1 Code) and Use (Article 2.2 Code).⁷

3.3. According to the Code, there is no margin here, no small print. Figuratively speaking, the Strict Liability rule set out in Code Articles 2.1 and 2.2 is set in stone: an AAF leads to the determination that an anti-doping rule violation occurred.⁸ This is one of the core elements of the anti-doping rules worldwide. It may well be the single most fundamental rule in the World Anti-Doping Code as well as in the World Anti-Doping Program.

3.4. Adherence to the principle of Strict Liability can, in some cases, seem harsh, but is crucial because it avoids the creation of a double standard. Strict Liability ensures that all athletes who are confronted with an AAF are treated equally. This is essential to:

- a. ensure harmonisation; and
- b. maintain trust in the anti-doping system.

⁵ More specifically, the International Standard for Results Management (ISRM) and the International Standard for Code Compliance by Signatories (ISCCS).

⁶ CAS 1994/129 USA Shooting & George Quigley vs Union Internationale de Tir (UIT).

⁷ Article 2.1.2 Code, the comment to Article 2.2.2 Code and Article 5.1.2.1 (a) ISRM.

⁸ That is: an AAF that is either not challenged by the athlete or an AAF is upheld after a challenge in accordance with Article 3.2.2 Code.

3.5. For cases and situations involving AAFs where the athlete is 'innocent', to use WADA's wording at the press conference, the World Anti-Doping Code has a fixed rule as well. When an athlete can establish "*that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had used or been administered the prohibited substance or prohibited method or otherwise violated an anti-doping rule*"⁹, the applicable disposition under the Code is a determination of an ADRV with 'No Fault'.¹⁰ There is no other rule for such cases. For compliance monitoring purposes in relation to a National Anti-Doping Organisation (NADO)'s anti-doping rules, WADA relies on the following provision in the Code and requires a NADO to adhere to it:

*"No additional provision may be added to a Signatory's rules which changes the effect of the Articles enumerated in this Article."*¹¹

CHINADA's decision, WADA acceptance of this decision and WADA's explanation about multiple precedents that preceded CHINADA's decision, in effect mean that there are different rules and interpretations outside of the Code. And this - naturally - poses a serious problem: WADA and ADOs cannot rely and refer to Article 23.2.2 Code and at the same time stray away from it.

3.6. To clarify, WADA refers to Article 23.2.2 Code when applying the International Standard for Code Compliance by Signatories (ISCCS) to organisations that are Signatories to the World Anti-Doping Code. National Anti-Doping Organisations both refer to, and rely on, this Code Article in doping cases in order to point out to disciplinary panels and opposing counsel that the Code and the national anti-doping rules need to be strictly applied and adhered to.

3.7. It is undisputed that CHINADA did not adhere to the Code. 28 undisputed AAFs, reported by a WADA-accredited laboratory, did not lead to ADRVs being established. Hence, it is undisputable that CHINADA departed from the most essential rule in the World Anti-Doping Code: the principle of Strict Liability. WADA's statement that it had in fact already before, for many years and in many cases, accepted decisions not to pursue AAFs as ADRVs¹² revealed that such departures apparently occur frequently.

3.8. It is not only the NADOs that rely on the principle of Strict Liability. More importantly, so do athletes. However, if WADA does not rely on Strict Liability, athletes understandably will no longer trust the anti-doping system.

4. Results management: Contamination

4.1. During its press conference on of 22 April 2024, WADA referred to the 28 AAFs from 1-3 January 2021 involving the 23 Chinese swimmers as: "food contamination", "environmental contamination" and "group contamination".

4.2. The Code contains various references to 'contamination': "Contaminated Product", "supplement contamination" and "environmental contamination of a "non-product" such as tap water or lake water".

4.3. In case law, four generally recognised types of contamination exist: (i) supplements, (ii) food, (iii) medication and (iv) body to body transfer.

4.4. Examples of 'environmental contamination' are quite rare in case law. One example is the Veronica Campbell-Brown case, where the majority of the CAS¹³ Panel accepted the possibility of environmental contamination of the urine sample arising from the failure to comply with the partial collection procedure having caused the AAF.¹⁴ This case, however, fundamentally differs from the abovementioned scenarios due to the fact that the AAF itself was in fact successfully challenged and for that reason the AAF did not result in an ADRV. In other words, in this case it was the violation of the sample collection procedure¹⁵ that caused the AAF not to result in an ADRV.

⁹ See the definition of 'No Fault or Negligence' in the Code.

¹⁰ Article 10.5 in the 2021 Code.

¹¹ Article 23.2.2 Code.

¹² See paragraph 7: Precedents.

¹³ CAS: Court of Arbitration for Sport.

¹⁴ CAS 2014/A/3487 Veronica Campbell-Brown v. JAAA & IAAF, at para 170.

¹⁵ The International Standard for Testing (IST), as it was called at the time (2014).

A second example of 'environmental contamination' is the 2019 FIFA vs Gastón Laduche Gerpe decision. Here the panel accepted the source of the AAF were prescribed eye drops containing dorzolamide, used by the player's grandparents. However, the decision in this case was that an ADRV had been committed, with 'No Fault or Negligence' on the part of the player, meaning that the Strict Liability principle was respected.

4.5. In its explanation of why no appeals were lodged in relation to the CHINADA decision, WADA used the phrase "environmental food contamination". WADA has also referred to a case of "group contamination" at the under-17 football World Cup in Mexico in 2011, which took place from 18 June to 10 July 2011.

4.6. However, these AAFs:

- a. involved clenbuterol, which is a logical food contaminant;¹⁶
- b. occurred at a time when clenbuterol was already a known contamination issue in anti-doping as a result of a significant amount of AAFs for this particular substance;¹⁷
- c. occurred at a time when several NADOs had issued warnings vis-à-vis clenbuterol¹⁸ or had written to WADA about their concerns vis-à-vis clenbuterol.¹⁹

None of those factors apply in relation to the prohibited substance TMZ.

4.7. More importantly, as far we can tell (at least until WADA's press conference and the publication of WADA's fact sheet²⁰), each and every clenbuterol AAF that was reported until 1 June 2021 resulted in the determination that an ADRV occurred. The final decision was always the occurrence of an ADRV, with either a reduced or no period of ineligibility being imposed.

4.8. In this regard, the reference by WADA to a "group contamination" case at the Under-17 football World Cup in Mexico in July 2011 requires further attention.

4.8.1. What has been reported by WADA is that five football players tested positive for clenbuterol during the CONCACAF Gold Cup in June 2011 in Mexico and were consequently provisionally suspended. The Mexican Football Federation decided not to impose sanctions on these footballers. WADA appealed this decision to CAS pending the obtaining of the full cases files relating to those cases. However, WADA decided to withdraw its appeal following a study conducted by FIFA during the Under-17 World Cup.²¹ In other words, this withdrawn appeal by WADA was about not imposing sanctions (i.e. no periods of ineligibility), not about whether or not these five players committed ADRVs.

4.8.2. WADA has to our knowledge never reported on the disposition of AAFs arising from the Under-17 football World Cup in Mexico in July 2011, but has now confirmed that the 109 AAFs for clenbuterol that were reported by the media at the time²², and which were later mentioned in a scientific study from 2013²³, were not brought forward as ADRVs, meaning that the Strict Liability rule was not applied to these AAFs.

4.9. Despite a multitude of clenbuterol AAFs over the years, and despite ample evidence existing from scientific studies about proven meat contamination in various countries²⁴ it took until the revision in 2019 for the Code:

"to provide ADOs with the possibility of conducting an investigation when low concentrations of identified Prohibited Substances that are known meat contaminants are detected by Laboratories and reported as ATFs. This will ensure that valid meat contamination cases are dealt with fairly and, notably, may

¹⁶ Is logical in the sense that clenbuterol, among other properties, increases muscle mass in livestock, which makes a substantially larger profit for livestock farmers per animal.

¹⁷ Multiple cases involving elite professional athletes and clenbuterol had already arisen at the time, e.g. Philipp Nielsen (Danish cyclist), Dimitrij Ovtcharov (German table tennis player), Alessandro Colò (Italian cyclist).

¹⁸ Warning German NADO regarding food contamination, dated 4 April 2011.

¹⁹ Letter Anti-Doping Denmark (ADD) to WADA, dated 31 March 2011.

²⁰ WADA held its press conference on 22 April 2024. WADA published a Fact Sheet/Frequently Asked Questions in relation to the case involving swimmers from China on 29 April 2024.

²¹ Director General's Report, November 2011 (Item_3_0_DGReport_ENG_FINAL), Legal Update, November 2011 (Item_5_1_Legal_Update_ENG_FINAL).

²² For example, <https://www.theguardian.com/football/2011/oct/18/fifa-clenbuterol-contaminated-meat>

²³ Thevis (2013), *Adverse analytical findings with clenbuterol among U-17 soccer players attributed to food contamination issues*.

²⁴ China, Guatemala, Mexico, South-Africa.

*prevent athletes from having their competition results disqualified as a result of eating contaminated meat.*²⁵

- 4.10. Only from that moment onward, i.e. 1 June 2019 (8-9 years after first being identified as such) could *known* food contaminants lead to:
- WADA-accredited laboratories reporting these findings as Atypical Findings (ATFs) rather than AAFs;
 - such findings not leading to the determination of an ADRV; and
 - such findings not leading to the subsequent automatic disqualification of competition results under Article 9 Code.
- 4.11. None of the circumstances above apply to the 28 AAFs for TMZ involving the 23 Chinese swimmers:
- TMZ is not a known food contaminant;
 - there is no increase in reported TMZ AAFs by WADA accredited laboratories beyond the 1-3 January 2021 events; and
 - there is no abundance of scientific evidence that support the notion that TMZ is a food contaminant, let alone a known food contaminant.
- 4.12. Also, TMZ is not mentioned in:
- WADA's 'Stakeholder Notice regarding potential meat contamination cases', dated 1 June 2021, despite the TMZ contamination theory being known to WADA at the time; nor in
 - WADA Technical Letter – TL23 regarding minimum reporting levels for certain substances known to be potential meat contaminants, either in June 2021 when this Technical Letter was first published, or now.²⁶
- 4.13. After 1 June 2019, the amended Code entered into force as explained above. What remained unchanged after 1 June 2019, however, and what thus both stayed and stays exactly the same, is the principle of Strict Liability, which importance to anti-doping and clean sport is as paramount as it was before. Under this principle, every reported AAF for a substance included on WADA's Prohibited List shall still and in all cases result in:
- an ADRV being established;
 - competition results in relation to the positive test being disqualified under application of Article 9 Code; and
 - public disclosure.
- 4.14. The 28 TMZ findings from 1-3 January 2021 were reported as AAFs, not ATFs. To the outside world, including the anti-doping community, it seems unprecedented that these AAFs were treated by CHINADA as if they were ATFs in the sense of WADA Technical Letter – TL23, although (i) TMZ is not a known food contaminant and (ii) this is not possible under the Code and the ISRM.
- 4.15. WADA effectively approved this approach, despite the fact that:
- CHINADA decided that none of the AAFs constituted an ADRV, in direct violation of the Code and the principle of Strict Liability; and
 - the competition results connected to the AAFs were not disqualified, in direct violation of the Code.
- 4.16. In light of the above, it is noteworthy that WADA accepted that CHINADA treated 28 AAFs involving TMZ in the same way as ATFs for known food contaminants like clenbuterol, despite this not being possible or permitted under the Code, nor under Technical Letter – TL23.

5. Results Management: Provisional suspension

5.1. Article 7.4.1 Code refers to the mandatory nature of the provisional suspension when an AAF has been reported for a non-specified substance. Article 7.4.1 Code states that a provisional suspension:

²⁵ WADA publication of Stakeholder Notice regarding meat contamination, dated 30 May 2019.

²⁶ There is a WADA Technical Letter (TL13) regarding TMZ, but this Technical Letter does not mention the possibility of food contamination.

"shall be imposed promptly upon or after the review and notification required by Article 7.2"²⁷

5.2. In accordance with the Code:

"A mandatory Provisional Suspension may be eliminated if (a) the Athlete demonstrates to the hearing panel²⁸ that the violation is likely to have involved a Contaminated Product."²⁹

5.3. Consequently, the threshold for eliminating a mandatory provisional suspension is demonstrating that "the violation"³⁰ is likely to have involved a Contaminated Product. Other forms of (environmental/group) contamination are not mentioned in Article 7.4.1 Code and can therefore not be considered for the purpose of lifting a provisional suspension.

5.4. The Code defines Contaminated Product as:

"A product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search."

5.5. The comment to Article 10.6.1.2 Code explains that the provision regarding Contaminated Products:

"should not be extended beyond products that have gone through some process of manufacturing."

5.6. In early April 2021, CHINADA informed WADA that it had initiated an investigation into the source of the TMZ with the assistance of the Public Health Authorities in China. It is not clear when this investigation was initiated, but WADA stated that the 28 AAFs had already been reported to CHINADA (and in ADAMS³¹) on or around 15 March 2021, meaning around two weeks earlier. WADA further explained that CHINADA reported the preliminary results of the investigation to WADA at the end of May 2021.³²

5.7. This means that between the time CHINADA informed WADA about the investigation and CHINADA reporting the preliminary investigative findings to WADA almost two months elapsed. During this period there was no evidence of a Contaminated Product being involved. Therefore during these two months, there was no reason or justification to consider a possible Contaminated Product scenario with respect to the 28 reported AAFs for the obvious reason that the prohibited substance in question was TMZ, which is not a known food contaminant, not in China and not anywhere else.

5.8. Moreover, at no time, not even after the results of the investigation were reported, but certainly not prior to CHINADA submitting the preliminary report, was there an *established link* with a Contaminated Product in the sense of the Code, i.e. a link between TMZ and a product that:

- a. has gone through some process of manufacturing; and
- b. contains a prohibited substance that is not disclosed on the product label or in information available in a reasonable internet search.

²⁷ Article 7.2: "Review and notification with respect to a potential anti-doping rule violation shall be carried out in accordance with the International Standard for Results Management." In accordance with Article 5.1 ISRM this initial review involves checking (a) whether the athlete has a TUE, including whether the AAF involves therapeutic use of a prohibited substance where the athlete may request a retroactive TUE, (b) whether a departure from an International Standard occurred, and (c) for certain prohibited substances, reviewing the route of administration. It should be noted however that the initial review does not involve the investigation itself, as evident from the word 'initial' in the ISRM article's heading: "5.1.1 Initial Review".

²⁸ This 'hearing panel' is explained in the comment to Article 7.4 Code: The organisation imposing a provisional suspension shall ensure that the athlete is given either (i) an opportunity for a provisional hearing before or promptly after the imposition of the provisional suspension, or an expedited final hearing under Article 8 Code, promptly after imposition of the provisional suspension. CHINADA never imposed a provisional suspension and appears to have never held any provisional hearings prior to the imposition of the mandatory suspension even though this is required under Article 7.4.1 Code.

²⁹ The only other option for eliminating a mandatory provisional suspension is not applicable in the case of the Chinese swimmers. This other option relates to Substances of Abuse (Article 10.2.4 Code). Under WADA's Prohibited List TMZ is not considered a Substance of Abuse.

³⁰ It should be noted here that the Code refers here to "violation" and **not** to 'AAF'. The reason for this is, as explained above, that under the principle of Strict Liability in Articles 2.1 and 2.2 of the World Anti-Doping Code, an (unchallenged) AAF shall always lead to the determination of an (anti-doping rule) violation.

³¹ ADAMS (Anti-Doping Administration and Management System) is WADA's Internet-based database for managing anti-doping information.

³² WADA suggested during its press conference that it was on 31 May 2021.

After all, the preliminary report from the Chinese authorities merely claimed the presence of TMZ in various locations in a hotel restaurant kitchen, without establishing a concrete and probable link with a product in the sense and the meaning of the World Anti-Doping Code.³³

5.9. This means that:

- a. almost two and a half months elapsed between CHINADA being informed about the 28 AAFs for TMZ "on or around" 15 March 2021 and CHINADA reporting to WADA about the preliminary investigation results on 31 May 2021;
- b. almost two months elapsed between CHINADA informing WADA in early April 2021 of an investigation being conducted and CHINADA reporting to WADA about the preliminary investigation results on 31 May 2021;
- c. between CHINADA being informed about the 28 AAFs for TMZ and CHINADA receiving the preliminary investigation report no known, logical or probable link existed between the possible presence of TMZ in a hotel kitchen and the 28 AAFs for TMZ; and
- d. at no point a Contaminated Product in the sense of the Code was identified, let alone established with the support of evidence.³⁴

5.10. Taking these aspects and factors into consideration:

- a. the possible elimination of a mandatory provisional suspension for Contaminated Products mentioned in Article 7.4.1 Code did not apply to the 28 AAFs due to the fact that it was not established that these AAFs were "likely to have involved a Contaminated Product"; and thus
- b. there was no legal basis for CHINADA under the provisions of the Code vis-à-vis Provisional Suspensions to not impose the mandatory provisional suspensions on the 23 swimmers involved in the 28 AAFs.

5.11. This is especially the case when one looks at the following factors:

- (i) the World Anti-Doping Code expressly requires that a mandatory provisional suspension in relation to a substance as TMZ must be imposed promptly; and
- (ii) that even if the hotel kitchen contamination scenario could have been considered a Contaminated Product, a provisional suspension had to have been imposed by CHINADA until actual evidence was presented to a hearing body that contamination was the likely source.

5.12. The World Anti-Doping Code and the ISRM require a (N)ADO³⁵ to report provisional suspension decisions to WADA.³⁶

5.13. According to Article 13.2 Code, WADA has the right to appeal the following situations regarding provisional suspensions: (i) "*a decision to impose, or lift, a Provisional Suspension as a result of a Provisional Hearing*" and (ii) "*an Anti-Doping Organization's failure to comply with Article 7.4*".

5.14. WADA stated during its press conference that prior to CHINADA's final decision on 15 June 2021 there was no appealable decision. However, Article 7.4 Code, which deals with (mandatory) provisional suspensions, specifically states that a failure by an ADO (like CHINADA) to comply with Article 7.4 Code may be appealed. Hence, there was in fact a possibility for WADA under the Code to initiate an appeal.³⁷

5.15. It should be noted here that an AAF for a non-specified substance like TMZ triggers a mandatory provisional suspension that shall be imposed "promptly". Regarding the required provisional suspension, WADA remarked at its press conference that the Code stipulates that a provisional hearing must be offered to an athlete either before or after the imposition of the provisional suspension. It makes sense that a hearing in relation to a *mandatory* provisional suspension is held after the provisional suspension is imposed,

³³ Leaving aside for now the question whether this finding is credible and whether this finding should or should not have been investigated by WADA.

³⁴ This means that at this stage of the proceedings there was no indication that the 28 AAFs would result in a finding of 'No Fault' under the World Anti-Doping Code (article 10.5), meaning that no period of ineligibility would be imposed on the athletes involved.

³⁵ (National) Anti-Doping Organisation.

³⁶ Code: Article 14.2.2 (implied), ISRM: Article 6.4.1.

³⁷ The failure to impose a provisional suspension in accordance with Article 7.4.1 qualifies here as a decision for the purpose of Article 13.2 Code.

because of the time factor, i.e. the mandatory provisional suspension must be imposed promptly. However, there is no express language in the Code about this aspect. Regardless, considering the absence of any evidence of a link between the AAFs and a Contaminated Product at the time CHINADA conducted its initial review, it is difficult to envision how the mandatory provisional suspensions for TMZ could not have been imposed or have been lifted if a hearing had been held.

5.16. As CHINADA's decision not to impose the mandatory provisional suspension in these 23 swimmers' cases is clearly not in line with the Code, this could have been in a reason for an appeal, if CHINADA had informed WADA, with reasons, about its decision not to impose provisional suspensions on the 23 swimmers.

5.17. However, this is not just a question of whether the Code was applied or not. The circumstances surrounding these 28 AAFs also give rise to the question whether CHINADA did this, i.e. failing to impose mandatory provisional suspensions, deliberately and whether this failure to act took place with the aim of preventing 23 candidate Olympians and possible medal winners from being provisionally suspended at a critical time, namely just prior to the Olympic qualifiers in China which according to the ARD publication were held in April 2021.

6. Results management: Appeal

6.1. At its press conference, WADA indicated that, after being notified of CHINADA's decision on 15 June 2021, it had:

- entertained the possibility of filing an appeal to CAS against the decision of CHINADA's to not move forward with the 28 AAFs; and
- in this regard consulted with its regular outside counsel (Kellerhals Carrard) as well as a barrister from the UK.

6.2. WADA explained at the press conference that it was advised in early to mid-July 2021 that an appeal to CAS was "not warranted". WADA then clarified what it meant by this. In essence, it was explained, these appeals would have been only about:

- a. seeking an ADRV, without the intention of imposing consequences against these athletes;
- b. the disqualification of their competition results after the test on 1-3 January 2021; and
- c. public disclosure at a much later date, after the completion of the CAS appeals, which would for sure be long after the Tokyo Games.

6.3. WADA further explained that in such a possible appeal, WADA would:

- have accepted the environmental food contamination theory submitted by CHINADA;
- have accepted that these athletes were innocent;
- have accepted that these athletes were contaminated through "environmental food contamination";
- have accepted that these athletes bore 'No Fault' for their violation;³⁸
- not have requested the imposition of any period of ineligibility;
- not have requested the imposition of a provisional suspension; and
- not have requested subsequent competition results being disqualified.

According to WADA, such an appeal, so close to the Olympic Games in July 2021, would not have been fair to the athletes involved, because it had already agreed that the 28 AAFs involved "technical ADRVs with no fault".

6.4. While the reasoning provided by WADA sounds reasonable, this outcome still remains puzzling, for the simple reason that CHINADA did not apply a fundamental and mandatory anti-doping rule, i.e. the principle of Strict Liability.³⁹

6.5. In addition, it was suggested by the New York Times from e-mail communication that CHINADA may have appeared especially concerned about the mandatory public disclosure under Article 14.3.2 Code. For that reason CHINADA may have intentionally

³⁸ Meaning 'No Fault' in the sense of Article 10.5 Code.

³⁹ Which principle is embedded in Article 2.1 (Presence) and Article 2.2 (Use) of the World Anti-Doping Code.

circumvented the mandatory public disclosure rule by deciding not to proceed with 28 AAFs as ADRVs.

6.6. By not appealing CHINADA's decisions, WADA accepted that one of the most important elements of the global anti-doping rules, the principle of Strict Liability, was not adhered to.

7. Results Management: Precedents

7.1. During the press conference, WADA referred to the CHINADA decision to not move forward with 28 AAFs as ADRVs as not being without precedent. WADA has explained that in the past "multiple" precedents of group contamination, resulting from environmental or food contamination exist, where the Results Management Authority, with the involvement of WADA, decided to not bring forward AAFs as ADRVs.

7.2. As an example, during its press conference on 22 April 2024, WADA referred to a case from 2014, where a significant group of more than 10 athletes tested positive in the United States ("U.S soil"), where no ADRV was found to have been committed. On its website, USADA⁴⁰ has indicated that these were not USADA cases, and that USADA has no knowledge of these cases.^{41,42}

7.3. The one specific precedent that has been confirmed by WADA involves the case described above⁴³ involving the 109 AAFs arising from the Under-17 football World Cup in June 2011 in Mexico. As mentioned before, to our knowledge, WADA has never reported this case to its governing bodies. From the reactions, the press statements, the letters and other communications from the (NADO and government) anti-doping community and the meetings that were held by members of the anti-doping community, including WADA's own Executive Committee and Foundation Board, since the publications by ARD and the New York Times, it may be inferred that either no one (or very few) within the anti-doping community had any knowledge of any of the "multiple" precedents referred to by WADA, including the NADO from the United States, the only country that was expressly identified by WADA as a location where one of these precedents occurred.

7.4. This apparent multitude of unknown cases referred to by WADA, took place over an unidentified but possibly extended period of time and:

- a. were, to our knowledge, until 22 April 2024 (i) never expressly mentioned by WADA, (ii) never reported to WADA's governing bodies⁴⁴ and (iii) would have led to discrepancies between WADA's yearly Testing Figures Reports and ADRV reports;
- b. would possibly never have been disclosed by WADA if not for the publications by ARD and the New York Times about the Chinese swimmers' AAFs for TMZ; and
- c. were never publicly reported for the reason that no ADRVs were deemed to have been committed, thereby not triggering the mandatory public disclosure under Article 14.3.2 Code.

7.5. WADA's statements about the existence of multiple precedents prior to the CHINADA decision raise more questions rather than address them.⁴⁵ A limited review of WADA meeting documents⁴⁶ reveals no communication to either of WADA's governing bodies about WADA accepting decisions where unchallenged AAFs did not result in ADRVs. One reference that can be found is in the Director General's Report for the November 2013 Executive Committee and Foundation Board meetings, where it is mentioned that there "have been recent cases in Mexico where result management cannot be pursued because

⁴⁰ USADA: United States Anti-Doping Agency.

⁴¹ <https://www.usada.org/announcement/call-for-independent-prosecutor-wada/>

⁴² A limited review of the WADA documents for the ExCo/Foundation Board meetings during this time does not show any references to such a case on US-soil.

⁴³ In paragraph 4.8.

⁴⁴ The documents provided to WADA's Executive Committee and Foundation Board in November 2011 (Director General's Report and Legal Update) refer to the five AAFs in relation to the CONCACAF Gold Cup in June 2011 in Mexico, where (a) the footballers in question were provisionally suspended and (b) ADRVs were found to have been committed.

⁴⁵ From WADA's fact sheet (page 5): "These prior cases of established contamination have involved different sports and different countries over many years."

⁴⁶ I.e. documents submitted by WADA to its governing bodies (Executive Committee and Foundation Board).

of the possibility of food contamination.” The Director General’s Report does not provide more information in this regard. Consequently, it is not clear what this comment is exactly referring to and whether this comment relates to AAFs not being brought forward as ADRVs.⁴⁷

7.6. In addition, these statements raise questions about who was aware of this practice by WADA. Was CHINADA aware (perhaps because some of these precedents occurred in China or involved Chinese athletes?) and did these precedents play a part in the way CHINADA handled the 28 AAFs?

7.7. For NADOs, the anti-doping community and clean athletes, in order to understand WADA’s acceptance of the CHINADA decision *to not pursue unchallenged AAFs as ADRVs*, in direct violation of Articles 2.1/2.2 Code and the principle of Strict Liability, it is crucial to know which precedents WADA is referring to⁴⁸ and why these precedents were never reported to WADA’s governing bodies.⁴⁹

8. Compliance

8.1. Article 20.7 Code places, among others, the following role and responsibility on WADA:

“To provide support and guidance to Signatories in their efforts to comply with the Code and the International Standards and monitor such compliance in accordance with Article 24.1 of the Code and the International Standard for Code Compliance by Signatories.”⁵⁰

8.2. The issues described above raise the question as to whether WADA considered CHINADA’s determination to not consider any of the 28 AAFs as ADRVs as being in line with the Code or not.

8.3. At no point did WADA during its press conference, or in any of its post-ARD/New York Times publications, express that CHINADA had correctly applied the Code and the International Standards or not. It merely stated that:

- it had never appealed a no violation in order to obtain a violation of ‘No Fault’; and
- while referring to the precedents where the same approach had been followed as with CHINADA, commented that “whether or not it would agree technically with that approach under the Code” in those case WADA had decided not to appeal.

8.4. If WADA considered that CHINADA had indeed acted in full compliance with the Code and the Standards, there was never any impetus for any appeal in the first place. ‘Not warranted’ must then also have been considered to mean ‘unjustified’, because all rules and requirements under the Code were complied with.

8.5. From WADA’s comments on ‘technicalities’⁵¹ as well as the references it made to the existence of several precedents, it may be assumed that no non-compliance assertions were ever considered by WADA against CHINADA.

8.6. In this regard, we understand that the ISCCS is drafted to address non-conformities in an ADO’s rules and structures as opposed to non-conformities in decisions in doping cases. Having said that, not appealing CHINADA’s decision to not proceed with 28 AAFs was a decision that one could foresee would generate debate and criticism, as evidenced by the events following the ARD and New York Times publications. To accept CHINADA’s decision on all fronts, without any reservations whatsoever, is difficult to fathom. One would think that WADA would not make a possibly controversial decision on 28 AAFs without at least informing CHINADA formally that, while it would not be appealing

⁴⁷ For the sake of clarity: this White Paper is referring here to unchallenged AAFs not being brought forward as ADRVs; not to AAFs where a departure from an International Standard occurred, not to non-analytical cases, nor to Adverse Passport Findings.

⁴⁸ In this regard, at WADA’s Foundation Board meeting held on 17 May 2024, WADA made further references to cases in the United States. However, USADA has since disputed these statements in a publication on its website: <https://www.usada.org/statement/facts-following-wada-foundation-board-meeting/>

⁴⁹ It is noteworthy in this regard that WADA did report about the five AAFs arising from the CONCACAF Gold Cup in June 2011 in Mexico, but did not report the 109 AAFs arising from the Under-17 World Cup in Mexico in July 2011.

⁵⁰ Article 20.7.3 Code.

⁵¹ Which introduces the notion of ‘technical’ non-conformities versus ‘true’ or ‘real’ non-conformities.

CHINADA's decision for practical reasons (e.g. fairness, costs, chance of success), this decision was considered by WADA as not being in line with the World Anti-Doping Code. 8.7. If WADA would intrinsically have seen sufficient reasons to appeal, but chose not to for e.g. financial reasons, without WADA having other avenues to address non-conformities, this raises the question as to whether there are sufficient options in the Code and the ISSCS to address non-compliant Results Management decisions. And if not, whether other options need to be considered.

9. Investigation

9.1. In Article 20.7.14, the Code contains the following provision with respect to WADA's roles and responsibilities:

"To initiate its own investigations of anti-doping rule violations, non-compliance of Signatories and WADA-accredited laboratories, and other activities that may facilitate doping."

9.2. There are some contradictory elements between the different publications and statements that have been made. For example regarding which Chinese authority or authorities⁵² conducted the investigation and regarding the timing and the content of the tips that were provided to WADA about Chinese swimmers.

9.3. More importantly, WADA stated at the press conference that "the threshold to open an investigation was not met". It can, however, be argued that the threshold for WADA to conduct its own investigation was met from the outset due to the fact that:

- a. CHINADA's decision to discard 28 AAFs is based on a theory of 'environmental contamination' presented in a report by a Chinese governmental authority; whereas
- b. China is a country where government involvement, interference and control are known to occur.

9.4. Therefore, an acceptable premise could be that one cannot and should not exclude the possibility of the Chinese government wishing to exert influence and involvement in a doping case involving 23 of Chinese elite swimmers, including world record holders, world champions and possible Olympic gold medal winners, in the months prior to the Olympic Games. This holds especially true for WADA, as the global face of clean sport. The Russian scandal has unfortunately taught us that we cannot close our eyes to the possibility of systemic 'tampering' scenarios.

9.5. Regarding WADA initiating its own investigation of the TMZ case, it is important to point out that WADA in May 2020 reported to its Executive Committee (ExCo) about an investigation it had conducted of doping in China. The "Investigation Report China" was provided by the Director of WADA's Intelligence and Investigations department to WADA's ExCo in May 2020.⁵³ This report refers to extensive interviews with a "credible witness" who, while not being personally witness doping or any of the alleged wrongdoing:

- stated that Chinese athletes were using certain prohibited substances at the Olympic Games in Beijing (2008), London (2012) and Rio (2016); and
- referred to allegedly undetectable levels of TMZ.⁵⁴

The report concluded that due to there being insufficient evidence this case "be closed with no follow up actions, and that should substantive new information or evidence be presented the case would be reopened."

9.6. The relevance of this report is not only the timing, but foremost the reference to undetectable levels of TMZ. WADA has explained that (a) the 28 AAFs were for extremely low concentrations of TMZ and (b) some athletes fluctuated between testing positive and negative (or vice versa) in a few hours.

9.7. In September 2020, a few months after the China Investigation Report was provided to WADA's Executive Committee, USADA provided a tip to WADA about Chinese swimming. A Chinese whistle-blower had provided information about:

⁵² Whether it was conducted by the Ministry of Public Security (allegedly a branch of the Secret Service in China) or the Public Health Authority, whether the Chinese police was involved.

⁵³ Investigation Report – China, WADA Executive Meeting 15 May 2020.

⁵⁴ Among other prohibited substances, like stanozolol and growth hormones.

- an alleged cover-up involving elite Chinese swimmers (three of whom were part of the 23 Chinese swimmers who tested for TMZ in early January 2021); and
- Chinese swimming allegedly hiding elite swimmers from testing in the weeks leading up to the competition in early January 2021 during which the 28 positive TMZ samples were collected.

9.8. Still, WADA maintains that there was no impetus to start its own investigation of the TMZ cases.

9.9. Other factors that should have led to a decision from WADA to launch its own investigation are:

- a. The 28 AAFs for Chinese swimmers, all of whom were candidates for participation in the Olympic Games that summer, were reported in ADAMS on or around 15 March 2021. ARD reported that the Olympic qualifiers were scheduled for April 2021. Hence, there was an *immediate link* between these decisive competitions and CHINADA's choice to not impose the mandatory provisional suspension pursuant to Article 7.4.1 Code on the 23 Chinese swimmers;
- b. it was reported that the 28 AAFs involved several athletes who were minors at the time of the test, meaning that they fell within the definition of 'Protected Person' in the Code. In cases involving minors/protected persons, the Code requires ADOs to "*conduct an automatic investigation of Athlete Support Personnel within their authority in the case of any antidoping rule violation by a Protected Person and to conduct an automatic investigation of any Athlete Support Person who has provided support to more than one Athlete found to have committed an anti-doping rule violation.*";^{55,56}
- c. the reported possibility of a cover-up involving Chinese authorities in relation to Chinese swimmer Sun Yang's positive test for TMZ in 2014;⁵⁷
- d. the tip provided by the ITA⁵⁸ to WADA about Chinese swimming in July 2021;
- e. the fact that the investigation by Chinese authorities took place 2-3 months after the samples were collected from the 23 swimmers at a time when hygiene was at a premium because of the covid-19 pandemic, especially in China, which maintained some of the strictest covid-19 controls and protocols in the world. This makes the TMZ findings by the Chinese authorities, at the very least, remarkable. In terms of the applicable standard of proof, i.e. the balance of probabilities, the findings may be called improbable;
- f. the fact that the reported presence of TMZ in the hotel kitchen does *not* create a comprehensive credible and likely scenario, supported by concrete evidence, about how and why the alleged TMZ was present in the kitchen in the first place and, most importantly, through what route it ended up in the athletes' systems.⁵⁹ There is a crucial link missing.

9.10. The missing link in the contamination theory alone required more investigation being conducted. The Chinese authorities reportedly found traces of TMZ in the kitchen of the hotel. This report led to the creation of a contamination theory where the reported presence of TMZ theoretically found its way into the bodies of 23 athletes who were guests at the hotel. However, 'theoretically' is not sufficient in terms of the standard of proof under the Code. Equally, the contamination theory being a 'plausible' explanation is insufficient. In order to establish how a prohibited substance entered an athlete's system by the required balance of probability (Article 3.1 Code), an athlete must provide actual

⁵⁵ The mandatory requirement to conduct an automatic investigation into Athlete Support Personnel is included in the Code both for IFs (Article 20.3.12) as well as for NADOs (Article 20.5.12).

⁵⁶ Neither of these provisions place an obligation on WADA to conduct an investigation itself. However, they do reflect the importance and urgency of conducting investigations when minors are involved. Taking into consideration that the report by the Chinese authorities leaves a significant amount of questions unanswered, there appears to have been ample reason for WADA to have taken it on itself to investigate the matter further.

⁵⁷ <https://www.swimmingworldmagazine.com/news/sun-yang-team-face-new-questions-over-2014-doping-positive/>

⁵⁸ ITA: International Testing Agency.

⁵⁹ Why and by whom was a TMZ tablet supposedly crushed (pulverised) in the hotel restaurant kitchen? Was it then mixed with kitchen utensils, or pans, the sauce container? Is any of such information included in the report by the Chinese Authorities, or has that information been provided to WADA by CHINADA in some other way?

evidence. According to the standard CAS case law, the applicable threshold 'more probable than not' must be met by submitting concrete and specific evidence.

This evidence has not been presented in the case of the 28 AAFs. There is no established link between the reported presence of TMZ in three places in the restaurant kitchen 2-3 months later on the one hand, and the presence of TMZ in 23 swimmers in early January 2021 on the other. There is no evidence that the TMZ was actually there on 1-3 January 2021 and also no proof that it was not deliberately placed there afterwards.

9.11. The Chinese authorities reportedly found traces of TMZ in the kitchen of the hotel restaurant. If this is indeed the case, this reported presence of TMZ means that probably more if not most hotel guests may have had traces of TMZ in their systems. If this investigation was carried out by the Chinese Public Health Authorities, one would in such a case expect that the investigation report:

- a. would have led to the hotel staff being investigated, questioned or even sanctioned; and
- b. would possibly have led to the hotel even being closed (temporarily or otherwise) and/or otherwise sanctioned.

In other words, one would expect the Chinese Public Health Authorities to have (i) conducted various kinds of follow-up investigations and (ii) imposed consequences for the hotel and/or its staff. It is not clear whether this has indeed been the case.

9.12. Each of all the factors and elements described in this paragraph could separately and individually have been impetus for WADA to start its own investigation. However, all of the factors combined mean that there was not only impetus for WADA to conduct its own investigation, but that for the sake of its own reputation and the credibility of anti-doping WADA had no choice but to conduct its own investigation.

9.13. In this light, WADA's decision not to launch its own investigation is difficult to comprehend.

9.14. Also important to note here is that while the covid-19 pandemic may have limited the options to investigate to an extent⁶⁰, according to WADA's own statements these restrictions did not play any role in WADA's decision not to conduct its own investigation. WADA's position with respect to conducting its own investigation was that this was not warranted due to the threshold to open an investigation not having been met.

10. Minors

10.1. Under the World Anti-Doping Code a minor is defined as: "*a natural person who has not reached the age of eighteen years.*"

10.2. The definition of 'Protected Person' in the Code is:

"An Athlete or other natural Person who at the time of the anti-doping rule violation: (i) has not reached the age of sixteen (16) years; (ii) has not reached the age of eighteen (18) years and is not included in any Registered Testing Pool and has never competed in any International Event in an open category; or (iii) for reasons other than age has been determined to lack legal capacity under applicable national legislation."

10.3. Article 20.3.12 Code places the following obligation on International Federations: "*To vigorously pursue all potential anti-doping rule violations within their authority including investigation into whether Athlete Support Personnel or other Persons may have been involved in each case of doping, to ensure proper enforcement of Consequences, and to conduct an automatic investigation of Athlete Support Personnel in the case of any anti-doping rule violation involving a Protected Person or Athlete Support Person who has provided support to more than one Athlete found to have committed an anti-doping rule violation.*"

10.4. At least two of the positive samples collected between 1-3 January 2021 involved swimmers who had not reached the age of sixteen (16) years at the time. The two respective swimmers were both fifteen (15).

⁶⁰ Traveling to China was restricted, but not impossible (<https://www.china-briefing.com/news/chinas-travel-restrictions-due-to-covid-19-an-explainer>) and investigation could have been done remotely by holding online interviews.

10.5. Among the 23 Chinese swimmers were other minors who may have been 'Protected Persons', for example one swimmers who at age sixteen (16) was also a minor at the time of the tests in early January 2021.⁶¹

10.6. As for the required automatic investigation of Athlete Support Personnel by CHINADA pursuant to Article 20.5.12 Code, the question is whether CHINADA initiated this investigation or not, and if not why.

10.7. Did CHINADA choose to postpone any investigations of Athlete Support Personnel until after it had received the results of the investigation by the Chinese authorities? This would mean that CHINADA would wait at least several months to start a mandatory automatic investigation.

10.8. Also relevant is that CHINADA, as the national authority on doping, may have relied solely on an investigation report from a third party that is not an anti-doping expert. Not much is known about what information CHINADA exactly based its decision upon, but it seems from the outside that the investigation report from the Chinese authorities was the main factor in the decision, where it can be argued that this report rather is one piece of a puzzle that has yet to be completed.⁶²

10.9. As far as an investigation of Athlete Support Personnel by the relevant International Federation is concerned: several of the positive swimmers who were under 16 at the time were elite International-Level Athletes who fell within the jurisdiction of the International Swimming Federation, FINA (now World Aquatics). These factors could have triggered an automatic investigation of Athlete Support Personnel pursuant to Article 20.3.12 Code, unless FINA (World Aquatics) decided to defer such investigation to CHINADA. It has been confirmed that FINA (World Aquatics) did in fact not conduct an investigation of Athlete Support Personnel.⁶³

11. Equal treatment of athletes

11.1. In its explanation to not appeal the CHINADA decision, WADA referred to the aspect of fairness in relation to the 23 Chinese swimmers. It also confirmed that for many years it has been accepting similar decisions to not bring forward AAFs as anti-doping rule violations.⁶⁴ However, during this time (N)ADOs that were unaware of this practice by WADA continued to treat similar AAFs differently. Unlike the precedents referred to by WADA, these AAFs:

- a. were considered ADRVs pursuant to Articles 2.1 and 2.2 Code;
- b. led to the disqualification of the athletes' competition results related to the test pursuant to Article 9 Code;
- c. were publicly disclosed pursuant to Article 14.3.2 Code;
- d. led to disciplinary proceedings, including hearings and related cost awards; and
- e. may have involved the imposition of provisional suspensions.

11.2. This means that WADA consistently allowed what in essence is differential treatment of similar positive tests, thereby allowing the unequal treatment of athletes.

11.3. Athletes were treated unequally in the following sense. In some cases of food contamination, athletes who had tested positive (i.e. AAF) were:

- a. found guilty of having committed a doping offence (ADRV)⁶⁵, and bore the consequences for this AAF and ADRV in the form of:
- b. the prompt imposition of a provisional suspension;⁶⁶
- c. the disqualification of competitive results⁶⁷; and

⁶¹ This would depend on this athlete being part of any Registered Testing Pool (RTP) and having competed in any International Event in an open category.

⁶² See the observations in the previous paragraph about a missing link.

⁶³ <https://www.thetimes.co.uk/sport/swimming/article/chinese-swimmers-were-cleared-after-review-from-only-one-person-jb75bg8fn>

⁶⁴ Apparently, the decisions involved cases for known food contaminations until 1 June 2019 and, after the change to the Code on that date, cases that did not involve known food contaminations, like the 28 TMZ AAFs involving Chinese swimmers.

⁶⁵ Pursuant to Article 2.1 and 2.2 Code.

⁶⁶ Pursuant to Article 7.4.1 Code.

⁶⁷ In relation to the competition during which they were tested, pursuant to Article 9 Code. If the ADRVs would involve athletes in a team sport in the sense of the Code, Article 11.2 would apply.

d. the public disclosure of the disposition of the case.⁶⁸

However, in other cases involving food contamination, the AAFs were dismissed and not brought forward as ADRV, meaning none of the four consequences listed above were imposed, although these athletes' cases were essentially equal.

11.4. This unequal treatment of athletes means some athlete were found guilty of having committed an doping offence, and bore the consequences, although they were equally innocent as:

- a. WADA claims the 23 Chinese swimmers were; and
- b. the athletes involved in the preceding cases, i.e. the precedents, were.

However, these athletes effectively received preferential treatment for their "technical violation with no fault", with either WADA's involvement or retroactive approval.

11.5. Unequal treatment is not in line with the Code, and not in line with the objective of harmonisation that is the very reason why the World Anti-Doping Program was established.

11.6. The question whether athletes' food contamination cases over the years have been treated equally, consistently and transparently raises the question whether the principle of the Rule of Law was respected.

⁶⁸ Pursuant to Article 14.3.2 Code. Public disclosure includes the sport, the anti-doping rule violated, the name of the athlete or other person committing the violation, the prohibited substance or prohibited method involved (if any) and the consequences imposed.