

House Energy and Commerce Subcommittee Oversight and Investigations

Testimony of Travis T. Tygart

Chief Executive Officer

United States Anti-Doping Agency

June 25, 2024

Mr. Chairman, members of the Committee, good evening. My name is Travis T. Tygart, CEO of the United States Anti-Doping Agency (USADA), a 501(c)(3), not-for-profit, incorporated in Colorado. I want to thank this Committee for its interest in clean sport and for the opportunity to appear before you tonight to discuss how we can better protect the rights of athletes and the fairness of Olympic and Paralympic sport competition around the world.

I want to speak to the Committee not only about the significant and urgent threat facing clean athletes and fair sport, but also the very feasible solutions to the current crisis.

Once again, we find ourselves at a critical juncture for the soul of sport. Fairness and integrity in athletic competition — two principles at the very heart of why we play sports — are under attack. We need to act now to ensure accountability, justice for athletes, and reforms at the World Anti-Doping Agency (WADA). This is all necessary to protect the rights of clean athletes and to preserve a level playing field. If we don't, we will be committing an unacceptable injustice to today's athletes, fans, and sponsors who believe in and invest in fair and clean competition. And equally intolerable, we risk undermining the dreams of tens of millions of youth all around the world who rely on the global anti-doping system to protect them to compete clean, safe and on a fair playing field, not one tilted against them in favor of WADA's chosen few.

The urgency to act could never be greater given the recent collapse in confidence in WADA and given that the U.S. is hosting many major international competitions over the next 10 years, including the 2026 FIFA World Cup, the 2028 LA Summer Olympic Games and most likely the 2034 Winter Olympic Games in Salt Lake City. We need to act now!

You have just heard from Allison Schmitt, and Michael Phelps. Two of the greatest Olympians of all-time. If not for the sport and sponsor pressures on our Olympians and Paralympians to just keep quiet and focus on training, many other Olympians and Paralympians from around the world would join Allison and Michael here today to share their dismay and disgust with the current crisis in the global anti-doping system. A crisis that has been caused by WADA's decision to allow China to sweep under the rug 28 positive tests for a potent performance enhancing drug on 23 of its top swimming athletes.

Hopefully, you have already heard many of their voices but here is a small sampling:

“It’s extremely frustrating for athletes to always have on the back of our minds that maybe the sport is not fair.”

“It’s just really disappointing and frustrating for all athletes”

Faith in the anti-doping system is “at an all-time low”

“Who really benefits from the lack of transparency and secrecy?”

“What happened to strict liability?”

“So disappointing from WADA”

“Shock and shock. Another big doping scandal and again institutions that didn’t act as they should have in order to protect clean athletes.”

“Slap in the face of all clean athletes” and trust in institutions has “simply evaporated”

We view athletes — and their powerful stories — as USADA’s guiding light, our North Star. Their stories give us hope, they remind us of our purpose, and they provide us the fuel to continue to advocate for their right to clean and fair competition. This is why we have been outspoken about the failures of WADA and the Chinese Anti-Doping Agency (CHINADA). This is why we are here today pleading for help to fix this mess and let all athletes truly have a level playing field. Athletes must regain confidence in those that are supposed to have their back and fight for their right to clean and fair competition. Athletes must regain trust that the global regulator will change the rules to make them fair for athletes not secretly change how they apply the rules to serve their own interests.

Candidly, Mr. Chairman, enough is enough. For clean athletes, we have all seen this WADA horror show before. As you all know, in 2017, this very Committee held a hearing where Michael Phelps and I testified about WADA’s ineffectiveness, lack of leadership and conflicted governance. We called for change then due to WADA’s inept handling of the Russian state-sponsored doping scandal that robbed hundreds of athletes from around the world and stole their dream of Olympic and Paralympic success.

In that devastating affair, which is still on-going, WADA hoped to simply limit the damage, and pacify Russia and put the whole corrupt scheme in the rearview mirror. At that 2017 hearing, here in this very room, WADA supplied excuse after excuse for not uncovering Russia's drug program earlier and then leaned on technical justification for its failure in handling it effectively after courageous whistleblowers exposed it to the press.

Now, thanks again to courageous whistleblowers and the media, the world has learned for the first time that on the eve of the 2021 Olympic Games in Tokyo, WADA sat back and allowed China to disregard the rules and sweep 23 TMZ positive cases under the rug. These were not low-level athletes, these were the elite of the elite. And 13 of these swimmers who tested positive represented China in the 2021 Summer Olympic Games in Tokyo. The Chinese swimming team won 6 medals including 3 gold at these Games. Worse yet, 11 of the TMZ 23 have just been named to this summer's Chinese Olympic swim team for the Paris Games.

And, make no mistake, TMZ is a potent performance enhancing drug. It is banned at all times, not just during competition due to the benefits it can give athletes in recovery and training. The default sanction for testing positive for it is a 4-year sanction. It is a controlled drug not available in many parts of the world. It is not found in the water supply, the environment, in any food or food ingredient, supplement or given to cattle or other livestock in the meat supply.

At the 2017 hearing here in front of this Committee, WADA testified that they needed an investigations team using the lack of one as an excuse for failing to uncover the Russia state-sponsored doping scheme. Well, they got a big investigations team and a 60% bump in their budget to help fund investigations. A big part of this increase was funded by U.S. taxpayers, who at over \$3.7 million a year, are the single-highest payor of the public authorities. Despite the new team and new funding WADA's investigators did not lift a finger to investigate these positives even with glaring evidence staring them in the face.

Interestingly, since 2018, China has paid an extra \$1.8 million, well over its required dues. Out of the extra payments to WADA, the Chinese earmarked \$500K specifically for Investigations and Intelligence work. And, while no evidence of a quid pro quo has surfaced, the appearance of a conflict in these extra payments and WADA's Investigative department's lack of action is quite

troubling.

You can now understand why the world's athletes are incensed that WADA did not even investigate the outrageous claims by the Chinese authorities that this potent drug, TMZ, somehow found its way into a kitchen and then into these 23 athletes' samples.

On top of that, Mr. Chairman, these 23 TMZ positive cases came on the heels of WADA deciding to close an investigation into allegations of systemic state-run doping in China during which they found the whistleblower to be credible.¹ This whistleblower, is a defector from China now living in Germany. She met with WADA investigators and told them according to WADA's own investigations report that the Chinese government was giving its athletes undetectable levels of TMZ for performance enhancing purposes.

A little over 9 months after this report, WADA received notice of 28 positives for low levels of TMZ. But, yet, WADA still claims, to not have had enough evidence to even open an investigation. Incredible. It is the Keystone cops at their worst. WADA handcuffed and blindfolded themselves, and their inaction, as it stands today, will forever haunt athletes who competed against the 13 swimmers in the 2021 Tokyo Games, as well as those competing against the 11 of those Chinese swimmers in Paris next month.²

This pattern of failure, understandably, has led to the current crisis of confidence in WADA. What is worse, Mr. Chairman, is that WADA has said they would do nothing different and would act the same today.

So, what can be done? USADA believes three things need to happen to ensure, accountability, reform, and justice for athletes.³ First, ONDCP and Congress must demand to seek

¹ See Exhibit A WADA Investigation and Intelligence Report on Allegations by Chinese Whistleblower of systemic doping in China.

² See Exhibit B Letter to CHINADA of June 5, 2024 USADA offering assistance to CHINADA for transparency in this matter. We have genuine empathy for the 23 Chinese athletes, as the system failed them and now they are under an unfair cloud of suspicion. Also, those Chinese athletes that competed against the 23 rightfully deserved the wins and any associated money or prizes from the event at which the 23 tested positive. If the rules would have been enforced as required, we can have comfort this was truly contamination that caused these positive tests and that the Chinese athletes, without positive tests, would have been reallocated to their rightful place in that event since disqualification was mandatory.

³ See Exhibit 3- Letters from U.S. Athlete Committees and ONDCP Director Dr. Gupta to WADA President Banka. All USADA's requests are consistent with what U.S. athletes and ONDCP have also asked for.

the entire China dossier. There are no reasons the entire dossier cannot be made public. Anything less than this will not satisfy those who want to ensure justice for all the athletes involved. While WADA and others are going to rely on the “reviews” that they were forced to open, these are flawed for several reasons. The WADA staff selected the individual from their own backyard with no, absolutely no, anti-doping experience or expertise. They intentionally set an artificial timeline clearly aimed to put these cases to rest and in the rearview mirror as soon as possible before Paris. The two questions to be answered in this “review” were defined by the same WADA staff whose decisions are at issue, and they are not aimed at the full truth or justice but merely a self-serving, public relations exercise. Your Committee should request, even subpoena if necessary, the full China dossier. Additionally, you could weigh-in with House and Senate Appropriators to condition U.S. taxpayer funding of WADA on the release of the full China dossier. We should let transparency reveal the truth.

Second, we should demand and condition funding, if needed, on WADA setting up an independent expert committee that makes the decision on all positive tests that do not result in an anti-doping rule violation and public announcement.⁴ The rules require this in all positive cases of this type and WADA has now finally admitted that China should have determined these 23 cases to be violations and therefore should have announced them back 2021.

It can't be that a couple of WADA staffers on the advice of outside legal counsel in secret backrooms are allowed to pick and choose which countries and athletes have to follow the mandatory rules and which ones get to follow an unwritten set of rules. Additionally, since WADA staff and President did not inform the WADA Executive Committee about the decision to let China circumvent the rules, we should require that the WADA Executive Committee must be notified of all of these types of decisions.

Last, we ask for an audit of WADA. As the global regulator, WADA has compliance powers and a large staff to perform audits, as it chooses, on other anti-doping organizations. But WADA does not have any oversight that can audit its overall functionality. Throughout the WADA Code including in Code Article 20.7, WADA has detailed responsibilities. It has been 25-years, it is time for WADA to finally go through an independent, legitimate compliance audit of the

⁴ See Exhibit D- White Paper Written by Legal Expert, Steve Teitler from the Netherlands Anti-Doping Authority.

responsibilities and roles that it has under the WADA Code. Athletes and most anti-doping organizations are all held to the strictest compliance standard by WADA, it's time that WADA is also held to the standards in place for them. Shockingly, even though WADA admits that CHINADA did not follow mandatory rules of the WADA Code in its handling of the TMZ 23 positives, WADA did not appeal the cases wrongly handled or conduct a compliance investigation or otherwise hold CHINADA accountable for its deliberate and blatant failure to follow the mandatory rules.

To be clear, the threat of doping is a global problem and the U.S. is not immune. And, as a nation of laws established on the ideals of justice, fairness and equality, the United States must lead the way and ensure we are doing everything we can do to set an example and protect athletes so that their decision to compete by the rules is honored and they can be the true heroes that they are when competing here at home and representing our great nation in competitions around the globe. Clean athletes in many ways are the best example of our values and the importance of our principles when they compete and win the right way. These are the same Olympic and Paralympic values and its why we have asked for answers.

There are core principles of an effective anti-doping program – the application of year-round, no-notice, out-of-competition testing, certified labs, an active research program to stay ahead of the dopers, and an active education program for all athletes. But the most important part of the criteria is the idea that an effective anti-program must be free from the influence of sport. It must be independent.

The word 'independent' is thrown around a lot in the global Olympic and Paralympic movement. From our experience and perspective, however, the only true definition of 'independence' is that those who govern or otherwise make decisions affecting others cannot have any actual or perceived interest in the outcome of the decision they are making. We are proud of the fact that no one on our Board can also serve in a paid or voluntary governing or employment position for any organization for which we administer an anti-doping program. Many of you have heard me say that you cannot have the fox guarding the henhouse. It is a concept that is as simple as it is effective.

Unfortunately, the WADA is not independent. The International Olympic Committee pays half its budget and essentially controls its decisions. It is “pay to play” for sport. Governments of the world, including the U.S., pay the other half of WADA’s budget.

As it stands, WADA’s governance structure allows for its board members to simultaneously serve in an executive capacity for sports organizations. For example, during the Russian affair, WADA’s President was also an IOC member and even served as an IOC Executive Board member while also serving as WADA President. Today, WADA’s Vice President from China is a current IOC Board member. WADA staff have admitted not informing its Executive Committee of its decision to hide the 23 positive tests, acknowledging it did not do so as it did not want it getting out in the public. WADA has failed to answer whether the WADA Vice President and/or President were directly involved with the decision on the TMZ 23 or if the IOC, WADA’s largest single-funder, was involved or when they were made aware of the TMZ 23.

If the IOC made the decision to properly finance efforts to keep performance-enhancing drugs out of sport, and to remove themselves and other sports organizations from critical anti-doping functions – the anti-doping landscape would be exponentially stronger and clean athletes could trust the global system – and be much better protected. Sport involvement in these critical anti-doping functions is a glaring conflict of interest, and we know from experience that it’s too much to expect any organization to effectively promote and police itself.

WADA’s response to the U.S advocacy for fair sport is to deflect from answering the material questions and attack. WADA’s outside counsel’s response to the Senate Commerce Committee’s letter request now admits that CHINADA did not follow the rules and should have determined these 23 positive cases to be anti-doping rule violations. Of course, if this was done then the 23 TMZ cases should not have been swept under the carpet and disqualification and public announcement, at a minimum, should have occurred back in 2021 before the Tokyo Games.

We all are disappointed that WADA declined to testify before this Committee and continues to double and even triple down on deflecting fault and pointing fingers at the U.S. In response to the recent New York Times article exposing that 3 of the Chinese swimmers with TMZ positives in 2021 also tested positive in 2016 and 2017, WADA again levied allegations that those

from the U.S. were politically motivated against WADA implying that these facts were somehow made up. There was a clear violation of the rules, and WADA chose to do the expedient, rather than their job, and avoid answering the basic questions. It is also disappointing to hear comments by the WADA President at their Foundation Board meeting where he had the audacity to throw U.S. athletes under the bus by attempting to discredit their hard work and integrity. That was a new low. It is clear that WADA will stop at nothing to avoid accountability so that they can retain the power to decide which countries and athletes get special treatment and which ones do not.

The U.S. is not alone in this assessment. Just last week, a German Parliamentary State Secretary following a hearing similar to today's, stated that WADA is "gambling away all acceptance and right to exist."

Let me be very clear, clean athletes, sport and the public need a strong WADA. A fierce, fair, and effective global watchdog is absolutely essential to protecting the Olympic and Paralympic movement. But we need WADA to be a truly independent, global regulator, not merely the sport service organization many in sport want it to remain.

That's what is so frustrating for us at USADA and for the athletes we serve. The solutions are not impossible, but finding sport leaders with the political will to implement those solutions has, so far, proven to be.

What right-minded company would want to invest in these corrupt competitions in which athletes are robbed and abused? What right minded broadcaster would spend a dime on airing a deceptive outcome in sport? And, what country around the world that actually embodies the Olympic values would invest the resources it takes to host these Games?

To a large extent, the personal well-being of the next generation of athletes hangs in the balance. This is not just about elite Olympic and Paralympic athletes – this is about every kid on a playground who has an Olympic or Paralympic dream and asks, "What do I have to do to make my dreams come true?" And, the truth is, if we as a movement don't push, if we don't win on all the issues that affect athletes, we will likely find ourselves back in this same position, years from now, staring down another egregious scandal that has abused athletes and robbed another generation of athletes in the process.

And we will all be wondering why we didn't do more when we had the chance. Thank you for the invitation to appear before you today and best of luck with your important work.

Thank you, I look forward to your questions.

Exhibit A



TrueSport

BY EMAIL: lizhiquan@chinada.cn

Li Zhiquan
Director General
China Anti-Doping Agency
No.1, An Ding Road, Chao Yang
District, Beijing Post Code: 100029

Dear Mr. Li-

I hope you will receive and accept this letter in the spirit of cooperation and partnership in which it is intended and written.

I hope you know based on the conversations between us and our teams in Norway in February 2024 that we genuinely have an interest in protecting clean athletes and the integrity of competition. I have a great deal of respect for you personally, the team at CHINADA and for the challenge of running an anti-doping program in a large country. I think I mentioned to you my fondest memories of sport include my time at the 2008 Beijing Summer Olympics in my role with the WADA Independent Observers Team. Many of my close friends and colleagues in anti-doping including many from China are a direct result of the amazing and impactful time I spent in your country.

Our commitment to clean sport and the rights of athletes is also why we have been outspoken about the situation involving CHINADA's testing of 23 top-level Chinese swimmers in January 2021 and asking for answers from the World Anti-Doping Agency (WADA) about its involvement with these cases. I have read your statements on these cases and those of the Chinese government. Like you, I am also greatly troubled by the news and the erosion of the athletes' trust and confidence in the global anti-doping system. Unfortunately, the lack of answers have only further raised suspicions by those who care about clean sport and the rights of clean athletes. We agree with your comments that this is an incredibly difficult time for athletes from around the world including athletes from China who are expecting the leaders of our organizations and of WADA to protect their right to a level playing field.

Additionally, I have seen your statements and that of the Chinese government essentially stating that the media reports including our comments are false and "not based on the accurate facts."¹

¹ <https://www.stateofswimming.com/chinada-says-it-has-worked-with-zero-tolerance-attitude-towards-doping/>

U.S. ANTI-DOPING AGENCY

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USADA@USADA.org • www.USADA.org

Given your perspective that the facts being reported on these cases are inaccurate or false, we are eager to discover the true facts and to assist to ensure the real, truthful facts are known to all athletes and the public. Having objective, unbiased facts published, especially if, from your perspective, they are not currently published, would go a long way in returning the confidence of athletes and the public in the global anti-doping system.

In this spirit, we believe it would be helpful for us to assist in being transparent and in answering the questions that many stakeholders around the world have concerning the handling of the 23 athlete positive cases. If you are willing to cooperate with us, a partner NADO, in allowing us and our experts to review the entire case file and discuss the handling of the cases with you and your staff, this would help in understanding the truth and ensuring accurate and evidence-based facts are presented to all stakeholders. The key information for such a review, of course, would be to obtain copies of the testing information on the 23 athletes in the month before these adverse analytical findings and any excretion data that you have, or otherwise relied on to base your conclusion that these positives were due to contamination. As well, the evidence collected and used to form the determination that the drug, Trimetazidine (TMZ), was the source of the adverse analytical findings and how it came into the kitchen would be of utmost relevancy.

Also, we are curious why you and your team did not mention the possibility of contamination of Trimetazidine (TMZ) when we met and specifically discussed the topic of contaminants in February 2024. We were surprised to learn that all of these cases were closed due to contamination but yet, when we met and discussed contamination and specific drugs each of us are seeing causing positive cases, that this substance was not mentioned as a possible contaminant. Likewise, we note in CHINADA's submission on the WADA Code review that you specifically mention several drugs as being possible contaminants but fail to mention TMZ.

I appreciate you considering our request to assist and hope to find a way to reveal the truth and accurate facts to then begin working on restoring confidence in the global anti-doping system. Athletes deserve a well-functioning anti-doping system and answers to the fair and obvious questions presented based on the reported handling of these cases by the global anti-doping system.

I look forward to your prompt response given the urgency of the current situation.

Sincerely,



Travis T. Tygart
USADA CEO

U.S. ANTI-DOPING AGENCY

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Exhibit B

MATTER FOR WADA EXECUTIVE COMMITTEE

INFORMATION

SUBJECT: INTELLIGENCE AND INVESTIGATIONS
DEPARTMENT/AREA: INVESTIGATION REPORT - CHINA
DIRECTOR: GUNTER YOUNGER

1. EXECUTIVE SUMMARY

On 21 October 2017, German television station ARD, aired a documentary that asserted the historical existence of large-scale doping within Chinese sports and centred on claims made by Doctor Xue.

The Doctor Xue allegations (Xue Allegations) first surfaced in 2012 when they were reported in an Australian newspaper, the Sydney Morning Herald. In this article, Doctor Xue purportedly described doping in China as “rampant in the 1980s” and said that anyone who rejected drugs “would face punishment or criticism”. In response to the ARD documentary, WADA’s I&I Department interviewed Doctor Xue at length.

To sum up, the Xue Allegations comprised five historical allegations:

- 1) Chinese athletes were using certain prohibited substances at the Olympic Games in Beijing (2008), London (2012) and Rio (2016);
- 2) In the 1980s and 90s, Chinese nationals from governmental organizations and national sport federations openly promoted the use of prohibited substances and prohibited methodologies by Chinese athletes;
- 3) In the 1980s and 90s, Chinese nationals within governmental organization(s) covered-up doping cases by manipulating the Results Management process;
- 4) In the 1980s and 90s, Chinese individual(s) sourced, supplied and sold Prohibited Substances to Chinese athletes; and
- 5) A former Chinese coach forced his athletes to use Prohibited Substances.

Most of the allegations were historical and predated the existence of WADA and therefore materially and adversely impacted the investigation. Doctor Xue was considered as a credible witness, however did not personally witness doping or any of the alleged wrongdoing.

Some of the allegations were referring to allegedly undetectable levels of Prohibited Substances namely trimetazidine, stanozolol and growth hormones. In cooperation with the IOC, a comprehensive and tailored testing program of London and Beijing Olympics samples was launched but all results came back negative. It was decided that Rio samples would have been tested as well if the allegations were substantiated by the testing procedure of London and Beijing samples. As this was not the case, Rio samples are spared for later testing initiatives.

After all other leads had been exhausted it was concluded that there was insufficient evidence available to substantiate or corroborate the allegation of a large-scale doping scheme.

The investigation was conducted with the support and assistance of the IOC's Medical and Scientific Department and the International Testing Agency's Science and Medical Department.

The final report can be shared with Members upon request to the I&I Department.

2. WADA Assessment

The I&I conclusions have been shared and discussed with relevant WADA program areas, namely Legal Affairs, Science and International Partnerships, Standards & Harmonization, Program Development and NADO/RADO Relations, the Compliance Task Force and the Asia/Oceania Regional Office.

In the absence of any new information or evidence being presented on this matter, it is considered that this case be closed with no follow up actions. Should substantive new information or evidence be presented however, we will reopen the case.

Exhibit C



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF NATIONAL DRUG CONTROL POLICY
Washington, D.C. 20503

May 8, 2024

Mr. Witold Banka
President
World Anti-Doping Agency
Stock Exchange Tower
800 Place Victoria, Suite 1700
Montreal (Quebec) H4Z 1B7 Canada

Dear President Banka:

Thank you for convening Executive Committee (ExCo) members to discuss the recent allegations of doping among Chinese swimmers ahead of the 2021 Tokyo Olympics, and the World Anti-Doping Agency's (WADA) decision to retain an independent investigator to look into WADA's handling of the case.

Following the ExCo meeting on April 25, 2024, in my role as Chair of the One Voice Governmental Coordination Forum (One Voice), I called for an urgent meeting of One Voice ExCo members to share concerns, and to discuss appropriate oversight of WADA processes to thoroughly and rigorously address doping allegations and preserve the integrity of sport. We remain deeply concerned that the ExCo was not adequately briefed with essential information throughout this process, and are making the following recommendations to WADA management. In addition, we note that the reports of this incident have raised deep concerns among athletes and the public, which must be thoroughly evaluated and addressed.

Based on my conversations with the One Voice public authorities, athletes, and external organizations, please see the recommendations below. Additionally, I am requesting that WADA hold an emergency convening of the ExCo in the next ten days, by May 18, 2024, to discuss and address this matter.

1. Formal Review and Approval of Terms of Reference

ExCo Public Authorities were disappointed to not have received any written materials, especially the full terms of reference, for review prior to (or even during) the extraordinary ExCo meeting. Similarly, we were not offered the opportunity to participate in a formal vote on the launch of the independent investigation and/or the selection of the investigator to look into these doping allegations. The ExCo Public Authorities request that the mandate indicated in the letter of engagement to Eric Cottier to serve as investigator, shared by WADA via email on May 6, 2024, be expanded to ensure that the investigation will:

- Review, assess, and report whether WADA's actions, since initial notification of the doping allegation, were compliant with the World Antidoping Code, particularly with regard to the correct standard and burden of proof when an athlete indicates no fault or negligence, and when a provisional suspension must be imposed.

- Clarify to whom and when the independent investigators will be reporting throughout the review process.
- Clarify the process for how all reports will be transmitted from the independent investigators to WADA and the ExCo.
- Clarify the process for the ExCo’s review, discussion, and acceptance of these reports.
- Review, assess, and report whether ExCo members should have been advised of WADA’s actions, as they have been for other, previous, doping allegation cases.
- Provide additional clarity on what WADA knew, at what time, and why WADA decided not to take additional actions, such as to investigate the contamination claims, or otherwise generate lessons-learned from this case that could inform and strengthen the anti-doping system.
- Clarify that this independent investigation will not be limited by the deadline of the pending Paris Olympics (recognizing that an interim report before the Olympics will be issued).

2. Issues of Governance and Transparency

Per Article 11 of the WADA statutes, WADA ExCo members have a responsibility for “supervising WADA management.” Moving forward, WADA ExCo members should:

- Receive the forthcoming and any subsequent investigation report concurrent with WADA management receiving it.
- Receive the terms of reference of an investigation, as well as the background information of any proposed investigator, in writing, with an opportunity to review, comment, and ultimately vote to approve or disapprove such matters (either in a meeting or via a circulatory vote).
- Investigations should remain independent and the investigator’(s) conclusions his/their own views. The ExCo will take decisions based on the findings and conclusions, but should not validate them.
- Be consulted on WADA management’s media strategy on major issues of public interest and provided the opportunity to approve press statements invoking the ExCo or other major issues of high public interest prior to public release.
- Be given an opportunity for a formal, recorded vote on significant matters coming before the ExCo. There must be corresponding written documented materials for review in advance of such a vote.
- Be notified and timely consulted on major decisions WADA management intends to make that are not otherwise reflected in WADA’s written meeting documentation

packages or on the meeting agendas. If sensitivity of the matters is a concern, a sub-committee, representing governments and the sports movement, could be pre-selected specifically for this purpose.

- Obtain clarification on the process and rules for the selection of independent investigators by WADA management.
- Identify recommendations for updating the WADA Code or otherwise adding governance or other options for WADA to respond to a similar situation in the future (i.e., choices beyond challenging a national anti-doping organization's decision through the Court of Arbitration for Sport or taking no action).

3. Convene Additional Athletes and other Stakeholders to Receive Input

While the independent investigation of this matter is underway, further efforts to provide information and receive questions directly from athletes from each WADA region, as well as other stakeholders, are necessary and appropriate. WADA management should brief ExCo members, in writing, on the highlights of these athlete and stakeholder engagements, in particular specific information on any additional actions WADA decides to take in response to questions or requests.

After the Paris Olympics, WADA management should assess its two-way communications strategy with a broad cross-section of athletes and other stakeholders, and consider a sustained, permanent posture of increased frequency of consultations, reporting to the ExCo on their plans going forward.

Finally, as a member of the ExCo, let me underscore the extreme concern I have been hearing directly from American athletes and their representatives on this issue. As I have shared with you, the athletes have expressed they are heading into the Olympic and Paralympic games with serious concerns about whether the playing field is level and the competition fair. Their concerns must be taken with paramount importance and thoroughly addressed. To that end, I am calling for:

- The appointment and funding of an independent commission to conduct a thorough investigation of the doping allegations and WADA's handling of their response. This is too important and complex of a task for any single individual to lead the effort.
- A comprehensive mandate beyond this case [of the 23 athletes who tested positive] and WADA's subsequent decisions on recommendations for changes to improve the future practices of WADA and national anti-doping organizations in order to fulfill the promise it makes to clean athletes and to the integrity of the Olympic and Paralympic Games.
- Whistleblower protections, because the independent commission must have full authority to protect individuals who have legitimate standing as whistleblowers. If there are whistleblowers involved in this case or moving forward, WADA must pledge to protect them.

Athletes deserve a level playing field and every step taken in the weeks and months ahead must build confidence in the system established to preserve and promote clean sport.

Thank you for your urgent attention to these matters. Please do not hesitate to contact me, or to have your staff contact Richard Baum (at 202-701-8572 or Rbaum@ondcp.eop.gov) as necessary.

Sincerely,



Rahul Gupta, MD, MPH, MBA
Director

cc:

Ingmar De Vos

Ryan Pini

Gabriella Battaini-Dragoni

Venetia Bennett

Patricia Sangenis



TEAM USA ATHLETES'
COMMISSION

April 29, 2024

Dr. Rahul Gupta
Director
Office of National Drug Control Policy
1800 G Street NW
9th Floor
Washington DC 20005

Dear Director Gupta,

As the athlete representatives for USA Swimming athletes and Team USA athletes, we are extremely concerned about the recent publications by the New York Times and other media organizations exposing the positive tests of 23 Chinese swimmers in early 2021 that went unsanctioned and subsequent decisions made by the World Anti-Doping Agency (WADA) not to investigate these positive tests. Once again, we are heading into another Olympic and Paralympic games with serious concerns about whether the playing field is level and the competition fair.

The decisions made by WADA, the way they were made, and the lack of transparency has undermined our confidence in WADA's stated mission to "lead a collaborative worldwide movement for doping-free sport." As athletes, we have to trust WADA to set and enforce standards that will ensure fair play and protect our rights. WADA's failure to follow its own rules and procedures in the wake of the positive tests of these 23 Chinese athletes has broken this trust.

The recent announcement from WADA regarding their own investigation appears to be a "check the box" exercise that will be substantially limited and biased and thus fail to reveal the whole truth.

Given this, we are asking you, as the United States representative to the WADA Executive Committee, to:

1. Create and announce a truly independent investigation into the cases of the 23 Chinese athletes who tested positive;
2. Perform an audit and ensure that WADA is held accountable to all stakeholders in the handling of this matter; and,
3. Initiate an independent review that results in greater independence and oversight of WADA and its decisions so that WADA can fulfill the promise it makes to clean athletes and the integrity of the Olympic and Paralympic Games.

Athletes from the U.S. and other countries may have been directly impacted by this 2021 oversight of the WADA rules and possible doping infractions. WADA must honor its stated values of "integrity," "openness," and a commitment to "listen to athletes' voices" by



TEAM USA ATHLETES'
COMMISSION

allowing an immediate independent investigation into the case and WADA's response. We believe this is the only way forward.

Thank you in advance for your commitment to and representation of Team USA athletes around the world.

Signed by:
USA Swimming Athletes' Advisory Council
Team USA Athletes' Commission

...

CC: Gene Sykes, Chairman, United States Olympic and Paralympic Committee
Sarah Hirshland, CEO, United States Olympic and Paralympic Committee
Husain Al-Musallam, President, World Aquatics
Brent Nowicki, CEO & Executive Director, World Aquatics
Chris Brearton, Board Chair, USA Swimming
Tim Hinchey, President & CEO, USA Swimming

Exhibit D

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

DATE:	4 June 2024
AUTHOR:	Steven Teitler (Legal Director, Doping Authority Netherlands)

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 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.