CAS 2010/A/2161 Wen Tong v. International Judo Federation

ARBITRAL AWARD

delivered by

THE COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Ercus Stewart, Senior Counsel in Dublin, Ireland

Arbitrators: Mr Michele Bernasconi, attorney-at-law in Zurich, Switzerland

Dr Hans Nater, attorney-at-law in Zurich, Switzerland

Ad hoc Clerk: Ms Jennifer Kirby, attorney-at-law in Paris, France

in the arbitration between

WEN TONG, Tianjin, China

Represented by (1) Mr Mike Morgan, Squire, Sanders & Dempsey (UK) LLP, 7 Devonshire Square, London EC2M 4YH, United Kingdom, (2) Mr Adam Lewis, Blackstone Chambers, Blackstone Houser, Temple, London, EC4Y 9BW, United Kingdom, and (3) Mr Antonio Rigozzi, Lévy Kaufmann-Kohler, 3-5, rue du Conseil-Général, 1211 Geneva 4, Switzerland

-Appellant-

and

INTERNATIONAL JUDO FEDERATION, Lausanne, Switzerland

Represented by Mr Jean-Pierre Morand and Mr Yvan Henzer, Carrard & Associés, Lausanne, Switzerland

-Respondent-

1. THE PARTIES

1.1 Ms Wen Tong ("Ms Tong" or "Appellant") is a Chinese national who competes as an international-level judoka.

1.2 The International Judo Federation ("IJF" or "Respondent") is the international federation governing judo and is recognized by the International Olympic Committee.

2. FACTUAL BACKGROUND

2.1 Below is a summary of the main relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the factual allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only the submissions and evidence it considers necessary to explain its reasoning.

2.2 Appellant, who was born in February 1983, is an international-level judoka who competes in the women's 78kg+ category. She started practicing judo at the age of 13 and has gone on to win medals in numerous national and international competitions, including the gold medal at the 2008 Olympic Games in Beijing.

2.3 Appellant has undergone over 60 doping control tests throughout her career. Apart from the test at issue in this case, she has never tested positive for any prohibited substances. Prior to the proceedings at issue here, Appellant had no prior experience with anti-doping proceedings.

2.4 In August 2009, Appellant competed in the IJF World Judo Championships in Rotterdam, where she won the gold medal in her weight category on 30 August 2009. That same day, following the competition, Appellant provided a doping control sample.

2.5 On 8 September 2009, Appellant's A sample tested positive for clenbuterol. By letter dated 14 September 2009, the Cologne Laboratory informed the IJF Medical Commission of Appellant's positive test results. Respondent did not inform Appellant of her test results. Rather, nearly two weeks later, on 29 September 2009, Respondent sent an email to the Chinese Judo Association (the "CJA") informing it of Appellant's test results. Appellant did not learn of her test results until a meeting with the CJA on 18 October 2009, by which time nearly another three weeks had passed. During her meeting with the CJA, Appellant alleges she was not given any information about the amount of clenbuterol involved or provided any documents concerning the testing of her A sample.

2.6 According to Appellant, present at the meeting were, among other people, Mr Zhaonian Song, a member of Respondent's Executive Committee, who was also Respondent's marketing director as well as the vice president of the CJA and an official of the Chinese government. Mr Song allegedly told Appellant not to discuss her case with anyone. Appellant contends he further told her that, although she could request analysis of her B sample, it would not be in her interest to do so, as the test results could not be wrong and requesting analysis of the B sample would only antagonize Respondent. In addition, Mr Song allegedly told Appellant that, if she had her B sample tested and the results came back positive, (1) the commencement date of any ban imposed on Appellant would run from the date of the B-sample analysis, (2) Appellant would not be given any credit for the time she was provisionally suspended, and (3) Respondent could impose on Appellant a longer ban than if she were to simply accept the results of the A-sample analysis.

2.7 Appellant alleges that Mr Song insisted that Appellant's best course of action was to cooperate with Respondent in order to gain leniency. Mr Song allegedly stated that, by waiving the B-sample test, Appellant would be seen as cooperating with Respondent and Respondent would be willing to reduce the otherwise applicable sanction and allow Appellant to return to competition early enough to accumulate qualification points required to participate in the London 2012 Olympic Games. Mr Song's remarks were allegedly seconded by Mr Feng-Shan Xiong, another Chinese government official and secretary general of the CJA, who was also present at the meeting.

2.8 According to Appellant, no one explained to her during this meeting or at any time (1) what requirements she would have to satisfy before an otherwise applicable sanction could be reduced, or (2) that any sanction longer than six months would bar Appellant from competing in the 2012 Olympic Games pursuant to Rule 45 of the Olympic Charter. She was not aware of this.

2.9 At this point, Appellant insisted that her B sample be opened and tested in the presence of a representative on her behalf. Appellant also requested copies of documents related to her A-sample test. Mr Song told Appellant that these would be requested from Respondent. The CJA contacted Respondent that same day to ask that her B sample be tested. In the meantime, since 18 October 2009, the Appellant has not participated in any competition.

2.10 Appellant alleges that, a week later on 25 October 2009, Mr Zhen Liu, the CJA's interpreter, spoke with Appellant on behalf of Mr Xiong and told her the CJA had decided that she had to write a letter to Respondent accepting responsibility for the positive test of her A sample and that he would give her guidance on how and what to write. Like Messrs. Song and Xiong before him, Mr Liu allegedly emphasized that it was in Appellant's best interest to be conciliatory and cooperative with Respondent.

2.11 According to Appellant, that same day, Appellant prepared a draft letter as directed by Mr Liu and sent it to him for his review. The same day, Mr Liu allegedly sent it back to her with some revisions, which Appellant incorporated.

2.12 In the letter, Appellant wrote that the "*only possible way*" clenbuterol could have entered her system was that she "*went for barbeque with some friends in the informal restaurant nearby my home in a few weekends before attending the Rotterdam World Championships. As I am bigger category, I like meat very much. I eat a lot of pork including some splanchnic goods. There is much possibility that the 'Clenbuterol' which caused my Anti-Doping test as positive is from these food I taken during these weekends before going to Rotterdam World Championships.*"

2.13 Appellant further wrote, "*I don't want to defend my self for such case, as I know that I should be responsible for it. However, I am sincerely pleading for light punishment given by IJF and WADA, as I don't want to break my dream either destroy my career for my beloved sport of Judo. I am eager and willing to present beautiful Judo competition in London Olympic Games, and make further and bigger contribution to Judo.*"

2.14 Appellant alleges that she understood from the CJA that the letter had been sent to Respondent, but she never received any response to her letter from Respondent. At this point, Appellant understood that the testing of her B sample would still go ahead and that she was still to receive documents from Respondent regarding the test results of her A sample. And on 6 November 2009, the CJA again informed Respondent that Appellant wished to have her B sample tested and the documentation package for the A-sample analysis.

2.15 On 8 November 2009, Respondent told the CJA to contact the laboratory directly with respect to the documentation package and the testing of Appellant's B sample.

2.16 According to Appellant, three days later, on 11 November 2009, Mr Liu again spoke with Appellant on behalf of Mr Xiong and told her that the CJA had decided that it would be in her best interests for her to withdraw her request to have her B sample tested. Mr Liu then dictated the content of her statement withdrawing her request and Appellant wrote it down and signed it. The CJA sent the statement to Respondent on 14 November 2009. Appellant did not know at the time she wrote out the statement on 11 November 2009 that the CJA had the day before, on 10 November 2009, contacted Respondent and purported to withdraw Appellant's request to have her B sample tested. This the CJA did without telling Appellant or consulting her. In reaction, Respondent asked the CJA to get a written statement from Appellant agreeing to withdraw her request to have her B sample tested; hence Mr Liu's dictating a statement of withdrawal for Appellant to sign.

2.17 On 25 November 2009, Respondent nevertheless had Appellant's B sample tested without informing her nor offering her an opportunity to attend herself or through a representative. The B sample also tested positive for clenbuterol.

2.18 For nearly six months, Appellant heard nothing further about her case. During this time, on 4 April 2010, Respondent's Executive Board decided to impose a two-year suspension on Appellant, but she was not informed or aware.

2.19 On 2 May 2010, Appellant alleges she met with Mr Xiong who informed her that Respondent had recently contacted Mr Song (as a member of Respondent's Executive Committee) to seek his opinion on a proposed two-year suspension. Mr Xiong allegedly instructed Appellant that, if approached, she should not talk to the media, as it would not be in the best interest of her case. Appellant again asked Mr Xiong for the documents concerning the positive test of her A sample. Mr Xiong stated that the CJA had requested them from Respondent, but had not yet received them, and he promised to request them again.

2.20 Unknown to Appellant, by this time, Respondent's Independent Doping Commission had already suggested to Respondent's Executive Committee that Appellant be suspended for two years and that her results in the Rotterdam World Championships be annulled, and Respondent's Executive Committee had already agreed with that suggestion on 4 April 2010.

2.21 Appellant alleges that, a week later, on 9 May 2010, she learned through the Internet that Respondent had imposed a two-year suspension on her. The following day, 10 May 2010, the CJA summoned Appellant and her coach to a meeting in Beijing. Once there, Appellant alleges that only her coach was allowed to attend the meeting and Appellant was required to wait outside. After the meeting, Appellant's coach allegedly told her that Respondent had informed the CJA that it would impose a two-year suspension on her, though the CJA did not know when the suspension was to start and when it was to end.

2.22 Nearly six weeks later, on 19 June 2010, Appellant again asked the CJA for the documents related to the finding of a prohibited substance in her doping control sample. Three days later, on 22 June 2010, the CJA sent Appellant an incomplete set of the documents concerning her positive clenbuterol test, as well as Respondent's letter notifying the CJA of its decision to impose a two-year suspension on Appellant.

3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

3.1 On 6 July 2010, pursuant to Article R47 of the Code of Sports-Related Arbitration (2010 edition) (the "Code"), Appellant filed a Statement of Appeal at the Court of Arbitration for Sport (the "CAS") against Respondent's decision of 4 April 2010

(communicated to Appellant on 9 June 2010) to impose on her a two-year period of ineligibility for an alleged violation of the 2009 IJF Anti-Doping Rules (the "2009 IJF ADR").

3.2 By letter dated 22 July 2010 – following a request from Appellant to suspend the time limit to file her Appeal Brief pending Respondent's disclosure of documents relevant to its decision in her case, a request to which Respondent objected – the CAS informed the parties that the Deputy President of the Appeals Arbitration Division had decided (1) to direct Respondent to provide the CAS with a copy of any and all documents in its file relevant to the proceedings against Appellant and, in the interim, (2) to suspend the time limit for Appellant to file her Appeal Brief.

3.3 By letter dated 2 August 2010, Respondent sent to the CAS relevant documents from its file concerning the proceedings against Appellant and CAS sent these on to Appellant.

3.4 Following several requests from Appellant for extensions of time, many of which Respondent objected to, the Panel ultimately gave Appellant until 17 September 2010 to file her Appeal Brief, which she did on that day, along with a Request for Further Information (attached as Appendix 1) concerning the laboratory's lower limit of detection ("LLOD") and lower limit of quantification ("LLOQ") for the particular method it used to detect clenbuterol in her sample.

3.5 Respondent timely filed its Answer on 13 October 2010. In the letter accompanying its Answer, Respondent stated that it did not consider a hearing necessary in this matter and would not participate in any hearing the Panel might decide to hold. Respondent also asked Appellant to (1) disclose documents establishing when she was notified of the IJF decision from which she appeals, and (2) offered Appellant the opportunity to have her B sample retested. Respondent contended that, if Appellant refused this offer, the Panel should draw an adverse inference against her. Appellant produced the documents Respondent requested in its 13 October 2010 letter, but refused Respondent's offer to have her B sample retested and argued that no adverse inference should be drawn against her in light of her refusal.

3.6 By letter dated 22 October 2010, Appellant confirmed her request that a hearing be held in this matter.

3.7 By letter dated 28 October 2010, Appellant reiterated and amplified upon its Request for Further Information.

3.8 By letter dated 3 November 2010, Appellant sought leave from the Panel to file a second round of written submissions in light of certain evidentiary issues raised in Respondent's Answer. With her letter, Appellant submitted a report of a polygraph examination allegedly designed to determine Appellant's truthfulness when responding

to allegations that she deliberately or knowingly ingested clenbuterol before or during the IJF 2009 World Championships in Rotterdam.

3.9 By letter dated 5 November 2010, Respondent objected to Appellant's request for a second round of submissions and to the admissibility of the polygraph examination report.

3.10 By letter dated 22 November 2010, the CAS notified the parties of the Panel's decision (1) directing Respondent to disclose the further information Appellant requested concerning the laboratory's LLOD and LLOQ for the particular method it used to detect clenbuterol in Appellant's sample, (2) granting Appellant leave to file a second round of submissions and Respondent an opportunity to respond to them, (3) noting Appellant's comments in relation to Respondent's offer to retest her B sample, and (4) noting Respondent's comments in relation to the polygraph examination report submitted by Appellant.

3.11 By letter dated 1 December 2010, Respondent disclosed information and documents further to the CAS's 22 November 2010 letter.

3.12 Further to extensions of time agreed between the parties, Appellant timely filed her Second Written Submission on 20 December 2010.

3.13 By letter dated 30 December 2010, Respondent informed the Panel that it would not file a second written submission.

3.14 At all stages, Respondent has stated that it would not attend or be represented at any hearing.

4. THE CONSTITUTION OF THE PANEL AND THE HEARING

4.1 By letter dated 4 August 2010, the CAS informed the parties that the Panel to hear the appeal had been constituted as follows: Mr Ercus Stewart SC, President of the Panel, Mr Michele Bernasconi and Dr Hans Nater, arbitrators. The parties did not raise any objection as to the constitution and composition of the Panel.

4.2 By Order of Procedure dated 6 January 2011, signed by the parties, the parties confirmed that the CAS has jurisdiction over this dispute, the date and time of the hearing (24 January 2011 at 9H30), and the witnesses who would be present at the hearing.

4.3 A hearing was held indeed on 24 January 2011 at the CAS headquarters in Lausanne. At the close of the hearing, Appellant and her representatives confirmed that they were satisfied as to how the hearing and the proceedings were conducted.

4.4 In addition to the Panel, Ms Louise Reilly, Counsel to the CAS, and Ms Kirby, the following people attended the hearing:

- Ms Wen Tong, Appellant
- Mr Adam Lewis, counsel for Appellant
- Mr Antonio Rigozzi, counsel for Appellant
- Mr Mike Morgan, solicitor for Appellant
- Mr James Day, trainee solicitor
- Prof Vivian James
- Ms Min Wang, Deputy Director of the Tianjin Sports Bureau
- Mr Terry Mullins, polygraph examiner
- Mr Paul Scott (by video conference)
- Ms Weifung Wu (by telephone)
- Mr Simon Bai, assistant to Appellant
- Ms Jane Zou, independent interpreter

4.5 With her written submissions, Appellant filed detailed witness statements from herself (two), Ms Wang, Ms Wu, Mr Scott, Ms Shi Junjie and Ms Dou Shumei, as well as reports from Mr Scott, Mr James (two) and Mr Mullins.

4.6 Appellant offered to have Ms Junjie and Ms Shumei attending the hearing by telephone, should the Panel or Respondent require it. Ms Wu was available by telephone for the hearing. The Panel ultimately decided that it did not need to hear her.

4.7 Though fully aware of the date and time and invited to attend, Respondent did not attend the hearing, nor was it represented.

5. THE PARTIES' SUBMISSIONS

A. Appellant's Submissions and Requests for Relief

5.1 In summary, Appellant submits the following in support of her appeal:

5.2 Appellant did not deliberately or knowingly ingest clenbuterol.

5.3 Respondent cannot establish by a standard of comfortable satisfaction under Article 3.1 of the 2009 IJF ADR that clenbuterol was reliably detected in Appellant's samples because:

5.3.1. The machine used to test her A sample had not been calibrated for over 18 months in violation of paragraphs 5.4.5.2 and 5.4.5.4 of the January 2009

International Standards for Laboratories ("ISL"), and the A-sample results are therefore inadmissible as evidence.

5.3.2. Appellant was not aware nor was she given the opportunity to be present herself and/or by her representative for the opening and testing of her B sample in violation of ISL 5.2.4.3.2.6 and Articles 7.1.4 and 7.1.6 of the 2009 IJF ADR. The right of the athlete to be present applies whenever the B sample is analyzed, irrespective of who asks for it or whether the athlete has for her part waived the analysis. The failure to afford Appellant this essential right renders the B-sample analytical results invalid. Those results therefore cannot confirm the A-sample analytical results with the consequence that, pursuant to Article 2.1.2 of the 2009 IJF ADR, no doping violation is established.

5.3.3. Appellant also initially argued that Respondent could not prove an anti-doping violation by comfortable satisfaction because the concentration of clenbuterol reported in Appellant's samples appeared to fall below the laboratory's established LLOD for the method used. The letter dated 24 September 2010 from Wilhelm Schänzer to Yvan Henzer, which Respondent filed with its Answer, clarified the LLOD for the method used and Appellant expressly withdrew this argument at the hearing.

5.4 Respondent was guilty of repeated and serious failures to inform Appellant of her essential procedural rights under Articles 7 and 8 of the 2009 IJF ADR. These failures include the following:

5.4.1. Respondent delayed seven weeks before communicating Appellant's test results in violation of Articles 7.1.2 and 7.1.4 of the 2009 IJF ADR.

5.4.2. In communicating only with the CJA and not with Appellant directly, Respondent failed to communicate to Appellant her rights and ensure that Appellant was properly informed and aware of her position in violation of Articles 7.1.2 and 8 of the 2009 IJF ADR. Under these circumstances, Respondent is responsible for the actions of the CJA, which failed to inform Appellant of her rights and gave her inaccurate information and advice that she relied upon to make critical, flawed decisions in the management of her defence. Specifically:

5.4.2.1. Appellant was led to believe that there was no prospect of establishing that the analytical results of her A sample were in error and that to challenge them would lead to an even greater sanction.

5.4.2.2. Appellant was wrongly led to believe that leniency would be available on the basis of the letter dated 25 October 2009 that she was told to write. Neither Respondent nor the CJA informed Appellant that it would

be necessary or desirable to establish the precise source of the prohibited substance in order to benefit from an elimination or reduction of an otherwise applicable sanction under Article 10.5 of the 2009 IJF ADR.

5.4.2.3. Appellant was wrongly led to believe that adopting a conciliatory course of action would allow her to be back in competition in time to qualify for the 2012 Olympic Games. Neither Respondent nor the CJA ever informed Appellant that, pursuant to Article 45 of the Olympic Charter, any suspension over six months would preclude Appellant's participation in the 2012 Olympics.

5.4.3. In breach of Articles 7.1.4 and 8.3 of the 2009 IJF ADR, Respondent failed to provide the A-sample documentation package for over eight months, despite repeated requests. When Respondent eventually provided the A-sample and B-sample documentation package in June 2010 – after Respondent had already taken its decision – that package was incomplete and remained so until September 2010 – i.e., more than one year after Appellant had provided her sample.

5.4.4. In breach of Article 8.3 of the 2009 IJF ADR, Respondent failed to provide a fair and expeditious hearing. No hearing was held expeditiously and, indeed, Respondent may have never held a hearing at all. In all events, Respondent never informed Appellant of any hearing date in breach of Articles 8.1.4 and 8.3 of the 2009 IJF ADR.

5.5 As a consequence Respondent cannot contend that Appellant has irrevocably accepted the validity of any results or waived any of her rights. In fact, these failures are cumulatively so extreme as to invalidate the entire process by analogy to the decisions in *CAS 2008/A/1607 Varis v IBU* and *CAS 2002/A/385 Tchachina v International Gymnastics Federation*. These failures irreversibly deprived Appellant of the opportunity to conduct investigations that would have been necessary to establish the precise source of clenbuterol allegedly detected in her samples. Accordingly, in light of the principles of due process, estoppel, good faith, prohibition of abuse of right, and fairness and legitimate expectation, Respondent cannot now contend that Appellant's inability in this respect prevents her from relying on Article 10.5 of the 2009 IJF ADR. In fact, under these circumstances, the burden of proof should be on Respondent to establish that the clenbuterol did *not* originate from contaminated meat. Any other result would be unfair to Appellant.

5.6 If the Panel finds that a doping violation is established, then Appellant acted with "No Fault or Negligence", or alternatively "No Significant Fault or Negligence", for purposes of Article 10.5 of the 2009 IJF ADR. This is because, as in the *Ovtcharov* case (*German Table Tennis Association/Dimitrij Ovtcharov 875/10*), any clenbuterol

in Appellant's sample came from eating contaminated meat, and Appellant took all reasonable precautions and could not reasonably have known before or afterwards that the meat she ate was contaminated with clenbuterol.

5.7 Also if the Panel finds that a doping violation is established, any period of ineligibility should run from 30 August 2009 when Appellant's sample was collected pursuant to Article 10.9 of the 2009 IJF ADR.

5.8 Appellant requests that the Panel grant the following relief:

5.8.1. Annulment of the IJF Executive Committee's decision of 4 April 2010;

5.8.2. Confirmation that:

5.8.2.1. There is no reliable basis upon which to find that Appellant has committed an anti-doping rule violation; or alternatively

5.8.2.2. Appellant's ability to defend herself has been so compromised that there can be no finding of an anti-doping rule violation; or alternatively

5.8.2.3. Appellant bore "No Fault" for the alleged anti-doping rule violation; or alternatively

5.8.2.4. Appellant bore "No Significant Fault" for the alleged anti-doping rule violation.

5.8.3. Confirmation that:

5.8.3.1. if paragraph 5.8.2.1 above applies, Appellant's results at the 2009 IJF World Championships are reinstated, she is to retain the gold medal won at those Championships and she is to be reinstated to sports participation with immediate effect;

5.8.3.2. if paragraph 5.8.2.2 above applies, Appellant's results at the 2009 IJF World Championships are reinstated, she is to retain the gold medal won at those Championships and she is to be reinstated to sports participation with immediate effect;

5.8.3.3. if paragraph 5.8.2.3 above applies, the otherwise applicable period of ineligibility is eliminated and Appellant is to be reinstated to sports participation with immediate effect;

5.8.3.4. if paragraph 5.8.2.4 above applies, the maximum period of ineligibility shall be limited to one year and any applicable period of ineligibility commences on 30 August 2009, the date of sample collection.

5.8.4. Respondent be ordered to reimburse the Appellant's legal costs. Appellant submits that Respondent should bear the reasonable costs of Appellant's legal fees in pursuing this appeal based on the following grounds:

5.8.4.1. Respondent's failure to accord Appellant her due process rights, as set out above, has resulted in these proceedings, which may not have been necessary had Respondent adhered to its own rules.

5.8.4.2. Appellant has only very limited financial resources by comparison to Respondent.

B. Respondent's Submissions and Requests for Relief

5.9 The Cologne Laboratory, which is accredited by the World Anti-Doping Agency ("WADA"), detected clenbuterol in Appellant's A and B samples. Appellant does not contest that an anti-doping violation occurred because she expressly accepted the result of the A-sample analysis in a written statement. Accordingly, a doping violation is established pursuant to Article 2.1 of the 2009 IJF ADR.

5.10 As this is Appellant's first violation of the anti-doping rules, pursuant to Article 10.2 of the 2009 IJF ADR, the period of ineligibility is two years. The only basis upon which the sanction can be reduced is if Appellant proves by a balance of probabilities how clenbuterol got into her system and meets the conditions for No Fault or Negligence or No Significant Fault or Negligence under either Article 10.5.1 or 10.5.2 of the 2009 IJF ADR.

5.11 Appellant has failed to provide any evidence as to how clenbuterol got into her system and she has therefore failed to meet her evidentiary burden (citing *CAS 99/A/234 David Meca-Medina v FINA* and *CAS 99/A/235 Igor Majcen v FINA*). In particular, Appellant has failed to establish (1) that she ate a lot of meat prior to the Rotterdam competition, (2) that the meat was contaminated with clenbuterol, (3) that the meat was the source of the adverse analytical finding, (4) the circumstances in which she could have eaten contaminated meat, or (5) that she took any precautions before eating meat.

5.12 Appellant's statements as to how clenbuterol entered her system are contradictory. Appellant stated in her letter dated 25 October 2009 that clenbuterol must have entered her system through some barbecued meat she ate at a restaurant a few weeks prior to the World Championships in Rotterdam. In her witness statement, however, Appellant

no longer makes reference to this and merely claims that she ate a lot of meat prior to the competition.

5.13 On the balance of probabilities, it is more likely that the cause of the adverse analytical finding is not contaminated meat. This is so for a variety of reasons:

5.13.1. The risk of meat being contaminated with clenbuterol is almost non-existent.

5.13.2. Before the Rotterdam competition, Appellant trained for 12 days in the Beijing Olympic Sports Center. It is unlikely that the food served there to international-level athletes is not appropriately controlled to avoid any risk of contamination.

5.13.3. No other Chinese athletes who trained at the Beijing Center tested positive for clenbuterol.

5.13.4. Appellant left China a week before giving her sample. It is unlikely that any clenbuterol from Chinese meat would remain in Appellant's system after seven days.

5.13.5. Appellant arrived in Rotterdam a week before giving her sample and has provided no evidence regarding the risk of meat contaminated with clenbuterol in the Netherlands.

5.13.6. Additives such as clenbuterol are banned in the European Union. The risk of finding clenbuterol-contaminated meat in Rotterdam is therefore very slim if not non-existent. In all events, it is more likely than not that the meat served in Rotterdam did not contain clenbuterol.

5.14 Moreover, Appellant's witness statement cannot establish that she ate contaminated meat because, under Swiss law, a party is not considered a witness and a party's witness statement is not sufficient proof (citing WALTHER J. HABSCHEID, DROIT JUDICIARE PRIVÉ SUISSE (2d ed. 1981), 457; JACQUES HALDY, LA NOUVELLE PROCEDURE CIVILE SUISSE (2009), 55).

5.15 As Appellant has not proven that clenbuterol entered her system by way of contaminated meat, the two-year period of ineligibility should stand.

5.16 Turning to Appellant's other arguments, the instrument used to detect clenbuterol was properly calibrated, as evidenced by the fact that the reference standard was detected. Moreover, the instrument was duly calibrated when the B sample was tested six weeks later and confirmed the A-sample analysis. This shows that the instrument was also calibrated for the A-sample analysis.

5.17 With respect to the admissibility of the B-sample results, Respondent promptly informed the CJA of Appellant's right to have her B sample tested. While Appellant apparently initially wanted her B sample tested, she thereafter withdrew her request.

5.18 Appellant contends that CAS precedent requires that her B-sample results be found inadmissible because she was not allowed to attend the B-sample analysis in breach of her rights. In all the cases she relies upon, however, the athlete challenged their test results and requested B-sample analysis. This is not the case here, where Appellant expressly accepted her A-sample results and waived her right to request a B-sample analysis.

5.19 Moreover, Appellant should be estopped (*venire contra factum proprium*) from claiming that the B-sample analysis is invalid after admitting that clenbuterol was detected in her sample, particularly when she only contended that the B-sample test was invalid after receiving notice of her two-year suspension.

5.20 With respect to Appellant's grievances regarding Respondent's disciplinary procedure, they are without merit because Appellant has the possibility to have her case reviewed *de novo* by the CAS pursuant to Article R57 of the Code. Moreover, Appellant made a written statement to Respondent in which she accepted the results of her A-sample analysis. Under these circumstances, Respondent was right in following an expedited procedure.

5.21 Respondent acted diligently; there was no delay in the communication with Appellant. Even if Appellant had been notified earlier of the adverse analytical finding, she could not have advanced any more convincing explanations, as she claims she never knew how the clenbuterol entered her system.

5.22 With respect to Appellant's allegation that she was misinformed or betrayed by the CJA, there is no evidence to support this allegation. Appellant does not call a witness to testify on this score. Moreover, Appellant has never been deprived of her right to obtain advice from a lawyer or any other specialist. This appeal procedure shows that Appellant has the resources and ability to engage a high profile law firm to represent her. Nothing prevented her from engaging a lawyer before Respondent took its decision, when she defended her case in collaboration with the CJA.

5.23 Respondent asks the Panel to grant the following relief:

5.23.1. Dismiss Appellant's appeal; and

5.23.2. Grant Respondent an award of costs.

6. JURISDICTION OF THE CAS

6.1 Article R47 of the Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

6.2 Article 8.1.8 of the 2009 IJF ADR provides as follows:

Decisions of the IJF Doping Hearing Panel may be appealed to the Court of Arbitration for Sport as provided in Article 13.

6.3 Article 13.2.1 of the 2009 IJF ADR provides as follows with respect to appeals involving International-Level Athletes:

In cases arising from competition in an International Event *or in cases involving* International-Level Athletes*, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court.*

6.4 Appellant filed her appeal with the CAS and Respondent has not raised any jurisdictional objections. Furthermore, both parties confirmed that the CAS has jurisdiction in this matter by signing the Order of Procedure dated 6 January 2011. It is accordingly undisputed that the CAS has jurisdiction over Appellant's appeal.

7. APPLICABLE LAW

7.1 Article R58 of the Code provides as follows:

The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

7.2 In their submissions, the parties make reference to and rely on provisions of the 2009 WADA World Anti-Doping Code, 2009 IJF ADR, and ISL, as well as provisions of Swiss law. Accordingly, these regulations and Swiss law are applicable to the merits of the parties' dispute.

8. ADMISSIBILITY

8.1 Article 13.6 of the 2009 IJF ADR provides in pertinent part as follows with respect to the time for filing appeals:

The time to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party.

8.2 Based on the documents submitted, Respondent took the decision at issue here on 4 April 2010, and Appellant was notified of that decision on 22 June 2010. Appellant filed her Statement of Appeal on 6 July 2010. The Panel is satisfied that Appellant's appeal was timely filed and is admissible.

9. MERITS OF THE APPEAL

9.1 As noted above, Appellant contends, among other things, that Respondent's decision dated 4 April 2010 should be annulled because Appellant was not given the opportunity to be present herself and/or by her representative for the opening and testing of her B sample in violation of Articles 7.1.4 and 7.1.6 of the 2009 IJF ADR. According to Appellant, the right of the athlete to be present applies whenever the B sample is analyzed, irrespective of who asks for it or whether the athlete has for her part waived the analysis, and Respondent's failure to afford Appellant this essential right renders the B-sample analytical results invalid. As those results therefore cannot confirm the A-sample analytical results, no doping violation has been established pursuant to Article 2.1.2 of the 2009 IJF ADR.

9.2 For the reasons set forth below, the Panel agrees.

9.3 Article 2.1.2 of the 2009 IJF ADR provides as follows:

Sufficient proof of an anti-doping rule violation under Article 2.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample.

9.4 There are accordingly two ways for Respondent to establish an anti-doping violation under Article 2.1.2. Where the athlete waives analysis of the B sample, and the B sample is not analyzed, Respondent can rely on the results of the A-sample analysis alone. This route is not open to Respondent, as Appellant's B sample was analyzed at Respondent's request, and this is admitted by Respondent.

9.5 Alternatively, where the athlete's B sample is analyzed, Respondent can establish an anti-doping violation under Article 2.1.2 if the analysis of the B sample confirms the presence of a prohibited substance found in the athlete's A sample. As Respondent elected to have Appellant's B sample analyzed, this is the only route open to Respondent to prove an anti-doping violation in this case.

9.6 Articles 7.1.5 and 7.1.6 of the 2009 IJF ADR require that the athlete be granted the right to attend the opening and analysis of her B sample and provide as follows:

7.1.5 Where requested by the Athlete or the IJF, arrangements shall be made for Testing the B Sample within the time period specified in the International Standard for Testing. An Athlete may accept the A Sample analytical results by waiving the requirement for B Sample analysis. The IJF may nonetheless elect to proceed with the B Sample analysis.

7.1.6 The Athlete and/or his representative shall be allowed to be present at the analysis of the B Sample within the time period specified in the International Standard for Laboratories. Also a representative of the Athlete's National Federation as well as a representative of the IJF shall be allowed to be present.

9.7 The athlete thus has the right to be present for the opening and analysis of her B sample regardless of whether it is the athlete or the IJF who requests testing of the B sample. In light of this, Article 7.1.4(d) of the 2009 IJF ADR requires Respondent to inform the athlete of the "*scheduled date, time and place for the B Sample analysis (which shall be within the time period specified in the International Standard for Laboratories) if the Athlete or the IJF chooses to request an analysis of the B Sample*". And Article 7.1.4(e) requires that Respondent give the "*opportunity for the Athlete and/or the Athlete's representative to attend the B Sample opening and analysis at the scheduled date, time and place if such analysis is requested*".

9.8 Moreover, it is now established CAS jurisprudence that the athlete's right to attend the opening and analysis of her B sample is fundamental and, if not respected, the B-sample results must be disregarded. *See Tchachina*, ¶¶ 22-34 (disregarding B-sample results where the neither the athlete nor her federation was given notice of the B-sample analysis). This is so even if denial of that right "*is unlikely to affect the result of a B-sample analysis*". *Id.*, ¶ 26. This is because an "*athlete's right to be given a reasonable opportunity to observe the opening and testing of a 'B' sample is of sufficient importance that it needs to be enforced even in situations where all of the other evidence available indicates that the Appellant committed an anti-doping rule violation.*" *Varis*, ¶ 123 (disregarding B-sample results where the federation failed to make reasonable efforts to accommodate the athlete's request to have her B sample opened and analyzed in the presence of her representative); *see also Tchachina*, ¶ 29 (explaining that to do otherwise would be to treat the athlete "*as the object of the doping test procedure not its subject*").

9.9 This right is "*completely taken away from the athlete when the analysis of the B-sample is conducted without the athlete . . . being given due notification of the relevant date and time.*" *Tchachina*, ¶ 29. Moreover, it is not possible to remedy such a procedural error through the course of the arbitral process. In contrast to violations of the athlete's right to be heard, the "*arbitration cannot substitute the presence (in its widest definition) of a representative of the athlete at the opening of the B-sample.*" *Tchachina*, ¶ 33. And where – as here – the rules establish a strict liability regime with respect to doping, "*[i]t is of fundamental importance . . . that the rules have been clearly followed.*" (*CAS 2003/A/477 Beaton & Scholes v Equestrian Federation of Australian Limited*, ¶ 29, citing *CAS 94/129 USA Shooting & Q. v International Shooting Union*).

9.10 In the present case, it is undisputed that Respondent did not inform Appellant that it intended to have the B sample analyzed at all – much less inform her of where and when that analysis would take place – and it did not give Appellant an opportunity to attend the opening and analysis of her B sample in person or by way of a representative. Under these circumstances, her B-sample results must be disregarded. As a consequence, the analysis of Appellant's B sample cannot validly confirm the presence of clenbuterol found in Appellant's A sample and Respondent has therefore failed to establish an anti-doping violation under Article 2.1.2 of the 2009 IJF ADR.

9.11 In reaching this conclusion, the Panel rejects Respondent's argument that Appellant cannot complain about Respondent's failure to inform her of the B-sample analysis because she had waived her right to have her B sample analyzed. Even assuming *arguendo* that Appellant's waiver was valid (an issue the Panel does not need to decide), the conclusions of the Panel would not change. As discussed above (¶¶ 9.6-9.7), the athlete's right to be informed that her B sample will be analyzed and the time and place of the analysis – as well as her right to attend the opening and analysis in

person or through a representative – applies regardless of whether it is the athlete or Respondent who requests testing of the B sample.

9.12 The Panel further rejects Respondent's efforts to distinguish this case from *Varis* and *Tchachina*. Respondent contends that those cases are not on point and do not support disregarding the results of Appellant's B-sample analysis because – unlike Appellant – the athletes in those cases had requested that their B samples be analyzed. Although Appellant here initially requested analysis of her B sample, Respondent contends that she later withdrew her request. The Panel finds this to be a distinction without a difference.

9.13 As a preliminary matter, and as noted above (¶¶ 9.6-9.7), under the relevant provisions of the 2009 IJF ADR Respondent must inform the athlete that her B sample will be analyzed and the time and place of the analysis. Respondent must also afford the athlete an opportunity to attend the opening and analysis in person or through a representative. And these rights apply regardless of whether it is the athlete or Respondent who requests analysis of the B sample. As a consequence, even assuming *arguendo* that Appellant validly withdrew her request to have her B sample tested, her withdrawal is not relevant because Respondent itself elected to have the B sample analyzed, triggering Appellant's rights to be informed and to be present. The principles articulated in *Varis* and *Tchachina* apply to this case.

9.14 Moreover, where an athlete declines to have her B sample tested, Respondent has no need to have the B sample analyzed on its own initiative. This is because, as discussed above (¶¶ 9.3-9.4), where the athlete waives analysis of the B sample, and the B sample is not analyzed, Respondent can rely on the results of the A-sample analysis alone to establish an anti-doping violation under Article 2.1.2 of the 2009 IJF ADR. When Respondent nevertheless decided to exercise its own right to have the B sample tested, this triggered Appellant's rights. Respondent has never explained why it elected to open and test the B sample or why it did not inform Appellant.

9.15 The Panel likewise rejects Respondent's argument that Appellant should be estopped (*venire contra factum proprium*) from claiming that the B-sample analysis is invalid because she admitted that clenbuterol was detected in her A sample and only contended that the B-sample test was invalid after receiving notice of her two-year suspension (citing ATF 121 III 350 *Fédération Suisse de Lutte Amateur v Grossen* and ATF 119 II 386 *F. S.p.A. et M. S.p.A. v M. et Tribunal arbitral*). However, even assuming *arguendo* that Appellant validly admitted that clenbuterol was detected in her A sample (an issue we need not reach), Respondent's estoppel argument fails.

9.16 As a preliminary matter, the precedents Respondent cites either do not make reference to estoppel at all (ATF 119 II 386) or concern facts so dissimilar to the facts at issue here as to be unhelpful in the context of this case (cf. ATF 121 III 350 concerning the

power of a sport's governing body to change its rules for selecting athletes for competition during the selection process).

9.17 Moreover, there is nothing inconsistent about Appellant complaining that Respondent violated her rights by not informing her of its decision to have the B sample tested and inviting her to be present – something Appellant only learned after Respondent had already taken its decision to suspend her. If Respondent nevertheless decided to exercise its right to open and analyze the B sample, Appellant had the right to be informed and be present, as explained above (¶¶ 9.6-9.7).

9.18 Further, Respondent has not even attempted to articulate how it could legitimately expect, in light of Appellant's admission concerning her A sample, that Appellant intended to waive her fundamental right to be informed and present were Respondent later to elect to test her B sample. Nor has Respondent even attempted to argue that it relied on Appellant's A-sample admission at all, much less that it relied on that admission to its detriment. On the contrary, Respondent demonstrably did not rely on Appellant's admission, but rather decided to have her B sample tested on its own initiative.

9.19 Finally, as noted above (3.5), much later Respondent in its Answer offered Appellant the opportunity to have her B sample retested and invited the Panel to draw an adverse inference against Appellant should she decline Respondent's offer. Appellant declined Respondent's offer, and the Panel declines its invitation to draw an adverse interest against her for doing so. As explained above (¶ 9.9), Respondent's denial of Appellant's right to be present for the *opening* and analysis of her B sample cannot be remedied through the arbitral process because the seal on the B sample was already broken long ago in her absence.

CONCLUSION

9.20 The Panel accordingly annuls Respondent's decision dated 4 April 2010 because Appellant was not given the opportunity to be present herself or by her representative for the opening and testing of her B sample in violation of Articles 7.1.4 and 7.1.6 of the 2009 IJF ADR.

9.21 Appellant had a fundamental right to be present whenever her B sample was analyzed, regardless of who asked for it.

9.22 Violation of this essential right renders the B-sample analytical results invalid.

9.23 As those results therefore cannot validly confirm the A-sample analytical results, Respondent has not established a doping violation pursuant to Article 2.1.2 of the 2009 IJF ADR.

9.24 As the Panel has decided to uphold Appellant's appeal and annul Respondent's decision dated 4 April 2010 on this basis, it is not necessary for the Panel to address any of Appellant's other grounds for appeal.

9.25 The Panel wishes to emphasize that the present decision in favor of the Appellant should not be interpreted as an exoneration of her. In particular, the Panel is not declaring that the Appellant did or did not, voluntarily or not, ingest clenbuterol. The Panel is merely concluding that the Respondent has not been able to prove, to the comfortable satisfaction of the Panel, diligent adherence to the rules set out in the applicable anti-doping regulations.

9.26 The Panel confirms that Appellant's results at the 2009 IJF World Championships are reinstated, she is to retain the gold medal won at those Championships and she is to be reinstated to sports participation with immediate effect.

9.27 Given the above conclusion and analysis, the Panel finds no reason to address the Parties' further arguments and considers unnecessary for the Panel to consider the other requests submitted by the Parties. Accordingly, all other prayers for relief are rejected.

10. (…)

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal of Ms Tong is upheld.

2. The IJF's decision dated 4 April 2010 is annulled.

3. Ms Tong's results at the 2009 IJF World Championships are reinstated, she is to retain the gold medal won at those Championships and she is to be reinstated to sports participation with immediate effect.

4. (…)

Place of arbitration: Lausanne, Switzerland
Date: 23 February 2011

THE COURT OF ARBITRATION FOR SPORT

Ercus Stewart SC
President of the Panel

Michele Bernasconi
Arbitrator

Hans Nater
Arbitrator

Jennifer Kirby
Ad hoc Clerk