Arbitration CAS 2020/A/6764 Rafaela Lopes Silva v. International Judo Federation (IJF), award of 21 December 2020

Panel: Prof. Luigi Fumagalli (Italy), President; Mr Jeffrey Benz (USA); Prof. Ulrich Haas (Germany)

Judo
Doping (fenoterol)
Tasks of a DCO/Chaperone
Establishment of the route of ingestion

1. **A Doping Control Officer (DCO)/chaperone may at his/her discretion consider any reasonable request by the relevant athlete for permission to delay reporting to the Doping Control Station following acknowledgment and acceptance of notification and may grant such permission if such athlete can be continuously chaperoned and kept under direct observation during the delay. The task of a chaperone is to notify the relevant athlete (if so entrusted) and to observe said athlete, accompanying him/her after notification, in order to preserve the integrity of the control procedure, but without an obligation to interfere with the normal activities that follow a competition, provided that said athlete remains under the chaperone's control. It is not the duty of a chaperone to actively prevent the athlete from undertaking activities that could lead him/her to return an Adverse Analytical Finding (AAF); it is the athlete's responsibility, even after notification of a test and while under control of a chaperone, in this context as in all others to ensure that no Prohibited Substance enters his or her body.**

2. **An athlete may not merely speculate as to the possible existence of a number of conceivable explanations for the AAF, such as sabotage, manipulation, contamination, pollution, accidental use, and then further speculate as to which appears the "most likely" or the "least unlikely" of those possibilities to conclude that such possibility excludes "Fault". A protestation of innocence, the lack of sporting incentive to dope, or mere speculation by an athlete as to what may have happened does not satisfy the required standard of proof (balance of probability) and the mere allegation of a possible occurrence of a fact cannot amount to a demonstration that that fact did actually occur. Unverified hypotheses are not sufficient. Instead, an athlete has a stringent requirement to offer concrete and persuasive evidence that the explanation he/she offers for an AAF is more likely than not to be correct, by providing specific, objective and persuasive evidence of his/her submissions. Each case is to be judged in light of its peculiarities.**

I. BACKGROUND

1. Rafaela Lopes Silva (the "Athlete" or the "Appellant") is a Brazilian international-level athlete born on 24 April 1992. The Athlete is competing in the sport of Judo and is affiliated to the Brazilian Judo Federation (*Confederação Brasileira de Judô* - "CBJ"), which in turn is a member of the International Judo Federation. In her career, the Athlete participated in several important competitions, achieving remarkable results: *inter alia*, she won the gold medal at the World Judo Championship in 2013, becoming the first Brazilian world champion in Judo, and at the 2016 Summer Olympic Games in Rio de Janeiro, in the -57 kg weight division.

2. The International Judo Federation ("IJF" or the "Respondent") is the world governing body of the sport of Judo. The IJF is a signatory to the World Anti-Doping Code (the "WADC") and has adopted the IJF Anti-Doping Rules (the "ADR") to implement its responsibilities under the WADC. The IJF has delegated the implementation of certain areas of its anti-doping programme to the International Testing Agency ("ITA"). Such delegation includes, amongst others, the results management and subsequent prosecution of adverse analytical findings arising out of samples collected from judokas. ITA is a not-for-profit foundation, with seat in Lausanne, Switzerland, and is representing the IJF in the present proceedings.

3. The Appellant and the Respondent are the "Parties".

II. FACTUAL SUMMARY

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

5. On 9 August 2019, the Athlete underwent an anti-doping control during the 2019 Panamerican Games (the "Games"), in Lima, Peru, held under the authority of Panam Sports Organisation ("PASO"), after competing in, and winning, the final bout in the -57kg category (the "Event"). The doping control form (the "DCF") signed by the Athlete contained no declaration regarding medications used or blood transfusions received in the preceding three months, and no comments with respect to the collection procedure. The DCF shows that the Athlete was notified of the doping control at 18:09, arrived at the doping control station at 19:06, gave a partial sample at 19:21 and sealed the A and B bottles at 19:53.

6. On 17 August 2019, the Anti-Doping Laboratory of Laval, Quebec, Canada (the "Laboratory") reported an adverse analytical finding (the "AAF") for the presence in the A sample of the Athlete of *Fenoterol Metabolite* (the "Substance"), *i.e.* of a Beta-2 Agonist, prohibited as a specified substance in- and out-of-competition under S3 of the list of prohibited substances and methods published by the World Anti-Doping Agency ("WADA") for 2019 (the "Prohibited List"). The Laboratory, while reporting the AAF, *"roughly estimated"* the concentration of the Substance in

the Athlete's A sample at 1 ng/mL.

7. On 28 August 2019, the PASO Disciplinary Review Panel (the "PASO Panel") notified the Athlete of the AAF via the Brazilian National Olympic Committee (*Comitê Olímpico do Brasil* – "COB"). The Athlete was also informed of her right to either accept the AAF or request the B sample analysis.

8. On 31 August 2019, the Athlete underwent another doping control at the 2019 Judo World Championships in Tokyo, Japan. The sample analysis returned a negative result.

9. On 13 September 2019, the B sample provided at the Games was analysed, as requested by the Athlete. The result confirmed the finding of the A sample analysis.

10. On 20 September 2019, the PASO Panel held a hearing via videoconference.

11. On 23 September 2019, the PASO Panel notified the Athlete and the IJF of its decision:

> *"1. To disqualify athlete Rafaela SILVA from all competitions in which she participated during the Lima 2019 Pan American Games and order the return the medal that she won in the -57 kg event of the judo competition.*
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> *(…).*
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> *3.* [sic] *To send the complete file of the case to the International Judo Federation for its use as it deems appropriate".*

12. On 27 September 2019, ITA, acting on behalf of the IJF, informed the Athlete that her AAF was being brought forward as an anti-doping rule violation pursuant to Articles 2.1 and/or 2.2 of the ADR. The Athlete was also *inter alia* (i) informed of the applicable consequences of the AAF, (ii) given the opportunity to provide Timely Admission and/or Substantial Assistance, as defined in the ADR, and (iii) requested to provide explanations for the presence of the Substance in her sample.

13. On 30 September 2019, the Athlete replied to ITA and requested to be provided with the laboratory documentation packages of her A and B sample analyses.

14. On 7 October 2019, ITA provided the Athlete with the requested documents. The laboratory documentation package indicated that the concentration of the Substance found in the Athlete's samples had been measured at 0.98 ng/mL for the A sample, and at *"~ 1 ng/mL"* for the B sample.

15. On 21 October 2019, the Athlete submitted her explanation for the presence of the Substance in her samples.

16. On 25 October 2019, the Athlete was informed that ITA had decided to impose on her a

provisional suspension pursuant to Article 7.9.2 of the ADR, with immediate effect, and requested the Athlete to provide more evidence to further substantiate her allegations.

17. On 8 November 2019, the Athlete submitted supplementary information and requested a hearing to decide on her provisional suspension.

18. On 8 November 2019, ITA offered the Athlete to hold an expedited final hearing instead of the provisional hearing and requested the Athlete to confirm whether she agreed to such procedure. The Athlete was offered to bring her case to the Court of Arbitration of Sports Anti-Doping Division (the "CAS ADD") according to the collaboration agreement between the IJF and the CAS ADD.

19. On 12 November 2019, the Athlete confirmed that she agreed to an expedited final hearing, but declined to have her case heard by the CAS ADD and requested that a hearing panel be convened by the IJF as per the applicable ADR.

20. On 21 November 2019, ITA informed the Athlete that it would request the IJF to convene the IJF Hearing Panel (the "IJF Panel") and that it would refer the case to such IJF Panel.

21. On 29 November 2019, ITA filed its petition before the IJF Panel, seeking the imposition of a two-year ineligibility period, and the resulting disqualification.

22. On 7 January 2020, the Athlete filed her reply to the ITA's petition. The Athlete reiterated her previous position.

23. On 15 January 2020, a hearing was held by videoconference before the IJF Panel. At the hearing the Parties, also through their experts (Prof. L.C. Cameron for the Athlete and Prof. M. Saugy for ITA), stated their respective position with regard to the AAF.

24. On 22 January 2020, the IJF Panel issued its decision (the "Decision") as follows:

> *"Given the nature of the substance, "Specified Substance", IJF's burden of proof extended only to establish whether an Anti-doping Rule Violation (ADRV) has occurred or not. By the analysis of the B Sample that confirmed the A Sample analytical result, the IJF met the required proof to the comfortable satisfaction, therefore the ADRV was established.*
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> *Once an ADRV has been established by the IJF, the burden of proof then shifted to the athlete to prove either that the ADRV should not be considered as such, or that the ADRV was unintentional or that the applicable period of Ineligibility can be reduced, suspended or eliminated on the grounds provided for in the IJF ADR.*
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> *Any elimination or reduction other than Substantial Assistance requires that the Athlete be able to establish how the prohibited substance entered her body.*
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> *The IJF Hearing Panel, based on the written expert opinions that were submitted to the case and the*

discussion of the Experts during the Hearing concluded that the conditions in IJF ADR Art. 3.1 were not met, the Athlete failed to establish with confidence of at least 51% probability (balance of probability – IJF ADR Art. 3.1) how the substance entered her body.

Consequently, the Hearing Panel concluded that the Athlete failed to establish how the substance entered her body therefore there is no ground for applying either IJF ADR 10.4 or 10.5 that state the possibilities of potential elimination or reduction of ineligibility.

The IJF Hearing Panel concluded that therefore the applicable paragraph of the IJF ADR is Art. 10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance of Prohibited Method. Given that the substance is classified as a Specified Substance, the applicable ineligibility period is two (2) years commencing from the day of the provisional suspension, 25 October 2019 (IJF ADR Art. 10.2.2 and 10.11.3).

The IJF Hearing Panel considered the followings:

- *The Athlete did not dispute the final decision of PASO.*

- *Both A and B Samples resulted in the same analytical finding.*

- *The substance has no threshold level of report, it constitutes an anti-doping rule violation in any detected quantity at all times (both in and out of competition).*

- *The Experts concluded multiple times during the Hearing that there is not enough data in the literature to back up either side's opinion. However, as the burden of proof lies on the Athlete to eliminate any doubt about how the prohibited substance entered her body, consequently the Athlete failed to prove what caused the AAF.*

- *The Hearing Panel took into consideration that the Athlete's sample taken during the Judo World Championships Tokyo did not contain any prohibited substance.*

The IJF Hearing Panel recommended:

1. *disqualification of the Individual result obtained in the Judo World Championships Tokyo, JPN on 27 August 2019, including forfeiture of medal, points and prizes (IJF ADR Art. 10.8),*

2. *disqualification of the Athlete's Mixed Team result obtained in the Judo World Championships Tokyo, JPN on 1 September 2019, including forfeiture of medal, points and prizes (IJF ADR Art. 10.8),*

3. *disqualification of the result obtained in the Brasilia Grand Slam, BRA on 6 October 2019, including forfeiture of medal, points and prizes (IJF ADR Art. 10.8),*

4. *no disqualification of the Team result for the rest of the Brazilian Team in the Judo World Championships Tokyo, JPN on 1 September 2019 (IJF ADR Art. 11.2.3)*

5. *ineligibility for 2 years commencing from the date of the provisional suspension, 25 October 2019 (IJF ADR Art. 10.2.2 and 10.11.3).*

(…).

The period of ineligibility shall be from 25 October 2019 – 24 October 2021 (incl.)".

25. On 29 January 2020, following a request of the Athlete's new lawyers, ITA transferred the complete case file to the Athlete's legal representatives.

III. PROCEDURE BEFORE THE COURT OF ARBITRATION FOR SPORT

26. On 14 February 2020, the Athlete filed a statement of appeal with the Court of Arbitration for Sport (the "CAS"), pursuant to the Code of Sports-related Arbitration (the "Code"), to challenge the Decision. The statement of appeal contained, *inter alia*, the appointment of Mrs Cameron Myler as an arbitrator.

27. On 17 February 2020, the CAS Court Office forwarded the statement of appeal filed by the Athlete to the IJF.

28. On 20 February 2020, the Athlete filed her appeal brief pursuant to Article R51 of the Code. The appeal brief had attached 27 Exhibits (A-1 to A-27), which included the witness statements signed by the Appellant herself, Mrs Catierê Moya, Mrs Tamires Crude, Mrs Alessandra Salgado, Mrs Beatriz Rodrigues de Souza, Rev Lineu Ribeiro, Mrs Roberta Lima, Sensei Geraldo Bernardes, Dr Roberto Lohn Nahon, Dr Fernando Gaya Solera and Mr Gustavo Moreira, as well as expert reports signed by Dr Ronaldo Abud and Prof. Fernando Fonseca. The appeal brief also contained a request for evidentiary proceedings as follows:

"189. Salbutamol (a substance permitted by WADA) has a molecular structure similar to Fenoterol (a specified substance), both being Beta-2 Agonists, and possibly causing confusion during the laboratory analysis.

190. Also, according to WADA's Document TD2019MRPL, the minimum concentration level required by the laboratories accredited by WADA is 20 ng/mL for Fenoterol: (…).

191. Considering that Rafaela Lopes Silva never used Fenoterol and that only 0,98 ng/mL was found in her urine sample (an amount twenty times lower than the minimum concentration for detection), the Appellant does not discard the possibility of an error by the laboratory.

192. Being that the case, in accordance with art. R44.3 of the Code of Sports-Related Arbitration, the Appellant wishes that her urine samples are sent to a different laboratory accredited by WADA, so that a new test can be run.

193. Keeping in mind the athlete's right to accompany the opening of her urine sample, the Appellant

suggests that the latter is sent to the laboratory accredited by WADA in Rio de Janeiro – Brazil, due to the costs of this operation".

29. On 6 March 2020, the Respondent informed the CAS Court Office that it would be represented by ITA in these proceedings.

30. On 11 March 2020, the Respondent nominated Prof. Ulrich Haas as arbitrator.

31. On 16 March 2020, the Appellant noted that she had understood by mistake that she had to appoint an arbitrator from the CAS ADD list of arbitrators. The Appellant therefore, having realized that she had to appoint an arbitrator from the CAS general list, informed the CAS Court Office that she wished to appoint Mr Jeffrey Benz as arbitrator.

32. On 20 March 2020, the Respondent informed the CAS Court Office that it did not agree to the amended nomination of an arbitrator by the Appellant.

33. On 23 March 2020, the Appellant noted that she would be pleased to confirm her original appointment, if allowed by the President of the CAS Appeals Arbitration Division.

34. On 23 March 2020, the Respondent filed its answer, pursuant to Article R55 of the Code. The answer had attached 46 Exhibits (R-1 to R-46), which included the witness statement signed by Dr Rodrigo Furtado and Mrs Beatriz Rodriguez de Souza, as well as an expert opinion of Prof. Martial Saugy, and contained the request that the Appellant's petition for re-analysis of her samples be dismissed.

35. In a letter to the CAS Court Office dated 30 March 2020, the Appellant addressed a number of procedural issues and requested the President of the CAS Appeal Arbitration Division the following:

"a. if the arbitrator nomination from a wrong list of CAS arbitrators (in the case of the ADD List) requires the replacement of the arbitrator or if the nomination can be maintained;

b. a new test in the urine of Rafaela Lopes Silva, in a different WADA laboratory, is authorized, considering that only 0.98 nanograms of fenoterol were found in the athlete urine sample and WADA established a minimum limit of 20 nanograms of detection for its laboratories (the new test can occur in parallel to the procedure and the defense will bear the costs, therefore without prejudice to the IJF/ITA);

c. in view of the new documents presented by the International Testing Agency, innuendos and accusations authorize the defense to supplement or amend its requests and arguments, to produce new exhibits, and to specify further evidence;

d. finally, the defense reiterates its desire to exercise its right to a fair and presential hearing with the participation of Rafaela Lopes Silva, witnesses and expert witnesses".

36. On 31 March 2020, the Respondent addressed in a letter to the CAS Court Office the issues

raised by the Appellant in her letter of 23 March 2020.

37. On 6 April 2020, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had decided to grant the Appellant's request to amend her original appointment of an arbitrator on the grounds that arbitrators appearing on the special list of arbitrators for CAS ADD may not serve as an arbitrator in any procedure conducted by the CAS Appeals Arbitration Division.

38. By communication dated 14 April 2020, the CAS Court Office informed the Parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Prof. Luigi Fumagalli, President of the Panel; Mr Jeffrey Benz and Prof. Ulrich Haas, arbitrators.

39. On 16 April 2020, the CAS Court Office advised the Parties that:

- the Panel had decided to hold a hearing in this matter, but that whether the hearing could take place in Lausanne, Switzerland or by video or teleconference would depend upon the evolution of the situation in respect of the COVID-19 pandemic and the related governmental directions;

- considering the impossibility to hold a hearing in person in Lausanne in the foreseeable future, and in order to clarify the relevant facts and legal issues at stake, the President of the Panel had decided to grant the Parties a second round of written submissions pursuant to Article R56 of the Code;

- the Appellant's request that her urine samples be re-tested by a different laboratory accredited by WADA was denied, for the reasons to be set out in the final award.

40. On 4 May 2020, the Appellant filed her reply, together with 7 Exhibits (A-28 to A-34), which included a witness statement of Sensei Mario Tsutsui, a second witness statement of Mr Gustavo Moreira, a second witness statement of Mrs Beatriz Rodrigues de Souza, and a second expert opinion jointly signed by Dr Abud and Prof. Fonseca.

41. On 19 May 2020, the Respondent lodged a rejoinder, containing, *inter alia*, amendments to the requests for relief specified in the answer to the appeal.

42. On 8 June 2020, the Panel informed the Parties that a hearing in these proceedings would be held in Lausanne on 10 September 2020.

43. On 5 August 2020, the CAS Court Office issued, on behalf of the President of the Panel, an order of procedure (the "Order of Procedure"), which was signed by the Appellant on 20 August 2020 and by the Respondent on 19 August 2020.

44. On 5 August 2020, the Appellant's counsel requested information from the CAS Court Office as to the holding of the hearing, in light of the ongoing pandemic crises and the ensuing travel

restrictions.

45. On 6 August 2020, the CAS Court Office informed the Parties that, in light of the pandemic crisis, the Panel was inclined to proceed with a video-hearing, adjusting its start time in order to take into account the different time zones.

46. On 19 August 2020, the Respondent in a letter to the CAS Court Office brought to the Panel's attention *"a recent matter which touches upon (…) the availability of Dr. Rodrigo Furtado (…) as one of the witnesses of the Respondent"*. More in details, the Respondent indicated [footnote omitted] that:

> *"1. On 5 August 2020, the Respondent's witness Dr Furtado was informed by the Brazilian Olympic Committed that the Appellant has initiated proceedings against him for alleged breach of medical ethics (in particular, breach of duty of doctor-patient confidentiality) before the Brazil Medical Board ("Professional Deontology Proceedings"). We understand that the primary allegation against Dr Furtado is that by providing medical information concerning the Appellant in these proceedings (that is Exhibit R-39.2 of the Answer of the Respondent dated 23 March 2020), Dr Furtado has allegedly breached his duty of confidentiality towards the Appellant. Dr Furtado has informed the ITA of the Professional Deontology Proceedings on 5 August 2020.*[…]
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> *2. Whilst neither the Respondent or the ITA are acting as Dr. Furtado's legal representative in the parallel proceedings and are not involved in it whatsoever, it is our opinion that the allegations against Dr Furtado are unfounded as any information shared as part of confidential CAS proceeding is treated as privileged and does not breach doctor-patient confidentiality. Moreover, upon an assessment of Exhibit R-39.2, it is evident that this document does not contain medical values or sensitive medical information. In addition, it is noteworthy that as part of the CAS Appeal, the Appellant herself has shared extensive medical documentation containing details of her physiological and pathological parameters, therefore we find that she has waived any doctor-patient privilege insofar as she cannot cheery-pick what information she wants to disclose and which she wants to keep in confidence.*
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> *3. We believe that the Professional Deontology Proceedings against Dr Furtado have been initiated with a view to discouraging the latter against giving testimony before this Panel. The Appellant is well aware that the testimony of Dr Furtado debunks the explanations of the Appellant and proves that the Appellant has unequivocally committed an Anti-Doping Rule Violation. Hence, the nature and timings of the unwarranted proceeding.*
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> *4. Currently, Dr Furtado has informed us that he would still be available to give his testimony before the Panel. However, depending on how the Professional Deontology Proceedings progress, we believe that it may impact his ability to depose before this Panel insofar as Dr Furtado would not want to further fuel the Appellant's claims before the Brazil Medical Board. In the event that Dr Furtado is unable to act as witness, in application of R44.2 of the Code of Sports Related Arbitration, we respectfully ask the Panel to exempt Dr Furtado from appearing at the hearing and instead rely solely on his written statement. We will endeavour to keep the Panel informed of Dr Furtado's availability as soon as we have any further information".*

47. On 20 August 2020, the Appellant declared her availability for a hearing to be conducted on-

line, provided that both Parties participate by video-conference. At the same time, the Appellant addressed the issue regarding the "*Respondent Witness Ethical Violation Proceedings*" as follows:

"One of the athlete's defense thesis about the origin of the specified substance "fenoterol" in her body stems from the breach of the medical safety protocol by the former doctor of the Brazilian judo team, Dr. Rodrigo Furtado.

Right after notification of the adverse analytical result, Rafaela Silva's defense attempted to contact Dr. Rodrigo Furtado, who refuse to answer calls or answer messages, as he confirms in his written statement given to ITA/IJF (…).

The circumstances are very suspicious, with evidence in the files that (i) Dr. Rodrigo Furtado treated athlete Beatriz Rodrigues for asthma while she was sharing a room with Rafaela Silva; (ii) Dr. Rodrigo Furtado irregularly instructed Beatriz Rodrigues to take her own asthma medicine to Lima, when Team Brazil was officially taking permitted asthma medication; (iii) Dr. Rodrigo Furtado treated Beatriz Rodrigues outside the medical area, possibly exposing Rafaela Silva.

It happens that, Dr. Rodrigo Furtado, upon learning that his flaws in the Team Brazil Medical Protocol during Pan de Lima 2019, was apparently not comfortable with the evidence presented.

In this sense, Dr. Rodrigo Furtado did not limit himself to defending his performance within the medical protocols or to narrating facts he witnessed during the Pan American Games in Lima, as a normal witness would do.

Apparently acting for reasons unknown to the Appellant, Dr. Rodrigo Furtado performed a very serious act by spontaneously forwarding a medical record from Rafaela Silva to ITA/IJF.

In Brazil, in the same way that information between lawyers and clients is privileged, doctors are ethically obliged to keep their patients' information confidential.

The medical record was not used to defend the performance of Dr. Rodrigo Furtado. In fact, it was used to attack Rafaela Silva because in that document there is a mention of the use of supplements (allowed by WADA) and the defense stated in the Appeal that Rafaela Silva is an athlete who practically does not use supplements.

Therefore, contrary to what ITA/IJF suggests, ethical representation against Dr. Rodrigo Furtado does not prevent him from giving testimony at the hearing on September 10, 2020. The defense vehemently refutes the ITA/IJF suggestion that the Ethical Representation has been used to discourage the witness to testify.

The Ethical Representation was initiated only because Dr. Rodrigo Furtado violated the Code of Ethics of the Brazilian Medicinal Society.

On the other hand, the ITA / IJF's claim that it was only after July 15, 2020 that they became aware of these facts is simply not true. In this sense, Dr. Rodrigo Furtado's ethical violation was widely communicated in a letter sent to CAS on March 30, 2020, verbis: (…).

As if that were not enough, on May 1, 2020, the Appellant not only informed the procedure for ethical violation, but also enclosed a copy of the representation petition: (…).

However, the ITA/IJF has never commented on this fact until now, just before the hearing. Apparently, they are seeking to victimize a doctor who broke the medical protocol of Team Brazil in Lima and who violated the Brazilian Code of Medical Ethics.

Finally, by reading the terms of the Ethical Violation Report (…), it is easy to conclude that there is no obstacle or request that could prevent Dr. Rodrigo Furtado from participating in the hearing on September 10, 2020, quite the contrary, the defense wants him to participate in order to explain his actions.

With all due respect, the victim of the breach of the medical protocol and the violation of the Medical Code of Ethics is the athlete Rafaela Silva, not the doctor Dr. Rodrigo Furtado. Considering the ethical failures above, Dr. Rodrigo Furtado's testimony, including his written statement already annexed by ITA - in view of the defense – has no credibility and it would make no sense to take any measure to obstruct his testimony".

48. On 31 August 2020, the CAS Court Office confirmed that the scheduled hearing would take place by video-conference.

49. A hearing was held on 10 September 2020 by video link. The Panel was assisted at the hearing by Mrs Delphine Deschenaux-Rochat, Counsel to the CAS.

50. The Panel was joined at the hearing:

    i. for the Appellant: by the Appellant herself, assisted by Mr Marcelo Franklin and Mr Thomas Mattos de Paiva, counsel, and by Mrs Franziska Becskehazy, interpreter;

    ii. for the Respondent: by Mrs Andrea Ember, IJF Anti-Doping Coordinator, assisted by Mrs Dominique Leroux and Mrs Ayesha Talpade, ITA legal department, and by Mrs Allana Pereira, interpreter.

51. At the hearing, preliminarily, the Parties confirmed that they had no objection as to the appointment of the Panel and the holding of the hearing by video connection. Then, after opening submissions by the Parties in support of their respective cases, the Panel heard the depositions[1] of:

    i. Dr Roberto Lohn Nahon, former chief doctor of the COB, who testified about the breach by Mrs Beatriz Rodriguez De Souza and Dr Rodrigo Furtado of the medical protocol for the Brazilian team during the Games;

    ii. Dr Fernando Solera, head of Brazilian Football Federation Anti-Doping Department,

[1] The Panel emphasizes that it considered the entirety of the declarations made at the hearing, even though only a summary of such declarations is set out in this Award.

who testified on the role of a *chaperone* in connection with anti-doping testing. Dr Solera underlined his long experience in anti-doping matters and indicated that the role of a *chaperone* is to protect the athlete, avoiding that he/she is given products containing prohibited substances, and to guide him/her to the doping control station, whose exact location might not be known to the athlete;

iii. Mr Mario Tsutsui, who testified about the participation of the Athlete to the Games, a competition felt not to be important by other athletes, who had decided not to take part;

iv. Dr Rodrigo Furtado, who answered questions on cross-examination by the Appellant about his qualifications and her treatment of Mrs Beatriz Rodriguez De Souza. In that regard, Dr Furtado declared that he exchanged messages with Mrs Rodriguez with respect to some respiratory problems (not asthma) affecting her, advising her to take the most appropriate medicine (*i.e.*, Aerolin), containing non-prohibited substances. In his recollection, Mrs Rodriguez had not bought the product he suggested (or in any case he did not see any product brought by Mrs Rodriguez from Brazil), and therefore she used his personal inhaler a couple of days before the start of the judo competitions at the Games. Dr Furtado indicated that he informed the CBJ of the administration of Aerolin to Mrs Rodriguez, and that it was the CBJ's duty to inform the COB of such administration;

v. Mrs Beatriz Rodriguez De Souza, who testified about her use of a medicine at the Games. In more details, Mrs Rodriguez declared that:

- she had a respiratory crisis on 5 August 2019, and therefore visited a hospital in Sao Paulo. In that occasion, she was not administered any substance, and chiefly she was not advised to use Fenoterol;

- she sent a message to Dr Furtado after leaving the hospital;

- on the basis of the indications received, in order to treat her problems, she bought Aerolin (paid in cash) before traveling to the Games, a product she took with her together with a vaporizer;

- at the Games, she used Aerolin (from the inhaler she had bought) and the vaporizer with saline; she did not use Fenoterol;

- there is no possibility that Dr Furtado had administered a substance of which she was not aware or which she had not controlled;

- the weather at the Games was bad and rainy;

- she shared a small room with the Athlete and the windows always remained closed;

- she shared a bottle with the Athlete.

52. The Appellant, then, waived the hearing of Mr Gustavo Moreira and of Mrs Alessandra Salgado, with the consent of the Panel and on the basis of the indication that the Respondent had no questions for them. Their respective witness statements were indicated as included in the arbitration file by the Panel.

53. The Panel, after the witnesses, heard, by way of conferencing, the declarations of the experts indicated by the Parties: Dr Ronaldo Abud and Prof. Fernando Fonseca for the Appellant and Prof. Martial Saugy for the Respondent:

    i. Dr Abud explained that the analytical results are compatible only with a "contamination", since, in the event of an intentional administration, the concentration found would be 20,000 times higher. In fact, taking into account the half-life of the Substance, and making a calculation backwards, starting from the concentration actually detected, the intentional administration of a normal dose of Fenoterol should have taken place several days prior to the Event, at a time it would not have any meaning. In addition, there is no evidence that the Athlete used the Substance to lose weight. The opinion expressed by the Respondent's expert is based on a study lacking sufficient scientific basis;

    ii. Prof. Fonseca described the metabolization and excretion process of the Substance and stressed that only "contamination" can explain the concentration found in the Athlete's samples;

    iii. Prof. Saugy denied the "contamination" scenarios and underlined that for a transdermal transmission it is necessary that a massive quantity of product is applied, much larger than the quantity that could be transmitted in the scenario described by the Athlete (contact with a supporter).

54. Finally, the Appellant herself rendered some declarations concerning her background and experience as an athlete, her drug testing history, the circumstances surrounding her positive drug test, the circumstances surrounding her contamination, and issues related to her future competition schedule.

55. At the conclusion of the hearing, after cogent submissions in support of their respective cases, the Parties confirmed that they had no objections in respect of their right to be heard and to be treated equally in the arbitration proceedings.

IV. THE POSITION OF THE PARTIES

56. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Panel, indeed, has carefully considered all the submissions made by the Parties, even if there is no specific reference to those submissions in the following summary.

A. The Position of the Appellant

57. In her statement of appeal, the Appellant requested the CAS:

> *"a) to rectify the decision passed by the IJF Doping Panel, as to:*
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> *a.1.) apply the provisions of IJF ADR Rule 10.4 and 10.5, taking due consideration to all mitigating circumstances applicable to the case, specially that (i) the Athlete produced corroborating evidence, which established by a balance of probabilities of how the specified substance entered her body and had no connection with performance enhancement; (ii) that the IJF Doping Panel decision did not follow the principal of proportionality and is not consistent with Jurisprudence of TAS-CAS, in similar cases, according to which involuntary/accidental contamination by specified substances has triggered application of shorter ineligibility periods in comparison to the present case;*
>
> *b.2.) application of IJF ADR 10.11.1 (Delays not attributable to the Athlete or other Person) as to establish the period of ineligibility as early as the date of the Sample collection, which has not been taken into consideration by the IJF Doping Panel".*

58. In the appeal brief, then, the Appellant requested the Panel to rule as follows (emphasis omitted):

> *"a. set aside the IJF Panel Decision issued on 22 January 2019;*
>
> *b. Since there was no fault or negligence of Rafaela Lopes Silva, that had no way of knowing her roommate could contaminate her (simply impossible), neither physical contact with persons at the competition venue, and could not have done reasonably anything else to avoid the outcome, besides the provisional voluntary suspension already served, no further sanction should be applied to her;*
>
> *c. Only in case the panel considers that the athlete acted with any degree of fault or negligence, it should be considered minimum and the sanction applied should be a warning, or alternatively should be considered the suggested three months of sanction of ineligibility;*
>
> *d. Must be pondered the principle of proportionality of the sanctions, considering that Rafaela Lopes Silva has been training during for more than 3 years for the Tokyo 2020 Olympics and because of her advanced age (28 years) probably this will be her last Olympic Games participation;*
>
> *e. Once the positive test took place on 9 August 2019, there was a first instance with a hearing before the Panam Sports, a second instance and hearing before the IJF and no delays can be attributable to the athlete, any period of suspension should start from sample collecting date according do WADA Code article 10.11.1;*
>
> *f. In any case must be considered the period of ineligibility already served by Rafaela Lopes Silva, that he had gone through more than 30 exams with any problems (plus 3 biological passports), that has already suffered very much, has been public humiliated, lost her Club contract, has little career time left and needs to be eligible in order to financially support her family;*

g. Determine that the following stages of the present procedures are held exclusively via electronic correspondence (E-Filing)".

59. In other words, the Appellant requests this Panel to find that no Consequences, as defined in the ADR, be derived from the AAF, as she bears no fault or negligence, or, in the alternative, that the sanction to be applied for her anti-doping rule violation be kept to a minimum level. More specifically, the Appellant submits that her case does not concern the intentional use of a prohibited substance in order to enhance performance nor to obtain any type of unfair advantage, but that she was unintentionally "contaminated" with the Substance by contact with her roommate during the Games and/or with supporters.

60. In support of her position, the Appellant refers, by way of preliminary consideration, to her personal life, having grown up in a very poor environment in a *favela* of Rio de Janeiro to become World and Olympic champion. In that context, the Appellant emphasizes the important values that she has learnt from Judo and that have become a central part of her life: respect, commitment, effort and determination. In addition, her good character and dedication are confirmed by several witnesses. The Appellant underlines that life has never been easy for her and that, after the many obstacles she had to overcome, it made no sense for her to put everything at risk, by committing an anti-doping rule violation at the Event, a competition that could be won easily and was not important to her, having already qualified for the Tokyo 2020 Olympic Games. However, because of her previous social situation, the Appellant submits that she lacks proper education, has no college degree, does not speak English, has only a modest knowledge of doping rules and that, for this reason, she avoided supplements, medication and constantly consulted everyone possible in order to avoid a situation like the one at hands.

61. The Appellant, then, explains the *"possible occurrences"* which may have caused the Substance to enter her body and to return the extremely low concentration reported by the Laboratory as an AAF:

i. contacts with Mrs Beatriz Rodriguez de Souza ("Beatriz"), her roommate at the Games (Scenario 1). The evidence, which includes *WhatsApp* messages exchanged by the Appellant with Beatriz and by Beatriz with Dr Furtado, shows that Beatriz, in the five days during which she shared a small room with the Appellant, was receiving asthma treatment in violation of the applicable medical protocols. In fact, Dr Furtado instructed Beatriz to purchase an asthma inhaler and take it with her to Lima, and the fact that Dr Furtado suggested in writing the purchase of a permitted medication does not mean that this was the medicine effectively purchased by Beatriz. In fact, all the circumstances suggest that Beatriz could make a mistake by buying and using a prohibited substance (*e.g.*, Fenoterol); in addition, some contradictions between the declarations of Beatriz and Dr Furtado and the obscure language in the messages exchanged might be explained by the fact that in the messages they possibly were talking about the Substance. Another contradiction, among the several, concerns the electric vaporizer that Beatriz used inside the room, supposedly only with saline solution, since there is a consensus among doctors that in an asthma attack there would be no justification for using a vaporizer with saline solution;

ii. contacts with supporters after the Event, but prior to the doping control, who might have contaminated the Appellant (Scenario 2). According to the written statements and medical reports filed by the Appellant, she had direct physical contact with Mr Gustavo Moreira, a supporter attending the Event, who was using the Substance at the time. She also held the doll "Chapolim", given to her by the supporters, for a relevant period of time, around her neck. Both situations (touching the supporters and holding the doll) occurred right before she was submitted to the anti-doping test, and it is worth mentioning that the Substance spreads through the air and can enter the human body orally or when in contact with the skin. In addition to being a likely explanation for the AAF, such contacts amounted to a violation of the applicable rules set by the International Standard for Testing and Investigations (the "ISTI"). In fact, the Appellant was accompanied by a *chaperone* until she reached the doping control station, but was not prevented from having physical contact with several people and being interviewed over and over: there should have been a barrier to prevent the athletes from having physical contact with the fans; and the *chaperone* should have kept the Appellant under constant observation and registered everything in the proper form.

62. In that context, the least probable cause of the AAF would be the intentional use of the Substance (Scenario 3), *i.e.* that the Appellant transported (though security checks) and used a prohibited medicament for asthma, in a competition that was not worth much for her, risking her career, the life she was able to provide to her family and her qualification to the Olympics. This simply makes no sense, and it has to be recognized as the least likely situation to have happened.

63. On the other hand, as confirmed by the experts consulted by the Appellant, contamination through the skin is a possibility, considering the low concentration (0.98 ng/mL) of Substance detected in the Appellant's A sample. For instance, Dr Abud expressly indicated (with statements agreed to by Prof. Fonseca) that the Appellant *"did not use Fenoterol, neither with the intention of improving performance, nor as a therapeutic form, because the result found in the urine test is not compatible with the use, but with contamination through contact through the air, or water, or even through contact with the skin of other individuals who used the substance, or even objects, made use of the water bottle of her roommate during the competition period and held object (game mascot) right after her final fight. And probably even by the use of Fenoterol by her roommate who used a pump and inhalation near her or even other people who were around her before, during or after the competition. Rafaela was embraced by the fans to celebrate the victory and was also greeted by the journalists there and also by one of the people from the organized fans who made use of Fenoretol as attested in a statement attached to the defense. Therefore, I conclude that the amount found in the urine is incompatible with the intentional use of the substance in question, once the athlete had used Fenoterol for doping effect more than 20,000 nanograms of metabolites would have been found in her urine".*

64. In summary, there was no intent on the part of the Appellant to ingest any prohibited substance or to enhance her performance. As a result, the conditions set by Articles 10.4 and 10.5.1 of the ADR for sanction elimination or reduction are satisfied.

65. In that regard, the Appellant accepts that, according to Article 3.1 of the ADR, she has the

burden to prove by a balance of probability that she has not violated the anti-doping regulations. However, she submits that she has satisfied such burden, by presenting *"undisputable evidence of the cause of the adverse analytical finding, namely, contamination as well as her lack of fault or negligence"*, and considering that (i) she has undergone more than 30 (thirty) anti-doping tests with negative results; (ii) her blood tests (and biologic passport) do not indicate any variation compatible with the direct use of the Substance; (iii) she was tested at a competition with no distribution of ranking points, when she was already qualified for the Olympics; (iv) medical experts verified her clinical and laboratory tests and concluded that the Substance was not used on purpose, but that the AAF was the consequence of contamination; (v) the amount found in the urine sample (980 picograms or 0.98 ng/mL) is extremely low and totally compatible with contamination; (vi) the Appellant was sharing the same room with another athlete that was treating asthma in breach of Team Brazil medical protocols; (vii) only a few minutes before the doping sample collection the Appellant had physical contact with supporters, who confirmed that they were under treatment with the Substance.

66. In addition, the Appellant underlines that she has always taken the appropriate measures and observed her duty of utmost caution to avoid that any prohibited substance entered her body. The Appellant could never imagine that her roommate was acting in breach of Team Brazil medical protocol and therefore putting her at risk of contamination by a prohibited substance; and could not reasonably have known or suspect even with the exercise of utmost caution that she could be victim of contamination by having physical contact with supporters at the competition venue. It is unrealistic and impractical for any anti-doping program to impose on an athlete an obligation not to have physical contact with her roommate or journalists or supporters just because of fear that someday they might be contaminated.

67. As a result, the Appellant submits that she bears No Fault or Negligence in the sense of Article 10.4 of the ADR, since she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that she could be contaminated by Fenoterol.

68. Alternatively, the Appellant contends that any period of ineligibility eventually imposed on her should be the minimum possible (a reprimand or ineligibility for less than six months), as per Article 10.5.1.1 of the ADR, consistently with the jurisprudence in similar cases.

69. Finally, the Appellant notes that no delay in trial can be attributed to her, since she always tried to cooperate and advanced no procedural requests. Therefore, if any period of suspension is to be applied, its starting moment should be backdated to the date of the doping control (9 August 2019), as provided by Article 10.11.1 of the ADR.

B. The Position of the Respondent

70. In its answer, the Respondent requested the CAS to conclude as follows:

> *"1. That Ms Rafaela Silva is found to have committed an anti-doping rule violation of Article 2.1 of the IJF Anti-Doping Rules.*

2. *That Ms Rafaela Silva is sanctioned with a period of Ineligibility of 2 years or alternatively 4 years if Article 10.2.1.2 of the IJF ADR applies.*

3. *That the period of Ineligibility commences on 25 October 2019 and will be effect* [sic] *until 24 October 2021 (or alternatively 24 October 2023).*

4. *That all competitive results of Ms Rafaela Silva from the date of sample collection (i.e. from 9 August 2019) are disqualified with all resulting Consequences, including forfeiture of any medals, points and prizes".*

71. In the Rejoinder, then, the Respondent slightly modified the relief sought (strikethrough in the original) requesting the Panel to conclude as follows:

"1. That Mrs Rafaela Silva is found to have committed an anti-doping rule violation of Article 2.1 of the IJF Anti-Doping Rules.

2. *That Mrs Rafaela Silva is sanctioned with a period of Ineligibility of 2 years ~~or alternatively 4 years if Article 10.2.1.2 of the IJF ADR applies~~.*

3. *That the period of Ineligibility commences on 25 October 2019 and will be effect* [sic] *until 24 October 2021 (or alternatively 24 October 2023).*

4. *That all competitive results of Ms. Rafaela Silva from the date of sample collection (i.e. from 9 August 2019) are disqualified with all resulting Consequences, including forfeiture of any medals, points and prizes".*

72. The Respondent, in other words, asks this Panel to dismiss the appeal brought by the Appellant and to confirm the Decision. In fact, the original "alternative" request that the sanction be increased to four years as per Article 10.2.1.2 of the ADR was dropped in the course of the arbitration. In essence, the Respondent submits that:

i. the Appellant has committed an anti-doping rule violation for the presence of the Substance in the urine sample she provided on 9 August 2019;

ii. the Respondent has discharged its burden of proof to establish the anti-doping rule violation as per Article 2.1 of the ADR to the comfortable satisfaction of the Panel;

iii. the Appellant has not been able to prove, on a balance of probability, the source of the AAF, *i.e.* how the Substance entered her system and resulted in the AAF;

iv. the sanction imposed in the Decision is consistent with the ADR in all respects (including ineligibility, disqualification and the commencement date of the period of Ineligibility).

73. The Respondent contends that the commission of an anti-doping rule violation by the

Appellant is established. In fact, the analyses of the A and B samples confirmed the presence of the Substance (for which no quantitative threshold is required) in the Appellant's urine, and the IJF does not have to show intent, fault, negligence or knowing use on the Athlete's part to establish an anti-doping rule violation under Article 2.1 ADR.

74. In the Respondent's opinion, there was no departure from the ISTI. Therefore, the question of whether a departure could reasonably have caused the AAF does not arise in the present case and in no way was the burden shifted to the IJF to prove that such departure did not cause the AAF. The Appellant's argument, based on a distortion of the rules, is a tactic by the Athlete to attempt to divert the Panel from the main issue in this case – the Athlete's inability to establish how the Substance entered her body.

75. In that regard, the Respondent notes that, according to the Appellant, a breach occurred because she had excessive contacts with her supporters. However, the Appellant was absolutely free to report directly to the doping control station, as she was required to do. It was the Appellant's decision to go in front of the grandstand and give a *"high-five"* to her supporters, it was her call to give interviews and she was equally free to take pictures with her teammates. As much as her acts did not infringe upon the ISTI, these were the result of the Athlete's free will. In the same way, the Athlete's insinuations that the sample collection personnel should have prevented her from having contacts with third parties, and that these interactions should have been reported by the *chaperone* pursuant to Article 5.4.8 of the ISTI, are groundless. In fact, the ISTI does not set an obligation on the sample collection personnel to seclude the athlete from any contact. Indeed, allowing the Athlete to interact with fans in celebration of her gold medal and complete her media commitments do not amount to *"any matter with potential to compromise the collection of Sample"* and were not circumstances to be reported to the Doping Control Officer pursuant to Article 5.4.8 of the ISTI. In any case, at the end of the sample collection, the Athlete was given the opportunity to file any issues or comments in relation to the sample collection procedure and report any irregularity on her DCF. The Athlete however did not to highlight any alleged concerns. On the contrary, the Athlete attested to the fact that the sample collection was conducted in accordance with the relevant procedures for sample collection.

76. The Respondent, then, submits that the Appellant's contentions as to the scenarios put forward to explain the AAF *"do not hold water"* and cannot be accepted, *"both factually and scientifically"*. The Respondent is of the view that the Appellant did not establish, on balance of probabilities, how the Substance entered her body, as her evidence is speculative, and, pursuant to the consistent CAS case law, mere conjectures cannot satisfy the Athlete's onus:

    i. as to *"Scenario A: The source of the AAF is inadvertent contamination from another athlete during the Games"*, the Appellant's contentions that Beatriz (her roommate) was using Berotec (containing the Substance) is factually incorrect and based only on innuendos without any substantive supporting elements, because the evidence shows that Beatriz was taking Aerolin (containing Salbutamol) and used a saline solution with a vaporizer. In any case, assuming, without admitting, that Beatriz took Fenoterol, considering its excretion rate, the concentration level of Substance detected in the Athlete's urine is far too high and is not compatible with an indirect contamination 48 hours before the urine test. As a result,

this scenario should be rejected;

ii. as to *"Scenario B: The source of the AAF is inadvertent contamination from a spectator prior to doping control"*, the Respondent submits that, even if the factual background in this respect is accepted, the Appellant's explanation must be rejected on the basis of the pharmacokinetics of the Substance. As explained by Prof. Saugy, indirect transdermal contamination is not consistent with the concentration level of the Substance detected in the Appellant's urine, as the latter is far too high. The Respondent does not dispute that, after the gold medal combat, somewhere between 18:09 (time of notification for the doping control) and 19:06 (time of arrival at the doping control station), the Appellant interacted with Mr Moreira, shook his hands and accepted a mascot doll from him. Furthermore, the Respondent can accept Mr Moreira's word according to which he consumed Berotec on 9 August 2019. However, the Respondent submits that, based on Prof. Saugy clear findings, it can be comfortably concluded that the concentration of Substance found in the urine of the Appellant (1 ng/mL) is not consistent with a transdermal contamination from a spectator. As stated by Prof. Saugy, it is *"very unlikely"* that this scenario is the source of the AAF, and therefore it should be rejected;

iii. as to *"Scenario C: The source of the AAF is intentional intake by the athlete to treat asthma prior to the doping control"*, the Respondent submits that the fact that the Appellant is not asthmatic does not allow her to demonstrate how the Substance entered her body. As prof. Saugy declared, even if it can certainly be excluded a recent intake (6 to 8 hours before the test) of a normal dose of the Substance by the Appellant, the concentration of 1 ng/mL found in her urine does not allow to exclude the direct application of Fenoterol, by any route of administration, 24 to 48 hours before the test.

77. According to the Respondent, therefore, the Appellant failed to demonstrate how the Substance entered her body. In fact, in addition to those offered by the Appellant, other scenarios could be identified:

i. *"Scenario D: The source of the AAF is intentional intake by the Athlete to lose weight to compete in the Games"*. The Respondent is of the view that intentional inhaling of Fenoterol to reduce body mass in the lead up to 9 August 2019, date of the positive test, is a possible explanation for the anti-doping rule violation, if not the most probable one;

ii. *"Scenario E: The source of the AAF is intentional intake by the Athlete of a contaminated supplement"*. The Respondent contends that the Appellant's claim that she never used supplements is contradicted by her medical records, as submitted by Dr Furtado, who indicates that she used BCAA (Branched-Chain Amino Acids). Since it is common knowledge that supplements can be contaminated with prohibited substances, it cannot be ruled out that the supplement taken by the Appellant was tainted with the Substance, even though no cases of contamination with Fenoterol have been reported so far. In any event, in light of the circumstances of the case, no reduction of the sanction should be granted.

78. To conclude, in light of the established CAS jurisprudence, the Respondent considers that the

provisions of Articles 10.4 or 10.5 of the ADR are inapplicable to the Appellant's case. Therefore, the Appellant should be sanctioned with a period of ineligibility of two years, starting, as per Article 10.11 of the ADR, on the date of the final hearing decision providing for ineligibility. However, considering that the Appellant has been provisionally suspended from 25 October 2019 to 22 January 2020 and has been serving an ineligibility period since then, the Respondent submits that, in accordance with Article 10.11.3 of the ADR, the Appellant should receive a credit for such period of provisional suspension and, accordingly, the period of ineligibility should commence on 25 October 2019.

79. The Respondent notes that, pursuant to the PASO Decision, the results obtained by the Athlete at the Event have been disqualified with all resulting consequences. Therefore, the only question which remains is the disqualification of the results obtained by the Athlete after the date of sample collection. As per Article 10.8 of the ADR, all competitive results of the Athlete after 9 August 2019 until the date of provisional suspension (*i.e.*, until 25 October 2019) should be disqualified, including forfeiture of any medals, prizes and points, in compliance with the Decision of the IJF Panel. Namely, the bronze medals obtained at the Judo World Championships on 27 August 2019 and Brasilia Grand Slam on 6 October 2019 are to be returned and results and points to be invalidated. Given the suggested outcome of this case and that the Athlete should not have participated in the World Championships and Grand Slam, fairness does not apply to her case and she should not be able to keep her Olympic Games qualifying points.

80. Pursuant to Article 10.10 of the ADR, the IJF is entitled to ask the Panel to (i) impose upon the Athlete all costs associated with the ADRV and/or (ii) fine the Athlete an amount of USD 1,000. The Respondent notes that the Appellant's *"intricate defence"* submitted during the first instance proceedings required IJF to disburse many resources to address her claims. Again, in the scope of this appeal proceedings, addressing Appellant's new line of defence entailed new legal and scientific costs. However, that said, in the spirit of good faith, the Respondent does not ask the Panel to order costs nor to impose a fine on the Athlete.

V. JURISDICTION

81. The jurisdiction of the CAS, which is not disputed by the Parties, is based *in casu* on Article R47 of the Code and Articles 13.2.1 and 13.2.3 of the ADR, and has been confirmed by the Order of Procedure, signed by the Parties.

82. In detail, the provisions of the ADR that are relevant to this effect are the following:

i. Article 13.2.1 [*"Appeals involving International-Level Athletes or International Events"*]:

> *"In cases arising from participation in an International Competition or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS"*

ii. Article 13.2.3 [*"Persons entitled to appeal"*]:

> *"In cases under Article 13.2.1, the following parties shall have the right to appeal to CAS: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) IJF; (d) the National Anti- Doping Organization of the Person's country of residence or countries where the Person is a national or license holder; (e) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games; and (f) WADA".*

83. Therefore, the CAS has jurisdiction to decide the present dispute between the Parties.

VI. ADMISSIBILITY

84. The statement of appeal was timely filed, as accepted by the Respondent, and complied with the requirements set by Article R48 of the Code. No further recourse against the Decision is available within the structure of IJF. Accordingly, the appeal filed by the Athlete is admissible.

VII. SCOPE OF REVIEW

85. According to Article R57 of the Code, the Panel has full power to review the facts and the law of the case. Furthermore, the Panel may issue a new decision which replaces the decision challenged, or may annul the decision and refer the case back to the previous instance.

VIII. APPLICABLE LAW

86. Pursuant to Article R58 of the Code, the Panel is required to decide the dispute *"according to the applicable regulations and, subsidiarily, to 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".*

87. As a result, the IJF rules and regulations apply primarily, with Swiss law applying subsidiarily.

88. With regard to the IJF regulations, the Parties agree that the ADR, in their 2015 edition, as in force since 1 January 2017, fall to be applied in this case.

89. The provisions from the ADR that are relevant, or have been invoked, in this case, are the following:

> **Article 2 *"Anti-Doping Rule Violations"***
>
> *"The following constitute anti-doping rule violations:*
>
> *2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample*

2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any 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; or, where the Athlete's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.

2.1.3 Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an anti-doping rule violation".

Article 3 *"Proof of Doping"*

"3.1 Burdens and Standards of Proof

IJF shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether IJF has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

3.2 Methods of Establishing Facts and Presumptions

Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases:

(…).

3.2.2 WADA-accredited laboratories, and other laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Athlete or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding. If the Athlete or other Person rebuts the preceding presumption by showing that a departure from the International Standard

for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, then IJF shall have the burden to establish that such departure did not cause the Adverse Analytical Finding".

(…).

Article 10 *"Sanctions on Individuals"*

(…).

10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method

10.2.1 The period of Ineligibility shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

10.2.1.2 The anti-doping rule violation involves a Specified Substance and IJF can establish that the anti-doping rule violation was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

(…).

10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence

If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.

10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence

10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Article 2.1, 2.2 or 2.6.

10.5.1.1 Specified Substances

Where the anti-doping rule violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

10.5.1.2 Contaminated Products

In cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault.

(…).

10.8 Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation

In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.

(…).

10.10 Financial Consequences

Where an Athlete or other Person commits an anti-doping rule violation, IJF may, in its discretion and subject to the principle of proportionality, elect to a) recover from the Athlete or other Person costs associated with the anti-doping rule violation, regardless of the period of Ineligibility imposed and/or b) fine the Athlete or other Person in an amount up to $1,000 U.S. Dollars, only in cases where the maximum period of Ineligibility otherwise applicable has already been imposed.

The imposition of a financial sanction or the IJF's recovery of costs shall not be considered a basis for reducing the Ineligibility or other sanction which would otherwise be applicable under these Anti-Doping Rules or the Code.

10.11 Commencement of Ineligibility Period

Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed.

10.11.1 Delays Not Attributable to the Athlete or other Person

Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, IJF may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the

date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified.

(…).

10.11.3 Credit for Provisional Suspension or Period of Ineligibility Served

10.11.3.1 If a Provisional Suspension is imposed and respected by the Athlete or other Person, then the Athlete or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal".

Appendix 1 "*Definitions*"

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

"Fault: Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2".

"International Standard: A standard adopted by WADA in support of the Code. Compliance with an International Standard (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude that the procedures addressed by the International Standard were performed properly. International Standards shall include any Technical Documents issued pursuant to the International Standard".

"No Fault or Negligence: The Athlete or other Person's establishing 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. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system".

"No Significant Fault or Negligence: The Athlete or other Person's establishing that his or her Fault or

negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system".

90. Reference was made also to the ISTI, and more specifically to the following provisions:

"5.4 Requirements for notification of Athletes

5.4.1 When initial contact is made, the Sample Collection Authority, DCO or Chaperone, as applicable, shall ensure that the Athlete and/or a third party (if required in accordance with Article 5.3.8) is informed:

(…).

d) Of the Athlete's rights, including the right to:

(…).

iii. Request a delay in reporting to the Doping Control Station for valid reasons;

(…).

e) Of the Athlete's responsibilities, including the requirement to:

i. Remain within direct observation of the DCO/Chaperone at all times from the point initial contact is made by the DCO/Chaperone until the completion of the Sample collection procedure; (…) and
iv. Report immediately for Sample collection, unless there are valid reasons for a delay, as determined in accordance with Article 5.4.4.

(…).

5.4.2 When contact is made, the DCO/Chaperone shall:

a) From the time of such contact until the Athlete leaves the Doping Control Station at the end of his/her Sample Collection Session, keep the Athlete under observation at all times;

(…).

5.4.4 The DCO/Chaperone may at his/her discretion consider any reasonable third party request or any request by the Athlete for permission to delay reporting to the Doping Control Station following acknowledgment and acceptance of notification, and/or to leave the Doping Control Station temporarily after arrival, and may grant such permission if the Athlete can be continuously chaperoned and kept under direct observation during the delay. For example,

delayed reporting to/temporary departure from the Doping Control Station may be permitted for the following activities:

a) For In-Competition Testing:

i) Participation in a presentation ceremony;

ii) Fulfilment of media commitments;

iii) Competing in further Competitions;

iv) Performing a warm down;

v) Obtaining necessary medical treatment;

vi) Locating a representative and/or interpreter;

vii) Obtaining photo identification; or

viii) Any other reasonable circumstances, as determined by the DCO, taking into account any instructions of the Testing Authority.

(…).

5.4.5 The DCO or other authorised Sample Collection Personnel shall document any reasons for delay in reporting to the Doping Control Station and/or reasons for leaving the Doping Control Station that may require further investigation by the Testing Authority. Any failure of the Athlete to remain under constant observation should also be recorded.

5.4.6 A DCO/Chaperone shall reject a request for delay from an Athlete if it will not be possible for the Athlete to be continuously observed during such delay".

IX. MERITS

91. The object of this arbitration is the Decision, which found the Athlete responsible for the anti-doping rule violation contemplated by Article 2.1 of the ADR and imposed on her the ineligibility for a period of 2 years pursuant to Article 10.2.2 of the ADR: the Athlete's violation was found to be not "intentional", within the meaning of Article 10.2.3, for the purposes of Article 12.2.1 of the ADR; however, the Athlete was not considered to be entitled to a "fault-related" reduction of the period of ineligibility pursuant to Article 10.4 or 10.5 of the ADR. The Appellant disputes this conclusion and requests the Decision to be set aside, and the sanction cancelled or reduced. The Respondent, on the other hand, requests this Panel to dismiss the appeal and to confirm the Decision.

92. As a result of the Parties' requests and submissions, there are two main issues that need to be

addressed by this Panel:

i. is the Appellant responsible for the anti-doping rule violation found by the Decision?

ii. if so, what are the proper consequences to be applied?

93. The Panel will consider each of those issues separately and in sequence.

A. Is the Appellant responsible for the anti-doping rule violation found by the Decision?

94. The first issue to be addressed concerns the commission by the Appellant of the anti-doping rule violation contemplated by Article 2.1 of the ADR [*"Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's sample"*] for which she was found responsible by the IJF Panel.

95. In this context, the Panel notes (i) that both the A and the B samples analyses were reported as an AAF for the presence in the Appellant's body of the Fenoterol, a specified non-threshold substance prohibited in- and out-of-competition under S3 of the Prohibited List, and (ii) that the Appellant had no Therapeutic Use Exemption to justify such presence. As such, the anti-doping rule violation would be established.

96. The Appellant, however, disputed such conclusion in two respects.

97. The first contention, advanced in the appeal brief in the context of the request for evidentiary proceedings, regarded the "identification" of the substance detected in the Athlete's urine samples. The Appellant, in fact, argued that Fenoterol has a molecular structure very similar to Salbutamol, a substance which is not prohibited under the Prohibited List when inhaled up to a maximum of 1,600 micrograms over 24 hours, in divided doses not to exceed 800 micrograms over 12 hours starting from any dose. Therefore, according to the Appellant, the possibility of an error by the Laboratory cannot be discarded, considering the low amount of Substance found, 20 times lower than the minimum concentration for Fenoterol according to the WADA technical document setting the minimum requirement performance levels for accredited laboratories.

98. The Panel notes, however, that no scientific evidence has been brought by the Appellant to support her contention, which was presented as, and remained, highly speculative. At the hearing, Prof. Saugy categorically ruled out the possibility that an error of identification could have occurred. Such statement remained uncontradicted by the experts adduced by the Appellant. As a result, the Panel finds that no error of identification has ben established and that the AAF for the presence of Fenoterol has to be confirmed.

99. The second point brought by the Appellant concerns an alleged deviation from the ISTI, which could reasonably have caused the AAF. Therefore, according to the Appellant, it should be for the Respondent to establish that such departure did not cause the AAF. In the absence of such evidence, to be adduced by the Respondent, no AAF could be confirmed.

100. In the Appellant's opinion, such departure occurred when the *chaperone* appointed for the anti-doping control at the Event allowed the Appellant to get in touch with the supporters, teammates, journalists, etc. after notification and prior to reporting to the doping control station, *i.e.* between 18:09 and 19:06 of 9 August 2016.

101. The Panel finds that the Appellant's submissions are based on a misunderstanding as to the role of a *chaperone* with respect to anti-doping controls.

102. According to the ISTI (Definitions), a *chaperone* in *"an official who is trained and authorized by the Sample Collection Authority to carry out specific duties including one or more of the following (at the election of the Sample Collection Authority): notification of the Athlete selected for Sample collection; accompanying and observing the Athlete until arrival at the Doping Control Station; accompanying and/or observing Athletes who are present in the Doping Control Station; and/or witnessing and verifying the provision of the Sample where the training qualifies him/her to do so"*.

103. Article 5.4 of the ISTI, then, describes the *"Requirements for notification of Athletes"* and confirms that the athlete should be informed *inter alia* of his/her responsibility to *"remain within direct observation of the DCO/Chaperone at all times from the point initial contact is made by the DCO/Chaperone until the completion of the Sample collection procedure"* and to *"report immediately for Sample collection, unless there are valid reasons for a delay, as determined in accordance with Article 5.4.4"*. In fact, Article 5.4.4 ISTI allows the DCO/*chaperone "at his/her discretion"* to consider any reasonable request by the athlete for permission to delay reporting to the doping control station following acknowledgment and acceptance of notification if the athlete can be continuously chaperoned and kept under direct observation during the delay. For example, delayed reporting to the doping control station for in-competition testing may be permitted for the participation in a presentation ceremony, fulfilment of media commitments, or in any other reasonable circumstances.

104. In other words, the task of the *chaperone* is to notify the athlete (if so entrusted) and to observe the athlete, accompanying him/her after notification, in order to preserve the integrity of the control procedure, but without an obligation to interfere with the normal activities that follow a competition (such as celebration, interviews, etc.), provided that the athlete remains under the *chaperone*'s control. It is definitely not the duty of a *chaperone* to actively prevent the athlete from undertaking activities that could lead the athlete to return an AAF; it is the athlete's responsibility (even after notification of a test and while under control of a *chaperone*) in this context as in all others *"to ensure that no Prohibited Substance enters his or her body"* (Article 2.1.1 of the ADR).

105. As a result, the fact that after the Event the Athlete made contact with her supporters (a circumstance that in the Appellant's submission caused the AAF), her coach, other members of the Brazilian team or journalists does not amount to a deviation from the applicable international standard, as celebrations or interviews (at the Athlete's risk) were allowed.

106. As a result, the Athlete's contentions must be rejected: The Panel confirms that the A and B

samples analyses show the presence of a prohibited substance and that there is no basis to discard such analytical results. The Athlete has therefore committed the anti-doping rule violation contemplated by Article 2.1 (*"Presence of a prohibited substance or its metabolites or markers in a Athlete's sample"*) of the ADR.

B. In light of such finding, what are the proper consequences to be applied?

107. According to Article 10.2 of the ADR, the sanction provided for the violation committed by the Athlete, involving a specified substance, is an ineligibility period of 2 years (Article 10.2.2), unless the IJF proves that the violation was intentional, in which case the period of ineligibility is 4 years (Article 10.2.1.2 of the ADR). However, the sanction can be eliminated or reduced if the Athlete proves that he/she bears "no fault or negligence" (Article 10.4 of the ADR) or "no significant fault or negligence" (Article 10.5 of the ADR).

108. In the case of the Appellant, the IJF found that the Athlete had failed to establish the conditions for a *"fault related"* reduction or elimination of the sanction, and therefore imposed on the Athlete an ineligibility period of two years (with the ensuing consequences) as requested by the ITA.

109. Such conclusions are disputed before this Panel. The Appellant submits that no consequences (as defined in the ADR) should be drawn from the AAF, as she bears "No Fault or Negligence" (Article 10.4 ADR) or, alternatively, that the ineligibility period should be reduced to the maximum possible extent, because she bears, "No Significant Fault or Negligence" (Article 10.5.1 ADR). On the other hand, no request has been made by the Respondent that the Athlete be declared ineligible for 4 years for an intentional violation (see para. 72 above).

110. The main question therefore is whether the sanction imposed by the Decision is to be cancelled or reduced, and, in that context, whether the "threshold" conditions established by the ADR to allow "access" to a finding of "No Fault or Negligence" or "No Significant Fault or Negligence" are satisfied. In both cases, in fact, as made clear by the "Definitions" of "No Fault or Negligence" and "No Significant Fault or Negligence", the Athlete (who is not a "Minor") had to establish how the Substance entered her system (the so-called "route of ingestion"). According to Article 3.1 of the ADR, then, the "standard of proof" for the Athlete to establish the "route of ingestion" is by "balance of probability".

111. It is this Panel's opinion that, to satisfy such burden, an athlete may not merely speculate as to the possible existence of a number of conceivable explanations for the AAF (such as sabotage, manipulation, contamination, pollution, accidental use, etc.) and then further speculate as to which appears the "most likely" (or the "least unlikely") of those possibilities to conclude that such possibility excludes "Fault". There is in fact a wealth of CAS jurisprudence stating that a protestation of innocence, the lack of sporting incentive to dope, or mere speculation by an athlete as to what may have happened does not satisfy the required standard of proof (balance of probability) and that the mere allegation of a possible occurrence of a fact cannot amount to a demonstration that that fact did actually occur (CAS 2010/A/2268; CAS 2014/A/3820): Unverified hypotheses are not sufficient (CAS 99/A/234-235). Instead, the CAS has been clear

that an athlete has a stringent requirement to offer concrete and persuasive evidence that the explanation he/she offers for an AAF is more likely than not to be correct, by providing specific, objective and persuasive evidence of his/her submissions. In short, the Panel cannot base its decision on a speculative guess.

112. The Panel is aware that some recent CAS decisions (CAS 2019/A/6313; CAS 2019/A/[6443] & 6593) have been indicated, also in this arbitration, as proposing an enlargement of the possibility for an athlete to satisfy the evidentiary standard of balance of probability by apparently adopting the "most likely possibility" approach: Starting from a "finite list" of possible "pathways" for a substance to enter an athlete's body, which does not include intentionality, but covers all possible sources, provided they are based on logic, experience and common sense, it would be possible to find that the only reasonable and credible explanation is the one more likely than not to have occurred.

113. This Panel does not need to comment on this jurisprudence, which, according to its terms, is *"unique"* to the cases covered. It only notes that the principles so expressed appear to be "outliers" with respect to a long-standing line of precedents. Indeed, each case is to be judged in light of its peculiarities. In the present case, therefore, it is necessary to verify whether the Appellant has offered concrete and persuasive evidence demonstrating, on the balance of probabilities, the "route of administration", taking into consideration that it would be an affront to common sense to accept that a highly improbable explanation is more likely than not to have occurred.

114. As mentioned (paras. 61-62 above), the Appellant submits that 3 different theoretical scenarios can be envisaged: (i) inadvertent ingestion deriving from the sharing of a room, bottle, cup or glass with Beatriz, her roommate at the Games; (ii) inadvertent absorption caused by contacts with supporters after the Event, minutes before the doping control; or (iii) intentional use of the Substance. In the Appellant's opinion, however, the third scenario should be discarded, as it would make no sense, in light of her behaviour and personal conditions. Another scenario, initially advanced in the proceedings before the IJF (contacts with a baby treated with the Substance), is no longer relied upon in this arbitration. The Respondent, in addition to suggesting a possible reason for an intentional use, suggests another theoretical possibility: ingestion of the Substance caused by the use of a contaminated supplement.

115. With respect to the foregoing, the Panel preliminarily notes that the Athlete is in essence advancing (and the experts she called are supporting) two scenarios on the same footing, each of them being equally suitable to give a possible explanation of the AAF. The two explanations, even though they are intended to advance a case of inadvertent use, are however mutually in conflict; the occurrence of one denies the other, and the plurality of alternative explanations devalues the individual impact of each of them.

1. The First Scenario

116. In any case, with respect to the first scenario, the Panel notes that the Appellant's contention is based on a number of assumptions. In order to submit that the AAF was caused by the

inhalation or ingestion of the Substance (also through the sharing of a bottle, of a cup or of a glass) because Beatriz was using it in a closed, small room, in fact, the Appellant assumes that Beatriz was suffering from asthma and was being treated (at the Games, in violation of the applicable medical protocols) with Berotec, a medication containing the Substance. However, the Panel notes that:

i. there is no evidence that Beatriz had asthma attacks at the Games (Beatriz denied this); and

ii. there is no evidence that Beatriz was using the Substance at the Games: not only Beatriz firmly denied that circumstance on several occasions (including in a witness statement dated 26 April 2020 filed by the Appellant), but evidence has been offered to prove that she was using Aerolin, *i.e.* a different product which does not contain the Substance; use of Aerolin was in fact suggested by Dr Furtado in a WhatsApp message to Beatriz before the Games, transmitting also a picture of its container; Beatriz confirmed the use of Aerolin through an inhaler and of saline solution through a vaporizer, and denied the possibility that Dr Furtado had administered her a substance of which she was not aware; and the prescription and use of Aerolin was confirmed, also at the hearing, by Dr Furtado;

iii. the suggestions of the Appellant that Beatriz did not follow the advice of Dr Furtado, *i.e.* instead of purchasing a permitted medication recommended by Dr Furtado effectively purchased (by mistake or not) a medicine with a prohibited substance, is not convincing. Even if one were to assume that there are contradictions between the declarations of Beatriz and Dr Furtado and that language in the messages exchanged is *"obscure"*, nothing points in the direction that Beatriz and Dr Furtado referred therein to the Substance. Such allegation advanced by the Appellant is completely unsubstantiated. In addition, also the contention that the use of a vaporizer only with saline solution was not justified in an asthma attack is denied by the mentioned absence of evidence that Beatriz had asthma attacks at the Games.

117. As a result, the first scenario appears factually unsubstantiated and cannot therefore be accepted as proven by any standard, irrespective of any scientific evaluation as to the possibility that inhalation or ingestion of the Substance in the circumstances advanced by the Appellant may have resulted in the AAF, for the concentration of Substance detected in the Appellant's samples.

2. The Second Scenario

118. In a second scenario the Appellant explains the AAF as the result of an intake of the Substance caused by a contact with, directly with a *"high-five"*, or indirectly through a doll offered by, a fan who was using the Substance at the Event. In support of such explanation, the Appellant submitted the written declarations of Mr Gustavo Moreira, who (i) in a first statement of 12 February 2020 attested that he attended the Event and on the same day used the Substance to treat his asthma, and then (ii) in a second statement of 26 April 2020 (a) clarified that, when he used the Substance before reaching the arena for the Event, the doll was behind him and

therefore it was *"exposed to the steam"* of the Substance, (b) indicated that he took with him to the Event the doll and the Berotec container, placed in the same handbag, and (c) remembered that *"few seconds"* after using the Substance the Appellant shook his hand and received the doll.

119. In support of this scenario the Appellant tendered in this arbitration not only a video confirming the receipt of the doll from, and the two *"high-fives"* with, the supporters, but also the expert reports signed by Dr Abud and Prof. Fonseca.

120. The Panel notes that such expert reports are in essence based on the *a priori* exclusion of an intentional use and try to identify the alternative reasons of the detection of the Substance. As Dr Abud put it in the report dated 21 February 2020, he was faced with an *"hypothesis"* of contamination and to prove *"such hypothesis (…)* [he] *(…) elaborated an analysis of all the parameters involved"*, including the consideration that the concentration found *"does not show plausible for the ingestion and/or use of the substance (…) (either for intentional or therapeutic use), considering the relationship between the bioavailability and the half-life of the substance in the period of the competition schedule and the time of the exam"*. Therefore, he came to a conclusion in support of the two scenarios advanced in this arbitration. The same approach was adopted by Prof. Fonseca in his undated expert report, who, while describing as *"possible"* the two mentioned scenarios, ruled out, on the basis of the concentrations reported as the AAF, an intentional use of a therapeutic dose of the Substance in the hours before the Event. Finally, in the joint report of 28 April 2020, the two Appellant's experts insisted that *"the result found in the urine test is incompatible with use"* and concluded that *"it is impossible to affirm that the athlete intentionally used Fenoterol"*, while the two alternative scenarios are *"scientifically possible, in addition to being the most likely ones"*.

121. In other words, the experts, also when heard at the hearing, excluded an intentional use of the Substance by calculating its half-life and came to the conclusion (i) that the AAF is inconsistent with the inhalation of a therapeutic dose of the Substance in the hours before the Event, and (ii) that if the concentration found in the sample is assumed as showing a tail-end excretion of an intentional use of a therapeutic dose of the Substance, such use must have occurred days before the Event, when it was meaningless for doping purposes.

122. The Panel notes, however, that whatever the purpose, even if unrelated to a performance enhancing purpose, an intentional inhalation (or ingestion) of the Substance days before the hearing cannot be ruled out from a scientific point of view. The plausibility, then, of such an intake cannot be excluded merely on the basis of the contentions advanced by the Appellant, referring to her good character, personal history, and lack of incentives.

123. Finally, the Panel notes that Prof. Saugy, the expert presented by the Respondent, indicated in his report dated 23 March 2020 that the Substance, *"because of the extremely low amount which could be exchanged between the two individuals (…) would never be excreted in the first hour at the concentration of 1 ng/ml"*. Indeed, based on the observations of Prof. Cameron, an expert for the Appellant before the IJF, *"we can notice that a concentration of 1 ng/ml in the urine could correspond to the beginning (1-2 hours after intake) of the elimination of a normal dose taken by the athlete (as can be seen in the ascending part of the curve of elimination shown in Prof. Cameron's experience (…)). But in this supposed scenario of recent intake of fenoterol, we can firmly make the statement that the dose absorbed by the athlete would have been much*

higher than what can be done through dermal exchange described above". According to Prof. Saugy, *"if any fenoterol is exuded through the hand skin of the treated person, it would be at the picogram level"*.

124. In summary, alternative plausible explanations can be offered for the AAF, other than the two scenarios proposed by the Appellant: The latter are therefore not the only reasonable and credible explanations for the ingestion of the Substance. Consequently, it is not possible to conclude that one or the other of those two scenarios is more likely than not to have occurred.

125. Accordingly, the Panel cannot find that the Appellant has discharged the burden which lies upon her to establish by a balance of probability the "route of ingestion". Therefore, the Appellant is not entitled to any reduction or to the elimination of the sanction imposed on her by the Decision. In that regard, the Panel reminds itself that it is not confined to a binary choice: *"Fault"* or *"No* [Significant] *Fault"*. It is sufficient for it to find that the Athlete has not proved the "route of ingestion". It can itself construct theories which both inculpate and which exculpate the Athlete from negligent use; but its only function as an arbitral body is to make findings based on the evidence and arguments adduced before it.

126. In conclusion, the Panel finds that the appeal has to be dismissed and the Decision confirmed. The Panel in fact finds that no delays occurred in the hearing process of the Appellant's case. The doping control took place on 9 August 2019, the AAF for the A sample was reported on 17 August 2019, the B sample was analyzed on 13 September 2019 and on 25 October 2019 the Appellant was provisionally suspended, after she had been given the opportunity to state her case. 25 October finally became the date of the ineligibility period imposed by the Decision. Such sequence of events, in a short period of time, warrants no back-dating of the starting date of the ineligibility period.

127. The Panel wishes to make clear that while it is bound to make its decision on application of the applicable rules, this does not mean that the Panel has made any determination that the Appellant is a cheater or that she engaged in doping. In fact, the Panel is of the view that based on its assessment of the Appellant's testimony and her demeanour and history she did not engage in doping. But, the Panel is also duty-bound to apply the applicable rules, and in doing so here the Panel is of the view that the only conclusion it can reach is that which has reached as explained fully herein.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mrs Rafaela Lopes Silva with the Court of Arbitration for Sport against the decision issued on 22 January 2020 by the Hearing Panel of the International Judo Federation is dismissed.

2. The decision issued on 22 January 2020 by the Hearing Panel of the International Judo Federation is confirmed.

3. (…).

4. (…).

5. All other prayers for relief are dismissed.