Arbitration CAS 2019/A/6541 Hiromasa Fujimori v. Fédération Internationale de Natation (FINA), award of 6 March 2020

Panel: Mr Ken Lalo (Israel), Sole Arbitrator

Aquatics (swimming)
Doping (methylephedrine)
Proof of the source of the prohibited substance required to reduce the period of ineligibility
Balance of probability
Proportionality of the sanction
Imposition of an "alternative solution"
Measure of the sanction

1. **In order to benefit from a fault related reduction, an athlete must prove the source of the prohibited substance. The applicable standard of proof for an athlete to establish the source of the prohibited substance and that there was no significant fault or negligence is by a balance of probability. It is not sufficient for an athlete merely to make protestations of innocence and to suggest that the prohibited substance must have entered his/her body inadvertently from some supplement, medicine or other product. An athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question.**

2. **The meaning of *"by a balance of probability"* is that the occurrence of the scenario suggested by the athlete must be more likely than its non-occurrence and not the most likely among competing scenarios. There is no need to decide which is the most likely between two or more competing scenarios, but rather the athlete must prove that the chain of events presented by him/her did happen, more likely than not. Of course, the athlete is allowed to address other scenarios put forward in an effort to support his/her position. However, the other party does not have the burden of proving the prevailing likelihood of a different scenario and it is not obliged to put forward any other competing scenarios.**

3. **The principle of proportionality is embodied in the provisions of Article 10.5 of the World Anti-Doping Code (WADC). The "No Significant Fault or Negligence" and "No Fault or Negligence" exceptions to an otherwise strict liability anti-doping rule are indeed embodiments of the proportionality, and there is no gap in the rules that may allow the principle of proportionality to be utilized. Even an "uncomfortable feeling" regarding a sanction mandated in the rules is not sufficient to invoke the principle of proportionality where the applicable rules include a sanctioning regime which is proportionate and contains clear and concise mechanism which allows for a reduction of the applicable sanction.**

4. There is no basis to find ways outside of the rules to circumvent the application of the provisions of the 2015 WADC and to impose "alternative solutions" to a decision based on the simple application of the rules and regulations in force.

5. The measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence.

I. THE PARTIES

1. Mr Hiromasa Fujimori (the "Appellant" or the "Athlete") is a Japanese swimmer, born on 7 August 1991. The Appellant competes at international events and he finished fourth in the men's 200 meters individual medley at the Rio de Janeiro 2016 Olympic Games. At the event at which the Athlete tested positive, the Athlete was the captain of the Japanese men national swimming team.

2. Fédération Internationale de Natation ("FINA" or the "Respondent") is an association established under Swiss law as the world governing body for swimming. FINA directs, develops, regulates, controls and disciplines swimming worldwide. In furtherance of its commitment to swimming, FINA enacted various regulations to organise swimming internationally, including the FINA Doping Control Rules (the "FINA DC") to implement the provisions of the 2015 World Anti-Doping Code (the "WADC") established by the World Anti-Doping Agency ("WADA").

3. The Athlete is a member of Japan Swimming Federation ("JSF"), who is a member of FINA. JSF is required to recognize and comply with the FINA DC. The FINA DC is directly applicable to and must be followed by competitors, such as the Athlete.

4. The Appellant and the Respondent are hereinafter referred to as the "Parties".

II. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced during these proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in this award only to the submissions and evidence he considers necessary to explain his reasoning.

6. The Athlete provided an in-competition urine sample (the "Sample") during the FINA World Championships in Hangzhou (China) (the "Championships") on 14 December 2018. The analysis of the Sample revealed the presence of methylephedrine in a quantified concentration of 17 μg/mL with a specific gravity at 1.025.

7. Methylephedrine is a stimulant, prohibited under S.6 of the WADA Prohibited List. It is a Specified Substance which is prohibited in-competition only and is subject to a Decision Limit of 11 μg/mL with a normal specific gravity of 1.020 or below. Adjusted to specific gravity at 1.025, the Decision Limit is corrected to 13.75 μg/ mL, as stated by Professor Saugy who testified for FINA. The concentration of methylephedrine in the Athlete's A Sample is above the Decision Limit.

8. The Adverse Analytical Finding ("AAF") was reported by the Beijing WADA-accredited laboratory on 16 January 2019.

9. On 11 February 2019, the Athlete was notified of the AAF and on 19 February 2019, the Athlete requested the analysis of the B Sample. From 13 February 2019 onwards, the Athlete refrained from participating in any competitions or other activities organized by FINA.

10. On 27 March 2019, the Athlete was informed that the analysis of his B Sample had confirmed the presence of methylephedrine. The anti-doping rule violation ("ADRV") is therefore established, which was not and is not challenged by the Athlete.

11. On 28 March 2019, the Athlete accepted a voluntary provisional suspension, effective as of 27 March 2019.

12. A FINA Doping Panel (the "FINA DP") was formed pursuant to provision C 22.9 of the FINA Constitution.

13. On 27 August 2019, the FINA DP rendered a decision (the "Decision"), finding that the Athlete had committed an ADRV and imposing a two-year period of ineligibility on the Athlete. This decision states the following:

> *"Mr. Hiromasa Fujimori is found to have committed an anti-doping rule violation under FINA DC Rule 2.1 – presence of prohibited substance* ***Methylephedrine*** *in an athlete's sample (Class S6. Stimulants).*
>
> *Mr. Hiromasa Fujimori is sanctioned with* ***two (2) years*** *ineligibility period. The sanction starts on 1st January 2019 and will end on 31st December 2020 in accordance with FINA DC Rule 10.11.1.*
>
> *All costs of this case shall be borne by the Japan Swimming Federation in accordance with FINA DC 12.3.*
>
> *Any appeal against this decision may be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland not later than twenty one (21) days after receipt of the complete and reasoned judgement (FINA Rule C 12.11.4 and DC 13.7)".*

14. The complete and reasoned decision by the FINA DP was communicated later and received by the Athlete on 8 October 2019 (together with the Decision, the "Challenged Decision"). The Challenged Decision found, among others, that the Athlete had failed to establish the origin of the Prohibited Substance, which meant that he could not benefit from any reduction from the

applicable two-year period of ineligibility under Rule 10.5 of the FINA DC. The Challenged Decision concluded with a similar judgement as the Decision.

15. The FINA DP's legal reasoning for its judgement was, essentially, as follows:

"The FOP has reached the following legal conclusions in this case:

6.3.1 The Athlete has committed his first anti-doping rule violation as a result of the positive test for methylephedrine in his Sample.

6.3.2 FINA has not sought to prove that the Athlete's anti-doping rule violation was intentional, there is no evidence that his rule violation was intentional, and there was strong and persuasive evidence of the Athlete's honesty and integrity; therefore, the FINA DP finds that his rule violation was not intentional.

6.3.3 Despite due diligence, the Athlete has not established how the Prohibited Substance entered his system.

6.3.4 Because the Athlete has not established how the Prohibited Substance entered his system, the FINA DP is without authority under FINA DC 10.5 to lower the Athlete's period of ineligibility below two years.

6.3.5 Nevertheless, given the following factors the FINA DP considers that a two year period of ineligibility, may not be totally fair, but is only outcome available to the FINA DP under the rules.

6.3.6 All of the following issues were examined by the Panel and constituted the grounds based on which it was considered whether if there was any room to go below the sanction set forth in the FINA Doping Rules.

- *The relatively ubiquitous nature of methylephedrine as a product ingredient and product contaminant in both over-the counter medicinal products and supplements;*
- *The vanishingly small estimated concentration of methylephedrine found in the Athlete's sample;*
- *The due diligence exercised by the Athlete in testing products he was using at the time of his positive test and attempting to ascertain the source of his positive;*
- *The honesty demonstrated by the Athlete in his testimony*
- *The unlikelihood that the Athlete was using methylephedrine to enhance performance; and*
- *The frequency with which other athletes have received a significantly reduced sanction (in the range of 3-6 months total sanction) upon identifying the source of methylephedrine in their Sample.*

The issue of proportionality been discussed by CAS Panels, notably CAS 2016/A/4534 […]. In this matter, the CAS Panel held under the chapter in which it examined the question of proportionality that "In the Panel's view it would be a wholly exceptional, if any, case to allow particular circumstances to trump the provisions of the WADC 2015 relating to sanctions for an ADRV". Here in the present case, only exceptional circumstances could have allowed this

Panel to consider that it could go below the sanction as set forth in the FINA Rules and the WADA Code. None of the circumstances highlighted above constituted sufficiently exceptional grounds to allow it to trump the provisions of the Code.

6.3.7 The Athlete's period of Ineligibility shall start on 1st January 2019 due to substantial delay in notification to him of his positive test which prevented him from earlier accepting a provisional suspension".

16. The FINA DP went into substantial lengths to highlight the honesty and integrity of the Athlete. Against this analysis of the Athlete's character, the FINA DP made it evident that it was bound to apply the rules and that it was limited by these rules and mandated to impose a sanction which it did not deem justified or appropriate for the Athlete's fault. The FINA DP highlighted that in its opinion:

"2.14 As discussed below, the FINA DP is firmly convinced that Mr. Fujimori did not intend to enhance his sport performance through the use of a prohibited substance, and we conclude that the most likely source of Mr. Fujimori's positive test was either a contaminated supplement or some contamination arising from a medication containing methylephedrine.

2.15 Regrettably, however, even though the substance at issue is a "Specified Substance", meaning that it is a substance categorized by WADA as "more likely to have been consumed by an Athlete for a purpose other than the enhancement of sport performance", the rules do not permit a downward departure from two years ineligibility without Mr. Fujimori having identified the source of his positive test.

2.16 The FINA DP's hands are tied in this regard even though internet research reveals the extensive use of methylephedrine as an ingredient (both listed and unlisted and as a product contaminant) in supplements4 and in common over-the-counter cold medications5 and the Athlete's positive test is susceptible to a multitude of possible (and this Panel finds on the facts of this case probable) non-doping, alternative causes.

2.17 The FINA DP regrets the lack of express authority within the rules to reduce Mr. Fujimori's sanction in this case.

2.18 The FINA DP considers that, on the facts of this case (which include a common supplement contaminant and Specified Substance, at a very low picogram level (i.e., 16 trillionths of a gram), coupled with strong evidence of lack of intent, an Athlete should not be prejudiced by telling the truth that he is unable to identify source and there should be some ability to depart downward from two years ineligibility.

2.19 Arguably, this is even more the case where, as here, the Athlete did not receive notice of his positive test as early as he might have and the delay of about two months between sample collection and notification of his positive A Sample may have made it somewhat more difficult to review his diet and possible exposures and identify the source of his positive test".

17. The FINA DP was hopeful that an alternative solution may be found in the special circumstances of this case:

"2.20 The FINA DP therefore urges WADA to promptly review this case and the relevant rules with a view to determining whether an exception can be made in this case or through amending the rules to permit discretion for a downward sanction departure to be exercised in unique circumstances involving:

2.20.1 exceptional circumstances (perhaps the final determination of which should involve scrutiny or oversight by WADA);

2.20.2 a Specified Substance in circumstances involving a low picogram estimated concentration of the Specified Substance in the Sample or other evidence suggestive of (though not necessarily dispositive of) product contamination;

2.20.3 general marketplace evidence reflecting the easy availability of the Specified Substance in supplements or over-the-counter medications and/or that the Specified Substance has been known to be a product contaminant in the past;

2.20.4 some delay in notifying the Athlete of his pending adverse analytical finding where more prompt notification could conceivably have helped the Athlete to identify the cause of his positive test;

2.20.5 the Athlete presenting convincing evidence of his overall honesty and lack of intent to enhance performance; and

2.20.6 thorough and reasonable, even though unsuccessful, efforts by the Athlete to identify the source of his positive test.

2.21 Ultimately, this Panel is hopeful that through the intervention of WADA and/or FINA (through amending its rules if necessary) Mr. Fujimori may receive a more lenient sanction than appears to be presently available to the FINA DP to issue under the FINA DC".

III. PROCEEDINGS BEFORE THE CAS

18. On 28 October 2019, the Athlete filed a Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the Challenged Decision, pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration (2019 Edition) (the "Code"). In the Statement of Appeal, the Athlete requested that the case be submitted to a Sole Arbitrator.

19. On 5 November 2019, FINA confirmed its agreement that the case be submitted to a Sole Arbitrator.

20. On 9 December 2019, following agreed extensions, the Athlete filed an Appeal Brief pursuant to Article R51 of the Code.

21. On 6 January 2020, pursuant to Article R54 of the Code, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, informed the Parties that Mr Ken E. Lalo was appointed as a Sole Arbitrator to decide the case.

22. On 6 January 2020, the Parties were advised by the CAS Court Office on behalf of the Sole Arbitrator that a hearing would be held in this matter on 20 January 2020.

23. On 13 January 2020, following a granted extension, FINA filed its Answer to the appeal, pursuant to Article R55 of the Code.

24. On 16 January 2020, the Athlete filed summary translations of Exhibits 14 and 15 to the Statement of Appeal, as requested by the Sole Arbitrator in a letter dated 13 January 2020.

25. On 20 January 2020, the CAS Court Office issued on behalf of the Sole Arbitrator an order of procedure, which was accepted and signed by the Parties on the same date and before the hearing.

26. On 20 January 2020, a hearing was held in Lausanne. The Sole Arbitrator was assisted by Mr Brent J. Nowicki, Managing Counsel at CAS. The Athlete and his counsels participated by video from Tokyo, Japan as specifically permitted by CAS Court Office letter of 7 January 2020. The following persons attended the hearing for the Parties:

    i. for the Appellant: Mr Hiromasa Fujimori, the Appellant
    Mr Yuji Nakano, counsel
    Mr Shigeyuki Mito, counsel
    Mr Hitoshi Fujimaki, counsel
    Mr Taro Matsumoto, counsel
    Mr Bruce Holcombe, interpreter

    ii. for the Respondent: Ms Ms. Katarzyna Jozwik, FINA
    Mr Jean-Pierre Morand, counsel

27. At the hearing, the Parties agreed to forgo opening statements and to hear the Athlete and the expert witness first, followed by detailed legal submissions of both Parties. The Sole Arbitrator heard the Athlete's testimony as well as the testimony provided by Professor Martial Saugy on behalf of FINA, who was accepted as an expert witness. The hearing concluded with a statement provided by the Athlete.

28. The contents of the respective statements and testimonies can be summarised as follows:

- The Athlete:
    - Highlighted the importance of swimming in his life. He was engaged in swimming from a young age, following family tradition, *"swimming is life itself"*, *"everything is swimming"* for him from a very young age.
    - Indicated that he did not use drugs.
    - Highlighted that he is always telling the truth and that his family always thought him

to be clean and correct and tell the truth.

- Indicated that the positive finding of which he was notified about a year before took him and his family by surprise and is a huge shock for all of them.
- Since then he acts *"as if I am a living dead"*. He lost his sponsors, had severe consequences to his entire life and negative social effect on him.
- He could have admitted taking medication containing the Prohibited Substance for which he would have received a light sentence of 3 – 6 months, but this would be lying and against the way he was raised (his father advised him to always be honest).
- It is for him the last chance to be at the Olympics and restore his life.
- He accurately listed all his activities and everything he consumed and used during the entire period between the last negative test and the positive one.
- During this entire period he was only at the hotel, the competition venue and the buses in between; practicing, resting and reading.
- He ate only the buffet food at the hotel where most other athletes were staying, coffee he made himself and the rice balls and cake received from his acquaintance.
- He took no medications during the period before the event (from early November). He brought no medications with him since the team doctor was at the competition and there was no need to bring anything himself.
- He does take on occasion various permitted supplements all sourced from certified sources following consultation with the coach. In this instance he took no supplements and did not even bring any. They were on training camp between 2 to 8 December 2018 and from there went directly to the competition venue. He sent back the supplements to his home on 7 December 2018, since his condition was very good during training.
- The rice balls made in China are made by hand so each is somewhat different. They come unwrapped in a small box.
- He indicated that an acquaintance (whom he met at a competition in Peking some 1 to 2 months earlier; someone who appears to be of a similar age to his) who on occasion accompanies Japanese athletes when in China and whom he trusted gave him ten rice balls as well as rice cakes, since he knew that the buffet food at the hotel was not great. He ate three rice balls (the last one some 5 hours before the race and test in question) and gave the other to his team mates and the trainer; the trainer ate his but he does not think that the other athletes ate the ones he gave them.
- In closing the Athlete stated again that this case ruined his life, that swimming is his sport and makes up his entire life and that he was training for 4 years for these Tokyo Olympics. It would be highly unfair if he ends up missing the Olympics due to the imposed sanctions.

- Professor Martial Saugy, former director of the Lausanne WADA-accredited laboratory and now director of REDs (Research and Expertise in anti-doping sciences) confirmed his statement dated 17 December 2019. Professor Saugy indicated that methylephedrine was

originally used as a product to relieve asthma and similar breathing conditions and was not a food supplement. It was later also used in supplements which aim to decrease fat mass. When used in supplements it is used as a true ingredient aimed to have an effect and not there as a result of contamination. The concentration found in the Athlete's systems is one that can have an effect. In cases of an accidental contamination the concentration would typically be diluted in the urine and would be much lower. In such cases it would not appear in micrograms but concentrations which are *"1000 less at least"*.

- Professor Saugy:
  - The Challenged Decision mistakenly refers to picograms, while the finding as is evidenced by the test reports is in micrograms (one picogram is one million times less than a microgram).
  - A finding of 17 mg/mL in the sample means an approximate consumption of a dose of 25 micrograms about 12 hours before the test.
  - A 2016 study by a Japanese group of experts (Kojima et al; Drug Test. Analysis, 8, 189-198, 2016) studied the pharmacokinetic of excretion of methylephedrine after the oral intake of a normal therapeutic dose of 25 mg. All five volunteers of the study showed their maximum peak concentration of methylephedrine to be 12 hours after the oral intake of the substance. The range of concentrations found for the 5 volunteers after 12 hours was of 5.9 to 21.3 mg/mL.
  - A positive result based on spitting or coughing on rice balls or touching the rice balls when hands are not clean and the cook consumed cold medicine containing methylephedrine *"would not be consistent with the result"* of the test. In such a case the concentration would be in picograms and not micrograms.
  - In response to the Appellant's questions Professor Saugy explained that the positive finding may be explained only if the tablet itself is put (or poured in the case of liquid or powder) into the specific rice ball which is consumed.
  - Professor Saugy explained that, based on the rules, WADA decision limit of 11 mg/mL is corrected to the specific gravity, and in this case is corrected to 13.75 mg/mL. Only the A Sample needs to be quantified under the WADA rules and concentration of 16 mg/mL in the B Sample is consistent with 17 mg/mL in the A Sample and within the range of uncertainty.
  - In response to the Appellant's indication that urine tests are not accurate and that tests of dry blood spots are more accurate, Professor Saugy explained that *"in future it is possible that dry blood spots will bring other solutions"* to the test process, but that currently urine is the test which is accurate enough at the levels of this case.
  - Professor Saugy confirmed that it is difficult to correlate the concentration with an exact specific scenario. The concentration found it the Athlete's systems is in line with consumption of 20 to 30 micrograms 12 to 24 hours before the test, although other scenarios are also possible as the one put by the Athlete of consumption of somewhat lower quantity closer to the test.
  - Professor Saugy confirmed that he was generally familiar with the 1968 article cited

by the Athlete. However, he indicated that there was no need to go back to a 1968 study since the 2016 study of Kojima et al (which also refers to the 1968 study) *"is out there"*.

29. Both Parties confirmed that they had no objection to the constitution of the panel and that their rights to be heard and to be treated equally in the proceedings had been fully respected.

IV. THE POSITION OF THE PARTIES

30. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every submission advanced by the Appellant and by the Respondent. The Sole Arbitrator has nonetheless carefully considered all the submissions made by the Parties, whether or not there are specific references to them in the following summary.

A. The Position of the Appellant

31. In his Statement of Appeal the Appellant requested the Sole Arbitrator for the following relief:

"(1) This Appeal is admissible;

(2) The sanction for Appellant shall be reduced to reprimand and no period of ineligibility within the range of three to six months;

(3) The Respondent shall bear all its costs and expenses for this Appeal proceedings".

32. In his Appeal Brief the Appellant modified his request for relief as follows:

"(1) This Appeal is admissible;

(2) The sanction for Appellant shall be reduced to reprimand and no period of ineligibility, or a period of ineligibility within the range of three to six months, <u>or at maximum within twelve months, commencing as of 14 December 2018</u>;

(3) The Respondent shall bear all its costs and expenses for this Appeal proceedings".

33. The Appellant's contentions regarding the mistakes contained in the Challenged Decision which require the Sole Arbitrator to set it aside may be summarized as follows:

- Methylephedrine entered the Athlete's systems through the rice ball he consumed on 14 December 2018 at around 15:30 which was contaminated with such product.
- The Athlete underwent a prior test on 11 December 2018 at 21:30 which was negative; thus the product must have entered his systems within a period of about 71 hours between such time and the positive test on 14 December 2018 at 20:25.
- The Athlete was at the competition grounds, had a regular well controlled regime of practice, rest and competitions and has put together a detailed list of all activities and all food and products consumed/ used by him.

- The Athlete did not carry any medications or supplements to the Championships.
- During the relevant period, the Athlete consumed the same hotel food and drinks supplied to all other Athletes as well as closed water bottles supplied at the hotel and the competition grounds.
- The Athlete eliminated all other potential sources of the Prohibited Substance: (i) shampoo and body soap were wildly distributed standard products; (ii) coffee was carried by the Athlete from Japan and was consumed also before the negative test; (iii) baby oil used for massage was a wildly distributed standard product from a well-regarded manufacturer and a similar such product (the original one was fully consumed) tested negative by the Athlete's team (including a scientific expert, Professor Kazuhiro Matsuo, Associate Professor at the Faculty of Pharmacy at Toho University) when trying to find out the cause of the positive test; (iv) the actual Magnesium sports' lotion used by the Athlete was tested negative by the Athlete's team when trying to find out the cause of the positive test and (v) a similar short cake to the one ate by the Athlete (the original one was fully consumed) tested negative by the Athlete's team when trying to find out the cause of the positive test and additionally the short cake was consumed by the Athlete some 54 hours before the positive test and the scientific research does not support a positive finding of a small quantity consumed so long before the test.
- Therefore, the only possible source are the rice balls. These were prepared by a local eatery in Hangzhou China called "Chushin-ya", purchased by an acquaintance of the Athlete who visited the Athlete during the Championships; The chefs and staff at this eatery prepared rice balls with bear hands and without wearing masks unlike the way these are often prepared in Japan.
- Methylephedrine is contained in various over-the-counter cold medicines that are freely distributed and easily obtained in China to treat symptoms such as runny nose, allergy, asthma, cold, cough, diarrhea, fever and headaches.
- These products is available not only in tablets but also in white power form.
- It is a *"realistic possibility"* that one of the chefs or staff members at the eatery consumed this product, which found its way into the rice balls; it is possible that it was consumed by such staff members during the preparation of the rice balls and found its way into the rice ball actually consumed by the Athlete.
- Methylephedrine in white powders is impossible to visually identify once mixed with white rice.
- The suspected rice ball was eaten by the Athlete at around 15:30 on 14 December 2018, approximately five hours before the positive test. This rice ball is the only suspicious ingestion by the Athlete, especially within the 24 hours prior to the test.
- This is a unique case in that the suspected period between the prior negative test and the positive one is well defined short period and the Athlete was able to provide a complete and comprehensive list of everything consumed and used by him. Therefore, on the balance of probabilities, the rice ball contaminated with methylephedrine must be

identified as the source for the Prohibited Substance. There can be no other source for this substance.

- A leading scientific analysis ("Absorption, Metabolism and Excretion of the Ephedrines in Man. I. The Influence of Urinary pH and Urine Volume Output", by G.R. Wilkinson and A.H. Beckett, Department of Pharmacy, Chelsea College of Science and Technology, University of London, March 7, 1968, The Journal of Pharmacology and Experimental Therapeutics, Vol. 162) confirms that the excretion of methylephedrine in urine is heavily affected by the pH of the urine.
- The article "Comparison of urine analysis and dried blood spot analysis for the detection of ephedrine ad methylephedrine in doping control" by Kojima et al (Drug Test Analysis, 8, 189-198, 2016) states that *"the urinary excretion of … methylephedrine can be strongly affected by urine pH and/or urine volume"*. Additionally, the system of an individual under extreme psychological pressure or nervousness, such as a swimmer facing the finals of a world cup race may experience, may cause different effects to those of a "normal" subject.
- The minimum threshold for methylephedrine set forth in the WADA Prohibited List lacks rational. Under such threshold, while an athlete with acidic urine may be relatively easily declared with AAF, an athlete with alkaline urine will hardly ever be caught even when ingesting a significantly greater amount of methylephedrine.
- Dried blood analysis would be a more accurate testing method.
- WADA also recognizes such issues and a special WADA working group is working on raising the reporting limits for Prohibited Substances which are known as contaminants.
- Considering the pH of the Athlete's urine and the urine which he has passed outside of his system after consuming the rice ball and until the race, the estimated amount of methylephedrine that he ingested is somewhere within the wide range of more than 1.6 to 1.7mg and significantly less than 27.12mg.
- The normal daily amount of dose of methylephedrine is 160-200mg and a user of cold medicine containing methylephedrine could possess this daily amount of 160-200mg.
- Therefore, there is a rational possibility that such amount of methylephedrine, especially the lower amount within the range of more than 1.6 to 1.7mg and significantly less than 27.12mg, could have accidently mixed into the rice used for the rice ball through one of the chefs or staff members who was a user of cold medicine containing methylephedrine.
- The science is not conclusive in this case. The urine test cannot indicate at what time and which quantity was consumed and big variables may exist. The rice ball "episode" cannot be rejected based on science alone. Consumption of a small quantity some 5 hours before the race may yield a test level of 17 mg/mL, and not only the consumption of 25mg some 12 to 24 hours before a race. The scientific papers referred to by the Athlete show that urine tests have low credibility.
- The Athlete is truly credible and honest and this was also confirmed by the FINA DP. Therefore, the close list of products consumed and used by the Athlete should be accepted.

- After examining the complete and comprehensive list of all items consumed and used by the Athlete and against such scientific background, the rice ball contaminated with methylephedrine must be identified as the source under the balance of probabilities.
- A two-year ban is not a proportionate sanction for the ADRV and should be reduced based on the principle of proportionality. Therefore, regardless of the source of the Prohibited Substance, other circumstances exist where a two-year ban cannot be reasonably justified. This is particularly so in the circumstances of this case in which such a ban will eliminate the Athlete from competing at the 2020 Summer Olympics taking place at his home town of Tokyo. This unfairness was also acknowledged in the Challenged Decision. These factors are:
    - The Athlete's high standard of honesty, fairness and integrity acknowledged by the FINA DP;
    - Refusing to falsely "admit" ingestion of an over-the-counter medicine containing methylephedrine which otherwise would likely have resulted in a light sanction;
    - The nature of methylephedrine which is a substance that can easily enter an athlete's systems in an inadvertent manner;
    - The fact that the Athlete tested negative in all 52 anti-doping tests prior to the positive test resulting in these proceedings;
    - The Athlete is a well-disciplined top swimmer; he did not carry any medicines or supplements into the Championships and strictly obeyed his routine in the period before the race in question;
    - The Athlete's immediate refrainment from all competitions from the moment he first learned about the AAF and even before he immediately accepted voluntary provisional suspension after receiving the B Sample result; and
    - The Athlete's sincere effort in trying to determine the cause despite the substantial delay in being notified of the AAF.
- The Athlete should be treated equally to other Japanese athletes who had tested positive for methylephedrine coming from a cold medicine and who were sanctioned with periods of ineligibility of up to six months.
- Alternatively, and as also suggested by the FINA DP, the Sole Arbitrator should issue an instruction for an alternate solution which will be fairer in the special circumstances of this case. This is in line with the new 2021 WADC which will be implementing a new Article regarding Case Resolution Agreement (new Article 10.8.2) which appears to be developed precisely for such kind of situations.
- The appropriate sanction for consuming a contaminated rice ball is a reprimand and no period of ineligibility, or a period of ineligibility within the range of three to six months, or, at maximum, within twelve months. Rice is the staple food for Japanese people and the Athlete simply could not have anticipated that rice balls could be contaminated.
- The period of voluntary provisional suspension served by the Athlete starting 27 March

2019 should be credited against the period of ineligibility Under FINA DC 10.11.4.

- There was a substantial delay in notifying the Athlete of the AAF not attributable to him, thereby infringing his right under FINA DC 7.1.3(a).
- After being notified of the AAF of his A Sample, the Athlete immediately refrained from participating in any competitions and immediately accepted voluntary provisional suspension after being notified his B Sample test results, and admitted his ADRV in a timely manner. FINA DC 10.11.1 allows to impose the period of ineligibility starting from the sample collection date. There is no justification for the substantial delay in notifying the AAF which is not attributable to the Athlete. FINA DC 10.11.1 should be fully applied to the Athlete and the commencement date of the period of ineligibility should be 14 December 2018.

B. The Position of the Respondent

34. In its Answer to the appeal, the Respondent requested the Panel to issue an award:

"FINA hereby respectfully requests the CAS to rule that:

- *The Appeal filed by Hiromasa Fujimori is dismissed.*
- *FINA is granted an award for costs".*

35. The Respondent's answer may be summarized as follows:

- The Athlete was not able to establish the source of the Prohibited Substance and he can therefore not benefit from a reduced sanction for No Significant Fault or Negligence under FINA DC 10.5.1.
- The explanations offered by the Athlete for the presence of the Prohibited Substance are far from being plausible ones and are at odds with Professor Saugy's expert testimony.
- The rice ball scenario cannot be proven by presenting various possible scenarios that do not make sense and stating that the rice ball story is better than the others. This is like a sophisticated denial. One should show that the rice ball episode is more likely than not.
- The Athlete did not mention the possibility of taking supplements thus ignoring the most likely scenario.
- FINA does not argue that the act was intentional. Maybe the Athlete really does not know and cannot explain the presence of the substance, but this does not mean that it is explained. FINA does not argue that the Athlete has an interest to lie, but the story of the rice ball is highly improbable and, therefore, not proven.
- The Athlete has not provided any supporting evidence for the source of the Prohibited Substance. His proposed scenario that contaminated rice balls would have to be the source of the Prohibited Substance is per se *"highly improbable"*. The proposition of an unlikely scenario falls far from meeting the required burden of proof.

- Had the FINA DP benefitted from the explanations of Professor Saugy, it might have reached the same conclusion with a much higher level of comfort.
- Urine test, even if less accurate than blood cells, is still accurate enough as it provides an order of magnitude and one need not be more exact than that in the circumstances of this case.
- The sanctioning regime of the WADC embodies the principle of proportionality through the application of No Fault or Negligence and No Significant Fault or Negligence. The sanctioning regime of the WADC was also found to be proportionate by CAS case law. Therefore, the principle of proportionality cannot apply to correct the result of the application of the rules beyond the possible reductions provided therein, precisely in order to take into account proportionality.
- In view of Professor Saugy's testimony, the Athlete's explanations lack plausibility and there is no justification to even consider that an alternate solution would be desirable.
- In any event, an invitation for an alternate solution lacks any basis. A decision-making panel can only decide a case in application of the rules in force and cannot direct another body to find a solution outside of the existing regulations.
- The 2021 WADC is not in force and therefore cannot be applied in anticipation. In any event, Article 10.8.2 of the 2021 WADC is not meant to enable a decision-making body to instruct an anti-doping organization to circumvent the provisions of the WADC and the organization's own anti-doping rules.
- The request for an *"Alternate Solution"* can therefore only be rejected.
- Given the fact that the whole process from collection to decision took approximately 8 months, it can be noted that the FINA DP used the discretion provided under FINA DC 10.11.1 already rather generously in favour of the Athlete when it decided that the start of the ineligibility period should be backdated to start on 1 January 2019.
- This FINA DP exercise of discretion should not be reviewed by the Sole Arbitrator substituting his own appreciation to correct the decision issued by the first instance body. In accordance with CAS' well established jurisprudence, the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed under the rules may only be reviewed when the sanction is *"evidently and grossly disproportionate to the offence"*.
- The FINA DP's decision is clearly not *"evidently and grossly disproportionate"* and must therefore be respected.
- The FINA DP properly exercised its discretion when backdating the start date of the period of ineligibility only shortly after the collection date.
- The Challenged Decision must be confirmed and the Athlete's appeal dismissed.

V. JURISDICTION

36. The jurisdiction of CAS is accepted by the Respondent, is confirmed by the Order of Procedure, signed by the Parties without any reservation, and is contemplated by Rule 12.13.2 of the FINA Constitution and by Rule 13 of the FINA DC. No objections were lodged in regard to CAS' jurisdiction before or at the hearing.

37. Rule 12.13 of the FINA Constitution states in its pertinent part that:

> *"C 12.13.2 A Member, member of a Member, or individual sanctioned by the Doping Panel, the Disciplinary Panel or the Ethics Panel may appeal the decision exclusively to the Court of Arbitration for Sport (CAS), Lausanne Switzerland. The CAS shall also have exclusive jurisdiction over interlocutory orders and no other court or tribunal shall have authority to issue interlocutory orders relating to matters before the CAS".*

38. Rule 13 of the FINA DC states in its pertinent part that:

> *"DC 13.2 Appeals from decisions regarding Anti-Doping Rule violations, Consequences, Provisional Suspensions, recognition of decisions and jurisdiction.*
> *A decision that an anti-doping rule violation was committed, a decision imposing Consequences or not imposing Consequences for an anti-doping rule violation, or a decision that no anti-doping rule violation was committed; ….*
>
> > *DC 13.2.1 Appeals involving International-Level Athletes or International Competitions*
> > *In cases arising from participation in an International Competition or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court.*
> > *[Comment to DC 13.2.1: CAS decisions are final and binding except for any review required by law applicable to the annulment or enforcement of arbitral awards]".*

39. CAS jurisdiction over the current proceedings is therefore confirmed.

VI. ADMISSIBILITY

40. The Statement of Appeal was filed on 28 October 2019, within twenty-one days of the date the Challenged Decision was received by the Athlete; namely, 8 October 2019.

41. This conforms with the time limit for appeal pursuant to Rule 13.7.1 of the FINA DC which states in its pertinent part:

> *"DC 13.7.1 Appeals to CAS*
>
> *The deadline to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party. …".*

42. The Statement of Appeal was filed within the deadline set in Rule 13.7.1 of the FINA DC and

complies with the requirements of Articles R48 and R65 of the Code, including the payment of the CAS Court Office fee. The admissibility of the appeal is not challenged by the Respondent. Accordingly, the appeal is admissible.

VII. SCOPE OF THE PANEL'S REVIEW

43. According to Article R57 of the Code:

> *"The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. …".*

VIII. APPLICABLE LAW

44. This arbitration has its seat in Lausanne. Since the Athlete is not domiciled in Switzerland, the present arbitration is governed by Articles 176 et seq. of the Swiss Private International Law Act (PILA). Pursuant to Article 182, para. 2 PILA, the Code governs the procedural aspects of this arbitration.

45. The law applicable in the present arbitration is identified by the Sole Arbitrator in accordance with Article R58 of the Code.

46. Article R58 of the Code provides the following:

> *"The Panel shall 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

47. In the present case, the *"applicable regulations"* for the purposes of Article R58 of the Code are, indisputably, those contained in the FINA Constitution and the FINA DC and associated rules and regulations because the appeal is directed against the Challenged Decision, which was decided applying the FINA DC.

48. As a result, FINA Constitution and the FINA DC shall apply primarily. Swiss law, being the law of the country in which FINA is domiciled, applies subsidiarily.

49. The provisions of the FINA DC which are relevant in this case include primarily the following:

Regarding the violations:

> *"The following constitute anti-doping rule violations:*

***DC 2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample*.**

DC 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 DC 2.1.
[Comment to DC 2. 1. 1: An anti-doping rule violation is committed under this Article without regard to an Athlete's Fault. This rule has been referred to in various CAS decisions as "Strict Liability". An Athlete's Fault is taken into consideration in determining the Consequences of this anti-doping rule violation under DC 10. This principle has consistently been upheld by CAS].

DC 2.1.2 Sufficient proof of an anti-doping rule violation under DC 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.
[Comment to DC 2.1.2: FINA or its Member Federation with results management responsibility may at its discretion choose to have the B Sample analyzed even if the Athlete does not request the analysis of the B Sample].

DC 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.

DC 2.1.4 As an exception to the general rule of DC 2.1, the Prohibited List or International Standards may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously.

DC 2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method

DC 2.2.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used. 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 violation for Use of a Prohibited Substance or a Prohibited Method.

DC 2.2.2 The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed.
[Comment to DC 2.2.2: Demonstrating the "Attempted Use" of a Prohibited Substance or a Prohibited Method requires proof of intent on the Athlete's part. The fact that intent may be

required to prove this particular anti-doping rule violation does not undermine the Strict Liability principle established for violations of DC 2. 1 and violations of DC 2. 2 in respect of Use of a Prohibited Substance or Prohibited Method.
An Athlete's "Use" of a Prohibited Substance constitutes an anti-doping rule violation unless such substance is not prohibited Out-of-Competition and the Athlete's Use takes place Out-of-Competition. However, the presence of a Prohibited Substance or its Metabolites or Markers in a Sample collected In-Competition is a violation of DC 2. 1 regardless of when that substance might have been administered]".

Regarding the respective burdens and standards of proof:

"DC 3.1 Burdens and Standards of Proof

FINA and its Member Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether FINA or the Member Federation 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.

[Comment to DC 3.1: This standard of proof required to be met by the Anti-Doping Organization is comparable to the standard which is applied in most countries to cases involving professional misconduct]".

Regarding the sanction for an ADRV of Presence or Use:

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

The period of Ineligibility imposed for a first violation of DC 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension of sanction pursuant to DC 10.4, 10.5 or 10.6:

DC 10.2.1 The period of Ineligibility shall be four years where:

DC 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.

DC 10.2.1.2 The anti-doping rule violation involves a Specified Substance and FINA, the designated organization or the Member Federation can establish that the anti-doping rule violation was intentional.

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

DC 10.2.3 As used in DC 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in conduct

which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

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

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

DC 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.

DC 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.

[Comment to DC 10.5.1.2: In assessing that Athlete's degree of Fault, it would, for example, be favorable for the Athlete if the Athlete had declared the product which was subsequently determined to be Contaminated on his or her Doping Control form.]

DC 10.5.2 Application of No Significant Fault or Negligence beyond the Application of DC 10.5.1

If an Athlete or other Person establishes in an individual case where DC 10.5.1 is not applicable that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in DC 10.6, the otherwise applicable period of Ineligibility may be reduced based on the Athlete or other Person's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this rule may be no less than eight years.

[Comment to DC 10.5.2: DC 10.5.2 may be applied to any anti-doping rule violation except

> *those rules where intent is an element of the anti-doping rule violation (e.g., DC 2.5, 2. 7, 2.8 or 2.9) or an element of a particular sanction (e.g., DC 10.2.1) or a range of lneligibility is already provided in a rule based on the Athlete or other Person's degree of Fault]".*

Relating to the definitions of No Fault or Negligence and No Significant Fault or Negligence:

> *"**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 DC 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 antidoping rule violation. Except in the case of a Minor, for any violation of DC 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.*
>
> *[Comment: For Cannabinoids, an Athlete may establish No Significant Fault or Negligence by clearly demonstrating that the context of the Use was unrelated to sport performance]".*

IX. MERITS

50. The object of this arbitration is the Challenged Decision, which found the Athlete responsible for the ADRV contemplated by Rule 2.1 of the FINA DC and imposed on him a suspension for two-years pursuant to Rule 10.2.2 of the FINA DC (specified substance and FINA did not allege that the violation was "intentional" as this term is defined in Rule 10.2.3 FINA DC). The Challenged Decision concluded that the Athlete was not entitled to a fault-related reduction of the period of suspension pursuant to Rule 10.5 of the FINA DC, since he was not able to establish the source of the Prohibited Substance. The Athlete does not dispute the finding of an ADRV, but argues that the period of ineligibility should be eliminated or reduced since the Athlete identified the source of the Prohibited Substance and can prove no significant fault or negligence or that the sanction is otherwise neither proportionate nor justified. FINA, on the other hand, requests to dismiss the appeal and to confirm the Challenged Decision.

51. FINA did not claim that the Athlete's ADRV was intentional and there is no request to apply FINA DC 10.2.1.2.

52. The Athlete accepts the positive finding and the ADRV and this finding is not subject to this appeal. The Athlete seeks a reduced sanction based on Rule 10.5.1 FINA DC back-dated to the date of the sampling. As specified in the Statement of Appeal, the appeal is limited to two elements of the Challenged Decision: (i) the finding on the establishment of origin of the Prohibited Substance; and (ii) the conclusion on backdating of the sanction. Alternatively, the Athlete claims that the sanction should be reduced in accordance with the principle of proportionality or, in the alternative, that the Sole Arbitrator should *"issue an instruction for an alternate solution"* resulting in a more proportionate sanction.

53. FINA, on the other hand, confirms that no definite conclusion can be drawn in respect to the Athlete's guilt or absence of guilt. FINA is not seeking a four-year sanction, and thus does not carry the burden of proving intent of the Athlete.

54. There are four main issues which need to be addressed by the Sole Arbitrator:

    i. Was the Athlete able to prove the source of the prohibited substance allowing him to benefit from a reduction of the period of ineligibility?

    ii. Is the period of ineligibility proportionate or should it otherwise be eliminated or reduced?

    iii. Should an alternative solution be imposed?

    iv. When should the period if ineligibility commence?

55. The Sole Arbitrator will consider each of those issues separately.

i. Was the Athlete able to prove the source of the prohibited substance allowing him to benefit from a reduction of the period of ineligibility?

56. The Athlete argues that the FINA DP was required to eliminate or reduce the period of ineligibility since he established that his fault or negligence, when viewed in the totality of the circumstances, was not significant in relationship to the ADRV.

57. Pursuant to Rule 10.5.1.1 of the FINA DC, *"[w]here 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"*.

58. In order to benefit from a fault related reduction, the Athlete must prove the source of the Prohibited Substance. This is explicitly stated in the definitions of the terms No Fault or Negligence and No Significant Fault or Negligence in the FINA DC, as follows:

    *"**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. ….*

    ***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 antidoping rule violation. …"*.

59. Therefore, for the Athlete to benefit from the provisions of Rule 10.5.1.1 of the FINA DC and be able to request a reduced sanction, he must first establish the source of the Prohibited Substance.

60. According to Rule 3.1 of the FINA DC, the applicable standard of proof for the Athlete to

establish the source of the Prohibited Substance and that there was no significant fault or negligence is *"by a balance of probability"*.

61. In the present case, the Athlete was able to identify a closed "suspected period" of about 71 hours since he tested negative at the same Championships on 11 December 2018 at 21:30, while the positive test occurred on 14 December 2018 at 20:25. This relatively short period combined with the fact that the Athlete was at a competition site and followed a competition schedule and regime, staying and resting at the hotel along with other athletes and traveling to the competition grounds for exercise and events, permitted the Athlete to come up with a comprehensive and detailed report of his schedule, activities and items consumed or used during this limited period.

62. The Athlete also highlighted his integrity and honesty. Before the Championships at which the positive test occurred, the Athlete underwent a total of 51 anti-doping tests, all testing negative. During the Championships, on 11 December 2018, he took the 52nd anti-doping test in his career, and tested negative. Following the positive test which is the subject of this appeal, while he was complying with his voluntary provisional suspension and on 2 May 2019, he was subject to his 54th anti-doping test which also resulted negative. The Athlete argues that these facts, along with the FINA DP observations regarding the Athlete's honesty and credibility, must provide substantial evidentiary weight to what he described as an exhaustive list of products used or consumed by him during the suspected period and to his repeated testimony that he did not use any Prohibited Substances.

63. The Athlete then went through a process of elimination of items consumed or used by him. The Athlete eliminated all other potential sources of the Prohibited Substance. According to the Athlete by eliminating all other products, the positive finding must have come from contaminated rice balls bought by an acquaintance in China. All other possible sources that he listed in his submissions, were ruled out by the Athlete himself. Although these were potentially suspect since they were consumed or used by the Athlete during the suspected period, they were, on the Athlete's own admission, not likely to be the source of the Prohibited Substance.

64. The Sole Arbitrator must therefore consider only the rice ball contamination scenario, and conclude whether the Athlete was able to establish that this scenario was proven to have happened more likely than not.

65. The Athlete argued that medication containing methylephedrine was freely available in the region of China where the Championships took place. Indeed, the evidence showed that in Zhejiang Province (the Province where Hangzhou is located), 170 types of medicine containing ephedrine is distributed and cold medicine containing methylephedrine can be easily obtained by anybody.

66. The shop/ restaurant where the rice balls were purchased by the Athlete's acquaintance were visited for the purposes of this case and it was shown that kitchen staff and the chef prepared rice balls wearing no gloves and no masks. In his Statement of the Athlete contended that *"if the chef, or other staffs such as the waiter/waitress, had taken medication including methylephedrine shortly before or while at work, it could contaminate the rice balls"* and that *"if the chef, or other staffs such as the*

waiter/waitress, had a common and frequent symptom such as allergy, cold cough, diarrhea, fever, headache or runny nose, s/he could have easily taken medication containing methylephedrine".

67. In his Appeal Brief the Athlete claimed that *"there is a realistic possibility that one of the chefs or staffs at the local eatery possessed cold medicine containing methylephedrine, and that cold medicine accidentally contaminated the rice used for the rice balls. The cold medicine, available in powders [...] could have dropped on the rice ball itself, or gotten mixed into the rice cooker preserving the cooked rice to be used for the rice balls"*.

68. According to Professor Saugy, the concentration found in the Athlete's urine is, based on the studies, *"in the same range of those obtained 12 hours after the oral intake of 25 mg"* of methylephedrine. Namely, the concentration is compatible with an intake of a pharmacological dose of methylephedrine.

69. Professor Saugy further testified that a positive result based on spitting or coughing on rice balls or touching the rice balls when hands are not clean and the cook consumed cold medicine containing methylephedrine *"would not be consistent with the result"* of the test. In such a case the concentration would be in picograms and not micrograms. *"Contamination by a person having used Methylephedrine would normally be for a small fraction of that quantity"* and *"[t]his scenario is effectively highly improbable"* and *"the most plausible scenario is that the athlete took within the last 12 to 24 hours before the test an oral therapeutic dose of Methylephedrine"*.

70. In response to the Appellant's questions, Professor Saugy accepted at the hearing that only if the medication tablet itself is put into (or if liquid or powder – poured into) the specific rice ball which is consumed the positive finding may be explained.

71. Following such confirmation of this theoretical scenario by Professor Saugy at the hearing, the Athlete somewhat adjusted his explanation and indicated that it is plausible that the quantity (in powder form or otherwise) of an entire dose of medication containing methylephedrine was mistakenly poured into the rice ball consumed by the Athlete.

72. CAS jurisprudence is clear that it is not sufficient for an athlete merely to make protestations of innocence and to suggest that the Prohibited Substance must have entered his body inadvertently from some supplement, medicine or other product. An athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question.

73. In CAS 2010/A/2230, the Sole Arbitrator indicated that *"[t]o permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination - two prevalent explanations volunteered by athletes for such presence - do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body"*.

74. In CAS 2014/A/3820, the panel held that: *"[i]n order to establish the origin of a Prohibited Substance by the required balance of probability, an athlete must provide actual evidence as opposed to mere speculation"*.

75. The panel in CAS 2014/A/3615 clearly stated that mere attestations of innocence and efforts

to locate the source of the substance are not enough and that supporting evidence is needed:

> *"The person charged cannot discharge that burden [of proof] merely by showing that he made reasonable efforts to establish the source, but that they were without success. The resolution of the issue which arises at this first stage does not relate to the presence or absence of fault or negligence, or, if it is present, its degree. Such matters are relevant only to the second stage. The resolution of the issue which arises at the first stage depends upon the answer to a simple question: has the person charged established what the source is? Mere assertion as to what the source is, without supporting evidence, will be insufficient".*

76. The panel in the CAS OG 16/ 25 *"found the sabotage(s) theory possible, but not probable and certainly not grounded in real evidence"*. It considered that *"the nature and quality of the defensive evidence put forward by the athlete, in light of all the facts established, must be such that it leaves the tribunal actually satisfied (albeit not comfortably so) that the athlete's defence is more likely than not true"*. Therefore, establishing that a scenario is possible is not enough to establish the origin of the Prohibited Substance, and that an athlete must show that the argued scenario is more likely than not.

77. Merely identifying a potential source is not enough and an athlete must also demonstrate that the source could have caused the actual adverse finding, using corroborating evidence, such as scientific or other evidence, and meeting the balance of probability test (see CAS 2010/A/2277).

78. In CAS 2006/A/1067, the panel held that: *"[t]he Respondent has a stringent requirement to offer persuasive evidence of how such contamination occurred. Unfortunately, apart from his own words, the Respondent did not supply any actual evidence of the specific circumstances in which the unintentional ingestion of cocaine occurred"* (see also CAS 2014/A/3615; CAS 2006/A/1032; CAS 2010/A/2277).

79. The Sole Arbitrator concludes that, based on the CAS case law recalled above, the Athlete's explanation cannot be enough to satisfy his burden of establishing the origin of the Prohibited Substance. The Athlete failed to provide any evidence except his attestation regarding the source. This in contrast to CAS 2011/A/2384 & 2386 where the panel did not accept that contaminated meat was the source of clenbuterol, even in circumstances where the athlete established that he ate a particular piece of meat at the relevant time, traced the meat back to a particular butcher, then to a slaughterhouse, and finally to a farmer, whose brother had previously been convicted for using clenbuterol.

80. In accordance with the established jurisprudence of the CAS (see, CAS 2014/A/3615, and CAS 2012/A/2759), the meaning of *"by a balance of probability"* in this context is that the occurrence of the scenario suggested by the Athlete must be more likely than its non-occurrence and not the most likely among competing scenarios. The Sole Arbitrator does not need to decide which is the most likely between two or more competing scenarios, but rather the Athlete must prove that the chain of events presented by him did happen, more likely than not. Of course, the Athlete is allowed to address other scenarios put forward in an effort to support his position. However, FINA does not have the burden of proving the prevailing likelihood of a different scenario and it is not obliged to put forward any other competing scenarios.

81. The Athlete referred to "indirect evidence", "circumstantial evidence" and argued that no other source was possible or at least all other possible sources were less likely. In the present case the

Athlete put forward a number of possible scenarios and designated one – the rice ball scenario - as the most likely in his view. This was, however, done without any evidence supporting the plausibility of this choice other than the fact that the Athlete himself considered the other possible explanations proposed be him as lacking any plausibility.

82. There is no evidence beyond the denial by the Athlete to exclude a potential intentional intake, including for example the use of supplements containing the Prohibited Substance which the Athlete might not be willing to admit. The burden to establish the origin lies solely on the Athlete and FINA does not have a burden to hypothesise and, still less, prove an alternative source.

83. The scenario put forward by the Athlete regarding contamination of the rice used for the rice balls given to the Athlete including the ones consumed by him through medication used by the restaurant staff was not supported or corroborated by any evidence and was merely argued by the Athlete. Professor Saugy testified that this was highly unlikely based on the detected levels in the Sample which were scientifically far too high to support such an assertion.

84. The adjusted scenario of the pill or powder of an entire dose falling into the specific rice ball consumed by the Athlete five hours before the race is also not corroborated by any additional evidence. Furthermore, the Sole Arbitrator finds this scenario to be most unlikely and not proven as it would require the combination of an unimaginable set of events: a restaurant staff member taking medication while preparing the rice balls, doing so while and at the same place as making the rice balls, pouring the entire dose content into the rice and ignoring it, this specific rice ball being among the 10 delivered to the Athlete and being the one of these 10 actually consumed by the Athlete 5 hours before the race.

85. In CAS 2017/A/5301 & CAS 2017/A/5302 the Athlete was able to establish, although "just slightly", by a balance of probability that she ingested letrozole, which was contained in the medication her mother used to treat cancer and which found its way to the meal prepared by her mother. In that case this was supported by expert evidence and by other testimony including testimony regarding at least one prior case in which this actually happened.

86. The Sole Arbitrator concludes that the Athlete has not provided any corroborating evidence of the alleged source of the Prohibited Substance. His proposed scenario that contaminated rice balls would have to be the source is highly improbable and falls short of meeting the required burden of proof. Thus, the Athlete has failed to discharge his burden of establishing the origin of the Prohibited Substance and the FINA DP was correct to find that the Athlete cannot benefit from any reduction of the period of ineligibility below a two-year period.

ii. Is the period of ineligibility proportionate or should it otherwise be eliminated or reduced?

87. The Athlete argues that, regardless of the source of the Prohibited Substance, other circumstances exist where a two-year ban cannot be reasonably justified and that such a sanction is not a proportionate sanction for the Athlete's level of fault and should be reduced based on the principle of proportionality. The Athlete highlights the following factors which according

to him should be considered in reducing the sanction based on the principle of proportionality:

i. The Athlete's high standard of honesty, fairness and integrity acknowledged by the FINA DP;

ii. Refusing to falsely "admit" ingestion of an over-the-counter medicine containing methylephedrine which otherwise would likely have resulted in a light sanction;

iii. The nature of methylephedrine, which is a substance that can easily enter an athlete's systems in an inadvertent manner;

iv. The fact that the Athlete tested negative in all 52 anti-doping tests prior to the positive test resulting in these proceedings;

v. The Athlete is a well-disciplined top swimmer; he did not carry any medicine or supplements into the Championships and he strictly obeyed his routine in the period before the race in question;

vi. The Athlete's immediate refrainment from all competitions from the moment he first learned about the AAF and even before he immediately accepted voluntary provisional suspension after knowing the B Sample result;

vii. The Athlete's sincere effort in trying to determine the cause despite the substantial delay in being notified of the AAF; and

viii. The circumstances of this case in which such a two-year ban will preclude the Athlete from competing at the 2020 Summer Olympics taking place at his home town of Tokyo.

88. The Athlete cites CAS 2010/A/2268, which states as follows:

> *"Even after the entry into force of the WADC, the CAS has recognized that any antidoping sanction inflicted by a sports federation - that is, a private association - must in any event be consistent with the principle of proportionality: «The sanction must also comply with the principle of proportionality, in the sense that there must be a reasonable balance between the kind of the misconduct and the sanction. In administrative law, the principle of proportionality requires that (i) the individual sanction must be capable of achieving the envisaged goal, (ii) the individual sanction is necessary to reach the envisaged goal and (iii) the constraints which the affected person will suffer as a consequence of the sanction are justified by the overall interest in achieving the envisaged goal. A long series of CAS decisions have developed the principle of proportionality in sport cases. This principle provides that the severity of a sanction must be proportionate to the offense committed. To be proportionate, the sanction must not exceed that which is reasonably required in the search of the justifiable aim (CAS 2005/A/976 & 986 FIFA & WADA, paras. 138-139, footnotes and italics omitted)".*

89. As presented above, the Sole Arbitrator concluded that the Athlete failed to establish a plausible source to the Prohibited Substance. This said, the cause of the positive result is not known and guilt was neither alleged nor proven.

90. The Sole Arbitrator agrees with FINA that in this context, the issue of proportionality can simply not arise for lack of circumstances in respect to which proportionality could be evaluated.

91. The Sole Arbitrator follows the line of CAS case law confirming that the principle of proportionality is embodied in the provisions of Article 10.5 of WADC and would cover the elements alleged by the Athlete. The *"No Significant Fault or Negligence"* and *"No Fault or Negligence"* standards were enacted and are meant to deal with this type of situation, and there is no gap in the rules in this matter that may allow the principle of proportionality to be utilized.

92. As set out in the CAS 2008/A/1489, the principle is that *"the 'no fault or negligence' and 'no significant fault or negligence' exceptions to an otherwise strict liability anti-doping rule are themselves embodiments of the proportionality"*. See also CAS 2017/A/5015 & CAS 2017/A/5110, CAS 2016/A/4643, CAS 2018/A/5546 & 5571.

93. This principle was also confirmed in CAS 2016/A/4534 as follows:

> *"The WADC 2015 was the product of wide consultation and represented the best consensus of sporting authorities as to what was needed to achieve as far as possible the desired end. It sought itself to fashion in a detailed and sophisticated way a proportionate response in pursuit of a legitimate aim"*.

94. Even an *"uncomfortable feeling"* regarding a sanction mandated in the rules, had there been one, would not have been sufficient to invoke the principle of proportionality where the applicable rules include a sanctioning regime which is proportionate and contains clear and concise mechanism which allows for a reduction of the applicable sanction. See CAS 2005/A/830 and CAS 2008/A/1473.

95. The Athlete also refers to 2021 WADC, arguing that a number of amendments are contemplated to be implemented in order to further achieve the spirit of the principle of proportionality, and permitting some additional flexibility in sanctioning. The Athlete reflects that this also implies that there are certain occasions where the severity of sanctions provided in the 2015 WADC provisions are not necessarily proportionate to the offense committed, and *"that in such event the WADC 2015 provisions should be trumped so that the sanction will not exceed what is reasonably justifiable"*.

96. The Sole Arbitrator highlights that the 2021 WADC is not in force and cannot be applied and that the 2015 WADC contains a comprehensive and reasonable sanctioning regime imposed in order to counter the destructive effects of doping, whether intentional or not, on the entire existence of sport. The fact that other possible regimes may be developed or may be imposed in the future is not in and of itself a reason to ignore rules which regulate a certain course of action at the present time.

97. The Sole Arbitrator thus concludes that the principle of proportionality should not be invoked in the circumstances outside of the applicable sanctioning regime and does not require a modification of the two-year period of ineligibility imposed on the Athlete by the FINA DP.

iii. Should an alternative solution be imposed?

98. Alternatively, the Athlete seeks an "alternative solution" referring also to the Challenged Decision in which the FINA DP, faced with an inability to reduce the two-year ban and an Athlete it considered extremely honest with a lower degree of fault, was *"hopeful that through the*

intervention of WADA and/or FINA (through amending its rules if necessary) Mr. Fujimori may receive a more lenient sanction than appears to be presently available to the FINA DP to issue under the FINA DC". The FINA DP further requested that *"FINA is directed to communicate promptly with WADA and to determine whether a reduction of the foregoing two-year period of ineligibility can be achieved as explained above in this decision".*

99. The Athlete also refers to the future 2021 WADC which will be implementing new Article 10.8.2 regarding Case Resolution Agreement *"which appears to be developed precisely for such kind of situation".*

100. FINA reflects that the FINA DP did not have the benefit of Professor Saugy's explanations, and that had it considered them, it is likely that it would have found the lack plausibility of the Athlete's contentions regarding the source and avoided the need to seek "alternative solutions".

101. The Sole Arbitrator concludes that there is no basis in the present rules to impose "alternative solutions" to a decision based on the simple application of the rules and regulations in force. There is no basis to find ways outside of the rules to circumvent the application of the provisions of the 2015 WADC. The 2021 WADC is not in force and therefore cannot be applied in anticipation.

iv. When should the period if ineligibility commence?

102. The Athlete argues that his sanction should be backdated to the date of sample collection (i.e., 14 December 2018) based on Rule 10.11.1 of the FINA DC which states that:

> *"Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person , the body imposing the sanction 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".*

103. The FINA DP accepted that there had been a substantial delay in the procedure and this was not challenged by FINA.

104. However, Rule 10.11.1 of the FINA DC provides the FINA DP with the discretion to backdate the sanction all the way to sample collection, or to another date before such date.

105. It is well established by CAS and confirmed by the Sole Arbitrator that *"the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence"* (see CAS 2009/A/1870).

106. The Sole Arbitrator finds no persuasive reason to replace his discretion with that of the FINA DP, which already used the discretion provided under Rule 10.11.1 of the FINA DC rather generously in favour of the Athlete when it decided that the start of the period of ineligibility should be backdated to 1 January 2019, mere two or so weeks following the date of the test and before the Athlete stopped participation at FINA events.

v. Conclusion

107. The Sole Arbitrator concludes that the Athlete failed to establish the origin of the Prohibited Substance and therefore cannot enjoy a reduction of the sanction under Rule 10.5.1 FINA DC. It is inappropriate to circumvent the application of the applicable rules by imposing the principle of proportionality which is already embodied in the FINA DC rules or by seeking an alternate solution. There is no justification not to confirm the two-year period of ineligibility issued by the FINA DP in application of Rule 10.2.2 FINA DC. The Sole Arbitrator further refuses to replace his discretion with that of the FINA DP and modify the start date of the sanction which was already backdated to shortly after the sample collection date.

108. The Sole Arbitrator concludes that the Challenged Decision must be confirmed and the Athlete's appeal dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Hiromasa Fujimori on 28 October 2019 against the decision rendered on 27 August 2019 by the Doping Panel of the Federation Internationale de Natation is dismissed.

2. The decision rendered on 27 August 2019 by the Doping Panel of the Federation Internationale de Natation in the case relating to Mr Hiromasa Fujimori is confirmed.

3. (…).

4. (…).

5. All other motions or prayers for relief are dismissed.