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Report of Chinese Swiss International Sports Arbitration  
Online Forum(3rd SCLA Global Online Forum)

**瑞中国际运动仲裁论坛  
暨第三届瑞中法协全球论坛报告(英文版)**

## Chinese Swiss International Sports Arbitration Online Forum (Full Report, Dr. Carlos Li)

### Moderators:

1. Mr. Tianze Zhang

### Speakers:

1. Mr. Ming Wu
2. Ms. Guo Cai
3. Mr. Philippe Vladimir Boss
4. Mr. Lucien William Valloni
5. Ms. Ping Zhang
6. Mr. Jean-Pierre Morand
7. Mr. Fang Ye

### Attendants:

1. Mr. Flavio Peter
2. Mr. Mikael Wahlgren
3. Mr. Yaowen Tan
4. Ms. Viktoria Tsvetanova
5. Mr. Xiaoping Wang
6. Mr. Shengchang Wang
7. Mr. Ning Fei
8. Mr. Sheng Zeng
9. Mr. Gianmarco Caliri
10. Mr. Harvey Yan
11. Ms. Fang Zhao
12. Mr. Xianwei Peng
13. Ms. Yanxiang Wang
14. Mr. Jinwen Feng
15. Mr. Naiquan Zheng
16. Ms. Min Min Zhou
17. Ms. Verena Moll
18. Mr. Marco Vedovatti
19. Ms. Ying Wang

20. Mr. Raphael Zumsteg
21. Mr. Wai Sun Szeto
22. Mr. Jacques Buhart
23. Andras Gurovits
24. Mr. Hermann Knott
25. Mr. Florian Mueller
26. Mr. Luka Groselej
27. Mr. Carlos Li
28. Mr. Jianjun Zheng
29. Mr. Leopold Bauer
30. Ms. Margareth d' Avila
31. Mr. Khaled Chowdhury
32. Mr. Paul Neufeld
33. Mr. Koorosh Ameli
34. Yang Yang
35. Yao Zhao
36. Dan Li
37. Ksenia A. Melnikova
38. Yuran Tang

**Date:** 30<sup>th</sup> March 2020

**Time:** CET 1100 – 1400

## **1. Introduction of Swiss Chinese law Association (Tianze Zhang)**

- Mr. Zhang kicked off the 3<sup>rd</sup> SCLA Online Global Forum: Chinese Swiss International Sports Arbitration Online Forum.
- He highlighted the values and visions of SCLA. The two layers of the value are (1) promoting the legal collaboration among China, Switzerland and other countries and (2) promoting connection with international organizations where, for instance, SCLA is now applying for the observer status of UNCTRAL etc. Likewise, there are also two layers of the visions, which are (1) establishing a transparent integrated legal market and an open platform and (2) acting as a global voice for the legal

communities.

- SCLA has established long-term friendly cooperative relations with the Swiss Chinese Chamber of Commerce (SCCC), the Swiss Chamber Arbitration Institution (SCAI), the Swiss federal Supreme Court, the WTO, the United Nations and other international organizations and association. It now has over 90 members from 6 countries across different sectors.
- The actions of SCLA broadly include 1) SCLA Common standard of Legal practice, 2) global presence, 3) initiation for the Centre of the Proof of Foreign Law and 4) Swiss Chinese Law Review.
- Mr. Zhang invited Mr. Flavio Peter, Ms. Viktoria Tsvetanova and Mr. Wang Xian Ping to introduce themselves.

## **2. Case Brief and Insight: a Chinese Practice Perspective (Mr. Ming Wu)**

- Mr. Zhang introduced the background of Mr. Wu.
- There were two parts of Mr. Wu's presentation, namely Part 1) Case Brief: Factual Background And Focus Of Disputes and Part 2) Thoughts From The Chinese Practice Perspective.
- Part 1) Case Brief: Factual Background And Focus Of Disputes.
  - In 2014, the Athlete committed his first anti-doping violation in 2014 whereby he suffered a heart problem and the doctor prescribed him a banned substance to him. Thereafter, he received a doping test and the result was positive. As a result, China Anti-Doping Agency ("the CHINADA") sanctioned him with a three-month period of ineligibility.
  - On 4 September 2018, FINA authorized IDTM to conduct sample

collection and IDTM appointed DCO, BCA and DCA to undertake the out-of-competition sample collection from the Athlete. The said sample collection began at 10:55 p.m. At 11:35, the Athlete signed the Doping Control Form and provided two blood samples which were sealed in the container. Afterwards, DCA took photos on the Athlete without his permission and so the Athlete followed to check the credential of the sample collection officers. After inspection, it was found that DCA and BCA did not have individual letters of authorization from either FINA or IDTM. As such, the Athlete demanded them to remove the sample but they did not do so. So, he and a security guard broke the glass container, took the blood vessel out and tore the signed Doping Control Form. Finally, DCO left and failed to complete sample collection from the Athlete.

- The key issue of this case was to interpret Article 5.3.3 of ISTI. After hearing, the CAS concluded that a generic letter of authority issued by FINA to IDTM was sufficient and therefore DCO, DCA and BCA did not need to require specific and individual letters of authorization. The CAS also found that DCO had already given warning about the consequences of a failure to comply with by the Athlete. In the circumstances, the CAS further concluded that the Athlete did not have a compelling justification not to comply with the sample collection process and consequently violated Article 2.5 of FINA Doping Control Rules, which is a tampering violation. According to FINA Doping Control Rules, if the Athlete commits his second anti-doping rule violation, the period of ineligibility

will be doubled in the sense that four-year period of ineligibility will become eight-year ban for which the arbitral panel has no discretion in it. As this is the second violation, the Athlete was banned for eight years.

- Part 2) Thoughts From The Chinese Practice Perspective
  - The Athlete should have complied with the regulations under protest including complying with the directions of a DCO, cooperating to provide samples in every case and recording any objection, complaints and comments on the Doping Control Form.
  - CHINADA embraces zero tolerance with anti-doping violation
  - In future, Chinese witnesses should have adequate preparations and practices before they testify at the hearing. They should learn more about and familiarize themselves with the adversarial trial process. In the examinations, they must ensure they should testify and answer questions in accordance with their testimonies otherwise their credibility may be impaired. After all, comparing with western people, it is easier for them to testify and defend themselves.
  - Chinese media should showcase their professionalism of sports media. The fact is that, after the CAS released its full decision on 4<sup>th</sup> March 2020, the Chinese media exhibited a 180-degree-reverse attitude toward the Athlete and the main reasons was that it was the first time for them to read the different versions of the story.
  - The Sun Yang case could enhance people's awareness of global sports rules and regulations and speed up the globalization of Chinese sports industry development. In respect of international sports rules and

regulations, they may include but not limited to the laws of game, disciplinary code, anti-doping rules and procedural rules of sports arbitration.

- While there is still a long way to go, Chinese people have learned of how to operate and manage the sport IP in a modern way. For example, the market value of NBA is US\$2.7 billion that is 54 times more than that of CBA which has 50 million only. Such a huge difference lies in their different business modes, market scale and broadcasting prices.
- Q&A (Question 1): Mr. Zhang asked who the Chinese witnesses were in this case?
  - Mr. Wu answered that the first witness was Sun Yang, the second witness was the team doctor of Chinese National Swimming Team, the third witness was the team leader of Chinese National Swimming Team, the fourth witness was the deputy leader in charge of Zhejiang Anti-doping Agency, the fifth witness was Sun Yang's mother and the sixth witness was the expert of Chinese Law.
- Q&A (Question 2): Mr. Flavio Peter wondered whether the aforementioned question would be related to the poor performance of Chinese witnesses before the arbitral tribunal?
  - Mr. Wu said yes.
- Q&A (Question 3): Mr. Zhang queried about why there was such an abrupt change of attitude of the Chinese media towards the Athlete after the release of the arbitral award?
  - Mr. Wu explained that people in China do not want to talk about this sensitive issue so precisely. Further, Chinese media only paid attention to

what the Athlete had reported and the content of which merely depended on what the Athlete released in his social media. In fact, Chinese media were unable to read materials in English. They relied too much on a single source of information but could not find information from other sources.

- In the Sun Yang case, Chinese Media have a chance to know the truth behind the whole incident.

### **3. The Sun Yang Case at the Court of Arbitration for Sport (Miss Guo Cai)**

- Mr. Zhang introduced Miss Guo Cai.
- International law, constitutional analysis and human rights fittingly converge in sports law and sports dispute resolution. This is because:
  - Sports has an intrinsic transnational feature since, to make international competitions happen, participants across the globe must observe universal, and harmonized rules.
  - In almost every sport there must be a world governing body responsible for making and enforcing these rules through the so called “sports pyramids”, to ensure each member organization and affiliated athletes to observe the rules. The sports pyramids then inevitably give rise to governance issues that require constitutional thinking – the last resort of argument usually being challenging the rules themselves.
  - Such arguments tend to have higher chance of success provided that the rules in question are proved to have violated fundamental human rights. these highly theoretical legal fields, such as public international law, constitutional analysis and human rights, perfectly interplay in the sports sector.



- Miss Cai would like to emphasize that challenging the rules shall not be viewed as a readily available option, which should only be last resort in exceptional circumstances. Athletes should not expect to challenge the rules after an violation has occurred as it would be a huge gamble on the athlete's professional career and reputation.
- From the Chinese perspectives, people hold different views as to the procedures and the decisions of the CAS which however are very common and usual in the areas of international law, constitutional law and human right law. Chinese people have not put the case in the context of international sports.
- Miss Cai had four questions to be discussed.
  - Question 1: Did Sun Yang get an unfair trial? Some people agreed and one of the reasons was that the Athlete and WADA would be on the different playing fields. But in her view, it would be just common in terms of the rule of sports governance and disciplinary proceedings. It was not strange at all.
  - Question 2: Given that the CAS panel has chosen a lower standard stipulated in ISTI but China has adopted a higher standard that is common in its domestic sports field, is there really fairness problem? Miss Cai said there would be no unfairness issue in substance. All signatories to the conventions should comply with the pertinent rules and regulations which are mandatory per se. Thus, it is not unfair at all.
  - Question 3: While ISTL is a universally acceptable rule, it is ambiguous and interpreted in favor of the rule makers themselves? Article 5.3.3. of ISTL has no ambiguity at all.
  - Question 4: Was drawing blood in breach of Chinese Law if the BCA from

Shanghai collected blood sample in Hangzhou? Was this a procedural fraud?

Mr. Cai said that drawing blood is nursing in nature that would not invalidate the whole sanction.

- What reflection could be made on the defense strategies adopted by the Athlete?
  - This case is so international and sports-specific. Chinese does not know much the context of international sports.
  - That domestic rules apply locally does not mean that they can be applicable to the globe. People should understand that WADA and the CAS just exercised their jurisdictions.
  - The analysis on the trajectory of this case shows that the whole dispute arose from the person who confused with the ISTL which is mandatory requirements.
- Miss Cai left four questions to attendees for reflection:
  - What is the possible consideration behind the multiple challenges against WADA arbitrators and counsel, yet without merits?
  - Is there any effective witness compelling and protection mechanism in CAS proceedings? There were 6 times the witness had put forward to requesting witness protections which was however not accommodated. Hence, what is the protection mechanism in that sense? If the Chinese witness resides in China, what can he do with regard to witness compelling and protection mechanism?
  - How to streamline the coordination between Chinese-Swiss co-counsel?
  - Why, in the SFT proceedings, was FINA listed as a co-respondent with WADA?

- Q&A (Question 1): Mr. Zhang asked, while the Swiss law is the applicable law, is it fair and accessible by Chinese lawyers to learn the new law and know the new system?
  - Miss Cai said that, before the rule changes, people have to accept it.
  - All Swiss lawyers actively involve in the proceedings and possess the Swiss law specific knowledge. So Chinese lawyers should collaborate with them.
  - When an athlete has committed antidoping, you cannot raise objection because the rules are there.
  - Chinese lawyers should train themselves to be well versed in the sports law and arbitration so that they know due process and understand how to protect themselves.

#### **4. Global Mapping of Players and Stakeholders in the Anti-Doping Environment (Mr. Philippe Vladimir)**

- Mr. Zhang introduced Mr. Philippe Vladimir.
- For World Anti-Doping Agency (WADA), its foundation has 18 members from the governments and 18 members from Olympic Movement respectively.
- WADA is the independent international anti-doping agency and constituted as a private law foundation under Swiss Law. WADA has its registered seat in Lausanne, Switzerland and its headquarters in Montreal, Canada. WADA aims to promote anti-doping concept and coordinate the battle against doping in sport internationally. In other words, its focus is upon global coordination and enforcement.
- Olympic Movement representatives include AIOWF (Association of International

Olympic Winter Sports Federations), ANOC (Association of National Olympic Committees), ASOIF (Association of Summer Olympic International Federations), GAISF (Global Association of International Sports Federations), IOC (International Olympic Committee), IOC Athletes Commission and IPC (International Paralympic Committee). Through their own internal elections, these entities designate their representatives to the Olympic Movement.

- The actual cost of WADA was US\$35,386 in 2018 and its budget plan of 2021 would be US\$43,414.
- Upon broad consultation, WADA enacts the WADA Code, the International Standards (IS) and Guidelines. The IS include IS For Testing and Investigations (ISTI), IS for Results Management (ISRM), IS for Therapeutic Use Exemption (ISTUE), IS for the Protection of Privacy and Personal Information (ISPPPI), IS for Education (ISA), IS for Code Compliance for Signatories (ISCCS) and IS on Prohibited List.
- Pursuant to Art. 23.11 WADC, the WADA Code Signatories encompass a wide variety of major events organizers such as WADA, IOC, International Federation, IPC, National Olympic Committees (NOC), National Paralympic Committees (NPC) and National Anti-Doping Agencies (NADO). In contrast, players are not the signatories to the WADA Code but whenever they enter into competitions, they are committed to respecting and complying with those rules governing anti-doping although they are not the direct signatories.
- IS are mandatory and directly applicable and signatories thereto must implement the WADA Code through their own rules by reference to Art. 23.2.1 WADC. Players must comply with the IS. Therefore, in the context of the Sun-Yang case, Paragraph

188 of the award states that the Panel agrees that the FINA DC (edition 2017) and the ISTI (edition 2017) are directly applicable to these proceedings. Paragraph 217 adds that Article 5.3.3 of the ISTI provides “*Sample Collection Personnel shall have official documentation, provided by the Sample Collection Authority, evidencing their authority to collect a Sample from the Athlete, such as an authorization letter from the Testing Authority. DCOs shall also carry complementary identification card from the Sample Collection Authority, driver’s license, health card, passport or similar valid identification) and the expiry date of the identification*”. Nonetheless, Mr. Kemp testified that it may be best practice to include individual details as set out in WADA’s Urine Sample Collection Guidelines and Blood Sample Collection Guidelines (collectively “WADA’s Guidelines”) but it is not a requirement under the ISTI. Mr. Kemp further attested that the generic letter of authority provided to the Athlete by the DCO was sufficient under the ISTI to test the Athlete. In the premise, according to Paragraph 227, the Panel does not dispute Mr. Kemp’s testimony and fully adheres to his logic that WADA’s Guidelines are not binding. Such Guidelines are merely intended to promote best practices whereas binding provisions are only set out in the ISTI. The “Introduction” sections in WADA’s Guidelines specifically provides that “*the process outlined in this document promote good practice moving forward*”

- By virtue of Article 5.2.2 of WADC, International Federation (“IF”) tests international athletes in the international competitions. Therefore, in the context of the Sung Yang case, IF tested Sun Yang. For the domestic level, Article 5.2.1 of WADC states that National Anti-Doping Organization (“NADO”) tests national athletes. Article 5.2.3 stipulates that major event organizers conduct anti-doping

tests upon athletes who participated in its competition. In addition, both Article 5.2.4 and Article 20.7.8 list out which exceptional circumstances WADA shall undergo an anti-doping test.

- Who can appeal and how is the appealed decision determined? By reference to the Sun-Yang Case, Paragraph 169 of the award depicts that the Parties did not dispute that CHINADA could challenge the appealed decision. Considering that CHINADA is the Athlete's National Anti-Doping Organization, this follows from Article 13.2.3.d FINA DC, which provides that *"In case under DC 13.2.1, the following parties shall have the right to appeal to CAS: ...(d) the National Anti-Doping Organization of the Person's country of residence or countries where the Person is a national or license holder ....."*. Paragraph 175 states that the Panel in particular finds the reasoning of WADA compelling, namely that, as the main harmonizer of the WADA Code, it needs to decide which decisions to appeal and that a relevant consideration in this respect could be whether any other party within a right to do so has already filed an appeal. The Panel finds that such function and the rationale of Article 13.2.3 WADA Code and Article 13.7.1 2(a) FINA DC would be obstructed if FINA were to be granted an identical time limit to appeal as WADA, for in such case WADA would have been required to decide whether to challenge the appealed decision without knowing if FINA would do so. Further, Paragraph 176 states that the existence of a special provision, applicable only to WADA, does not violate the general principle of parity of all the Parties. The special status and unique function of WADA serves in the general interest to prevent and counter doping-related violations in sport, and doing so, it pursues one of the key objectives of the Olympic Charter.

- Organizations involved in the process include A Testing Authority, A Sample Collection Authority (IDTM, PWC), A Result Management Authority, An Arbitral Tribunal (CAS), An Appeal Tribunal and International Testing Agency (ITA). The aim of the ITA is to ensure and keep sports real. In the context of the Sun-Yang Case, Paragraph 7 singles out that on the evening of 4 September 2018, an attempt was made to collect blood and urine samples from the Athlete at his residence compound in Hangzhou, People’s Republic of China. This was an out-of-competition (“OOC”) sample collection mission. The Athlete was accompanied by his mother. FINA had Results Management Authority and authorized the mission as the Testing Authority. The company International Doping Tests and Management (“IDTM”) was the Sample Collection Authority. IDTM, by means of a female Doping Control Officer (the “DCO”), a female Blood Collection Assistant (the “BCA”) and a male Doping Control Assistant (the “DCA”) (jointly referred to as “IDTM’s Sample Collection Personnel”), attempted to collect blood and urine from the Athlete between 22:00 and 23:00, in accordance with the Athlete’s time preference as indicated in his whereabouts information. IDTM’s Sample Collection Personnel was accompanied by a fourth unidentified individual who drove the car of the team. In Paragraph 23, it states that on 5 October 2018, FINA formally asserted violations of Article 2.3 (Refusing or Failing to Submit) and 2.5 (Tampering or Attempted Tampering with Any Part of Doping Control) of the FINA Doping Control Rules against the Athlete (the “FINA DC”). In response, the Athlete filed extensive written submissions in his defense, which FINA answered. Paragraph 218 states that in considering the meaning of Article 5.3.3 ISTI, it is relevant to bearing in mind that FINA is the Testing Authority and IDTM is the Sample Collection Authority. Paragraph 24

exhibits that on January 2019 the FINA Doping Panel issued its decision (the “Appeal Decision”), with the following operative part whereas Paragraph 140 stipulates that based on the provisions set out above, the Panel is satisfied that the CAS has jurisdiction to adjudicate and decide on the present dispute.

- In connection with the anti-doping rules, the Athlete must know the anti-doping rules. For example, he must know which substances or medications are prohibited even though he has used them for a long period of time. When the anti-doping test is conducted, the Athlete must be available for testing at all times and responsible for any substance found in its samples. The Athlete cannot attribute the fault of doping to the third party such as his entourage who may cause him to violate the anti-doping rule violation or gave a wrong advice to him, he must still be responsible for his violation. Therefore, in the Sun Yang Case, the CAS emphasized that the Athlete should respect the authority of others, or of established procedures. The Athlete is a world-class athlete, with an impressive list of sporting achievements: he is not, however, above the law or legal process. The rules apply to him as they do to all athletes and he is required to comply with them. According to the award, Paragraph 341 states that the principle that an athlete is responsible for his or her own actions, and cannot deflect responsibility to his or her support staff, is well-established in the CAS jurisprudence. It pertains even in situations where the support staff threatens an athlete with consequences in case of disobedience with the wishes of support staff a situation which is not the case in the matter at hand. As one Panel put it in this way, the Athlete should be responsible for the mistakes he made.
- Q&A (Question 1): Mr. Zhang asked why the budget of WADA has increased



significantly?

- Mr. Boss said he did not have any specific explanation on the growing budget but he speculated that the increase of the budget may be due to the increasing number of testing and workload. After the Russian case, new rules and compliance works have been rolled out so as to possibly exert heavier workload and burden upon the compliance team of WADA.
- Mr. Jean-Pierre Morand added that there had been a significant increase in the cost of investigation in the Russian case and the investigation department which is structurally independent has been fully busy.
- Q&A (Question 2): Mr. Zhang questioned how Sweden would integrate international sports rules into its domestic rules?
  - When the Sweden signs the rules, it will incorporate them into its own rules and regulations.
- Q&A (Question 3): Mr. Shengchang Wang wrote a question in the chat box asking “Does the terms “DCOs” in ISTI 5.3.3 refers to DCO only, excluding BCA and DCA?”. He further elaborated that these terminologies are very special and what the true meaning thereof would be?
  - Miss Guo CAI replied that DCOs refers to the DCO only. The DCO is defined in ISTI as “an official who has been trained and authorized by the Sample Collection Authority” to carry out the responsibilities given to DCOs in the ISTI. In the Sun Yang Case, Sample Collection Authority was IDTM and only the DCO had the ID card issued by IDTM. BCA and DCA (chaperone) had separate definitions and the DCO had trained the BCA and DCA on record with IDTM.

- Mr. Ming Wu agreed that, under ISTI, the terminologies used are DCO, BCO and Chaperone. Each abbreviation has different definitions.

## 5. Introduction of International Sports Arbitration (Mr. Lucien William Valloni)

- Mr. Zhang introduced Mr. Lucien William Valloni.
- The agenda of the Mr. Valloni's presentation consisted of 1) Settlement of Sports-Related Disputes, 2) The International Courts of Sports Organizations, 3) Sports Arbitration and 4) The Court of Arbitration for Sport (CAS).
- In respect of **Settlement of Sports-Related Dispute**, in order to ensure its proper functioning, a sports association needs the power to apply its own standards and the disciplinary power thereof is stemmed from the state or national laws. Such power is needed even against the will of some of its members.
- For **the International Courts of Sports Organizations**, by virtue of the autonomy granted to them under state law, the statutes of sports associations generally stipulate the internal bodies to which they refer the settlement of disputes between the association (the club, the league, the federation, national or international) and its members, as well as between members themselves. In fact, the power of the association with respect to the settlement of disputes includes the right to hand down sanctions. The state laws give guidelines to the sports associations for handing down sanctions. Nevertheless, the disciplinary power of an association or federation is not unlimited and the scope thereof depends on state laws. Like any other rules, the provisions pertaining to the settlement of disputes must comply with state law, with the statutes of the association (or of the federation) as well as with general legal principles.

- **Sports arbitration** is the main dispute resolution method used to settle disputes in the sports domain. The parties (clubs, athletes, federations) involved in a sports-related dispute must, in principle, follow the ensuing procedures to settle their disputes: (1) they must first refer their disputes to the internal judicial authorities of the sports organization (club, association or federation) and (2) after exhaustion of the legal remedies within the sports organization, they may refer to the said disputes either to the state judge or to a court of arbitration. In Switzerland, since the state has given the power to arbitration and the Swiss law is very arbitration friendly, the state court has a very limited power to adjudicate the sports disputes.
- Sports arbitration has become a generalized practice for sports organization. As many sports organizations very often want to avoid a decision by a state judge, their statutes have been revised to require disputes to be referred to arbitration in particular to the CAS. The advantages of sport arbitration, compared to ordinary law, include but not limited to (1) the procedure is generally quick, simple and flexible, (2) the procedure makes it possible to achieve a certain form of unity in decisions pertaining to the same types of problems whereby the procedure makes it possible to refer a dispute to specialized judges. For example, FIFA Statutes (Article 58) contains an arbitration clause stating that “*Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question*”. The appellant cannot go to the state court directly.
- Regarding the background of **CAS**, the IOC President H.E. Juan Antonio Samaranch expressed that it would be necessary to solve sports disputes within the sporting family and offer a quick procedure to settle sport related disputes. In 1983,

IOC ratified the statutes of CAS which they came into force as of 30 June 1984. Since then, every dispute of the Olympic Games goes for sports arbitration, which is based on Chapter 12 of the Swiss International Private Law Act that is very arbitration friendly. Arbitration award can only be appealed on a very limited ground. Since 1984, only 13 cases from CAS have been overturned

- From 1984-1994, IOC could choose all members of CAS, finance everything and decide every rule. The CAS statute could be modified by the IOC Session. In the premises, CAS could still be accepted as an independent institution, which however was called into question by Emar Gundel Decision that led the 1994 Reform of CAS. On 15<sup>th</sup> March 1993 (FT 119 II 271), Swiss Federal Supreme Court decided and recognized the CAS as a true court of arbitration. However, the Court said “CAS is financed almost exclusively by the IOC which was also competent to modify the CAS Statute. The considerable power was given to the IOC and its President to appoint the members of the CAS. In the view of the FT, such links would have been seriously sufficient to call into question the independence of the CAS in the event of the IOC’s being a party to proceedings before it. In the circumstance, this has led to the creation of the International Council of Arbitration for Sport (“ICAS”).
- **The ICAS** was established in 1994. IOC finances ICAS and sets out all the rules related thereto. It has introduced the Ordinary Arbitration Division and the Appeals Arbitration Division. ICAS is the supreme organ of CAS and is composed of 20 members which 4 members appointed by International Sports Federation, 4 members appointed by the Association of the National Olympic Committees (ANOC), 4 members appointed by IOC, 4 members appointed by 12 members above to safeguard the interest of the athletes and 4 members appointed by 16

members above chosen from personalities independent of the bodies designated the other members of the ICAS. Those 20 members cannot act as CAS arbitrators or counsels to parties.

- The main functions of ICAS include 1) adopting and amending the CAS Code, 2) electing its President/ Vice-President, 3) electing the President of the Ordinary Arbitration Division, 4) electing the disputes of the two Division Presidents, 5) appointing the arbitrators who constitute the list of CAS arbitrators and the mediators, 6) resolving challenges to and removal of arbitrators, 7) financing CAS and appointing the CAS General Secretary.
- The Code of sport-related arbitration CAS Code governs the organization and arbitration procedures of the CAS and contains a set of mediation rules and ad hoc rules
- In respect of the structure and functions, ICAS has created decentralized offices in Sidney, Denver and Abu Dhabi. There are 393 arbitrators from around 90 countries on CAS Arbitrator list. CAS provides different services for settlements of disputes including arbitration (both an ordinary arbitration and an appeal), mediation, legal opinions and also new services relating to the CAS Anti-Doping Division. CAS also has some ad hoc divisions such as Olympic Games, FIFA World Cup and UEFA European Championship.
- CAS accommodates disputes relating to contractual relations or torts (by means of ordinary arbitration or mediation) or resulting from decisions taken by the bodies of sports federations through appeals arbitration procedure. CAS will intervene when the written agreement/ commitment to arbitration between parties appears in a contract, the statutes/regulations of a sports organization.

- CAS's arbitration can be broadly categorized into disciplinary arbitration and non-disciplinary arbitration. The former is in relation to sanctions such as those applied by FIFA to the associations, clubs and players whereas the latter is in connection with financial fights between association, clubs, players and players agents. For instance, parties may initiate employment law disputes to FIFA dispute resolution first and subsequently if needed bring the appeal to CAS.
- **The procedure of ordinary arbitration proceedings** includes (1) request for arbitration (R38 of the CAS Code) stating name and address of parties, brief statements of the facts and legal arguments, request of relief, contract containing arbitration agreement and choice of arbitrator, (2) payment of court office fees (Article R64.1), (3) answer from the counterpart (R39) stating brief statement of defense, any defense or lack of jurisdiction and any counterclaim, (4) appointment of the Arbitrators (R40.2), (5) panel's decision upon written submissions (R44.1), (6) hearing (R44.2), (7) evidentiary proceedings (R44.3), (8) applicable law (R45) and award (R46).
- **The procedure of appeal arbitration proceedings** includes (1) statement of appeal (R48), (2) time limit for appeal (R49), (3) appeal brief (R51), (4) answer of the Respondent (R55), (5) appeal and answer complete (R56), (6) scope of Panel's review and hearing (R57), (7) law applicable to the merits (R58) and (8) award (R59).
- Statement of appeal (R48) contains name and address of Respondents, copy of the decision appealed against, Appellant's request for relief, nomination of the arbitrator chosen by the Appellant from CAS list, request for a sole arbitrator, reasoned application to stay execution of the decision appealed and copy of the

provisions of the statutes or regulations or agreement providing for appeal to CAS.

- For time limit for appeal (R49), according to the statutes of Federation, if nothing is contained (silent), it will be 21 days from receipt of the decision. The Appellant should pay attention to which time limit for appeal is relevant to the particular federation. Different federations have different rules and some of them require the Appellant to make an appeal within 10 days in certain cases
- Appeal Brief should be filed within 10 days following the expiry of the time limit for the appeal (R51) to showcase the Appellant's attention and the content of which should include names of any witnesses, names of any experts and full reasoning.
- Within 20 days from receipt of the grounds for the appeal (appeal brief), the Respondent shall submit its answer (R55) including a statement of defense, any defense of lack of jurisdiction, any exhibits or specification of evidence, name of witnesses and name of experts.
- Regarding appeal and answer complete (R56), unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer.
- Regarding scope of Panel's review and hearing (R57), the Panel has full power of review concerning facts and law. It may issue a de novo (new) decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. The panel also has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by

them before the challenged decision was rendered.

- For the hearing (R57), the proceedings take place in camera, unless the parties agree otherwise. At the request of a physical person who is party to the proceedings, a public hearing should be held if the matter is of a disciplinary nature. Article 6 of the European Convention of Human Rights is applicable in sports arbitration which is however not applicable to the commercial arbitration. Parties need to prepare for oral arguments, witness examination and experts to be heard.
- Regarding the law applicable to the merits (R58), 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 as issued the challenged decision is domiciled according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.
- For the award in the appeal arbitration proceedings (R59), it is made by majority decision of the panel. The award shall state brief reasons for which no dissenting opinions allowed. The operative part of the award shall be communicated to the parties within three months after file was sent to Panel (such period is always extended). The award will be made public unless both parties agree that they should remain confidential.
- Regarding matters of provisional and conservatory measures suspensive effect (R37), the party should file a related request for arbitration within 10 days following the filing of the request for provisional measures or any statement of appeal within the time limit provided by Article R49 of the Code. The President of the relevant division prior to the transfer of the file to the Panel or thereafter the Panel may, upon



application by a party, make an order for provisional or conservatory measures. Should an application for provisional measures be filed, the President of the relevant Division or the Panel shall invite the other party to express a position within ten days or a short time limit if circumstances so require. In case of utmost urgency, the President of the relevant Division, prior to the transfer of the file to the Panel, or thereafter, the President of the Panel may issue an order upon mere presentation of the application. Upon filing the request for provisional measures, the Applicant shall pay a non-refundable Court Office fee of Swiss francs 1,000. When deciding whether to award preliminary relief depends on 1) whether the relief is necessary to protect the applicant from irreparable harm (*Periculum in mora*), the probability of success on the main case (*Fumus boni juris*) and whether the interests of the Applicant outweigh those of the Respondent (*Balance of interests/ suspensive effect*)

- Q&A (Question 1): Mr. Zhang asked what the legal grounds of overturning the award by the Federal Supreme Courts would be in Switzerland?
- Mr. Valloni said judicial recourse to the Swiss Federal Tribunal is allowed on a very limited number of grounds such as wrongful appointment of arbitral tribunal, incorrect decisions, lack of jurisdiction, violation of elementary procedural rules such as violation of the right to a fair hearing or incompatibility with public policy. Regarding the jurisdictional appeal as opposed to other grounds, the tribunal has the full discretion on the appeal because it is entitled to see the whole picture of the appeal. On the whole, the Federal Supreme Court of Switzerland does not look at everything and the Appellant should tell everything to the court including the governing law otherwise he will have no chance.

- Q&A (Question 2): Mr. Koorosh Ameli said that provided that there would be many witness tampering complaints by WADA in the award against the respondent, why there would be no announcement by the tribunal in the award but only in the procedural order?
  - Miss Guo Cai said the Panel had already exercised its discretion. She was wondering what kind of measures or action the CAS under Swiss law could take to protect the witnesses or deal with this matter.
  - Mr. Jean-Pierre Morand also expressed his view and guessed this would be due to certain procedural considerations of the tribunal.

## 6. An Athlete Personal Perspective of Anti-Doping (Miss Ping Zhang)

- Mr. Zhang introduced Miss Ping Zhang.
- The content of Miss Zhang's presentation included 1) Doping in Sport, 2) World Anti-Doping Agency (WADA), 3) High-Performance Team in Sport, 4) Reference and 5) Q&A.
- Doping in sport refer to stimulants as drugs that usually act on the central nervous system to modulate mental function and behavior, increasing an individual's sense of excitement and decreasing the sensation of fatigue.
- The World Anti-Doping Agency (WADA) was set up on 1999. It is a foundation initiated by the International Olympic Committee based in Canada to promote, coordinate and monitor the fight against drugs in sports.
- There are In of Competition (IOC) and Out of Competition (OOC) sample collections.
- Anti-Doping Administration Management System (ADAMS) was launched in 2005

for the initial pilot phase. The system has since then been introduced and implemented by most Anti-Doping Organizations (ADOs) and all WADA accredited anti-doping laboratories

- Regarding FINA Doping Control Rules, DC 2.4 “Whereabouts Failures” refers to any combination of three missed tests and/or filing failures, as defined in International Standard for Testing and Investigation, within a twelve-month period by an Athlete in a Registered Testing Pool.
- A high performance sports team should include athletes, a coach, a team leader, a team doctor and a lawyer.
- Q&A (Question 1): Mr. Zhang asked from whom you would get helps whenever you as a Chinese athlete had legal problems. Did you have a lawyer?
  - Miss Zhang said she had no lawyer but only a team leader who represented her to deal with the relevant legal documents.
  - In Bangladesh, as a general rule, no lawyer is provided in a cricket team. Probably some workshops would be organized so that athletes could understand the laws. Seeking legal advice from lawyers is the last resort.
  - Mr. Boss said it would be the same case here in Switzerland where no lawyer would be provided to athletes. The Swiss Sports Committee would provide instructions, guidance and advice to athletes. When athletes come across problems relating to medical point of view such as how the medication or drug would affect them, they would consult with the team doctor.
  - Mr. Szeto from Hong Kong (Mr. Szeto) said, as far as the rules themselves are concerned, it is necessary for athletes to know more about rules and regulations relevant to their own interests.

## 7. Type of Anti-Doping Rule Violations (ADRVs)(Mr. Jean-Pierre Morand)

- Mr. Zhang introduced Mr. Jean-Pieree Morand.
- Mr. Morand presented his topic in respect of analytical and non-analytical ADRVs
- Concerning analytical ADRVs, 2.1 WADA Code is pertaining to the presence of prohibited substance (PS).
  - The use of CAS for appeal is compulsory to which there are no alternatives. Whether such an appeal mechanism is good or not? However, the issue should be whether there could be a better appeal mechanism than the CAS? It is not easy to find a unified and coherent solution.
  - Arbitral tribunals are better than national courts in dealing with sports disputes because the latter involves too many different concepts and legal approaches. National courts are not the appropriate places and jurisdictions to deal with sports issues due to a multitude of national issues and competitions.
  - Swiss law offers some flexibility and options to parties to sports disputes at least so far it is difficult to find a better one than Swiss law. Of course, Swiss law itself needs improvement.
  - In the Federal Supreme Court, it is less likely that the appellant could reverse the decision issued by the CAS.
  - It is sometimes more difficult to handle non-analytical ADRVs that are beyond the evidence of objective facts for which private organizations may have difficulties in getting the evidence in respect of the anti-doping violation.
- Concerning non-analytical ADRVs, 2.2 WADA Code refers to the use of PS or prohibited methods.

- EPO (method) or expert reports (ABP) are still based on analytical basis.
- Prohibited methods include tampering M2 in the prohibited list in term of an adulteration of samples
- Other non-analytical ADRVs include 2.3, 2.4 and 2.5 WADA Code which refer to failure to participate in the process, obstructions/ manipulations and tampering respectively. There are other forms of non-analytical ADRVs including possession (2.6), trafficking (2.7), administration (2.8), complicity (2.9) and forbidden association (2.10).
- In respect of evidence rules, pursuant to the Result Management Jurisdiction (WADA Code 7.1), the basis of the ADRVs is comfortable satisfaction and that of rebuttal is balance of probability.
  - Analytical aspects are covered by a presumption in favor of elements linked with laboratory process (3.2.2 WADA Code). There is no specific evidence rule for non-analytical aspects. Who is in charge of the collection process in the Sun Yang Case?
- Q&A (Question 1): Mr. Zhang asked what the brief definitions of analytical and non-analytical ADRVs would be? In the Sun yang case, which threshold would be higher? Any exceptions?
  - Mr. Morand said that analytical ADRVs are defined as a result of an analysis of samples. You may refer to 2.1 WADA Code. In a more extensive manner, for EPO case, violations are based on the analysis and interpretation by expert panels and the related objective results.
  - For non-analytical ADRVs, they are in relation to collaborating with process, obstructing the process and keeping substance in a storage room. These do not

depend on analytical results from samples.

## 8. A Vision for Legal Collaboration in Shanghai Free Trade Zone (Dr. Fang Ye)

- Mr. Zhang introduced Dr. Fang Ye.
- The content of Dr Ye's presentation had three parts, namely 1) China (Shanghai) FTZ: 1.0 to 4.0 (two main issues: is it free? what are the legal framework?), 2) Foreign Arbitration Institutions Establishing in Shanghai FTZ and 3) Lawyers Collaboration in Shanghai FTZ
- Regarding China (Shanghai) FTZ 1.0, the China (Shanghai) Pilot Free Trade Zone (SHFTZ), located in Pudong New Area, is a regional free trade zone founded by the government of China. It was established on 29<sup>th</sup> September 2013 and originally consisted of Waigaoqiao Free Trade Zone, Waigaoqiao Free Trade Logistics Park, Yangshan Free Trade Port Area and Pudong Airport Free Trade Zone.
- Key words related thereto SHFTZ are negative list, special management measures, national treatment, FT account system etc.
- There are four waves of China economy, which are 1) China's open and reform policy, 2) Shanghai Pudong's new area development, 3) China's accession to the WTO in 2001 and 4) The "One Belt One Road" Initiative.
- There has been a notable improvement in doing business in China. According to Doing Business Database, China has improved the most on the ease of doing business after implementing regulatory reforms during the past 7 years. Shanghai has made significant progress in the evaluation. As one of the two representative cities covered in the study, Shanghai has always weighed 55%.
- SMART China FTZ connotes improvements on regulations. SMART denotes

Streamlined, Meaningful, Adaptable, Relevant and Transparent. Firstly, “Streamlined” enables regulation to achieve the desired results in the most efficient manner. Secondly, “Meaningful” means regulations will have a measurable positive impact on driving market activity. Thirdly, “Adaptable” regulations can be adjusted according to the changes in the environment. Fourthly, “Relevant” refers to regulations which are relevant to the problems they are trying to solve. Fifthly, “Transparent” means regulations are transparent and anyone who needs to use them could clearly understand.

- There are 12 free trade zones in China in 4 batches, which are 1) Shanghai FTZ in 2013, 2) Tianjin FTZ, Fujian FTZ and Guangdong FTZ in 2015, 3) Shanxi FTZ, Sichuan FTZ, Chongqing FTZ, Hubei FTZ, Liaoning FTZ, Henan FTZ and Zhejiang FTZ in 2017 and 4) Tianjin FTZ, Fujian FTZ and Guangdong FTZ in 2018.
- Shanghai FTZ 2.0-3.0 represents more responsibilities in the form of zones and bridgehead which comprise the primary roles in a comprehensive reform pilot zone, a test zone of risk of pressure and a leading zone for improving governance of the government and a bridgehead serving the country’s “Belt and Road”.
- Shanghai FTZ 4.0 represents new heights. On one hand, the planning area covers an area of 119.5 square kilometers and the new area will cover the region south to Dazhi River and east to Jinhui Stream, Xiaoyangshan Island and the southern part of Shanghai Pudong International Airport. On the other hand, in respect of the developing goals, by 2035, it will be built into a special economic function zone with strong global market influence and competitiveness, helping China further integrate with the global economy. By 2025, the Lingang area will have a relatively mature institutional system of investment and trade liberalization and facilitation,

and build a batch of highly open functional platforms.

- Concerning foreign arbitration institutions from representative offices to operating offices, the evolution of international commercial arbitration rules in SHFTZ and Status of Foreign Arbitration Institution include 1) further connecting with international commercial dispute resolution rules, 2) breakthrough, 3) operational rules: the qualifications required to establish an operating office and the scope of arbitration, 4) scope of applicants, application conditions and scope of business and 5) application and approval process including applicants, application materials and Shanghai BOJ.
- Concerning sports arbitration Institutions and the SHFTZ, six cases so far have been handled, namely (1) 12 August 2013 (FC Seoul v. Newcastle Jets FC on transfer (CAS 2012/A/2919), (2) 26 February 2014 (Dario Leonardo Conca v. Guangzhou Evergrande Taobao FC, (3) 17 September 2014, Changchun Yatai Football Club v. Marko Ljubinkovic on contract dispute (CAS 2014/A/3525), (4) 15 September 2015, Nashat Akram V. Dalian Aerbin FC on contract dispute on Doping (CAS 2015/A/4039), (5) 5 February 2016, Federation Internationale de Football Association (FIFA) v. Korea Football Association (KFA); Kang Soo Il on doping (CAS 2015/A/4215) and (6) 11 September 2018, Shabab Al Ahli Dubai Club v. Shanghai SIPG Football Club on player loan dispute (CAS 2018/A/5618).
- Dr. Ye also pinpointed her view on the vision for lawyers collaboration from different countries and regions.
- Q&A (Question 1): Mr. Morand said the current international issues may exhibit imbalance rules and rulings towards white communities. Swiss law could offer more favorable conditions and balanced solutions to the Chinese parties from the

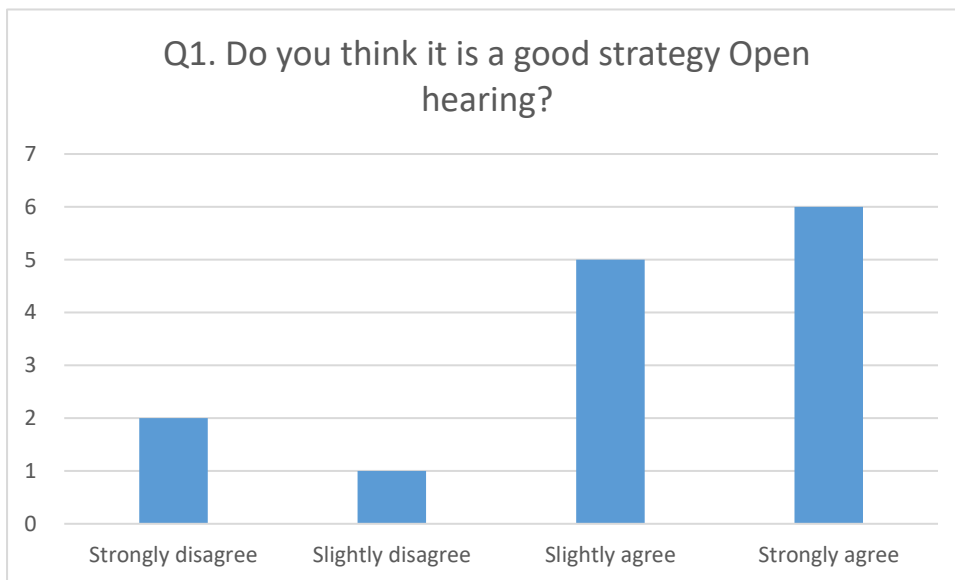


similar civil law system. Owing to the stable Swiss legal system particularly its domestic laws and judicial courts, whether the Chinese Chambers of Commerce would welcome Swiss arbitration associations to China?

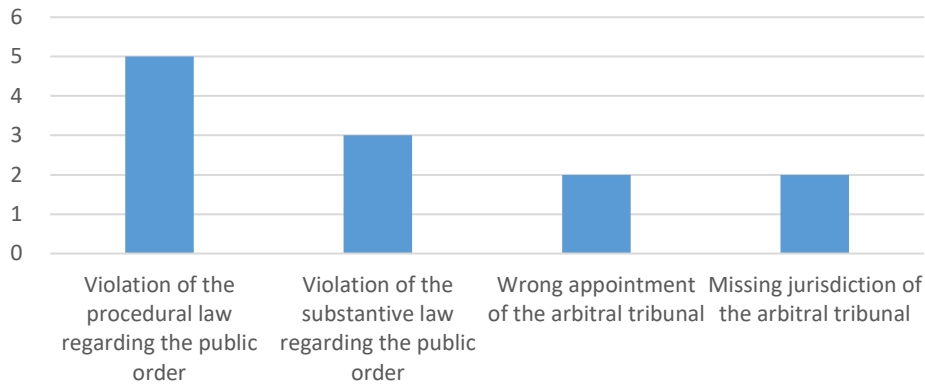
- Dr. Ye said that some places like Qatar are setting up their common law free trade zones. She is now seeing how these free trade zones would work there. She will be doing research on Shanghai’s court system to evaluate how to reform and formulate legal framework in SHFTZ. She advised Mr. Morand to approach the government.

**9. Mr. Zhang adjourned the online forum.**

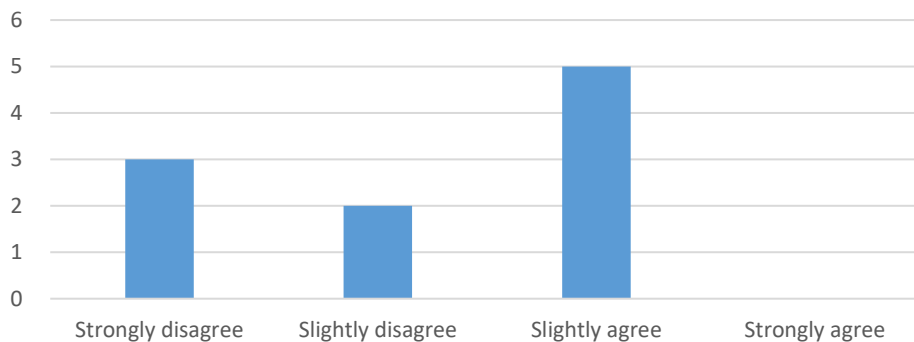
**Voting results**

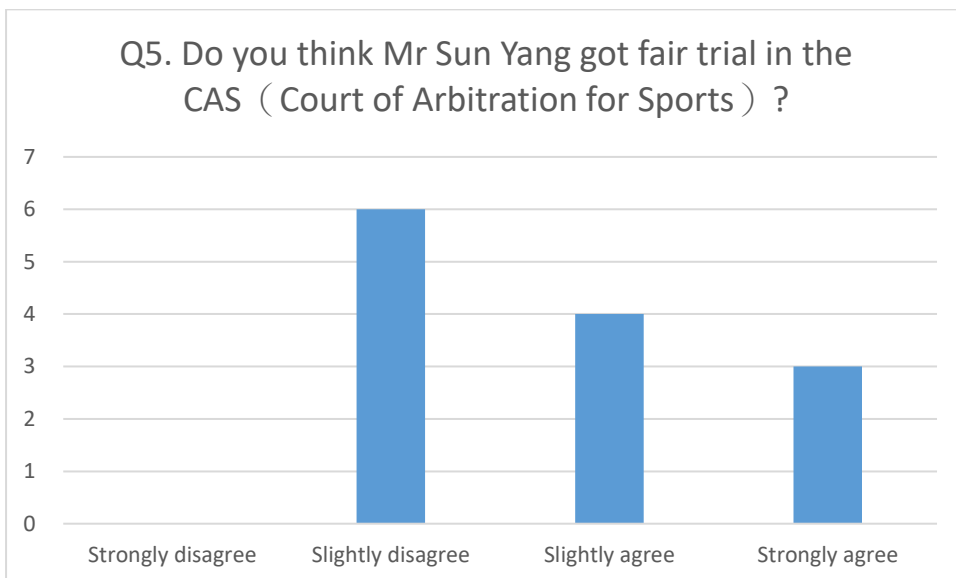
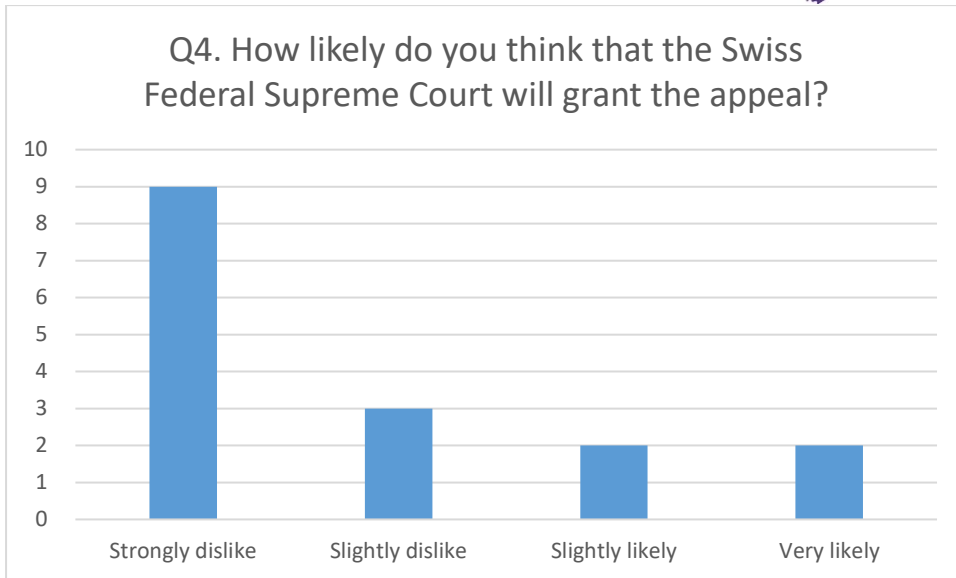


Q2. The athlete is “going to appeal” the case, on which bases do you think will be proper for the appeal?

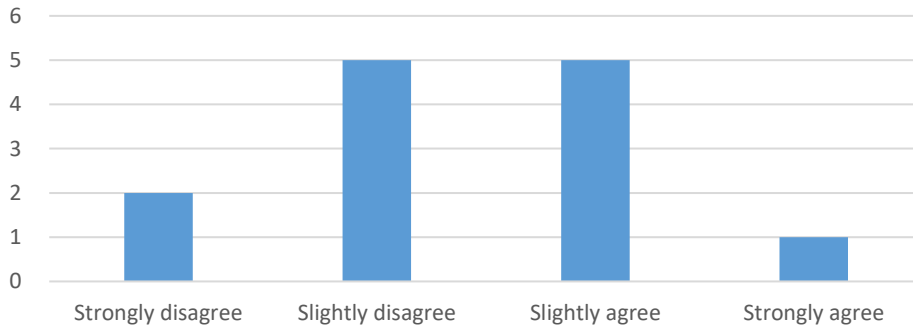


Q3. Do you think the practise of the Anti-Doping rules(e.g. FINA DC rules) are more in favour of the “developed countries” rather than “developing countries”?

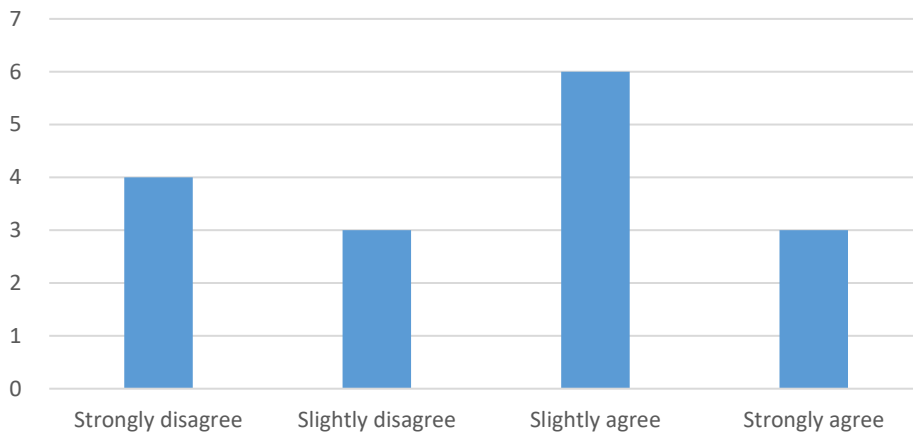


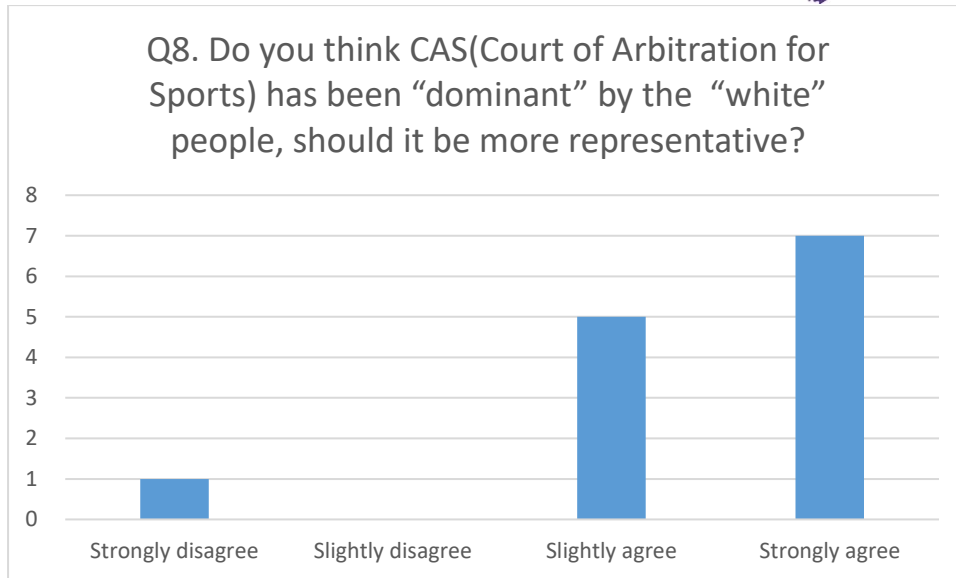


Q6. Under FINA DC Rule 2.4, that the athlete can reasonably miss three tests or filing failures within a twelve-month without being punished, considering about this, do you believe that Sun Yang used the doping and tried to avoid the test that night?



Q7. Do you think that observing athlete urinating is a violation of “privacy rights” of the athlete?





**Video link:**

[www.cnsla.org](http://www.cnsla.org)