Arbitration CAS 2019/A/6210 & 6277 Yang Gao v. Olympic Council of Asia (OCA), award of 20 February 2020 (operative part of 17 September 2019)

Panel: Prof. Ulrich Haas (Germany), President; Mr Boris Vittoz (Switzerland); Mr Olivier Carrard (Switzerland)

Athletics (shot put)
Doping (betamethasone)
Procedural flaws warranting annulation of the challenged decision (de novo hearing)
ADRV based on the presence of a prohibited substance in-competition
Interpretation of the Prohibited List
Entitlement of the athlete to a retroactive TUE

1. **From a Swiss perspective, there is no uniform standard of independence with respect to adjudicatory bodies of associations. In particular, the majority of legal literature applies a lesser standard with regard to independence for association tribunals compared to state courts or arbitral tribunals. Furthermore, even if the members of an association tribunal were not sufficiently independent, such a procedural flaw may be healed in a proceeding before the CAS. According to Article R57 para. 1 of the CAS Code, the Panel has the full power to review the facts and the law. In principle, the *de novo* proceeding before the CAS cures any purported (procedural) violations that occurred in prior proceedings. There may be exceptions to this rule in case of exceptional circumstances. However, in any case, i.e. even if 2 members of the association's disciplinary body were not sufficiently independent, such violation cannot be qualified as an irreparable breach of the applicable procedural standards. If the appellant has the opportunity to extensively present his/her case before the CAS, where all of his/her fundamental procedural rights are fully respected, any procedural flaw before the association's disciplinary body fades to the periphery and is herewith cured.**

2. **It clearly follows from the applicable anti-doping regulations (ADR) that for an anti-doping rule violations (ADRV) based on presence of a Prohibited Substance it is irrelevant when the substance was administered. Instead, it suffices that the Prohibited Substance is still present in the athlete's system in-competition.**

3. **Under Section S9 of the Prohibited List all glucocorticoids are prohibited when administered by intramuscular routes. The term "intramuscular" might appear clear and unambiguous at the outset i.e. injections of glucocorticoids into the muscle. Yet, to decide an important question related to the interpretation of the Prohibited List solely based on evidence submitted by one of the parties to the proceedings is not easy. Indeed, there could be a serious issue with regard to the principle of legal certainty in relation to Section S9 of the Prohibited List, should the term**

"intramuscular" injection be interpreted contrary to the ordinary meaning attached to such technical term by the relevant professional community. The question should be left open if – provided the route of administration was prohibited – the athlete was entitled to a Therapeutic Use Exemption (TUE).

4. **The presence of a Prohibited Substance shall not be considered an ADRV if it is consistent with the provisions of a TUE granted in accordance with the International Standard for Therapeutic Use Exemptions (ISTUE). Under Article 4.1 ISTUE, 4 conditions are to be met for granting a retroactive TUE, namely (a) the Prohibited Substance is needed to treat an acute or chronic medical condition, (b) the therapeutic Use of the Prohibited Substance is highly unlikely to produce any enhancement of performance, (c) there is no reasonable therapeutic alternative, (d) the necessity for the use of the Prohibited Substance is not a consequence of the prior use of a prohibited substance or method. The administration of Glucocorticoids, a non-threshold substance is not prohibited out-of-competition. Thus, an athlete is permitted to treat an acute medical condition with Glucocorticoids out-of-competition. In addition, retroactive TUEs want to ensure that there is immediate treatment available to an athlete in situations where a prospective TUE cannot be granted in due time and there is a danger that a medical condition turns chronic further damaging the athlete's health. The purpose of retroactive TUEs is to reasonably balance between the protection of the athlete's health and the athlete's responsibilities under the anti-doping program.**

I. PARTIES

1. Ms Yang Gao (the "Athlete" or "Appellant"), born on 1 March 1993, is a female athlete of Chinese nationality specialising in shot put.

2. The Olympic Council of Asia (the "OCA" or "Respondent") is the continental governing body of sports in Asia recognised by the IOC. It is headquartered in Kuwait City, Kuwait. The OCA was the organiser of the 2018 Asian Games held in Jakarta and Palembang, Indonesia.

II. FACTUAL BACKGROUND

3. The dispute in these proceedings revolves around two decisions rendered by the OCA. The first decision of 2 March 2019 (the "Decision") is a disciplinary measure taken by the OCA based on the presence of Betamethasone in the Athlete's system during an in-competition doping test. The OCA found that this constitutes an anti-doping rule violation ("ADRV") and, thus, disqualified the Athlete's results and withdrew her silver medal obtained at the 2018 Asian Games held in Jakarta and Palembang, Indonesia (the "Asian Games"). The second decision dated 1 May 2019 (the "TUE Decision") against which the Appellant filed an appeal

concern the Athlete's application for a retroactive Therapeutic Use Exemption ("TUE") that was rejected by the OCA.

4. Below is a brief summary of the main facts and allegations based on the Parties' written submissions, the file and the content of the hearing that took place in Lausanne, Switzerland on 19 August 2019. Additional facts and allegations found in the Parties' submissions and evidence may be set out, where relevant, in other parts of this award.

A. Background Facts

5. Since mid-July 2018, the Athlete suffered pain in her lower back. The Athlete attempted to cure these pains through exercises, massages and acupuncture.

6. On 23 August 2018, while doing strength exercises, the Athlete again experienced severe pain in her lower back. The Athlete consulted Mr Ganq Qiao, a physiotherapist and team doctor of the Chinese national Athletic Team. He decided to treat her with electro-acupuncture. Unfortunately, the pain did not disappear.

7. On 24 August 2018, the Athlete consulted Dr Jianquan Wang, a doctor in the Chinese delegation. The latter diagnosed a lumbar muscle strain (right side) and decided to administer a trigger point injection ("TPI") of two ampoules of Diprospan combined with two ampoules of Lidocaine Hydrochloride. Diprospan contains Betamethasone. The injection was made inside the right erector spinae muscle and contained 14 mg Betamethasone together with 10 ml Lidocaine Hydrochloride, and immediately relieved the Athlete's back pain.

8. On the same date, 24 August 2018, Dr Wang filed an injection declaration form with the OCA Medical Committee and Anti-Doping Commission. Dr Wang mentioned on the form that the justification for the injection was "lumbar muscles strain".

9. On 26 August 2019, the Athlete competed in the women's shot put event at the Asian Games and was subjected to an in-competition doping control urine test. The Athlete disclosed on the Doping Control Form the use of Betamethasone and Lidocaine Hydrochloride, as well as diclofenac ("Voltaren") and a birth control pill.

10. On 28 August 2018, the WADA-accredited laboratory in Doha ("ADLQ") completed its analysis of the Athlete's A sample (#4289839). The analysis report revealed the presence of "Betamethasone" in low concentration (59 ng/mL). The analysis of the B sample confirmed the results of the A sample analysis (56 ng/mL).

11. "Betamethasone" is listed in the WADA's 2018 Prohibited List ("Prohibited List") under Section S9, "Glucocorticoid". The substance is a non-threshold substance prohibited in-competition when administered by oral, intravenous, intramuscular or rectal routes.

12. On 3 September 2018, the ADLQ reported the Athlete's Adverse Analytical Finding ("AAF") to the OCA Anti-Doping Commission Review Panel ("Doping Review Panel").

13. On 6 September 2018, the Doping Review Panel recommended to the OCA Disciplinary Commission (the "OCA DC") that the Athlete's AAF shall be considered as an ADRV.

14. On 9 September 2018, the Athlete was notified by the OCA – through the General Secretary of the Chinese Olympic Committee (the "China-NOC") – of the AAF and the disciplinary proceedings.

15. On the same date, 9 September 2018, Dr Wang submitted a signed statement to the OCA that reads as follows:

Yang Gao, female, 25 y/o, shot throwing athlete of China team, complained sudden pain in the right low back during training in August 23, 2018. She came to see Dr. Jianquan Wang, the medical officer of NOC of China in August 24. PE showed no difference between bilateral low back muscle, pain of the right erector spinae muscle during palpation, straight leg raise test negative. The diagnosis is right lumbar muscles strain. Treatment: local injection in right erector spinae muscle by compound betamethasone injection (diprospan 14mg combined with lidocaine 10 ml.

16. On 16 September 2018, Dr Wang submitted a second statement. Therein, Dr Wang stated that the TPI *"is a classical and effectively clinical treatment of a pain of trigger point, [which] is not included in the four prohibited methods of Betamethasone in the WADA prohibited List (2018)".*

17. On 1 November 2018, the Athlete requested the analysis of the B sample and the full Laboratory Reports for the A and B samples.

18. On 3 November 2018, the analysis of the B sample by the ADLQ confirmed the presence of Betamethasone (56 ng/mL).

B. Proceedings before the OCA Disciplinary Commission

19. On 9 September 2018, the Athlete was notified that the OCA had initiated formal proceedings against her before the OCA DC. No provisional suspension was imposed on the Athlete.

20. On 14 January 2019, a hearing was held before the OCA DC.

21. On 2 March 2019, the OCA DC recommended to the Executive Board of the OCA – *inter alia* – the following:

5. The Competitor should be disqualified from the 18th Jakarta & Palembang Asian Games 2018, Indonesia; and all her results attained should be annulled and her Accreditation cancelled.

6. The Silver Medal shall be withdrawn and adjustments shall be made to the medal table accordingly.

9. A copy of the case file shall be forwarded to the International Federation concerned for further disposition concerning the imposition of sanction; noting that the Asian Federation concerned and the National Olympic Committee and WADA were always kept copied with all our correspondences to the international federation.

13. On the release of these findings and recommendations, if adopted by the President and the Executive Board of the Olympic Council of Asia and implemented, the Competitor has a right to appeal to Court Arbitration of Sport (CAS) within 21 days after the recipient of the decision letter.

22. On 7 March 2019, the Decision was notified to the Athlete through her National Olympic Committee.

C. Proceedings before the OCA TUE Sub-commission

23. On 11 September 2018, the Appellant filed an application for a retroactive TUE.

24. On 13 October 2018, the TUE Sub-Commission of the OCA ("TUEC") rejected the Athlete's application for a TUE stating – *inter alia* – the following:

In the case of this athlete we believe that effective alternative non-prohibited substance does exist. Since non prohibited substance, such as non-steroidal anti-inflammatory drug (NSAID) with or without a skeletal muscle relaxant and or non-pharmaceutical therapy have not been considered as alternative to the prohibited in-competition Intramuscular injection of Betamethasone, this retrograde TUE therefore, cannot be approved.

25. On 17 October 2018, the Athlete was notified – through Mr Yan Qingping – of the TUEC's decision to reject her TUE application. The Appellant did not appeal this decision.

26. On 1 April 2019, the Athlete filed a second retroactive TUE application, signed by the Athlete and Dr Wang on 29 March 2019, for the use of Betamethasone. The application sought to authorise the use of Betamethasone injected by Dr Wang on 24 August 2019.

27. On 6 May 2019, the Athlete was notified by the OCA of the TUE Decision that rejected her (second) application for a retroactive TUE. The TUEC stated in the TUE Decision as follows:

The information re-submitted in the attached reports does not constitute enough justification to use a prohibited substance. Furthermore, local intramuscular injection regardless of being a trigger point or not is still considered a prohibited route of administration for glucocorticoids that require a TUE before it's use. The TUE committee previous decision was based on not fulfilling ISTUE criterion 4.1c.

Therefore, We (The OCA TUEC) don't see any reason for changing the previous TUE committee decision. Therefore, the retrospective TUE of the athlete Yang GAO is rejected.

III. PROCEEDINGS BEFORE THE CAS

28. On 25 March 2019, the Appellant filed an appeal against the Respondent with respect to the Decision with the Court of Arbitration for Sport (the "CAS") in accordance with Article R48

of the Code of Sports-related Arbitration (the "CAS Code"). The proceedings were docketed as CAS 2019/A/6210 ("CAS 6210"). The Athlete nominated Mr Boris Vittoz as arbitrator.

29. On 1 April 2019, the Appellant informed the CAS Court Office about her (second) application for a retroactive TUE with the TUEC. She requested a suspension of the CAS proceedings pending the outcome of her TUE application.

30. On 2 April 2019, the CAS Court Office invited the Respondent to comment on the request for a suspension of the procedure within three days.

31. On the same date, the Appellant requested a suspension of the deadline to file the Appeal Brief until the issuance of a decision on her second TUE application by the TUEC.

32. On 3 April 2019, the CAS Court Office granted the Appellant's request for a temporarily suspension of the deadline to file her Appeal Brief.

33. On 4 April 2019, the Respondent nominated Mr Olivier Carrard as arbitrator.

34. On 16 April 2019, the CAS Court Office confirmed the suspension of the procedure pending the outcome of the Appellant's application for a TUE.

35. On 8 May 2019, the Appellant informed the CAS Court Office that her (second) application for a retroactive TUE had been denied in the Respondent's TUE Decision. Furthermore, the Athlete requested an extension of the deadline to file her Appeal Brief by one week.

36. On 9 May 2019, the CAS Court Office invited the Respondent to comment on the Appellant's request for an extension of the deadline to file her Appeal Brief.

37. On 10 May 2019, the Respondent objected to an extension of the deadline.

38. On 13 May 2019, the CAS Court Office, in accordance with Article R32 of the CAS Code, granted the Appellant an extension of 5 days to file her Appeal Brief.

39. On the same date, the Appellant filed an appeal with the CAS against the TUE Decision. The Statement of Appeal was directed against the Respondent and the proceedings were docketed by the CAS Court Office as CAS 2019/A/6277 ("CAS 6277"). The Athlete again nominated Mr Boris Vittoz as arbitrator. Furthermore, the Appellant requested a consolidation of both procedures CAS 6210 and CAS 6277.

40. On 20 May 2019, the Respondent agreed with a consolidation of both procedures and nominated Mr Olivier Carrard as arbitrator in CAS 6277.

41. On 21 May 2019, the CAS Court Office informed the Parties that the President of the Appeals Arbitration Division decided to consolidate both procedures in accordance with Article R52 of the CAS Code.

42. On 5 June 2019, the Appellant filed her Appeal Brief.

43. On 6 June 2019, the CAS Court Office, on behalf of the President of the CAS Appeals Arbitration Division, informed the Parties that the Panel appointed to decide the dispute was constituted as follows:

President:	Mr Ulrich Haas, Professor, Zurich, Switzerland
Arbitrators:	Mr Boris Vittoz, Attorney-at-Law in Lausanne, Switzerland
	Mr Olivier Carrard, Attorney-at-Law in Geneva, Switzerland

44. On 13 June 2019, the CAS Court Office, on behalf of the Panel, acknowledged the Appellant's request that the ADQL provide her with the concentration of Betamethasone found in her A and B sample, the uncertainty applicable to the measurement of the concentration and with the specific gravity of the Athlete's urine. In view of this request for information, the Panel invited the Respondent either to provide the information requested by the Appellant within ten days or to provide reasons for a refusal within the same deadline. Furthermore, the letter advised the Parties that the Panel had decided to hold a hearing in this matter.

45. On 14 June 2019, the CAS Court Office advised the Parties that Mr Björn Hessert had been appointed as an *Ad hoc* Clerk in these proceedings.

46. By 24 June 2019, the Respondent responded to the letter of the CAS Court Office dated 13 June 2019 as follows:

On behalf of the Anti-Doping Lab Qatar, Doha (ADLQ), Respondent wishes to submit the following information, as requested by the Appellant at para. 90 et seq. of the combined Appeal Brief:

a) The concentration of betamethasone from screening results is referred to the TUE Enquire Form (ADLQ 1/9/2018, OCA 2/9/2018): 45 ng/ml. The A-sample confirmatory analysis concentration of betamethasone was estimated to 59 ng/ml and the B-sample confirmatory analysis concentration of betamethasone was estimated to 56 ng/ml.

b) The estimated A&B-sample confirmatory analyses concentrations as well of the A-sample screening analysis of betamethasone were estimated by qualitative methods and NOT quantitative methods, which are applied to WADA TD DL threshold substance. Consequently, for the qualitative methods there is no uncertainty value for the concentrations.

c) The specific gravity measurement is referred to the ADAMS report of the sample 4289839.

47. Furthermore, the Respondent requested an extension of the deadline to file its Answer until 15 July 2019.

48. On 25 June 2015, the Appellant stated in her letter to the CAS Court Office that *"the Doha Laboratory did not reply to the query by the Appellant to be provided with an uncertainty value for the estimated concentration…In order to be able to assess whether follow-up questions are required. I first need to consult the Appellant's experts. I would therefore be grateful if you could grant the Appellant a one-week deadline to inform the CAS as to whether the Respondent should be deemed to adequately reply to the Appellant's request for disclosure"*.

49. On 26 June 2019, the CAS Court Office on behalf of the Panel granted the Appellant's request and set a deadline for the Appellant until 2 July 2019 to state whether or not the Respondent had responded adequately to her request for information.

50. Also on 26 June 2019, the Appellant agreed to an extension of the Respondent's deadline to file its Answer until 12 July 2019. The CAS Court Office, thus, granted an extension accordingly pursuant to Article R32 of the CAS Code.

51. On 2 July 2019, the Appellant informed the CAS Court Office that in her view the Respondent had not adequately responded to her request for information and, therefore, reiterated her request that the ADLQ "*be invited to provide an estimate of uncertainty, which applies when an estimated concentration of the substance betamethasone is reported*".

52. On 3 July 2019, the CAS Court Office invited the Respondent to comment on the Appellant's letter within three days.

53. On 8 July 2019, the Respondent objected to Appellant's request for the disclosure of information arguing that all information requested had already been provided in its previous letter dated 24 June 2019.

54. On 12 July 2019, the Respondent filed its Answer.

55. On 23 July 2019, the CAS Court Office, on behalf of the Panel, informed the Respondent that in its view the response provided to the Appellant's request for information *"does not fully answer the Appellant's inquiry"*. Therefore, the Panel requested the Respondent to provide a more detailed answer. Therein, the Respondent was requested to explain *"why it is able to make an estimation of the concentration of betamethasone in the Athlete's sample by application of a quantity method, but is unable to provide an estimate of the accuracy/certainty of such measurement"*. Furthermore, the letter referred to para. 13 of the Decision. Therein, the OCA stated that the Decision still needed to be "*adopted by the President and the Executive Board of the Olympic Council of Asia and implemented*". The Panel invited the Respondent to inform it whether or not such adoption/implementation had taken place.

56. On 2 August 2019, the Respondent responded to the letter of the CAS Court Office dated 23 July 2019 – *inter alia* – as follows:

None of the standards of regulations applicable require neither to calculate nor to report a numeric value of the uncertainty of the estimation, because this would be meaningless in the context of an analysis like the one performed.

The estimation of the concentration of betamethasone in the Athlete's samples by ADQL was performed in line with all applicable scientific standards. In the light of the purpose of the analysis, the precision of the measurements, the reference values utilized and the order of magnitude of the concentrations to be determined, it can be considered very accurate. […]

The concentration of betamethasone present in the Athlete's urine was estimated by comparing the betamethasone signal obtained in the athlete sample with the one in the positive control sample of betamethasone 30 ng/mL by means of LC/MS according to the ISO/IEC17025 accredited method.

The internal standard mefruside was added both to the Athlete's sample and to the positive control sample of betamethasone and the peak area of mefruside in the positive control sample was then calculated.

The same was done between the peak area of betamethasone and the peak area of mefruside in the Athlete's sample. The proportion of the two calculated ratios allows to calculate the concentration of betamethasone in the Athlete's A and B samples. […]

The testing procedure was performed in compliance with all applicable WADA, ISO and scientific standards. The calculation and report of a numeric value of the uncertainty of the estimation was accordingly not required by any mentioned standards.

The reason for this is that the aim of such an analysis is only to determinate if the concentration of the analyte in the Athlete's sample is higher or lower than the one in the positive control sample with a known concentration of the analyte (in casu 30ng/mL, also the reporting limit).

The estimation of the concentration was made for information purposes and to highlight the chromatography signal for betamethasone in Athlete's sample indicated a concentration of the substance almost twice as high as the reporting limit of 30 ng/mL.

57. Furthermore, the Respondent offered the participation of Dr Costas Georgakopoulos as an expert witness. Moreover, with regard to the second request of the Panel encompassed in the letter dated 23 July 2019, the Respondent explained that the Working Group of the OCA adopted the recommendations of the OCA DC on 2 March 2019 in accordance with the OCA Constitution. In support, the Respondent sent a copy of the Adoption of the Working Group along with its explanation.

58. On 5 August 2019, the Appellant objected to the explanations given by the Respondent on 2 August 2019 and argued that *"[t]he issue is that there is inevitably margin of error in the reporting of a concentration. This is precisely why the estimate of the concentration of betamethasone is very close to the reporting limit. More importantly, if the uncertainty is duly considered, the concentration of the substance in the urine of Ms Gao may well be below the reporting limit of 30ng/ml, with the consequence that no adverse analytical finding should have been reported by the laboratory. It is therefore crucial to know the uncertainty. In the view of the above, the request for disclosure dated 2 July 2019 is maintained.*

59. On 6 August 2019, the CAS Court Office, on behalf of the Panel, invited the Appellant to comment on the Respondent's letter of 2 August 2019 within seven days. In addition, the CAS Court Office informed the Parties that the Panel accepted the participation of Dr Costas Georgakopoulos as an expert witness.

60. On 13 August 2019, the Appellant informed the CAS Court Office that she did not wish to respond to the Respondent's letter dated 2 August 2019 and fully referred to her letter dated 5 August.

61. On 15 and 16 August 2019, the Appellant and Respondent, respectively, returned a signed copy of the Order of Procedure ("OoP").

62. On 19 August, a hearing was held at the CAS headquarters in Lausanne. The Panel was assisted by the *Ad hoc* Clerk Mr Björn Hessert and Brent J. Nowicki, Managing Counsel of the CAS. The Appellant was present in person at the hearing and was assisted by Mr Claude Ramoni, Mr. Yvan Henzer, Mr Wang Yu Peng and Ms Xiaoyan Gong. The Respondent was represented by counsels Mr Jan Kleiner and Mr Francisco Rapp.

63. At the outset of the hearing, the Parties reiterated that they had no objection to the formation of the Panel and to the jurisdiction of the CAS. Furthermore, the Appellant waived the examination of the witnesses Mr Bo Dong, Mr Quiui Wang and Mr Ganq Qiao. The Respondent waived the examination of Dr Abdul Wahab Al-Musleh and of Dr Costas Georgakopoulos.

64. The Panel heard the following witnesses and experts on behalf of the Appellant:

- Professor Kenneth Fitch (expert),
- Professor David F. Gerrard (expert),
- Professor Mark R. Hutchinson (expert),
- Professor Martial Saugy (expert),
- Dr Jianquan Wang (witness).

65. At the closing of the hearing the Parties confirmed that the Panel had observed their right to be head and that they had ample opportunity to question / cross-examine the witnesses / experts and to present their case.

IV. POSITIONS OF THE PARTIES

66. This section of the award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this Award, the Panel has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties,

including allegations and arguments not mentioned in this section of the Award or in the discussion of the claims below.

A. The Appellant's Submissions

67. On 25 March 2019, in her Statement of Appeal (CAS 6210), and on 5 June 2019, in her Appeal Brief, the Appellant requested as follows:

1. The appeal dated 25 March 2019 is upheld.

2. The decision issued by the Olympic Council of Asia dated 2 March 2019 is annulled.

3. Ms Yang Gao did not commit an Anti-Doping Rule Violation on the occasion of the in-competition test that took place on 26 August 2018 and no sanction shall be imposed on her.

4. The results obtained by Ms Yang Gao on the occasion of the Asian Games competition that took place on 26 August 2018, as well as her silver medal are unaffected.

5. The Olympic Council of Asia shall be ordered to bear all arbitration costs and to reimburse Ms Yang Gao the minimum CAS Court Office Fee of CHF 1000.

6. The Olympic Council of Asia shall be ordered to pay Ms Yang Gao a contribution towards the legal and other costs incurred in the framework to these proceedings in an amount to be determined at a later stage or at the discretion of the Panel.

68. The Appellant's submissions in support of her appeal against the Decision may be be summarised as follows:

a) Procedural flaws

69. The Appellant submits that the composition of the OCA DC violates Article 8.1 of the Anti-Doping Rules (2018 edition) (the "OCA ADR"). Two of the OCA DC's members were not impartial and independent for the following reasons:

(a) Dr Jegathesan Manikavasagam signed the AAF notice "and was therefore not in the position to sit in an independent hearing panel", i.e. the OCA DC.

(b) Dr Mokoto Ueki was a member of the OCA initial review panel who signed the decision regarding the Athlete's AAF and ADRV. In addition, he participated in establishing the doping control test plan. He is also a member of the ADLQ and was, therefore, possibly involved in the analysis of the Athlete's sample.

(c) The lack of impartiality and indepence of the OCA DC may have – according to the Appellant – affected the outcome of the Decision.

(d) According to the Appellant, the above finding is corroborated by the report of the Independent Observer Team ("IO-Team") to the Asian Games. In this report the IO-Team complained about the composition of the OCA DC and recommended that the Respondent should implement in its rules that the CAS be appointed in order to ensure that anti-doping matters are adjudiciated by a proper hearing panel.

b) On the ADRV

70. The Appellant submits that the injection of Betamethasone on 24 August 2018 was *"a permitted medical act"* that does not constitute an ADRV.

(a) The Athlete does not deny that Betamethasone was found in her system. Furthermore, it is not disputed that Betamethasone is a banned substance under the Prohibited List.

(b) However, the administration of a TPI of – *inter alia* – Betamethasone to ease the Athlete's pain in her lower back is not prohibited.

(c) Betamethasone is only prohibited in-competition. Dr Wang administered the injection on 24 August 2018 which was more than 12 hours before the Athlete's shot put competition on 26 August 2018. Thus, the substance was administered out-of-competition.

(d) A TPI does not constitute a prohibited route of administration within the meaning of Section S9 of the Prohibited List. According thereto only *"oral, intravenous, intramuscular, and rectal routes"* of adminstration are prohibited.

- The performed targeted local injection into the right erector spinae muscle by Dr Wang is not an intramuscular injection.
- Based on the expert opinion of Prof. Mark R. Hutchinson, Mr Wang's injection *"was clearly targeting myofascial tissue as it targeted the focal area of pain. The injection was not placed into the gluteus, tricepts, quadriceps or other large msucle group with the intention of intramuscular diffusion throughout the body [...] Lumbar muscle injection would NOT be a common avenue for administration of an intra-muscular injection"*
- Based on the expert opinion of Prof. Kenneth Fitch *"a local pathological condition may and often do result in some of the injected drug going into the adjacent muscle tissue. This is not a prohibited systematic administration but a permitted local injection* […] *Furthermore, if the injection was an intramuscular injection i.e. systemic injection, it would not have resulted in the rapid benefit that resulted from the injection into Gao Yang's back"*.
- The above conclusions are corrobarated by the expert opinion by Prof David F Gerrard as well as by statements found on USADA's website. The latter clearly advises that *"local injections/trigger point treatment of cortisone/corticosteroid into a joint are permitted"*.

(e) The Athlete bears no fault or negligence. She relied on her doctor and she had no intention to enhence her sport performance.

(f) Alternatively, in case there is a doubt whether or not the administration route applied to the Athlete is prohibited or not, the Appellant submits that such doubt must play in favor of the athletes. The unclear and ambiguous wording of Section S9 of the Prohibited List cannot be to the detriment of the Athlete. The Appellant claims that:

- the rule is unpredictable and that
- it is in breach of the legal principle of *nulla poena sine lege certa*.

c) As to the TUE Decision

71. With respect to the TUE Decision, the Athlete on 13 May 2019 (Statement of Appeal in the matter CAS 6277) and on 5 June 2019 (Appeal Brief) filed the following prayers of relief:

1. The appeal dated 13 May 2019 is upheld.

2. The decision issued by the Therapeutic Use Exemption Sub-Committee of the Olympic Council of Asia dated 1 May 2019 is annulled.

3. In the event that the CAS Panel would rule that the administration of Betamethasone to Ms Yang Gao on 24 August 2018 occurred through a prohibited route of administration, Ms Yang Gao shall be granted a retroactive Therapeutic Use Exemption authorising her use of 14mg Compound Betamethasone injecting and 10ml Lidocaine Hydrochloride by trigger point injection on 24 August 2018.

4. The adverse analytical finding reported on the occasion of the in-competition test that took place on 26 August 2018 shall not be considered as an anti-doping rule violation.

5. The Olympic Council of Asia shall be ordered to bear all arbitration costs and to reimburse Ms Yang Gao the minimum CAS Court Office Fee of CHF 1000.

6. The Olympic Council of Asia shall be ordered to pay Ms Yang Gao a contribution towards the legal and other costs incurred in the framework to these proceedings in an amount to be determined at a later stage or at the discretion of the Panel.

72. The Appellant's submission in support of her appeal against the TUE Decision – in essence – can be summarised as follows:

(a) The Appellant submits that, by a balance of probability, the criteria for granting a retroactive TUE pursuant to Article 4.1 ISTUE are fulfilled.

- The Athlete was in an acute medical condition caused by the severe pain in her lower back.
- The TPI of Betamethasone on 24 August 2018 had no performance-enhancing effect. The substance is only prohibited in-competition so that an additional performance enhancement two days after the injection is highly unlikely.
- According to the Appellant, also the condition in Article 4.1 c ISTUE is fulfilled. Before applying the injection, the Appellant tried to manage the pain through stretching exercises and electro-acupuncture. However, the alternative applications did not help to relief her pain. Furthermore, non-steroidal anti-inflammatory drugs ("NSAIDs"), such as Voltaren, would not have enabled the Appellant to participate in the shot put competition on 26 August 2018 due to a three-day treatment period and possible side-effects of NSAIDs.
- The use of Betamethasone was not a consequence of the prior use of a prohibited substance.

- According to the Appellant, also the criterion of an emergency treatment in accordance with Article 4.3 a ISTUE is met. The Athlete was unable to walk, sit down, lean forward or stand up due to her pain.
- Moreover, the permission of TPI of Betamethasone while being out-of-competition shall be considered as exceptional circumstance. Accordingly, it was not possible to request a TUE prior to the injection as was wrongfully stated in the TUE Decision.
- Even if the Panel found that the conditions for an emergency treatment are not met or no exceptional circumstances present, the Athlete is nevertheless entitled to a retroactive TUE based on fairness reasons in light of Article 4.3 d ISTUE. It is obvious that the Athlete believed that the TPI was a permitted and legitimate route of administration under Section S9 of the Prohibited List.

B. The Respondent's Submissions

73. In its Answer dated 12 July 2018, the Respondent filed the following prayers for relief:

1. Rejecting the Appeal;

- and -

2. Ordering the Appellant to (i) pay any arbitration costs in full and (ii) pay in full, or pay a contribution towards the legal fees and other expenses incurred by the Olympic Council of Asia in connection with these proceedings at an amount of at least CHF 25,000.00.

74. The Respondent's submissions – in essence – can be summarised as follows:

a) Procedural flaws

75. The Respondent denies that any procedural flaws occurred in the proceedings before the OCA DC.

(a) The hearing on 14 January 2019 before the OCA DC respected the Athlete's procedural rights. The Athlete was heard and was granted sufficient time to present her case before the members of the OCA DC.

(b) The hearing was held by an impartial and independent panel.

- Dr Jegathesan and Dr Ueki are experienced, independent and impartial experts and were impartial when casting their vote.
- The decision taken by the OCA DC was not binding since the OCA Executive Board had to pass the final decision based on the recommendation of the OCA DC.

b) On the ADRV

76. In regard to the alleged ADRV, the Respondent submitted that the injection of Betamethasone on 24 August 2018 constitutes an AAF and ADRV for the following reasons:

(a) The Athlete took the substance Betamethasone in-competition.

- The Athlete was tested positive in-competition.
- Whether or not the substance was administered out-of-competition is irrelevant as long as the substance is still in the Athlete's system in-competition.
- The Athlete Reference Guide to the 2015 WADA Code provides that *"out-of-competition use of substance that is prohibited only in-competition is not considered an anti-doping rule violation unless evidence of that substance is still in your system at the time of an in-competition test"*.

(b) The performed injection of Betamethasone in the Athlete's right erector spinae muscle is a prohibited route of administration.

- The TPI (or local injection) into the Athlete's back constitutes an intramuscular route prohibited under Section S9 of the Prohibited List.
- The information on the USADA website refers only to permitted injections of Glucocorticoids into *"joints, tendons, and epidural spaces"*, but not into muscles.
- WADA banned all forms of intramuscular injections of Glucocorticoids in-competition because of their potential to enhance performance and their potential to endanger the health of athletes. This prohibition is regardless of the purpose of the injection, i.e. whether it is a local injection/TPI or whether it serves systemic treatment.
- This view held here is supported by the WADA experts that were consulted by the Respondent. They stated unequivocally that *"local injections into muscle are still considered intramuscular injection"*.
- In addition, evidence on the exact location of the trigger point other than the Athlete's lumbar muscle was not provided.

(c) The concentration of Betamethasone found in the Athlete's A and B sample is of no relevance.

- Betamethasone is not a threshold substance. Thus, there is no requirement for confirmatory quantifications.
- The analysis of Betamethasone by the ADLQ were estimated by qualitative and not by quantitative measures.
- The WADA Technical Document TD2019MRPL provides that an AAF can result from a lower Minimum Required Performance Level.
- The concentration found in the Athlete's urine sample was above 30 ng/mL so that the ADLQ was required to report the AAF to the OCA.

(d) A retroactive TUE cannot be granted to the Athlete, because she does not fulfil the requirement set forth in Art. 4.1 c ISTUE. According thereto, a retroactive TUE can only be granted if there is *"no reasonable Therapeutic alternative*". The Respondent submits that

- The Athlete could have been treated with NSAIDs.
- Other non-prohibited alternatives could have been rest, ice, compression and elevation.
- Withdrawal from or non-participation in a competition constitutes a reasonable alternative in the context of Article 4.1 c ISTUE.
- All of the above (permitted) therapeutic alternatives were carelessly not taken into considerations by Dr Wang.

V. JURISDICTION

77. Article R47 para. 1 of the CAS Code provides as follows:

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

A. Jurisdiction in relation to the Decision

78. Article 8.2.6 of the OCA ADR provides as follows:

The Disciplinary Commission shall issue a timely reasoned decision. That decision […] may be appealed as provided in Article 12.

79. Article 12.2 of the OCA ADR states in its relevant part as follows:

A decision that an Anti-Doping rule violation was committed, a decision imposing Consequences or not imposing Consequences for an Anti-Doping rule violation […] may be appealed exclusively as provided in this Article 12.

80. Article 12.2.1. of the OCA ADR states:

In cases arising from the Event, the decision may be appealed exclusively to CAS.

81. In addition, para. 13 of the Decision of 2 March 2019 provides as follows:

13. On the release of these findings and recommendations, if adopted by the President and the Executive Board of the Olympic Council of Asia and implemented, the Competitor has a right to appeal to Court Arbitration of Sport (CAS) within 21 days after the recipient of the decision letter.

82. In view of all of the above and in light of the fact that none of the Parties has disputed the jurisdiction of CAS as well as the OoP has been signed by both Parties, the Panel accepts that it has jurisdiction to decide the present matter.

B. Jurisdiction in relation to the TUE Decision

83. The CAS jurisdiction in relation to the appeal against the TUE Decision is not based on the rules and regulations of the Respondent, but on a separate agreement of the Parties. Following the issuance of the TUE Decision by the TUEC, on 9 May 2019, both Parties expressly agreed that the CAS shall have jurisdiction to review the TUE Decision. In view of this express agreement between the Parties Article 4.4.4 of the OCA ADR, stating that *"[a] decision by the OCA TUEC not to recognize or not to grant a TUE may be appealed by the Athlete exclusively to the independent TUE Appeal Committee",* does not apply. None of the Parties challenged the jurisdiction of the CAS with respect to the appeal against the TUE Decision. In light of the foregoing and taking into account that the parties have signed the OoP, the Panel is satisfied that the CAS has jurisdiction to hear the present appeal.

VI. ADMISSIBILITY

84. Article R49 of the CAS Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federations, associations or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of a decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the parties.

85. In addition, Article 12.7.1 of the OCA ADR – *inter alia* – sets forth:

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

86. Furthermore, para. 13 of the Decision of 2 March 2019 refers to a time limit of twenty-one days. It follows from the above that the appeal on 25 March 2019 in the matter CAS 6210 was filed within the prescribed time limit.

87. As for the appeal against the TUE Decision, the Panel notes that the (ad hoc) arbitration agreement entered into by the Parties on 9 May 2019 did not provide for a time limit for appeal. Consequently, the Panel finds that it shall fall back on the deadline provided in Article R49 of the CAS Code, i.e. twenty-one days. The appeal on 13 May 2019 in matter CAS 6277 was, thus, filed on time.

VII. OTHER PROCEDURAL ISSUES

88. Since this procedure was initiated after 1 January 2019, the applicable CAS Code is the one in force as from 1 January 2019.

89. The Parties agreed to consolidate the two proceedings CAS 6210 and CAS 6277. Consequently, the President of the Appeals Arbitration Division decided on 21 May 2019 to consolidate both proceedings in accordance with Article R52 para. 4 of the CAS Code. Consequently, the Panel will issue a single award in both proceedings.

VIII. APPLICABLE LAW

90. Article R58 of the CAS 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 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.

91. Accordingly, the Panel decides that the merits of the case shall be governed by the OCA Regulations, particularly the OCA ADR (2018 edition) which incorporate by reference the WADA International Standards. Subsidiarily, the Panel will apply Kuwaiti Law as the OCA has its seat in the State of Kuwait.

IX. MERITS

92. The relevant questions in the matter in dispute before this Panel can be grouped into three sets of issues:

i. Should the Decision be annulled for procedural flaws?

ii. Did the Athlete commit an ADRV?

iii. In case the aforementioned question (ii) is answered positively, are the criteria for granting a retroactive TUE fulfilled?

A. Should the Decision be annulled for procedural flaws?

93. The Athlete submits that two members of the OCA DC were not impartial and independent which may have affected the Decision taken by the OCA DC on 2 March 2019. In addition, the Athlete submits that her arguments were not properly considered during the hearing held on 14 January 2019.

94. It appears questionable what legal standards apply to the issue of impartiality and independence of the OCA DC and its members. The OCA ADR provide only limited guidance in that respect. The relevant rules read as follows:

Art. 8.1

The OCA President shall immediately set up a Disciplinary Commission (OCA-DC). The Commission shall consist of Chairman or his alternative as appropriate of the OCA Medical Committee and Anti-Doping Commission, one member of the OCA Rules Committee, and one member from OCA Executive Board.

…

Art. 8.2.5

The Disciplinary Commission shall act in a fair and impartial manner towards all parties at all times.

…

Art. 8.3.2

No person may be a member of the OCA Disciplinary Commission if he:

a) Has the same nationality as the Athlete, or other Person, concerned;

b) Has any declared or apparent conflict of interest with such Athlete, the National Olympic Committee, or International and Asian federations of such Athlete or any Person whatsoever involved in the case; or

c) In any way whatsoever, does not feel himself to be free and independent.

Art. 8.3.3

No violation of the above-noted procedures and general provisions can be invoked if the Person involved has not yet been prejudiced by such violation.

95. The Appellant does not submit that the OCA DC was composed contrary to Article 8.1 of the OCA ADR or that the members of the OCA ADR acted contrary to Article 8.2.5 of the OCA ADR. In particular, the Appellant has not submitted that Dr Jega and Dr Ueki acted in a partial manner during the proceedings before the OCA DC. The Appellant is of the view that these two members had a conflict of interest which resulted in them not being independent. The OCA ADR try to tackle the issue of conflict of interests of the OCA DC members in Article 8.3.2 of the OCA ADR. Again, the Appellant does not submit that this provision has been breached. Instead, the Appellant refers to and seeks application of a standard of independence beyond Article 8.3.2 of the OCA ADR. The Appellant does not explain from what law she derives her (high) legal standard of independence. In particular, it is unclear whether such standard follows from Swiss public policy consideration. Be it as it may, the Panel observes that from a Swiss perspective, there is no uniform standard of independence with respect to adjudicatory bodies of associations. In particular, the Panel notes that the majority of legal literature applies a lesser standard with regard to independence

for association tribunals compared to state courts or arbitral tribunals (see OSWALD D., Associations, Fondations, et autres Formes de Personnes Morales au Service du Sport, 2010, p. 157 seq.; GUROVITS A., Verbandsinterne Gerichtsbarkeit, in KLEINER/BADDELEY/ARTER (eds), Sportrecht, Vol. 2, 2018, p. 298; HAAS/MARTENS, Sportrecht – Eine Einführung in die Praxis, 2011, p. 120).

96. Furthermore, the Panel observes that even if the members of the OCA DC were not sufficiently independent (what the Appellant failed to prove), such a procedural flaw may be healed in a proceeding before the CAS. According to Article R57 para. 1 of the CAS Code, the Panel has the full power to review the facts and the law. In principle, the *de novo* proceeding before the CAS cures any purported (procedural) violations that occurred in prior proceedings (see CAS 2011/A/2594; CAS 2018/A/5853). There may be exceptions to this rule in case of exceptional circumstances. The Panel, however, is of the view that in any case, i.e. even if Dr Jega and Dr Ueki were not sufficiently independent, such violation cannot be qualified as an irreparable breach of the applicable procedural standards. In view of the fact that the Appellant has the opportunity to extensively present her case before the CAS, where all of her fundamental procedural rights are fully respected, the Panel finds that any procedural flaw before the OCA DC fades to the periphery and is herewith cured.

B. Did the Athlete commit an ADRV?

97. Article 2.1.1 of the OCA ADR provides as follows:

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 violation under Article 2.1.

98. It is undisputed between the Parties that the A and B samples of the Appellant contained the substance Betamethasone.

99. Betamethasone is on the Prohibited List. However, the presence of Betamethasone in an athlete's system only constitutes an ADRV if two further requirements are met. First, the presence of Betamethasone is only prohibited if detected in-competition. Second, the Prohibited List provides that the substance must have entered the Athlete's system through prohibited route of administration (i.e. oral, intravenous, intramuscular or rectal).

a) The presence of Betamethasone in-competition

100. The Appellant submits that Betamethasone was injected by Dr Wang on 24 August 2018, i.e. more than 12 hours before the start of the women's shot put competition. Thus, according to the Appellant, the substance was present out-of-competition. The Respondent objects to the Appellant's submission and states that since an in-competition test revealed Betamethasone, the substance was present in-competition.

101. The term "in-competition" is defined in the OCA ADR as follows:

For the purpose of this Anti-Doping Rules, 'In-competition ' means the period commencing twelve hours before a Competition in which the Athlete is scheduled to participate through to the end of such Competition and the Sample collection process related to such Competition.

102. In turn, "out-of-competition" covers *"any period which is not In-Competition"*.

103. The definition provided in the OCA ADR is in compliance with the World Anti-Doping Code ("WADC"). In addition, the comment to Article 4.2.1 of the WADC provides as follows:

Out-of-Competition Use of a substance which is only prohibited In-Competition is not an anti-doping rule violation unless an Adverse Analytical Finding for the substance or its Metabolites or Markers is reported for a Sample collected In-Competition.

104. It clearly follows from the above that for an ADRV based on presence of a Prohibited Substance it is irrelevant when the substance was administered. Instead, it suffices that the Prohibited Substance is still present in the Athlete's system in-competition. The Panel is comforted in its view by the CAS jurisprudence. In CAS 2013/A/3327 & 3335, the Panel held that *"[t]he violation (for which the athlete is at fault) is not the ingestion of the substance, but the participation in competition while the substance itself (or its metabolites) is still in the athlete's body. The illicit behaviour, thus, lies in the fact that the athlete returned to competition too early, or at least earlier than when the substance he had taken out of competition had cleared his system for drug testing purposes in competition"*.

105. To conclude, therefore, the Panel finds that the substance of Betamethasone was present in the Appellant's system in-competition.

b) The prohibited route of administration

106. Betamethasone is a Glucocorticoid prohibited under Section S9 of the Prohibited List which reads as follows:

All glucocorticoids are prohibited when administered by oral, intravenous, intramuscular or rectal routes.

ba) The Position of the Parties

107. The Parties are in dispute whether the injection administered by Dr Wang constitutes a prohibited route within the above meaning. The Appellant submits that the term "intramuscular" is a medical term. It prohibits injections into big muscle groups only. Such route is prohibited because it constitutes a systemic administration whereby the substance is diffused into the whole body. Only such systemic applications of Glucocorticoids are suspected to have a performance enhancing effect. Local injections, on the contrary, are not prohibited, because they have no sport enhancing effect. A TPI is – typically – a local injection, even if administered into or close to a muscle (into myofascial tissue). According to the Appellant, Dr Wang performed a TPI, i.e. a treatment that is not covered by the four prohibited routes of administration described in Section S9 of the Prohibited List.

108. The Respondent submits that Dr Wang administered the injection into a muscle. This clearly follows from Dr Wang's statement of 10 September 2018. According thereto, the "local injection" was administered into the *"right erector spinae muscle"*. Injection into any muscle must be qualified as "intramuscular injections" and are, thus, forbidden. This holds true – according to the Respondent – irrespective of whether the injection was "local" or a "myofascial TPI". In support of its view, the Respondent refers to two letters sent by WADA in response to questions raised by the OCA. The letter by Mr Alan Vernec, Medical Doctor of WADA, of 26 September 2018 reads as follows:

Thank you for your email. As I understand, this is an athlete who received trigger point injections with betamethasone, a substance which is prohibited in competition. The substance was delivered into the right erector spinae muscle approximately 2 days before her test. Local injections into the muscle are still considered intramuscular injection and therefore is a prohibited route of administration of the use of glucocorticoids. ….

109. On 2 May 2019, Mrs Marissa Sunio, Manager of Legal Affairs at WADA wrote to the OCA as follows:

…. You queried as to the 'exact meaning of intra-muscular injection and whether it includes any injection in the muscles or it has a specific meaning in WADA rules and practice' and specially asked about trigger point injections (TPI).

Trigger points are defined in the literature as palpable, tense bands of skeletal muscle fibres. As stated by the Chinese doctor, the substance was delivered into the right erector spinae muscle approximately 2 days before her test.

As per our previous communication in September 2018, it is understood that a local injection into the muscle is still considered an intra-muscular injection and therefore is a prohibited route of administration of the use of glucocorticoids. Although the intent of the injection may have been to treat a local injury and not systemic application, if the injection is into the muscle then it is intra-muscular.

bb) The Findings of the Panel

110. The term "intramuscular" might appear clear and unambiguous at the outset only. In the view of the Panel, the term must be interpreted in light of the history and the purpose of the provision. When doing so, the Panel has serious doubts whether the term "intramuscular" in Section S9 of the Prohibited List covers the route of administration in question here.

111. Professor Fitch convincingly explained the historical background of the prohibition of Glucocorticoids in sports. According to Professor Fitch, it has always been disputed whether or not Glucocorticoids should be included on the Prohibited List because experts were divided on the issue whether or not Glucocorticoids had a performance enhancing effect. Professor Fitch also explained that such dispute between the experts was and still is limited to systemic applications of Glucocorticoids. The experts – on the contrary – are in agreement that local applications have no potential to enhance sport performance. Thus, the purpose of Section

S9 of the Prohibited List always was (and still is) – according to Professor Fitch – to only capture and prohibit systemic applications of Glucocorticoids.

112. The above conclusion finds support in the scientific literature that was submitted before this Panel. A recent research conducted by Mr Alan Vernec et al. describes the potential performance-enhancing effects from long-term use of systematic Glucocorticoids as follows: *"Some athletes have undoubtedly attempted to harness the purported performance-enhancing effects of systematic GCs that they perceive to be beneficial in their particular sporting discipline. […] There is no evidence of performance-enhancing effects from short-term use of systematic GCs"* (VERNEC A. ET AL., Glucocorticoids in elite sport: current status, controversies and innovative management strategies – a narrative review, (2019) Br J Sports Med 1, 2). This finding is in line with a previous research in this field from 2012. Therein, Mr Fabio Pigozzi et al. advocate *"to maintain the systematic use of GCs on WADA's prohibited list. Moreover, the systematic use of GCs should be prohibited in and out of competition to strongly discourage their use. […] their long-term or high-dose usage can be both performance-enhancing and potentially deleterious for athletes' health"* (PIGOZZI F. ET AL., Why glucocorticoids should remain in the list of prohibited substances: A sports medicine viewpoint, (2012) 25 International Journal of Immunopathology and Pharmacology, 19, 21 et seq.).

113. Professor Gerard and Professor Fitch explained that the term "intramuscular" was a term of art, widely used in medicine. According thereto, intramuscular injections describe applications whereby a substance is deposited into the muscle with the intent of diffusing it into the whole body. This, according to both experts, is also evidenced by the word "intra"- muscular (as opposed to "inter"-muscular). Thus, the mere fact that a muscle is pierced by an injection or that the injection is placed adjacent to a muscle (into fibres and myofascial tissue) does not turn the injection into a "intramuscular" injection. Local applications – according to both experts – serve a completely different purpose. According thereto, the substance shall exercise its effects only locally, in particular on a trigger point. The difference in type of treatment is also explained by the fact – according to Professor Fitch – that "intramuscular" injections are fairly easy to administer and that, consequently, also nurses are allowed to do so. Instead, local injections are much more difficult to administer and require a lot of experience in order to deposit the substance at the exact right spot. Consequently, only doctors are allowed to practice local injections. In order to ensure that the substance is placed correctly, local injections are sometimes supported by ultrasound guidance in order obtain optimal results. However, ultrasound guidance is – as explained by the experts – not standard practice, since many doctors will not have access to such technical support at the relevant time and therefore rather rely on their experience and expertise when administrating a TPI. Professor Gerrard and Prof Hutchinson further explained that the intention of a TPI is to get an effective immediate relief of pain. Both experts stated that since the Athlete experienced immediate relief of her lower back pain, Dr Wang must have hit the trigger point with the TPI and, thus, successfully administered a local injection (with very little of the substance diffusing into the body).

114. The Panel also found Professor Saugy's explanation convincing that even if an injection was not placed in perfect vicinity of a trigger point and some of the Glucocorticoids are spilled into an adjacent muscle, this would not turn the administration into an "intramuscular" injection, since such spilling effects would have no performance enhancing effect on an athlete. Professor Saugy further explained that also the estimated concentrations of Betamethasone found in the Athletes urine sample support the Athlete's submission that the route of administration was local rather than intramuscular. However, Professor Saugy also stated that it is very difficult to deduct from the analytical data the route of administration.

115. In the view of the Panel it would have been extremely helpful if Mr Vernec had been available at the hearing to give expert evidence. Unfortunately, this was not the case. The Panel does not feel at ease to decide an important question related to the interpretation of the Prohibited List solely based on evidence submitted by one of the Parties to these proceedings. It appears to the Panel that there could be a serious issue with regard to the principle of legal certainty in relation to Section S9 of the Prohibited List, should the term "intramuscular" injection be interpreted contrary to the ordinary meaning attached to such technical term by the relevant professional community. Be it as it may, the Panel finds that it does not need to decide the above question in a final manner. Instead, it can leave the question open, if – provided the route of administration was prohibited – the Athlete was entitled to a TUE.

C. Is the Athlete entitled to a retroactive TUE?

116. The Athlete has requested a retroactive TUE for the injection of Betamethasone administered to her on 24 August 2018. The TUE was denied – a second time – on 1 May 2019.

117. The conditions for granting a (retroactive) TUE are to be found in Article 4.1 of the International Standard for Therapeutic Use Exemptions ("ISTUE") and Article 4.3 ISTUE. The effects of a TUE are described in Article 4.4.1 of the OCA ADR. The latter provision reads as follows:

The presence of a Prohibited Substance or its Metabolites or Markers, and/or the Use or Attempted Use, Possession or Administration or Attempted Administration of a Prohibited Substance or Prohibited Method shall not be considered an Anti-Doping rule violation if it is consistent with the provisions of a TUE granted in accordance with the International Standard for Therapeutic Use Exemptions.

118. Consequently, if the Athlete is entitled to a (retroactive) TUE, the AAF shall not be considered an ADRV.

a) The starting point

119. Article 4.1 ISTUE provides as follows:

An Athlete may be granted a TUE if (and only if) he/she can show, by the balance of probability, that each of the following conditions is met:

a. The Prohibited Substance or Prohibited Method in question is needed to treat an acute or chronic medical condition, such that the Athlete would experience a significant impairment to health if the Prohibited Substance or Prohibited Method were to be withheld.

b. The Therapeutic Use of the Prohibited Substance or Prohibited Method is highly unlikely to produce any additional enhancement of performance beyond what might be anticipated by a return to the Athlete's normal state of health following the treatment of the acute or chronic medical condition.

c. There is no reasonable Therapeutic alternative to the Use of the Prohibited Substance or Prohibited Method.

d. The necessity for the Use of the Prohibited Substance or Prohibited Method is not a consequence, wholly or in part, of the prior Use (without a TUE) of a substance or method which was prohibited at the time of such Use.

120. It is undisputed between the Parties that the prerequisites of Article 4.1 a, b and d ISTUE are fulfilled in the present case. It is further undisputed that the prerequisites in Article 4.3 a ISTUE (for a retroactive procedure) are equally fulfilled. In addition, it is undisputed that the Athlete had a health issue with her back since mid-July 2018. She had tried – with the help of her support personnel – to manage the lumbar muscle strain – through exercises, massages and acupuncture. It is also uncontested that the problem turned into an acute medical condition after her training session on 23 August 2018. Thereafter she was in severe pain in her lower back. She was unable to walk, sit down, stand up or lean forward. She was not able to sleep, because she could not turn around in her bed. On 24 August 2018 she made an appointment with Dr Wang to treat her acute medical condition.

b) No reasonable Therapeutic alternative

121. The dispute between the Parties solely pivots around the question whether or not there was "no reasonable Therapeutic alternative" to the TPI administered by Dr Wang pursuant to Article 4.1 c ISTUE.

ba) The Position of the Parties

122. The Appellant submits that the circumstances on 24 August 2019 required an instant treatment with Betamethasone to immediately relieve her from her acute pain. Prior to the injection performed by Dr Wang, the Athlete unsuccessfully tried to treat her diagnosed lumbar muscle strain with exercises, massages and acupuncture. According to the Appellant, NSAIDs would not have had the same effects as the TPI, since NSAIDs require a treatment period of at least three days. In addition, NSAIDs may have negative side-effects for the Athlete.

123. The Respondent disagrees with the position of the Appellant and submits that the administration of NSAIDs was a reasonable therapeutic alternative under the relevant circumstances. However, the Respondent does not deny that NSAIDs-therapy may have negative side-effects. The Respondent is further of the view that other non-prohibited alternatives were carelessly not taken into consideration prior to the injection of

Betamethasone, i.e. rest, ice, compression and elevation. In addition, a withdrawal from or non-participation in the competition was a further reasonable therapeutic alternative, taking into consideration the severe pain of the Athlete in her lower back.

bb) The Position of the Panel

124. The Panel first and foremost notes that there was no other possibility for the Athlete than to ask for a retroactive TUE. The administration of Glucocorticoids is not prohibited out-of-competition. Thus, an athlete is permitted to treat an acute medical condition with Glucocorticoids out-of-competition. In addition, retroactive TUEs want to ensure that there is immediate treatment available to an athlete in situations where a prospective TUE cannot be granted in due time and there is a danger that a medical condition turns chronic further damaging the athlete's health. Thus, the purpose of retroactive TUEs is to reasonably balance between the protection of the athlete's health (and his or her interest in immediate treatment of the acute medical situation) and the athlete's responsibilities under the anti-doping program. In the case before the Panel, the Athlete was in a serious medical condition. She had acute and severe pain. She was unable to stand up, sit down, lean forward, sleep or walk. Her health was at risk and there was a danger that without instant treatment her pain would turn chronic. The Panel is persuaded that that immediate medical treatment by Dr Wang was necessary and reasonable and that there was no time and no reason to request a prospective TUE before treating the Athlete. Furthermore, the Panel notes that an application for a retroactive TUE only became an option, once the TPI was successful and relieved the Athlete from her acute pains. Only then the Athlete's return to competition became an option and there was a need to secure – through a TUE – that any findings of Glucocorticoids in-competition would not qualify as an ADRV. Thus, it does not come as a surprise that about 40 % of all TUEs for Glucocorticoids are retroactive TUEs. Consequently, the Panel finds that it was perfectly legitimate to request a retroactive TUE, i.e. TUE after administrating the injection of Betamethasone.

125. The remaining issue for this Panel to deal with is, thus, whether there was no "reasonable" therapeutic alternative to the TPI. The wording in Article 4.1 c ISTUE does not demand that there is no alternative. Instead, the provision requires that the other alternative is "reasonable" based on the circumstances of the individual case. The Panel finds that there was no reasonable alternative available:

- It is undisputed that the Athlete suffered from severe back pain. It was necessary to treat her immobility immediately because there was a danger that the Athlete´s condition could turn chronic. Thus, an effective instant medical treatment was required. The TPI constitutes such treatment. On the contrary, "rest, ice, compression and elevation" – as proposed by the Respondent – cannot be considered reasonable therapeutic alternatives in light of the medical condition of the Athlete.
- It follows from the credible testimony of Dr Wang that the TPI was not administered with the view of getting the Athlete fit for competition (a couple of days later). The Panel is persuaded by Dr Wang's testimony that his judgement to administer a TPI was

purely based on medical reasons, i.e. to relieve the Athlete effectively from her acute pains. The competition schedule was no issue for Dr Wang when deciding which therapy to follow.

- Based on Dr Wang's experience, the TPI treatment was the best medical option for treating the Athlete's condition under the given circumstances. That such a treatment was perfectly legitimate (and "state of the art") was corroborated by the expert testimony of Professor Hutchinson. According to him administrating a TPI under these conditions was absolutely appropriate and legitimate. This is all the more true considering that the application of NSAIDs – according to the testimony of Professor Hutchinson – would not have produced similar positive results within a comparable timeframe. In addition, a treatment with NSAIDs would have necessitated a longer treatment period (up to seven days) with possible negative side-effects. All of these elements must be taken into account when assessing whether there was a "reasonable" alternative.
- The Panel further notes that the Athlete had tried to manage her pain through alternative treatment methods, such as exercises, massages and acupuncture. Only after these treatment methods had failed and the Athlete's condition deteriorated the TPI was administered to the Athlete. Thereafter, Dr Wang submitted an Injection Declaration Form to the Respondent in compliance with the applicable regulations. In addition, the Athlete followed the instructions given by Dr Wang. She did not take part in any competition or training for the next 48 hours. She avoided to bend down or to move. Instead, she simply rested and stayed in bed most of the time. Such conduct (after the local administration of Glucocorticoids) is also recommended by the scientific literature. F. Pigozzi et al. state in their above mentioned research that *"it is recommended that a medically justified obligatory rest period of at least 48 hours is introduced; a period in which the athlete is not allowed to compete or to train and in which the physician implements a gradual rehabilitation within the limits of pain"* (PIGOZZI F. ET AL., Why glucocorticoids should remain in the list of prohibited substances: A sports medicine viewpoint, (2012) 25 International Journal of Immunopathology and Pharmacology, 19, 22). The Respondent could not explain why it would have been "reasonable" for the Athlete to further rest or withdraw from the competition after the (successful) therapy had been concluded.

126. The Panel further finds that in view of all of the detailed submissions provided by the Appellant, the explanations given by the TUEC to reject the retroactive TUE are rather generic in nature, unsubstantiated and unsatisfactory. It seems that the TUEC made no effort to properly assess the Athlete's submissions in the context of her second TUE application on 1 April 2019. It is also quite surprising that none of the members of the TUEC were available for questioning at the hearing and to counter the abundant expert testimony provided by the Appellant. This is all the more disturbing considering what is at stake in this dispute from the Athlete's viewpoint.

bc) Conclusion

127. To conclude, the Panel finds that there was no reasonable Therapeutic alternative to the TPI administration of Betamethasone by Dr Wang. Consequently, the requirements of Article 4.1 c ISTUE are fulfilled and the Athlete was – in any event – entitled to a (retroactive) TUE. Consequently, the Athlete has not committed an ADRV and the appeal against the TUE Decision and, consequently, against the Decision must be upheld.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeals filed by Ms Yang Gao on 25 March 2019 and 13 May 2019 are upheld.

2. The decision of the TUE Sub-Commission of the Olympic Council of Asia dated 1 May 2019 is set aside. Ms Yang Gao is granted a retroactive Therapeutic Use Exemption for the local injection of glucocorticoids administered to her on 24 August 2018. Consequently, the decision of the Disciplinary Committee of the Olympic Council of Asia dated 2 March 2019 is set aside.

3. (…).

4. (…).

5. (…).

6. All other and further motions or prayers for relief are dismissed.