Arbitration CAS 2022/A/9351 Philippine Swimming Inc. v. World Aquatics (WA, formerly known as Fédération Internationale de Natation, FINA), award of 8 May 2023

Panel: Mr Georgios Petrochilos KC (France), President; Mr Michael Hwang SC (Singapore); Mr Dolf Segaar (The Netherlands)

Aquatics
Governance
Admissibility of the appeal
Interpretation and consequence of WA's decision to appoint a stabilization committee to rule a member federation
Suspension of WA membership and consequence

1. **Under Article R47 of the CAS Code, the existence of a *"formal decision"* that can form the object of an appeal is a requirement of admissibility. The object of an appeal may only be a *"decision"*, which sets forth one or more measures. For precisely the same reason it is important that International Federation's decisions provide textual clarity to member federations. The objective of clarity is not well-served by setting out decisions in successive communications with partially overlapping terms, nor by using terminology which is prone to misunderstanding. That observation applies with more, not less, force in the context of decisions which are likely to be contentious.**

2. **Under Rule C 10.6 of the FINA Constitution, a FINA decision appointing a Stabilization Committee tasked with, among other functions, the management of a member federation's *"daily affairs"* and indicating that, in consequence, continuing to treat the relevant national federation's board members as authorized representatives would be impossible, should be understood as a single measure. The range of functions that such a committee may be tasked with is broad under the FINA Constitution, but the source of all these functions is the committee's appointment under Rule C 10.6 of the Constitution. The appointment of and the functions entrusted to the Stabilization Committee form a composite measure. As a consequence, such decision should not be read as imposing a sanction on the basis of Rule 12.2(d) of the 2021 FINA Constitution.**

3. **Suspension of membership of an entire national federation as provided by Article 8.3 of the 2022 WA Constitution entails that the federation concerned *"may not exercise any of its membership rights"* vis-à-vis WA until the suspension is lifted. This is a severe sanction, second in severity only to expulsion. The suspension as a WA's member logically covers, as a necessary consequence, the statutory organs and officers through which a member federation normally exercises such rights. WA's refusal to deal with the board member of a suspended member appears to be a consequence of the decision which imposed the sanction of suspension of WA membership. The CAS**

panel has accordingly no jurisdiction to pronounce on the validity or otherwise of this consequence.

1. This is an appeal by Philippine Swimming Inc. seeking to annul an adverse decision concerning its Board members which was issued by FINA (since renamed World Aquatics) in December 2022. It is brought before CAS pursuant to Article R47 of the Code of Sports-related Arbitration (the "CAS Code"), that is, as an *"appeal against the decision of a federation"*. It is contested whether the appealed decision is *"exclusively of a disciplinary nature"* within the meaning of Article R65.1 of the CAS Code.

I. PARTIES

2. Philippine Swimming Inc. ("PSI" or the "Appellant"), is a non-profit corporation organized under Philippine law, seated in Pasig City, Philippines. PSI is the Philippine national governing body for the sports of swimming, diving, water polo, synchronized swimming, and open-water swimming. It is a member of the Respondent, World Aquatics. As described at paragraph 22 below, PSI's membership in WA is at present suspended.

3. Pursuant to Article VI of its By-Laws, PSI is managed by a Board of Trustees (referred to as the "Board" in this Award, or "BOT" in a number of the documents in the record), headed by a "Chairman". According to Article XII, Section 7 of the By-Laws, the chief executive officer of PSI is the President, who is also a member of the Board and operates *"subject to [its] control"*. The same individual may hold both the chairmanship of the Board and the presidency of PSI; as in fact is the case at present.

4. World Aquatics ("WA" or the "Respondent"), was known until December 2022 as the Fédération Internationale de Natation ("FINA")[1] and is a Swiss-law association with a registered office in Lausanne. Article 1 of the WA Constitution (approved on 12 December 2022) describes the WA as *"the sole and exclusive world governing body for all Aquatics"*, namely swimming, open-water swimming, diving, high diving, water polo, artistic swimming, and *"Masters programme / activity"*.

5. The decision-making body of WA is the Bureau, which comprises 39 members and is headed by a President, all elected by the WA Congress. (The FINA Bureau comprised 26 members.) A smaller formation of at least eight Bureau Members, called the Executive, is entrusted with a number of responsibilities to be exercised when the Bureau is not in session, pursuant to Article 18 of the 2022 WA Constitution. Further, pursuant to Article 23(1)–(2) of the Constitution, *"the administrative work"* of WA is carried out by a body called the Office. The

[1] The name change was effected on 12 December 2022, when WA's Constitution was adopted. For the sake of fidelity to the record, which refers to *FINA* or *WA* depending on the date of the relevant document, both names are used in this Award when referring to contemporaneous documents.

Office operates under the direction of the Executive Director, an appointed (not elected) official.

II. FACTUAL BACKGROUND

6. The Panel expresses its gratitude to the Parties for their comprehensive, detailed pleadings. While the Panel has carefully considered these pleadings, ultimately the disposition of this case rests on a discrete and narrow point, namely whether this appeal can be decided on the merits or dismissed on grounds of mootness of its object. The Panel therefore focuses on the few texts and evidential materials that are necessary to decide this point.

A. FINA's December 2022 Decision

7. On 3 December 2022, FINA, through the FINA Executive Director Brent J Nowicki, addressed a letter to PSI's Board Chair and PSI President, Ms Maria Lailani M Velasco, which read as follows in relevant part (emphasis added):

> *"Following your meeting with Mr. Taja Al Kishry on 22 November, Mr. Al Kishry's findings were presented to and discussed within the FINA Bureau.*
>
> *The FINA Bureau discussed various complaints received by the FINA Office concerning matters of inter alia poor governance principles within your National Federation. For this reason, and as a matter of last resort, the FINA Bureau has confirmed the implementation of a Stabilization Committee, as set out in C 10.6 of the FINA Constitution […]*
>
> *Effective immediately, the Stabilization Committee shall run all day-to-day operations of Philippine Swimming Inc.[,] conduct the proper and necessary amendments of the Constitution and organize and conduct a new election. This means that any Philippine Swimming Inc. board members shall no longer be recognized as representatives (legal or otherwise) of Philippine Swimming Inc. […]".*

8. On 15 December 2022, FINA sent a further letter to PSI, in the following terms (emphasis added):

> *"Following the Bureau meeting of 12 December 2022, the FINA Bureau has confirmed the implementation of a stabilization committee, as set out in C 10.6 of the FINA Constitution […]*
>
> *The recognition of Philippine Swimming, Inc. is now deemed withdrawn and the stabilization committee will act as a reform and electoral committee in its place. The term of appointment for the stabilization committee will expire no later than 6 months after appointment by the Bureau and may be extended as necessary. The participation of athletes in FINA events and/or Olympic Games during the installation of the stabilization committee shall not be impacted.*
>
> *Effective immediately, the stabilization committee shall run all day-to-day operations of Philippine Swimming Inc.[,] conduct the proper and necessary amendments of the Constitution and organize and*

conduct a new election. This means that any Philippine Swimming Inc. board members shall no longer be recognized as representatives (legal or otherwise) of Philippine Swimming Inc".

9. PSI characterizes the communications of 3 and 15 December 2022 as constituting each a separate decision. This may perhaps be accurate in a formal sense, in that the 15 December 2022 communication states that it was issued following a Bureau meeting which took place on the 12th of December, after the communication of the 3rd of December. In substance, however, the 15 December communication conveys *"confirm[ation]"* of the Bureau's earlier decision to put in place a stabilization committee; and both communications contain an identically worded operative paragraph starting with the words *"effective immediately"*. Thus, it is convenient in this Award to refer to the communications of 3 and 15 December 2022 compendiously, as the "December 2022 Decision".

10. Further, it is common ground between the Parties that the December 2022 Decision comprised two elements, while the Parties disagree whether each of these is to be regarded as a measure in its own right:

    i. The *"appointment of a 'Stabilization Committee' to run PSI's affairs"*;

    ii. The *"withdrawal of recognition of the PSI's [Board members] as 'representatives' of PSI"*.

11. At the outset of the case, it was contended by PSI that the December 2022 Decision also comprised a further measure, namely the *"withdrawal of the recognition of PSI as a FINA Member"*. PSI's reading was justified, given that the 15 December 2022 communication by FINA states that *"[t]he recognition of Philippine Swimming, Inc. is now deemed withdrawn"*. Nevertheless, through the exchange of subsequent pleadings and in the light of subsequent events, it has been clarified and is now common ground that the December 2022 Decision did not result in withdrawal of PSI's membership in FINA.

12. Indeed, that was made plain in an Order issued by the Deputy President of the CAS Appeals Arbitration Division on 2 February 2023 (the "Deputy Division President"). This Order was issued upon an application by PSI for provisional measures, lodged on 20 December 2022. (As this Panel was yet to be fully constituted, the application was ruled upon by the Deputy Division President, pursuant to Article R37 of the CAS Code.) PSI's application was dismissed chiefly on the ground that while *"withdrawal of recognition of PSI as a World Aquatics member would undoubtedly have caused irreparable harm to [PSI]"*, no such withdrawal had in fact occurred. The Order records the following findings (at paragraphs 69–70):

    "[P]ursuant to the FINA Constitution, the appointment of a Stabilisation Committee does not entail the withdrawal of recognition of the member concerned. Indeed, pursuant to Article C 10.6 of the FINA Constitution, the mandate of the Stabilisation Committee may only include the management of the daily affairs of the member, the establishment of a debt repayment plan, the review and amendments of the member's statutes and the organisation and conduct of elections. By contrast, the 'withdrawal of recognition' is listed amongst the sanctions which can be taken against a member federation pursuant to Article C 12.2 (d) of the FINA Constitution 'if duties and obligations to FINA are not fulfilled',

'in case of violation of the FINA Rules and/or decisions of the Congress and/or decisions of the Bureau and Executive, or […] for bringing the Aquatics sport and/or FINA into disrepute'.

The Deputy Division President welcomes the clarifications provided in [respect of the measures imposed by the FINA Bureau in the December 2022 Decision] by the Respondent in its Rejoinder and in its Second Rejoinder. Nevertheless, the Deputy Division President considers that the wording used in the 15 December Letter was unfortunate, to say the least. Such wording indeed gave the impression – both to PSI and to anyone outside PSI – that the recognition of PSI as a member federation of the Respondent had been withdrawn, thus leaving the Philippines without a member federation […] Ultimately, the fact that the Respondent clarified in the present procedure that PSI 'is and remains WA's recognized National Federation of the Philippines' and – most importantly – its letter to the Stabilisation Committee[2] clarifying that the latter did not have 'the right for any further measures, for example, to set-up and/or seek recognition of a new Aquatics' federation in the Philippines' lead the Deputy Division President to consider that there was no withdrawal of the recognition of PSI as a member federation of World Aquatics. […]".

13. The Panel respectfully concurs with the Deputy Division President's remark that *"the wording used in the 15 December Letter was unfortunate, to say the least"*. It is undesirable for the content of such decisions to engender unnecessary and avoidable litigation.

14. For present purposes little needs to be said as to the background to the December 2022 Decision, and only by way of context. FINA's communication of 3 December 2022 refers to *"findings"* by Mr Al Kishry. He was a member of the FINA Bureau (and now a member of the WA Bureau) and around November 2022 he was tasked with the mission of investigating complaints said to have been received by FINA *"from some members, athletes and officials against PSI"*. These complaints have not been placed in the record of the present proceedings.

15. It appears that the reasons which motivated the December 2022 Decision were communicated to PSI by WA only some two months later, in a letter of 9 February 2023. They were said to be grounded in complaints related to:

"Unethical and discriminatory actions by [Ms Velasco] and the PSI Board against athletes and coaches;

Non-compliance with the PSI By-Laws during the election procedure in April 2022 (e.g., issues in relation to the convocation of the Congress, etc.);

Integrity issues related to membership applications;

Lack of transparency and good governance by the PSI President and the Board, as well as non-compliance with the World Aquatics Constitution".

16. PSI strongly denies the veracity and accuracy of these statements. PSI also asserts that it has never received evidence of the alleged complaints or Mr Al Kishry's report of findings, nor

[2] Quoted at paragraph 18 below.

has it been given an opportunity to respond to them. Indeed, PSI issued an official statement to that effect on 5 December 2022.

17. The December 2022 Decision is the sole object of the present appeal proceedings. As explained at paragraphs 59–61 below, in accordance with Article R47 of the CAS Code, no other FINA/WA decision may be the object of the present appeal.

B. WA's February 2023 Decision

18. As it happened, matters evolved in the course of January–February 2023. On 13 January 2023, WA wrote to the Stabilization Committee in the following terms:

> *"[W]e understand that the Stabilization Committee:*
>
> ▪ *manages the daily affairs of the Philippine Swimming Inc.;*
>
> ▪ *reviews and amends the Philippine Swimming Inc. statutes and ensures their compliance with the FINA Constitution before duly submitting them for approval to the Member's Congress; and*
>
> ▪ *organizes and conducts elections.*
>
> *The mandate of the Stabilization Committee is […] to properly reform the current and existing Philippine Swimming Inc. However, and simply for the avoidance of doubt[], it does not entail the right for any further measures, for example, to set-up and/or seek recognition of a new Aquatics' federation in the Philippines".*

19. The Stabilization Committee replied on 23 January 2023 to acknowledge this communication as setting forth the "*directives*" comprised within its *"mandate"*.

20. Thereafter, the disagreement between the Parties evolved, and in some ways escalated. PSI accused WA of withdrawing its status as a member and of seeking to set up (through the Stabilization Committee) a competing national federation, United Philippines Aquatic Inc. – an entity which appears indeed to have been established. It also appears that PSI, citing the pendency of this appeal, stated an intention to *"continue to function in accordance with [its] mandate as officers of PSI under the Revised Corporation Code and PSI's By-Laws"*.

21. For its part, WA took issue with what it saw as PSI's failure to lend support to the Stabilization Committee and with the stated intention of PSI's Board to continue to exercise its functions. On 9 February 2023, WA stated that it was *"considering imposing a sanction […] [on] PSI, which may consist, in particular, of a suspension of PSI"*.

22. On 21 February 2023, WA announced (through a communication to CAS) that it had taken the decision to terminate the mandate of the Stabilization Committee. The following day, WA communicated to PSI its decision in fuller terms (emphasis added):

"[T]he World Aquatics Bureau met yesterday, 21 February 2023, and took into due consideration all the arguments submitted by PSI. Unanimously, the World Aquatics Bureau held the following:

While the World Aquatics Bureau noted that PSI denied all allegations, it considers the allegations against PSI to be proven and very serious. World Aquatics has tried to resolve the many issues with PSI, but PSI and in particular, certain members of its Executive (the President and Members of the Board of Trustees) have ever since vigorously resisted to any assistance and help for the necessary reforms, showing no interest and no willingness to act in accordance with World Aquatics Constitution nor with the principles enshrined in such Constitution. […]

In view of the above, the World Aquatics Bureau considers it to be established that PSI has violated the following provisions of the World Aquatics Constitution: Art. 7 (Obligations of Members), namely 7 a), 7 b), 7 c), 7 e), 7 f), 7 i) and 7 l). With this, PSI has violated its obligations towards World Aquatics, has violated the World Aquatics Constitution, and has proven to be unwilling and unable to preserve its independence […]

Accordingly, based on Art. 8.3 lit. a), b), d), e) and f) as well as Art. 8.4 of the World Aquatics Constitution, the World Aquatics Bureau decided yesterday unanimously to suspend PSI and to appoint, in accordance with Art. 8.7 lit. b) of the World Aquatics Constitution, an Electoral Committee with the mandate to take all steps necessary to conduct and hold new elections. […]

As to the suspension, according to Art. 8.6 of the World Aquatics Constitution, a suspended Member may not exercise any of its membership rights during the period of suspension, including without limitation the right to attend and participate in a Congress of World Aquatics. […]".

23. WA's decision, as communicated on 22 February 2023 (the "February 2023 Decision"), was appealed by PSI on 13 March 2023. Separate CAS proceedings (CAS 2022/A/9489) have been instituted to determine that appeal. Once again, the February 2023 Decision is not the object of the present proceedings.

III. THE PRESENT PROCEEDINGS

24. On 20 December 2022, PSI instituted the present proceedings by lodging a Statement of Appeal with CAS. This was directed at the *"revers[al]"* of the December 2022 Decision and was accompanied by a witness statement by PSI's Board Chair and President, Ms Velasco. PSI nominated Ms Andrea Carska-Sheppard as arbitrator. There is no dispute that the appeal was lodged in a timely manner.

25. Also on 20 December 2022, PSI filed an urgent application for an order staying enforcement of the December 2022 Decision and the measures set out therein. The substance and procedural history of that application are described in the Order of 2 February 2023 by which (as this Panel was yet to be fully constituted) the Deputy Division President dismissed the application, as described at paragraph 12 above.

26. On 23 December 2022, the CAS Court Office wrote to PSI that *"pursuant to Article A8 of the Arbitration Rules applicable to the CAS Anti-Doping Division [or ADD], '[a]rbitrators appearing on the*

special list of arbitrators for CAS ADD may not serve as an arbitrator in any procedure conducted by the CAS Appeals Arbitration Division'". Since Ms Carska-Sheppard is on the special ADD list, PSI was given five days to nominate another arbitrator.

27. On 29 December 2022, PSI informed the CAS Court Office that its Statement of Appeal, together with additional annexes and exhibits submitted on that date, should be considered as its Appeal Brief, pursuant to Article R51 of the CAS Code. Also, PSI nominated Dr Michael Hwang SC as arbitrator.

28. On the same day, the CAS Court Office invited WA to nominate an arbitrator by 9 January 2023, pursuant to Article R53 of the CAS Code. Under that provision, *"[i]n the absence of a nomination within such time limit, the President of the [CAS Appeals Arbitration] Division shall make the appointment"*.

29. On 10 January 2023, the CAS Court Office noted that the Respondent had not nominated an arbitrator within the prescribed deadline and informed the Parties that the Division President, or her Deputy, would proceed with the appointment in lieu of the Respondent.

30. On 13 January 2023, the CAS Court Office fixed the first advance of costs in the proceedings, pursuant to Article R64.2 of the CAS Code.

31. Between 12 and 20 January 2023, the Parties explored the possibility of extending by consent the time-limit for WA's nomination of an arbitrator. In the end, no such consent was achieved. Accordingly, on 23 January 2023, the CAS Court Office informed the Parties that *"the President of the CAS Appeals Arbitration Division, or her Deputy, will appoint an arbitrator in lieu of the Respondent"*. On 24 January 2023, Mr Dolf Segaar was nominated as arbitrator by the Deputy Division President.

32. On 25 January 2023, the CAS Court Office invited the Appellant to pay the entire advance of costs, as the Respondent had indicated that it would not pay its share of the advance. PSI duly defrayed this amount.

33. On 31 January 2023, the CAS Court Office invited WA to submit its answer to the appeal and any objections to CAS jurisdiction by 20 February 2023.

34. On 6 February 2023, the constitution of the Panel was completed by the appointment of Dr Georgios Petrochilos KC by the President of the Appeals Arbitration Division. This was notified to the Parties by the CAS Court Office by letter of the same date.

35. On 8 February 2023, PSI filed a new request for provisional measures, titled "Second Urgent Application to Stay the Execution of the Appealed Decisions" on the basis of "new elements", together with an expert legal opinion by Mr Benito A Cataran, dated 6 February 2023 (the "Second Application"). The Parties' submissions and the procedural history relating to the Second Application are addressed in a separate Order issued by the Panel on the same date as this Award.

36. On 15 February 2023, PSI filed an unsolicited "Urgent Motion for Leave to Admit Submission" concerning the Articles of Association of United Philippines Aquatic Inc., which had been registered with the Philippine Securities and Exchange Commission.

37. On 16 February 2023, the CAS Court Office conveyed to the Parties the Panel's directions that *"no sanctions decision shall take effect pending the Panel's determination of the Appellant's [Second Application]"*.

38. On 17 February 2023, WA wrote to the CAS Court Office to note that it was entitled to conduct separate proceedings and take new decisions on matters outside the scope of the December 2022 Decision.

39. On 21 February 2023, PSI filed an unsolicited "Urgent Manifestation (Re: Respondent's soon-to-be issued 'Sanctions Decision' against PSI)", stating that WA intended to issue a "sanctions decision" against PSI.

40. The same day, WA addressed to CAS the communication referred to at paragraph 22 above, regarding the decision of the WA Bureau to terminate the mandate of the Stabilization Committee appointed in December 2022. On this basis, WA requested CAS to close the present proceedings, without any costs imposed on the Respondent.

41. On 23 February 2023, PSI filed a further "Urgent Manifestation (Re: Respondent's Sanctions Decision against PSI dated 22 February 2023)", informing CAS of WA's communication of 22 February 2023, together with a motion to be granted a period of time to submit (i) an opposition to WA's request to terminate the proceedings and (ii) a reply to WA's 20 February 2023 Answer to PSI's Second Application.

42. On 7 March 2023, PSI filed an "Opposition to Respondent's Request to 'Close' the Proceedings and 'Remove' it from the CAS Roll".

43. On 9 March 2023, PSI filed a further "Urgent Manifestation (Re: Respondent's Continued Violation of the 16 February 2023 Letter of the CAS)", asking the Panel to direct WA not to give effect to the February 2023 Decision.

44. On 13 March 2023, PSI requested that the present appeal be consolidated with its appeal (noted at paragraph 23 above) against WA's February 2023 Decision.

45. On 14 March 2023, WA filed its Rejoinder to PSI's Second Application, whereby WA requests this Panel *"to close the present proceedings and to remove the case from the CAS Roll"*.

46. On 15 March 2023, the CAS Court Office informed the Parties that it was not possible to consolidate the present appeal with PSI's appeal against the February 2023 Decision (CAS 2022/A/9489) given that the two appeals are directed against different decisions. The Panel has not had sight of pleadings and submissions in case CAS 2022/A/9489.

47. On 16 March 2023, WA reiterated its request to terminate the present proceedings and the other requests for relief set out in its Rejoinder to PSI's Second Application, including that PSI be ordered to pay all costs of the present proceedings.

48. On 20 March 2023, the Panel clarified that, in light of the separate CAS proceedings on foot relating to the February 2023 Decision (CAS 2022/A/9489), *"the present Panel's directions dated 16 February 2023, to the effect that 'no sanctions decision shall take effect pending the Panel's determination of the Appellant's [Second Application], are to be read as excluding World Aquatics' decision of 22 February 2023"*.

49. On 21 March 2023, the Panel directed PSI to comment on WA's request for PSI to be ordered to pay all costs.

50. On 24 March 2023, PSI submitted a "Comment on Respondent's Letter dated 16 March 2023", reiterating its opposition to WA's request to close the present proceedings and responding to WA's request that PSI be ordered to pay all costs of the proceedings.

51. On 20 April 2023, PSI filed an unsolicited "Motion to Resolve" requesting, in the event the Panel considers the appeal not to be moot, that the Respondent be directed to file its Answer; and, if the appeal is considered to be moot, reiterating its claim for costs.

IV. SUMMARY OF PARTIES' ARGUMENTS AND REQUESTS FOR RELIEF

52. The Parties' respective positions, so far as relevant to the substantive appeal, may be described briefly.

53. WA seeks a decision closing the proceedings. It argues that the jurisdiction of this Panel is confined to the December 2022 Decision, which (WA claims) has been entirely superseded by the February 2023 Decision. This applies not only to the appointment of the Stabilization Committee (whose mandate, it is common ground, has been terminated) but also to the withdrawal of recognition of the members of PSI's Board as representatives of PSI. Non-recognition of the Board members, WA says, was *"not an additional measure, but a consequence of the implementation of a stabilization committee"*. The termination of the Stabilization Committee's mandate is said to have swept away that consequence as well. It follows, argues WA, that the present appeal no longer has any object, such that the proceedings must be *"closed"*.

54. Accordingly, WA seeks the following relief (set out in its Rejoinder to the Second Application):

> *"(1) to close the present proceedings and to remove the case from the CAS Roll;*
>
> *(2) in any event, to reject Appellant's unsolicited submissions as being inadmissible"*.

55. For its part, PSI rejects the notion that this appeal is moot. PSI's position is helpfully summarized in a "Comment" submission of 24 March 2023. It states in relevant part (omitting citations):

"5.1 Respondent's Appealed Decisions [ie, the December 2022 Decision] have produced, and continue to produce, effects and consequences prejudicial to PSI.

5.1.1. It is false for Respondent to assert that the Appealed Decisions supposedly did only one thing – create a 'Stabilization Committee'. This claim is totally belied by the words Respondent itself used in its Appealed Decisions which clearly show that, apart from creating the 'Stabilization Committee,' Respondent also withdrew recognition of PSI's Board of Trustees ('BOT') as 'representatives (legal or otherwise)' of PSI.

5.1.2. Respondent's 3 December 2022 letter 2 (the '3 December 2022 Decision') states that 'any (PSI) board members shall no longer be recognized as representatives (legal or otherwise) of (PSI)'.

5.1.3. Similarly, Respondent's 15 December 2022 letter 3 (the '15 December 2022 Decision') states that 'any (PSI) board members shall no longer be recognized as representatives (legal or otherwise) of (PSI)'.

5.2. When Respondent's Bureau 'terminated' the 'mandate' of the Stabilization Committee on 21 February 2023, Respondent did not restore the recognition of PSI's BOT as 'representatives (legal or otherwise) of (PSI)'. There was no indication in Respondent's 21 February 2023 letter to the CAS that, together with the termination of the mandate of the 'Stabilization Committee,' Respondent's Bureau had also decided to again 'recognize' PSI's BOT as PSI's 'representatives'.

5.3. To this day, Respondent has not categorically stated that, with the termination of the 'Stabilization Committee,' it now recognizes PSI's BOT as 'representatives' of PSI.

5.4. On the contrary, by creating an 'Electoral Committee' for PSI through its 22 February 2023 Sanctions Decision, Respondent confirmed that it continues not to recognize PSI's BOT as 'representatives' of PSI. The creation of an 'Electoral Committee' with a mandate to 'conduct' new elections for PSI, presupposes that PSI's BOT is vacant and that Respondent does not recognize PSI's existing BOT".

56. PSI requests that the Panel:

"DENY Respondent's request to 'close' the proceedings and 'remove' the case from the CAS Roll";

"[…] GRANT this APPEAL;

REVERSE the Appealed Decisions issued by the FINA Bureau, as reflected in the 3 and 15 December 2022 letters […]; and

DIRECT Respondent FINA to follow due process and to afford PSI its right to be heard in any future disciplinary case or investigation, consistent with the FINA Constitution and basic principles of justice and fairplay".

V. THE BASIS FOR THE PANEL'S JURISDICTION AND ITS SCOPE

57. This appeal was brought pursuant to Article R47, paragraph 1 of the CAS Code, which reads as follows (with emphasis added):

> *"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".*

58. PSI and WA have not *"concluded a specific arbitration agreement"* in terms of Article R47 of the CAS Code.

59. As to WA/FINA's *"statutes or regulations"*, the applicable text is the 2021 FINA Constitution (as approved by the FINA Congress on 18 December 2021), pursuant to which FINA purported to take the December 2022 Decision, the object of this appeal. Rule C 12.13.3 of the 2021 FINA Constitution provides (with emphasis added):

> *"An appeal against a decision by the Bureau (including a decision on appeal pursuant to FINA Rule C 12.11.1), may only be filed to the CAS. The CAS shall also have exclusive jurisdiction over interlocutory orders and no other court or tribunal shall have authority to issue interlocutory orders".*

60. The existence of the Panel's jurisdiction under Article R47 of the CAS Code and Rule C 12.13.3 of the 2021 FINA Constitution is uncontested. It is also uncontested that an Article R47 appeal may only concern a specific *"decision"* of the WA/FINA Bureau. It is, moreover, also uncontested that for an appeal to lie, the relevant decision must remain in force, such that CAS may annul it or replace it by a new one pursuant to Article R57 of the CAS Code. Article R47 does not contemplate an appeal against a decision that is no longer in force, because in that case CAS would have nothing to overturn or substitute. CAS has no power to resuscitate a decision that has expired or been revoked so it can exercise appeal jurisdiction. The power to issue decisions vests only in *"a federation, association or sports-related body"*, as Article R47 provides.

61. By the same token, Article R47 requires there to be an extant decision. One cannot appeal a prospective or hypothetical decision. This is relevant to PSI's request for an order that WA *"follow due process and […] afford PSI its right to be heard in any future disciplinary case or investigation"*. Given that this request is not anchored to a specific, extant FINA/WA decision, the Panel may not pronounce on abstract guidance for potential future decisions.

62. Further, it is common ground that another CAS panel has exclusive jurisdiction to determine the appeal that PSI has lodged against the February 2023 Decision, in the CAS 2022/A/9489 proceedings which are on foot. The decision which the present proceedings concern – and may exclusively concern – is the December 2022 Decision.

63. It appears also to be common ground, and rightly so, that if a decision comports several measures, an appeal may lie against each or some of these discrete measures. This is important

in the present case, because (as already noted) the Parties disagree on whether or not the withdrawal of recognition of PSI's Board members was an independent measure that could have subsisted after the February 2023 Decision and, if so, whether it did so subsist. The Panel turns now to address that question.

VI. THE ADMISSIBILITY OF THE APPEAL

64. As already noted, an Article R47 appeal must have a live object, ie a decision which, being in force, can be annulled. The existence of a *"formal decision"* that can form the object of an appeal has been described in authoritative commentary as a requirement of admissibility (MAVROMATI/REEB, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (2015) 382). The Panel respectfully agrees with this characterization and considers that it covers also the related requirement that such a decision must remain in force. This requirement goes not to the question which body has the power to adjudicate, ie the question of jurisdiction, but to the exercise of jurisdiction.

65. As already noted, the Panel's jurisdiction in respect of the December 2022 Decision is per se uncontested. The only question is whether there is any live decision over which the Panel may exercise the jurisdiction which it incontestably has. This question may be stated as whether or not the appeal is admissible following the adoption of the February 2023 Decision.

66. That question requires the Panel to consider the tenor and effect of both the December 2022 Decision and the February 2023 Decision. As to the latter decision, the Panel is mindful of course that it comes within the exclusive jurisdiction of another panel. The present Panel is neither authorized nor required to take a view on the validity or otherwise of the February 2023 Decision. The Panel is simply required, for purposes of its own jurisdiction, to form a view on whether the February 2023 Decision had the effect of maintaining, rather than terminating, WA's withdrawal of recognition of the members of PSI's Board as PSI's representatives.

67. It is also helpful at the outset to frame the question for the Panel in its proper context. PSI asserts that:

> *"When Respondent's Bureau 'terminated' the 'mandate' of the Stabilization Committee on 21 February 2023, Respondent did not restore the recognition of PSI's BOT as 'representatives (legal or otherwise) of (PSI)'. There was no indication in Respondent's 21 February 2023 letter to the CAS that […] Respondent's Bureau had also decided to again 'recognize' PSI's BOT […] Respondent's 22 February 2023 Sanctions Decision through which, among other things, Respondent appointed a so-called 'Electoral Committee' for PSI, proves that even after the termination of the mandate of the 'Stabilization Committee' on 21 February 2023, Respondent continued to refuse to 'recognize' PSI's BOT […]".*

68. In simple terms, PSI asserts that, even after the termination of the mandate of the Stabilization Committee on 21–22 February 2023, WA refuses to deal with PSI's Board members. The factual accuracy of PSI's position is not contested by WA. Rather, the contested issue is

whether WA's ongoing refusal is founded only in the December 2022 Decision (as PSI contends) or in the December 2022 Decision up to 21–22 February 2023, and thereafter in the February 2023 Decision (as WA appears to contend).

69. That issue does not turn on the legal validity of either one of these decisions. It turns on a proper understanding of what *measures* each of the December 2022 and February 2023 Decisions set forth, and what *consequences* or *effects* these measures entailed. To be clear, it is not contested, nor could it be, that PSI has a right to appeal the decision which is the source of WA's refusal to recognize a role for PSI's Board members. But PSI must be able to know which decision that is. It is important for PSI to know this so it can have certainty as to the target of its right to appeal under the CAS Code and the FINA/WA Constitution: the object of an appeal may only be a *"decision"*, which sets forth one or more measures. And for precisely the same reason it is important that FINA/WA decisions provide textual clarity to PSI and other member federations. The objective of clarity, the Panel observes, is not well-served by setting out decisions in successive communications with partially overlapping terms, nor by using terminology which is prone to misunderstanding. That observation applies with more, not less, force in the context of decisions which are likely to be contentious.

A. Was Non-Recognition of PSI's Board Members a Measure in its own right or the Consequence of a Measure?

70. With these observations in mind, the Panel now turns to the December 2022 Decision. The 3 December 2022 communication by FINA states that:

> *"[A]s a matter of last resort, the FINA Bureau has confirmed the implementation of a Stabilization Committee […]".*

71. It is not clear to the Panel why FINA used the term *"confirmed"* rather than, say, *"decided"*. Perhaps this was because an intention to appoint a stabilization committee had already been imparted by the FINA Bureau's Mr Al Kishry in discussions with PSI's Ms Velasco in November 2022. Be that as it may, the 3 December 2022 communication clearly states the *"implementation of a Stabilization Committee"* as a measure being adopted by FINA. In order to determine whether this was the sole measure adopted (as WA says) or just the primary measure among several measures (as PSI says) one must consider the remainder of the text.

72. For this, one turns to an identically worded paragraph which is found in both the 3 December and the 15 December 2022 FINA communications. This paragraph states:

> *"Effective immediately, the stabilization committee shall run all day-to-day operations of Philippine Swimming Inc.[,] conduct the proper and necessary amendments of the Constitution and organize and conduct a new election. This means that any Philippine Swimming Inc. board members shall no longer be recognized as representatives (legal or otherwise) of Philippine Swimming Inc".*

73. Properly to understand this paragraph, one must bear in mind Rule C 10.6 of the 2021 FINA Constitution, which is quoted extensively in both the 3 December and the 15 December 2022 FINA communications. This Article is in two parts. Its chapeau paragraph establishes the

FINA Bureau's power to appoint a stabilization committee in respect of a FINA Member federation, such as PSI, and the circumstances in which that power may be exercised. It reads as follows in material part:

> *"The Bureau may under exceptional circumstances appoint a stabilization committee to the extent the executive body of a Member fails to adhere to practices of good governance, transparency, financial accountability and stability, participation in FINA events, or puts at risk the organisation and development of Aquatics in their country".*

74. The last sentence of the chapeau paragraph announces what functions may be comprised within the *"mandate"* of a stabilization committee, followed by a range of possible functions set out in separately numbered sub-paragraphs. The text reads as follows:

> *"The mandate of the stabilization committee may include the following:*
>
> *C 10.6.1 manage the daily affairs of the Member;*
>
> *C 10.6.2 establish a debt repayment plan (where necessary);*
>
> *C 10.6.3 review and amend the Member's statutes (and other regulations where necessary) and to ensure their compliance with the FINA Constitution before duly submitting them for approval to the Member's Congress; or*
>
> *C 10.6.4 organise and to conduct elections. […]".*

75. As already described, it was clarified in correspondence on 13 and 23 January 2023 that the mandate of the Stabilization Committee appointed by virtue of the December 2022 Decision comprised the management of PSI's *"daily affairs"* (per Rule C 10.6.1), the review and amendment of PSI's statutes (per Rule C 10.6.3), and the organization and conduct of elections for PSI's elected organs (per Rule C 10.6.4). There was no mention of a debt-repayment plan (per Rule C 10.6.2 – not quoted in FINA's communications), and it was indeed helpfully spelt out in the same communications that the Stabilization Committee's mandate *"d[id] not entail the right [to take] any further measures"*.

76. It is therefore clear that the appointment of the Stabilization Committee by the December 2022 Decision was a single measure. The range of functions that such a committee may be tasked with is broad under the FINA Constitution, but the source of all these functions is the committee's appointment under Rule C 10.6 of the Constitution. The appointment of and the functions entrusted to the Stabilization Committee formed a composite measure.

77. The December 2022 Decision, after describing the mandate of the Stabilization Committee, goes on to state: *"This [ie, the appointment of the Stabilization Committee with the functions there described] means that any [PSI] board members shall no longer be recognized as representatives (legal or otherwise) of [PSI]"*. The text uses natural language and is clear in its import: *"this means"* is to say *"this entails"*. FINA was conveying a practical consequence entailed by the appointment of the Stabilization Committee. It is therefore plain that, in FINA's conception, the non-

recognition of PSI's Board members was a consequence flowing from the fact that the core functions of PSI, including day-to-day affairs, were entrusted to the Stabilization Committee.

78. FINA's conception is straightforward to understand as a matter of fact. (For present purposes it is irrelevant whether it was valid, justified, or not, as a matter of law.) Given that PSI's *"daily affairs"* were to be managed, not by PSI's statutory body, the Board, or PSI's President but by the Stabilization Committee, the inexorable consequence was that, for as long as the Stabilization Committee was in place, FINA could not recognize PSI's Board or individual officers as exercising (or *"representing"*) PSI's authority.

79. In short, FINA's statement is to be understood – and in the Panel's view could only have been reasonably understood – to say that while the Stabilization Committee was in place, FINA would not treat PSI's Board members as exercising PSI's authority. This is therefore a consequence of the appointment of the Stabilization Committee with the mandate of, among other things, managing PSI's *"daily affairs"*.

80. The Panel recognizes that Rule C 12.2(d) of the 2021 FINA Constitution refers to *"withdrawal of recognition"* as one of the permissible forms of *"sanctions"*. Under Rule C 12.1, such a sanction may be imposed on (*inter alios*) Member federations and on a "*member of a Member, or [an] individual member of a Member*". It therefore appears possible for FINA to withdraw its recognition of officers of the governing body of a Member federation, as a sanction. Nevertheless, what FINA could theoretically have done is of no moment in the present case, which concerns only what FINA in fact did. The fact is that FINA's December 2022 Decision does not purport to rely on Rules C 12.1–2. Again, whether that choice of legal foundation was or was not legally valid or justified is immaterial for present purposes. What matters is that, in fact, FINA did not purport to issue a stand-alone sanction. It chose, instead, to appoint a Stabilization Committee, tasked with, among other functions, the management of PSI's *"daily affairs"* and to indicate that, in consequence, continuing to treat PSI's Board members as authorized PSI representatives would be impossible. The Panel recognizes that the *"shall no longer be recognized"* language in FINA's communication might have been read as imposing a sanction, but it is also bound to note that FINA did not refer to Rule C 12.2(d) or to a *"sanction"*, while it did refer expressly to Rule C 10.6 and specific provisions therein.

B. Did Non-Recognition of PSI's Board Members Subsist After the February 2023 Decision?

81. The Panel now turns to consider the tenor of the February 2023 Decision in order to determine whether the *"non-recognition"* element of the December 2022 Decision was preserved or remained unaffected by the February 2023 Decision.

82. One notes, in the first place, that the February 2023 Decision does not address the status of the prior, December 2022 Decision or the measure set out therein. The Panel is compelled to say that this does not serve clarity and was apt to lead to unnecessary doubt and disputation. In the course of these proceedings, WA has represented that the February 2023 Decision had the effect of terminating the mandate of the Stabilization Committee. PSI has accepted this representation, and this is now common ground.

83. In the second place, the Panel disagrees with PSI's suggestion that it was necessary for WA to *"restore"* the recognition of PSI's Board members, if that was indeed its intention in the February 2023 Decision. As already described, FINA/WA's conception was that non-recognition was a consequence of the appointment of the Stabilization Committee; and following that conception, termination of the committee's mandate would necessarily remove that consequence. No affirmative "restoration" was therefore necessary.

84. In the third place, PSI fairly points out that WA *"has not categorically stated that, with the termination of the 'Stabilization Committee,' it now recognizes PSI's BOT as 'representatives' of PSI"*. In fact, WA has not felt it necessary to take a clear stance either way, which again in the interests of clarity is to be regretted.

85. Nevertheless, there is sufficient clarity for purposes of the present Award:

i. A principal measure of the February 2023 Decision is *"to suspend PSI"*, expressly relying for that purpose on Article 8.3 of the 2022 WA Constitution, which grants to WA's Bureau *"the power to suspend […] a Member"*.

ii. Suspension of membership of an entire national federation entails that the federation concerned *"may not exercise any of its membership rights"*. That is the effect of Article 8.6 of the 2022 WA Constitution, a provision which is quoted in the February 2023 Decision. In turn, this entails that until the suspension is lifted, PSI will not be treated as a Member which may exercise rights vis-à-vis WA, notably under Article 6 of the Constitution. This is a severe sanction, second in severity only to expulsion. One expects its consequences to be far-reaching; and PSI did indeed anticipate such consequences in its 14 February 2023 Supplement pleading.

iii. The suspension of PSI's rights as a WA Member logically covers, as a necessary consequence, the statutory organs and officers through which PSI normally exercises such rights. That would explain why WA refuses to deal with PSI's Board and officers. Such a consequence is also consistent with the last paragraph of the February 2023 Decision, which notes the WA Bureau's instruction to the WA Office *"to ensure that Filipino athletes may continue to take part in World Aquatics competitions and events"*: these are normally functions which PSI officials exercise, now assigned *"[d]uring this transitory phase"* to WA organs.

86. The Panel therefore concludes that WA's refusal to deal with PSI's Board members appears to be a consequence of the February 2023 Decision, which imposed the sanction of suspension of WA membership on PSI. The Panel has accordingly no jurisdiction to pronounce on the validity or otherwise of this consequence.

87. Finally, the Panel has noted PSI's argument that:

> *"The creation of an 'Electoral Committee' with a mandate to 'conduct' new elections for PSI [by virtue of the February 2023 Decision], presupposes that PSI's BOT is vacant and that Respondent does not recognize PSI's existing BOT [whose term expires in 2026]"*.

88. The Panel is unable to draw such a conclusion. An electoral committee may be established even if a federation's membership is not suspended, as a *"specific measure"* under Article 8.7(b) of the 2022 WA Constitution, which can be imposed *"[i]n place of […] any suspension of a Member"* pursuant to Article 8.7 of the Constitution. The establishment of an electoral committee may also be part of a stabilization committee's mandate, even if the stabilization committee is not to take over management of *"daily affairs"* (under Article 8.10(d) of the Constitution) and therefore the organs of the Member federation remain in place and continue to exercise their functions.

89. Perhaps more importantly, the creation of an electoral committee by virtue of the February 2023 Decision is consistent with the suspension of PSI's membership. As already stated, WA appears to regard the status of PSI's organs and officers as suspended and therefore capable of being replaced by newly elected organs and officers.

90. Again, it is not for this Panel to pronounce on whether WA's measures in the February 2023 Decision, and the consequences WA thereby intended, are legally valid or justified. These are matters for another panel. It is sufficient for this Panel to conclude, as it does, that the refusal of WA to deal with PSI's Board as a representative of PSI may only be regarded as a measure adopted by the February 2023 Decision, or a consequence of such a measure, as to which PSI has lodged an appeal, where these issues may be ventilated and adjudicated.

91. The Panel therefore concludes that after the issuance of the February 2023 Decision, no measure set out in the December 2022 Decision survived. In consequence, this appeal no longer has an object and is inadmissible.

92. While the Panel therefore agrees in substance with WA that the present appeal cannot proceed, it is unable to agree that it may "close" or terminate the proceedings. This is a power that Article R37, paragraph 4 of the CAS Code reserves to the Division President, in the specific context of his/her determining a provisional measures application, before a fully constituted panel is seized of an appeal. An arbitral Panel may "terminate" the procedure in case of lack of jurisdiction. However, in most situations, like in the present one, the proceedings are terminated by way of a final Award pursuant to Article R59 of the CAS Code (see eg D Mavromati & M Reeb, The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials (2015) 205).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Philippine Swimming Inc. on 20 December 2022 against World Aquatics with respect to the decisions issued by FINA on 3 and 15 December 2022 is rejected as inadmissible.

2. (…).

3. (…).

4. All other or contrary motions or prayers for relief are dismissed.