CAS 2011/A/2435 **World Anti-Doping Agency (WADA) v. Gert Thys, Athletics South Africa (ASA) & South African Institute for Drug-Free Sport (SAIDS)**

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Luigi **Fumagalli**, Professor and Attorney-at-Law, Milan, Italy

Arbitrators: Mr Ulrich **Haas**, Professor, Zurich, Switzerland
Mr Hans **Nater**, Attorney-at-law, Zurich, Switzerland

between

World Anti-Doping Agency (WADA)
Represented by Mr Yvan Henzer, Attorney-at-Law, Lausanne, Switzerland

as Appellant

and

Gert Thys
Represented by Mr Howard Jacobs, Attorney-at-law in Westlake Village, USA

as First Respondent

Athletics South Africa

as Second Respondent

South African Institute for Drug-Free Sport
Represented by Mr Tony Irish, Attorney-at-law in Cape Town, South Africa

as Third Respondent

1. BACKGROUND

1.1 The Parties

1. The World Anti-Doping Agency (hereinafter referred to as "WADA" or the "Appellant") is a Swiss private-law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms.

2. Mr Gert Thys (hereinafter referred to as "Mr Thys" or the "First Respondent") is a South African national, born on 12 November 1971, who competes as a long-distance runner.

3. Athletics South Africa (hereinafter referred to as "ASA" or the "Second Respondent") is the organisation administering and controlling athletics in South Africa and is an affiliated national member of the International Association of Athletics Federations (hereinafter referred to as "IAAF").

4. The South African Institute for Drug-Free Sport (hereinafter also referred to as "SAIDS" or the "Third Respondent") is a corporate body established under the South African Institute for Drug-Free Sport Act, 1997 (hereinafter referred to as the "Act of 1997"), with the objective, *inter alia*, to promote participation in sport, free from the use of prohibited substances or methods intended to artificially enhance performance.

1.2 The Dispute between the Parties

5. The circumstances stated below are a summary of the main relevant facts, as submitted by the parties in their written pleadings or in the evidence offered in the course of the proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion which follows.

6. On 12 March 2006, Mr Thys was subjected to in-competition drug testing at the Seoul Marathon. Mr Thys' sample was separated into an "A" and a "B" sample and sent to the Doping Control Centre of the Korea Institute of Science and Technology, Seoul, Korea (hereinafter referred to as the "DCC").

7. On 16 March 2006, the "A" sample was tested by Mr Young Dae Cho and the presence of the prohibited substance 19-norandrosterone was detected.

8. On 13 April 2006, the IAAF notified ASA of the results of the "A" sample analysis and directed ASA to deal with the matter "*in accordance with the results management procedure set out in IAAF Rule 37*".

9. On 17 April 2006, ASA notified Mr Thys of the positive test, invited him to explain the presence of the prohibited substance in his sample, and advised him of his right to have the "B" sample tested.

10. Mr Thys did not offer any explanation for the presence of 19-norandrosterone in the "A" sample and, on 25 April 2006, ASA provisionally suspended Mr Thys from all competitions.

11. On 16 May 2006, the "B" sample was analysed by Mr Young Dae Cho under the supervision of Dr Man Ho Choi and the presence of 19-norandrosterone was again detected.

12. On 10 September 2006, ASA commenced its first disciplinary hearing. After numerous adjournments[1], and the examination of the evidence submitted by the parties, the initial ASA tribunal disbanded. On 11 December 2008, then, the hearing of Mr Thys' case commenced *de novo* before a newly constituted tribunal.

13. On 11 December 2008, ASA advised Mr Thys by letter that the newly constituted tribunal "*unanimously found that you committed a doping violation and declared you ineligible to participate in athletics from 25th April 2006 to the 11th December 2008 (Date of tribunal) – a period of 2 years seven and a half months. In terms of the decision you will forfeit all income, prizes and benefits derived from your participation in the Seoul Marathon on the 17th* (sic) *March 2006*". The tribunal's decision (hereinafter referred to as the "ASA Decision") is contained in a one-page letter and does not set out any reasons or analysis or means of appeal.

14. On 7 January 2009, Mr Thys filed an appeal at the Court of Arbitration for Sport (hereinafter referred to as the "CAS") against the ASA Decision pursuant to Article R47 of the Code of Sports-related Arbitration (hereinafter referred to as the "Code"). The arbitration proceedings so started were registered by the CAS Court Office as CAS 2009/A/1767 *Thys v. Athletics South Africa.*

15. In an award dated 24 July 2009 rendered in CAS 2009/A/1767 (hereinafter referred to as the "1767 Award"), the CAS ruled as follows:

    "*1. It has jurisdiction to hear the appeal filed by Gert Thys on 7 January 2009.*

    2. The appeal of Gert Thys is upheld.

    3. The decision of Athletics South Africa of 11 December 2008 is set aside.

    4. Gert Thys is exonerated of any doping infraction and is eligible to compete without any prior reinstatement testing.

    5. The prize money, income and benefits derived from the participation of Gert Thys in the Seoul Marathon in March 2006 shall not be forfeited.

    6. The award is pronounced without costs, except for the court office fee of CHF 500 (five hundred Swiss Francs) paid by Gert Thys, which is retained by the CAS.

    7. Athletics South Africa shall pay Gert Thys a contribution towards his legal

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[1] Hearings in fact took place on 4 June 2007, 23 October 2007, 25 February 2008, 1 April 2008, 16 May 2008, 26 May 2008 and 1 September 2008.

fees in the amount of CHF13,000 (thirteen thousand Swiss Francs), within 30 (thirty) days of notification of this award".

16. ASA filed an appeal with the Swiss Federal Tribunal (hereinafter referred to as the "FT") pursuant to Article 190 of the Swiss Private International Law Act (hereinafter referred to as the "PILA") to challenge the 1767 Award.

17. On 3 May 2010, the FT rendered a judgment as follows[2]:

"*1. The Appeal is admitted and the CAS award of July 24, 2009 is annulled.*

2. The CAS shall have no jurisdiction to decide the Respondent's appeal.

3. The court costs set at CHF 5'000.- shall be paid by the Respondent.

4. The Respondent shall pay to the Appellant an amount of CHF 6'000.- for the federal judicial proceedings.

5. This judgment shall be notified in writing to the parties and to the Court of Arbitration for Sport (CAS)".

18. As a result of the judgment of the FT, holding in substance that an appeal against the ASA Decision had to be directed to SAIDS, and not to CAS, Mr Thys filed with SAIDS, on 4 June 2010, an appeal against the ASA Decision.

19. In a letter of 26 January 2011 addressed to the South African Minister of Sport and Recreation (hereinafter referred to as the "Minister"), and copied *inter alia* to SAIDS, WADA wrote the following:

"*We refer to the case of the above-mentioned South-African athlete. This athlete tested positive to a prohibited substance on 12 March 2006. On 10 September 2006, Athletics South Africa (ASA) instigated disciplinary proceedings against this athlete. After numerous adjournments, the Athletics South Africa Arbitration Panel pronounced a 2-year ban against this athlete on 11 December 2008.*

Mr. Thys then appealed this decision to the Court of Arbitration for Sport (CAS), which rendered its decision on 24 July 2009, exonerating the athlete of any anti-doping rule violation. ASA appealed the CAS decision before the Swiss Federal Tribunal, which considered that CAS was not competent to hear the appeal lodged by Mr. Thys against ASA Arbitration Panel decision. CAS considered that the appeal by Gert Thys should properly have been filed with SAIDS. Further to the decision of the Swiss federal Tribunal, Mr. Thys filed a notice of appeal to SAIDS on 4 June 2010.

Despite numerous requests on behalf of Mr. Thys, SAIDS has to date, i.e. almost 8 months later, not taken any substantial steps to adjudicate this matter. SAIDS has not even convened a hearing panel. We have now been informed that the Tribunal has to be constituted and approved by your Ministry and that the members of the

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[2] The original text of the FT judgment is in German. The Panel makes reference to a publicly available English translation.

SAIDS Tribunal have not ever been appointed, despite being established by SAIDS Anti-doping Rules in force for several years. As a consequence, Mr. Thys's due process rights are seemingly being ignored.

This situation is not acceptable and we ask you herewith to take all appropriate actions to ensure Mr. Thys's case is heard very shortly. In case no hearing date is set within 21 days from reception of this letter by your Ministry, WADA will have no choice but to bring this case directly before the Court of Arbitration for Sport (CAS) pursuant to the World Anti-Doping Code and then seek reimbursement from SAIDS of our costs and attorneys fees in prosecuting the appeal, as set forth by article 13.3 of SAIDS Anti-doping Rules".

2. THE ARBITRAL PROCEEDINGS

2.1 The CAS Proceedings

20. On 4 May 2011, WADA filed a statement of appeal with the CAS in the intended exercise of "*its competence to bring a case before CAS in view of the persistence of SAIDS not to render a second instance decision in the case of Mr. Gert Thys*". The statement of appeal contained also the appointment of Prof. Ulrich Haas as arbitrator.

21. In its statement of appeal, WADA named as respondents Mr Thys, ASA and SAIDS (hereinafter collectively referred to as the "Respondents"). At the same time, however, WADA indicated that Mr Thys should be considered as a "co-appellant", since the appeal was filed upon his request in order to give him access to a tribunal hearing his case. In addition, WADA requested that CAS

"*invites SAIDS, or ASA, to provide WADA with the complete case file, including in particular the documentation package of the laboratory which performed the analysis on the Athlete's samples*".

22. On 12 May 2011, the CAS Court Office forwarded to Mr Thys, ASA and SAIDS the statement of appeal filed by WADA. In the cover letter, the CAS invited Mr Thys, ASA and SAIDS to comment on the WADA's request that Mr Thys be considered a "co-appellant", and advised the parties that the Deputy President of the CAS Appeals Arbitration Division had decided, *inter alia*, to direct SAIDS or ASA to provide WADA with the complete case file, including in particular the documentation package of the laboratory which had performed the analysis on Mr Thys' samples.

23. In a letter of 17 May 2011, the First Respondent indicated that he had no objection to being considered a "co-appellant" and to accept the appointment of Mr Haas as arbitrator, provided he was allowed to file his appeal brief 20 days after the submission of the WADA's appeal brief. No position, however, was expressed on the point by ASA and SAIDS.

24. In addition to the foregoing, in the letter of 17 May 2011 Mr Thys also

"*submitted that this matter can properly be decided without the need for a hearing, based upon the written submissions and evidence put forward by the parties, and based upon the testimony that was presented in the case Thys v. Athletics South Africa (CAS 2009/A/1767). For this reason, request is made that CAS provide copies of any audiotapes or transcripts from 11 May 2009 hearing in Thys v. Athletics South Africa (CAS 2009/A/1767)*".

25. Failing an agreement between the parties to treat Mr Thys as co-appellant, in a letter of 18 May 2011, the CAS Court Office invited the Respondents to jointly appoint an arbitrator.

26. On 30 May 2011, WADA informed the CAS that it had been provided by the First Respondent with the laboratory documentation packages relating to the sample analyses. As a result, the CAS was advised that "*WADA withdraws its request to be provided with the complete case file, … renounces to file an Appeal Brief and fully refers to its Statement of Appeal*".

27. On 31 May 2011, the CAS Court Office informed the parties that failing a joint nomination of an arbitrator by the Respondents, the arbitrator would be appointed by the President of the CAS Appeals Arbitration Division.

28. On 20 June 2011, the First Respondent and the Third Respondent filed their respective answers to the appeal. No answer was filed by the Second Respondent.

29. In a letter of 5 July 2011, SAIDS requested that a hearing be held before the Panel. In the same letter SAIDS explained its case on the CAS jurisdiction, which it intended "*to air before the Panel*".

30. On 6 July 2011, Mr Thys reacted to the SAIDS' letter of 5 July 2011, as containing "*an impermissible reply brief*".

31. By communication dated 23 August 2011, the CAS Court Office informed the parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Prof. Luigi Fumagalli, President of the Panel; Prof. Ulrich Haas and Mr Hans Nater, arbitrators.

32. In a letter dated 1 September 2011, the CAS Court Office informed the parties that the Panel, having considered Mr Thys' request that the audio tapes of the CAS hearing in CAS 2009/A/1767, *Thys v. Athletics South Africa* be produced in this procedure, had decided to grant ASA a final time limit to respond to Mr Thys' request and that in the absence of any objection on the part of ASA within the time limit granted, the Panel would direct that a CD of the recording be provided to the Panel and to the parties. At the same time, the parties were informed that the Panel had decided to hold a hearing.

33. On 7 September 2011, the CAS Court Office, failing any objection by ASA, transmitted to the parties a CD with the recording of the hearing in CAS 2009/A/1767.

34. In a letter of 16 September 2011, WADA confirmed to the Panel that, as already announced on 5 September 2011, it would not attend the hearing.

35. On 18 October 2011, the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure (hereinafter referred to as the "Order of Procedure"), which was accepted and countersigned by WADA, Mr Thys and SAIDS.

36. On 25 October 2011, a letter from ASA was received by CAS. In such letter, the Second Respondent explained that

> "*... although Athletics South Africa is cited as a party to this arbitration, it is in no position to influence the hold of a hearing of an appeal by Mr Thys in terms of the relevant South Africa legislation. It has always been prepared to and will assist in all ways possible to expedite that hearing should it help.*
>
> *Athletics South Africa has experienced a financial crisis since being placed under administration by the South African Sports Commission and Olympic Committee in 2009. As such it is unable to afford legal representation with this matter.*
>
> *Accordingly, Athletics South Africa shall abide by the decision of the Court*".

37. A hearing was held on 26 October 2011 on the basis of the notice given to the parties in the letter of the CAS Court Office dated 15 September 2011. The Panel was assisted at the hearing by Ms Louise Reilly, Counsel to the CAS.

38. The hearing was attended:

i.	for Mr Thys:	by Mr Howard Jacobs and Ms Meredith Lee, both attorneys-at-law, appearing by videoconference, and by Mr Thys himself, attending on the phone;
ii.	for SAIDS:	by Mr Frans Rautenbach, attorney-at-law.

39. Nobody attended the hearing for WADA and ASA.

40. At the beginning of the hearing, the parties confirmed that they had no objection to the constitution of the Panel and made submissions in support of their respective cases with respect to the issues of jurisdiction of the CAS, admissibility of the WADA's appeal, and costs. In such latter respect, the Panel granted the parties a short deadline to file in writing after the hearing their respective bills of costs.

41. The counsel for SAIDS, after the presentation of his client's position on the jurisdiction of the CAS, the admissibility of the WADA's appeal, and costs, excused himself and left the hearing. Before leaving, however, the counsel for

SAIDS confirmed that the hearing could continue also in his absence and that he had no objections in respect of SAIDS' right to be heard and to be treated equally in the arbitration proceedings.

42. The First Respondent, then, made submissions in support of his case on the merits, referring mainly to the documents from CAS 2009/A/1767, and to the declarations at the hearing in that arbitration, as also lodged or included in the file in these proceedings. At the conclusion of the hearing, Mr Thys confirmed that he no objections in respect of his right to be heard and to be treated equally in the arbitration proceedings.

43. Pursuant to the Panel's directions, issued at the hearing of 26 October 2011, on 2 November 2011 Mr Thys and SAIDS filed their respective bills of costs. In a letter of 2 November 2011, WADA confirmed its position on the award of costs, but filed no bill.

2.2 The Position of the Parties

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

a. The Position of WADA

45. In its statement of appeal, WADA submitted to the CAS the following request for relief:

> "*1. The Appeal of WADA is admissible.*
>
> *2. Mr. Gert Thys is sanctioned with a period of ineligibility to be set between 12 and 24 months, provided that Mr. Gert Thys committed fault or negligence or no significant fault or negligence. Any period of ineligibility (whether imposed to or voluntarily accepted by Mr. Gert Thys) before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*
>
> *3. WADA is granted an award for costs*".

46. In other words, the Appellant, by its appeal, is not seeking the sanctioning or the absolution of Mr Thys: whether the First Respondent committed an anti-doping rule violation and has to be sanctioned is left by WADA to this Panel to decide, on the basis of the submissions of the First, the Second and/or the Third Respondent. WADA, in fact, indicates that it is acting only for the benefit of Mr Thys, "*who is at the moment deprived of his right to have his case heard by the competent national body*".

47. In support of the admissibility of its appeal, WADA refers to the fact that SAIDS had failed to take substantial steps to adjudicate on Mr Thys' case, notwithstanding Mr Thys' appeal of 4 May 2010 and the WADA letter of 26 January 2011. WADA submits that the possibility to appeal before CAS against the failure to render a timely decision by the relevant national anti-doping organization (in this case SAIDS) is set forth in the WADA World Anti-Doping Code (hereinafter referred to as the "WADC"), as well as in applicable domestic rules. In that context, WADA submits that it has a right of appeal to CAS under Article 13.3 of the SAIDS Anti-Doping Rules (hereinafter referred to as the "SAIDS ADR").

48. On the basis of such provision, finally, WADA submits that "*SAIDS will have to reimburse the totality of WADA's costs and attorney's fees if the CAS Panel decides that it is competent to rule on the present case, not only if the CAS Panel decides that an anti-doping rule violation occurred*".

b. The Position of Mr Thys

49. In his answer, Mr Thys submitted to the CAS the following request for relief:

"*... that this Tribunal declare that WADA's appeal is admissible; that SAIDS has no jurisdiction or standing to require Mr. Thys to participate any further in its 'appeal proceeding'; that the alleged March 12, 2006 positive test result be set aside and that Gert Thys be exonerated; and award Mr. Thys a contribution towards his legal costs from respondents ASA and SAIDS*".

50. In other words, the First Respondent requests the CAS "*to put an end*" to the violation of his basic right to have his case timely heard, and to reverse, consistently with the 1767 Award, the suspension that was imposed on him by ASA.

51. In support of his requests that the WADA's appeal be considered admissible, Mr Thys refers to the SAIDS' failure to convene a panel to hear the appeal filed on 4 June 2010, notwithstanding the WADA's letter of 26 January 2011. In respect to that letter, Mr Thys notes that is was copied to, and received by, SAIDS, and that its content could not be misunderstood. In any case, "*having waited almost six months*" to take issue with the WADA's letter, "*SAIDS must be considered to have waived any perceived misunderstanding or objection*" thereto.

52. At the same time, Mr Thys submits that "*CAS' exercise of jurisdiction over this matter must be considered to have divested SAIDS of any jurisdiction over this case*". Therefore, SAIDS has no jurisdiction to require Mr Thys "*to participate any further in its appeal proceeding*".

53. As to his request to have the ASA Decision set aside, the First Respondent submits that a major violation of the applicable WADA International Standard for Laboratories, version 3.0 of June 2003 (hereinafter referred to as the "ISL") occurred. More specifically, in Mr Thys' opinion, ISL 5.2.4.3.2. was violated,

because the same analyst, Mr Young Dae Cho, performed all or nearly all of the analytical procedures for the screening analysis, the "A" sample confirmation analysis and the "B" sample confirmation analysis. On the basis of the CAS jurisprudence (CAS 2006/A/1119, *UCI v/ Landaluce*, award of 19 December 2006) confirmed also by the 1767 Award, the First Respondent submits that "*this is not a technical violation, but rather a serious breach*" of the ISL. Such serious violation, according to Mr Thys, "*cannot be overcome in this case and ASA cannot meet its burden of proving that the violation of the ISL did not undermine the validity of the adverse analytical finding*".

54. With respect to costs, Mr Thys insists that they should be borne by ASA and SAIDS.

c. The Position of ASA

55. No answer has been filed by Second Respondent. In a letter of 25 October 2011, ASA indeed explained that "*it is unable to afford legal representation*" in this case, because of a "*financial crisis*".

56. According to Article R44.5 of the Code

"*if the Respondent fails to submit its response ... the Panel may nevertheless proceed with the arbitration and deliver an award*".

57. In this respect, the Panel notes that the statement of appeal filed by WADA, together with a letter of the CAS Court Office explaining its meaning, was received by the Second Respondent at the address provided by the Appellant (see § 22 above): as a result, the Second Respondent was informed that arbitration proceedings had been started against it before the CAS, and that it had the opportunity to state its case. In the same way, the subsequent submissions filed by Mr Thys and SAIDS, as well as all communications issued by the CAS Court Office, also on behalf of the Panel, were sent to, and received by, ASA. Such receipt is indeed also confirmed by the above-mentioned letter of 25 October 2011. Therefore, the failure of the Second Respondent to file any submission does not prevent this Panel from deciding on the claims brought in these proceedings against it.

d. The Position of SAIDS

58. In its answer, SAIDS submitted to the CAS the following request for relief:

"*... that the appeal should be dismissed with an order that WADA and the athlete be held liable jointly and severally to pay SAIDS' costs on the highest permissible scale*".

59. The Third Respondent, in fact, raises the preliminary point that "*WADA has not established its right of appeal in this case*". Therefore, "*CAS does not have jurisdiction to hear the appeal*".

60. In support of its contention, SAIDS submits that the WADA letter of 26 January 2011 "*fails to comply with the prescripts of article 13.3 in at least two respects*", since:

    i. "*it purports to set a deadline*" to the Minister. However, since the decision on the appeal filed by Mr Thys had to be rendered by an independent tribunal of SAIDS, the deadline envisaged by Article 13.3 of the SAIDS ADR had to be given to SAIDS. "*SAIDS cannot respond to a deadline not given to it*", and the failure of the Minister to respond to the deadline "*has no jurisdictional impact*";

    ii. "*it does not give a deadline to SAIDS to render a decision*" contrary to what Article 13.3 of the SAIDS ADR "*clearly envisages*".

61. At the hearing, then, SAIDS explained that Article 17 of the South African Institute for Drug-Free Sport Act, 1997 (hereinafter referred to as the "Act of 1997") provided for the establishment of an independent board, to be known as the Anti-Doping Appeal Board (hereinafter referred to as the "Appeal Board"), in order to hear appeals involving national level athletes, whose members had to be appointed by the Minister. However, only on 15 June 2011 were those members appointed. Therefore, SAIDS cannot be blamed for the fact that before that date the appeal filed by Mr Thys could not be heard by the Appeal Board, since it had no possibility to establish it. The appeal filed by WADA is, for such reason, according to SAIDS, not admissible, since Article 13.3 of the SAIDS ADR implies the existence of an Appeal Board: no hearing could be held, or decision rendered, within the deadline set by WADA.

62. In any case, SAIDS underlines that, in a letter dated 15 June 2011, WADA and Mr Thys have been informed, since the Appeal Board has been appointed, and that procedural directions have been issued, the appeal filed by Mr Thys can be heard by the Appeal Board and not by CAS.

63. With respect to costs, SAIDS claims that WADA and Mr Thys should reimburse, "*at the highest possible scale*", the costs it has incurred in connection with the CAS appeal.

3. LEGAL ANALYSIS

3.1 Jurisdiction

64. As mentioned, the CAS jurisdiction is affirmed by WADA and Mr Thys (§§ 47, 51), but is challenged by SAIDS (§§ 59-61).

65. In accordance with Article 186 of the PILA, the CAS has the power to decide upon its own jurisdiction.

66. In the absence of a specific arbitration agreement, in order for the CAS to have jurisdiction to hear an appeal, the statutes or regulations of the sports-related body

from whose decision the appeal is being made must expressly recognise the CAS as an arbitral body of appeal. Article R47 of the CAS Code in such respect states that:

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

67. The CAS jurisdiction is based by WADA and Mr Thys on Article 13.3 of the SAIDS ADR.

68. Article 13.3 of the SAIDS ADR ["*Failure to Render a Timely Decision by SAIDS*"], corresponding to Article 13.3 of the WADC, provides as follows:

"*Where, in a particular case, SAIDS fails to render a decision with respect to whether an anti-doping rule violation was committed within a reasonable deadline set by WADA, WADA may elect to appeal directly to CAS as if SAIDS had rendered a decision finding no anti-doping rule violation. If the CAS hearing panel determines that an anti-doping rule violation was committed and that WADA acted reasonably in electing to appeal directly to CAS, then WADA's costs and attorneys fees in prosecuting the appeal shall be reimbursed to WADA by SAIDS*".

69. By its plain text, Article 13.3 of the SAIDS ADR provides for the CAS jurisdiction in specific, extraordinary circumstances. It does not grant the CAS the jurisdiction to review, upon a party's request, a SAIDS decision finding (or denying) the commission of an anti-doping rule violation and drawing the consequences of such finding; it actually considers the situation in which SAIDS has failed to render such decision, and grants WADA the standing to start CAS arbitration proceedings as if the SAIDS had rendered a decision finding no anti-doping rule violation. In other words, Article 13.3 of the SAIDS ADR grants the CAS the power to review the facts and the law of the case (§ 79 below), upon WADA's request, assuming (for the purposes of Article R47 of the Code) a "national" domestic decision holding that no anti-doping rule violation has been committed.

70. Article 13.3 of the SAIDS ADR, at the same time, subjects the possibility for WADA to "*elect to appeal directly to CAS*" to specific conditions, failing which the appeal is not admissible and the CAS jurisdiction cannot be exercised[3]. In fact, SAIDS must have failed "*to render a decision*" with respect to whether an anti-doping rule violation was committed "*within a reasonable deadline set by WADA*".

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[3] Discussions at the hearing took place with regard to the characterization of such conditions, as

71. As such, this condition reflects, in the Panel's opinion, the basic requirement of "fair hearing" in anti-doping adjudication, expressed in the WADC and reflected in the SAIDS ADR, which includes the right of the athlete to a "timely hearing" and to a "timely decision". At the same time, Article 13.3 of the SAIDS ADR affords WADA an instrument intended to promote the fight against doping in sport, monitoring the activities performed by the national anti-doping organizations with respect to the enforcement of anti-doping rules. The appeal to CAS, under such provision, is therefore intended to guarantee that a case concerning an anti-doping rule violation is finally heard, notwithstanding the delays occurred at the national level.

72. At the same time, this condition matches (and replaces as an equivalent) the requirement mentioned in Article R47 of the Code, which stipulates that an appeal to the CAS can be formed only after the exhaustion of all other internal remedies. The requirement so set is intended to afford the internal bodies of a federation the opportunity to ensure that all the relevant rules, applicable to the case at stake, are fully complied with. Although it pays tribute to the freedom of organization of the sports entity in question, it is therefore based on the assumption that the internal legal order will provide effective remedies for the violations of its internal rules, and requires that final adjudication is "timely". The WADA's possibility to start CAS proceedings under Article 13.3 of the SAIDS ADR intends, in that context, also to avoid a "denial of justice".

73. The conditions set by Article 13.3 of the SAIDS ADR for a WADA appeal must be read against that background, marked by the interests of the athlete and of WADA to have the anti-doping case finally heard.

74. As mentioned, the satisfaction of such conditions is disputed by SAIDS. The Third Respondent in fact:

    i. refers to the WADA's letter of 26 January 2010 and denies that by said letter:

        a. WADA set a reasonable deadline to SAIDS, since the deadline was set to the Minister;

        b. WADA granted a deadline to render a decision, since it only requested that a hearing date be set;

    ii. explains that no delay which could be attributed to SAIDS had occurred, since, failing the establishment of the Appeal Board by the Minister, it was not in a position to set a hearing date or render a decision within the deadline set by WADA.

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affecting the appeal's admissibility or the Panel's jurisdiction. For the purposes of this award, however, that question can be left open.

75. The Panel does not agree with the Third Respondent's submissions and finds that the conditions set by Article 13.3 of the SAIDS ADR are fulfilled: SAIDS failed to render a decision with respect to whether an anti-doping rule violation was committed by Mr Thys within a reasonable deadline set by WADA. In fact, on 4 May 2011 (date on which WADA filed with CAS the statement of appeal originating the present arbitration), no hearing date had been set or decision rendered on the appeal filed by Mr Thys on 4 June 2010: the Appeal Board only started proceedings on 15 June 2011, almost five months after the letter of WADA of 26 January 2010, with respect to an anti-doping rule violation allegedly committed on 12 March 2006.

76. Contrary to such conclusion, it cannot be maintained that no deadline was set to SAIDS to render a decision, in a situation in which SAIDS could not reasonably comply with the WADA's request, because the Appeal Board had not been established by the Minister. In respect of the SAIDS' contentions based on such points the Panel notes that:

    i. the WADA's letter of 26 January 2011, however addressed to the Minister, was explicitly copied to, and admittedly received by, SAIDS;

    ii. the contents of said letter could not be misunderstood, as it also made reference to Article 13.3 of the SAIDS ADR and to the intention of WADA to start proceedings before CAS under it;

    iii. even though WADA requested that a hearing be held (and not that a decision be rendered) within the set deadline, no hearing was held or decision issued also long past that deadline;

    iv. the fact that SAIDS could not hear Mr Thys' appeal because the Appeal Board had not been established by the Minister is irrelevant and cannot be invoked by SAIDS, since

        a. Article 13.3 of the SAIDS ADR does not make any reference to any aspect of fault on the part of SAIDS in connection with its failure to render a timely decision. Actually, the provision makes a reference only to an objective, and not to a negligent, failure by SAIDS; in fact

        b. whichever subject is responsible for the lacking timely adjudication, and even without any responsibility by any subject in that respect, it is simply not possible to shift on WADA or Mr Thys the burden of the consequences of SAIDS' failure to render a decision, if the underlying purpose of the provision is considered; otherwise, WADA would be deprived of its right to have an anti-doping rule violation eventually adjudicated, and the athlete of the benefit of the hearing of his case, only because an Appeal Board had not been set up, years after the entry into force of the Act of 1997, which provided for it, and after that it had been pleaded before the FT that Mr Thys' case had to be heard by such Appeal Board.

77. Based on the foregoing, the Panel therefore concludes that it has jurisdiction to decide the present dispute: the appeal filed by WADA is, in that context, admissible.

3.2 Appeal Proceedings

78. As these proceedings involve an appeal brought by WADA in a disciplinary matter brought on the basis of rules providing for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings in a disciplinary case of international nature, in the meaning and for the purposes of the Code.

3.3 Scope of the Panel's Review

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

3.4 Applicable Law

80. The law applicable in the present arbitration is identified by the Panel in accordance with Article R58 of the Code.

81. Pursuant to Article R58 of the Code, the Panel is required to decide the dispute

> "*... according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision*".

82. In their submissions, the parties rely on provisions set in the applicable version of the IAAF anti-doping rules, as set forth in the IAAF Competition Rules in force at the time the anti-doping rule violation was allegedly committed by Mr Thys (hereinafter referred to as the "IAAF ADR"), in the SAIDS ADR and in the ISL. Accordingly, these are the rules and regulations which shall be applicable to this dispute.

83. The provisions set in applicable rules and regulations include the following:

i. <u>within the IAAF ADR</u>:

Rule 32

"*1. Doping is strictly forbidden under these Anti-Doping Rules.*

2. Doping is defined as the occurrence of one or more of the following anti-doping rule violations:

(a) the presence of a prohibited substance or its metabolites or markers in an athlete's body tissues or fluids. …
(i) it is each athlete's personal duty to ensure that no prohibited substance enters his body tissues or fluids. Athletes are warned that they are responsible for any prohibited substance found to be present in their bodies. It is not necessary that intent, fault, negligence or knowing use on an athlete's part be demonstrated in order to establish an anti-doping rule violation under Rule 32.2 (a)…".

Rule 33

"*1. The IAAF, the Member or other prosecuting authority shall have the burden of establishing that an anti-doping rule violation has occurred under these Anti-Doping Rules.*

2. The standard of proof shall be whether the IAAF, the Member or other prosecuting authority has established an anti-doping rule violation to the comfortable satisfaction of the relevant hearing body, bearing in mind the seriousness of the allegation which is made. This standard of proof is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

3. Where these Anti-Doping Rules place the burden of proof on an athlete, athlete support personnel or other person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

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

(a) WADA-accredited laboratories are presumed to have conducted sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The athlete may rebut this presumption by establishing that a departure from the International Standard for Laboratories has occurred, in which case the IAAF, the Member or other prosecuting authority shall have the burden of establishing that such departure did not undermine the validity of the adverse analytical finding.

(b) A departure from the International Standard for Testing (or other applicable provision in the Procedural Guidelines) shall not invalidate a finding that a prohibited substance was present in a sample or that a prohibited method was used, or that any other Anti-Doping Rule violation under these Anti-Doping Rules was committed, unless the departure was such as to undermine the validity of the finding in question. If the athlete establishes that a departure from the International Standard for Testing (or other applicable provision in the Procedural Guidelines) has

occurred, then the IAAF, the Member or other prosecuting authority shall have the burden of establishing that such departure did not undermine the validity of the finding that a prohibited substance was present in a sample, or that a prohibited method was used, or the factual basis for establishing any other anti-doping rule violation was committed under these Anti-Doping Rules".

ii. within the SAIDS ADR:

Article 2

"*Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.8 of these Anti-Doping Rules (Anti-Doping Rule Violations). The following constitute Anti-Doping Rule Violations:*

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

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

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample".

Article 3

"*3.1 SAIDS has the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether SAIDS has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.*

Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Articles 10.4 and 10.6 where the

Athlete must satisfy a higher burden of proof.

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

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

If the Athlete or other Person rebuts the preceding presumption by showing that a departure from the International Standard occurred which could have reasonably caused the Adverse Analytical Finding, then SAIDS shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.

3.2.2 Departures from any other International Standard or other anti-doping rule or policy which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such results. If the Athlete or other Person establishes that a departure from another International Standard or other anti-doping rule or policy which could reasonably have caused the Adverse Analytical Finding or other anti-doping rule violation occurred, then SAIDS shall have the burden to establish that such a departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation".

iii. <u>within the 2006 WADA Prohibited List</u>:

Section 1(b) mentioning 19-norandrosterone as an endogenous prohibited substance in the list of anabolic agents and providing in such respect as follows:

"*Where an anabolic androgenic steroid is capable of being produced endogenously, a Sample will be deemed to contain such Prohibited Substance where the concentration of such Prohibited Substance or its metabolites or markers and/or any other relevant ratio(s) in the Athlete's Sample so deviates from the range of values normally found in humans that it is unlikely to be consistent with normal endogenous production.*

In all cases, and at any concentration, the Athlete's Sample will be deemed to contain a Prohibited Substance and the laboratory will report an Adverse Analytical Finding if, based on any reliable analytical method (e.g. IRMS), the laboratory can show that the Prohibited Substance is of exogenous origin. In such case, no further investigation is necessary. ...

For 19-norandrosterone, an Adverse Analytical Finding reported by a laboratory is considered to be scientific and valid proof of exogenous origin of the Prohibited Substance. In such case, no further investigation is necessary".

iv. within the ISL:

ISL 5.2.4.3.2.2

"*The "B" Sample confirmation must be performed in the same Laboratory as the "A" Sample confirmation. A different analyst must perform the "B" analytical procedure. The same individuals(s) that performed the "A" analysis may perform instrumental set up and performance checks and verify results*".

84. With respect to the foregoing, the Panel indeed notes that the provisions set in the IAAF ADR and in the SAIDS ADR referred to above have substantially the same contents and refer, with the same meaning and purpose, to the ISL.

3.5 The Dispute

85. The dispute submitted to this Panel concerns, in its merits, the challenge brought by Mr Thys to the ASA Decision and to the finding that he had committed an anti-doping rule violation. This matter has already been considered by another CAS Panel, in CAS 2009/A/1767, *Thys v. Athletics South Africa*, which lead to the 1767 Award. Documents relating to such proceedings have indeed been lodged by the First Respondent also in this arbitration. In the file of the current arbitration, in addition, also the audio-recording of the hearing in CAS 2009/A/1767 was admitted. This Panel has therefore considered, together with the parties' submissions and productions before it, also that material. The following considerations, even though largely corresponding to reasoning followed in CAS 2009/A/1767, are in any case the result of an independent review of the facts and the law made by this Panel.

86. As a first point, the Panel remarks that an anti-doping rule violation has been established, since the results of the analyses conducted by the DCC are positive and show the presence of a prohibited substance or its metabolites or markers in Mr Thys' body tissues or fluids. Such finding is undisputed.

87. As a result, the burden shifts to Mr Thys to demonstrate that there was a departure from the ISL in order to rebut the presumption that the analyses were conducted in accordance with prevailing and acceptable standards of scientific practice. Mr Thys has to prove that a departure from the ISL has occurred in accordance with Rule 33.4(a) of the IAAF ADR or of Article 3.2.1 of the SAIDS ADR. This is the second point to be examined by the Panel.

88. Mr Thys contested the validity of the analyses claiming that the analyst who did the analysis of the "B" sample, had also been involved in the "A" sample analysis, in violation of ISL 5.2.4.3.2.2.

89. The Panel notes that it is undisputed that Mr Young Dae Cho performed the screening procedure (First Respondent's Exhibit 1: p. 2), and that Mr Young Dae Cho performed also the confirmation procedure (First Respondent's Exhibit 2: p. 2). The Aliquot Chain of Custody Documentation of the "A" sample analysis (First Respondent's Exhibit 1: p. 13) and the Aliquot Chain of Custody Documentation of the "B" sample analysis (First Respondent's Exhibit 2: p. 11), then, show the identical ID code and signature of Mr Young Dae Cho. The findings in the 1767 Award that Mr "*Young Dae-Cho has done the quantitative GCMS*" of the "A" sample and "*the qualitative was done by Dr. Man-Ho Choi*", while for the "B" sample "*Young-Dae Cho started the confirmation*" and "*the qualitative analysis was done by GCHRMS by Dr. Man-Ho Choi*" have not been in any way challenged in the current arbitration.

90. In light of these circumstances this Panel confirms that a departure from ISL 5.2.4.3.2.2, since the same analyst performed most of the steps involved in the "A" and the "B" sample analytical procedure, beyond the limits set by the ISL.

91. As a result of such finding, the burden shifts to ASA and/or SAIDS to demonstrate according to Rule 33.4 of the IAAF ADR or Article 3.2 of the SAIDS ADR that this departure from the ISL did not undermine the validity of the adverse analytical finding. This is the third point that the Panel has to consider, taking in mind that, according to Rule 33.2 of the IAAF ADR and Article 3.1 of the SAIDS ADR, SAIDS has the burden to prove such fact "*to the comfortable satisfaction of the relevant hearing body*", which "*standard of proof is greater than a mere balance of probability*".

92. In such respect, the Panel notes that, at the CAS hearing in CAS 2009/A/1767 proceedings, Dr Black, an experienced scientist regarding doping analyses and familiar with the requirements of the ISL, testified that the purpose of ISL 5.2.4.3.2.2 "*is to ensure the integrity of the testing process*", especially if "*an analyst has an improper understanding of the status or has actually patent error in the A sample testing that they would not then replicate the error in B sample test*". In addition, Dr Black pointed out the importance of having "*a complete second opinion of the analysis conducted*" and "*to have some insurance internally that there would be no bias introduced in the B sample test*". Dr Black stated that even if "A" sample analysis and "B" sample analysis came to the same result, this didn't *per se* reverse the conclusion to be drawn from the departure of ISL, thus curing the non-compliance with the ISL.

93. Although ISL 5.2.4.3.2.2 has since been removed, this does not affect the decision in question. Based on Dr Black's indications in CAS 2009/A/1767, undisputed in the current arbitration, the Panel is convinced that ISL 5.2.4.3.2.2 was not a mere formal rule to regulate the process of testing in the laboratories or a mere technicality, but was a part of the ISL for good reason to protect the athlete from possible errors, mistakes and dishonesty. It is not up to the Panel to adopt the change that has been made in the meantime, but to apply the rule being in force at the time of the testing.

94. The scientific accuracy of the testing results does not automatically prove the negative fact that the departure from the ISL did not undermine the adverse analytical finding. If one accepts this argument, the integrity of the testing process would lose all importance. The laboratories would be free to ignore any standards as long as they manage to achieve similar results. In the same way, the honesty of the analysts, which the Panel has no reason to doubt, does not exclude errors or mistakes by accident during the testing process and therefore can be neglected in assessing the compliance of the rule.

95. Previous decisions have dealt with the issue of the consequences of non-compliance with ISL 5.2.4.3.2.2:

i. in CAS 2006/A/1119, *UCI v. Landaluce*, award of 19 December 2006 (§§ 105-107), the Panel, with respect to facts almost identical to this case, exonerated the athlete and stated the following about the consequence of a violation of said ISL Rule:

"*It was not demonstrated that this was not at the origin of the adverse finding, nor that it was. It was however incumbent upon the UCI, according to article 18 of the UCI Anti-Doping Rules, to demonstrate that the departure from the ISL was not at the origin of the adverse finding, but this was not done. The UCI merely indicated in this appeal brief that: 'And even if there had been a departure – quod non – this couldn't have led to the adverse analytical finding, unless it is established that [the analyst] committed an error which caused the adverse analytical finding, quod non.' Also during the hearing, the UCI simply noted: 'As for the departures from the ISL which were brought up, I believe I can conclude that if they had took place, they are not significant and certainly not at the origin of the result.' It was indeed for the UCI to demonstrate that the failure to meet point 5.2.4.3.2.2 of the ISL was not at the origin of the adverse finding. To the extent that the UCI did not succeed in doing so, the Panel's only possible conclusion is to exonerate Mr. Landaluce*";

ii. in the case decided by an American Arbitration Association CAS Panel in *USADA v. Jenkins* (AAA No. 30 190 0019907, award 25 January 2008, §§ 120-the individual who had prepared the "B" confirmation analysis was also involved in the "A" sample analysis. In *Jenkins,* USADA presented detailed scientific opinions that the violation of ISL 5.2.4.3.2.2 did <u>not</u> cause the adverse analytical finding, but the Panel came to the same conclusion as in *Landaluce*, stating the following about the proper understanding of the rule:

"*On its face, ISL 5.2.4.3.2.2 clearly forbids an analyst who performs the "A" sample analysis from performing the "B" sample analysis: 'A different analyst must perform the "B" analytical procedure'... Nevertheless, controversy arose during the course of the proceeding in respect of the meaning of the term 'analytical procedure' and, more broadly, the proper interpretation of the standard for the purpose of identifying conduct which would amount to a violation of this standard. 'Analytical procedure' is not*

defined ... However, two observations must be made. First, the singular use of the term 'analytical procedure' (i.e., as opposed to 'analytical procedures') suggests that, to the extent that an analytical procedure is composed of several steps, the drafters intended that an analyst involved in any step of the "A" sample analytical procedure must not perform any step of the analytical procedure on the "B" sample ... Second, the drafters have set out a closed list of steps that analysts are involved in the "A" sample analysis may also perform on the "B" sample analysis: instrumental set up and performance checks, and the verification of results. There is no basis on the face of the standard to import other activities into this list of acceptable areas of overlap".

96. Having carefully reviewed the facts of this case, the Panel finds that ASA and/or SAIDS have not satisfied the burden, according to the standard set by Rule 33.4(a) of the IAAF ADR and Article 3.1 of the SAIDS ADR, to demonstrate that the departure from ISL 5.2.4.3.2.2 did not undermine the validity of the adverse analytical finding. The Panel is convinced that it is almost impossible to prove a negative fact, but nevertheless ASA and SAIDS have not presented anything that could lead this Panel to state that they have met their burden of proof.

97. In summary, the Panel concludes that:

i. an adverse analytical finding of 19-norandrosterone in the urine provided by Mr Thys on 12 March 2006 has been established;

ii. a departure from ISL 5.2.4.3.2.2 has been demonstrated; and

iii. ASA and/or SAIDS have failed to prove to the Panel's comfortable satisfaction that the departure from ISL 5.2.4.3.2.2 did not undermine the validity of the adverse analytical finding.

3.6 Conclusion

98. In light of the foregoing, the Panel holds that the ASA Decision is to be set aside.

99. (...)

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the World Ant-Doping Agency on 4 May 2011 against the decision issued by the tribunal of Athletics South Africa on 11 December 2008 is admissible.

2. The decision issued by the tribunal of Athletics South Africa on 11 December 2008 is set aside.

3. (...)

Lausanne, 30 November 2011

THE COURT OF ARBITRATION FOR SPORT

Luigi **Fumagalli**
President of the Panel

Ulrich **Haas**
Arbitrator

Hans **Nater**
Arbitrator