Arbitration CAS 2018/A/5853 Fédération Internationale de Football Association (FIFA) v. Tribunal Nacional Disciplinario Antidopaje (TNDA) & Damián Marcelo Musto, award of 2 July 2019

Panel: Prof. Ulrich Haas (Germany), President; Prof. Massimo Coccia (Italy); Mr Carlos Del Campo Colás (Spain)

Football
Dopage (hydrochlorotiazide; furosemide)
Material scope of the FIFA Statutes' arbitration clause related to doping-related decisions
FIFA's right to appeal doping-related decisions directly to the CAS in the context of national-level players
Impact of the national anti-doping law on CAS jurisdiction
Discretion not to issue a preliminary award on jurisdiction
Late transmission of the Laboratory Documentation Package
Determination of the applicable period of ineligibility in the context of a negligent ADRV
Commencement of the period of ineligibility

1. **By virtue of holding a license, a player submits to an arbitration clause by reference and is bound to the FIFA arbitration clause related to appeals by FIFA against doping-related decisions. Doping-related decisions of anti-doping organizations to whom the interested national federations delegated their disciplinary responsibilities and powers in doping matters are covered by the material scope of the arbitration clause, since the list of decisions referred to in Article 58 para. 5 of the FIFA Statutes is not exhaustive ("in particular").**

2. **The FIFA ADR, in principle, differentiate in relation to the internal means of recourses between national-level players and international-level players. A decision may be appealed to a national-level appeal body before the appeal to CAS in cases involving national-level players whereas a final decision may be appealed exclusively to CAS in cases involving international-level players. However, in special circumstances, FIFA has a right to appeal doping-related decisions in the context of national-level players directly to the CAS, i.e. where no other party with a right to appeal has challenged the decision (before the national-level appeal body) and, therefore, the decision became legally "final" within the national anti-doping organization's process.**

3. **A player may be submitted to two different sets of rules, i.e. the FIFA ADR to which he submitted by entering into a license agreement with the interested national federation and a national law. Both sets of rules are not identical. The mere fact, however, that both sets of rules to which the player is submitted are not identical has no impact on the CAS jurisdiction. On the contrary, it suffices that the arbitration agreement is found in either one of the applicable sets of rules in order to establish the jurisdiction of the**

CAS. This is all the more true considering that the FIFA ADR make it clear that they want to be applicable to all players irrespective of any concurrent set of rules.

4. **According to Article R55 para. 5 of the CAS Code, it is at the discretion of the panel (*"may rule"*) whether to render a preliminary decision on its jurisdiction or to rule on its jurisdiction in the final award. When applying such discretion the panel – in principle – takes account of the reasoning submitted by the party requesting a preliminary decision, in particular why a preliminary decision is necessary to safeguard its interests and to prevent it from possible harm or why a decision on jurisdiction, for some other reasons, is urgent. Absent any compelling reason and/or urgent necessity for a preliminary decision, a preliminary award on jurisdiction should not be rendered.**

5. **The fact that a player was only provided with the Laboratory Documentation Package ("LDP") at a late stage in the proceeding does not affect the case in an irreparable manner. The LDP is – for sure – an important source of information. The documents help to understand whether or not there have been deviations from the applicable International Standards. But the latter is a legal analysis that can be performed also at a later stage, i.e. before the appellate instance. Thus, the fact that the player was only provided with the LDP before CAS does not amount to a breach of a party's procedural rights.**

6. **The breadth of sanction for a negligent anti-doping rule violation under Article 22 para. 1 lit. a FIFA ADR is from a reprimand to 24 months ineligibility, depending on the player's degree of fault. In exercising discretion to determine the appropriate sanction within this range, a difference is made between "normal degree of fault" ranging between 12-24 months and a "light degree of fault" ranging between a reprimand and 12 months. In order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his/her personal capacities.**

7. **If there were delays in the context of the analysis of a player's sample and, in particular, in the procedure before the anti-doping authority, if these delays were substantial and if they cannot be attributed to the player, there is room to backdate the player's sanction at the discretion of the deciding body, pursuant to Article 28 para. 1 FIFA ADR. However, one must note that backdating a period of ineligibility in team sports effectively amounts to waiving part of the sanction, since – differently from individual sports – *"competitive results achieved during the period of ineligibility"* can – in principle – not be disqualified (the exception being when multiple players test positive at the same time). Thus, restraint must be shown when backdating the period of ineligibility in order not to undermine the FIFA ADR. The fact that the player was adversely affected by the sanction, because he could not participate in the team preparations for one season, should be taken into account.**

I. PARTIES

1. The Fédération Internationale de Football Association (hereinafter "FIFA" or the "Appellant") is the world governing body of football, headquartered in Zurich, Switzerland.

2. The Tribunal Nacional Disciplinario Antidopaje (hereinafter "TNDA" or "First Respondent") is the adjudicating body of first instance for anti-doping rule violations (hereinafter "ADRV") in Argentina with its own legal identity.

3. Mr Damián Marcelo Musto (hereinafter the "Player" or "Second Respondent") is an Argentinean professional football player who currently plays for the Spanish football club SD Huesca in the Spanish first division. He was transferred on loan to SD Huesca on 26 July 2018 from the Mexican football Club Tijuana. Before being transferred to the Club Tijuana on 12 July 2017 he played for the Argentinian football club CA Rosario in the first Argentinian football division.

II. FACTUAL BACKGROUND

4. The dispute in these proceedings revolves around the decision rendered by the TNDA on 19 June 2018 (hereinafter "the Decision"). The TNDA imposed a period of ineligibility of 7 months on the Player for an ADRV. The sanction ran from 16 January 2018 until 15 August 2018.

5. Below is a brief summary of the main facts and allegations based on the Parties' written submissions, the CAS file and the content of the hearing that took place in Lausanne, Switzerland on 05 April 2019. Additional facts and allegations found in the Parties' submissions and evidence may be set out, where relevant, in other parts of this award.

6. On 20 June 2017, the Player submitted to an in-competition doping control organized by the Argentinian National Anti-Doping Organization (hereinafter the "NADO").

7. The Player's samples were originally sent to the laboratory in Paris, France. Once the latter's accreditation had been suspended by the World Anti-Doping Agency (hereinafter "WADA"), the Player's samples were forwarded to the WADA-accredited laboratory in Madrid. The analysis of the A-sample in the Madrid laboratory revealed the presence of two prohibited substances, namely "Hydrochlorothiazide" and "Furosemide". The analysis of the B-sample confirmed the result of the A-sample analysis.

8. "Hydrochlorothiazide" and "Furosemide" are both listed in the WADA's 2017 Prohibited List under class S5, "Diuretics and Masking Agents". The substances are prohibited at all times (i.e. in- and out-of-competition).

9. In January 2018, the Player was notified by the NADO of the Adverse Analytical Finding (hereinafter the "AAF"). Later, the NADO also informed the Player about the estimated concentrations of the prohibited substances found in his samples: Hydrochlorothiazide:

15ng/ml (A-sample) and 11ng/ml (B-sample), Furosemide: 22ng/ml (A-sample) and 24ng/ml (B-sample).

III. PROCEEDINGS BEFORE THE TNDA

10. Based on the AAF, formal proceedings were initiated against the Player before the TNDA. No provisional suspension was imposed on the Player.

11. On 24 May 2018, a hearing was held before the TNDA.

12. On 19 June 2018, the TNDA issued the Decision that – *inter alia* – reads (in the English translation) as follows:

"1) A suspension (disqualification) from playing in competitions is hereby ordered for a period of 7 (seven) months for the [Player], counting from 16 January 2018, in accordance with the explanation set forth in Recital VII, which means that the suspension period ordered herein will end on 15 August 2018.

2) Let the National Anti-Doping Commission be notified of this ruling and requested to make the relevant notifications to the [Player], the appropriate national and international associations and the [WADA]".

13. The Decision was notified to the Player on 21 June 2018.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

14. On 7 August 2018, FIFA filed its appeal before the Court of Arbitration for Sport (hereinafter the "CAS") against the Decision and submitted its Statement of Appeal according to Article R48 of the Code of Sports-related Arbitration (hereinafter the "Code"). The appeal is directed against the TNDA and the Player as Respondents.

15. On 24 August 2018, the First Respondent advised the CAS Court Office, that it will not take part in this procedure and that it will ratify any award issued by the CAS in this matter.

16. On 7 September 2018, the Appellant filed its Appeal Brief.

17. On 19 September 2018, the CAS Court Office noted that the Respondents failed to jointly nominate an arbitrator within the set time limit. It further advised the Parties that, in consequence thereof and according to Article R53 of the Code, it would be for the President of the CAS Appeals Arbitration Division, or her Deputy, to nominate an arbitrator *in lieu* of the Respondents.

18. On 1 October 2018, the CAS Court Office advised the Parties that the arbitrator designated *in lieu* of the Respondents had declined to serve as arbitrator in the present matter and invited the Respondents to jointly nominate a new arbitrator within 10 days from receipt of this letter.

19. On 4 October 2018, the Second Respondent nominated a new arbitrator.

20. On the same date, the Appellant objected to the letter of the CAS Court Office dated 1 October 2018. It submitted that Respondents' right to nominate an arbitrator had elapsed, that no new deadline could be set by the CAS Court Office and that it was solely for the President of the CAS Appeals Arbitration Division to nominate an arbitrator *in lieu* of the Respondents.

21. By letter of 5 October 2018, the CAS Court Office acknowledged receipt of the letters by the Appellant and the Second Respondent. It confirmed that pursuant to Article R53 of the Code it was for the President of the CAS Appeals Arbitration Division, or her Deputy, to nominate an arbitrator *in lieu* of the Respondents.

22. By letter of 1 November 2018, the CAS Court Office advised the Parties that the Panel appointed to decide the present case was constituted as follows:

President:	Mr Ulrich Haas, Professor in Zurich, Switzerland
Arbitrators:	Mr Massimo Coccia, Professor and attorney-at-law in Rome, Italy
	Mr Carlos Del Campo Colás, Secretary General of Liga Nacional de Fútbol Profesional in Madrid, Spain

23. On 5 November 2018, the Second Respondent filed its Answer, raising an objection to the jurisdiction of the CAS and requesting that this issue be decided as a threshold matter.

24. The First Respondent failed to file its Answer.

25. On 7 November 2018, the CAS Court Office advised the parties that Mr Oliver Vogel, attorney-at-law in Wiesbaden, Germany, had been appointed as *ad hoc* clerk in these proceedings.

26. By letter of 8 November 2018, the CAS Court Office noted that the Second Respondent – *inter alia* – had raised an objection to the jurisdiction of the CAS and granted the Appellant and the First Respondent a time limit of 10 days to file a supplement strictly limited to the Second Respondent's objection to the jurisdiction of the CAS.

27. On 19 November 2018, the Appellant filed its comments.

28. With letter dated 19 November 2018, the CAS Court Office noted that the First Respondent had failed to file its comments on this issue of jurisdiction within the prescribed time limit.

29. With letter of 21 November 2018, the Parties were invited to inform the CAS Court Office by 28 November 2018 whether they preferred a hearing to be held in this matter or for the Panel to issue an award based solely on the Parties' written submissions.

30. With letter of 27 November 2018, the Second Respondent informed the CAS Court Office of its preference to hold a hearing.

31. On 28 November 2018, the Appellant sent a letter requesting that a hearing be held.

32. By letter of 17 January 2019, the CAS Court Office informed the Parties that the Panel had decided not to bifurcate this case but to hear the issue of jurisdiction along with the merits of the case. It further informed the Parties that the Panel had also decided to hold a hearing in this matter.

33. On 29 January 2019, the CAS Court Office advised the Parties that the Panel had decided to dismiss the Second Respondent's request (contained in his) Answer according to which *"the Panel shall request the NADO all documents related to the present procedure from the beginning, including the requests made by Musto of the documentation package"*. Furthermore, the Parties were advised that it was up to them to adduce and present the evidence they deem necessary to make their case and that it was – in principle – not for the Panel to investigate the matter *ex officio*. Finally, the Second Respondent was invited to file witness statements with the CAS Court Office for Mr Agustin Fattal Jaef (in-house lawyer of CA Rosario), Mr Julio Pigliacampo (the agent of the Player) and Mrs Sabrina Goddard (nutritionist).

34. By letter dated 4 February 2019, the Second Respondent requested the Panel to reconsider its decision of 29 January 2019 whereby it dismissed the request for the production of additional documents.

35. On 6 February 2019, the CAS Court Office invited the Parties to comment on the Second Respondent's letter of 4 February 2019.

36. With letter dated 7 February 2019, the CAS Court Office advised the Parties that the hearing in the present case would be held on 05 April 2019 at the CAS Court Office, Lausanne, Switzerland.

37. With letter of 11 February 2019, the Appellant informed the CAS that FIFA and the Second Respondent had agreed on the following:

    i. that FIFA request the Laboratory Documentation Package ("LDP") from the Madrid laboratory;

    ii. that following the receipt of the LDP:

        a. the Second Respondent would have 7 days to submit comments regarding the LDP; and

        b. the Appellant would have 7 days to reply to the Second Respondent's comments.

    The Second Respondent also confirmed that, in view of the above, his request of 4 February 2019 was to be deemed withdrawn.

38. By letter of 12 February 2019, the CAS Court Office acknowledged receipt of the letter dated 11 February 2019 and approved its contents. The letter further advised that it was the Panel's understanding that the Appellant and the Second Respondent would request/procure the LDP themselves. The Parties were invited to confirm that the Panel's understanding was correct within 3 days as from the receipt of this letter. Furthermore, the Parties were informed that the

Panel considered the Second Respondent's request made in his letter of 4 February 2019 to be moot.

39. On 13 February 2019, the Appellant confirmed that the Panel's understanding of the Parties' agreement was correct and that the LDP had already been requested in the meantime.

40. On 18 February 2019, the Second Respondent filed the witness statements for Mrs Sabrina Goddard and Mr Agustin Fattal Jaef, but not for Mr Julio Pigliacampo.

41. By email of 8 March 2019, FIFA forwarded the LDP to the CAS Court Office and to the Second Respondent.

42. With letter dated 08 March 2019, the CAS Court Office acknowledged receipt of the LDP and granted the Second Respondent a deadline of 7 days to file his comments strictly limited to the LDP.

43. On 14 March 2019, the Second Respondent filed his comments on the LDP.

44. By letter of 14 March 2019, the CAS Court Office invited the Appellant and the First Respondent to submit their replies to the Second Respondent's comments within 7 days.

45. With email of 21 March 2019, the Appellant provided the CAS Court Office with its comments on the Second Respondent's submissions regarding the LDP.

46. The First Respondent did not file any comments on the Second Respondent's submissions regarding the LDP.

47. By letter of 22 March 2019, the CAS Court Office granted the Respondents a time limit of 5 days to comment on the new documents annexed to the Appellant's submissions.

48. On 28 March 2019, the CAS Court Office noted that the Respondents had failed to file comments on the new documents annexed to the Appellant's submissions.

49. Still on 28 March 2019, the CAS Court Office invited the Parties to sign and return the Order of Procedure ("OoP") by 2 April 2019.

50. By email of 30 March 2019, the First Respondent informed the CAS Court Office that the address to which all the correspondence had been sent so far would no longer be valid as of 1 April 2019.

51. By letter of 1 April 2019, the Second Respondent requested that the OoP be amended.

52. With letter of 2 April 2019, the CAS Court Office advised the First Respondent that it was up to the party of the proceedings to inform the CAS Court Office of any change of address. Furthermore, the CAS Court Office acknowledged the objections raised by the Second Respondent to the OoP and invited him to record these objections in the OoP and to return a signed copy thereof by 3 April 2019.

53. On 2 April 2019, the Appellant returned a signed copy of the OoP.

54. On 5 April 2019, the Second Respondent returned a signed copy of the OoP including his objections.

55. The First Respondent did not return the OoP singed.

56. On 5 April 2019, a hearing was held at the CAS Court Office in Lausanne, Switzerland.

57. Besides the members of the Panel, Mr Daniele Boccucci (Counsel to the CAS) and Mr Oliver Vogel (*Ad hoc* Clerk), the following persons attended the hearing:

    1) For the Appellant:
        a. Dr Volker Hesse, legal counsel
        b. Mr Jaime Cambreleng, Head of Litigation
        c. Ms Audrey Cech, legal counsel, litigation department

    2) For the Second Respondent:
        a. Mr Gustavo Casasola, legal counsel
        b. Mr Ariel Reck, legal counsel

58. The Panel heard evidence from the following persons:
    a) On behalf of the Appellant: Prof Martial Saugy, expert (in person)
    b) On behalf of the Second Respondent:
        a. Mr Damián Marcelo Musto (by video-conference)
        b. Mr Agustin Fattal Jaef, lawyer of CA Rosario (by telephone-conference)

59. At the hearing, the Second Respondent waived the witness testimonies of Mrs Sabrina Goddard and Mr Julio Pigliacampo.

60. At the closing of the hearing, the Parties expressly stated that they did not have any objections with regard to the procedure. The Parties further confirmed that they were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel and that their right to be heard had been respected.

V. POSITIONS OF THE PARTIES

61. The following is a summary of the Parties' submissions and does not purport to be comprehensive. However, the Panel has thoroughly considered all the evidence and arguments submitted by the Parties, even if no specific or detailed reference has been made thereto in the following outline of their positions and in the ensuing discussion of the merits.

A. The Appellant

62. The Appellant – in essence – is of the view that the Decision must be set aside and the Player must be sanctioned with a 2-year period of ineligibility starting on the date on which this award is communicated. In support of this request, the Appellant submits that:

63. The CAS has jurisdiction to hear the appeal.

(a) This ensues from Article R47 of the Code in conjunction with Articles 57 and 58 para. 5 of the FIFA Statutes. In addition, the jurisdiction of the CAS is also based on Articles 80 para. 3 and 75 para. 1 of the FIFA Anti-Doping Regulations (hereinafter the "FIFA ADR").

(b) The Player is an international-level player within the meaning of the FIFA ADR. He is a professional football player who participated in various competitions of the Confederation of North, Central America and Caribbean Association Football (hereinafter the "CONCACAF") and the Confederación Sudamericana de Fútbol (hereinafter the "CONMEBOL").

(c) Notwithstanding the above, the jurisdiction of the CAS also follows from Articles 81 and 75 para. 3 FIFA ADR. According thereto, FIFA has a right of appeal against decisions (within the meaning of Article 75 para. 2 FIFA ADR) that involve national-level players. Consequently, it is irrelevant for the question of CAS jurisdiction whether the Player is an international-level player or not. Furthermore, the FIFA ADR provide a right to appeal of FIFA directly to the CAS, i.e. without having to exhaust internal remedies of the national adjudicating bodies.

(d) The aforesaid is backed by CAS jurisprudence, e.g. CAS 2015/A/4215, where the panel stated under para. 125 as follows:

"It is apparent from the above FIFA ADR provisions that:

a) FIFA may appeal a final anti-doping rule violation decision involving an International Level Player rendered at association level (in casu the KFA) to the CAS (Article 75.1 of the FIFA ADR).

b) In anti-doping rule violation matters involving non International-Level Players, FIFA has the right to appeal to the relevant National Anti-Doping Organisation, in this case the KADA as confirmed by the Player (Article 75.3 of the FIFA ADR); and

c) FIFA has an option of filing a direct appeal to the CAS against any anti-doping rule violation decision rendered at national level without necessarily having to first exhaust the remedies available at the relevant National Anti-Doping organization (emphasis added), - in casu the KADA - if no other party has appealed the said decision (Article 81 of the FIFA ADR)".

(e) This adjudicatory system is not only in line with the prerequisites of the World Anti-Doping Code ("WADC"), but also with the Argentinian anti-doping law. The latter recognizes – *inter alia* – the jurisdiction of the CAS. The provisions of the Argentinian anti-doping law confirm FIFA's right to appeal any decisions directly to the CAS.

(f) The Appellant, additionally, submits that:

- The Player is not disputing CAS' jurisdiction *ratione personae* but only *ratione materiae*. However, CAS has also jurisdiction *ratione materiae* with regard to the Decision.
- The Player is a professional player with an impressive career. At the time of sample collection (20 June 2017) he was registered with the AFA. On 12 July 2017, he was transferred to the Club Tijuana and, consequently, registered with the Mexican Football Federation. On 26 July 2018, he was transferred again to the Spanish club SD Huesca and, thus, registered with the Spanish Football Federation. All these federations are members of FIFA and all players affiliated to these federations are bound by virtue of indirect membership to the FIFA Regulations. Consequently, the Player is submitted to the FIFA ADR. This also follows from Article 1.1 FIFA ADR according to which these regulations apply to players by virtue of their agreement, membership, affiliation, authorization, accreditation or participation. Thus, the FIFA Regulations including the FIFA ADR are applicable to the present case (and not Argentinian law).
- It is not a mandatory prerequisite for the jurisdiction of CAS that FIFA exhaust the internal remedies. According to Articles 81 and 75 paras. 1, 2 and 3 FIFA ADR (and in conformity with the relevant CAS jurisprudence, e.g. CAS 2015/A/4215) FIFA may opt to appeal directly to the CAS against a first-instance decision involving a football player *"without having to exhaust other remedies in the Anti-Doping Organization process"* (Article 81 FIFA ADR) if no other party has appealed the decision. In the case at hand no other party appealed the Decision within the Argentinian adjudicatory system.
- Article 81 FIFA ADR applies to both, national and international-level-players. The provision refers to *"remedies in the Anti-Doping Organisation's process"*. This wording not only covers decisions rendered by national football federations, but also decisions rendered by a national anti-doping organization.
- The CAS awards referred to by the Player (CAS 2017/A/5316 and CAS 2016/A/4563) are not relevant in the present case. In both proceedings neither the jurisdiction of the CAS nor the status of the football player involved was in dispute.
- The CAS award referred to by the Player (CAS 2008/A/1588) is not pertinent, because it is based on regulations no longer in force (FIFA Doping Control Regulations 2008, FIFA Disciplinary Code 2008).
- Even if Argentinian anti-doping law was applicable in this case (instead of the FIFA ADR) – *quod non* – the CAS would have jurisdiction, because the contents of the Argentinian anti-doping law is identical to the FIFA ADR. Similarly to Article 81 FIFA ADR, "Ley 27434 modificatoria de la Ley 26912" (Article 34 para. 2 amending Article 86 of the Ley 26912) acknowledges FIFA's right as an *"International Sports Federation"* to appeal *"directly to the Court of Arbitration for Sport without having to exhaust other remedies"*. The provision does not differentiate between national-level and international-level players.
- The argument of the Player that Article 86 of the Argentinian anti-doping law only applies to decisions of the second instance (and not the TNDA) must be rejected. Such understanding would – according to FIFA – not make any sense, since the

second instance is the final (national) instance and, thus, all internal means of recourse would have been exhausted with no national instance left to be bypassed based on Article 86 of the Argentinian anti-doping law.

- The jurisdiction of the CAS does not depend on whether the Player is qualified as an international-level or a national-level player. This follows from Articles 81 and 75 para. 3 FIFA ADR, since the latter provision refers to both type of players.
- Irrespective of the above, the Player is an international-level player within the meaning of the WADC. The WADC reserves the right to define an international-level athlete to the relevant international federation. However, the intention of the WADC is clear in that the term international-level athlete should cover *"athletes who compete in sport at international level"*. The Player clearly fulfills this definition, since he played in the top leagues of various countries (Uruguay, Argentina, Mexico and Spain) and participated in various international competitions of two different confederations (CONMEBOL and CONCACAF).
- The Player also complies with the definition of an international-level player in the FIFA ADR. He played eleven (11) international matches for the club CA Rosario before submitting to the doping control on 20 June 2017. He remained an international-level player also thereafter having played four (4) international matches for the Club Tijuana from February to March 2018. According to CAS jurisprudence (CAS 2015/A/4215, para. 130) a player must be qualified as an international-level player "by virtue of his eligibility" for past and even future international matches without even necessarily having been fielded. The fact that only 5% of the matches played by the Second Respondent were "international" is of no avail, since the definition in the FIFA ADR does not refer to a specific minimum quota or percentage of international matches played.
- Even if Argentinian anti-doping law was applicable – *quod non* – the result, once again, would remain unchanged, because "Ley 27434 modificatoria de la Ley 26912" (Article 34 para. 2 amending Article 86 of the Ley 26912), with respect to FIFA's right to appeal to the CAS does not differentiate between national-level and international-level players.

64. The Appellant further submits that:

(a) The appeal is admissible. FIFA received the Decision on 12 July 2018 and the full case file on 18 July 2018. On 7 August 2018, FIFA filed the Statement of Appeal.

(b) The applicable law to the merits for this case are the FIFA Regulations, in particular the FIFA ADR entered into force on 1 May 2018 and, additionally, Swiss law.

65. The Appellant submits that the Player has committed an ADRV:

(a) The Player violated Article 6 FIFA ADR. The ADRV committed by the Player has been established in accordance with Article 66 and 67 FIFA ADR.

(b) The substances Hydrochlorothiazide and Furosemide are prohibited according to the WADA's 2017 Prohibited List (class S5, "Diuretics and Masking Agents"). They are prohibited at all times. The applicable provisions do not require a minimum threshold or provide for a reporting limit.

(c) In the proceedings before the TNDA, the Player did not object to the analytical results of the Madrid laboratory or to any other part of the doping control process.

(d) Even after obtaining the LDP, the Player did not claim any irregularities of the doping control process. Moreover, the Player neither contested the analytical results of the Madrid laboratory nor did he challenge the internal chain of custody within the laboratory.

(e) The Player only challenged the external chain of custody. In particular, the Player submitted that irregularities occurred while his samples were in the custody of the National Sports Centre Lab (hereinafter the "CENARD") in Buenos Aires. His samples arrived at the CENARD on 21 June 2017 and were stored there until 23 August 2017. Only then were his samples sent to the Paris laboratory. The Appellant finds that all of the above does not constitute a departure from the applicable regulations. In particular no breach of the WADA International Standard for Testing and Investigations ("WADA ISTI") has occurred. Even if such departure occurred – *quod non* – the Appellant finds that it could not have reasonably caused the AAF (cf. Article 67 para. 2 FIFA ADR) because:

- The CENARD is a professional laboratory used by the Argentinian NADO to store samples. It is a laboratory with restricted access only for laboratory personnel. The samples are stored at the CENARD in cooled conditions in a locked area, which is equipped with an alarm system to detect temperature variations. Thus, the Player's samples were always safely stored at all times, which is also evidenced in the LDP. Any damage to, altering of and degradation of the samples as well as any departure from the applicable standards (including sabotage) can, therefore, be excluded.
- It is true that the samples were stored for two (2) months at the CENARD. However, this does not constitute a breach of the applicable regulations. Article 10 para. 2 FIFA ADR and Article 9.3.2 of the WADA ISTI both provide that a sample should be transported *"as soon as practicable"* to the laboratory. The mere fact that samples arrived in the Paris laboratory after two (2) months does not constitute a departure of the applicable rules. This finding is backed up by CAS jurisprudence (CAS 2013/A/3071 – 30 days of transportation of the sample to the laboratory; CAS 2009/A/2018 – two and a half months of transportation of the sample to the laboratory).
- Even if the Panel were to find that there was a substantial delay – *quod non* – the Second Respondent would have to show that such breach of the applicable rules could have reasonably caused the AAF. However, nothing in the LDP indicates that the Player's sample had been affected negatively by the long storage.
- The proceedings before the CAS are *de novo* procedures, according to Article R57 of the Code. The CAS has full power to review the facts and the law. Consequently,

any procedural defects that might have occurred before the previous instance (TNDA) have been cured. This is all the more true, considering that the Player received the LDP in the course of the present proceedings.

(f) Pursuant to Articles 6 and 19 para. 2 FIFA ADR, the Player must be sanctioned with a two-year-period of ineligibility.

(g) There is no room for a reduction of the Player's sanction pursuant Article 22 FIFA ADR. Any reduction based on "No Significant Fault or Negligence" ("NSF") requires that the Player establishes how the prohibited substance entered his system. The burden of proof in this respect rests on the Player. Consequently, it is not up to the Appellant to establish alternative scenarios, still less to prove which of them is more likely to be the source of the substance (see CAS/2012/A/2759 para. 42 seq.).

(h) According to the settled case-law the establishment of the source of the prohibited substance is a *conditio sine qua non* for any reduction under the NSF rules. CAS 2012/A/2759, para. 49 states in that respect that

"Unless and until the Player establishes the presence of the prohibited substance, the Panel cannot consider whether, and if so, how negligent he was".

(i) The applicable standard of proof for the Player to show the route of ingestion is – as consistently confirmed by CAS jurisprudence (e.g. CAS/2012/A/2759 para. 17 seq.) – the standard of balance of probability pursuant to Article 66 para. 2 FIFA ADR.

(j) In the proceedings before the TNDA, the Player submitted that he had taken the vitamin supplement "Natures Plus Chewable ACEROLA-C 55 mg Vitamin with Bioflavonoids Dietary Supplement" and capsules of pure caffeine that were not available on the market, but manufactured at the Rosario City compounded prescription pharmacy "Farmacia Salta". According to the Player's submission, the supplements and the capsules had been prescribed to him by the doctors of his club. Furthermore, the Player submitted that the "only possible" explanation how the prohibited substances could have entered his body is that either the vitamin supplement or the caffeine capsules had been contaminated. According to the Player, a contamination of the caffeine capsules/pills appears to be more likely. However, the Player failed to support these submissions with any proof. He only claimed that, because of the long time lapsed between the sample collection and the notification of the AAF, he was prevented from having the caffeine capsules/pills and the vitamin supplement tested. By the time he was notified of the AAF, he had used up all of the supplements and pills/capsules.

(k) FIFA is of the view that these explanations are not credible and, consequently, do not establish on a balance of probability that the supplements and capsules/pills ingested by the Player are the source of the prohibited substances found in the Player's samples because:

- The Player failed to mention the supplements and capsules/pills on the doping control form, even though the latter advises all players to record all prescribed and non-prescribed medications and supplements used during the past 7 days. The Player, who was assisted by an official of his club, only mentioned the following products on the doping control: *"Pridinol, Diclofenaco y Zoltiden"*.

- Moreover, in the proceedings before the TNDA the Player alleged that he took two (2) caffeine capsules/pills before the match and three (3) capsules of the vitamin supplement on the match day. However, one would expect a player to remember and record the taking of five (5) capsules/pills in close proximity right before sample collection. Thus, the Player's theory of contaminated supplements and/or capsules/pills does not appear credible.
- Furthermore, the Player's contamination theory is undermined by the fact that two (2) different prohibited substances were found in the Player's sample. It is rather unlikely that a product is contaminated with two (2) different prohibited substances or, alternatively, that an athlete ingests two products that are both contaminated with a prohibited substance. This is all the more true considering the opinion of the expert Professor Martial Saugy according to which *"the contamination of any pharmaceutical preparation or sport's supplement with two diuretics, to my knowledge, has never been documented in the past"*.
- The Player's theory of contaminated supplements is furthermore contradicted by the fact that – according to Player's submissions before the TNDA – all of his team players had taken the same caffeine capsules/pills before the matches upon the directions of the club doctor. Considering that the source of all products taken by all team players was identical (club officials bought the capsules from one pharmacy) it is rather striking that none of the other players tested positive for Hydrochlorothiazide and/or Furosemide.
- The low concentration of the two prohibited substances found in the Player's sample does not support the contamination theory. With respect thereto, the expert Professor Martial Saugy submitted as follows:

  "It is always difficult to draw clear conclusions from estimated concentrations of substances in a single urine, because we do not know the dose and the timing of the intake prior to the urine collection. Nevertheless, it can be said that these estimated concentrations could correspond to a late excretion of a normal dose of both substances 2-3 days after the intake. This can also correspond to the recent intake of a low dose of both products".
- The Player's submission that the specific gravity of his urine sample was within the normal range and that this proves that there was no diuretic effect, is contradicted by Professor Martial Saugy who stated that:

  "We can consider that 7.018 is the specific gravity of a non-diluted urine. With regard to the use of normal dose of diuretic(s), the urine specific gravity of urine will decrease for only a short period of time after the intake (2-5 hours). This means that this particular urine has been produced more than 5 hours after the intake of a normal dose of diuretic(s) or has not been affected by a recent low dose of the substances".

(l) In conclusion, the Appellant finds that the Player failed to establish the source of the prohibited substance found in his sample. Thus, the period of ineligibility to be imposed on the Player shall be two (2) years.

66. Subsidiarily, the Appellant submits as follows:

(a) According to CAS jurisprudence, *"a period of ineligibility can be reduced based on NSF only in cases where the circumstances justifying a deviation from the duty of exercising the "utmost caution" are truly exceptional, and not in the vast majority of cases"* (CAS 2016/A/4643 para. 84).

(b) Furthermore, the Appellant invites the Panel to take guidance from the comment to Article 10.5.1 WADC, which states that, *"[i]n assessing the Athlete's degree of Fault, it would, for example, be favorable for the Athlete if the Athlete had declared the product which was subsequently determined to be contaminated on his or her Doping Control form"*.

(c) The Appellant submits that in view of the above the Player's fault must be considered significant because the Player failed to record the two supplements on the Doping Control Form.

(d) Moreover, the Player did not take the necessary precautions a reasonable professional athlete would take in order to avoid the ADRV. Despite the frequent warnings from WADA, FIFA and many other anti-doping organizations about the danger associated with the use of supplements, the Player decided to ingest two (2) supplements / pills without making any inquiries or having them tested.

(e) Even more seriously, the Player – allegedly – used caffeine capsules/pills that were produced in a "Compound Pharmacy". This is rather careless considering that – according to the Player's own submissions – there have been many past cases in South America of football players testing positive after the use of contaminated products manufactured in "Compound Pharmacies". It can be expected from a professional first division football player of international experience like the Player to apply a greater degree of care in the choice and use of the products or supplements.

(f) In view of all of the above, the Player's degree of fault must be qualified as significant. Whether the Player took the supplements/pills at the direction of a club official has no impact on the Player's high degree of fault (cf. CAS 2005/A/872, para. 5.9).

67. Finally, with regard to the commencement of the period of ineligibility, the Appellant submits as follows:

(a) The TNDA backdated the start of the period of ineligibility in its Decision to 16 January 2018. In addition, the TNDA failed to provisionally suspend the Player. Consequently, he was eligible to play during the whole course of the procedure before the TNDA. In addition, since the Player's first official match with SD Huesca on 19 August 2018, he did not miss a single match despite being found guilty of an ADRV.

(b) The above situation is untenable. In order to guarantee the punitive and preventive effect of the sanction, the period of ineligibility must be effectively served by the Player. The TNDA violated the applicable rules by backdating the start of the sanction as there are no exceptional circumstances that could justify such retroactive start of the period of

ineligibility. There were no "substantial" delays in the procedure before the TNDA or in the anti-doping process. There was only one (1) instance dealing with the Player's case in Argentina compared to up to three (3) instances in other countries. The fact that it took about one (1) year from sample collection until the issuance of the Decision does not constitute an exceptional factor. This is all the more true considering that the Player was allowed to play during this whole period of time.

68. The Appellant has filed the following prayers for relief:

i. The appeal of FIFA is admissible.

ii. The decision of the Tribunal Nacional Disciplinario Antidopaje rendered on 19 June 2018 is set aside.

iii. Mr Damián Marcelo Musto is sanctioned with a two-year period of ineligibility starting the date on which the CAS award is communicated.

iv. The costs of the arbitration procedure shall be borne by the Respondents.

v. FIFA shall be granted a contribution to its legal fees and other expenses.

B. The First Respondent

69. The First Respondent initially submitted that it would not take part in the proceedings. It then, however, submitted that the Player cannot be considered an international-level player in accordance with Article 75 FIFA ADR at the time of the ADRV. The First Respondent has not filed any prayers for relief.

C. The Second Respondent

70. The submissions of the Second Respondent, in essence, may be summarized as follows:

71. First and foremost, the Second Respondent submits that CAS lacks jurisdiction:

(a) The Appellant failed to exhaust the remedies available against the Decision according to Article R47 of the Code.

(b) The applicable national anti-doping law provides in Article 86 of the law 26.912 (after the amendment by Article 34 para. 2 of the law 27.434) that the WADA, the IOC and the International Federations have the right to appeal directly to the CAS, only with respect to *"the decision of the second instance of the NADO, the National Antidoping Arbitration Tribunal (art. 84 of the law) and not the decision of the first instance body, the 'Tribunal Nacional Disciplinario Antidopaje'"*. In support of this, the Second Respondent refers to CAS 2014/A/3576:

"Where all internal legal remedies available to an appellant have not been exhausted, CAS has no jurisdiction to hear an appeal against a disciplinary decision taken by a first instance decision".

(c) The FIFA ADR (in particular Article 75 para. 3) do not apply to the present case. Instead, solely the WADC and Argentinian law are applicable. The AAF occurred in Argentina

and was asserted by the NADO. The latter is not bound by the FIFA ADR, but by the regulations of the WADC instead. The NADO is responsible for all doping controls in any sport in Argentina. Therefore, the WADC and the Argentinian anti-doping law are the only relevant sources of law for the NADO. *"[A]ny tailored rule inserted in the federations ADR to by-pass internal steps"* is not applicable. Finally, as the FIFA ADR are not in line with the WADC, and contrary to the Argentinian law, the FIFA Regulations must be discarded.

(d) The WADC is in conformity with the Argentinian anti-doping law. Both provide that only WADA has the right to bypass the internal instances by going directly to the CAS. This finding is not contradicted by the decision in CAS 2015/A/4125. In that case, the sample collection was conducted by the Korean Football Association that is – unlike the NADO – bound by the FIFA rules.

(e) The above findings are also supported by CAS jurisprudence (cf CAS 2008/A/1588 and CAS 2016/A/4563). CAS 2008/A/1588 – *inter alia* – provides that:

"1. In line with CAS jurisprudence, the system put in place under the FIFA Disciplinary Code (FDC), shows that FIFA has exclusive competences at national level. Therefore, the FDC is not directly applicable when it comes to sanctions imposed against players on national matches and competitions. In order to ensure the harmonization of doping sanctions at national level FIFA cannot claim the direct applicability of the FDC antidoping regulations but must use its disciplinary prerogatives provided under article 152 FDC in order to have national antidoping regulations amended accordingly.

Once the national antidoping regulations have been harmonized, it is then FIFA's and WADA's duty to ensure that those national regulations are correctly applied by the national judicial bodies, using their right of appeal if necessary.

2. Although the FDC antidoping regulations can apply at national level per reference through national civil law or through the statutes and antidoping regulations of the relevant national association, as a general rule the FDC antidoping regulations don't prevail on national antidoping regulations".

CAS 2016/A/4563 states, *inter alia,* that:

"Pursuant to Article R58 of the Code, the Sole Arbitrator concludes that the present appeal by WADA shall be decided on the basis of the EGY-NADO Rules in conjunction with the 2015 WADC so as to harmonise anti-doping policy rules and regulations within all sports in Egypt as well as all sports around the world. In this respect, the Sole Arbitrator notes that no party has asserted that any other set of laws or procedures should apply alternatively".

(f) The Player is not an international-level player, neither in the sense of the WADC nor within the meaning of the FIFA ADR. He is a national-level player instead. Also the TNDA qualified the Player as a national-level player.

(g) The Player – at the time of the AAF – had played 229 games at national level and 11 games at international level, thus 240 games in total. 2 matches at international level took place in the season 2012/2013 and 9 international matches in the season 2015/2016 between March and May 2016. The Player played no international match in the season when the sample was collected from him. Any games played after the ADRV occurred

cannot be taken into account when qualifying the player as national or international. This follows from the wording of the applicable provisions. Any ambiguity in the interpretation of the rules must be resolved applying the principle of *contra proferentem*.

(h) The Player also was not within the registered testing pool, neither before the AAF occurred nor afterwards.

(i) In the decision CAS 2017/A/5316 (para. 47) the panel qualified an athlete as a national-level player, even though he had played with the U 20 national team of his country and at the Copa Libertadores.

72. In case the CAS accepts jurisdiction, the Second Respondent submits that his procedural rights were violated in the course of the anti-doping process and that this must lead to a *"rejection of the appeal"*.

(a) There was an *"unjustified and never explained delay of the NADO to communicate the AAF"*. The AAF was only notified to the Player six (6) months after the sample collection on 20 June 2017. This prevented the Player to properly defend himself in the proceedings before the TNDA, since it was *"very difficult to reconstruct the events that could have caused an AAF or to gather evidence after so many months"*. When the Player received notice of the AAF he was already living in another country and playing in another league. All *"the supplements and medicine he was taking at the time of the sample were already consumed"* and therefore, it *"was almost impossible to reconstruct how the substance entered the player's body with accuracy after this amount of time"*. The Player claims that his right to a proper and full defense was affected.

(b) The NADO never sent the LDP to the Player. The Player requested the LDP twice. Both times the requests were refused. The Player was only provided with the estimated concentration levels of the prohibited substances found in his sample. In consequence thereof, the Player *"was deprived of an invaluable source of evidence and information and his right to a proper and full defense was hindered"*. This violation *"impeded the player to duly control the compliance with the international standards at the antidoping process and to re-construct properly the events of the past, which affected the whole case from the beginning in an irreparable manner"*. The Player was not provided with any information concerning the chain of custody of the samples. This is alarming considering that the relevant period in question covers 6 months. The late offering of the LDP by FIFA cannot cure the procedural violation of the Argentine NADO and does not change the fact that the athlete's rights were denied during the first instance procedure.

73. The Second Respondent submits that there was, in addition, a departure from the relevant International Standards and that, therefore, also for this reason the appeal must be dismissed.

(a) The TNDA has accepted in its Decision that the applicable regulations, in particular Article 7 para. 3 WADC, has been violated. The provision reads – *inter alia* – as follows:

Notification After Review Regarding Adverse Analytical Findings

If the review of an Adverse Analytical Finding under Article 7.2 does not reveal an applicable TUE or entitlement to a TUE as provided in the International Standard for Therapeutic Use Exemptions, or departure that caused the Adverse Analytical Finding the Anti-Doping Organization shall promptly notify the Athlete, in the manner set out in Articles 14.1.1 and 14.1.3 and its own rules, of: (a) the Adverse Analytical Finding; (b) the anti-doping rule violated; and (c) the Athlete's right to promptly request the analysis of the B Sample or, failing such request, that the B Sample analysis may be deemed waived; (d) the scheduled date, time and place for the B Sample analysis if the Athlete or Anti-Doping Organization chooses to request an analysis of the B Sample; (e) the opportunity for the Athlete and/or the Athlete's representative to attend the B Sample opening and analysis within the time period specified in the International Standard for Laboratories if such analysis is requested; and (f) the Athlete's right to request copies of the A and B Sample laboratory documentation package which includes information as required by the International Standard for Laboratories. If the Anti-Doping Organization decides not to bring forward the Adverse Analytical Finding as an anti-doping rule violation, it shall so notify the Athlete and the Anti-Doping Organizations as described in Article 14.1.2.

(b) It follows from the LDP that the sample (taken on 20 June 2017) was sent to Buenos Aires on 21 June 2017 and was temporarily stored there at the CENARD. The latter is a non-WADA-accredited laboratory. Only on 23 August 2017, the sample was sent to the Paris laboratory. There is no information about the (external) chain of custody, the temperature of storage and the persons that handled the sample during these 2 months. After a month in the Paris laboratory, the sample was then sent to the Madrid laboratory due to the suspension of the WADA-accreditation of the French laboratory. According to the Player the above constitutes a violation of the WADA ISTI, in particular Articles 6.3.5, 8.3, 8.3.2, 8.3.3, 9.3.2. The Player, furthermore, refers to CAS jurisprudence (CAS 2013/A/3071 and CAS 2013/A/3170) to support his case.

(c) The above deficiencies cannot be cured in a *de novo* hearing before the CAS. This is supported by the CAS decision (CAS 2013/A/3170), in which the panel has stated the following:

"1. Complete absence of an external chain of custody and multiple deficiencies in the internal chain of custody affect in a very material way the evaluation of a laboratory's Adverse Analytical Finding (AAF). The absence of this information is a breach of the WADA International Standard for Laboratories (ISL).

2. The failure for the anti-doping organization to duly submit the laboratory's Standard Operating Procedure (SOP) makes it impossible for the athlete to verify if the laboratory followed its own SOP, as is required under the WADA ISL. Therefore, the presumption that the laboratory has conducted its sample analysis in accordance with the ISL cannot be enforced against the athlete.

3. Due to the breaches of the WADA ISL the laboratory does not have the benefit of the presumption set out in the WADA Code for WADA accredited laboratories and the burden of proof therefore shifts to the anti-doping organisation to prove that the violations in the laboratory did not cause the AAF".

74. The Player submits that he established on a balance of probabilities how the prohibited substance entered his body.

(a) He accepts that the burden of proof lies with him and that the applicable standard of proof is the standard of "balance of probabilities". The CAS, however, has acknowledged in the Contador decision that this standard *"may require special application in so-called instances of "Beweisnotstand" or "evidence calamity",* i.e. *"when a party faces serious difficulty in discharging his or her burden of proof, in light of the fact that the information required to prove the fact is (for example) not in the athlete's control, or that: […] by its very nature, the alleged fact cannot be proven by direct means. This is the case whenever a party needs to prove "negative facts".* In consequence thereof, *"principles of procedural fairness demand that in cases where a party is facing extreme evidentiary difficulties, the opposing party who contests an explanation that has been offered must substantiate and explain in detail why it considers that the facts submitted by the other party are wrong".* This means, in essence, that *"while there is no re-allocation of the burden of proof, such cases will result in a "duty of cooperation" of the contesting party".*

(b) In application of the above, the Player finds that he may establish the source of the prohibited substance found in his sample as follows:

"i. The athlete must provide a credible explanation as to how the prohibited substance entered his or her system, direct proof of which may not be available to substantiate his or her claim.

ii. In such cases, the athlete may only succeed in discharging his or her burden by proving that: a. The explanation offered is possible; and b. Other sources from which the substance may have entered the athlete's body either do not exist or are less likely.

iii. Given that ii.(b) above involves a form of negative fact that is difficult to prove for the athlete, the party who contest the athlete's explanation must "contribute through substantiated submissions to the clarification of the corresponding facts of the case".

iv. The Panel must then evaluate the submissions of each party and determine what was most likely to have occurred. It is submitted that the Contador Panel's clarification of the operation of the standard of proof in instances of Beweisnotstand is both necessary and positive".

(c) The Player did not use any substances to enhance his performance. Consequently, the only possible explanations remaining are: a) a contamination of products used by the Player, b) a departure by the laboratory from the required standards in the course of the analysis, c) sabotage or d) the intentional intake of the prohibited substances by the Player.

(d) The Player submits that the most likely explanation is that the supplements, capsules or pills taken by the Player were contaminated and that all other alternatives can be ruled out. In support of this allegation, the Player refers to USADA's website, which reads as follows:

"Athletes are responsible of what they put in their body. Dietary supplements and other products can be mislabeled to incorrectly represent the ingredients contained therein. In the past, investigations of some nutritional supplements have shown that they contained prohibited substances, (…). Consumption of cross-contaminated multivitamins could lead to inadvertent positive tests and hence athletes should be aware of the substances they are consuming at all times".

(e) The Player took two different products, the vitamin supplement "Natures Plus Chewable ACEROLA-C 55 mg Vitamin with Bioflavonoids Dietary Supplement" and caffeine capsules/pills. The vitamin supplement was prescribed by the famous doctor Giuliano Poser, the caffeine pills were prescribed by the club's team doctor, Mr Marco Diaz. With regard to the vitamin supplement, the Player consulted also the club's team doctor and did some research on the internet. The latter revealed no evidence that the vitamin supplements could have been contaminated. The caffeine pills were given to 5-6 selected players per match in order to combat fatigue. Mr Marco Diaz would hand out the caffeine pills to selected players a couple of minutes prior to the match, when they were accessing the pitch. The pills were put in the players' hands. The players did not see the packaging of the caffeine pills.

(f) The Player submits that he got the caffeine capsules/pills analysed, but that the analysis results were negative. This is, however, not surprising, since the capsules/pills sent to the laboratory were from a different batch than the ones taken at the time of the AAF (seven months earlier). Furthermore, the analysis was conducted by a (non-WADA-accredited) laboratory in Argentina. Thus, according to the Appellant the quality and reliability of the laboratory analysis with respect to the caffeine capsules/pills is somewhat impaired. Furthermore, the medical team of the Player's club at the time cannot be considered entirely reliable, since it is established that the club's doctor prescribed prohibited substances to the club's players without their knowledge in the past (cf. CAS 2016/A/4849).

(g) Around the time when the Player's AAF occurred, several other "positive cases" involving similar prohibited substances became public. In total four (4) players of three (3) different Argentinian football teams tested positive for the substances "HCTZ" and for "HCTZ" together with "Furosemide". In all these cases the players submitted that the source of the AAF was either a contaminated caffeine pill or a contaminated supplement. These explanations were accepted by the competent adjudicatory bodies and the players were sanctioned each with a backdated period of ineligibility of 7 and 9 months. None of these decisions were appealed by FIFA.

(h) The Player could not have been aware of the risk of contamination at the time when he ingested the products, since all the above cases occurred contemporaneously with his case. Except for one (1) case, the decisions in these cases were all published in September 2017, i.e. 3 months after the Player's anti-doping test.

(i) There was a *"tendency"* within Argentinian football clubs to provide players with caffeine capsules/pills before the matches and with vitamin supplements in-between. This caused an *"epidemy"* of AAFs in the past. In particular, caffeine capsules/pills manufactured at local pharmacies are deemed to be the cause of such AAFs. These pharmacies commonly produce dietary products containing diuretics, especially furosemide and HCTZ. Consequently, cross-contamination appears to be very probable. While national laboratories are not sophisticated enough to detect these contaminations, WADA-accredited laboratories are. When this situation was revealed, Argentinian football clubs and players, respectively, ceased to use these kinds of caffeine capsules/pills.

(j) The expert report submitted by FIFA states that it is not aware of any case of product contamination with two diuretics at the same time. However, a simple internet search reveals that these cases exist. For instance, on the website of the International Tennis Federation one can read – *inter alia* – that

"The International Tennis Federation announced today that Fernando Romboli has been found to have committed an Anti-Doping Rule Violation under Article 2.1 of the Tennis Anti-Doping Programme (presence of a Prohibited Substance in a player's sample).

Mr Romboli, a 24-year-old tennis player from Brazil, provided a sample on 11 July 2012 at the ATP Challenger Event held in Bogota, Colombia. That sample was sent to the WADA-accredited laboratory in Montreal, Canada for analysis, and was found to contain two diuretics, furosemide and hydrochlorothiazide. Both furosemide and hydrochlorothiazide are Prohibited Substances under section S5 of the 2012 WADA List of Prohibited Substances and Prohibited Methods, and are therefore also prohibited under the Tennis Anti-Doping Programme (the "Programme"). Mr Romboli was therefore charged with an Anti-Doping Rule Violation under Article 2.1 of the Programme.

Mr Romboli asserted that the furosemide and hydrochlorothiazide, for which he did not hold a valid TUE, had entered his system through a contaminated supplement that had been prescribed for him by a doctor. He denied any intent to enhance his performance as a result of taking that supplement.

The ITF accepted Mr Romboli's account of the circumstances surrounding his ingestion of furosemide and hydrochlorothiazide, and that he (a) met the requirements to satisfy article 10.4 of the Programme (Elimination or Reduction of the Period of Ineligibility for Specified Substance under Specified Circumstances), and (b) bore No Significant Fault or Negligence.

Mr Romboli's commission of an Anti-Doping Rule Violation under Article 2.1 of the Programme was confirmed, and it was determined that he is suspended from participation for a period of eight and a half months, back-dated to commence from 1 September 2012, the date on which he accepted a voluntary provisional suspension, (…)".

(k) In summary therefore, also in the case at hand *"the inadverted consumption of the substances via supplement contamination (caffeine pills) is a valid and plausible explanation and in the expressed context the most reasonable one, beyond the standard of probabilities"*. Moreover, *"(…) the contamination explanation is not only confirmed from a medical point of view (as the expert report admits) but also supported by the context in Argentina with similar cases in the same time-frame explained for the change of laboratories from non-Wada credited to Wada credited and by the existence of previous cases involving the two substances"*.

75. With regard to the sanction imposed on him, the Second Respondent submits as follows:

(a) The sanction imposed by the TNDA is proportionate and consistent with other decisions in similar cases involving the same substances (cf. CAS 2011/A/2495; CAS A2/2011). A 2-year ban, on the contrary, is excessive and disproportionate.

(b) The TNDA was justified in backdating the start of the period of ineligibility on the basis of the particular circumstances of the case.

(c) 6 months had passed from the sample collection until the notification of the AAF. About 13 months elapsed in total between the date of the sample collection and the issuance of the Decision. Such delays affected the Player's right to a proper defense. They must be regarded as "substantial". This is confirmed by CAS jurisprudence (CAS 2010/A/2216, para. 16; CAS 2012/A/2859, para. 44 et seq.; CAS 2010/A/2307, para. 186). The Player in particular refers to CAS 2013/A/3071. In this case the panel confirmed (at para. 145) as follows:

"In the case in point, 34 days elapsed between the day of the sample collection and the day where the samples reached the Havana Laboratory, due to an agreement between the Venezuelan NADO and the Havana Laboratory. Such a delay is in no account not imputable to the Appellant and has, above all, been considered by the Panel as irregular and not in accordance with Article 5.9.1.9 of the FIE Rules (…). Therefore, the Panel deems it fair to apply the principle set forth in Article 10.9.1 of the FIE Rules and start the period of ineligibility 30 days before June 6 2012, date fixed by the FIE Tribunal".

(d) *"The starting date of the sanction is in line with the applicable regulations and the overall circumstances of the case"*, because the Player *"suffered consequences from the delay in process"*. His intended transfer to River Plate failed once the AAF became public. In addition, he was not permitted to train with the first team of his new club SD Huesca. As a result, he missed the preparation phase of the upcoming season where he usually prepares physically and learns to play with his new teammates.

76. The Second Respondent has submitted the following prayers for relief:

"1.- To issue a preliminary award on jurisdiction in the present case, confirming that the [Second Respondent] *is a national level athlete for the purposes of the applicable regulations and FIFA did not exhaust the internal legal remedies.*

2.- On a subsidiary basis to reject the appeal confirming the decision of the [TNDA] *in its entirety.*

3.- To order FIFA to pay all costs and expenses relating to the CAS arbitration proceedings.

4.- To order FIFA to pay a contribution towards the legal fees and other expenses incurred by this party, estimated in CHF 15.000.-"

VI. JURISDICTION

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

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

A. The Position of the Parties

78. The Appellant and the Second Respondent are in dispute whether or not CAS has jurisdiction to hear this case. The Second Respondent originally submitted that the FIFA regulations

(including the FIFA ADR) were not applicable and that only the Argentinian Law on the *Régimen juridico para la Prevención y el Control del Dopaje en el deporte* of 2013 (hereinafter referred to as "Law 26.912"), including its subsequent amendments, applied. In the hearing, the Second Respondent explained that the Player – holding a football license from the AFA at the relevant time – was also submitted to the FIFA regulations, but that the provisions in the Law 26.912 would prevail over the FIFA regulations, since the Decision was issued by the TNDA under the auspices of the Law 26.912. According thereto, thus, the CAS would lack jurisdiction since FIFA failed to exhaust the internal remedies by not appealing to the *Tribunal Arbitral Antidopaje* ("the Appeal Tribunal") before appealing to the CAS.

B. The Findings of the Panel

79. Whether CAS has jurisdiction in the present matter is only disputed between FIFA and the Second Respondent. The First Respondent, on the contrary, has not objected to CAS jurisdiction. In its correspondence with the CAS dated 24 August 2018, the TNDA stated that it will ratify any award issued by the CAS in the present dispute. In doing so, the First Respondent has unequivocally submitted to the jurisdiction of the CAS in the present dispute (even though the First Respondent failed to sign the OoP).

80. In view of the above, the Panel must only examine whether or not there is a valid arbitration agreement between FIFA and the Second Respondent. The starting point of such examination is Article 178 para. 2 of the Private International Law Act ("PILA") that reads as follows.

"Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law".

81. According to the above provision the question of whether or not an arbitration agreement has been executed is to be assessed – alternatively – according to different legal regimes. The Panel will first examine the relevant question in light of Swiss law. According thereto, it is undisputed that the Parties can also enter into an arbitration agreement by reference.

82. The FIFA Statutes provide in Article 57 as follows:

1. FIFA recognizes the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents.

2. The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.

83. Article 58 para. 5 of the FIFA Statues reads as follows:

FIFA is entitled to appeal to CAS against any internally final and binding doping-related decision passed in particular by the confederations, members or leagues in accordance with the provisions set out in the FIFA Anti-Doping Regulations.

84. It is undisputed between the Parties that the Player held a license from AFA at the relevant time. It is equally undisputed between the Parties that by holding such a license the Player has

submitted – *inter alia* – to the FIFA Regulations. Consequently, the Player by virtue of holding a license has submitted to an arbitration clause by reference and is bound to the above-cited FIFA arbitration clause related to appeals by FIFA against doping-related decisions (see CAS 2007/A/1370-1376, upheld by the Swiss Federal Tribunal in its judgment of 9 February 2009, 4A_400/2008). The Player does not dispute the formal validity of his submission to the FIFA Regulations (and the arbitration clause contained therein). Instead, the Player only submits that FIFA has failed to exhaust the internal remedies before filing its appeal to the CAS.

C. Is the appeal against the Decision covered by the FIFA Statutes *ratione materiae*?

85. Article 58 para. 5 of the FIFA Statutes provides – with respect to the material scope of the arbitration clause – that the doping-related decision forming the subject matter in dispute must be *"passed in particular by the confederations, members or leagues in accordance with the provisions set out in the FIFA Anti-Doping Regulations"*.

86. The Decision under appeal here was adopted by the TNDA, that is a distinct legal entity that is neither a confederation, nor a member of FIFA or a league. Nevertheless, the Panel holds that the doping-related decision in question here (the Decision) is covered by the material scope of the arbitration clause, since the list of decisions referred to in Article 58 para. 5 of the FIFA Statutes is not exhaustive ("in particular") and the TNDA is part of an Anti-Doping Organisation to whom the interested national federation (AFA) delegated its disciplinary responsibilities and powers in doping matters. Indeed, the FIFA ADR expressly refer to decisions of Anti-Doping Organizations being appealable to the CAS (cf. e.g. Articles 80 para. 3, 81 FIFA ADR). Article 80 para. 3 FIFA ADR – e.g. – provides:

"Where FIFA appeals against a decision of in particular an Association, ***Anti-Doping Organisation*** *or Confederation to CAS under this chapter, the applicable law for the proceedings shall be the FIFA regulations, in particular the FIFA Statutes, the FIFA Anti-Doping Regulations and the FIFA Disciplinary Code"* (emphasis added).

87. In addition, Article 2 para. 5 FIFA ADR expressly provides as follows:

"It is recognised that in some countries the Association will conduct the Testing and results management process itself whilst, in others, some or all of the Association's responsibilities may be delegated or assigned to a National Anti-Doping Organisation (NADO). In respect of these countries, reference in these Regulations to the Association shall, where appropriate, be understood as meaning the NADO".

88. Consequently, the Panel is persuaded that there is no room to argue that the Decision is not covered by the arbitration clause contained in the FIFA Statutes *ratione materiae*.

D. Exhaustion of legal Remedies?

89. The Parties are in dispute whether or not FIFA has exhausted the available internal means of recourse under the applicable provisions. Article R47 of the Code provides that an Appellant can only rely on the arbitration clause in favor of the CAS, if it has exhausted the legal remedies available to it prior to the appeal, in accordance with the applicable provisions.

90. The FIFA ADR, in principle, differentiate in relation to the internal means of recourses between national-level and international-level players. For international-level players Article 75 para. 1 FIFA ADR provides as follows:

"In cases arising from participation in an International Competition or in cases involving International-Level Players, a final decision within FIFA's, the Confederation's or the Association's process may be appealed exclusively to CAS".

91. For national-level players, Art 75 para. 2 FIFA ADR reads as follows:

"In cases where art. 75 para. 1 (Appeals involving International-Level Players or International Competitions) is not applicable, the decision may be appealed to a national-level appeal body, being an independent and impartial body established in accordance with rules adopted by the National Anti-Doping Organisation having jurisdiction over the Player or other Person. …".

92. Only once the national-level appeal body has issued its decision, then *"WADA … and FIFA shall also have the right to appeal to CAS with respect to the decision of the national-level appeal body"* according to Article 75 para. 3 FIFA ADR.

93. The Parties are in dispute whether the Player is a national-level or an international-level player. The term "international-level player" is defined in the FIFA ADR as follows:

"International-Level Player: a Player designated by FIFA or a Confederation as being within FIFA's or the Confederation's Registered Testing Pool and/or a Player who participates in International Competitions (as defined in these Regulations) and/or Competitions under the jurisdiction of a Confederation".

94. It is undisputed that the Player is neither in FIFA's nor in the Confederation's Registered Testing Pool. What is in dispute between the Parties is the second limb of the above definition, i.e. whether or not the Player is someone who *"participates in International Competitions…"*. The Panel has serious doubts whether the Player fulfills this condition. First of all, the Panel notes the present tense in the definition. This seems to indicate that a player – in order to qualify as an international-level player – must have participated at the relevant time (i.e. when the anti-doping rule violation occurred) in an international competition. This interpretation based on the wording of the definition is further backed by a construction of the provisions based on its spirit and purpose. Qualifying an athlete as international-level player in case he participated sometimes during his career in a single international competition would cast the net far too wide. If one were to follow such approach, any player participating in an international event would never lose his or her status as an international-level player. He or she would remain an international-level player even if the international competition dates back several years. This, however, would render the first limb of the definition meaningless, since players included in FIFA's or a Confederation's Registered Testing Pool most certainly would have participated (at some point in time) in an international competition. Finally, the Panel notes that CAS jurisprudence appears to be contradictory in this respect. In the case CAS 2015/A/4215, para. 128 *et seq*., the panel in an *obiter dictum* held that a player (not included in an international registered testing pool) qualified as an international-level player in the context of an anti-doping rule violation committed during a national football match because he had been called to participate in some other international events (without being fielded). In CAS 2017/A/5316 (para. 47), on the contrary, the panel qualified a player that had played with the U 20 national

team as a national-level player in the context of a national doping control. In CAS 2018/A/5842, the sole arbitrator qualified an athlete (not included in the relevant registered testing pool) as a national-level athlete even though during the same season he had participated in the Olympic Games, due to the fact that (i) the adverse analytical finding had occurred on the occasion of a national competition and (ii) the Olympic Games were not included in the international federation's list of "international competitions". Be it as it may, the Panel for the purposes of this case can leave the question unanswered, because Article 81 of the FIFA ADR provides – in special circumstances – that FIFA has a right to appeal doping-related decisions in the context of national-level players directly to the CAS. The provision reads as follows:

"Where FIFA has a right to appeal under this chapter and no other party has appealed a final decision within the Anti-Doping Organisation's process, FIFA may appeal such a decision directly to CAS without having to exhaust other remedies in the Anti-Doping Organisation process".

95. It is undisputed between the Parties that no other party with a right to appeal has challenged the Decision (before the national-level appeal body, i.e. the Appeal Tribunal); therefore, the Decision became legally "final" within the NADO's process. Consequently, by virtue of Article 81 FIFA ADR, FIFA may – even if the Player is qualified as a national-level player – appeal the Decision to the CAS without having to exhaust the other remedies within the Anti-Doping Organization's process.

E. The impact of the national Argentinian anti-doping law

96. The Panel notes that in the case at hand the Player is submitted to two different sets of rules, i.e. the FIFA ADR to which he submitted by entering into a license agreement with the AFA and the Law 26.912 being the statutory provisions governing the activities of the Argentinian NADO. Both sets of rules are not identical. In particular, Law 26.912 does not contain a provision comparable to Article 81 FIFA ADR. Contrary to what the Appellant finds, Article 86 of the Law 26.912 is not akin to Article 81 FIFA ADR. The provision reads – *inter alia* – as follows:

Sin embargo, la AGENCIA MUNDIAL ANTIDOPAJE, el COMITE AOLIMPICO INTERNATIONAL, el COMITE PARALIMPICO INTERNACIONAL y las Federaciones Deportivas Internacionales podrán (…) recurrir el laudo directamente ante el TRIBUNAL ARBITRAL DEL DEPORTE sin necesidad de agotar otras viás.

***Free translation**: "Notwithstanding the above, the World Anti-Doping Agency, the International Olympic Committee, the International Paralympic Committee and the International Sports Federations may (…) appeal the decision directly to the Court of Arbitration for Sport without having to exhaust other remedies".*

97. The Panel is of the view that the above provision only applies to appeals against decisions of the national-level appeal body (the Appeal Tribunal), and not to appeals against decisions of the first-instance body, i.e. the TNDA. This clearly follows from para. 1 of the provision and the fact that the latter is placed in the third chapter of the law 26.912 dealing with the Appeal Tribunal (and not with the TNDA). In the context of law 26.912, the "other remedies" that need not be exhausted under said Article 86 are clearly those in front of Argentinian state courts.

98. The mere fact, however, that both sets of rules to which the Player is submitted are not identical has no impact on the CAS jurisdiction. On the contrary, the Panel finds that it suffices that the arbitration agreement is found in either one of the applicable sets of rules in order to establish the jurisdiction of the CAS. This is all the more true considering that the FIFA ADR make it clear that they want to be applicable to all players irrespective of any concurrent set of rules. Article 1 para. 1 FIFA ADR provide as follows:

"These Regulations shall apply to FIFA, its Member Associations and the Confederations and to Players, clubs, Player Support Personnel, Match Officials, Officials and other Persons who participate in activities, Matches or Competitions organised by FIFA or its Associations by virtue of their agreement, membership, affiliation, authorisation, accreditation or participation".

99. To conclude, therefore, the Panel finds that the CAS has jurisdiction to entertain the present appeal.

VII. ADMISSIBILITY

100. Article R49 of the Code provides as follows:

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

101. In addition, Article 80 para. 1 and para. 3 FIFA ADR – *inter alia* – read:

"1. The time to file an appeal to CAS shall be 21 days from the date of the receipt of the motivated decision in an official FIFA language by the appealing party.

(…)

3. b) Where FIFA appeals against a decision of an Association, Anti-Doping Organisation or Confederation to CAS under this Chapter, FIFA's time limits stipulated in art. 80 par. 1.1 shall start with the receipt of the relevant document(s) by the FIFA Anti-Doping Unit (antidoping@fifa.org)".

102. The appeal was filed within the deadline of 21 days set by Article 80 para. 1, 3 FIFA ADR. Furthermore, the appeal complies with all other requirements of Article R48 of the Code. It follows that the appeal is admissible.

VIII. OTHER PROCEDURAL ISSUES

A. Decision not to issue a preliminary award on jurisdiction

103. The Second Respondent requested the Panel to issue a preliminary award on jurisdiction.

104. Article R55 para. 5 of the Code stipulates:

"When an objection to CAS jurisdiction is raised, the CAS Court Office or the Panel, if already constituted, shall invite the parties to file written submissions on jurisdiction. The Panel may rule on its jurisdiction either in a preliminary decision or in an award on the merits".

105. The Panel notes that, according to the above article, it is at the discretion of the Panel (*"may rule"*) whether to render a preliminary decision on its jurisdiction or to rule on its jurisdiction in the final award. When applying such discretion the Panel – in principle – also takes account of the reasoning submitted by the party requesting a preliminary decision, in particular why a preliminary decision – according to the requesting party's opinion – is necessary to safeguard its interests and to prevent it from possible harm or why a decision on jurisdiction, for some other reasons, is urgent or, otherwise, how and why the requesting party should legitimately benefit from a preliminary decision. The Panel notes that the Second Respondent failed to provide any reasons in support of his request of a preliminary award on jurisdiction going in this direction. Hence, the Panel declares that no compelling reason and no urgent necessity for a preliminary decision on jurisdiction is ascertainable in the case at hand. Thus, in exercising its discretion, it waived the opportunity to issue a separate preliminary award on its jurisdiction and, consequently, dismisses the Seconds Respondent's request.

B. Request for the production of the LDP by the Second Respondent

106. In his Answer the Player requested – *inter alia* – that the *"panel shall request the NADO all the documents related to the present procedure from the beginning, including the request made by Musto of the documentation package"*. With letter dated 29 January 2019, the Panel first dismissed the request because the Second Respondent's request was too generic and he did not provide reasons explaining why the documents would be material to the case. With letter dated 4 February, the Second Respondent asked the Panel to reconsider its previous decision. The Panel then invited the Appellant to provide its comments on the Second Respondent's request for reconsideration. In its letter dated 11 February 2019, FIFA informed the CAS that – subject to the Panel's acquiescence – it will request the LDP for the Player's sample and provide it to the Second Respondent. In view of the Parties' agreement, the Panel granted the Second Respondent's request to be provided with and to be able to comment on the LDP.

C. Late Filing of a document by the Second Respondent

107. At the hearing, the Second Respondent filed two documents. The first document pertained to a consolidated version of Law 26.912 containing all the amendments and changes. The second document referred to proof of receipt of the Decision by the counsel of the Player. According thereto, the Decision was notified to the (representative of the) Player on 21 June 2018. The Appellant did not object to taking these documents on file. In view of the agreement between the Second Respondent and the Appellant and in light of the relevancy of the new documents, the Panel – taking due consideration of Article R56 para. 1 of the Code – decided to accept them on file

D. Non-participation of the First Respondent

108. Subject to the First Respondent's letter dated 24 August 2018, it did not participate in these proceedings, did not sign the OoP and did not attend the hearing. Article R57 para. 4 of the Code provides that if *"any of the parties … having been duly summoned, fails to appear, the Panel may nevertheless proceed with the hearing and render the award"*. In application of the aforementioned provision the Panel proceeds with this arbitration despite of the First Respondent being in default.

E. Mandate of the Panel

109. According to Article R57 of the Code, the Panel has full power to review the facts and the law of the case (*de novo* proceedings). 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.

IX. APPLICABLE LAW

110. Article R58 of the CAS Code provides the following:

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

111. In addition, Article 80 para. 3 FIFA ADR determines – *inter alia* – the following:

"Where FIFA appeals against a decision of an Association, Anti-Doping Organisation or Confederation to CAS under this chapter, the applicable law for the proceedings shall be the FIFA Regulations, in particular the FIFA Statutes, the FIFA Anti-Doping Regulations and the FIFA Disciplinary Code".

112. Accordingly, the Panel considers that the present dispute shall be resolved on the basis of the applicable FIFA Regulations and, subsidiarily, based on Argentinean Law.

X. MERITS

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

i. Is the appeal to be dismissed because of fundamental and incurable breaches of the Player's right to defense?

ii. Is the appeal to be dismissed because there were breaches of the WADA ISTI?

iii. In case the aforementioned questions are answered in the negative, did the Player commit an ADRV, what is the proper length of the period of ineligibility and when shall the latter commence?

A. Were there fundamental and incurable Breaches of the Player's Right to Defense?

114. The Player submits that the delay in notification of the AAF and the denial of the TNDA to provide him with the LDP deprived him of his right to a full and proper defense. The delay in notification placed the Player in a "difficult situation" to reconstruct the facts and to collect relevant evidence. By withholding the LDP before the TNDA, the Player claims that he was deprived of an invaluable source of evidence and information. This affected *"the whole case from the beginning in an irreparable manner"*.

115. In principle, breaches of a party's procedural rights can be cured at a later stage in the proceeding, e.g. in a "second instance". This is particular true, where a *de novo* hearing is provided on appeal as is the case before the CAS (Article R57 para. 1 of the Code). In exceptional circumstances it may be true that a *de novo* hearing may not fully cure the breaches that occurred. In such cases a remedy is warranted. The Panel observes that the applicable rules – at least for some violations – provide for some kind of remedy. Thus – e.g. – the FIFA ADR regulate in Article 63 lit. e the player's right to a timely decision. In case this principle is violated, Article 28 FIFA ADR rules that *"where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Player … the FIFA Disciplinary Committee may decide that the period of ineligibility shall start at an earlier date …"*.

116. The Panel finds that the fact that the Player was only provided with the LDP at a late stage in the proceeding did not affect the present case in an irreparable manner. The LDP is – for sure – an important source of information. The documents help to understand whether or not there have been deviations from the applicable International Standards. The latter is a legal analysis that can be performed also at a later stage, i.e. before the appellate instance. Thus, the fact that the Player was only provided with the LDP before CAS has not impaired the Player's right to a fair defense.

117. It is true that the Player was only notified late in time. The Panel acknowledges that – with respect to the individual circumstances of the case – the delay made it more difficult for the Player to reconstruct the facts of the case and to collect relevant evidence. However, the Panel also finds that these difficulties are not of a sufficient level to reject the appeal filed by FIFA from the outset. Instead, the Panel finds that the difficulties encountered by the Player must be addressed in a proportionate and appropriate manner. The Panel will do so where warranted (see below). In conclusion, therefore, the Panel finds that there were no fundamental (and not otherwise curable) breaches to the Player's right of defense demanding that FIFA's appeal be dismissed.

B. Were there Breaches of the WADA ISTI?

a) The Position of the Parties

118. The Second Respondent submits that several rules of the WADA ISTI were breached, in particular Articles 6.3.5, 8.3, 8.3.2, 8.3.3, 9.3.2. The violations result – according to the Second Respondent – from the fact that the Player's samples were stored for two months at the CENARD, which is a laboratory that is not WADA-accredited. The Second Respondent

submits that nothing is known about the circumstances in which the samples were stored. There is no documentation. Furthermore, the Second Appellant takes issue with the fact that his samples were only analysed nearly six (6) months after sample collection.

119. The Appellant submits that the above does not constitute a breach of the WADA ISTI and that the samples were handled professionally at all time, i.e. also while they were stored at the CENARD. They were kept under safe conditions at all times, which is implicitly confirmed by the fact that the Madrid laboratory did not notice any degradation or manipulation of the samples. However, such information would have been recorded in the LDP if that was the case. The Player's samples were in proper condition when analysed by the Madrid laboratory.

b) The Legal Framework

120. The WADA ISTI is a mandatory International Standard developed as part of the World Anti-Doping Program. One of the purposes of the WADA ISTI is to ensure that the integrity and identity of the samples collected is maintained from the point the athlete/player is notified of the test to the point in time the samples are delivered to the laboratory for analysis. To that end, the WADA ISTI (including its Annexes) establishes mandatory standards – *inter alia* – for notification of Athletes, preparing for and conducting sample collection, security/post-test administration of samples and documentation, and transport of samples to laboratories for analysis.

121. The FIFA ADR reference the WADA ISTI on several occasions. The term International Standard is a defined term. According thereto the latter is a *"standard adopted by WADA in support of the World Anti-Doping Code. Compliance with an International Standard (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude that the procedures addressed by the International Standard were performed properly"*. Furthermore, the WADA ISTI is referred to in Article 67 FIFA ADR. The provision reads as follow:

"(2) The following rules of proof shall be applicable in doping cases:

…

c) Departures from any other International Standard [than the International Standard for Laboratories] or other anti-doping rule or policy set forth in the WADA Code or these Regulations which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such evidence or results. If the Player or other Person establishes a departure from another International Standard or other antidoping rule or policy which could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding or other anti-doping rule violation, FIFA shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation".

122. It follows from the above that a breach of the WADA ISTI *per se* does not invalidate the AAF. Only if the Player can establish that the departure from the WADA ISTI could have reasonably caused the ADRV, the onus shifts to FIFA to proof that in the case at hand such departure did not cause the AAF.

c) The Findings of the Panel

123. The Panel notes that the WADA ISTI clearly provides that the samples shall be transferred to the laboratory for analysis *"as soon as practicable"* (see Article 9.3.2 of the WADA ISTI; see also Article 11 para. 2 FIFA ADR). The rationale of the provision is clear, it is to protect the sample from degradation and manipulation. Samples may be exposed to such dangers on their way to the laboratory. Once they are with the laboratory, they will be in "safe conditions". However, it also true that the provision does not state that samples shall be transported to the laboratory "as soon as possible", but only "as soon as practicable". Thus, the provision allows for a balancing of interests. According thereto, reasons of practicability may take precedence, in particular, when the samples are being stored in a safe and stable environment before being sent to the laboratory. In any event, the provision grants some discretion to the respective anti-doping authority.

124. The Panel is not persuaded that the storage of the samples at CENARD for about two (2) months exceeds such discretion and breaches Article 9.3.2 of the WADA ISTI, because the CENARD is a laboratory (though not WADA-accredited) that provides for safe storage conditions with respect to the samples. The Second Respondent did not substantiate why it would be "impracticable" to store the samples at the CENARD before sending them to the Paris laboratory.

125. Be it as it may, the Panel finds that the question of a breach of the WADA ISTI can remain unanswered here, since according to Article 67 para. 2 lit. c FIFA ADR, a violation of the WADA ISTI does not *per se* invalidate the analytical results of the laboratory. Instead, a breach of the WADA ISTI may affect the AAF only insofar as such a breach *"could have reasonably caused the anti-doping rule violation"*. The Panel is not persuaded that this is the case here.

126. First of all, the integrity of the Player's samples was acknowledged by the Paris laboratory. It is evident from the LDP that the samples arrived in Paris properly sealed and that, therefore, any tampering with the samples during their storage at the CENARD and the transport of the sample to the Paris laboratory can be excluded. After the opening of the A-sample in Paris, the latter was again properly sealed before the A and the B-samples were shipped to the Madrid laboratory. This is also evidenced by the LDP. Again, there is no evidence on file that anybody tampered with either the A or the B sample. It follows again from the LDP that the samples arrived in Madrid properly sealed. To conclude, therefore, the Panel finds that the samples tested in the Spanish laboratory stem from the Player and were not tampered with throughout the whole external chain of custody.

127. Secondly, it is true that between the sample collection on 17 June 2017 and the analysis of the A sample by the Madrid laboratory on 27 November 2017 nearly 5 months elapsed. However, nothing on file indicates that the Player's samples suffered degradation or were adversely affected in any other way. The LDP, on the contrary, shows that the pH of the Player's urine samples was normal. This is a clear indication that the samples had not suffered degradation. Furthermore, the LDP documents that the Player's urine samples were kept in frozen or chilled conditions at all times in order to protect the integrity of the samples. In addition, even if the samples had suffered degradation – *quod non* – the Player would have to prove that such

degradation of the samples could have caused the AAF. In principle, however, a degradation of a sample tends to be rather to the benefit of an athlete than to his or her detriment, since a degradation of the sample in most instances renders the detection of a prohibited substance in the sample more difficult.

128. To conclude, therefore, the Panel finds that, based on the evidence before it, it may not invalidate the findings of the Madrid laboratory.

C. Did the Player commit an ADRV?

129. In view of all of the above, the Panel finds that FIFA has discharged its burden according to Article 66 FIFA ADR *"of establishing that an anti-doping rule violation has occurred"*. The ADRV in question here is described in Article 6 FIFA ADR as follows:

"1. It is each Player's personal duty to ensure that no prohibited substance enters his body, Players 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 Player's part be demonstrated in order to establish an anti-doping violation under art. 6.

2. Sufficient proof of an anti-doping rule violation under art. 6 is established by either of the following: the presence of a Prohibited Substance or its Metabolites or Markers in the Player's "A" Sample where the player waives analysis of the "B" Sample and the "B" Sample is not analysed; or where the player's "B" sample is analysed and the analysis of the player's "B" Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the player's "A" Sample; or where Player's "B" Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.

3. Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in a player's Sample shall constitute an anti-doping rule violation.

4. As an exception to the general rule of art. 6, the Prohibited List or International Standards may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously".

130. The Madrid laboratory established the presence of "Hydrochlorothiazide" and "Furosemide" both in the A and the B sample. Both substances are prohibited in and out-of-competition and belong to class S5 of the WADA Prohibited List. Both substances are specified substances. The Panel is comfortably convinced that the Player committed an anti-doping rule violation for presence of a prohibited substance within the meaning of Article 6 FIFA ADR.

D. What is the appropriate period of Ineligibility?

a) The starting point

131. Article 19 FIFA ADR provides as a starting point the following periods of ineligibility in case of the presence of a prohibited substance:

1. The period of ineligibility shall be four years where

a) The anti-doping rule violation does not involve a Specified Substance, unless the Player or other Person can establish that the anti-doping rule violation was not intentional;

b) The anti-doping rule violation involves a Specified Substance and FIFA can establish that the anti-doping rule violation was intentional.

2. If art 19 par. 1 does not apply, the period of ineligibility shall be two years.

3. As used in arts 19 (Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method) and 20 (Ineligibility for Other Anti-Doping Rule Violations), the term "intentional" is meant to identify those Players who cheat. The term therefore requires that the Player or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. With regard to anti-doping rule violations resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition, there shall be rebuttable presumption that said violations are not intentional if the substance is a Specified Substance and the Player can establish that the Prohibited Substance was used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Player can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to Sport performance.

132. FIFA in its Appeal Brief stated that *"it does not base its appeal on art. 19 par. 1 ADR and hence FIFA does not request a 4-year period of ineligibility. FIFA submits that art. 19 par. 2 applies in the present case"*. It follows from the above that both FIFA and the Second Respondent are of the view that the ADRV committed by the Player does not involve intentional behaviour (within the meaning of Article 19 para. 3 FIFA ADR), but instead was caused by the Player's negligence.

b) Reduction based on NSF

133. The FIFA ADR provide in Article 22 that – in special circumstances – the 2-year period of ineligibility provided for in Article 19 para. 2 FIFA ADR may be reduced. Article 22 FIFA ADR reads – *inter alia* – as follows:

"1. Reduction of sanctions for Specified Substances or Contaminated Products for violations of art. 6 (Presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample), 7 (Use or attempted Use by a Player of a Prohibited Substance or a Prohibited Method) or 11 (Possession of a Prohibited Substance or a Prohibited Method)

a) Specified Substances

Where the anti-doping rule violation involves a Specified Substance, and the Player or other Person can establish No Significant Fault or Negligence, the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Player's or other Person 's degree of Fault.

b) Contaminated Products

In cases where the Player or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years' Ineligibility, depending on the Player's or other Person's degree of Fault".

134. The term "fault" is defined in the FIFA ADR as follows:

"Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing a Player or other Person's degree of Fault include, for example, the Player's or other Person's experience, whether the Player or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Player and the level of care and investigation exercised by the Player in relation to what should have been the perceived level of risk. In assessing the Player's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Player's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that a Player would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Player only has a short time left in his career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under art. 22 par. 1 or 2 (Reduction of the period of Ineligibility based on No Significant Fault or Negligence)".

135. The term NSF is defined in the FIFA ADR as follows:

"the Player or other Person's establishing that his Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of art. 6 (Presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample), the Player must also establish how the Prohibited Substance entered his system".

ba) The Position of the Parties

136. The Player submits that the AAF was the result of a contamination of one of the two products he used at the time of sample collection, i.e. the vitamin supplement or the caffeine pills manufactured at a local pharmacy. The Player submits that several cases of contaminated caffeine pills (manufactured in local pharmacies) have become public in South America. These cases occurred around the time when he had been tested. Thus, it is very likely that also his AAF falls within that group of cases. The Player submits that, because of the substantial delays between sample collection and the analysis, he was prevented from collecting and establishing evidence in his favor ("Beweisnotstand"). He could no longer test any of the other caffeine pills of the relevant batch, because he had used them all up in the meantime. The Player submits that he did all that could be reasonably expected from him to establish the source of the prohibited substances detected in his samples. The Player is further of the opinion that, in view of the circumstances of the case, he qualifies for a low degree of fault and, therefore, fulfils the threshold of NSF.

137. The Appellant objects to the concept of *"Beweisnotstand"*. The Appellant finds that the Player failed to establish the source of the prohibited substances detected in his system and that,

therefore, there is no room for a reduction of the 2-year period of ineligibility based on NSF. Even if the Panel were to find that the Player established the source of the prohibited substances – *quod non* – the Appellant finds that the Player was considerably at fault.

bb) The Findings of the Panel

138. In order to claim a reduction under Article 22 FIFA ADR, the Player must show how the prohibited substances entered his system. The burden of proof is on him (cf. CAS 2012/A/2759, para. 49). The standard of proof according to Article 66 para. 2 of the FIFA ADR is as follows:

"Where these Regulations place the burden of proof upon the Player 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".

139. When assessing the evidence before it, the Panel is satisfied on a balance of probabilities that the presence of the prohibited substances is a result of the intake of the caffeine pills. In coming to this conclusion, the Panel took into account the following:

(i) The use of caffeine pills has been a wide-spread (bad) practice in South American football for many years (see e.g. CAS 2007/A/1370-1376).

(ii) It appears that, at around the time when the Player was tested, a considerable amount of AAF have been reported as result of the above practice.

(iii) The substances found in the Player's bodily specimen appear to be typical for contaminated caffeine pills.

(iv) The Player's submissions in this respect were credible and consistent and, moreover, backed by the oral testimony of Mr Agustin Fattal Jaef, lawyer of the Player's former football club CA Rosario, who – *inter alia* – confirmed at the hearing that it was the club who advised the players to take the pills, who purchased the pills at a local pharmacy, stored them at its medical department and finally selected the individual players that took the pills.

(v) The finding of the Panel is not contradicted by the evidence of the expert Prof Martial Saugy. The latter stated in his expert report and at the hearing as follows: *"It is always difficult to draw clear conclusions from estimated concentrations of substances in a single urine, because we do not know the dose and the timing of the intake prior to the urine collection. Nevertheless, it can be said that these estimated concentrations could correspond to a late excretion of a normal dose of both substances 2-3 days after the intake. This can also correspond to the recent intake of a low dose of both products. The probability that these concentrations are due to the consumption of a contaminated product can be hardly evaluated with this sole information".*

(vi) In his expert report Prof Saugy also said that *"[t]he contamination of any pharmaceutical preparation or sport's supplement with two diuretics, to my knowledge, has never been documented in the past".* In the hearing Prof Saugy relativized the weight of his statement and explained that, personally, he had not heard of such cases at the time when he compiled his expert report. He stated at the hearing, however, that a contamination also with two different substances

was possible and that he had taken due note in the meantime of the case of Mr Fernando Romboli, i.e. a South American tennis player who tested positive for two diuretics (Furosemide and Hydrochlorothiazide) following the intake of a contaminated supplement.

(vii) Even though the Player did not list the caffeine pills on his doping control form – which would seem at first sight to contradict his version of facts – he credibly explained that the Doping Control Form had been filled out by the team doctor, Mr Marco Diaz, while he was passing the sample. The Player only signed the Doping Control Form after providing the sample.

(viii) The Player – due to the delays not attributable to him – was put in a difficult situation with regard to his onus to identify and prove the route of ingestion. This is uncontested between the Parties. The Appellant acknowledged at the hearing that the lapse of about 6 months between sample collection and notification of the AAF is a substantial delay that affected the Player's situation negatively. The Panel is aware of the CAS jurisprudence that applies stringent conditions when it comes to proving how the prohibited substance entered an athlete's system. However, in light of the specific circumstances of this case (substantial delays in notification and relocation of the Player to Mexico and later on to Spain) that rendered it particularly difficult for the Player to reconstruct the facts and collect evidence, the Panel finds that no excessive requirements or conditions remote from everyday life should be applied when determining the required threshold of substantiation.

140. When determining the appropriate sanction, the Panel notes that, under Article 22 para. 1 lit. a FIFA ADR, the breadth of sanction is from a reprimand to 24 months ineligibility depending on the Player's degree of fault. In exercising its discretion within this range, the Panel differentiates between "normal degree of fault" ranging between 12-24 months and a "light degree of fault" ranging between a reprimand and 12 months. In order to determine into which category of fault a particular case might fall, it is according to CAS jurisprudence (CAS 2013/A/3227, para. 71) helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities.

141. The Panel finds that this case is situated rather at the higher end of "light degree of fault". In coming to this conclusion, the Panel takes into account that

(i) The substances found in the Player's system are prohibited in and out-of-competition;

(ii) It is the Player's responsibility to ensure that no prohibited substance enters his system;

(iii) The Player, at best, did some internet research, he did not contact the manufacturer of the supplements, let alone did he attempt to get them analyzed before the intake;

(iv) The fact that, in general, food supplements often generate positive testing due to contamination and that, specifically, in the past some South American football players had tested positive due to contaminated caffeine pills given by team doctors (see e.g. CAS

2007/A/1370-1376) should have induced the Player to take a much more diligent approach;

(v) The pills were given by the team doctor, Mr Marco Diaz, to the Player only minutes before the start of the match. The Player at this point in time had neither the possibility to check the label of the product, inquire about the origin of the caffeine pills or conduct an internet search on the product or manufacturer. In addition, the Player was told that the pills had been manufactured by a "reliable pharmacy";

(vi) The pills were given to several players before each match (in general, 5-6 starting players). They were distributed openly and not covertly by the team doctor. Consequently, this procedure appeared unsuspicious to the Player;

(vii) The Player did not suspect that the club failed to get the caffeine pills tested, as the team doctor, Mr Marco Diaz, advised the Player that the pills came from a reliable source.

(viii) The Player never heard of any of his teammates testing positive. Since he was not the only player taken the pills and considering that the players were regularly tested, the Player felt confident that he did not need to be concerned about the caffeine pills.

142. In view of all of the above the Panel finds that a period of 11 months is proportionate in view of the Player's degree of fault and in light of the available jurisprudence.

E. The commencement of the period of ineligibility

143. Article 28 FIFA ADR– *inter alia* – provides:

"Except as provided below, the period of Ineligibility shall start as soon as the decision providing for Ineligibility is communicated to the Player or other Person concerned.

1. Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Player or other Person, the FIFA Disciplinary Committee may decide that the period of Ineligibility shall start at an earlier date, commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be disqualified.

2. Where the Player or other Person promptly (which, in all events, for a Player means before the Player competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by FIFA, the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this article is applied, the Player or other Person shall serve at least one half of the period of Ineligibility going forward from the date the Player or other Person accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, the date of the communication of the decision imposing a sanction, or the date the sanction is otherwise imposed. This article shall not apply where the period of Ineligibility has already been reduced under art. 23 par. 3 (Elimination, reduction, or suspension of period of Ineligibility or other consequences for reasons other than Fault).

3. a) If a Provisional Suspension is imposed and respected by the Player or other Person, the Player or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. If a period of Ineligibility is served pursuant to a decision that is subsequently

appealed, the Player or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal".

a) The Position of the Parties

144. In its written submissions, FIFA first argued that there were no "substantial" delays in the present proceedings. After reviewing the LDP, FIFA acknowledged that there were substantial delays not attributable to the Player and, thus, FIFA requested the Panel to apply Article 28 para. 1 FIFA ADR as it deems fair and reasonable. The Second Respondent is of the view that the start of the period of ineligibility must be backdated due to substantial delays. The Appellant submits that he suffered negative consequences from the delays in the process, namely (i) the failure of his intended transfer to River Plate and (ii) the fact of missing the pre-season preparation phase and the training with the first team of his new club SD Huesca.

b) The Findings of the Panel

145. It is undisputed that there were delays in the present case in the context of the analysis of the Player's sample and, in particular, in the procedure before the TNA, that these delays were substantial and that they cannot be attributed to the Player. Accordingly, the Panel finds that there is room to backdate the Player's sanction pursuant to Article 28 para. 1 FIFA ADR.

146. Article 28 para. 1 FIFA ADR grants the Panel discretion (*"may decide"*) if and how far it wants to backdate the period of ineligibility. When making use of its discretion the Panel first and foremost notes that backdating a period of ineligibility in team sports effectively amounts to waiving part of the sanction, since – differently from individual sports – *"competitive results achieved during the period of ineligibility"* can – in principle – not be disqualified (the exception being when multiple players test positive at the same time). Thus, the Panel must show restraint when backdating the period of ineligibility in order not to undermine the FIFA ADR. The Panel further notes that as a consequence of the Decision the Player so far has not missed a single official/in-season match. This being said, the Panel notes that the Player submits that he was adversely affected by the sanction, because he could not participate in the team preparations for the 2018/2019, because he was not allowed to train with his new team.

147. In view of the above, the Panel deems it fair that the commencement of the 11-months period of ineligibility shall start on the hearing date before the CAS, i.e. on 5 April 2019. Furthermore, the Panel finds that the period effectively served by the Player between 19 June 2018 and 15 August 2018 must be credited to the Player according to Article 28 para. 3 FIFA ADR.

F. Summary

148. The CAS has jurisdiction to decide the present appeal file by FIFA against the Decision of the TNDA.

149. The appeal is admissible. The mere fact that the TNDA withheld the LDP from the Player does not violate the Player's procedural right to an extent to invalidate the present proceedings.

Instead, these proceedings are de novo proceedings that cure procedural flaws at the lower instance. Since the LDP was provided to the Player in the course of the present proceedings, the Player had the right to a fair and proper defense before CAS.

150. The Player has committed an ADRV. FIFA has discharged its burden of showing that there were prohibited substances in the Player's sample. The Panel is not persuaded that there was a breach of the WADA ISTI and even if this were true – quod non – the Player has failed to demonstrate that such breach could have reasonably caused the AAF.

151. The Player committed the ADRV negligently. Furthermore, the Panel applies a reduction based on NSF and find that the appropriate sanction according to Article 22 FIFA ADR is 11 months.

152. The 11-month period of ineligibility shall start – in application of Article 28 para. 1 FIFA ADR – on 5 April 2019 and, consequently, should end with the expiry of 4 March 2020. However, the Player shall receive credit according to Article 28 para. 3 FIFA ADR for the period of ineligibility effectively served, i.e. from 19 June 2018 until 15 August 2018 (corresponding to 58 days). As a consequence, the Player's period of ineligibility shall end with the expiry of 6 January 2020.

153. All other and/or further reaching requests are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the Fédération Internationale de Football Association on 7 August 2018 against the decision issued by the Tribunal Nactional Disciplinario Antidopaje on 19 June 2018 is partially upheld.

2. The decision of the Tribunal Nacional Disciplinario Antidopaje dated 19 June 2018 is set aside.

3. Mr Damián Marcelo Musto is declared ineligible for a period of 11 months for having committed an anti-doping rule violation pursuant to Article 6 of the FIFA Anti-Doping Regulations. The period of ineligibility shall start on 5 April 2019. Mr Damián Marcelo Musto shall receive credit for the period of ineligibility effectively served from 19 June 2018 until 15 August 2018.

4. (…).

5. (…).

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