Arbitration CAS 2013/A/3262 Joel Melchor Sánchez Alegría v. Fédération Internationale de Football Association (FIFA), award of 30 September 2014 (operative part of 18 June 2014)

Panel: Mr Stuart McInnes (United Kingdom), President; Mr João Nogueira da Rocha (Portugal); Mr Pedro Tomás Marqués (Spain)

Football
Doping (methylhexameanine)
Admissibility of the appeal
De novo hearing
Lack of intent to enhance sport performance
Degree of fault or negligence
Personal duty of the athlete to ensure that no prohibited substance enters his body

1. **If particular items are missing in a Statement of Appeal, it can be reasonable for the CAS and in accordance with article R48 of the CAS Code, to accept the Statement of Appeal as filed and grant a short deadline of 5 days to supplement the initial submission and not deprive the appellant of its right to appeal based solely on the straightforward application of a procedural rule.**

2. **Pursuant to article R57 CAS Code, a CAS panel has full power to review the facts and the law *de novo* on an appeal, which may include, in certain circumstances, that potential violations of the principle of due process or of the right to be heard in prior instances, may be cured in the appeal before the CAS.**

3. **In order to satisfy lack of intent to enhance sport performance, the athlete shall demonstrate to the adjudicating body's comfortable satisfaction that the prohibited substance was not intended to enhance his sport performance, and produce corroborating evidence in addition to his own statement that establishes a lack of intent to the comfortable satisfaction of the adjudicating body. In particular, the athlete needs to prove that the ingestion of the specified substance, rather than the product itself, was not intended to enhance his sport performance. In any case, the mere fact that the athlete allegedly did not know that the product contained the specified substance does not establish an absence of intent. An athlete may only argue an absence of intent to enhance performance when his behaviour was not reckless, but only oblivious.**

4. **There are several factors to determine the athlete's degree of fault and eventually reduce the period of ineligibility, including (i) the fact that before taking the product for the first time the athlete consulted with personal trainers, (ii) read the product label, (iii) conducted internet research, (iv) consulted with the team's physician about all the nutritional supplements and products he was taking. In this respect, the fact that the label of the product contains a warning in English which was allegedly not understood**

by the athlete is no excuse. The facts that no internet research was made, that no team doctor was consulted but only a nutritionist who does not work in the world of football, and that the athlete did not disclose the product in his doping control form, shall be considered not only as a clear lack of the minimum diligence, but also as a sign that the athlete was trying to conceal that he was taking the product. Therefore, the athlete's degree of fault or negligence, viewed in the totality of the circumstances, is clearly significant in relation to the anti-doping rule violation and the sanction cannot be eliminated or reduced.

5. The FIFA Anti-Doping Regulations impose a personal duty upon each football player to ensure that no prohibited substance enters the football player's body, which necessarily means that the player must have taken all available precautions to avoid any anti-doping rule violations. Accordingly, the fact that this is a personal duty, means the player cannot avoid liability by simply arguing that another person was negligent.

I. THE PARTIES

1. Mr. Joel Melchor Sánchez Alegría (hereinafter, the "Player" or the "Appellant") is a professional Peruvian football player who at the time of the facts leading to the present proceedings was playing for the Peruvian' national football team.

2. The Fédération Internationale de Football Association (hereinafter "FIFA" or the "Respondent") is an association in accordance with Swiss law; it is the governing body of football on worldwide level and has its registered office in Zurich, Switzerland.

II. THE FACTS

3. A summary of the most relevant facts and the background giving rise to the present proceedings will be developed based on the parties' written submissions and statements, the FIFA file, and the evidence taken. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. The Panel refers in its Award only to the submissions and evidence it deems necessary to explain its reasoning. However, the Panel has considered all the factual allegations, legal arguments and evidence submitted by the parties in the present proceedings.

4. On 12 October 2012, during a preliminary competition match of the 2014 FIFA World Cup Brazil between Bolivia and Peru in La Paz, the Player underwent an in-competition doping control. In his "Doping Control Form 0-1" the Player did not mention any Prohibited Substance.

5. On 14 December 2012, the Player's urine sample was tested in the WADA-accredited laboratory of Rio de Janeiro, Brazil (the LAB DOP – LADETEC / IQ – UFRJ).

6. On 17 December 2012, the laboratory indicated that the Player's A sample produced an adverse analytical finding for the substance *methylhexaneamine* (hereinafter, also referred to as the "Prohibited Substance"). *Methylhexaneamine* is a specified substance included in section S6 of the 2012 Prohibited List published by WADA.

7. On 20 December 2012, via the Peruvian Football Association (hereinafter, the "PFA"), the FIFA Anti-Doping Unit (hereinafter, the "FIFA ADU") notified the Player of the adverse analytical finding and informed him of his right pursuant to article 61(1) of the FIFA Anti-Doping Regulations (hereinafter, "FIFA ADR") to request the analysis of his B sample within 12 hours of receiving the notification.

8. On 26 December 2012, via the PFA, the Player requested that his B sample was analyzed.

9. On 7 January 2013, via the PFA, the FIFA ADU notified the Player that the opening of his B sample would take place in the same laboratory in Rio de Janeiro, on 16 January 2013.

10. On 16 January 2013, the laboratory reported that the Player's B sample confirmed the adverse analytical finding of the A Sample analysis and the presence of the Prohibited Substance.

11. On 17 January 2013, via the PFA, the FIFA ADU notified these results to the Player.

III. THE PROCEEDINGS BEFORE FIFA

III.1 FIFA DISCIPLINARY COMMITTEE

12. On 22 January 2013, the Chairman of the FIFA Disciplinary Committee decided to provisionally suspend the Player for 30 days pursuant to article 38 and article 40 FIFA ADR and notified the Player via the PFA and CONMEBOL of this decision on the same day.

13. Also on 22 January 2013, the Secretariat to the FIFA Disciplinary Committee instituted disciplinary proceedings against the Player for a potential violation of article 6 FIFA ADR, and the Player was invited to inform the FIFA Disciplinary Committee whether he preferred a hearing to be held on this matter. Additionally, the Player was invited to submit his position along with any supporting evidence and documents in his possession by 6 February 2013.

14. On 25 January 2013, the Player sent a letter to the Secretariat to the FIFA Disciplinary Committee requesting the grounds of the decision of the Chairman of the FIFA Disciplinary Committee of 22 January 2013. In the same letter, the Player expressed his preference for a hearing to be held on the matter and indicated that he and his nutritionist, Mr. Ruben Hinojosa Alarcón (hereinafter, the "Nutritionist"), would make a statement at the hearing.

15. On 1 February 2013, the Player sent a letter to the Secretariat to the FIFA Disciplinary Committee requesting a complete analytical report with respect to the analysis of his A and B samples and requesting a suspension of the deadline to present his position and of the hearing, which was to be held on 20 February 2013. The FIFA Disciplinary Committee subsequently suspended the time limit given to the Player to submit his position and supporting evidence (the time limit was later extended until 15 February 2013) and the hearing was postponed until 1 March 2013.

16. On 8 and 14 February 2013, the Player sent letters to the Secretariat to the FIFA Disciplinary Committee requesting a further extension of time limit to submit his answer and supporting evidence, as well as a further postponement of the hearing.

17. On 8 and 15 February 2013, the Secretariat to the FIFA Disciplinary Committee responded to the Player's requests for postponement, indicating that the hearing scheduled for 1 March 2013 could not be further postponed but extended the deadline for presenting the Player's answer until 22 February 2013.

18. On 12 February 2013, the Chairman of the FIFA Disciplinary Committee communicated the grounds of the decision taken on 22 January 2013 with regard to the Player's provisional suspension.

19. On 20 February 2013, the Chairman of the FIFA Disciplinary Committee decided to extend the Player's provisional suspension for a period of 20 days, until 11 March 2013.

20. On 22 February 2013, the Player filed written submissions indicating that he had been working with his Nutritionist in order to improve his eating habits and thereby improve his physical performance in football. The Player explained that his Nutritionist had focused on weight loss and designed a diet plan for the Player that included, among other measures, ingesting a product called "Hemorage", also known as "Hemo Rage" or "Hemo Rage Black" (hereinafter, the "Product" or "Hemo Rage Black").

21. On 1 March 2013, the FIFA Disciplinary Committee held a hearing on the matter of the Player's alleged anti-doping rule violation.

22. On the same day the FIFA Disciplinary Committee passed the following decision:

> *"1. El jugador Joel Melchor Sánches* [Sic] *Alegría es suspendido por un periodo de dos (2) años hasta el 21 de enero de 2015 por violación del art. 6 del Reglamento Antidopaje de la FIFA.*
>
> *2. De conformidad con el Título Preliminar del capítulo I del Reglamento Antidopaje de la FIFA "Definiciones e Interpretación" respecto a la noción de "suspensión", el jugador Joel Melchor Sánches* [Sic] *Alegría está prohibido de competir – abarcando todos los tipos de partidos, incluidos los partidos nacionales e internacionales, amistosos y oficiales -, desempeñar cualquier actividad u obtener ayuda económica, de acuerdo con lo previsto en el Reglamento Antidopaje de la FIFA.*
>
> *3. Las costas y gastos no corren a cargo del jugador Joel Melchor Sánches* [Sic] *Alegría.*

4. *El jugador Joel Melchor Sánches* [Sic] *Alegría sufragará las propias costas procesales y otros gastos en que se hayan incurrido en relación con el presente procedimiento".*

which, freely translated into English, states:

"1. The player Joel Melchor Sánchez Alegría is suspended for a period of two (2) years until 21 January 2015 for a violation of art. 6 of the FIFA Anti-Doping Regulations.

2. In accordance with the notion of "suspension" contained in the preliminary title of Chapter I of the FIFA Anti-Doping Regulations, "Definitions and Interpretation", the player Joel Melchor Sánchez Alegría is forbidden from competing – covering all types of matches, including national and international, friendly and official matches –, carrying out any activity or obtaining financial assistance, in accordance with the provisions of the FIFA Anti-Doping Regulations.

3. The player Joel Melchor Sánchez Alegría shall not pay the costs and expenses.

4. The player Joel Melchor Sánchez Alegría shall bear his own legal costs and other expenses that were incurred in connection with these proceedings".

23. On 22 March 2013 FIFA notified the grounds of this decision the Player, the PFA and CONMEBOL.

III.2 FIFA APPEAL COMMITTEE

24. On 25 March 2013, the Player sent a letter to the Secretariat to the FIFA Appeal Committee indicating his intention to appeal the decision of the FIFA Disciplinary Committee.

25. On 26 March 2013, the Secretariat to the FIFA Appeal Committee granted the Player a deadline of 7 days to submit the grounds for the appeal.

26. On 27 March 2013, the Player requested an additional deadline until 9 April 2013 to submit the grounds for the appeal. That same day, the Secretariat to the FIFA Appeal Committee informed the Player that the extension he requested had been granted, warning him that if he did not submit his position, the FIFA Appeal Committee would decide the case based on the file in its possession.

27. On 9 April 2013 the player submitted the relevant appeal brief before the FIFA Appeal Committee.

28. On 24 April 2013, the Secretariat to the FIFA Appeal Committee informed the Player that the FIFA Appeal Committee would decide the appeal based on the file in its possession given that the Player had been heard by the FIFA Disciplinary Committee at the hearing held on 1 March 2013, the Player had already presented extensive written submissions on the grounds for his appeal, and the Player had not explicitly requested to be heard by the FIFA Appeal Committee.

29. On 6 May 2013, the FIFA Appeal Committee convened via telephone conference and rendered the following decision (hereinafter, the "Appealed Decision"):

> *"1. El recurso interpuesto por el jugador Joel Melchor Sánches* [Sic] *Alegría es rechazado y la decisión de la Comisión Disciplinaria de la FIFA tomada en fecha 1 de marzo de 2013 es confirmada.*
>
> *2. Las costas y gastos de este procedimiento en cuantía de 3,000 CHF corren a cargo del jugador Joel Melchor Sánches* [Sic] *Alegría. Este monto se compensa con el monto de 3,000 CHF que fue pagado como depósito por la Federación Peruana de Fútbol.*
>
> *3. El jugador Joel Melchor Sánches* [Sic] *Alegría sufragará las propias costas procesales y otros gastos en que se hayan incurrido en relación con el presente procedimiento".*

Which, freely translated into English, states:

> *"1. The appeal by the player Joel Melchor Sánchez Alegría is rejected and the decision of the FIFA Disciplinary Committee rendered on 1 March 2013 is confirmed.*
>
> *2. The costs and expenses of this procedure in the amount of CHF 3,000 shall be borne by the player Joel Melchor Sánchez Alegría. This amount is offset by the amount of CHF 3,000 which was paid as a deposit by the Peruvian Football Association.*
>
> *3. The player Joel Melchor Sánchez Alegría shall bear the costs of litigation and other expenses incurred in connection with these proceedings".*

30. On 3 June 2013, FIFA notified the grounds of the Appealed Decision to the Player, the PFA, CONMEBOL and WADA.

IV. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

31. On 20 June 2013, the Player sent a letter to the CAS indicating his intention to file an appeal against the Appealed Decision.

> *"Que, no encontrando conforme los hechos descritos y a derecho, la decisión adoptada por la Comisión de Apelación de la FIFA, dentro del término legal, y amparado en lo que señalan los artículos 67 apartado 1 de los Estatutos de la FIFA como así mismo el apartado 4 del artículo 79 del Reglamento Antidopaje de la FIFA, interpongo* ***recurso de apelación.***
>
> *Asimismo, de conformidad con la normatividad* [Sic] *vigente me reservo el derecho de fundamentar mi apelación dentro de los 10 días suplementarios que se dispone".*

Which, freely translated into English, states:

"Not being satisfied with the findings of fact and law, and the decision by the FIFA Appeal Committee, within the established time limit, and pursuant to article 67 paragraph 1 of the FIFA Statutes as well as paragraph 4 of article 79 of the FIFA Anti-Doping Regulations, I submit the present ***appeal****.*

Also in accordance with the regulations in force, I reserve my right to present the grounds for my appeal within the 10 additional days provided".

32. On the same date, the Player sent another letter to the CAS requesting that the time limit for submitting the Appeal Brief be suspended because the PFA had only informed the Player of the Appealed Decision on 17 June 2013 (even though the PFA had been notified of the Appealed Decision on 3 June 2013) and therefore had not been yet able to consult with his attorney on the matter.

33. On 11 July 2013, the CAS sent a letter to the Player acknowledging receipt of the Player's Statement of Appeal and informing him that his letter from 20 June 2013 was not a complete Statement of Appeal, and thus requested him to submit the additional information needed to complete it, in accordance with article R48 of the Code of Sports-related Arbitration (hereinafter the "CAS Code").

34. On 16 July 2013, the Player complemented his Statement of Appeal with the additional information requested, with the following request for relief:

"a. Principal:

- *Que se revoque, en todos sus extremos, la decisión de la Comisión de Apelaciones de FIFA (que confirma la decisión de la Comisión de Disciplina de la FIFA) y, en consecuencia, se anule el periodo de suspensión.*

- *Que se establezca que la decisión apelada se sustenta en la incorrecta determinación de los hechos, indebida valoración de las pruebas, errónea aplicación del derecho y en determinar que es contraria al orden público (procesal o sustantivo)*

b. Subsidiarias:

- *En el caso que no se revoque en todos sus extremos la decisión de la Comisión Disciplinaria de FIFA solicitamos que:*

  1. *Se Sustituya el periodo de suspensión impuesto al jugador por una reprensión. Esto de acuerdo al Reglamento FIFA sobre la materia y/o al Código AMA.*

  2. *O, que el periodo de suspensión no sea superior a los seis (6) meses.*

  3. *Y que, en todos los casos, se descuente de cualquier periodo de suspensión el tiempo durante el cual el jugador estuvo suspendido provisionalmente (desde el 21 de enero de 2013)*

4. *Que, en todos los casos (fundada la pretensión principal o una de las subsidiarias) se condene a FIFA al pago de las costas y costos del presente proceso y se determine el pago de una indemnización por el daño y perjuicio ocasionado".*

Which, freely translated into English, states:

"a. Principal:

- *To reject the decision of the FIFA Appeal Committee in its entirety (which in turn had confirmed the decision of the FIFA Disciplinary Committee) and, consequently, that the period of ineligibility be annulled.*

- *To conclude that the Appealed Decision is based on an incorrect determination of the facts, an improper evaluation of the evidence, and a misapplication of the law, and find that it is contrary to public policy (procedural or substantive)*

b. Subsidiary

- *If the Appealed Decision is not rejected in its entirety, the FIFA Appeals Committee is asked to:*

1. *Replace the period of ineligibility with a reprimand, in accordance with the FIFA regulations on the subject and/or the WADA Code.*

2. *Or, that the period of suspension not exceed six (6) months*

3. *And that, in any case, the period in which the Player was provisionally suspended (since 21 January 2013) be deducted from any period of ineligibility imposed.*

4. *That, in any case, (either the principal or subsidiary request for relief), FIFA be ordered to pay the costs and expenses of this procedure and be condemned to pay compensation in an amount that shall be determined for the damage and injury caused to the Player".*

In this letter the Player requested the CAS to grant a provisional measure, consisting of the stay on the execution of the Appealed Decision, and also appointed Mr. João Nogueira da Rocha as arbitrator.

35. On 26 July 2013, the CAS sent a letter to the parties acknowledging receipt of the Statement of Appeal and noting the Player's requests to suspend the time limit to file the Appeal Brief and to stay the execution of the Appealed Decision, and inviting FIFA to submit its position on both requests.

36. On 29 July 2013, FIFA sent a letter to the CAS requesting that all time limits were suspended until the language of the proceedings was decided.

37. On 30 July 2013, the CAS sent a letter to the parties indicating that all time limits were thereby suspended until the language of the proceeding was decided.

38. On the same date, FIFA sent a letter to CAS requesting a preliminary decision regarding the admissibility of the appeal, as well as suspension of the time limit and a new deadline for FIFA to submit its answer on the request for a stay of the execution of the Appealed Decision and on the substance of the matter. Additionally, FIFA opposed the Player's request for suspension of the time limit to submit the Appeal Brief.

39. On 31 July 2013, the CAS sent a letter to the parties informing them, among other things, that the time limits for FIFA were suspended until further notice.

40. On 1 August 2013, the Player sent a letter to the CAS insisting that the language of the proceedings be Spanish because it is one of FIFA's official languages and that there was already an alleged prejudicial misinterpretation of the Player's statements before the FIFA bodies due to a poor translation. In addition, the Player argued that FIFA was being excessively formalistic with regard to the statement of appeal and opposed the request for a preliminary decision on admissibility. Finally, the Player opposed the extension of FIFA's time limits to file its written submissions because this would give rise to an unequal treatment of the parties.

41. On 7 August 2013, the CAS sent a letter to the parties requesting the Player to choose English or French as the language of the proceedings. Additionally, it informed the parties that the President of the Appeals Division would issue a preliminary decision on the admissibility of the appeal, the request to suspend the time limits of FIFA, and the request to suspend the time limit for the Player to file his appeal brief.

42. On 8 August 2013, the CAS sent a letter to the parties inviting them to file their submissions on the admissibility of the appeal, upon which the President of the Appeals Division would then render a decision.

43. On 12 August 2013, the Player sent a letter to the CAS in which it informed the CAS that the Player and FIFA had reached an agreement regarding the language of the proceedings, which would be conducted in English but that the Player would be allowed to communicate with the CAS and send his submissions in Spanish, and both parties would be allowed to produce evidence in that language.

44. On 13 August 2013, FIFA sent a letter to the CAS requesting that the deadline for the parties to file their written submissions on the admissibility be extended, until 20 August 2013 or even longer, since the issue of the language of the procedure was not yet finally decided.

45. On 13 August 2013, the CAS sent a letter to the parties indicating that the time limit for filing their submissions on the admissibility of the appeal was suspended until further notice.

46. On 14 August 2013, the Player sent a letter to the CAS opposing FIFA's proposed extension of the time limit to file the submissions on admissibility until 20 August 2013.

47. On 16 August 2013, the CAS sent a letter to the parties confirming that the language of the proceedings was to be English, and granting a further extension of time until 20 August 2013

to file their submissions on the admissibility of the appeal. In its correspondence the CAS did not reinstate the deadline for FIFA to submit its comments on the Player's request for provisional measures. However, in their further submissions to the CAS, none of the parties made any reference or petition with regard to the Player's initial request for provisional measures , which were finally withdrawn by the Player during the hearing..

48. On 20 August 2013, the parties filed their written submissions on the admissibility of the appeal filed by the Player.

49. On 18 December 2013, the CAS sent a letter to the parties indicating that the President of the CAS Appeals Arbitration Division decided that the issue of the admissibility of the appeal should be submitted to the Panel for consideration and that, pending the Panel's decision on admissibility, the deadlines for the parties' submissions would remain suspended.

50. On 18 December 2013, FIFA sent a letter to CAS nominating Mr. Pedro Tomás Marqués as arbitrator.

51. On 16 January 2014, CAS sent the parties the Notice of Formation of the Panel, which was constituted in the following manner:

i. President: Mr. Stuart McInnes

ii. Arbitrators: Mr. João Nogueira da Rocha

Mr. Pedro Tomás Marqués

52. On 7 February 2014, CAS sent a letter to the parties informing them that the Panel had decided that the appeal was admissible.

53. On 10 February 2014, FIFA sent a letter to the CAS requesting an extension of time to submit its Answer to the Appeal Brief until 6 March 2014, due to the heavy workload of the Disciplinary and Governance Department at the time.

54. On 17 February 2014, the CAS sent a letter to the parties granting FIFA the requested extension of time to file its Answer to the Appeal Brief until 6 March 2014, given that the Player was invited to state its position on FIFA's request but failed to do so within the prescribed time limit.

55. On 6 March 2014, FIFA filed its Answer to the Appeal Brief, requesting the following relief:

"1. To reject all the reliefs sought by the Appellant.

2. To confirm in its entirety the decision of the FIFA Appeal Committee.

3. To order the Appellant to bear all the costs incurred in connection with these proceedings and to cover all legal expenses of the Respondent in connection with these proceedings".

56. On 23 April 2014 and 30 April 2014 FIFA and the Player respectively signed the order of procedure issued by the CAS Court Office.

57. On 13 May 2014, a hearing was held in the CAS headquarters in Lausanne, Switzerland. At the beginning of the hearing, as a preliminary issue the Panel addressed the matter of the Player's request for provisional measures, which was formally withdrawn by the Player at the hearing.

58. In the hearing the Panel heard and examined the following persons, in order of appearance:

    i. Laurent Perrenoud, expert witness.

    ii. Joel Melchor Sánchez Alegría, the Player (via teleconference, pursuant to article R44.2 of the Code).

59. At the end of the hearing, the parties agreed that due process had been fully observed and expressed their satisfaction with the manner in which the whole proceedings have been conducted.

V. SUMMARY OF THE PARTIES' SUBMISSIONS

V.1 THE APPELLANT

60. Violation of the principle of due process and the right to be heard

The proceedings before FIFA were tainted by an incorrect determination of the facts, an improper evaluation of the evidence presented, an incorrect application of the relevant regulations, a lack of respect for the right to defend oneself, and a lack of observance of due process. Thus, the Appealed Decision is against public policy (procedural or substantive) and violates the Player's fundamental rights.

FIFA assumes, without reason, that simply because its rules and regulations codify certain violations of public policy, the right of due process and to defend oneself, entitles FIFA to commit these violations. The proceedings before the FIFA Appeals Committee violated the right of due process as the Player was not heard. The right to be heard is a fundamental right and it is therefore unnecessary to request it as FIFA seems to contend. FIFA ignored these fundamental principles of law and violated the Player's right to defend himself against FIFA's accusations.

Article 135(1) of the FIFA Disciplinary Code (hereinafter "FIFA DC") violates the underlying principles of the right of due process, because it allows a purported "tribunal", the FIFA Appeals Committee, to engage in deliberations and make decisions via telephone without having the complete case file before them for review and without allowing the accused party to participate in proceedings which could affect his current and future economic well-being, as well as that of his family. Specifically, the manner in which the FIFA Appeals Committee reached its decision violates the principle of immediacy, which requires the decision-maker to

obtain the most direct and immediate impression of the events at issue, by having the decision-maker present during the entire course of the proceeding and having any party (namely the Player) to be heard directly by the decision-maker during the proceeding.

61. Misinterpretation of the Player's statements

The Player's written statement was misinterpreted, confusing his efforts of diligence with "negligence". Despite what FIFA concluded, the Player never admitted that the product he consumed has resulted in adverse analytical findings in other cases. Rather, in his written statement, the Player merely pointed out the fact that the U.S. Anti-Doping Agency ("USADA") has expressed doubts as to whether the Product contains the Prohibited Substance. In any event, the Player is not an expert in chemistry and cannot be expected to know the chemical composition of the Product. Further, the Nutritionist searched the product's website and corroborated that the Product did not contain the Prohibited Substance, having only found that there was a similar sounding ingredient named "1,3 *Dimethylamylamine*" that did not appear in the 2012 WADA Prohibited List. Any error committed by the Nutritionist cannot be attributed to the Player because the Player was diligent in his efforts to ensure that he was not negligently ingesting a Prohibited Substance.

Likewise, the Player's statements at the hearing before the FIFA Disciplinary Committee were misinterpreted because of poor translation. Despite FIFA's conclusions, the Player never admitted to having taken the Prohibited Substance in order to improve his sport performance. It has been proven that the Product's label states that *"This product contains ingredients that may be banned by some sports organizations",* and FIFA failed to ask the Player whether he speaks English or could otherwise understand that text or not (the Player does not understand English, which is why he relied on his Nutritionist). Moreover, none of the named substances on the product label appear in the 2012 WADA Prohibited List, so the Player did not find any indication that he was potentially ingesting a Prohibited Substance when he searched the list. FIFA's expert witness himself stated the Prohibited Substance has 15 different names and its principal effect is weight loss, not enhancing performance. FIFA's expert witness also noted that a problem existed with information and education, since it is a well-known fact that weight loss supplements can be dangerous. Therefore, given the Player's lack of knowledge, expertise and his reliance on his Nutritionist, it is evident the Player had no intention to enhance his performance by taking the product.

62. With regard to the anti-doping rule violation

On the basis of the award of the case CAS 2012/A/2804, the Appellant highlights several aspects of the WADA Code, and argues that this Code contains provisions that are analogous to the applicable provisions of the FIFA ADR:

i. Article 10.4 WADA Code establishes two conditions that, when proven cumulatively, allow a reduction in the period of ineligibility due to an anti-doping rule violation:

ii. (1) the athlete establishes how the specified substance entered his body, and

iii. (2) the athlete must demonstrate that, at the time he ingested the specified substance, there was no intention to enhance his performance.

iv. There is no question that the Player has established how the Prohibited Substance entered his body. Moreover, the Player had no knowledge that the Product contained the Prohibited Substance, which demonstrates a lack of intention to enhance his performance. The intention to enhance performance would only arise in a case where an athlete ingests a substance to help him recover after physical effort or to better prepare in anticipation of a physical effort.

v. Article 10.5.2 WADA Code requires that an athlete establishes that he possessed no fault or negligence or no significant fault or negligence. This means that the athlete must demonstrate that, even after exercising reasonable care, he did not know or suspect, nor could he have reasonably known or suspected, that he was using a prohibited substance. Even if the athlete is able to prove that he had no intention to enhance his performance by taking the prohibited substance, his ignorance of the fact that the product he ingested contained a specified substance allows for the application of article 10.5.2 WADA Code. Furthermore, only a case involving the least significant amount of fault would result in a 12-month period of ineligibility.

The applicable law chosen by the parties to a dispute is limited by public policy, which entails, among other things, ensuring that the decision rendered does not offend the general sense of justice and equity. Thus, when an athlete demonstrates that he acted without fault or negligence, the deciding body should ordinarily reject the decision of the prior instance and replace it with a new decision imposing no period of ineligibility.

Regarding the Prohibited Substance itself, it is worth mentioning that in the case CAS 2012/A/3029, which also dealt with *methylhexaneamine*, the Prohibited Substance was described as a short-term stimulant that was not significant for competition. In that case, the accused, a motorcycle rider, admitted to having been slightly careless when he bought an energy drink in a nutrition store without the intention of enhancing his performance. The rider argued that he had committed a minor anti-doping rule violation and that, in motorcycling, performance enhancement comes through altering the equipment, not the rider's physical state. In the end, the Panel imposed a period of ineligibility of 18 months minus the period already served under the provisional suspension due to the particular circumstances of the case, including the fact that the FIM has never been proactive in carrying out its duties of warning and educating riders about doping matters, and the rider's degree of fault.

63. In conclusion, the Player requests that the two-year period of ineligibility be eliminated and replaced by a reprimand or, in the alternative, that the period of ineligibility be reduced to no more than six months and the period of suspension already served by the Player be deducted from the sanction.

V.2 FIFA

64. With regard to the alleged violation of the principle of due process and the right to be heard

The Player's fundamental rights, specifically the right to be heard and the principle of immediacy, have been properly respected by FIFA. The right to be heard may not be equated to conducting (or not) an oral hearing; rather, the right to be heard includes different components which are all reflected in article 94 FIFA DC:

"1. The parties shall be heard before any decision is passed.

2. They may, in particular:

a) refer to the file;

b) present their argument in fact and in law;

c) request production of proof;

d) be involved in the production of proof;

e) obtain a reasoned decision".

The Player's criticism of the fact that a hearing was not held before the FIFA Appeal Committee is likewise unfounded. Article 111(1)-(2) FIFA DC establishes that, as a general rule, the FIFA decision-making bodies take their decisions based on the file without a previous oral hearing, meaning that holding a hearing is the exceptional situation and not the norm. However, simply because this is the case does not mean the right to be heard or due process has not been observed when no hearing is held.

Specifically, FIFA took numerous steps to ensure that the right to be heard was granted to the Player. Firstly, FIFA drew the Player's attention to all the rights conferred upon him by the applicable regulations. Secondly, the Player received copies of all relevant documents at all stages of the proceedings and even explicitly stated before FIFA that he had no objections to the manner in which all the disciplinary proceedings were conducted, confirming that all his rights had been respected. Thirdly, the Player was afforded ample opportunity to submit his defense before the FIFA Disciplinary Committee and, subsequently, the reasons for his appeal, having been granted extensions of the deadline to file them on two separate occasions throughout the proceedings (a total of 18 days, i.e. eight more days than is normally granted under article 120 FIFA DC). Fourthly, the Player was present at the hearing before the FIFA Disciplinary Committee after he explicitly requested to be present. The Chairman of the FIFA Appeal Committee correctly deemed it appropriate for the FIFA Appeal Committee to convene via telephone conference when considering that the Player had already been heard in the previous instance, had submitted extensive written reasons for the appeal, and had not explicitly requested to be heard by the FIFA Appeal Committee, thus making it clear that the Player did not wish to be heard orally at that stage.

The Player evidence no supporting reason why the fact that the Appealed Decision was decided upon via telephone harms the Player's fundamental rights in any way, when it is a situation provided for in article 135(1) FIFA DC and, further, this method of decision-making benefited the Player because it is the fastest, most effective and least costly way to ensure proceedings are carried out and concluded properly. .

In any case, any violations of the Player's procedural or fundamental rights, *quod non*, would be cured through the present proceedings before CAS.

65. The anti-doping rule violation

It is undisputed that the Player committed an anti-doping rule violation in the sense of article 6 FIFA ADR by testing positive for the use of *methylhexaneamine*, a substance on the 2012 WADA Prohibited List, that requires no quantitative threshold to constitute an anti-doping rule violation. Hence, the Player automatically receives the standard sanction of a period of ineligibility of 2 years. What is incumbent on the player is to demonstrate the proof necessary to reduce or eliminate the standard sanction of a period of ineligibility of 2 years.

A reduction or elimination of the standard sanction established in article 14 FIFA ADR in accordance with articles 16, 17 or 18 of the same rules is only possible, if, the Player can prove how the specified substance (in case of article 16) or the Prohibited Substance (in case of articles 17 and 18) entered his body. Based on the applicable standard, a balance of probability, the Player demonstrated how the specific substance entered his body. Firstly, this aspect of the facts was not in dispute. Secondly, the Player's statements before the FIFA Disciplinary Committee established that he had taken the Product (Hemo Rage Black). Thirdly, the statement by Mr. Laurent Perrenoud, expert witness, established that the Product was often used to help with weight loss and as a stimulant, and that the laboratory he worked for had analyzed the Product and detected the Substance in the samples. Thus, it was sufficiently demonstrated that the Prohibited Substance entered the Player's body through ingesting the Product.

In order to eliminate the standard sanction, the Player would have to demonstrate that he bore no fault or negligence pursuant to article 17 FIFA ADR. In this respect, FIFA highlights article 19(2)(c):

"Taking into consideration the Player's personal duty to ensure that no Prohibited Substance entered his body tissues or fluids (art. 6 par. 1), a sanction cannot be completely eliminated on the basis of No Fault or Negligence (art. 17) in the following circumstances: a positive test result from a mislabelled or contaminated vitamin or nutritional supplement; […]".

Thus, article 17 FIFA ADR, is inapplicable to the case at hand and the two-year period of ineligibility cannot be eliminated on the basis of the said article.

In view of the fact that the Prohibited Substance is a specified substance appearing in section S6. b) "Specified Stimulants" of the Prohibited List, the Player could argue for a reduction of the sanction based on article 16 FIFA ADR, which applies to specified substances only, by

establishing how the substance entered his body, (which he successfully did), and producing evidence that corroborates his statements and establishes the absence of intent to enhance his sporting performance to the comfortable satisfaction of the Panel. Unfortunately, the Player could not establish the absence of intent. Taking the Product as part of a weight loss plan and actually causing that weight loss can have no other result than to improve the Player's health, as well as his physical and sporting performance. Moreover, Mr. Laurent Perrenoud, the expert witness, explained that the Prohibited Substance has effect on blood pressure, heart rate, mental clarity and physical performance, and that its primary effect is as a stimulant and weight loss is only a secondary effect, though the two effects cannot be separated.

Additionally, the Player did not disclose the use of the Prohibited Substance to the team doctor of the Peruvian national team, nor was it disclosed on the Player's "Doping Control Form 0-1". Therefore, the Player's arguments that enhancement of sporting performance bears no relation to the products the Player took as part of his diet and that he never intended to use the Product to directly or immediately enhance his sporting performance are untenable; the Player had the intention to enhance his sporting performance. In light of this, the Panel should reject the Player's requests to reduce the standard sanction and to eliminate the sanction by only imposing a reprimand.

Even if the Panel should reach the conclusion that the Player must prove that the specified substance, and not the Product, was not intended to enhance his sporting performance, here the Player acted with at least indirect intent – i.e., that the Player's behaviour should be considered intentional and focused on one result: the enhancement of his sporting performance. Thus, the application of article 16 FIFA ADR is excluded.

The Player could also argue for a reduction of the standard sanction based on article 18 FIFA ADR by demonstrating he possessed no significant fault or negligence. Notably, article 18 FIFA ADR establishes that the reduced period of ineligibility may not be less than one-half of the period of ineligibility otherwise applicable, i.e. not less than a one-year period of ineligibility.

Article 18 FIFA ADR is interpreted in conjunction with article 19 FIFA ADR. Pursuant to article 19(2)(c) FIFA ADR, depending on the unique facts of the particular case, the sanction otherwise applicable can be reduced, based on no significant fault or negligence in the case of, amongst others, a positive test resulting from a mislabelled or contaminated nutritional supplement. Moreover, for the purpose of assessing the Player's fault, article 19(2)(a) and (b) state that only truly exceptional circumstances would permit a reduction of the standard sanction, and that the evidence considered must be specific and decisive to explain the Player's departure from the expected standard of behaviour.

In this case, the Player is a professional football player competing at an international level and in the top division in Peru. Therefore, he is expected to be aware of his anti-doping related duties beyond the level of awareness expected of an amateur. The Player cannot simply assume as a general rule that the products he ingests are free of prohibited substances. In case of nutritional supplements taken in a sport/training context, such as is the case here, the Player has to take a certain level of precautionary measures in order to avoid his behaviour from being

significantly negligent. Merely looking at a product's label, simply relying on the Nutritionist, not carrying out a more searching inquiry as to whether the Product contained a Prohibited Substance, and claiming not to understand English do not indicate that the Player was diligent, as he argues; rather, they are evidence of the Player's significant negligence. This is particularly evident when considering that the Player himself provided FIFA with a document published by USADA warning athletes about the use of the Prohibited Substance and specifically mentioned the Product by name, and when considering that a simple Internet search in either English or Spanish of the Product's name would demonstrate that the Product indeed contains the Prohibited Substance. The fact that the Player failed to consult the Peruvian national team's doctor regarding the Product prescribed by the Nutritionist is also indicative of the Player's significant negligence. Therefore, the Player's arguments for a reduction of the sanction shall be rejected.

VI. PRELIMINARY MATTERS

VI.1 CAS JURISDICTION

66. Article R47 of the Code provides as follows:

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

67. CAS jurisdiction in this matter arises out of article 67(1) of the FIFA Statutes, which establishes the following:

> *"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question".*

68. In addition, neither of the parties disputes the jurisdiction of the CAS and both of them signed the Order of Procedure.

69. Therefore, the CAS has jurisdiction to decide on the present appeal.

VI.2 APPLICABLE LAW

70. Article 66(2) of the FIFA Statutes provides as follows:

> *"The provision 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".*

71. In light of the aforementioned provision and the position of the parties in this case (which do not contest the applicability of the FIFA Regulations), the applicable law shall be the regulations of FIFA and, subsidiarily, Swiss law.

VI.3 ADMISSIBILITY

72. Before examining the merits of the case, the Panel shall provide the grounds for the admissibility of the Player's appeal which was notified to the parties on 7 February 2014.

73. FIFA contends that the appeal lodged by the Player did not comply with the requirements of article 67.1 FIFA Statutes, in connection with articles R47 and R48 CAS Code. In particular, FIFA states that the letter which would allegedly constitute the Player's Statement of Appeal did not comply with all the mandatory requirements of a timely statement of appeal, due to the following reasons:

    i. The grounds of the Appealed Decision were notified to the Player on 3 June 2013 through his legal representative, Mr. Philippe Govaert. Article 79.4 of the FIFA ADR and article 67.1 of the FIFA Statutes in connection with article R47.1 CAS Code establish a period of 21 days after notification of the decision in which the appellant shall lodge his appeal. This 21-day period began to run the day after the Appealed Decision was notified to the Player via his legal representative, i.e. 4 June 2013. Although the Player argues that Mr. Govaert was no longer his legal representative, the Player has failed to prove it and in any case, he did not notify FIFA of any change in legal representation. Thus, considering that Mr. Govaert was the Player's duly authorized legal representative before the FIFA Disciplinary Committee and the FIFA Appeal Committee, there is no reason to doubt that Mr. Govaert indeed communicated the decision to the Player. As such, the 21 days period to file a proper statement of appeal began on 4 June 2013.

    ii. Moreover, the Player's first letter dated 20 June 2013 does not comply with the requirements set forth in article R48 CAS Code, specifically:

        i. A copy of the decision appealed against was not attached thereto;

        ii. No request for relief was contained therein;

        iii. No arbitrator was appointed; and

        iv. It did not include the name and full address of the Respondent

        v. The party did not enclose a copy of the provisions of the statutes or regulations providing for the possibility to appeal to CAS.

74. On the contrary, the Player states that all of his written submissions have been properly filed in a timely manner before the CAS, and that in any case, he never received any communication from the CAS complaining about the lack of completeness of the statement of appeal in the

terms foreseen in article R48 CAS Code, which in his view, means that his submissions have been deemed appropriate.

75. To rule on this matter the Panel has taken into account not only the content of article R48 of the CAS Code but also:

a) The CAS jurisprudence which has decided that depending on the circumstances of the case, a letter from a party declaring its intent to appeal a decision, along with the payment of the relevant court fee, could be sufficient to consider it as a Statement of Appeal when it clearly establishes the will of the party to submit an appeal. Inter alia, the award in the case CAS 2011/A/2568, reads in the pertinent part as follows:

"66. Sur quoi, la Formation arbitrale considère que le courrier du 2 septembre 2011 manifeste sans ambiguïté la volonté de l'Appelant de faire recours contre la décision de la CRL devant le TAS; cette manifestation de volonté est d'autant plus marquée que Raja a payé ce qu'il pensait alors être le droit de greffe de CHF 500.

67. Certes, Raja indiquait dans ce courrier requérir un délai de dix jours pour soumettre sa «requête d'appel», comme Chiasso le relève. Toutefois, la Formation arbitral considère qu'il ne peut s'agir que d'une erreur de langage, ledit courrier se référant clairement au mémoire d'appel qui sera effectivement déposé le 12 septembre suivant.

68. Chiasso fait valoir la jurisprudence CAS 2006/A/1065 […] par laquelle la formation avait clairement statué: «It is not sufficient for the Appelant(sic) to merely indicate that he will file a Statement of Appeal, without actually filing it".

Or, la Formation arbitrale estime que la présent espèce est différente, notamment parce que l'intention de faire appel est clairement exprimée par Raja Dans son courrier du 2 septembre 2011 et par le paiement à cette date du droit de greffe".

which can be freely translated into English as follows:

66. "As such, the Arbitral Panel considers that the letter from 2 September 2011 unambiguously demonstrates the will of the Appellant to appeal against the decision of the CRL before CAS; this expression of will is even more apparent when considering Raja paid what he believed was the court fee of CHF 500.

67. Certainly, Raja stated in this letter that he required an additional period of 10 days to submit his statement of appeal, as noted by Chiasso. However, the Arbitral Panel considers that this can only be an error of language, for that letter is clearly referring to the Appeal Brief that was effectively filed on 12 September.

68. Chiasso argues that in the case CAS 2006/A/1065 […], the Panel clearly stated 'It is not sufficient for the Appellant to merely indicate that he will file a Statement of Appeal, without actually filing it'."

69. However, the Arbitral Panel considers that the present case is different, mainly because Raja clearly expressed his intent to appeal in his letter dated 2 September 2011 and by paying the court fee".

b) the prohibition of exaggerated formalism developed in Swiss constitutional law, which *"prohibits the formal application of procedural rules that prevent the party concerned from taking legal action although this is not at all appropriate or justified by the interests concerned"*. Notably, this occurs when the *"procedural irregularity is easily apparent to the court and could have been rectified within a short period of time following the appropriate notification of the party concerned"* (HAAS U., The 'Time Limit for Appeal' in Arbitration Proceedings before the Court of Arbitration for Sport (CAS); CAS Bulletin 2/2011).

76. Bearing this in mind, the Panel took note of the Player's letter dated 20 June 2013, in which he informed the CAS, along with proof of payment of the CAS Court fee, his intention of appealing the Appealed Decision:

"Que, no encontrando conforme los hechos descritos y a derecho, la decisión adoptada por la Comisión de Apelación de la FIFA, dentro del término legal, y amparado en lo que señalan los artículos 67 apartado 1 de los Estatutos de la FIFA como así mismo el apartado 4 del artículo 79 del Reglamento Antidopaje de la FIFA, interpongo ***recurso de apelación.***

Asimismo, de conformidad con la normatividad [Sic] *vigente me reservo el derecho de fundamentar mi apelación dentro de los 10 días suplementarios que se dispone".*

which can be freely translated into English as follows:

"Not being satisfied with the findings of fact and law, and the decision by the FIFA Appeal Committee, within the established time limit, and pursuant to article 67 paragraph 1 of the FIFA Statutes as well as paragraph 4 of article 79 of the FIFA Anti-Doping Regulations, I submit the present ***appeal****.*

Also in accordance with the regulations in force, I reserve my right to present the grounds for my appeal within the 10 additional days provided".

77. In addition, the Panel is aware that, on 11 July 2013, the CAS granted the Player an additional term of 5 days to complete its Statement of Appeal (*"completar su solicitud"*) by submitting the following information to CAS:

i. Full name and address of Respondent;

ii. Copy of the appealed decision;

iii. Request for relief;

iv. Nomination of an arbitrator;

v. Request for a stay on the execution of the proceedings (if applicable), together with reasons; and

vi. Copy of the statutes or regulations or explicit agreement that guarantee the possibility to appeal before CAS.

In this correspondence the parties were also cautioned that if the Player did not provide this information, the appeal would be considered incomplete, article R48 CAS Code would be applied and thus the appeal would be declared inadmissible.

78. This being said, the Panel stresses that in the case at stake, the Appellant's intention to appeal the Decision of FIFA is clear. He filed a letter to the CAS which so reveals, and paid the Court fee. It is true that there were particular items missing in the Player's Statement of Appeal but it was reasonable for the CAS and in accordance with article R48 of the CAS Code, to accept the Statement of Appeal as filed and grant the Player a short deadline of 5 days to supplement his initial submission and not deprive the Player of his right to appeal based solely on the straightforward application of a procedural rule.

79. Therefore the Panel deemed the Player's Appeal admissible**.**

VII. MERITS OF THE APPEAL

VII.1 APPELLANT'S DUE PROCESS RIGHTS AND THE RIGHT TO BE HEARD

80. The Player alleges that due process rights and his right to be heard have been infringed by FIFA in the proceedings before its decision-making bodies.

81. In this respect, the Panel, after having examined the file, considers that the Appellant has not substantiated these allegations. The Player simply states that there has been apparent infringement of these rights, but he does not contribute any convincing evidence in this respect, which leads the Panel to conclude that any of the aforementioned rights was actually infringed.

82. In any case, the Panel wishes to emphasize that pursuant to article R57 CAS Code, it has full power to review the facts and the *law de novo* on this appeal, which may include, in certain circumstances, that potential violations of the principle of due process or of the right to be heard in prior instances, may be cured in the appeal before the CAS.

83. In particular, the Panel wishes to highlight that, according to the consistent CAS jurisprudence (i.a. CAS 2009/A/1920), *""if the hearing in a given case was insufficient in the first instance (…) the fact is that, as long as there is a possibility of full appeal to the Court of Arbitration for Sport, the deficiency may be cured" (CAS 94/129 […, award of 23 May 1995, par. 59). Later the CAS has reaffirmed this principle, holding that "the virtue of an appeal system which allows for a rehearing before an appeal body is that issues relating to the fairness of the hearing before the Tribunal of First instance "fade to the periphery"" (CAS 98/211 […], award of 7 June 1999, par.8). More recently, the CAS has further relied on the Swiss Federal Tribunal case law, which held that "any infringement of the right to be heard can be cured when the procedurally flawed decision is followed by a new decision, rendered by an appeal body which had the same power to review the facts and the law as the tribunal of first instance and in front of which the right to be heard had been properly exercised" (CAS 2006/A/1177 […], award of May 2009, par. 7.3). For another recent case, see for*

instance, CAS 2008/A/1594 […] para. 109, "However, as CAS has complete power to review the facts and the law and to rule the case de novo, the procedural deficiencies which affected the procedures before FILA disciplinary bodies may be cured by virtue of the present arbitration proceedings (see e.g. CAS 2006/A/1175 […] paras. 61 and 62, CAS 2006/A/1153 […], para. 53, CAS 2003/O/486 […], para. 50)". This CAS jurisprudence is actually in line with European Court of Human Rights decisions, which in par. 41 of the Wickramsinghe Case concluded that "even where an adjudicatory body determining disputes over civil rights and obligations does not comply with Article 6 (1) [ECHR] in some respect, no violation of the Convention will be found if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 (1)".

84. Therefore, should an infringement of fundamental procedural rights have taken place in the previous instances of this case (*quod non*), the proceedings at CAS could have cured them.

85. In conclusion, the Appellant's allegations in this respect are rejected

VII.2 THE ANTI-DOPING RULE VIOLATION

86. The Panel firstly notes that it is undisputed that the analysis of both urine samples A and B delivered by the Player on 12 October 2012 on the occasion of the match between Peru and Bolivia, showed evidence of an adverse analytical finding of *methylhexameanine*, which is a stimulant included in section S6.b of the Prohibited List and considered to be a specified substance, and that the Player does not contest the scientific accuracy of the analysis carried out by the WADA-accredited laboratory of Rio de Janeiro.

87. Paragraphs 1 and 2 of article 6 of the FIFA ADR, referred to by article 63 of the FIFA DC, read as follows:

"Article 6. Presence of a Prohibited Substance

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 this article.*

2. *Sufficient proof of an anti-doping rule violation under this article 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".*

88. Therefore, pursuant to the aforementioned applicable regulations, the presence of a Prohibited Substance or its Metabolites or Markers in a player's bodily sample constitutes an anti-doping rule violation.

89. In the present case the Player signed his doping control form without objection, and without declaring that he had recently used any medication. The samples were duly preserved, transported, received and analyzed by the LADETEC laboratory in accordance with procedures that have not been challenged by the Player. The Player did not challenge the scientific conclusion as to the identification of *methylhexameanine* and its metabolites in his urine sample.

90. As a result the Panel finds that the presence of *methylhexameanine* in the Player's urine samples is proven and objectively constitutes an anti-doping rule violation.

VII.3 THE SANCTION

A. The applicable Regulatory Framework

91. Under article 14 of the FIFA ADR, the standard sanction for a violation of article 6 of the FIFA ADR (Presence of a Prohibited Substance) is a two-year suspension *"unless the conditions for eliminating or reducing the period of ineligibility, as provided under arts 16 to 22 […] are met"*.

92. Therefore, under the FIFA ADR, the two-year sanction may be eliminated or reduced if the conditions envisaged by articles 16 (specific circumstances), 17 (exceptional circumstances – no fault or negligence) or 18 (exceptional circumstances –no significant fault or negligence) are met.

93. With regard to the specific circumstances that may entail to the elimination or reduction of the sanction, article 16 of the FIFA ADR establishes:

> *"Art. 16.- Elimination or reduction of the period of Ineligibility based on specific circumstances*
>
> 1. *Where a Player can establish how a specified substance entered his body or came into his Possession and that such specified substance was not intended to enhance the Player's sporting performance or mask the Use of a performance-enhancing substance, the period of Ineligibility imposed under art. 14 (Imposition of Ineligibility for Prohibited Substances and Prohibited Methods) shall be replaced with the following: at minimum, a reprimand and no period of Ineligibility from future Competitions and, at a maximum, two years of Ineligibility.*
>
> 2. *To justify any elimination or reduction, the Player must produce corroborating evidence in addition to his word that establishes to the comfortable satisfaction of the FIFA Disciplinary Committee the absence of intent to enhance sporting performance or mask the Use of a performance-enhancing substance. The Player's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility"*.

94. Secondly, with regard to the exceptional circumstances that may entail the elimination or reduction of the sanction, articles 17 and 18 of the FIFA ADR envisages the 2 following possibilities:

"Art. 17.- Elimination or reduction of the period of Ineligibility based on exceptional circumstances – No Fault or Negligence

1. *If a Player establishes in an individual case that he bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated.*

2. *When a Prohibited Substance or its Markers or Metabolites is detected in a Player's Sample in violation of art. 6 (Presence of a Prohibited Substance), the Player must also establish how this Prohibited Substance entered his system in order to have the period of Ineligibility eliminated.*

3. *In the event that this article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under section 3 of this chapter".*

"Art.18.- Elimination or reduction of the period of Ineligibility based on exceptional circumstances – No Significant Fault or Negligence

1. *If a Player establishes in an individual case that he bears No Significant Fault or Negligence, then the otherwise applicable period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this article may not be less than eight years.*

2. *When a Prohibited Substance or its Markers or Metabolites is detected in a Player's Sample in violation of art. 6 (Presence of a Prohibited Substance), the Player must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility reduced".*

95. In order to determine whether these specific or exceptional circumstances are met, the Panel shall also consider that, pursuant to article 19.2 of the FIFA ADR:

   a. *"Specific or exceptional circumstances will exist only in cases where the circumstances are truly exceptional and not in the vast majority of cases.*

   b. *The evidence considered must be specific and decisive to explain the Player's departure from the expected standard of behaviour.*

   c. *Taking into consideration the Player's personal duty to ensure that no Prohibited Substance entered his body tissues or fluids (art. 6 par. 1), a sanction cannot be completely eliminated on the basis of No Fault or Negligence (art. 17) in the following circumstances: a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement, the administration of a Prohibited Substance by the Player's team doctor or coach without disclosure to the Player, sabotage of the Player's food or drink by a spouse, coach or other Person within the Player's circle of associates. However, depending on the unique facts of the particular case, any of the referenced circumstances could result in a reduced sanction based on No Significant Fault or Negligence (art. 18).*

   d. *[…]".*

96. Finally, the Panel, while applying the FIFA ADR, shall also consider the CAS jurisprudence on doping and the principles of the WADA Code, namely those relating to articles 10.4, 10.5.1 and 10.5.2, which are nearly identical in terms of the relevant content and application to articles 16, 17 and 18 FIFA ADR.

97. In accordance with the foregoing, the Panel observes that:

1. in order to establish that there were specific circumstances providing for the elimination or reduction of his sanction under article 16 FIFA ADR, the Player shall prove:

   (a) how the specified substance came to be present in his body and, thus, in his urine samples, and

   (b) that the specified substance was not intended to enhance his sporting performance, which requires the production of corroborating evidence in addition to the Player's own statement that establishes a lack of intent to the comfortable satisfaction of the Panel.

2. In order to establish he bore no fault or negligence and eliminate or reduce his sanction under article 17 FIFA ADR due to exceptional circumstances, in addition to the proof referred to in 1(a) above (though this article refers only to a Prohibited Substance and not a specified substance), the Player shall prove:

   (c) that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered the Prohibited Substance.

3. In order to establish that he bore no significant fault or negligence and eliminate or reduce his sanction under article 18 FIFA ADR based on exceptional circumstances, in addition to the proof referred to in 1(a) above (though, like article 17, this article refers to a Prohibited Substance), the Player shall prove:

   (d) that his fault or negligence, when viewed in the totality of the circumstances and taking into account the requirement of (c) above, was not significant in relationship to the anti-doping rule violation.

   In any case, the proof of the circumstances foreseen in both (a) and (d) would reduce the Player's sanction, but in any case the reduced period of ineligibility cannot be less than one half of the period of ineligibility applicable otherwise (article 18.1 of the FIFA ADR).

98. The Panel observes that article 19.2.a) of the FIFA ADR unequivocally foresee that the mitigation of mandatory sanctions is possible *"only in cases where the circumstances are truly exceptional and not in the vast majority of cases"*.

99. In this respect, with regard to the standard of proof required from the indicted athlete, the Panel notes that, in accordance with the CAS jurisprudence and the WADA Code, the Player must

establish the facts that he alleges to have occurred on the "balance of probability". In particular, the balance of probability standard means that the indicted athlete bears the burden of persuading the judging body that the occurrence of the circumstances on which he relies is more probable than their non-occurrence or more probable than other possible explanations of the doping offence (see CAS 2004/A/602, para. 5.15, or TAS 2007/A/1411, para. 59).

100. Finally, in order to determine the duty of caution required under the applicable rules, the Panel considers that *"«No fault» means that the athlete has fully complied with the duty of care. […] «No significant fault» means that the athlete has not fully complied with his or her duties of care. The sanctioning body has to determine the reasons which prevented the athlete in a particular situation from complying with his or her duty of care. For this purpose, the sanctioning body has to evaluate the specific and individual circumstances. However, only if the circumstances indicate that the departure of the athlete from the required conduct under the duty of utmost care was not significant, the sanctioning body may […] depart from the standard sanction"* (CAS 2005/C/976 & 986).

B. (a) Evidence on how the specified substance/Prohibited Substance entered the Player's body

101. The parties agree that the source of the Player's anti-doping rule violation was the ingestion of Hemo Rage Black, which contained the specified substance *methylhexaneamine*. Specifically, the Player recognized that the ingestion of the Hemo Rage Black was the source of the Prohibited Substance and this was confirmed upon consulting the Product's label and through the expert witness testimony.

102. Accordingly, the Panel holds that the Player has successfully established how the specified substance entered his body.

C. (b) Evidence on the Player's intent (or lack thereof) to enhance sport performance

103. In order to satisfy this circumstance, the Player shall demonstrate that the prohibited substance was not intended to enhance his sport performance, and produce corroborating evidence in addition to his own statement that establishes a lack of intent to the comfortable satisfaction of the Panel.

104. In particular, the Panel notes that, pursuant to CAS jurisprudence, the athlete needs to prove that the ingestion of the specified substance, rather than the Product itself, was not intended to enhance his sport performance (CAS 2010/A/2107, CAS 2013/A/3361). It then follows that, in order to analyze if this circumstance is met in the present case ake, the Panel shall first address the question regarding the potential Player's lack of knowledge that by taking Hemo Rage Black he was ingesting a specified substance, as alleged by the Appellant to justify that he did not intend to enhance his sport performance.

105. In this regard, while the Product's label included the substance *1,3 Dimethylamylamine* and not the exact name of the Prohibited Substance (*methylhexaneamine*), both of these names refer to

the same Prohibited Substance. In the Panel's view the existence of this alternative nomenclature, could have been easily discovered by the Player through a fairly simple Internet search, as it has been proven by the Respondent, with the Internet search result that it has produced with its answer to the appeal.

106. Indeed, the Panel notes that the label of the Product contains a warning stating that *"This product contains ingredients that may be banned by some sports organizations"*. The fact that the Player alleges not to understand English is no excuse for the Panel. Moreover, it is noted that the description (in Spanish) of the Product given in the webpage that the Nutritionist checked (www.labnutrition.com), describes the typical effects in connection with the enhancement of sport performance, such as a greater blood oxygenation *("oxigenación sanguínea superior")*, an abnormal vascularisation *("vascularización anormal")*, or the extreme energy and strength explosion *("explosión de energía y de fuerza extremas")* given by the Product. Therefore, in the Panel's view, applying a minimum diligence standard, the Player would have reach the conclusion that the Product could contain a prohibited substance.

107. Notwithstanding the foregoing, in any case, the mere fact that the athlete allegedly did not know that the Product contained the specified substance does not establish an absence of intent (CAS A2/2011). As it has been established by the CAS jurisprudence, an athlete may only argue an absence of intent to enhance performance when his behaviour was not reckless, but only oblivious (CAS 2012/A/2822, CAS 2012/A/2747). Here, the facts demonstrate a situation that goes beyond simply being oblivious because the Player did not exercise reasonable care in ensuring that he was complying with the applicable anti-doping regulations.

108. As established in the case CAS 2010/A/2107, in which as in the present case, the product ingested named the chemical equivalent of a specified substance, but not the specified substance as it appeared in the Prohibited List, there are several factors to determine the athlete's degree of fault and eventually reduce the period of ineligibility, including (i) the fact that before taking the product for the first time the athlete consulted with personal trainers, (ii) read the product label, (iii) conducted internet research, (iv) consulted with the team's physician about all the nutritional supplements and products he was taking.

109. In the case at stake, the fact that the Player did not consult with the team doctor regarding the product Hemo Rage Black and did not disclose it in his doping control form, shall be considered not only as a clear lack of the minimum diligence, but also as a sign that the Player was trying to conceal that he was taking this product. In the Panel's view, the Player, who is a professional football player, who plays at national and international level, was aware of the risks inherent in taking nutritional supplements with respect to doping, and thus, if he did not want to illegally enhance his sporting performance, it was reasonable to expect from him to at the very least consult his team physician, who is undoubtedly trained in these matters and could advise him properly, instead of a Nutritionist who does not work in the world of football.

110. The Player's lack of reasonable care is then coupled with the fact that allegedly, the Player's purpose in ingesting the specified substance was to lose weight, thereby improving in turn his physical state and, as a consequence, his performance on the pitch. As the expert witness

pointed out, it would be impossible to separate the weight loss effect of the Product, which is *per se* a secondary effect of the product, from the stimulating effect of the Product, which is the primary purpose of the Product and affects heart rate, mental agility and the like.

111. Notably, in the present case:

- in the Panel's view it is clear that the nature of the specified substance and the timing of its ingestion was beneficial to the Player, who indeed enhanced his sport performance,

- the Player neither disclosed the use of the product Hemo Rage Black with the doctors of the national team nor it was it disclosed in his doping control form, and

- there is no contemporaneous medical records file substantiating the non sport-related prescription for the specified substance. On the contrary, in the report that the Player's Nutritionist's filed before FIFA (Enclosure 27 of the answer to the appeal) he literally stated that the Player retained him in order to *"improve his eating habits to allow enhancing his physical sport performance" ("para mejorar sus hábitos de alimentación y permitir de esta manera su mejora en el rendimiento físico para su deporte"),* making clear that the prescription of the product was not due to medical reasons, but linked to the Player's sport performance.

112. In conclusion, for all these reasons the Panel finds that the Player has not demonstrated an absence of intent to enhance his sport performance to its comfortable satisfaction and hence article 16 of the FIFA ADR is not applicable.

D. (c) and (d) Player's degree of fault or negligence

113. To justify the reduction or elimination of the sanction under article 17 FIFA ADR, the Player must show that he did not know or suspect or could have reasonably known or suspected, even with the exercise of the utmost caution, that he ingested a Prohibited Substance.

114. Article 6.1 of the FIFA ADR imposes a personal duty upon each football player to ensure that no Prohibited Substance enters the football player's body, which necessarily means that the Player must have taken all available precautions to avoid any anti-doping rule violations.

115. The Panel firstly notes that in accordance with the aforementioned provisions, the fact that this is a personal duty, means the Player cannot avoid liability by simply arguing, as he does, that the Nutritionist was negligent and any negligence on the Nutritionist's part cannot possibly be attributed to the Player.

116. In the Panel's view, it cannot be held that the Player's actions in the present case entailed taking all available precautions or exercising the utmost caution and exempt the Player's conduct from reprehension. Even if it is accepted that the Player consulted with his Nutritionist and the latter researched Hemo Rage Black's ingredients on the internet and cross-checked them against the substances listed in the Prohibited List, the Panel does not accept the Player's conclusion that

there is no degree of fault or negligence involved in this case. The Player, as a professional who is aware of the anti-doping regulations and measures, could and should have been reasonably expected to find out exactly what the Product label stated, consult with the team doctor or even research the matter further on the internet himself. None of these measures require an extraordinary effort on the Player's part and would have certainly worked in his favour when considering the degree of fault or negligence in his actions and whether any degree of fault or negligence could be attributed to him.

117. Therefore, the Panel concludes that the Player has not proven to its comfortable satisfaction that he bears no fault or negligence, and thus the Player's sanction cannot be reduced under article 17 of the FIFA ADR.

118. Thus, the only remaining issue is whether the Player has proven that his actions demonstrate no significant fault or negligence so as to justify a reduction in the sanction imposed under article 18 of the FIFA ADR.

119. For this purpose, taking into account the circumstances of this case and taking into account the CAS jurisprudence (i.a. CAS 2012/A/2804 invoked by the Appellant) the Panel deems that the specific circumstances of this case operate against the Player. Specifically, the Panel notes that the following factors demonstrate that the *"no significant fault or negligence"* exception under article 18 of the FIFA ADR cannot be applied to the present case in order to mitigate the sanction:

    i. the Player was (or should had been) aware of anti-doping procedures under FIFA regulations and had experience as he was playing at international level;

    ii. the Player failed to disclose the Product on his doping control form;

    iii. the Player did not conduct any research on the Internet about the Product;

    iv. there is no evidence that the Player sought further information from any sport or anti-doping organization via telephone, internet or personal consultation;

    v. the risk of ingesting a supplement without consulting not only the manufacturer but, more feasible and important, the doctors of the Peruvian national team existed, and was deliberately ignored by the Player. A nutritionist cannot be considered an expert in anti-doping matters and it was not only naïve but negligent on the part of the Player to rely solely on the Nutritionist's advice when he could have easily consulted with the team physician.

120. Therefore, the Panel finds that the Player's degree of fault or negligence, viewed in the totality of the circumstances, is clearly significant in relation to the anti-doping rule violation and the Player's sanction cannot be reduced under article 18 of the FIFA ADR.

E. Period of suspension

121. The Player, having failed to prove an absence of intent to enhance his sport performance and to demonstrate that he bore no fault or negligence or no significant fault or negligence in connection with the anti-doping rule violation, articles 16, 17 and 18 of the FIFA ADR are inapplicable to the present case, and thus the Player is liable for the full two-year period of suspension provided under article 14 of the FIFA ADR.

122. In this regard, for the sake of completeness the Panel wishes to clarify that the period of provisional suspension already imposed on the Player must be credited against the two-year suspension.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 20 June 2013 by Mr. Joel Melchor Sánchez Alegría against the decision adopted by the FIFA Appeal Committee on 6 May 2013 is dismissed.

2. The decision adopted by the FIFA Appeal Committee on 6 May 2013 is confirmed.

3. (…).

4. (…).

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