Arbitration CAS 2017/A/5139 World Anti-Doping Agency (WADA) v. Confederação Brasileira de Futebol (CBF) & Olivio Aparecido da Costa

Panel: Mr Romano Subiotto QC (United Kingdom), Sole Arbitrator

Football
Doping (testosterone)
Standing to be sued
Strict liability
Balance of probability standard
Athletes' personal duty in connection with anti-doping
Constant interpretation of anti-doping rules

1. **For international purposes, the decisions of a national sport tribunal, although independently reached, must be considered to be the decisions of the national federation. In other words, the national federation is to be considered responsible vis-à-vis other international sports bodies for the decisions rendered by the national sports tribunal. This is exactly the same situation as in public international law where States are internationally liable for decisions rendered by their courts, even if under their constitutional law the judiciary bodies are independent from the executive branch.**

2. **According to art. 6 of the FIFA Anti-Doping Regulations, it is each player's personal duty to ensure that no prohibited substance enters his/her body. Accordingly, it is not necessary that intent, fault, negligence or knowing use on one player's part be demonstrated in order to establish an anti-doping rule violation under art. 6 of said regulations.**

3. **The balance of probability standard entails that an athlete has the burden of persuading a panel that the occurrence of the circumstances s/he relies on is more probable than their non-occurrence or more probable than the other possible explanations of positive testing.**

4. **Athletes bear a personal reasonability to ensure that no prohibited substance reaches their system. Athletes cannot shift their personal duty onto their doctors, regardless of whether a doctor prescribed such substance.**

5. **In spite of the fact that some athletes may have had limited education, it should be noted that the anti-doping rules cannot be interpreted differently based on different levels of education or cultural background. This would defeat the whole purpose of having a consistent and fair anti-doping system.**

I. THE PARTIES

1. World Anti-Doping Agency ("WADA" or the "Appellant") is an independent international anti-doping agency, constituted as a foundation under Swiss Law, and having its headquarters in Montreal, Canada, whose aim is to promote, coordinate and monitor, on an international level, the fight against doping in sports in all its forms.

2. Confederação Brasileira de Futebol ("CBF" or the "Respondent" or the "First Respondent") is the Brazilian football association governing the sport of football in Brazil, and is also a member of FIFA.

3. Olivio Aparecido da Costa (the "Athlete" or the "Second Respondent") is a Brazilian professional football player. He currently plays for the Clube de Regatas Brazil, and is affiliated to the Brazilian Football Federation.

4. The Appellant and the Respondents are each referred to individually as a "Party" and collectively as the "Parties".

II. FACTUAL BACKGROUND

5. The relevant facts and allegations are summarized below, based on the Parties' written submissions, pleadings, and the evidence adduced. Additional facts and allegations found in the Parties' submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

6. According to the athlete, on February 10, 2016 he sought medical advice for his low libido. The Athlete was advised by the club physician, Dr. Gilson Heleno Barbosa Silva ("Dr. Barbosa Silva") to see the urologist, Dr. Carlos Alberto Borba de Barros Baia ("Dr. Borba de Barros Baia"). Dr. Borba de Barros Baia recommended a series of tests to determine the level of testosterone, before proceeding with treatment. The results of the tests indicated a low level of testosterone.

7. On April 18, 2016, the Athlete was prescribed a product for topical use (called Androgel), that contained testosterone. This product was supposed to treat the Athlete's lack of libido. According to the athlete, after having received the prescription from Dr. Borba de Barros Baia, the Athlete visited Dr. Barbosa Silva to ask whether the product was safe for use, and Dr. Barbosa Silva advised that he could use Androgel.

8. During the hearing, on September 25, 2017, Dr. Barbosa Silva stated that the Athlete only saw him after he had already used Androgel. In addition, the Athlete also mentioned to Dr. Barbosa Silva that he had used the Androgel, and stopped, because it was not working. Dr. Barbosa Silva also stated that he did not authorize the use of Androgel, and would have advised the Athlete not to take it had he known that Dr. Borba de Barros Baia had prescribed Androgel to the

Athlete. At that point, Dr. Barbosa Silva did not think it was necessary for the Athlete to seek a Therapeutic Use Exemption ("TUE")[1], because the product would have already been assimilated by the body, and should no longer have been present in the Athlete's system.

9. During the hearing, Dr. Borba de Barros Baia also stated that he was unaware that the Second Respondent was an athlete, adding that he would otherwise have refrained from prescribing a testosterone product. The Athlete also confirmed that he did not inform Dr. Borba de Barros Baia that he was a footballer. Dr. Borba de Barros Baia added that he recommended the application of one Androgel sachet per day. However, the Athlete suggested that he used a pump type product, and applied the product twice a day, four pumps each time.

10. Although the packaging of Androgel clearly stated that the product contained testosterone, the Athlete explained that he was unaware that the product contained a prohibited substance, as he did not know what testosterone was. He also explained that after the doping test, he had training on doping, and only then did he understand that testosterone was a prohibited substance.

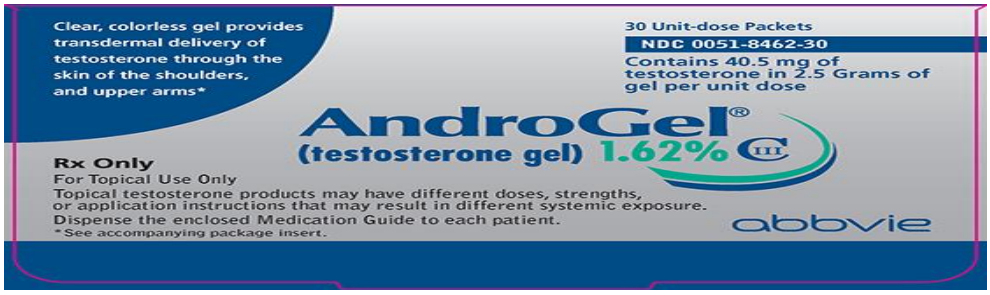

Figure 1: Image of Androgel stating that the product contains testosterone (submitted by the Appellant)

11. The Athlete did not remember the exact number of days during which he used the product, varying between 2 days and several weeks.

12. On May 11, 2016, the Athlete took a test during the Brazil Cup football competition, and did not declare the use of Androgel on the Doping Control Form. The test revealed that the Athlete had prohibited substances in his system, namely: 5a-androstane-3a, 17b-diol, 5b-androstane-3a, etiocholanolone and androsterone. These are considered to be anabolic steroids, and are prohibited by art. S1.1. of the 2016 WADA prohibited list.

13. The CBF Doping Control Committee took three series of tests, all confirming the high level of prohibited substance. Moreover, the Athlete did not dispute the presence of prohibited substances in his system.

14. On June 18, 2016 the Athlete took another anti-doping test, the results were negative, and there was no trace of prohibited substances in his system.

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1 Even if the athlete would have sought a TUE, the circumstances of this case would not warrant a TUE.

15. On October 10, 2016, the First Disciplinary Committee of the Superior Tribunal de Justicia Desportiva ("STJD"), took a decision against the Athlete, and imposed a one year suspension penalty. The STJD decided that a one year suspension was an appropriate sentence, because it considered that the Athlete had no significant fault or negligence.

16. On March 30, 2017 the CBF sent the judgment to FIFA. Subsequently, on April 12, 2017, FIFA informed WADA that it would not file an appeal in this case.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

17. On May 11, 2017, the Appellant filed an appeal at the Court of Arbitration for Sport (the "CAS"), pursuant to art. 75 of the FIFA Anti-Doping Regulations ("FIFA ADR") seeking annulment of the decision of October 10, 2016, rendered by the STJD. The Appellant requested that the CAS appoint a Sole Arbitrator.

18. By letter dated May 18, 2017, the CAS Court Office acknowledged receipt of the Statement of Appeal dated May 11, 2011.

19. The CAS noted that the Appellant chose to start proceedings in English and that this would be the language of the proceedings, unless the Respondents objected.

20. By email of May 22, 2017, the Appellant requested a five day extension of the time limit to file the Appeal Brief. The CAS Court Office granted the 5-day extension.

21. By letter dated May 25, 2017, the First Respondent requested to be excluded from the proceedings, because it did not consider its participation necessary. The First Respondent also pointed out that WADA did not seek relief against the First Respondent, but only against the Second Respondent.

22. The First Respondent had no objections to the choice of language, nor to the appointment of a Sole Arbitrator.

23. By letter dated May 26, 2017, the Second Respondent agreed with English as the language of the proceedings, but contested the Appellant's request to have a Sole Arbitrator. The Second Respondent argued that this case was very complex, and requested that the CAS appoints a panel of three arbitrators.

24. By letter dated May 30, 2017, the CAS Court Office acknowledged that all Parties agreed that English would be the language of the proceedings. The CAS Court Office also noted that the Second Respondent objected to the appointment of a Sole Arbitrator and invited the Appellant to specify, by June 2, 2017, whether it preferred a sole arbitrator as opposed to a panel of three.

25. The CAS Court Office also noted that the First Respondent did not consider itself as a party to the proceedings, and explained that the CAS had no power to remove it from the proceedings.

The Appellant was asked to inform the CAS Court Office, by June 2, 2017, whether it wanted to maintain the First Respondent as a party in this case.

26. By a further letter dated May 30, 2017, the CAS Court Office acknowledged receipt of the Appellant's Appeal Brief of May 29, 2017. The CAS Court Office also invited the Respondents to submit their respective Answer within 20 days upon receipt of the letter, pursuant to art. R55 of the Code of Sports-related Arbitration ("Code"), specifying that the proceeding would continue, regardless of whether the Respondents submitted their Answer.

27. By letter dated June 2, 2017, the Appellant addressed the following requests submitted by the Respondents:

- That the First Respondent be excluded from the proceedings: The Appellant submitted that, according to CAS precedent, the STJD is an *"integral part of the organizational structure of the CBF, with no legal personality of its own"* and that it is considered that the decisions taken by STD are decisions taken by CBF[2]. In this context the Appellant considered that the Decision against the Athlete was attributable to the CBF. For these reasons, the Appellant did not wish to release the CBF from the proceedings.

- Sole Arbitrator v Panel of Three Arbitrators: The Appellant noted that two out of three Parties agreed that the proceedings should take place before a sole arbitrator. Nonetheless, if the Respondents paid the entirety or their share of the advance costs, then the Appellant would be willing to have the matter submitted before a panel of three arbitrators, pursuant to art. R50 of the Code. If not, the Appellant insisted that the matter should be presented before a sole arbitrator.

28. By letter dated June 5, 2017, pursuant to art. R55 of the Code, the First Respondent asked the CAS Court Office to extend the deadline for submitting its Answer, after the payment by the Appellant of its own share of advanced costs.

29. By letter dated June 7, 2017, the CAS Court Office set aside the previous deadline for the submission of the Respondent's Answers, and noted that a new deadline would be set after the Appellant paid its share of the advanced costs.

30. By email of June 7, 2017, the Appellant brought to the CAS's attention that the change of the deadlines, as requested by the First Respondent, only caused procedural delays. The Appellant found it difficult to understand why the First Respondent requested an extension of the deadline, given that the First Respondent already stated in its letter dated May 25, 2017 that it would *"adopt a passive stance"* and *"cooperate with CAS only where deemed necessary by the relevant Panel"*. The Appellant also noted that the *"party's procedural conduct is a relevant consideration for the assessment of costs pursuant to R64.5"*. The Appellant also requested the CAS to fix the advance costs as soon as possible, to avoid further delays in the process.

31. By letter dated June 7, 2017, the CAS Court Office:

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2 CAS 2007/A/1370 & 1376

- Stated that it had no power to remove a party from the proceedings and the Appellant refused to release the First Respondent from the proceedings.

- Noted that the Appellant was willing to accept a panel of three arbitrators, only if the Respondents agreed to pay the entirety of their share of the costs. The Respondents were invited to inform the CAS Court Office whether it would pay the entirety of their share of the costs, by June 9, 2017. If the Respondents did not agree with these terms, then the President of the CAS Appeals Arbitration Division would take a decision on this matter.

32. By letter dated June 9, 2017, the First Respondent informed the CAS Court Office that it was not in a position to pay its advance share of the costs. Furthermore, it asked the CAS to order the Appellant to pay the fees of the First Respondent.

33. By letter dated June 14, 2017, the Second Respondent informed CAS Court Office that it was unable to pay the advance share of the costs, as it did not have the necessary means. Therefore the Second Respondent asked the CAS to order the Appellant to pay the entire costs of the case. In this context, the Second Respondent requested that the time limit for the submission of its Answer would be set after the Appellant had paid all the advance costs. In addition, the Second Respondent maintained its positions on to the appointment of a panel of three arbitrators.

34. The Second Responded noted that it has not received the Appellant's Appeal Brief, which was supposed to have been sent by May 30, 2017.

35. By letter dated June 14, 2017, the CAS Court Office informed the Second Respondent that the deadline for submitting their Answers was set aside, until the Appellant paid its share of the advance costs. The CAS Court Office also informed the Respondent that two copies of the Appeal Brief had been sent to the CBF by mistake, explaining why the Athlete had not received a copy. The CAS Court Office further indicated that it would send a copy of the Appeal Brief both by email and by courier.

36. By letter dated June 23, 2017 the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division decided that the matter would be heard by a sole arbitrator.

37. By letter dated June 23, 2017, the CAS Court Office informed the Parties that the sole arbitrator appointed for this case is:

> Sole Arbitrator: Mr Romano Subiotto QC, Avocat, Brussels, Belgium, and Solicitor-Advocate, London, United Kingdom

38. By letter dated July 3, 2017 the CAS Court Office invited the Respondents to submit their respective Answer, within 20 days of receipt of the letter.

39. On July 25, 2017 the Respondents submitted their respective Answer.

40. By letter dated August 2, 2017 the CAS Court Office requested the Parties to indicate whether they prefer that a hearing was held, or whether the Sole Arbitrator should award a decision solely based on the Parties' written submissions.

41. By letter dated August 9, 2017 the First Respondent requested that the matter be decided solely based on the Parties' written submissions. Furthermore, the First Respondent stated that it would not attend a hearing, because it took a passive stance in the proceedings.

42. By email of August 9, 2017 the Appellant requested that a hearing be held.

43. By letter dated August 14, 2017 the Second Respondent requested that a hearing be held.

44. By letter dated August 28, 2017 the CAS Court informed the Parties that pursuant to art. R57 of the Code, the Sole Arbitrator decided that a hearing would take place in the present matter.

45. By email of September 4, 2017, the Appellant requested clarification whether Dr. Irene Mazzoni was expected to provide oral clarification during the hearing, given that her testimony had not been challenged by the Parties.

46. By letter dated September 11, 2017, the Parties have been informed that Mrs Florina Pop, Legal Consultant, was appointed as an ad-hoc clerk in this matter.

47. By email of September 22, 2017 the Appellant returned the signed Order of Procedure to the CAS Court Office and also objected to Mr de Oliveira Barbosa being heard as a witness on behalf of the Second Respondent.

48. By email of September 22, 2017 the CAS Court Office requested that the Second Respondent submit a brief summary of Mr de Oliveira Barbosa's expected testimony, on or before September 23, 2017.

49. By email of September 23, 2017 the Second Respondent submitted that Mr de Oliveira Barbosa's testimony would relate to para. 73 of the Answer, namely to explain that the doping violation was not the fault of the Athlete.

50. On September 25, 2017, a hearing was held in Lausanne, Switzerland. The case was heard by the Sole Arbitrator assisted by Mrs Andrea Zimmermann, Counsel to the CAS and Mrs Florina Pop, ad hoc Clerk. The following Parties attended in person or by telephone:

- For the Appellant: Mr Ross Wenzel, and Mr Nicolas Zbinden, and Dr. Irene Mazzoni.

- For the Second Respondent: Mr Aparecido da Costa, assisted by Mr Felipe de Macedo, Mr Osvaldo Sestario Fildo, Mr Barbosa Silva, Mr Borba de Barros Baia, Mr de Oliveira Barbosa, and Mrs Luciana Ferreira (translator).

- The First Respondent did not attend the hearing.

51. At the end of the Hearing, the Parties confirmed that their right to be heard was respected.

A. Jurisdiction

52. Following the application made by WADA on May 11, 2017, the CAS Court Office informed the Parties by letter of May 18, 2017, that the case was assigned to the Appeals Arbitration Division of the CAS, pursuant to art. S20 of the Code.

53. The applicable procedure in this case is set out under art. R47 *et seq.* of the Code, which allows for an appeal to be filed with the CAS if the regulations of a sports association so provide. Art. R47 of the Code states in part:

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

54. Art. R57 sets out the Panel's power to determine the case *de novo*. It states in part:

> *"The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance".*

55. The Appellant and the Second Respondent did not dispute the jurisdiction of the CAS to hear this case, in accordance with the provisions of art. 75(3) of the FIFA ADR, 2015 edition and art. R47 of the Code, 2017 edition.

56. Therefore the CAS has jurisdiction on the matter at stake.

B. Admissibility

57. The Appellant submitted that, according to art. 75(3) of the FIFA ADR, it had the right to appeal to CAS against a decision rendered by a national appeals body.

58. The Second Respondent did not dispute that WADA has a right to appeal, as it complied with the provisions of art. R58 of the Code, and art. 57(2) of the FIFA statutes.

59. The Parties' submissions were filed within the deadlines provided by the CAS. The Parties complied with all other requirements of the Code, including the payment of the CAS Court office fees. It follows that the Appeal was admissible.

C. Applicable law

60. Art. R58 of the Code provides:

"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".

61. The Appellant submitted that the Decision by the STJD was taken pursuant to the FIFA ADR. The FIFA ADR therefore applies.

62. The Second Respondent agreed that the FIFA ADR applies, adding that Brazilian law should also be applicable, pursuant to art. R58 of the Code, as well as the Brazilian Sports Code, because it is mandatory in all the matters that the STJD handles.

63. The FIFA ADR is therefore applicable in this case, and Brazilian law and the Brazilian Sports Code subsidiarily to the extent any issue is not covered by the FIFA ADR.

IV. SUBMISSIONS OF THE PARTIES

64. The summary below refers to the allegations and arguments put forward by the Parties without listing them exhaustively. The Sole Arbitrator has nevertheless examined and taken into account all of the allegations, arguments, and evidence, whether or not expressly referred to in this award.

1. The Appellant's submissions and requests for relief

65. The Appellant filed an appeal against the decision of the STJD, imposing a one year suspension against the Athlete.

66. The Appellant noted that the Athlete did not dispute the anti-doping rule violation ("ADRV"), as upheld by the STJD decision.

67. The Appellant relied on art. 19(1) of the FIFA ADR, which states that the period of ineligibility should be of 4 years, unless the Athlete could establish that the ADRV was not intentional.

68. Art. 19(3) of the FIFA ADR provides that:

"the Athlete 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 the risk".

69. The Appellant relied on CAS jurisprudence, and claimed that the Athlete had to prove that the violation was not intentional, and had to establish the circumstances in which the substance entered his body (CAS 2016/A/4377; CAS 2016/A/4662; CAS 2016/A/4563; CAS 2016/A/4626).

70. The Appellant also stated that the Athlete had to prove the origin of the prohibited substance on a *"balance of probability"*. The Athlete had to convince the Sole Arbitrator that the occurrence on which the Athlete relied upon must have been more probable than its non-occurrence (CAS 2008/A/1515).

71. The Appellant noted the following:

    1. The Athlete did not provide any evidence to demonstrate the alleged condition of low libido. The only evidence presented was the test results on the level of testosterone of March 22, 2016.

    2. It is impossible to accept that two doctors, with significant experience in the field, allowed an Athlete to take a product that contains testosterone, and did not seek a TUE.

    3. The actual duration of the treatment remains unclear. The Appellant also made reference to a statement by the club's medical counsel Dr. Francisco Disnaldo Oliveira Leite (Dr. "Oliveira Leite"), stating that the Athlete took the product for 10-15 days. However, the Appellant also noted that Dr. Oliveira Leite was not involved in the treatment of the Athlete in any way.

    4. The two doctors that advised the Athlete did not appear before the STJD. Dr. Barbosa Silva submitted a statement. As for Dr. Borba de Barros Baia it is not clear whether he was summoned to attend the STJD hearing. Nonetheless, Dr. Borba de Barros Baia provided an oral statement during the Hearing, and stated that he did not know that the Second Respondent was an Athlete.

    5. Even if the Athlete took the product for 15 days, and had ended the treatment on May 3, 2016, this would still not explain the results of May 11, 2016.

72. As a result, WADA submitted that the Athlete has failed to prove the origin of the product, adding that a failure to provide additional evidence to substantiate his version of the events should lead to the conclusion that the Athlete has not established the origin of the prohibited sample.

73. WADA claimed that the Athlete also had to prove there was no indirect intention, namely that he was unaware that his conduct would lead to a violation of anti-doping rules, and that he did not manifestly disregard that rule.

74. The Appellant added that the Athlete should have carefully considered that medication on prescription could contain prohibited substances, but took the medication without looking at the product's ingredient, meaning that he manifestly disregarded the risk that it may contain prohibited substances.

75. The Appellant acknowledged that the STJD considered that the Athlete was not significantly at fault or negligent ("NSF").

76. The Appellant stated a finding of fault requires one to determine what the Athlete could have done to prevent the violation in question. Athletes cannot rely on doctor advice to escape liability. This is consistent with the CAS jurisprudence, stating that: *"in consideration of the facts that Athletes are under a constant duty to personally manage and make certain that any medication being administered is permitted under the anti-doping rules, the prescription of a particular medicinal product by the Athlete's doctor does not excuse the Athlete from investigating to their fullest extent that the medication does not contain prohibited substances"* (CAS 2008/A/1488; CAS 2005/A/828; CAS OG 04/003).

77. The Appellant stated that the STJD's application of the no significant fault principle was wrong, because the Athlete had failed to exercise his duty to check that the medication in question did not violate the anti-doping rules. In addition, the Athlete should not be able to rely on the doctor's advice to escape liability. Therefore, the reduction of the sanction, as decided by the STJD, was not justified.

78. In light of the foregoing, the Appellant requested the following relief:

1. *"The Appeal of WADA is admissible.*

2. *The decisions of the First Disciplinary Committee of the STJD of 10 October 2016, of the STJD on 24 November 2016 and of STJD on 26 January 2017, in the matter of Olivio Aparecido da Costa, are set aside.*

3. *Olivio Aparecido is sanctioned with a four-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of provisional suspension or ineligibility effectively served by Olivio Aparecido da Costa before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*

4. *All competitive results by Olivio Aparecido da Costa from and including 11 May, 2016 are disqualified, with all resulting consequences including forfeiture of medals, points and prizes.*

5. *The Respondents be ordered to pay WADA a contribution to its legal and other costs in connection with these appeal proceedings".*

2. The First Respondent's submissions and requests for relief

79. In reply, the First Respondent argued that it should not be a part of the proceedings because it did not have standing to be sued.

1. The First Respondent argued that a party has standing to be sued only if it is personally obliged *"by the disputed rights"* at stake (CAS 2006/A/1206, and CAS 2007/A/1329 & 1330). The First Respondent claimed that it did not have a stake in the dispute.

2. The First Respondent also submitted that it was not a party in the disciplinary procedure before the STJD, and the decision of the STJD only offers the possibility to sanction the Athlete, and made no reference to the CBF.

3. According to CAS precedent (CAS 2009/A/1974), a national sports federation lacks standing to be sued, where the decision appealed has been issued by an independent tribunal belonging to another entity.

80. The First Respondent also claimed that the costs related to the CAS proceedings should not be imposed upon it, for the following reasons:

1. CBF is the national confederation regulating football in Brazil, and it has 27 local federations affiliated to it. These federations each have their own independent Sports Justice Court.

2. Art. 52 of the federal law nr.9.615/98 ("Pele Law") states that; *"The Bodies of the Sports Justice are autonomous and independent from the sports administration entities or each system, and are composed of the Superior Courts of Justice, working with the national sports administration entities; of Sports Justice Courts, working with regional states/entities of sports administration, and the Disciplinary Commission, with jurisdiction to adjudicate the matter set out in the Sports Justice Code, always guaranteed the right to be heard".*

3. According to art. 217 of the Brazilian Federal Constitution, the STJD is an independent and autonomous body. By imposing cost upon the CBF, the CAS would indirectly treat the STJD as not independent from the CBF.

4. It also noted that if the CBF would have to bear the costs for all the doping decisions issued by the STJD (from all 27 local sports tribunals), this would be detrimental to the fight of anti-doping in Brazil.

81. In light of the foregoing, the First Respondent requested the following relief:

1. *"Reject the present appeal vis-a-vis CBF due to its lack of standing to be sued;*

2. *(…) order the Appellant and/or the Second respondent to bear any and all CAS administrative and procedural costs, as the case may be; and*

3. *Grant CBF a contribution towards its legal fees and other expenses incurred in connection with this arbitration, pursuant to Article R64.5of the CAS Code, in an amount to be fixed at the discretion of the Sole Arbitrator".*

3. The Second Respondent's submissions and requests for relief

82. The Athlete argued that the one year suspension decided by the STJD was fair.

83. The Athlete stated that Androgel has been prescribed 23 days before the test on May 11, 2016. The result of the test was notified to the Athlete at the end of June 2016.

84. Between May 11, 2016 and the end of June, the Athlete undertook a second doping test on June 18, 2016, which was negative. This suggests that the positive results, of the May 11, 2016 test, resulted from the use of Androgel.

85. In his statement, the Athlete noted that the doping test of May 11, 2016 was just another routine check, before a routine game that took place every Wednesday and Sunday. Therefore it was not a special game, and there was no correlation between the use of Androgel and the game. However, during the Hearing the Athlete stated that the game was important because it was a classification game during the Brazil Cup.

86. According to the Athlete, the use of Androgel was not related to his professional life.

87. The Athlete stated that, apart from Androgel, he did not use any other substances that may have triggered the positive doping result. In his opinion, it is very clear that the prohibited substance reached his system through the use of Androgel.

88. The Athlete stated that he had no intention to cheat or use a prohibited substance. He also made reference to art. 19(3) of the FIFA ADR, which requires that the Athlete be aware that his actions may constitute a violation, but disregarded that risk. The Athlete added that he did not know that Androgel contained a prohibited substance, and this can be substantiated by the fact that he sought the opinion of two doctors before taking the product.

89. The Athlete also explained that he had no doping education, and he did not know what testosterone was, or whether it was included in the WADA prohibited list. On the contrary, Dr. Borba de Barros Baia prescribed Androgel to the Athlete, he went to Dr. Barbosa Silva to ask for a second opinion about the product, which shows that he took a precautionary step before using the medication.

90. The Athlete also noted that the STJD awarded a one year sentence, because he was not significantly at fault or negligent.

91. The Athlete also sent a copy of a new contract signed with the Clube de Regatas Brazil, which demonstrates that the club did not consider that he was at fault, but that it was the doctor's fault.

92. The Athlete submitted that the sanction was appropriate and should not be extended, because he did not intend to take a prohibited substance.

93. In light of the foregoing, the First Respondent requested the following relief:

    1. *"Dismiss all and any requests for relief of the Appellant and maintain the appealed decision rendered by the STJD;*

    2. *Order the Appellant to pay the costs of this proceeding in full; and*

3. *Order the Appellant to pay a significant contribution towards the legal fees and other expenses incurred by the Respondent in connection with the proceedings".*

V. MERITS

1. First Respondent's standing to be sued

94. The CBF argued that (1) it does not have standing to be sued because it had no stake in the dispute, and (2) that the decision was issued by the STJD – *"autonomous and independent from the sports administration entities"* – therefore it did not derive from the CBF.

95. In its submissions, the CBF did not address the substantive issues under appeal, namely the doping decision against the Second Respondent. It merely focused in its Answer to the appeal on the lack of standing, and opposed the request to contribute to the costs of the proceeding.

96. In CAS 2007/A/1370 & 1376, the Panel found that *"the STJD has no autonomous legal personality and may not be considered as a Respondent on its own in a CAS appeal arbitration concerning one of its rulings; consequently, the procedural position of the STJD before the CAS must be encompassed within that of the CBF".*

97. Furthermore, at paragraph 88 of the same case, the Panel found that *"(at least) for international purposes the decisions of the STJD, although independently reached, must be considered to be the decisions of the CBF. In other words, the CBF is to be considered responsible vis-a-vis FIFA (or other international sports bodies) for the decisions adopted by the STJD. This is exactly the same legal situation as we have in public international law, where States are internationally liable for judgements rendered by their courts, even if under their constitutional law the judiciary is wholly independent from the executive branch".*

98. These principles have been confirmed by the CAS in its jurisprudence, *inter alia* CAS 2014/A/3842 and CAS 2010/A/2307.

99. The Sole Arbitrator concurs with the findings in the CAS jurisprudence, namely that the CBF if to be considered responsible for the decisions adopted by the STJD. Accordingly, the CBF is legitimately a party to the proceedings.

2. Second Respondent's intentional violation of anti-doping rules, delegation of responsibility and failure to prove origins

100. According to art. 6 of the FIFA ADR rules: *"it is each Player's personal duty to ensure that no Prohibited substance enters his body. (…) 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 rule violation under art. 6".*

101. In this case the existence of the prohibited substance in the Athlete's system was determined though the routine anti-doping test conducted before a game during the Brazil Cup. A sample was taken from the Athlete on May 11, 2016, and the results showed a high concentration of testosterone in his system. The initial values of the Testosterone/Epitestosterone ratio ("T/E") was of 85.89 ng/ml, and the confirmed value was of 50 ng/ml.

102. According to WADA's Technical Document TD2016EAAS on Endogenous Anabolic Androgenic Steroids the threshold is of 4:1, which means that the T/E ratio was twenty times higher than the threshold. During the Hearing, the expert witness, Dr. Mazzoni confirmed that, even if the Sole Arbitrator only took into consideration the lower confirmed T/E result, this would not change the findings that the Athlete had an extremely high percentage of prohibited substances in his system at the time of the doping test.

103. Furthermore, throughout the proceedings the Athlete did not deny the presence of testosterone in his system. Nonetheless, the athlete argued that the violation of the anti-doping rules was not intentional.

104. According to CAS jurisprudence, the Athlete bears the burden of proof of demonstrating that he did not intend to violate the anti-doping rules (CAS 2016/A/4377; CAS 2016/A/4662; CAS 2016/A/4563; CAS 2016/A/4626).

105. The Preliminary Title of the FIFA ADR states that:

- No Fault or Negligence means that *"the Player or other Person's establishing that he did not know or suspect, and he could not reasonably have known or suspected even with the exercise of outmost caution, that he had used or been administrated a Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. (…) the Player must also establish how the Prohibited Substance entered his system"*.

- No Significant Fault or Negligence means that *"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. (…) the Player must also establish how the Prohibited Substance entered his system"*.

106. The FIFA ADR rules therefore provide for a two limb test, namely (1) that the athlete must demonstrate how the prohibited substance entered his system, and (2) that the athlete could not have reasonably known or suspected that he had used a prohibited substance. These are considered below in turn.

a. Failure to prove origins

107. As stated, the FIFA ADR require the Athlete to prove how the prohibited substance entered his system, and the CAS has held that the Athlete bears the burden of proving on a balance of probability that the violation was not intentional, and of explaining how the prohibited substance entered his system. According to CAS 2008/A/1515:

> *"the balance of probability standard entails that the athlete has the burden of persuading the Panel that the occurrence of the circumstances on which the athlete relies is more probable than their non-occurrence or more probable than other possible explanations of positive testing"*.

108. Throughout the proceedings the Athlete argued that the high results of the doping test resulted from the use of Androgel. In his written statement, the Athlete claimed he had been using

Androgel for a period of 10 to 15 days more or less. During the hearing however, he stated he could have been using it for two days or maybe for weeks, but he could not recall. In any event, he stated that was not using Androgel at the time of the test.

109. Dr. Mazzoni explained that the T/E ratio was 20 times higher than what a normal test result, which suggests that either (1) the Athlete was using Androgel at the time when the doping sample was taken, or (2) that the Athlete was using a testosterone product other than Androgel.

110. While the Athlete argued that the results must have been a consequence of using Androgel, he failed to provide any evidence to demonstrate that it was likely that Androgel had stayed in his system for a long period of time after the Athlete stopped the treatment. If anything, the evidence given by the Athlete has been inconsistent.

111. The theories put forward by Dr. Mazzoni, are more likely to meet the standard balance of probability, as opposed to the inconsistent accounts given by the Athlete. The use of Androgel at the time of the test would most certainly explain the high T/E ratio. It cannot be said whether the Athlete used another type of testosterone product, but this possibility cannot be excluded, given that the testimony and evidence adduced by the Athlete was inconsistent throughout the proceedings.

b. Appropriate level of fault of the Athlete and Indirect Intention

112. Art. 19 para 3, of the FIFA ADR rules provide that conduct is considered to be intentional if a person *"engaged in conduct which he or she knew constituted an anti-doping rule violation or knew there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded it"*. In these proceedings the Athlete claimed that it was not his intention to violate the rules.

113. During the hearing, the Athlete maintained his position that he had no intention to cheat and was not aware that using Androgel would constitute a violation of the anti-doping rules. In his submissions to the CAS, the Athlete put forward two arguments attempting to demonstrate that he did not intend to cheat, namely (1) the athlete has very limited education and did not know what testosterone was, and (2) he sought medical advice before using Androgel.

114. In his written statement, the Athlete attempted to prove that he acted with outmost caution, because he asked the advice from two doctors before using Androgel. This however, is inconsistent with the evidence given during the Hearing on September 25, 2017:

- First, the Athlete confirmed that he did not inform Dr. Borba de Barros Baia that he was an Athlete, and Dr. Borba de Barros Baia therefore treated him as a routine patient.

- Second, in his written statement, the Athlete mentioned that he asked Dr. Barbosa Silva before taking Androgel. However, Dr. Barbosa Silva stated that the Athlete did not seek advice with regards to Androgel, and the Athlete merely informed Dr. Barbosa Silva, after he had already finished the treatment.

115. The Athlete attempted to shift his responsibility onto the doctors that treated him, but this is not an acceptable defense. The CAS's consistent jurisprudence is that athletes cannot shift their duty onto their doctors. As a result, the Athlete bears a personal reasonability to ensure that no prohibited substance reaches his system, regardless of whether a doctor prescribed it (CAS 2012/A/2959; CAS 2006/A/1133; CAS 2005/A/951; CAS 2005/A/828). This has been summarized in CAS 2012/A/2959:

> *"8.19 (…) Dr. Tachuk's role does not relieve Mr. Nilforushan of responsibility. In CAS 2008/A/1488, the CAS panel commented at paragraph 12 that "in consideration of the fact that athletes are under a constant duty to personally manage and make certain that any medication being administered is permitted under the anti-doping rules, the prescription of a particular medicinal product by the athlete's doctor does not excuse the athlete from investigating to their fullest extent that the medication does not contain prohibited substances". In CAS 2005/A/872, a CAS panel ruled that for a reduction based on no significant fault or negligence there must be more than simply reliance on a doctor. Further, Koubek (…) makes clear that an athlete must cross check assurances given by a doctor, even where such a doctor is a sports specialist".*

116. As a result, it must be held that the Athlete cannot rely on delegating his responsibility to his doctors.

117. The Athlete also claimed that he had very poor education and did not know what testosterone was, nor did he know that the substance was on the WADA prohibited list. While it may be true that the Athlete received limited primary school education, this does not demonstrate that the Athlete did not know what testosterone was. Given that the Athlete has been playing football for approximately 18 years, and had undergone countless routine anti-doping tests, it is hard to conceive that he did not know what testosterone was.

118. During the Hearing, the Athlete was shown a Doping Control form that he had signed. This form clearly stated on the top of the first page *"Formulario de Controle de Doping/ Doping Control Form"*. The Athlete explained that he did not know what it meant, and that he always signed forms when he was asked to sign, without questioning their purpose.

119. It is hard to envisage that an athlete that has been playing professional football for 18 years, and probably signed countless doping forms, has never wondered about or learned the meaning of doping.

120. During the Hearing, it became clear that the Athlete had some sort of understanding that he had to consult or at least ask the club doctor before taking any kind of treatment. It can therefore be inferred that he was aware that some substances might not be allowed. Thus, even in the unlikely/theoretical event that the Athlete did not know what testosterone was, the Athlete knew that there was a possibility that a medical treatment might affect his performance and could be prohibited.

121. Knowing that, the Athlete took a prescribed treatment, without checking whether the active substance was prohibited, thus manifestly disregarding the inherent risk that Androgel might contain a prohibited substance.

122. In these circumstances, the Athlete failed to demonstrate that he took the utmost care when using the libido treatment, and even if the Sole Arbitrator were to accept - but he does not - that the Athlete had not acted intentionally, it is clear that he manifestly disregarded the risks of taking Androgel.

123. During the proceedings, the Athlete put forward arguments relating to his limited educational background, his cultural environment and intellectual capacities, which could explain his lack of awareness and understating of what doping meant or what testosterone was. While the Sole Arbitrator accepts that the Athlete may have had limited education, it should be noted that the anti-doping rules cannot be interpreted differently based on different levels of education or cultural background. This would defeat the whole purpose of having a consistent and fair anti-doping system.

3. Appropriate sanction

124. According to art. 19, para 1 a) of the FIFA ADR states that the period of ineligibility for an intentional violation of doping rules is four (4) years.

125. For the reasons set forth in section VI of this judgement, the Sole Arbitrator finds that the Athlete should be suspended for a period of four (4) years from the date of this Award, reduced by any suspension time already served by the Athlete pursuant to the STJD's decision.

126. In addition, the Sole Arbitrator notes that art. 25 of the FIFA ADR provides that, in addition to the automatic disqualification of the results in the competition which produced the positive sample, all other competitive results of the Player obtained from the date a positive sample was collected, through the commencement of any suspension or period of Ineligibility, shall, unless fairness requires otherwise, be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.

127. In application of art. 25 of the FIFA ADR, the Sole Arbitrator considers that all of the Athlete's individual competitive results from and including 11 May, 2016 are therefore disqualified, with all resulting consequences including forfeiture of medals, points and prizes, provided always that this shall affect any team sport results only within the terms of art. 11 of the WADA Code.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Appeal filed on May 11, 2017 by the World Anti-Doping Agency, is upheld.

2. The Decision rendered by the First Disciplinary Committee of the Superior Tribunal de Justicia Desportiva, on October 10, 2016 is set aside.

3. Mr Olivio Aparecido da Costa is sanctioned with a period of ineligibility of four (4) years commencing on the date of this Award, reduced by any suspension time already served by the Athlete pursuant to the STJD's decision.

4. All of Mr Olivio Aparecido da Costa's individual competitive results from and including 11 May, 2016 are therefore disqualified, with all resulting consequences including forfeiture of medals, points and prizes.

5. (…).

6. (…).

7. All other motions or prayers for relief are rejected.