



Arbitrations CAS 2018/A/5546 José Paolo Guerrero v. Fédération Internationale de Football Association (FIFA) & CAS 2018/A/5571 World Anti-Doping Agency (WADA) v. FIFA & José Paolo Guerrero, award of 30 July 2018 (operative part of 14 May 2018)

Panel: The Hon. Michael Beloff QC (United Kingdom), President; Prof. Massimo Coccia (Italy); Mr Jeffrey Benz (USA)

Football

Doping (cocaine)

System of reduction of the period of ineligibility

Principles applicable to the establishment of the source of the prohibited substance

Reliance on officials as factor in the evaluation of fault or negligence

Application of the principle of proportionality in the reduction of the period of ineligibility

1. **Article 19.3 of the FIFA Anti-Doping Regulations (ADR) provides that an anti-doping rule violation (ADRV) in respect of a non-specified prohibited substance that is banned only in-competition (such as cocaine) shall not be considered intentional if an athlete can establish that the substance was used out-of-competition in a context that was unrelated to sport performance. In order to benefit from an elimination of or further reduction in the period of ineligibility, it is necessary to establish no fault or negligence, or no significant fault or negligence. As provided in the regulatory definitions of these concepts, it is a pre-condition to their possible application to establish the source of the prohibited substance.**
2. **The following principles apply to the establishment of the source of the prohibited substance: (i) it is for an athlete to establish the source of the prohibited substance, not for the anti-doping organisation to prove an alternative source to that contended for by the athlete; (ii) an athlete has to do so on the balance of probabilities. Evidence establishing that a scenario is possible is not enough to establish the origin of the prohibited substance; (iii) an athlete has to do so with evidence, not speculation; (iv) it is insufficient for an athlete to deny deliberate ingestion of a prohibited substance and, accordingly, to assert that there must be an innocent explanation for its presence in his/her system; and (v) if there are two competing explanations for the presence of the prohibited substance in an athlete's system, the rejection of one does not oblige (though it may permit) the hearing body to opt for the other. There is always available to the hearing body the conclusion that the other is not proven. For the hearing body in such a situation there are three choices, not just two.**
3. **A reasonable belief that team officials would, as had been the case in the past, ensure the safety of any food or drink served in designated areas and therefore that an athlete was not risking the entry into his/her body of a prohibited substance, is not a defence to an ADRV nor does it establish that there has been no fault or negligence; but it**

certainly bears weightily on the evaluation degree of fault.

4. **CAS jurisprudence since the coming into effect of the 2015 World Anti-Doping Code (WADC) is clearly hostile to the introduction of proportionality as a means of reducing yet further the period of ineligibility provided for by the WADC. The WADC has been found repeatedly to be proportional in its approach to sanctions, and the question of fault has already been built into its assessment of length of sanction.**

I. INTRODUCTION

1. These appeals, consolidated by agreement of the parties pursuant to Article R52 *in fine* of the Code of Sports-related Arbitration (the “CAS Code”), against a decision of the FIFA Appeal Committee concern the period of ineligibility to be served by Mr Guerrero for an admitted anti-doping rule violation (“ADRV”). There are three distinct positions taken by the parties. Mr Guerrero contends that he should serve no period of ineligibility at all. FIFA contends for a 6 month period. WADA contends for a 22 month period.

II. THE PARTIES

2. Mr Jose Paolo Guerrero (“Mr Guerrero” or the “Player”) is a 33-year-old professional football player. He is currently the captain of the Peruvian National Football Team (“Peruvian Team”) and plays professionally for the Brazilian team Clube de Regatas do Flamengo (“Flamengo”).
3. Fédération Internationale de Football Association (“FIFA”) is the world governing body of football, with its headquarters in Zurich, Switzerland.
4. The World Anti-Doping Agency (“WADA”) is the world governing anti-doping body, with headquarters in Montreal, Quebec, Canada.

III. FACTUAL BACKGROUND

A. Background Facts

5. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced for and at the hearing. Additional facts and allegations found in the parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in

the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

6. On 5 October 2017, the Peruvian Team played a match against the Argentinian National Team (the “Match”) during the Qualifier Rounds of the 2018 FIFA World Cup Russia (the “Competition”), in the Bombonera Stadium, in Buenos Aires, Argentina.
7. After the Match, Mr Guerrero underwent an in-competition Anti-Doping control.
8. The analysis of the A sample revealed the presence of the cocaine metabolite benzoylecgonine (“BZE”).
9. The analysis of the B sample confirmed the presence of BZE.
10. Cocaine is a non-specified stimulant prohibited in-competition under category S6 of the 2017 WADA Prohibited List.

B. Proceedings before the FIFA Judicial Bodies

(a) Notification of Provisional Suspension

11. On 3 November 2017, Mr Guerrero received a letter from the FIFA Medical and Anti-Doping Department dated 2 November 2017 – through his National Association –, informing him about the alleged presence of BZE in his urine sample.
12. On 3 November 2017, Mr Guerrero was provisionally suspended by the FIFA Disciplinary Committee for 30 (thirty) days.
13. On 8 November 2017, the grounds of the decision which imposed the provisional suspension were notified to the Parties.

(b) Provisional Measures before FIFA

14. On 9 November 2017, Mr Guerrero submitted a Request for Provisional Measures by means of which he requested the provisional suspension to be lifted.
15. On 10 November 2017, the FIFA Disciplinary Committee issued a decision by means of which it confirmed the decision to provisionally suspend Mr Guerrero passed by the Chairman of the Disciplinary Committee on 3 November 2017.
16. On the same date, Mr Guerrero was provided with the A Sample 6269737 Laboratory Documentation Package and the Analytical Report of the B Sample 6269737.

17. On 13 November 2017, Mr Guerrero filed an appeal before the FIFA Appeal Committee in order to revert the decision passed by the FIFA Disciplinary Committee.
18. On 15 November 2017, the FIFA Appeal Committee issued a decision rejecting the Player's Appeal and upholding the provisional suspension.
19. On 17 November 2017, Mr Guerrero was provided with the B Sample 6269737 Laboratory Documentation Package.

(c) *Proceedings before the FIFA Disciplinary Committee*

20. On 28 November 2017, Mr Guerrero filed with the FIFA Disciplinary Committee his Written Submissions, and accompanying evidence.
21. On 30 November 2017, a hearing was held at the headquarters of FIFA in Zurich, Switzerland.
22. On 8 December 2017, the FIFA Disciplinary Committee rendered the operative part of the decision issued on 7 December 2017 (the grounds of which were notified to the Parties on 10 December 2017), by which Mr Guerrero was suspended for a period of one year ("FIFA Disciplinary Committee Decision").

(d) *Proceedings before the FIFA Appeal Committee - The Appealed Decision*

23. On 12 December 2017, Mr Guerrero lodged an appeal before the FIFA Appeal Committee, against the FIFA Disciplinary Committee Decision.
24. On 20 December 2017, the FIFA Appeal Committee issued the operative part of the decision 171331 APC PER ZH, (the grounds of which were notified on 26 January 2018), by means of which the applicable period of suspension imposed on Mr Guerrero was reduced to six months ("Appealed Decision") in the following terms:

"1. The appeal lodged by the player José Paolo Guerrero Gonzales against the decision rendered by the FIFA Disciplinary Committee on 7 December 2017 is partially upheld.

2. The player José Paolo Guerrero Gonzales is declared ineligible for a period of six months for violation of art. 6 of the FIFA Anti-Doping Regulations starting as from the date of notification of the present decision. The period of provisional suspension already served by Mr Guerrero - since 3 November 2017 - shall be credited against the total period of ineligibility to be served.

3. In compliance with the Preliminary Title "I. Definitions and Interpretation" of the FIFA Anti-Doping Regulations as regards to the notion of "ineligibility" as well as art. 29 of the same regulations, the player José Paolo Guerrero Gonzales is suspended for a specified period of time from participating in any Competition (which covers all types of matches, including domestic, international, friendly and official)

or other activity or from receiving sport related financial support as provided in the FIFA Anti-Doping Regulations.

4. The costs and expenses of these proceedings in the amount of CHF 3,000 are to be borne by the player José Paolo Guerrero Gonzales. This amount is set off against the appeal fee of CHF 3,000 already paid by the player José Paolo Guerrero Gonzales.

5. The player José Paolo Guerrero Gonzales shall bear his own legal and other costs incurred in connection with the present proceedings”.

IV. PROCEEDINGS BEFORE THE CAS

(a) Written proceedings

25. On 29 January 2018, in accordance with Articles R47 and R48 of the CAS Code, Mr Guerrero filed his statement of appeal and the procedure *CAS 2018/A/5546 José Paolo Guerrero v. FIFA* was opened by the CAS Court Office on 8 February 2018.
26. On 1 February 2018, WADA requested to intervene in the procedure *CAS 2018/A/5546 José Paolo Guerrero v. FIFA*, pursuant to Article R41.3 of the CAS Code.
27. On 7 February 2018, WADA further specified that “*its role as an intervening/interested party in the Player’s appeal would effectively become moot once its own appeal had been filed and consolidated with that of the Player*”.
28. On 19 February 2018, in accordance with Articles R47 and R48 of the CAS Code, WADA filed its statement of appeal and the procedure *CAS 2018/A/5571 WADA v. FIFA & José Paolo Guerrero* was opened by the CAS Court Office on 22 February 2018.
29. On 26 February 2018, in accordance with Article R51 of the CAS Code, Mr Guerrero filed his appeal brief.
30. On 2 March 2018, the CAS Court Office requested WADA to clarify its position with regard to its participation in the procedure *CAS 2018/A/5546 José Paolo Guerrero v. FIFA*.
31. On 5 March 2018, WADA informed the CAS Court Office that it considered that it had “*a right to file an Answer to the Player’s Appeal Brief*” and that, in the event the Panel would determine that WADA does not have such a right, it maintained “*its request for intervention in the Player’s appeal*”.
32. On 6 March 2018, the CAS Court Office informed the parties, *inter alia*, that, in view of the parties’ agreement, the procedures *CAS 2018/A/5546 José Paolo Guerrero v. FIFA* and *CAS 2018/A/5571 WADA v. FIFA & José Paolo Guerrero* had been consolidated.

33. On 9 March 2018, in accordance with Article R51 of the CAS Code, WADA filed its appeal brief.
 34. On 22 March 2018, the parties were advised that the Panel had decided that, pursuant to Article R41.4 of the CAS Code, WADA was to intervene in Mr Guerrero's appeal (*CAS 2018/A/5546 José Paolo Guerrero v. FIFA*) with a status akin to that of a respondent and would be invited to file an answer to Mr Guerrero's appeal brief.
 35. On 12 April 2018, WADA requested, *inter alia*, that its appeal brief in the procedure CAS 2018/A/5571 WADA v. FIFA & José Paolo Guerrero "*shall be considered as an Answer to the Player's submissions*".
 36. On 17 April 2018, both FIFA and Mr Guerrero filed their respective answers.
 37. On 20 April 2018, the CAS Court Office sent an Order of Procedure to the parties, which was returned duly signed by WADA, on 27 April 2018, and by Mr Guerrero and FIFA, on 30 April 2018.
- (b) Oral presentation**
38. On 3 May 2018, in accordance with Article R57 of the CAS Code, the parties, experts, witnesses, and parties' legal representatives participated in the hearing, which took place at the CAS headquarters in Lausanne, Switzerland.
 39. Oral evidence was given for Mr Guerrero by the Player himself, Mr Jose Zegarra, Mr Francesco Balbi (by telephone) and Professor Luiz Carlos Cameron (expert witness). For FIFA by Professor Martial Saugy (expert witness).
 40. Submissions were made for Mr Guerrero by Messrs Bichara Neto, Pedro Fida, Juan de Dios Crespo Pérez and Paolo Torchetti, for FIFA by Messrs Jaime Cambreleng and Jacques Blondin and for WADA by Mr Ross Wenzel.
 41. At the start of the hearing the parties confirmed that they had no objection to the composition of the Panel and at its conclusion confirmed that their right to be heard had been fully respected.
 42. On 14 May 2018, at the request of the parties, the Panel issued the operative part of the award, which was notified to the parties on the same date.

V. THE PARTIES' SUBMISSIONS AND REQUEST FOR RELIEF

A. The Player

43. Mr Guerrero's essential submissions were as follows:

- He had established on the balance of probabilities, as and for the reasons found by the FIFA disciplinary bodies, that the BZE in his body was the result of his ingestion of tea containing coca leaves in the Visitors' Room in the Swissotel Lima Peru on 5 October 2017, 2 days before the match against Argentina;
- Because he reasonably assumed that only food and drink compliant with strict team food and beverage protocols would be served in the Visitors' room, he bore no fault or negligence ("NFN");
- Accordingly, pursuant to Article 21 of the FIFA Anti-Doping Regulations (the "FIFA ADR") he should not have any penalty of ineligibility imposed on him at all.

44. Mr Guerrero requested the following relief in his Statement of Appeal and Appeal Brief, that CAS should:

- (i) *Admit the appeal against the decision rendered by the FIFA Appeal Committee on 20 December 2017;*
- (ii) *Set aside and annul the Appealed Decision;*
- (iii) *Decide that no sanction be imposed on Mr. Guerrero, based on a No Fault and no Negligence finding, in accordance with Article 21 of the FIFA ADR;*
- (iv) *Declare and hold the Peruvian Football Association liable for its breach of the medical and nutritional protocols during the National Team concentration on 3 October 2017 in Lima, Peru, that allowed the Swissôtel to offer National Team Players products that could contain prohibited substances (i.e.: teas containing coca leaves);*
- (v) *Alternatively, in the event CAS believes that Mr. Guerrero had any level of fault, that it be determined as a light and the minimum degree of fault possible and, thus any sanction should be limited to a warning and no period of ineligibility (notwithstanding the fact that the Appellant will already have served over 115 days of suspension by the date of the decision of this appeal);*
- (vi) *Subsidiarily, in case any period of ineligibility is imposed, it shall not exceed the period of 06 (six) months, as per the Appealed Decision;*
- (vii) *In case a period of ineligibility is eventually imposed, it shall start at an earlier date, counting from the date of the Sample collection, i.e. from 05 October 2017;*

- (viii) *In case a period of ineligibility is eventually imposed, the results gained by the Appellant since sample collection until he was provisionally suspended shall remain undisturbed; and*
- (ix) *FIFA shall bear any and all costs in connection with the present proceedings, as well as shall reimburse the Appellant's legal costs”.*

45. In his answer, Mr Guerrero requested the following reliefs:

Main Request (1)

- (i) *That WADA's appeal is rejected in its entirety;*
- (ii) *Preliminarily, that the Panel determines that there is no “adverse analytical finding” in the present case, hence no anti-doping rule violation, because the B Sample did not meet the threshold level of the substance benzoylecognine and neither the standards imposed in the WADA Code, the MRPL Regulations or the ISL Regulations;*
- (iii) *Consequently, the finding of “no fault or negligence” or “no significant fault or negligence” is not at issue within the context of this argument; and*
- (iv) *For these reasons the sanction must be entirely eliminated, and Mr Guerrero's appeal allowed.*

Alternative Request (2)

On a subsidiary basis, in the case the Panel does not accept the Main Request (1) above, Mr. Guerrero respectfully requests:

- (v) *That WADA's appeal is rejected in its entirety;*
- (vi) *That Mr. Guerrero's answer be admitted;*
- (vii) *That no sanction be imposed on Mr. Guerrero based on No Fault and no Negligence finding, in accordance with Article 21 of the FIFA ADR;*
- (viii) *Although the Peruvian Football Association is not named as a party to this proceeding we request a factual declaration that it breached the medical and nutritional protocols during the National Team concentration on 3 October 2017 in Lima, Peru, that allowed the Swissôtel to offer National Team Players products that could contain prohibited substances (i.e. teas containing coca leaves);*
- (ix) *Alternatively, in the event CAS believes that Mr. Guerrero had any level of fault, that it be determined as a light and the minimum degree of fault possible and, thus any sanction should be limited to a warning and no period of ineligibility (notwithstanding the fact that the Appellant will already have served over 150 days of suspension by the date of the decision of the Player's appeal);*

- (x) *Subsidiarily, in case any period of ineligibility is imposed, it shall not exceed the period of 06 (six) months, as per the Appealed Decision;*
- (xi) *In case a period of ineligibility is eventually imposed, it shall start at an earlier date, counting from the date of the Sample collection, i.e. from 05 October 2017;*
- (xii) *In case a period of ineligibility is eventually imposed, the results gained by the Appellant since the sample collection until he was provisionally suspended shall remain undisturbed; and*
- (xiii) *In any event, order that WADA shall bear the administrative and procedural costs in relation to the present dispute.*

B. FIFA

46. FIFA's essential submissions were as follows:

- Mr Guerrero had established on the balance of probability, as and for the reasons found by the FIFA Disciplinary Committee and Appeal Committee, that the BZE in his body was the result of his ingestion of coca leaves tea in the Visitors Room in the Swisshotel Lima Peru on 5 October 2017, 2 days before the match;
- Mr Guerrero bore some fault or negligence as and for the reasons found by the FIFA Disciplinary Committee and Appeal Committee, given that he could have done more to check on the tea he drank in the Visitors room but he only bore, as and for the reasons found by those FIFA bodies, No Significant Fault or Negligence ("NSFN");
- However, in all the circumstances, to impose even the minimum period of ineligibility for NSFN would violate, as and for the reasons found by the FIFA Appeal Committee, the principle of proportionality. Accordingly, only a 6 month period of ineligibility was justified.

47. FIFA requested the following relief:

- “1. *To reject the Appellants' appeals.*
2. *To confirm the decision 171331 APC PER ZH passed by the FIFA Appeal Committee on 20 December 2017 hereby appealed against.*
3. *Alternatively, to confirm the decision 171331 PER ZH passed by the FIFA Disciplinary Committee on 7 December 2017.*
4. *To order the Appellants to bear all costs incurred with the present procedure and to cover all expenses of FIFA related to the present procedure”.*

C. WADA

48. WADA's essential submissions were as follows:

- While Mr Guerrero had established that the use of the prohibited substance was both out-of-competition and unrelated to sport performance, he has not presented concrete evidence that any tea he consumed in the days before the doping control in fact contained coca leaves or was contaminated therewith;
- In addition to identifying three different teas, consumed on different days and in different locations, as possible sources, Mr Guerrero had also left unresolved the question whether the source was an anis tea contaminated with coca leaves, a coca-anis tea combination or a pure coca-tea served by mistake;
- Accordingly, Mr Guerrero must serve the maximum period of ineligibility prescribed by the FIFA ADR, i.e. 2 years;
- Alternatively and subsidiarily, if the Panel found that Mr Guerrero had met his burden to establish the origin of the prohibited substance WADA would accept that NSFN applies, but in view of the clear shortcomings in his diligence, the level of fault should be at the higher end of the prescribed spectrum;
- There being no basis in law for any further reduction on the grounds of proportionality;
- In all the circumstances a period of ineligibility of 22 months would be appropriate.

49. WADA requested the following relief:

- “(1) The Appeal of WADA is admissible.*
- (2) The decision rendered by the FIFA Appeal Committee on 20 December 2017 in the matter of José Paolo Guerrero Gonzales is set aside.*
- (3) José Paolo Guerrero Gonzales is sanctioned with a period of ineligibility between one and two years starting on the date on which the CAS award enters into force. Any period of provisional suspension or ineligibility effectively served by José Paolo Guerrero Gonzales before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*
- (4) WADA is granted an award for costs”.*

50. Further consideration will be given to the parties' submissions in the section on Merits below.

VI. JURISDICTION

51. Article R47 of the CAS Code provides as follows:

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

52. In filing his appeal, Mr Guerrero relied on Articles 57 and 58.1 of the FIFA Statutes as conferring jurisdiction on the CAS. In filing its appeal, WADA relied on Article 75.1 of the FIFA ADR as conferring jurisdiction on the CAS. The jurisdiction of the CAS is not contested by any of the parties in either appeal and is confirmed by their signature of the Order of Procedure and their full participation in the process.

53. The Panel accordingly holds that it has jurisdiction over these appeals.

VII. ADMISSIBILITY OF THE APPEALS

54. Article R49 of the CAS Code provides as follows:

“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against”.

55. According to Article 67, para. 1 of the FIFA Statutes, an appeal must be lodged with CAS within 21 days of notification of the decision in question. The grounds of the Appealed Decision were notified to Mr Guerrero on 26 January 2018. Mr Guerrero filed his appeal before the CAS on 29 January 2018 and therefore did so within the prescribed time limit.

56. Article 80 para. 1.2 of the FIFA ADR states that *“the filing deadline for an appeal filed by WADA shall be the later of:*

a) Twenty-one days after the last day on which any other party in the case could have appealed, or

b) Twenty-one days after WADA’s receipt of the complete file relating to the decision”.

57. As already noted, the Appealed Decision was notified to the parties (including Mr Guerrero) on 26 January 2018, WADA received the case file on 29 January 2018. WADA filed its appeal before CAS on 19 February 2018 and therefore did so within the prescribed time limit.

58. The Panel accordingly holds that both appeals are admissible.

VIII. APPLICABLE LAW

59. Article R58 of the CAS Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, 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”.

60. The Appealed Decision was rendered in application of the 2015 FIFA ADR. The FIFA ADR (which reflect the World Anti-Doping Code (“WADC”) 2015) are therefore applicable to the present appeal. Since FIFA is domiciled in Switzerland Swiss law applies subsidiarily.

IX. MERITS

A. Introduction

61. In accordance with Article. 19.1 lit. a) of the FIFA ADR, a four year period of ineligibility must be imposed for a (first) ADRV involving a non-specified substance unless the player can establish that the violation was not intentional. However, Article 19.3 of the FIFA ADR provides further that an ADRV in respect of a non-specified prohibited substance that is banned only in-competition (such as cocaine) shall not be considered intentional if an athlete can establish that the substance was used out-of-competition in a context that was unrelated to sport performance.

62. Accordingly, in the light of WADA’s acceptance that Mr Guerrero’s ingestion of the prohibited substance was used out-of-competition in a context unrelated to sports performance, the maximum period of ineligibility to which he would be liable is two years.

63. In order to benefit from an elimination of or further reduction in the period of ineligibility under Articles. 21 and 22 of the FIFA ADR respectively, it is necessary for Mr Guerrero to establish NFN or NSFN. As provided in the regulatory definitions of these concepts, it is a pre-condition to their possible application that he establish the source of the prohibited substance.

64. Against that regulatory background and in the light of the parties’ respective submissions, there are in the Panel’s view three main issues.

- i. How did the PS enter Mr Guerrero’s system (“source”);
- ii. If it was coca tea, what was his degree of fault, if any, ingesting it (“fault”);

- iii. If Mr Guerrero was guilty of NSFN, whether he could nonetheless rely upon the principle of proportionality to reduce his period of ineligibility below one year (“proportionality”).

B. Source

65. The Panel considers the relevant principles to be as follows:

- (i) It is for an athlete to establish the source of the prohibited substance, not for the anti-doping organisation to prove an alternative source to that contended for by the athlete; see CAS 2012/A/2759, paras. 11.31 and 11.32 (“*It was not for UEFA – the Panel emphasise – to hypothesise, still less prove, their own version of events*” as to how the prohibited substance got into the athlete’s system); CAS 2014/A/3615, para. 52 (“*The Panel rejects a proposed interpretation of the rules which would seek to impose the burden on the person charging to explain the source of the substance detected in the system of the person charged*”); USADA v Meeker, AAA Panel decision dated 12 November 2013, para. 7.7 (“*Respondent alone bears the burden of showing an explanation that is more likely than not for how the Prohibited Substances entered his system. If he fails to do so he has not met the requirement for relief under WADA Code 10.5.1 and 10.5.2. Claimant is not required to put forward its own speculative theory, and its failure to do so does not compel the acceptance of Respondent’s theory*”).
- (ii) An athlete has to do so on the balance of probabilities. Evidence establishing that a scenario is possible is not enough to establish the origin of the prohibited substance. By way of example, the Panel in CAS OG 16/25 “*found the sabotage(s) theory possible, but not probable and certainly not grounded in any real evidence*” (para. 7.27).
- (iii) An athlete had to do so with evidence, not speculation; CAS 2014/A/3820: “*In order to establish the origin of a Prohibited Substance by the required balance of probability, an athlete must provide actual evidence as opposed to mere speculation*” (para. 80).
- (iv) It is insufficient for an athlete to deny deliberate ingestion of a prohibited substance and, accordingly, to assert that there must be an innocent explanation for its presence in his system; in CAS 2010/A/2230, the Sole Arbitrator expressed an athlete’s burden in the following terms:

“To permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination – two prevalent explanations volunteered by athletes for such presence – do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature of the athlete’s basic personal duty to ensure that no prohibited substances enter his body”(para 11.12).

- (v) If there are two competing explanations for the presence of the prohibited substance in an athlete's system, the rejection of one does not oblige (though it may permit) the hearing body to opt for the other. There is always available to the hearing body the conclusion that the other is not proven. For the hearing body in such a situation there are three choices, not just two (CAS 2010/A/2230, ditto).
66. The issue for the Panel lay not in identification of the relevant principles but rather in their application to the facts as found. In this as in other areas of anti-doping jurisprudence, the facts of one case are rarely, if ever, so similar to those of another that it is useful to seek to draw analogies between them.
67. The candidates for the source of the prohibited substance in Mr Guerrero's system canvassed during the course of the proceedings included: (i) the use of the drug cocaine; (ii) tea drunk in the Peruvian national team's private dining room in the Swisshotel in Lima on October 5th ("T1"); (iii) tea next drunk in the Peruvian team's Visitors room in the same hotel on the same date ("T2"); (iv) teas drunk on the morning of the match in Buenos Aires ("T3"). Other theoretical possibilities as to how Mr Guerrero might have ingested the prohibited substance, set out in the Annex to Professor Cameron's report, e.g. though a contaminated water supply, had no evidential substratum whatsoever and the Panel therefore discounts them right away.
68. The Panel is on balance satisfied that Mr Guerrero has established to a standard of not less than 51% or, to use the vernacular, a standard just over the line, that the source of the prohibited substance was coca tea, i.e. T2 (and it follows that to the extent that there is any scope for an athlete to disprove intention without proof of source, the facts of this case do not engage it).
69. The Panel rejects both T1 and T3 as the source for these reasons. T1 (Anis tea) was drunk by Mr Guerrero in an area, the players' private dining room to which strict food and beverage protocols applied; and on the recommendation and under the supervision of the team nutritionist to ease his bloated stomach. T3 (Black tea) was provided, also for therapeutic purposes, in Argentina, which, unlike Peru lacks a coca culture, under the preparation of the same nutritionist; moreover the amount of BZE found in his sample was too low, according to both experts, to be consistent with consumption so shortly before the test.
70. In relation to the other candidates – T2 or drug use – the Panel rejects the latter and considers the former established as indicated above for these reasons:
- (i) The amounts of the prohibited substance found in Mr Guerrero's samples were, according to both experts, consistent with either scenario; the ingestion of coca tea 2 days before the test or the use of the drug within a time frame of 4-7 days before the test;

- (ii) Both experts considered that mere contamination by coca tea of either jug or tea pot in which other tea was served would have been likely to produce concentrations lower than in the amounts found;
- (iii) Both experts agreed that the hair test eliminated the possibility that Mr Guerrero was a habitual user of the drug though both agreed, albeit with varying degrees of emphasis, that it could not disprove the possibility of a single use within 7 days or less before the test;
- (iv) It would be unwise, albeit not unheard of, for a footballer with an important match scheduled at most one week away to indulge in a drug which does not enhance performance on the field of play and may well be adverse to it and which is so easily capable (as it has been for decades) of detection;
- (v) Mr Guerrero not only has hitherto a clean record as regards doping control over a prolonged period but is also an ambassador and indeed poster boy for drug free sport. His use of the drug, if revealed, would seriously damage his reputation; and the Panel considers that it can take into account in its overall assessment of probabilities the unlikelihood of his running such risk;
- (vi) The Panel repeats that its rejection of the drug use explanation does not ipso facto establish that the coca tea explanation must be accepted (although it is a relevant factor). It, therefore, further considers the positive evidence in support of the latter explanation;
- (vii) It was accepted by all parties and underpinned by the expert evidence of Professor Stanish, an expert anthropologist (whose written statement was before the Panel and who had given evidence orally before the FIFA Disciplinary Committee), that the drinking of coca tea was part of Peruvian culture. The Panel accordingly acknowledges that its drinking in Lima, deliberately or inadvertently, would be plausible in a sense that its drinking in Lausanne would not be;
- (viii) The Swissotel did at the material time have available coca tea for its guests under the Delisse brands;
- (ix) There is considerable evidence from Mr Guerrero and his friends, which the Panel having heard and seen them accept, that he did drink tea in the Visitors Room. T2 was served to Mr Guerrero in an area where, as the nutritionist stated before the FIFA Disciplinary Committee, the food and beverage protocols were not in place. There would therefore be no equivalent lack of likelihood of the service of coca tea in T2 as there would be in T1. Moreover, as explained below, the Panel doubts Mr Guerrero's claim that he made clear to the waiter that he wanted Anis tea. It considers it more

likely that the waiter was asked for tea, and, hence without any mistake on his part, served Mr Guerrero a coca tea;

- (x) After being pressed in November 2017 to assist Mr Guerrero's case by identification of the waiter who served him and any other information relevant to T2, the hotel was uncooperative (see an email from its executive sub manager of 27 November 2017) but in December 2017 ceased to serve coca tea (see the certified declaration of a Public Notary of 13 December 2017 about his discussion with the Director of Food and Beverages at the hotel) although it was still available in November 2017 (see Certified Declaration of the Public Notary of 6 November 2017 about his visit to the hotel). The inference that the Panel draws is that the hotel's management was concerned that it might itself, rightly or wrongly, be liable to criticism or even a claim for compensation for putting Mr Guerrero's career in jeopardy by being held responsible for serving him a drink, which contained a prohibited substance, and was doing its best to conceal any tracks which might have led to such outcome;
- (xi) This is not, *pace* WADA's contention, a case where a Player simply denies use of a prohibited substance and asks, without more, to infer an innocent explanation for its presence in his system. A coherent, and, in the Panel's view, sufficiently convincing evidence-based case is advanced that T2 was the source.

C. Fault

71. The Panel must next assess whether Mr Guerrero was guilty of any fault, and, if so, how much by reference to the relevant provisions of the FIFA ADR.

72. Article 19 of the FIFA ADR (fault) provides:

"Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing a Player or other Person's degree of Fault include, for example, the Player's or other Person's experience, whether the Player or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Player and the level of care and investigation exercised by the Player in relation to what should have been the perceived level of risk. In assessing the Player's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Player's or other Person's departure from the expected standard of behaviour".

73. According to the definition of NFN in the FIFA ADR (definition No. 42):

"The Player or other Person establishing that he did not know or suspect, and could not have reasonably known or suspected even with the exercise of the utmost caution, that he had Used or administrated the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of art. 6 (Presence of a Prohibited Substance or its Metabolites or markers in a Player's Sample), the Player must also establish how the Prohibited Substance entered his system".

74. Article 22 of the FIFA ADR so provides with in relation to NSFN:

“The Athlete or other Person’s establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system”.

75. The key passages in Mr Guerrero’s evidence before the Panel were those where he describes what were his assumptions (sic) when he drank tea on the day in question. He assumed that there were protocols in place in the players’ private dining room, and indeed in the Visitors room. In point of fact, as the nutritionist has testified, he was correct as regards the former but not as regards the latter. From this false premise, he further assumed that the tea he drank on T2 was the same as the tea he drank on T1. In that, on the Panel’s analysis of the evidence (see above), he was mistaken. The two were in fact different.

76. The Panel does not question Mr Guerrero’s veracity in explaining that these were indeed his assumptions. As a an experienced player – having played professionally for many years in Europe and South America – he would have been naturally accustomed to team officials providing safe areas, whether in training camps or on match days, in terms not only of physical security but also of freedom from exposure to harmful food and drink, including any that might contain Prohibited Substances. But the Panel observes that these were no more, on his own admission, than assumptions. He never inquired of any team official whether, and if so what protocols were in place and where; in particular, whether they were in place in the Visitors room which was in a number of ways a different environment from that of the private dining room, notably in terms of who had access to it.

77. The Panel does, however, doubt that Mr Guerrero did, even in T1, inspect the label of the tea he was served in order to check that it was Anis tea. Given his assumptions about the private dining room as a safe environment, there would have been no need to do so. Moreover, his description of the colour of the tea bag he was provided with on T1 said to be Lipton’s McCollins, i.e. yellow, was discrepant with its actual colour as evidenced by WADA, i.e. blue.

78. Furthermore, it would in the Panel’s view be a fortuitous, and hence unlikely, coincidence if Mr Balbi and his girlfriend both asked for Anis tea when drinks were offered in the Visitors room to Mr Guerrero’s group of family and friends so prompting him to follow suit; before the FIFA Disciplinary Committee he had said (as per the transcript records): *“Sure I will have an anis tea as well”.*

79. Mr Guerrero claimed not to have been able to check on the label of T2 because it was inside the jug or pot (as the same container was differently described by witnesses). Again, if he assumed, as he said he did, that what he was to be served in T2 was the same as what he had been served in T1, he would have had no interest in checking T2 in any event. And there were other discrepancies in the evidence advanced on his behalf to the FIFA Disciplinary

Committee and the Panel about T2 – the number of jugs or pots in which T2 was served, whether, if more than one, they were brought simultaneously or in sequence; who paid for the various drinks and how, whether by Mr Guerrero putting it on his room tab or by Mr Balbi with cash. The Panel concludes that the T2 version was somewhat embroidered, not because Mr Guerrero and his friends were seeking to conceal his drug taking, but because they wanted to magnify the degree of care he showed in ensuring that he did not inadvertently ingest a prohibited substance.

80. There were a number of ways in which Mr Guerrero could, instead of relying on assumptions, have discharged his primary personal duty as an athlete to ensure that no prohibited substance entered his body. He could have inquired as to what protocols operated and where in the hotel. He could have asked specifically what teabags had been put in the jug or jugs in T2. He could have insisted on having the bags brought to him so that he could scrutinize the label (as he claimed to have done with T1) and himself carry out or at least supervise the infusion of the tea. The Panel finds unassailable the decision of the FIFA Disciplinary Committee (endorsed by the FIFA Appeal Committee) that it is not possible to describe Mr Guerrero as being guilty of NFN, especially since the comment on the relevant WADA Article 10.4, on which the FIFA ADR are based, refers to the availability of this plea as to sanction “*only in exceptional circumstances*”, an approach confirmed in CAS 2017/A/5015 & CAS 2017/A/5110: “*a finding of No Fault applies only in truly exceptional cases. In order to have acted with No Fault, [the Athlete] must have exercised the ‘utmost caution’ in avoiding doping. As noted in CAS 2011/A/2518, the Athlete’s fault is ‘measured against the fundamental duty which he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance’*” (para. 185).
81. That said the Panel considers that Mr Guerrero’s fault was not significant. The Panel deems it appropriate, in assessing the correct period of ineligibility, to follow the guidance given in the seminal *Cilic* case founded on WADC 2009 (CAS 2013/A/3327) and suitably adapted to the WADC 2015 and, therefore, to determine the appropriate period of ineligibility based on three different categories of fault and sanction ranges.
82. In application of that guidance the Panel finds, on the *Cilic* scale, Mr Guerrero’s fault as light rather than moderate, still less heightened for these reasons:
- (i) The Prohibited substance was in tea, not in a medicine or supplement where the risk of it being contaminated with such substance is inherently more likely to occur than in a common or garden drink, even taking account of the Peruvian context;
 - (ii) Mr Guerrero’s belief, borne of long experience of the artificially cocooned life of an international footballer, that the team officials would, as had been the case in the past, ensured the safety of any food or drink served to the Players in designated areas, separate from the main body of the hotel, was far from unreasonable. A reasonable belief that an athlete was not risking the entry into his body of a Prohibited substance—a subjective factor in the *Cilic* taxonomy (para 73) is not a defence to an ADRV nor

does it establish that there has been NFN; but it certainly bears weightily on the evaluation degree of fault.

83. Therefore, the Panel, subject only to considerations of proportionality which will be next addressed, cannot reduce the period of ineligibility to less than one year, but would reduce it to near that limit, i.e. 1 year and 2 months.

D. Proportionality

84. Were the Panel entirely unconstrained by the provisions of the FIFA ADR as to sanction and empowered to determine the appropriate period of ineligibility *ex aequo et bono*, it could entertain with some sympathy the argument advanced by FIFA that such period should be no more than 6 months in the light of the following factors considered purely from Mr Guerrero's perspective:

- (i) Mr Guerrero's hitherto clean record;
- (ii) Its finding that the adverse analytical finding resulted from the consumption by Mr Guerrero of an ordinary drink which contained, contrary to his reasonable belief, a prohibited substance;
- (iii) Mr Guerrero's consumption of the tea out-of-competition and without intent to enhance performance in the match;
- (iv) the small quantity of BZE which would, indeed, not have enhanced his performance;
- (v) BZE is the metabolite of a prohibited substance which is derived from a plant; cocaine is not a specified substance whereas other plant-based prohibited substances, e.g. morphine or heroin, are classified as such and the discrepancy is arguably anomalous;
- (vi) The very significant financial loss and deprivation of opportunity to play in important matches already sustained by Mr Guerrero during his period of suspension and which would be *pro tanto* increased if he were ineligible to play for any additional period;
- (vii) The fact that, if the 1 year and 2 month period of ineligibility were immediately enforced, Mr Guerrero would be denied the honour of captaining his national team in the major competition in international football, i.e. the FIFA World cup of 2018 (the first time Peru qualified for the finals of that competition since 1982).

85. However, the Panel is indeed constrained by the FIFA ADR read together with the WADC 2015, and there are three main features of those instruments which leave no scope for the deployment of the concept of proportionality over and above that inherent in the instrument itself:

- (i) Where, as here, a player is guilty only with NSFN a CAS Panel as any other body vested with responsibility is entitled to take account of proportionality in deciding where in the range of 1 to 2 years the period of ineligibility should be fixed;
 - (ii) To allow proportionality further to lower the period to below one year would make a nonsense of the prescribed minimum;
 - (iii) Even though the classification of cocaine as a non-specified substance, in contrast to other plant-based prohibited substances which are classified as specified substances, is open to question, it must be recognized that the criteria for including substances on the WADA Prohibited List (and, implicitly, their classification within it) are the result of the application of rational criteria (see Art. 4.3.1 WADC 2015) and a challenge to either is expressly proscribed (Art. 4.3.3). The different classification designedly carries with it different consequences, which the Panel is not free to ignore;
 - (iv) The definition of Fault itself for the purposes of the WADC 2015 expressly excludes as a factor to be taken into account in assessing the degree of fault, inter alia, “*the timing of the sporting calendar*” as well as the athlete’s loss “*of opportunity to earn large sums of money during the period of ineligibility*”.
86. Additionally, the CAS jurisprudence since the coming into effect of WADC 2015 is clearly hostile to the introduction of proportionality as a means of reducing yet further the period of ineligibility provided for by the WADC (and there is only one example of its being applied under the previous version of the WADC). In CAS 2016/A/4534, when addressing the issue of proportionality, the Panel stated:
- “The WADC 2015 was the product of wide consultation and represented the best consensus of sporting authorities as to what was needed to achieve as far as possible the desired end. It sought itself to fashion in a detailed and sophisticated way a proportionate response in pursuit of a legitimate aim”* (para. 51).
87. In CAS 2017/A/5015 & CAS 2017/A/5110, the CAS Panel, with a further reference to CAS 2016/A/4643, confirmed the well-established perception that the WADC “*has been found repeatedly to be proportional in its approach to sanctions, and the question of fault has already been built into its assessment of length of sanction*” (emphasis added, para. 227) as was vouched for by an opinion of a previous President of the European Court of Human Rights there referred to see <https://www.wada-ama.org/en/resources/legal/legal-opinion-on-the-draft-2015-world-anti-doping-code>.
88. Contrary to FIFA’s argument, the WADC 2015 does provide for the way to deal with a case such as Mr Guerrero’s from the perspective of the Code; the present case is no *casus omissus*. The WADC 2015 was designed not only to punish cheating, but to protect athletes’ health and, above all, to ensure fair competition and the level playing field, and has thus set up a

detailed framework which balances the interest of those athletes who commit ADRVs with that of those who do not.

89. The Panel is conscious of the much quoted legal adage “*Hard cases make bad law*”, and the Panel cannot be tempted to breach the boundaries of the WADC (or FIFA ADR) because their application in a particular case may bear harshly on a particular individual. Legal certainty is an important principle to depart from the WADC would be destructive of it and involve endless debate as to when in future such departure would be warranted. A trickle could thus become a torrent; and the exceptional mutate into the norm.
90. It is in the Panel’s view better, indeed necessary, for it to adhere to the WADC. If change is required, that is for a legislative body in the iterative process of review of the WADC, not an adjudicative body which has to apply the *lex lata*, and not some version of the *lex ferenda*.
91. For the above reasons the Panel concludes that the appropriate sanction for Mr Guerrero is a period of ineligibility of 14 months from the date of this Award less, as all parties agree, the 6 months of suspension already served. In this connection, the reference to “*period of provisional suspension*” in the operative part of the award, which was the wording of the FIFA decision challenged, must be interpreted as encompassing all periods of suspension hitherto served by the Player and shall be amended accordingly as being “*period of ineligibility*” as a matter of fairness to the parties affected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Jose Paolo Guerrero against the decision rendered by the FIFA Appeal Committee on 20 December 2017 is dismissed.
2. The cross-appeal filed by the World Anti-Doping Agency against the decision rendered by the FIFA Appeal Committee on 20 December 2017 is partially upheld.
3. The decision rendered by the FIFA Appeal Committee on 20 December 2017 is modified as follows:

Mr Jose Paolo Guerrero is declared ineligible for a period of 14 months for violation of art. 6 of the FIFA Anti-Doping Regulations starting as from the date of notification of this Award. The period of ineligibility already served by Mr Jose Paolo Guerrero shall be credited against the total period of ineligibility to be served.

4. (...).
5. (...).
6. All other motions or prayers for relief are dismissed.