



**Arbitration CAS 2012/A/2784 João Gabriel Schlittler v. International Judo Federation (IJF) & Brazilian Judo Confederation (BJC), award of 13 December 2012**

Panel: Mr Jacopo Tognon (Italy), President; Mr Rui Botica Santos (Portugal); Prof. Ulrich Haas (Germany)

*Judo*

*Doping (chlortestosterone metabolites/clostebol)*

*Standing to be sued*

*Condition of admissibility of a witness testimony*

*Duty to establish how the prohibited substance entered the athlete's system*

1. A national federation has no standing to be sued where it was not a party to the first instance proceedings, was not involved in the decision under appeal which was issued by a different entity and where its removal request was accepted by the other parties. A party lacking standing to be sued cannot be ordered to bear the costs of the arbitration and/or to pay any contribution to the relevant party's costs. At the same time it is not entitled to any contribution towards its legal costs.
2. Pursuant to Article R44.2 of the CAS Code, the witnesses called to be heard by a CAS panel must have been specified by the parties in their written submissions together with a witness statement. In this respect, an oral testimony shall not be admitted in the records where the appellant informed the panel of a new witness after having received the entire CAS case file and also a few days before the hearing took place.
3. To prevail under Article 10.5.1. (No Fault or Negligence) or 10.5.2. (No Significant Fault or Negligence) IJF Anti-Doping Rules (ADR), an athlete must first establish according to the standard of balance of probability how the prohibited substance entered his/her body. If the athlete has failed to discharge this step, the CAS panel cannot further assess whether s/he bears no fault or negligence or no significant fault or negligence.

**1. THE PARTIES**

- 1.1 Mr João Gabriel Schlittler (the "Athlete" or "Appellant") is a Brazilian national who competes as an international-level judoka, affiliated with the CBJ.
- 1.2 The International Judo Federation ("IJF" or "First Respondent") is the International Federation governing judo and is recognized by the International Olympic Committee.

- 1.3 The Brazilian Judo Confederation (“CBJ” or “Second Respondent”) is the federative body governing judo in Brazil and is recognized by the IJF.

## 2. FACTUAL BACKGROUND

- 2.1 The background facts stated herein are a summary of the main relevant facts, as established on the basis of the parties’ written and oral submissions and of the evidence examined in the course of the proceedings. Although the Panel has considered all the factual 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.
- 2.2 The Appellant, who was born in February 1985, is an international-level judoka who competes in the men’s 100kg+ category and is affiliated with the CBJ under reference number 60344. He started practicing judo at the age of 3 and has won medals in numerous national and international competitions, including the gold medal at the 2011 Rio de Janeiro Grand Slam, bronze medal at the 2007 World Championship and silver medal at the 2007 Pan American Games.
- 2.3 On 19 June 2011 the Athlete was selected to provide a bodily sample during one anti-doping test in the course of the Judo Grand Slam held in Rio de Janeiro, Brazil between 18 and 19 June 2011 (“the Competition”). This sample was sent to the “Institut Armand-Frappier, laboratoire de contrôle du dopage”, in Montreal, Canada, which is accredited by the World Anti Doping Agency (hereinafter referred to as the “WADA”).
- 2.4 On 22 July 2011, the laboratory reported to Mr Dan Constantinescu, Head of the IJF Medical Commission, that the A sample showed the presence of *chlortestosterone metabolites/clostebol*. According to the 2011 Prohibited List of the World Anti-Doping Code, clostebol belongs to the class S1.1.a (anabolic agent, anabolic androgenic steroids).
- 2.5 The B sample analysis confirmed the adverse analytical finding.
- 2.6 On 15 August 2011, the Appellant was provisionally suspended with immediate effect by the IJF Medical Commission, pending the conclusion of its investigation of the Athlete’s case.
- 2.7 On 19 March 2012 the IJF Executive Committee issued a decision that found the Athlete to have committed an anti-doping rule violation and imposed on the judoka a period of ineligibility of two (2) years, commencing on 15 August 2011 (hereinafter the “IJF Decision”) for an alleged violation of the 2009 IJF Anti-Doping Rules (the “2009 IJF ADR”). Below is the operative part of the IJF Decision:

*“The IJF Medical Commission recommends unanimously:*

*1. Disqualification of the result obtained in the Judo Grand Slam BRA, Rio de Janeiro, 19<sup>th</sup> June 2011, including forfeiture of medal, points and prizes (according to Article 9 – WADA Code and IJF Antidoping Rules)*

*2. An ineligibility of two years (according to Article 10.2 of the WADA Code and IJF Antidoping Rules)*

*The IJF Executive Committee agreed to the above suggestion by vote, between 13 March 2012 to 19 March 2013 (?) (13 votes for it)*

*Since 15<sup>th</sup> August 2011 the athlete was under provisional suspension.*

*The two years penalty will be between 15 August 2011 and 15 August 2013”.*

2.8 On 2 April 2012, Second Respondent notified the Athlete by email about the Decision.

### **3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

3.1 On 19 April 2012, pursuant to Article R47 of the Code of Sports-Related Arbitration (2010 edition) (the “Code”), the Appellant filed a Statement of Appeal at the Court of Arbitration for Sport (the “CAS”) against the IJF Decision.

3.2 By letter dated 3 May 2012 the CAS Court Office notified the appeal brief (filed on 30 April 2012) to the Respondents and invited them to file a written response within twenty days.

3.3 On 16 May 2012 the First Respondent informed the CAS Court Office that it would be represented by the attorneys-at-law Messrs. François Carrard and Yvan Henzer in the course of the appeal proceedings. On the same occasion the IJF requested an extension to jointly appoint an arbitrator with the Second Respondent until 25 May 2012.

3.4 On the same day the CAS Court Office granted the Respondents an extension until 22 May 2012 to jointly appoint an arbitrator.

3.5 On 22 May 2012 the IJF appointed Mr Ulrich Haas, Professor at the University of Zurich, Switzerland, as arbitrator and stated that it could not reach the Second Respondent in order to confirm whether it agreed with the proposed name. By the same letter, the IJF requested an extension of the time limit for filing the answer until 4 June 2012, due to the significant amount of data that had to be reviewed by the IJF’s appointed expert, who would need several days to finalize his scientific report.

3.6 On 23 May 2012 the CAS Court Office invited the Second Respondent to inform whether it agreed with the joint nomination of Prof. Haas as arbitrator, as well as if the Appellant agreed to the First Respondent’s request for extension.

3.7 On 31 May 2012, in view of the Appellant’s silence, the CAS Court Office advised the parties that the Deputy President of the CAS Appeal Arbitration Division had granted the four-day extension requested by the IJF to file its answer.

3.8 On 5 June 2012, and in view of the Second Respondent’s silence, the Deputy President of the CAS Appeal Arbitration Division decided to appoint Prof. Haas as arbitrator *in lieu* of the Respondents.

- 3.9 On 6 June 2012 the CAS Court Office received a power of attorney signed by Mr Marius Vizer, President of the IJF, in which he appointed Messrs. François Carrard and Yvan Henzer as IJF's legal counsels
- 3.10 On 7 June 2012 the IJF timely filed its Answer. However, the Second Respondent failed to file an Answer in this proceeding.
- 3.11 Following the CAS Court Office's request, the Appellant and the First Respondent stated on 14 June 2012 that they considered a hearing necessary in this matter. Furthermore, the Appellant – after having received the First Respondent's answer – stated on 22 August 2012 that he found it necessary to hear more witnesses than previously announced in the appeal brief, in particular the girlfriend of the athlete (whose name was not known at the time).
- 3.12 On 19 June 2012 the Second Respondent firstly wrote to the CAS Court Office and stated that it would be represented by Mr Luciano Hostins, attorney-at-law in Rio de Janeiro, Brazil, as well as that it agreed to hold a hearing in this matter.
- 3.13 By letter dated 22 June 2012, the CAS Court Office informed the parties that the Panel responsible for handling the present appeal had been constituted as follows: President: Mr. Jacopo Tognon, attorney-at-law in Padova, Italy; Mr. Rui Botica Santos, attorney-at-law in Lisbon, Portugal, Arbitrator appointed by the Athlete; and Prof. Ulrich Haas, Professor at the University of Zurich, Switzerland, appointed *in lieu* of the Respondents by the Deputy President of the CAS Appeal Arbitration Division. The parties did not raise any objection as to the constitution and composition of the Panel.
- 3.14 On 5 July 2012 and after consultation of the parties, the CAS Court Office confirmed that a hearing would be held on 31 August 2012, at the CAS Headquarters in Lausanne, Switzerland (hereinafter “the Hearing”).
- 3.15 On 12 July 2012 the IJF stated that it would be represented by Dr Dan Constantinescu and that Dr Hans Geyer would need to be heard via conference call as an expert witness, since Prof Wilhelm Schaenzer was not available on 31 August 2012.
- 3.16 On 13 July 2012 the Counsel for the Appellant stated that he would also be present at the hearing and that he intended to hear as witnesses the doctor Ms Priscila T. Martins Liu and the Athlete's girlfriend Ms Gisele Patricio Nunes de Figueiredo (hereinafter “Gisele”). Ms Cynthia Castelo Branco would also be present as interpreter.
- 3.17 On 20 August 2012 the CAS Court Office invited the parties to sign and return a copy of the Order of Procedure issued in this matter.
- 3.18 On 21 August 2012 the Appellant provided a copy of the Order of Procedure signed by Mr Felipe Bevilacqua de Souza, without any reservation or remarks.

- 3.19 On 22 August 2012 the Second Respondent provided a copy of the Order of Procedure signed by Mr Luciano Hostins, without any reservation or remarks.
- 3.20 On 22 August 2012 the Appellant asked the CAS Court Office whether he could present new documents at the hearing regarding his case, as this allegedly new evidence had already been produced in the course of the proceedings and was sufficiently important to be included in the file for the success of the case and in order to clarify the Athlete's Olympic reputation.
- 3.21 On 23 August 2012 the First Respondent provided a copy of the Order of Procedure signed by Mr Yvan Henzer, without any reservation or remarks.
- 3.22 In view of the Appellant's request to produce new documents in the course of the hearing, the CAS Court Office drew the parties' attention to the first paragraph of Article R56 of the Code and invited the Respondents to inform the CAS Court Office by 23 August 2012 whether they agreed with the Appellant's request.
- 3.23 On 23 August 2012 the First Respondent objected to the Appellant's request to file new documents.
- 3.24 The Hearing took place in Lausanne on 31 August 2012. The parties were represented by the following persons: Mr. Felipe Bevilacqua de Souza for the Appellant; Mr Yvan Henzer for the First Respondent; and Mr Luciano Hostins for the Second Respondent.
- 3.25 In addition to the Panel, the parties' representatives and Mr Pedro Fida, Counsel to the CAS, the following people attended the hearing:
- Mr João Gabriel Schlittler, Appellant
  - Mr Luiz Schlittler, Appellant's father
  - Mrs. Cynthia Castelo Branco, Interpreter for the Appellant
  - Ms Priscila T. Martins Liu (by telephone)
  - Ms Gisele Patricio Nunes de Figueiredo (by telephone)
  - Dr Dan Constantinescu, Head of IJF Medical Commission
  - Dr Hans Geyer (by telephone)
- 3.26 During the Hearing the Second Respondent informed the Panel that the CBJ wished to be excluded from the CAS 2012/A/2784 João Gabriel Schlittler v. IJF & CBJ proceedings, since the appealed decision was rendered by the IJF and not the CBJ; and, therefore, CBJ did not want to take part in the present case. It is important to state that the Second Respondent did not file an answer and that both the Appellant and the First Respondent did not object to the exclusion of the CBJ as a party from the proceedings.
- 3.27 During the Hearing the parties were granted the opportunity to present their oral arguments and answer the questions posed by the Panel and at the conclusion of the Hearing, the parties

confirmed that they had no objections in respect to their right to be heard and that they had been given the opportunity to fully present their cases.

- 3.28 At the end of the Hearing, the Panel requested the Appellant to provide a package of the medication *Trofodermin* as well as the relevant applicators of this medical cream.
- 3.29 On 6 September 2012 the Appellant filed at the CAS Court Office a letter containing the following documents attached: (i) a copy of Gisele's credit card statement confirming the purchase of the medication in a drugstore on the same day her physician prescribed her a post-surgery gynaecological treatment; (ii) a package of the medication *Trofodermin*; (iii) pictures of the medication, applicators and the possible manners of manipulation; and (iv) a sample applicator.
- 3.30 On 14 September 2012 the First Respondent was granted a deadline until 18 September to submit its comments to the Appellant's letter and enclosures filed on 6 September 2012.
- 3.31 On 18 September 2012 the First Respondent filed its final comments to the Appellant's letter and upon its receipt by the CAS Court Office, the parties were advised that, in accordance with the first paragraph of Article R56 of the Code, unless the parties agreed otherwise or the President of the Panel ordered otherwise on the basis of exceptional circumstances, the parties should not be authorized to supplement or amend their requests or their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer.

#### **4. THE PARTIES' POSITIONS**

##### **A. Appellant's Submissions and Requests for Relief**

4.1 In summary, the Appellant submits the following in support of his appeal:

##### ***a) Jurisdiction and applicable rules***

4.2 The Appellant states that the IJF Medical Commission is the entity responsible for dealing with doping cases, according to the Article 8.1.1. of the IJF ADR. Furthermore, Articles 13.1, 13.2.1. and 13.2.3(a) of the IJF ADR prove that the CAS is competent to hear the present case, as well as the IJF rules and regulations and, in particular, the IJF ADR are applicable to the present proceedings.

##### ***b) Appellant's submissions and factual background***

4.3 In essence, the Appellant submits the following in support of his appeal:

4.3.1. The Appellant states that he did not have the opportunity to argue his case properly before the IJF, due to the fact that the IJF disciplinary proceedings do not include an

oral hearing. Therefore, the Athlete states that the CAS is the only possible instance for him to prove his innocence.

4.3.2. The Appellant states that the present dispute is a contamination case, in which he was contaminated by his girlfriend Gisele during sexual intercourse.

4.3.3. On 1 April 2011 Gisele consulted the doctor Mrs Priscila T. Martins Liu (hereinafter “Mrs. Liu”) in order for the latter to analyze the results of colposcopy exam the patient had previously made and which reported a Cervix Intrapithelital Neoplasia grade II. As a result, Mrs. Liu proposed a surgery to remove the lesion.

4.3.4. The Athlete’s girlfriend underwent a gynaecological surgery on 17 May 2011 and after this medical procedure Gisele had an appointment with Mrs. Liu, who prescribed, on 30 May 2011, the use of the gynaecological cream *Trofodermin* for ten consecutive days in order to help the healing process. The following pharmacological information is detailed in the Trofodermin’s package sold in Brazilian pharmacies and which was included in the Medical Report of Gisele prepared by Mrs Liu (hereinafter “the Medical Report”):

*“Trofodermin (Clostebol acetate/ Neomycin sulphate) is a healing cream for local use, which consists of two substances: a synthetic androgenic steroid with anabolic effects widely used in clinical practice (Clostebol) and a locally acting antibiotic (Neomycin).*

*Trofodermin has trophic-healing properties and its use results in a decrease in the healing time of coetaneous and mucocoetaneous lesions. The substance Clostebol when used topically stimulates, due to its protein anabolic activity, the healing process of the ulcerative and dystrophic lesions, mucosal and coetaneous.*

*In the association of Clostebol acetate and Neomycin sulphate, the trophic-healing effects of the steroid join the activity of the antibiotic, Neomycin, which is necessary for the control of the infectious component, frequently a factor that aggravates and delays the healing of injuries. The excipient of the cream has great power of penetration and diffusion through the epidermis”.*

4.3.5. Within the Appellant’s written submissions were attached (a) the Medical Report; (b) several documents related to the surgery undergone by Gisele. Gisele’s credit card monthly statement as evidence that she had purchased Trofodermin on 30 May 2011 was only attached to the fax sent to the CAS Court Office on 11 September 2012.

4.3.6. During the night between 18 and 19 June 2011 – days of the Competition – the Athlete who lives in Rio de Janeiro, had sexual intercourse with Gisele. Despite the fact that she lives in São Paulo, she had travelled to Rio de Janeiro in order to cheer for the Athlete during the Competition.

4.3.7. The Appellant further states that during sexual intercourse he was inadvertently contaminated by Clostebol, which is a compound of the Trofodermin’s formula.

4.3.8. Since the Appellant could not know that the cream used by his girlfriend could cause an adverse analytical finding, the Athlete submits that this is a typical case in which the athlete bears no fault or negligence since the Appellant was able to demonstrate how the substance entered his system, as stated in Article 10.5.1. of the IJF Anti-Doping Rule.

4.3.9. The Appellant further states that he has a vast background in judo, being a judoka since he was three years old – as detailed in the Section 2 above. Furthermore, the Athlete avers that he has never had an adverse analytical finding apart from the positive result which is now object of the present appeal and that he supports the fight against doping and has the desire to face his opponents in sport without any illegal methods. He states that he believes in moral values and knows that doping is wrong and he has never taken any substance whatsoever that could result in an adverse analytical finding.

4.3.10. Finally, the Athlete states that during his entire career he has acted with caution and diligence in order to avoid potential problems when using medication or supplements. In the present case, the substance found in his sample is *chlortestosterone metabolites* and has entered his body without his knowledge, so that he bears no fault or negligence, elements which eliminate the two-year period of ineligibility imposed on him.

**c) *Appellant's requests for relief***

4.4 In his statement of appeal and appeal brief, the Appellant submitted the following prayers for relief:

*"1. That this Appeal be admissible under R47 of the CAS Code.*

*2. That the IJF Medical Commission Decision, in the matter of the Appellant, should not be considered and a new decision is set forth in view to acquit the Appellant or, apply over him another sanction less than two years.*

*3. That the Appellant are granted an Award on Costs".*

**B. First Respondent's Submissions and Requests for Relief**

**a) *Jurisdiction and Applicable rules***

4.5 The Respondent acknowledges the jurisdiction of the CAS in the present matter and submits that the IJF ADR shall be applicable to this case, since the anti-doping rule violation committed by the Appellant occurred during the Championship, an event organized by the IJF.

4.6 Furthermore, the Respondent alleges that since the IJF has its seat in Switzerland, Swiss law also governs this dispute.

**b) *First Respondent's submissions***

*ba) The anti-doping rule violation: Clostebol*

4.7 The First Respondent submitted that the Montreal WADA-accredited Laboratory identified Clostebol in the bodily A- and B- samples provided by the Athlete. This adverse analytical finding is not challenged. Therefore, the violation by the Athlete of article 2.1. IJF ADR (2.1 The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Specimen) is established.

*bb) Determining the sanction*

4.8 In essence, the First Respondent submits that according to Article 10.2 IJF ADR the period of ineligibility imposed for a violation of article 2.1 IJF ADR shall be two years for a first violation of the anti-doping rules.

4.9 The possibilities for reducing an anti-doping sanction under the IJF ADR would be possible if the conditions set forth in articles 10.5.1 (no Fault or Negligence), 10.5.2 (No Significant Fault), 10.5.3 IJF ADR (Substantial Assistance in discovering or establishing an anti-doping rule violation by another person) are met.

4.10 Pursuant to Articles 10.5.1. and 10.5.2. IJF ADR, in order to have the period of ineligibility reduced or eliminated, the athlete must first establish how the prohibited substance entered his system. And according to the CAS case law, the athlete must prove how the prohibited substance entered his system in order to establish the absence of fault or negligence (see CAS 2005/A/922, 923 & 926; CAS 2006/A/1067; and CAS 2006/A/1130).

4.11 Furthermore, according to the First Respondent, the Appellant shall prove his allegations on the "balance of probability", in conformity with Article 3.1. IJF ADR. The balance of probability standard entails that the athlete has the burden of convincing 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 the positive testing (CAS 2008/A/1515).

4.12 In view of the Appellant's assertions and factual background detailed in paragraphs. 4.4.2. – 4.4.8. above, the First Respondent challenges such a scenario for the following reasons:

4.12.1. According to the publication of the Rio de Janeiro "LABDOP-LADETEC" Laboratory (hereinafter the "Rio Publication") filed by the Appellant, one can be contaminated by Clostebol via sexual intercourse; however, the study which resulted in such publication considered sexual intercourse as having happened immediately after the application of Trofodermin, and not ten days later as in the present case.

4.12.2. The Appellant's girlfriend stopped her gynaecological treatment on 8 June 2011. She allegedly had sex with the Appellant ten days later, on 18 June 2011.

- 4.12.3. Considering the excretion of Clostebol, it can be expected that the substance exited the body after one or two days.
- 4.12.4. Assuming that Clostebol was completely removed from the girlfriend's body, ten days after the last application of Trofodermin, a contamination can be excluded.
- 4.13 Further, the First Respondent relied on the expert opinion of Prof. Wilhelm Schaenzer, Head of the Cologne WADA-accredited Laboratory (hereinafter the "Cologne Opinion"), to state that it is "*extremely improbable*" that the Appellant could still be contaminated with Clostebol, 10 days after the end of the medical treatment of his girlfriend.
- 4.14 Based on the above and on the balance of probabilities, the First Respondent submitted that the Appellant has not provided evidence making it more probable than not that Clostebol entered his system as a result of a sexual intercourse and, therefore, he has failed to demonstrate how the prohibited substance entered his body. The ordinary two-year period of ineligibility shall therefore be applicable.
- 4.15 Finally, the First Respondent stated that any of the alleged procedural deficiencies by the Appellant during the IJF disciplinary procedure could be resolved by the *de novo* review of the CAS. Since the Athlete expressly accepted the analytical results, the Respondent was also right to follow an expedited procedure. The First Respondent took its decision after having carefully examined the explanations of the Athlete. Considering that he brought no convincing evidence, the First Respondent correctly ruled that the standard two-year period of ineligibility should be imposed upon the Appellant.

**c) *First Respondent's requests for relief:***

- 4.16 In its Answer the First Respondent asks the Panel to grant the following relief:
- "1. The Appeal of Mr João Gabriel Schlitter be dismissed*  
*2. IJF is granted an award on costs".*

**C. Second Respondent's Submissions and Requests for Relief**

- 4.17 The Second Respondent remained silent during significant part of the present proceedings, having signed the Order of Procedure, attended the hearing and not filed an answer. Since the Second Respondent informed the Panel that the CBJ wished to be excluded from the proceedings CAS 2012/A/2784 João Gabriel Schlitter v. IJF & CBJ, it did not file any written submissions, neither raised any objections nor submitted any requests for relief.

**D. Hearing: Parties' Oral Submissions**

**a) Appellant's opening oral submissions**

- 4.18 During the Hearing the Counsel for the Appellant submitted, apart from the factual background detailed in para. 4.4. above, that the Athlete's girlfriend was allowed by her doctor Ms. Liu to have sexual intercourse as from 15 June 2011. However, Gisele continued to use Trofodermin cream by her own judgment after the treatment prescribed by Ms. Liu had terminated, i.e. 8 June 2011.
- 4.19 It was further submitted that the Athlete met Gisele only after her treatment was over, on 18 June 2011. On that occasion, the Athlete picked Gisele up at a bus station in Rio de Janeiro, around 1am, since she lived in São Paulo and had to travel around six hours by bus in order to meet her boyfriend for the Competition.
- 4.20 The Appellant explained that he had been called by the CBJ on a short notice, on 17 June 2011, to substitute one of the official athletes of the Brazilian team during the Competition. This occurred because one of the official athletes was apparently injured and could not compete. Therefore, since the Athlete lived in Rio de Janeiro, the Competition took place in his city, the CBJ logically preferred to have a local high-level athlete for the replacement. And this high-level athlete was the Appellant.
- 4.21 Furthermore, since the CBJ's hotel team was allegedly fully booked, the Appellant could not stay concentrated with the Brazilian team and had to remain at his home. Therefore, after having picked up his girlfriend at the bus station he brought her to his apartment.
- 4.22 Upon their arrival, Gisele allegedly took a shower and applied a dose of Trofodermin in sequence, since she was not comfortable after the gynaecological treatment ended and, therefore, she kept using Trofodermin cream by her own judgment after the termination of the prescribed treatment.
- 4.23 After her shower, the Athlete and Gisele had more than one sexual intercourse during the night and early in the morning, before the Athlete had to meet the CBJ team at the hotel for breakfast and weigh in before his fights.
- 4.24 The amount of Clostebol identified in the collected samples of 19 June 2011 are insignificant and, therefore, corroborates with all the context described by the Athlete so far, and demonstrates that this quantity cannot have a performance enhancing effect on the Athlete. Only a few hours elapsed from the contamination time and until the samples were collected during competition.
- 4.25 It was also submitted that Clostebol can only be found in Brazil in healing creams. It is not commercialized in any other medicine and Trofodermin can be easily purchased in drugstores even without medical prescriptions.

**b) *First Respondent's opening oral submissions***

4.26 In view of the scientific evidence presented in the case file, the First Respondent stated that, in theory a steroid contamination from one person to another is possible. It further submitted that it is also possible to be contaminated by Clostebol if sexual intercourse happens immediately after the application of the Trofodermin cream.

4.27 However, given the initial scenario proposed by the Athlete in his written submissions, a contamination is unlikely to have happened, because his girlfriend had to apply Trofodermin cream between 30 May 2011 and 8 June 2011, according to the doctor's prescription. Consequently, since only ten days later (i.e. 18 June 2011) she supposedly had sex with the Appellant, this scenario cannot explain the presence of Clostebol in the Athlete's samples, and the reasons are the following:

4.27.1. The alleged sexual intercourse occurred ten days after the last application of the Trofodermin cream. Analyzing the excretion curve of Clostebol, the substance cannot be present in the body one or two days after the last application, considering that a therapeutic dose of the cream (5 grams) is applied.

4.27.2. When the Appellant had a sexual intercourse with his girlfriend, ten days after the treatment ended, Clostebol was already completely removed from the body of Gisele, which excludes any contamination argument.

4.27.3. In light of the Cologne Opinion, the IJF submits that it seems extremely improbable that the Appellant's girlfriend could still be contaminated ten days after the medical treatment.

4.27.4. IJF further submits that the Appellant does not meet the burden of proof, which is a pre-condition of the balance of probabilities principle, since the Athlete could not successfully establish how the substance entered the his body. Consequently, IJF was correct in applying the two-year ban.

4.28 When finalizing its opening statement, the First Respondent emphasized that the Appellant had developed a new explanation and line of arguments during his opening statement at the Hearing (i.e. that Gisele continued to apply the Trofodermin cream by her own judgment even after the prescribed treatment was over). In view of these new facts and elements, the IJF proposed to examine this scenario in its closing statement after having heard all the witnesses.

**c) *Appellant's closing statement***

4.29 During the Appellant's closing oral submissions, the Counsel for the Appellant repeated the main part of his thesis and arguments developed in the written submissions and in the course of the hearing.

- 4.30 The Appellant wished to clarify that at the time of the Competition, he had obtained several international titles in judo, having beaten the current Olympic Champion and three-time World Champion. The Athlete always achieved podium positions in competitions held in Rio de Janeiro.
- 4.31 In relation to the witnesses and the evidence brought, the Counsel for the Appellant affirmed that the vast majority of the evidence was already attached to the file, including the Trofodermin tube - supposedly attached to the IJF Disciplinary proceedings.
- 4.32 At the end of the Hearing a controversy arose between the parties with respect to the amount of cream contained in a Trofodermin tube. It was not clear whether a sample of the Trofodermin tube was indeed sent and attached to the IJF Disciplinary proceedings. In order to clarify this issue the Counsel for the Appellant informed the Panel that he would send to the CAS Court Office a proof that the tube was submitted to the IJF. The IJF also agreed to review its file.
- 4.33 When the controversy arose it was submitted by the Appellant that there are two different types of Trofodermin cream sold under the same name in Brazil, being one for dermatological use and the other for gynaecological use, but he could not clarify the amount of cream in each tube.
- 4.34 It was further stated that the witnesses only corroborated what was written in the documents and added to the information with the particularities of each witness, which was the objective of hearing witnesses.
- 4.35 The Appellant also stated that the First Respondent also based its arguments on the Rio Study. And the Cologne Opinion not only confirms the grounds of the Rio Study but also gives more information on the probability of contamination with lower amounts and longer time in the body of a person. Therefore, the Appellant averred that the IJF was basing its arguments on unfounded grounds, in a mathematical analysis of quantity of grams allegedly used or not used by Gisele, without precisely knowing what was the correct amount used per application.
- 4.36 Finally, the Counsel for the Appellant requested the Panel to take into consideration everything which the Athlete had said and written until that moment, in order for a fair decision to be taken in this proceeding, also considering that the provisional suspension served by the Appellant had already completed one year and two months at the moment the Hearing was held (in reality it was one year and sixteen days), a fact which led to his exclusion from the 2012 London Olympic Games.
- 4.37 In his final pleadings, the Appellant requested the Panel to declare the lack of fault or negligence from his side, as well as the elimination of the suspension period based on Article 10.5.1 IJF ADR; or exceptionally, that it is confirmed the lack of significant fault or negligence by means of an exceptional circumstance and a reduction of the sanction be applied, in order for the Athlete to restart competitions.

**d) *First Respondent's closing statement***

- 4.38 The IJF submitted that the new scenario presented by the Athlete was not convincing. Until the new witnesses appeared during the hearing, the scenario initially presented by the Athlete was impossible in view of the scientific evidence brought.
- 4.39 During its closing statement, the IJF alleged that a new scenario had been created by the Appellant during the Hearing, curiously a scenario which matched the results detailed in the Rio Study, since according to the new facts, the Appellant allegedly was tested during competition 17 hours after having had sex with his girlfriend (i.e. a period which matches the Rio Study parameters).
- 4.40 The IJF alleged that it was not comfortable with this new scenario, since it was too good to be true. The Competition was a very important international championship and one can even say that it is the most important competition in Judo (a Grand Slam). Furthermore, the IJF submitted that the Athlete did not have such a high level as to be capable of defeating five international-level judokas, namely the Japanese athlete Suzuki, one of the stars of Judo, and win the Competition without a proper night of sleep. Therefore, the gathering of these elements raised questions and the IJF could not exclude the scenario of doping in the case at stake.
- 4.41 The IJF also submitted that Gisele's oral witness statement should not be admitted, since she is neither neutral nor impartial and this witness helps the Appellant's defence. Furthermore, the IJF stated that Gisele appeared only during the Hearing; the Appellant did not file any written witness statement of her; and not even the Appeal Brief mentions the calling of the girlfriend, after the written submissions' phase were concluded.
- 4.42 The First Respondent further alleged that Trofodermin contains 10 applicators and the normal size of a tube contains 45 grams. The therapeutic dose is 5 grams and the applicator allows the application of one therapeutic dose.
- 4.43 The witness Gisele confirmed having followed her doctor's prescription, i.e. 10 applications. Later on, she affirmed having continued the treatment by herself and could still apply 3 or 4 therapeutic doses after the 8 June 2011. And after all these applications, she admitted that there was still some cream remaining in the tube. However, the IJF avers that 45 grams per tube does not allow the application of more than 10 times of the therapeutic dose.
- 4.44 In view of the above, the facts of the case contradict the new scenario of the athlete's girlfriend. In this regard, the IJF stated that by applying less than the therapeutic dose, i.e. 2-3 grams, if the Rio Study is taken into consideration, there is no evidence that a contamination could still occur, because this study was conducted under the application of one therapeutic dose. Consequently, if Gisele applied fewer grams per dose than the recommended therapeutic dose, there is no scientific data which could allow anyone to affirm that contamination is possible.

- 4.45 Finally, the First Respondent submitted that, based on the facts, the written submissions, the new facts brought during the Hearing, the volume of the tube (45 grams) and the number of applications which are possible, these elements contradict the testimony of Gisele and, therefore, her testimony shall be rejected because she is not independent and could have had access to the file before giving her testimony.
- 4.46 Furthermore, the IJF requested that the Panel reject Gisele's testimony and that the Panel render an award based on the facts and evidence contained in the case file only and deny the new scenario developed by the Appellant during the Hearing. Therefore, the IJF maintained its request for relief.
- 4.47 At the conclusion of the hearing, the parties confirmed that they had no objections in respect to their right to be heard and that they had been given the opportunity to fully present their cases.

**e) *Post hearing submissions:***

- 4.48 At the end of the hearing the Panel requested the Appellant to provide it with a copy of the original Trofodermin cream sold nowadays in the Brazilian market, in order for a sample to be included in the file (either a photograph of the tube, its package or a copy of a product leaflet).
- 4.49 The Panel further clarified that it wished to verify the quantity of cream inside a Trofodermin tube. In this regard, the Appellant claimed that he could not confirm that the tube used in 2011 was still the same sold in 2012, but he would verify this and inform the Panel accordingly. On the day of the Hearing the Appellant was granted seven days to produce such elements and the parties raised no objections.
- 4.50 On 6 September 2012, the Appellant filed the requested documentation and attached a copy of Gisele's credit card statement attesting the purchase of the Trofodermin tube and a series of colour photographs of (i) the cream applicator; (ii) the Trofodermin tube; (iii) the Trofodermin cream container of 45 grams.
- 4.51 Together with the new documentation produced, the Appellant reproduced some of his arguments raised during the Hearing and reaffirmed that Gisele used Trofodermin more than three to four times besides the ten-day treatment prescribed by her doctor. Furthermore, he stated that she used some of the applicators more than once and that they can even be purchased separately in drugstores. A final clarification in this respect was that Gisele did not invent a new story by claiming that she bought more than one Trofodermin tube, but she continued to use the correct and original version stated in the file that only one package of the medication was purchased.
- 4.52 The Appellant further addressed, quoting the expert Dr. Geyer's testimony based on the Cologne Opinion, that a contamination of the Athlete could have occurred by a smaller

amount of cream used. Additionally, the Appellant stated that Clostebol could be detected in a person's body after more than thirty hours following sexual intercourse.

- 4.53 Upon receipt of the Appellant's letter and attached documents, the CAS Court Office provided the Respondent with a copy of said documentation and granted a time limit until 18 September for the IJF to submit its comments in that respect.
- 4.54 On 18 September 2012 the IJF provided the CAS Court Office with its comments, which apart from repeating some of the arguments raised during the Hearing and written submissions, can be summarized in general lines as follows:
- 4.54.1. The Appellant did not provide the CAS with any postal receipt linked with a package supposedly sent to IJF containing the tube of Trofodermin;
  - 4.54.2. The pictures attached to the Appellant's letter confirm the explanation of Dr Constantinescu, that a tube of Trofodermin contains 45 grams of cream;
  - 4.54.3. Eight applicators are apparently sold with the cream: this tends to establish that a therapeutic dose of the cream consists in eight applications of 5.625 grams;
  - 4.54.4. The therapeutic use is more or less consistent with the medical prescription of ten applications, during ten consecutive days; this prescription implies that a therapeutic dose is 4.5 grams;
  - 4.54.5. Gisele seems to have used between 12 to 14 doses with only one tube, a fact which is not possible assuming that a therapeutic dose is applied.
  - 4.54.6. Should Gisele's testimony be taken into account, this would mean that she applied between 3 and 3.5 grams of the cream per application; in this case there is no scientific data establishing that a contamination during a sexual intercourse is possible, since the Rio Study is based on 5 grams per application;
  - 4.54.7. Furthermore, the Appellant weighs more than 100kg and competed all day long during the day he was tested, which means that a contamination with a quantity of cream which is less than 5 grams is highly unlikely.
- 4.55 Finally, the First Respondent claimed that, on a balance of probability, it is more probable that the Appellant tested positive further to the ingestion of a doping agent, rather than further to a sexual contamination.

## 5. JURISDICTION OF THE CAS

5.1 Article R47 of the Code provides as follows:

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

5.2 Article 8.1.8 of the 2009 IJF ADR provides as follows:

*Decisions of the IJF Doping Hearing Panel may be appealed to the Court of Arbitration for Sport as provided in Article 13.*

5.3 Article 13.2.1 of the 2009 IJF ADR provides as follows with respect to appeals involving International-Level Athletes:

*In cases arising from competition in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court.*

5.4 The Appellant filed his appeal with the CAS and the Respondents did not raise any jurisdictional objections. Furthermore, both parties confirmed that the CAS has jurisdiction in this matter by signing the Order of Procedure dated 20 August 2012. It is accordingly undisputed that the CAS has jurisdiction over the appeal.

## 6. APPLICABLE LAW ON THE MERITS

6.1 Article R58 of the Code provides as follows:

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

6.2 In their submissions, the parties make reference to and rely on provisions of the 2009 IJF ADR, as well as provisions of Swiss law. Accordingly, the IJF ADR and Swiss law are applicable on the merits of the parties' dispute.

## 7. ADMISSIBILITY

7.1 Article 13.6 of the 2009 IJF ADR provides as follows with respect to the time for filing appeals:

*The time to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party.*

7.2 Based on the documents submitted, Respondent took the decision at issue on 19 March 2012, and the Appellant was notified of that decision on 2 April 2012 by e-mail from the CBJ. The Appellant filed his Statement of Appeal on 19 April 2012. The Panel is satisfied that the Appellant's appeal was timely filed and is therefore admissible.

## **8. PRELIMINARY PROCEDURAL ISSUES: DUE PROCESS & SECOND RESPONDENT'S LEGAL STANDING**

### **A. Due Process**

8.1 In view of the Appellant's allegation that he did not have the opportunity to argue his case properly before the IJF, due to the fact that the IJF disciplinary proceedings did not include an oral hearing, the Panel asserts that the CAS appeal arbitration procedure under Article R57 of the CAS Code entails a trial *de novo* which cures infringements of the right to be heard or fairly treated committed by sports organizations during its internal disciplinary proceedings.

8.2 Therefore, considering the Panel's authority to fully review the facts and the law on a *de novo* basis, the Panel considers that even if the Appellant's rights in this regard were violated within the IJF proceedings, such alleged violation is hereby cured and thus irrelevant.

### **B. Second Respondent's legal standing to be sued**

8.3 The Second Respondent argued during the Hearing that it does not have standing to be sued on the grounds that it was not a party in the proceedings before the IJF and also that the appealed decision was issued independently by IJF and CBJ did not have any involvement with it.

8.4 In view of the Second Respondent's position and its explicit request to be removed from this proceeding, both the Appellant and the First Respondent agreed with that request. Since the other parties agreed and the Second Respondent was wrongly involved by the Appellant in this arbitration which concerns a decision issued by a different entity, the Panel agrees with the CBJ's removal from the present proceedings.

8.5 Thus, since the Second Respondent lacked standing to be sued, the CBJ cannot be ordered to bear the costs of the arbitration and/or to pay any contribution to the relevant party's costs. At the same time it is not entitled to any contribution towards its legal costs.

## 9. MERITS OF THE APPEAL

- 9.1 The main issues to be resolved by the Panel in deciding the present dispute are the following:
- A. Has the Athlete committed an anti-doping rule violation?
  - B. If the answer to question i) is affirmative, what would be the appropriate sanction to be imposed on the Athlete?
  - C. What would be the legal consequences of the Panel's findings?
  - D. Conclusions

9.2 The Panel shall consider each of the said questions separately.

### A. Has the Athlete Committed an Anti-Doping Rule Violation?

- 9.3 The presence of chlortestosterone metabolites/Clostebol in the bodily samples of the Athlete from 19 June 2011 is not disputed. Clostebol is a prohibited substance, which is classified under "S1.1.a (anabolic agent, anabolic androgenic steroids)" of the Prohibited List of the World Anti-Doping Code, 2011 Edition (hereinafter "WADC").
- 9.4 The Athlete neither contests the scientific accuracy of the analysis carried out by the WADA-accredited "Institut Armand-Frappier, laboratoire de contrôle du dopage", in Montreal, Canada nor the scientific conclusion as to the identification of the chlortestosterone metabolites/Clostebol in the bodily samples.
- 9.5 According to Article 2.1. IJF ADR, "*the presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Specimen*" constitutes an anti-doping rule violation.
- 9.6 Article 2.1.2 of the 2009 IJF ADR provides as follows:
- Sufficient proof of an anti-doping rule violation under Article 2.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample.*
- 9.7 In view of the above, from the two possible ways for the IJF to establish an anti-doping violation under Article 2.1.2., the second possibility is the only one plausible in the case at stake, since the Appellant's B Sample was analysed and it confirmed the presence of the prohibited substance found in the Athlete's A Sample. Consequently, the IJF could establish an anti-doping violation under Article 2.1.2., which was not objected to by the Appellant.
- 9.8 As a result, the Panel finds that the objective presence of chlortestosterone metabolites/Clostebol in the Athlete's bodily samples, regardless of the Athlete's subjective attitude (i.e. his possible intent, knowledge, fault or negligence) constitutes an anti-doping rule

violation under Article 2.1. IJF ADR proven to the Panel's comfortable satisfaction bearing in mind the seriousness of the allegation.

**B. If the answer to question (a) is affirmative, what would be the appropriate sanction to be imposed on the Athlete?**

9.9 Considering that the Panel has previously determined that the Athlete has committed an anti-doping rule violation pursuant to Article 2.1. IJF ADR, the Panel now has to determine what the appropriate sanction to be imposed on the Athlete is.

9.10 Under Article 10.2. IJF ADR the period of ineligibility for a first time offence shall be two years. However, the Panel also notes that pursuant to Article 10.4. IJF ADR a period of ineligibility may be reduced or eliminated for specified substances in case of specific circumstances or be reduced in case of exceptional circumstances (Article 10.5. IJF ADR).

**a) Reduction based on "specified substance"**

9.11 As mentioned in paragraph 9.3 above, Clostebol is listed as a prohibited substance classified under the heading "S1.1.a. Anabolic Agent/ Anabolic Androgenic Steroids (AAS)" of the Prohibited List. In fact, the heading of the 2011 WADA Prohibited List expressly provides that S.1. anabolic agents are not to be considered as 'specified substances':

*"All prohibited substances shall be considered as 'specified substances' except substances in classes [...] S1 [...]"*

9.12 In light of the above, the Panel shares the ruling of another CAS Panel which decided that Article 10.3 WADC 2003 (current Article 10.4 WADC 2011 and included in the IJF ADR by means of its Article 10.4) could not be applied to validate a reduction of a sanction for an offence involving a non-'specified substance'. That Panel ruled as follows:

*"Although the manner of application of the banned substance in the case at hand (the external use of a medical cream between the fifth and fourth toe) speaks in favor of a finding that the Appellant did not intend to enhance her performance, 'Clostebol' is not a 'specified substance'. Nothing exists in the legislative history of DC 10.3 to indicate that the Panel can apply this legal idea to expand this list to applications of non-'specified substances'.*

*That is, because it is not clear that this is an unintentional loophole in the legislation, which could then be filled by the Panel, DC 10.3 will not be applied to validate a reduction of the fixed sanction in the case at hand"* (CAS 2005/A/830).

9.13 In view of the existent restriction to apply Article 10.4. IJF ADR in the present case, the only possibility for the Appellant to seek a reduction of the ineligibility period would be by complying with any of the provisions of Article 10.5. IJF ADR.

- 9.14 Considering the subparagraphs of Article 10.5. IJF ADR, the Panel considers that the only possible article which the Appellant could rely upon to support his defense and requests for relief would be Article 10.5.1 or 10.5.2 IJF ADR.
- 9.15 To prevail under Article 10.5.1. or 10.5.2. IJF ADR, the Athlete must first establish (a) how the Prohibited Substance entered his body and then (b) that he bears no significant fault or negligence. The Panel shall put both these requirements under scrutiny.
- 9.16 Before analyzing these criteria, the Panel considers that it is important to stress the concept of strict liability and its constant application by International Federations and CAS Panels and ultimately prescribed in the WADA Code, which resulted in its inclusion in the IJF ADR. According to this principle, whenever an anti-doping rule violation occurs, as in the present case, the Athlete shall demonstrate that the requirements foreseen under Article 10.5 of the IJF ADR are met. Such a burden of proof is expressly stated under Article 3.1 IJF ADR, which provides that: “[...] *Where these Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Articles 10.4 and 10.6, where the Athlete must satisfy a higher burden of proof. [...]*”.
- 9.17 Analyzing the criteria mentioned in para. 9.15 above, initially the Panel needs to assess whether the Athlete could establish (a) how Clostebol entered his body and then (b) that he bears no fault or negligence or no significant fault or negligence.

**b) *Athlete’s standard of proof: the alleged sexual contamination***

- 9.18 In the Athlete’s written submissions, the Appellant argues that the presence of Clostebol in his organism was a result of a sexual intercourse he had with his girlfriend on the day his Samples were collected during the Competition (i.e. on 19 June 2011). Therefore, the entrance of Clostebol in his body was a result of a sexual contamination, since his girlfriend had been under gynecological treatment and used for several days the Trofodermin cream, which contains the prohibited substance Clostebol.
- 9.19 In order to sustain this argument, the Athlete submitted that his girlfriend underwent a gynecological surgery on 17 May 2011 and following that, on 30 May 2011 Ms Liu prescribed a recovery treatment to Gisele, which consisted in the application of Trofodermin cream for ten consecutive days, from 30 May 2011 until 8 June 2011.
- 9.20 Furthermore, the Appellant alleged in the appeal brief that during the night between 18 and 19 June 2011, one day before the Competition, he had sexual intercourse with Gisele, who lives in São Paulo and travelled to Rio de Janeiro on that day to cheer for the Athlete during the Competition.
- 9.21 It is further submitted that the Athlete was inadvertently contaminated by Clostebol during the sexual intercourse, because Trofodermin cream contains this substance. Therefore, since he did not know about this information, he could not know that his girlfriend could provoke

an adverse analytical finding. This scenario was narrated in the Appellant's written submissions. However, the Athlete brought new factual elements in the course of the Hearing as well as the oral witness statement of Gisele, with the aim of complementing the written factual background initially presented by him.

- 9.22 However, before analyzing the content of Gisele's witness testimony during the Hearing, the Panel considers relevant to address some issues related to its admissibility.
- 9.23 As detailed above in Section 3, the Appellant filed his statement of appeal and appeal brief, respectively on 19 and 30 April 2012. The First Respondent filed its answer on 4 June 2012. Therefore, pursuant to Article R56 of the Code, the written submissions' phase was closed and unless the parties agreed otherwise or the President of the Panel ordered otherwise on the basis of exceptional circumstances, the parties should not be authorized to supplement or amend their requests or their argument, nor to produce new exhibits, nor to specify further evidence on which they intended to rely after the submission of the appeal brief and of the answer.
- 9.24 Within the appeal brief (Section IV.2), the Appellant stated the following:  
*"The Appellant also reserve its right to ask the Panel to be authorized to supplement their argumentation, to produce new exhibits and to specify further evidence in accordance with Article R56 of the Code of Sports-related Arbitration, once the Respondents have submitted their answers to this Appeal Brief".*
- 9.25 Furthermore, after having asked the Panel to hear three more witnesses via the letter sent on 14 June 2012, and specified that the name of the girlfriend was Gisele Patricia Nunes de Figueiredo in the letter sent on 13 July 2012, the Counsel for the Appellant wrote again on 22 August 2012 to the CAS Court Office stating which persons would be present at the Hearing, the persons who should be heard by teleconference, namely Mrs Liu and Gisele, as well as requesting whether he could present new documents during the Hearing. The Appellant justified the presentation of these new documents by alleging that they had already been produced in the course of this proceeding, they would be important for the success of the case and it would also clarify the Athlete's Olympic reputation. However, the Appellant presented neither further explanations nor exceptional circumstances to justify these allegedly new documents and Gisele's testimony.
- 9.26 On 22 August 2012, the CAS Court Office acknowledged receipt of the Appellant's letter, reminded the parties about the content of Article R56 of the Code and requested the Respondents to state whether they would agree with the Appellant's request.
- 9.27 On 23 August 2012 the First Respondent informed the CAS Court Office that it objected to the Appellant's request for filing new documents. The Second Respondent did not file any comments to this issue.
- 9.28 During the Hearing, the Appellant submitted orally new factual elements that were not presented previously, neither in the prior proceeding in front of IJF, the statement of appeal

nor in the appeal brief. Only for the sake of illustration, such new elements can be exemplified in paragraphs 4.18 - 4.25 above.

- 9.29 Amongst the main new facts brought during the Hearing, the Panel highlights the following statements made either by Gisele or the Counsel for the Appellant:
- Gisele allegedly continued to use Trofodermin cream for several days after her ten-day gynecological treatment was over, i.e. 8 June 2011, and specifically on the night before the Competition, or during the early morning of the Competition day (the precise time the sexual intercourse(s) occurred is not clear). It is submitted that Gisele applied the cream on two to four occasions after 8 June 2011;
  - The Athlete and Gisele had not seen each other for several days and when Gisele arrived in Rio de Janeiro for the Competition, they had sexual intercourse more than once during the night and the early morning of 19 June 2012.
  - Before the Athlete and Gisele had sex, Gisele took a shower, applied Trofodermin cream and went to bed;
  - The Athlete did not know his girlfriend was using Trofodermin cream and neither that Trofodermin cream contained Clostebol;
  - Trofodermin cream can be applied with specific applicators, which are allegedly reused sometimes by women;
  - Gisele purchased only one Trofodermin tube (as per receipt presented as evidence).
- 9.30 Besides, the Counsel for the Appellant informed the CAS Court Office only on 22 August 2012 (after the two letters sent on 14 June and 13 July 2012 and after the written submissions' phase had closed) that he would also call the Appellant's girlfriend as a witness, a fact which was completely new and was not raised in the Appellant's statement of appeal or appeal brief.
- 9.31 With regard to Gisele's testimony, the Panel understands that, pursuant to Article R44.2 of the Code, *"the parties call to be heard by the Panel such witnesses and experts which they have specified in their written submissions"*. In the present case this did not occur with Gisele, since the Appellant informed the Panel of this new witness, namely on 13 July 2012 (after having received the entire CAS case file) and also a few days before the hearing took place and not even a written testimony of Gisele's statement was submitted for the Respondents' and Panel's analysis. Consequently, the Panel understands that Gisele's oral testimony shall not be admitted in the records of the present proceedings.
- 9.32 In view of this first conclusion related to Gisele's oral testimony, the Panel further addresses that even if formally her testimony was to be admitted in this proceeding, the content of such evidence would not alter the Panel's findings, as per the reasoning below.
- 9.33 After the Hearing the Panel received detailed information from the Appellant about the Trofodermin's tube size, which confirmed that the Trofodermin vaginal cream tube, which is commercialized in Brazil, contains 45 grams.

- 9.34 Based on these elements as well as on the First Respondent's arguments raised in its written and oral submissions, the Panel understands and considers that (i) Gisele followed Ms Liu's ten-day treatment; (ii) the treatment was over on 8 June 2011; (iii) Gisele continued to apply Trofodermin even after the treatment was over (2 to 4 times) and also on 19 June 2011 before having had sexual intercourse(s) with the Athlete; and (iv) a standard Trofodermin vaginal cream tube contains 45 grams.
- 9.35 In view of the above, the Panel is not convinced of the likelihood of the occurrence of the events narrated by the Appellant, especially considering that most of the facts were brought and developed by the Appellant in the course of the Hearing after the Athlete had the opportunity to study the Respondent's answer and, therefore, against Article R56 of the Code, since no exceptional circumstances were justified by the Appellant.
- 9.36 Besides, even supposing that some of the facts are coherent; that Gisele respected the ten-day treatment; and also kept applying Trofodermin after the end of the treatment, all these facts do not seem to sustain when analyzing the size of the Trofodermin tube, i.e. 45 grams, and its application with the specific applicators.
- 9.37 Based on the written evidence submitted by the parties, namely the Rio Publication, and the Cologne Opinion, and without considering the new factual scenario developed during the Hearing, the Panel considers that it is improbable that the Appellant's girlfriend was still contaminated with Clostebol 10 days after the end of her medical treatment, especially in view of the high excretion speed of Clostebol from a human organism. Therefore, the Panel understands that a sexual contamination on the night before the Competition seems improbable to have occurred under these circumstances.
- 9.38 Furthermore, supposing that the Panel considered Gisele's testimony together with the scientific evidence provided in the written submissions and during the Hearing, it seems unlikely that a Trofodermin tube which contains 45 grams would last for more than 9 applications comprising a therapeutic dose of 5 grams (as apparently commonly recommended), which is the amount of cream used in the Rio Study to prove potential sexual contaminations with Clostebol. Therefore, by hypothetically considering that Gisele applied lesser amounts per dose of Trofodermin cream, i.e. 4.5, 3.5, 3 grams or less, the Panel cannot still precisely determine based on the presented evidence whether a sexual contamination could still happen and result in an adverse analytical finding of the Athlete.
- 9.39 In order for the Panel to decide whether the Athlete satisfactorily proved how Clostebol entered his body, the Panel relies on the established balance of probability standard, developed by the CAS award *CAS 2007/A/1370 & 1376* (para. 127) and which was corroborated in recent cases, namely *CAS 2009/A/1926 & 1930*, *CAS 2009/A/2012*, amongst others. In view of the above, the Panel is of the opinion that the non-occurrence of the circumstances on which the Appellant relies is more probable than their occurrence. Therefore, the Panel deems improbable that the presence of Clostebol in the Athlete's body was a result of a sexual contamination as narrated by him in his written and oral submissions and, consequently,

concludes that the Athlete could not successfully establish how Clostebol entered his body, not meeting the required standard of proof pursuant to Article 3.1. IJF ADR.

9.40 In conclusion, the Panel agrees with the final arguments presented by the First Respondent. When assessing the weight of the evidence it must be taken into account that it is very improbable that the girlfriend of the Appellant acted as an impartial witness; her testimony matches too closely with the data included in the scientific reports and is not compatible with a therapeutic use of Trofodermin.

**c) *Absence of Fault or Negligence***

9.41 The Appellant alleges that he bears no fault or negligence, because he was inadvertently contaminated by his girlfriend Gisele when they had sexual intercourse(s), and he could not know that she was using Trofodermin cream; and neither that this cream contained a prohibited substance.

9.42 However, the Panel understands that the Athlete could not successfully establish how the prohibited substance entered his body, as per the reasoning of Section 9 (a) above and required by the Article 3.1. IJF ADR.

9.43 No Fault or Negligence is defined in Appendix 1 of the IJF ADR as:

*“The Athlete’s establishing that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had Used or been administered the Prohibited Substance or Prohibited Method”.*

9.44 No Significant Fault or Negligence is defined in Appendix 1 of the IJF ADR as:

*“The Athlete’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 antidoping rule violation”.*

9.45 Considering that in order for the Athlete to claim for a reduction of his period of ineligibility under Articles 10.5.1 and 10.5.2 of the IJF ADR, he needs to firstly establish how the prohibited substance entered his organism, the Panel understands that since the Appellant failed to prove how Clostebol entered his organism it cannot further assess whether the Athlete acted with or without fault or negligence in the present case.

9.46 Hence it follows that the Appellant cannot qualify for a reduction in the applicable two-year sanction, because he does not meet the conditions for eliminating or reducing the period of ineligibility as provided in Articles 10.5.1 and 10.5.2 of the IJF ADR.

**C. What would be the legal consequences of the Panel's findings?**

- 9.47 In view of the above-mentioned findings, the Panel decides that the Athlete is sanctioned with a period of ineligibility of two years
- 9.48 Thus, the Panel needs to address the commencement of the suspension period to be served by the Athlete. Accordingly, taking into consideration the circumstances of the case, the fact that (i) the Athlete was notified of the IJF's Decision almost one year after the samples' collection; (ii) the IJF did not present detailed grounds and/or explanations for the IJF decision; and (iii) the provisional suspension of the Athlete started on 15 August 2011 and the samples were collected on 19 June 2011, the Panel finds that the two-year period of suspension must start on 19 June 2011 upon art. 10.9.1 of the WADA Code.
- 9.49 The ineligibility of the Athlete should end on 19 June 2013. The Panel further confirms that the Appellant's results at the Competition and all results that followed that event shall not be reinstated.

**D. Conclusion**

- 9.50 The Appellant had his fundamental rights to be heard and present his case before the Panel.
- 9.51 The Athlete and the IJF have established that the Athlete had committed an anti-doping violation rule according to Article 2.1 of the IJF ADR, since both A and B Samples have confirmed the presence of Clostebol, a prohibited substance under the WADA Prohibited List, classified under S1.1.a (anabolic agent, anabolic androgenic steroids).
- 9.52 The Athlete has been unable to prove, under Article 10.5 of the IJF ADR how, on a balance of probability, the Prohibited Substance had entered his organism.
- 9.53 As a result, the appeal filed by the Athlete has to be dismissed (and the IJF Decision confirmed concerning the period of ineligibility)
- 9.54 The Panel accordingly partially upholds the appeal lodged in relation to the commencement of the period of suspension, in view of the time gap between the samples' collection date (19 June 2011) and the date the Athlete was provisionally suspended (15 August 2011).
- 9.55 The Panel confirms that the Appellant's results at the Competition and all results that followed that event shall not be reinstated.

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport rules:**

1. The Appeal of Mr. João Gabriel Schlittler against the decision of the IJF dated 19 March 2012 is partially upheld.
2. The appeal of Mr. Joao Gabriel Schlittler against CBJ is rejected.
3. The IJF's Decision dated 19 March 2012 is partially amended.
4. Mr. João Gabriel Schlittler is suspended for a period of two years, starting on 19 June 2011.
- (...)
7. All other prayers for relief are dismissed.