Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2016/A/4772 Diego Dominguez v. Fédération Internationale de l'Automobile

ARBITRAL AWARD

Pronounced by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

President:	Mr Ken **Lalo**, Attorney-at-law in Gan-Yoshiyya, Israel
Arbitrators:	Mr Rui Botica **Santos**, attorney-at-law in Lisbon, Portugal Dr Hans **Nater**, Attorney-at-law in Zurich, Switzerland

in the arbitration between

Mr Diego Dominguez, Asuncion, Paraguay

Represented by Mr Antonio Quintero, Carrero & Quintero Abogados, Attorney-at-law in Caracas, Venezuela and Mr Jorge Ibarrola, Libra Law Ibarrola & Ramoni, Attorney-at-law in Lausanne, Switzerland

As **Appellant**

and

Fédération Internationale de l'Automobile, Geneva, Switzerland

Represented by Mr Pierre Ketterer, Head of Regulatory, Governance and Legal Corportae Affairs, FIA, Geneva, Switzerland and Mr Jonathan Taylor, QC and Ms Lauren Page, Bird & Bird LLP, London, United Kingdom

As **Respondent**

I. INTRODUCTION

1. This appeal is brought by Mr Diego Hugo Dominguez Stroessner (the "Appellant") against the decision of the Therapeutic Use Exemption Committee ("TUEC") of the Fédération Internationale de l'Automobile ("FIA"), dated 5 April 2016 (the "Challenged Decision"), which refused to grant the Appellant a retroactive Therapeutic Use Exemption ("TUE") for the use of lisdexamphetamine (50 mg once daily) and dextroamphetamine sulphate (10 mg three times daily) starting from 17 March 2015. These products contain amphetamine, a prohibited substance, which was discovered along with its metabolite, p-OH amphetamine, in a sample taken at an in-competition doping control during the Ralli Santa Cruz de la Sierra, Bolivia (the "Santa Cruz Rally", being part of FIA Confederación Deportiva Automovilística Sudamericana Rally Championship ("CODASUR"), subjecting the Appellant to proceedings for an anti-doping rule violation ("ADRV"), which are still pending but are not the subject of this appeal.

II. PARTIES

2. The Appellant is a Paraguayan businessman and competitor in rally competitions in South America.

3. The FIA is the international governing body for motorsport. The FIA is a French association constituted under and governed by the Loi du 1er juillet 1901 relative au contrat d'association, with its legal seat in Paris. Its responsibilities include the regulation of motorsport around the globe, including enforcement of its anti-doping program in compliance with the World Anti-Doping Code (the "WADC") of the World Anti-Doping Agency ("WADA").

III. FACTUAL BACKGROUND

4. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced 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 below. While the Panel has considered all the facts, evidence, allegations and legal arguments 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.

5. On 17 March 2015, the Appellant filed with his national association, Touring y Automovil Club Paraguayo ("TACPy"), a request for a renewal of a license to compete in driving rally competitions. As part of such process the Appellant completed the standard medical history form specifying that he suffered from Attention Deficit Hyperactivity Disorder ("ADHD") for which he was taking vyvanse and he attached to such form a letter from his doctor, Dr David Gross, confirming that the Appellant had ADHD and was treated with daily doses of vyvanse and dextroamphetamine sulphate (Dr Gross letter was apparently issued on a number of occasions with various dates and somewhat different versions but these are not material to the decision herein; therefore,

such letter in whichever form will be referred to herein as "Dr Gross' Letter"). TACPy granted the Appellant a license to compete.

6. On 28 August 2015, during the Santa Cruz Rally, the Appellant underwent an in-competition doping control test and provided a urine sample to the FIA. The Appellant advised the Doping Control Officer of his condition and provided a copy of Dr Gross' Letter.

7. On 11 September 2015, the WADA-accredited laboratory in Bogota, Colombia, reported that a prohibited substance, amphetamine, and its metabolite, p-OH amphetamine, had been found in that sample. The FIA checked the file and determined that the Appellant did not have a TUE permitting the use of amphetamine.

8. On 5 October 2015, the FIA sent the Appellant a notice of charge for the commission of an ADRV under Article 2.1 of the FIA Anti-Doping Regulation ("FIA ADR"), for the substance amphetamine (and its metabolite p-OH amphetamine), which is prohibited under Category S6 of the WADA 2015 Prohibited List.

9. On 4 February 2016, following notification of the ADRV, the Appellant applied for a retroactive TUE.

10. On 10 February 2016, the ADRV proceedings against the Appellant were suspended following resolution of the retroactive TUE issue.

11. On 2 March 2016, the Appellant applied for a prospective TUE.

12. On 24 March 2016, the Appellant's application for a prospective TUE was granted for a period of one (1) year.

13. On 1 April 2016, following a hearing, the provisional suspension of the Appellant imposed following the alleged ADRV was lifted.

14. On 5 April 2016, the TUEC issued the Challenged Decision rejecting the Appellant's application for a retroactive TUE and informing him that the FIA was "*unable to grant a retroactive TUE in this case, since the members do not consider that the explanations provided fulfil the criteria to grant a retroactive TUE on the basis of fairness*".

15. On 13 April 2016, the Appellant requested WADA to review the FIA's refusal to grant the retroactive TUE.

16. On 6 May 2016, Mr Andrew Slack, Ph.D., a Medical Manager at WADA wrote to the FIA's TUE department an email which in its pertinent part states:

> *"We are aware that FIA has recently denied a retroactive TUE requested by Mr. Diego Dominguez pursuant to ISTUE Article 4.3(d). According to Mr. Dominguez's documentation, the FIA TUEC agreed to grant a one year TUE, but refused to grant the retroactive TUE because the athlete did not fulfil the 4.3(d) criteria on fairness. Although prospective TUEs are still the recommended mechanism, two new categories were added to the ISTUE*

Retroactive criteria in 2015 to address administrative issues that affect both athletes and Anti-Doping Organizations: ISTUE Articles 4.3(c) and 4.3d).

Lower level athletes may be allowed to apply for retroactive TUE under criteria 4.3(c). The apparent circumstances support the argument that Mr. Dominguez, as a mainly amateur athlete not normally subject to, or knowledgeable about, anti-doping controls or processes could be granted a retroactive TUE under this clause. A lower level athlete such as Mr. Dominguez would not necessarily be expected to have submitted a prospective TUE, but would instead be expected, as he did, to have a complete medical file prepared and to apply for a TUE retroactively in the event of an AAF.

WADA envisioned in the drafting of the ISTUE that 4.3(d) would serve as a means of promoting fairness in unusual circumstances where no other specific 4.3 criteria apply. In other words, ISTUE 4.3(d) protects an athlete who would otherwise be vulnerable to sanction despite meeting ISTUE 4.1 criteria and acting in good faith to abide by the spirit, if not the absolute letter, of the Code and applicable sporting rules. Here again, it is WADA's preliminary assessment that principles of fairness may make it reasonable to grant a retroactive TUE under 4.3(d).

Based on our understanding of the facts, it is WADA's opinion that ISTUE 4.3(d), if not also 4.3(c), criteria are met in Mr. Dominguez's case and justify the grant of a retroactive TUE. Nevertheless, we recognize that there may be extenuating circumstances or considerations of which we are unaware. Would you be kind enough to elaborate on the TUEC's rationale for rejecting Mr. Dominguez's retroactive TUE pursuant to ISTUE 4.3(d)?"

17. On 25 July 2016, the FIA answered WADA on behalf of its TUEC that the Appellant was not a low level athlete, that he was made aware of the TUE process by Dr Gross before participation at the Santa Cruz Rally, that this is "*not a lack of knowledge but a lack of consideration for motor sport rules*", that amphetamine is a widely known doping substance, that this is "*[a] legal story rather than a medical story*" and that the Appellant did not deserve to be granted a retroactive TUE based on the fairness criterion.

18. On 10 August 2016, WADA advised the Appellant that it declined to conduct a formal review of the TUE application, in view of the absence of any agreement between the FIA and WADA regarding the application of the fairness criterion to the Appellant.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

19. On 31 August 2016, the Appellant filed his statement of appeal at the Court of Arbitration for Sport (the "CAS") against the FIA in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code") challenging the Challenged Decision. In his statement of appeal, the Appellant nominated Mr Rui Botica Santos as arbitrator. In his statement of appeal the Appellant also requested the CAS to order the FIA, pursuant to Article R57 of the Code, to produce the full case file including the detailed reasons for the rejection of the retroactive TUE application, as he had

previously directly requested from the FIA on 25 August 2016. The Appellant further requested that the deadline to file the appeal brief be stayed pending receipt of the full case file. On 2 September 2016, the FIA informed the CAS Court Office that the parties would try to consensually solve the issue of the disclosure of documents requested by the Appellant and agreed "*that the time limit for* [the Appellant] *to file his appeal brief should not run*".

20. On 22 September 2016, following the determination by the President of the CAS Arbitration Division pursuant to Article R50 of the Code that the matter be submitted to a panel of three arbitrators, the FIA nominated Dr Hans Nater as arbitrator.

21. On 3 November 2016, the Appellant filed a challenge to the nomination of Mr Ken Lalo as President of the Panel, pursuant to Article R34 of the Code.

22. On 24 November 2016, the Appellant withdrew the challenge to Mr Ken Lalo's nomination in light of "*comments by the members of the Panel*".

23. On 24 November 2016, the CAS Court Office informed the parties that, pursuant to Article R54 of the Code the Arbitral Panel in this appeal was constituted as follows:

President:	Mr Ken E. Lalo, attorney-at-law in Gan-Yoshiyya, Israel
Arbitrators:	Mr Rui Botica Santos, attorney-at-law in Lisbon, Portugal
	Dr Hans Nater, attorney-at-law in Zurich, Switzerland.

24. On 11 January 2017, the Appellant requested the Panel, pursuant to Article R44.3 of the Code, to order the production of the full case file, including in particular documents detailing the minutes, analysis and decision of the TUEC to reject the Appellant's request for a retroactive TUE. This followed efforts by the parties during the period commencing immediately following the filing of the statement of appeal to resolve consensually the issue of the disclosure of documents requested by the Appellant in his statement of appeal and earlier in direct communication with the FIA on 25 August 2016.

The Appellant advised that he could not accept the FIA's position during these discussions that there exist no other documents besides the exchanges with WADA and indicating that the disclosed documents failed to constitute the reasoned decision which the TUEC was required to issue. The Appellant further requested that the deadline to file the appeal brief pursuant to Article R51 of the Code be stayed until the receipt of the documents and information requested by the Appellant.

25. On 16 January 2017, the FIA responded to the Appellant's request for disclosure stating that the FIA complied with the requests for disclosure, that in response to the original request the FIA responded that "*to the best of our knowledge there were no formal documents setting out detailed reasons for the FIA TUEC's decision other than the exchange on emails with WADA.*" The FIA confirmed that there are no minutes of meetings in relation to the TUEC's decision and that other than the email exchange with WADA which was already disclosed "*there are no further formal documents elaborating on the FIA TUEC's reasons for denying the Appellant a retroactive TUE on the basis of fairness.*".

26. On 20 January 2017, CAS advised the parties that the Panel denied the Appellant's request for further disclosures and instructed that the twenty (20) days for the filing of the appeal brief shall resume from the date of provision of such notice to the Appellant.

27. On 9 February 2017, the Appellant filed his appeal brief in accordance with Article R51 of the Code.

28. On 13 February 2017, the FIA requested that exhibits filed along with the appeal brief in any language other than English be translated into English. On 14 February 2017, the CAS Court Office advised the parties that the Panel accepted this request and instructed that such translations be filed.

29. On 21 February 2017, the Appellant filed English translations of these exhibits to the appeal brief. The FIA was advised on 22 February 2017 that upon receipt of these translations the time for the filing of the answer shall resume.

30. On 22 March 2017, the FIA filed its answer in accordance with Article R55 of the Code, following the grant of a short extension.

31. On 24 March 2017, the Appellant filed a request to receive an official English translation of the exhibits and of the cited decisions which were attached as exhibits to the answer in their original languages rather than in English. The Appellant further referenced the FIA's similar request regarding its exhibits to the appeal brief, which request was granted by the Panel on 14 February 2017.

32. On 3 April 2017, the CAS Court Office advised the parties on behalf of the Panel, that they were provided the opportunity to reach an understanding among themselves that would resolve the issue of the translations, and included recommendations regarding possible construction of such consensual resolution.

33. On 3 April 2017, the CAS Court Office further advised the parties that the Panel, pursuant to Article R57 of the Code and having considered the parties' positions, decided to hold a hearing in this matter. In reaching this decision the Panel considered both the Appellant's preference, expressed in his letter of 24 March 2017, to hold a hearing in this case, as well as the FIA's preference, expressed in its letter of the same date, that the Panel issue an award based solely on the parties' written submissions, without the need for an oral hearing, since "*the disputed issues are legal, not factual, and have been fully canvassed in the parties' written submissions*".

34. On 5 April 2017, the Appellant agreed to seek a solution regarding the translations as suggested by the Panel.

35. Following efforts by the Panel to agree an earlier hearing date, it was finally agreed and advised on 13 April 2017 that the hearing in this appeal will be held on 15 June 2017.

36. On 26 April 2017, the FIA advised that the parties have agreed a solution regarding the translations requested by the Appellant (e.g., which portions, what type of translation) and on 24 May 2017, the FIA provided such translations.

37. On 9 May 2017, the Appellant filed an excerpt of a FIA web page stating that "*[m]y client has just provided me with an information that was unknown until today but which is in any event public knowledge, as it is published on the FIA website .....*" and which is relevant for this appeal. This web page indicated that only in September 2015, the FIA Medical Commission announced that it would "*commence deployment of its Race True anti-doping educational programme in 2016 for drivers competing in FIA championships; Formula One, WRC, WEC, World RX, WTCC, Formula E and Formula 3*". The Appellant claimed that this meant that on 28 August 2015, the date on which he underwent the in-competition doping control, the FIA had not yet implemented its programme to educate and prevent doping, named "*Race True*".

38. On 18 May 2017, the FIA submitted a letter in which it did not object to the inclusion into evidence of the documents attached to the Appellant's letter of 9 May 2017, but noted that the World Motor Sport Council's decision of 30 September 2015 was to ramp-up anti-doping education for 2016, including in-person anti-doping education with drivers. However, the "*Race True*" anti-doping program was launched in 2011 including sending materials to Paraguay for the CODASUR as early as on 10 June 2011. The FIA further commented that lack on anti-doping education is not an excuse for the Appellant's conduct resulting in the ADRV.

39. On 30 May 2017 and 12 June 2017, the FIA and the Appellant, respectively, signed and returned the order of procedure in this appeal. The Appellant qualified his execution of the order of procedure by specifically mentioning additional submissions which the Appellant wanted to ensure that were part of the file: (i) the Appellant's request for translations dated 24 March 2017; (ii) the translations filed by the FIA on 24 May 2017; (iii) the additional materials filed by the Appellant on 9 May 2017; and (iv) the comments by the FIA to such filing including additional exhibits filed by the FIA on 24 May 2017.

40. On 15 June 2017, a hearing was held at the CAS Court Office in Lausanne. The Panel was assisted by Mr Daniele Boccucci, Counsel to the CAS, and joined by the following persons:

For the Athlete:

Mr Diego Dominguez, the Appellant
Mr Jorge Ibarrola, counsel
Mr Claude Ramoni, counsel
Mr Antonio Quintero, counsel
Dr Francisco Peroni, interpreter
Dr Edgar Molas, President of the Sports Commission of the TACPy, witness
Dr Oscar Santacruz, Medical Officer of the TACPy, witness

For the FIA

Mr Pierre Ketterer, Head of Regulatory, Governance and Legal Corporate Affairs, FIA
Delphine Lavanchy, Legal Coordinator of Regulatory, Governance and Legal Corporate Affairs, FIA
Mr Jonathan Taylor QC, counsel
Ms Lauren Pagé, counsel.

41. Before the hearing was concluded, all parties expressly stated that they did not have any objection to the constitution or conduct of the Panel or to the procedure adopted by the Panel and that their right to be heard was respected.

42. The Panel has carefully taken into account in its decision all of the submissions, evidence, and arguments presented by the parties, including all of the documents specifically highlighted by the Appellant in his letter of 12 June 2017, even if they have not been specifically summarised or referred to in the present arbitral award.

V. JURISDICTION

43. 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 if the statutes or regulations of the said body so provide or as 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."*

44. The Appellant asserts that the jurisdiction of the CAS derives from Article 4.5.7.2 FIA ADR, which reads as follows:

> *"Any TUE decision by the FIA that is not reviewed by WADA, or that is reviewed by WADA but is not reversed upon review, may be appealed by the Athlete and/or the Athlete's National Anti-Doping Organisation exclusively before the CAS, in accordance with Article 13."*

45. Article 13.4 FIA ADR states:

> *"TUE decisions may be appealed exclusively as provided in Article 4.5."*

46. The FIA specifically consents to the jurisdiction of CAS in its answer, albeit without prejudice to its position that there is no right of appeal of a decision not to grant a retroactive TUE based on "fairness".

47. Moreover, both parties confirmed the CAS jurisdiction by the execution of the order of procedure, and no party objected to the proceedings or the jurisdiction of the arbitrators. It follows, therefore, that the CAS has jurisdiction in this appeal.

VI. ADMISSIBILITY

48. Article R49 of the 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 of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision*

> *appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late."*

49. Article 13.7.1 FIA ADR provides that: "*[t]he time to file an appeal to CAS shall be twenty-one days from the date of receipt of the decision by the appealing party.*"

50. Following the issuance of the Challenged Decision by the TUEC, there was an exchange of communication between the parties and WADA, concluded with WADA's letter of 10 August 2016 advising the Appellant that WADA declined to conduct a formal review of the TUE application, in view of the absence of any agreement between the FIA and WADA regarding the application of the fairness criterion to the Appellant, and further advising that "*pursuant to Article 4.4.7 of the World Anti-Doping Code, to appeal the decision of the FIA to reject your TUE application to the Court of arbitration for sport ("CAS") within 21 days from the date of reception of this letter.*"

51. The Appeal was filed on 31 August 2016, within twenty-one (21) days of this final communication from WADA regarding the Challenged Decision and WADA's decision not to conduct a formal review of the Challenged Decision.

52. The FIA has no objection to the admissibility of the appeal.

53. The Panel agrees, for those reasons, that the appeal is admissible.

VII. APPLICABLE LAW

54. 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, that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."*

55. For purposes of Article R58 of the Code, the "*applicable regulations*" are the provisions of the FIA International Sporting Code, incorporating the FIA ADR and the other FIA regulations which may be relevant to this appeal. The FIA ADR include the mandatory provisions of the WADC and incorporate by reference WADA's International Standards.

56. The FIA accepts that the FIA ADR apply to this appeal. The Appellant holds that he was not bound by the FIA ADR at the time of the doping control, but does accept that at a later time he chose to participate in the ADRV disciplinary proceedings, and that, in any event, prior to this appeal, he became bound by the FIA ADR, and therefore both parties accept that they apply to these proceedings.

57. The Challenged Decision was issued by the TUEC, which is a body of the FIA. The FIA is a French association established under the applicable French law. Therefore, French law applies subsidiarily.

58. Therefore, the applicable law, according to which the Panel will decide the present appeal, is the FIA ADR and, subsidiarily, French law.

59. The FIA comments that "*to ensure a level playing-field for the sport throughout the world, the FIA's rules have to apply equally in every national jurisdiction. Therefore, they have to be interpreted and applied in a manner consistent with the core legal principles of many different legal systems. As a result, the FIA would accept that they should be interpreted and applied based on 'general principles of law drawn from a comparative or common denominator reading of various domestic legal system*'" (citing CAS 98/200, *AEK Athens & SK Slavia Prague v UEFA*, para. 156). The Panel accepts such notion.

VIII. RELEVANT FIA ANTI-DOPING REGULATIONS

60. The following provisions of the FIA ADR, which are based on the WADC, are material to this appeal:

FIA ADR 4.5 ("*Therapeutic Use Exemptions ("TUEs")*") provides in its pertinent part:

> *"4.4 WADA's International Standards For reasons of harmonisation, WADA publishes International Standards for various technical and operational aspects of anti-doping. These International Standards constitute an integral part of the Regulations and it is obligatory to respect them. They can be downloaded from the WADA website (www.wada-ama.org) and comprise: - the Prohibited List; - the International Standard for Therapeutic Use Exemptions; - the International Standard for Testing and Investigations; - the International Standard for the Protection of Privacy and Personal Information; and - the International Standard for Laboratories. These may be revised from time to time by WADA. All amendments of WADA's International Standards will be regarded as entering into force on the date set by WADA.*
>
> *4.5.1 Athletes with a documented medical condition requiring the Use of a Prohibited Substance or a Prohibited Method must first obtain a TUE. The presence of a Prohibited Substance or its Metabolites or Markers (Article 2.1), Use or Attempted Use of a Prohibited Substance or a Prohibited Method (Article 2.2), Possession of Prohibited Substances or Prohibited Methods (Article 2.6) or Administration or Attempted Administration of a Prohibited Substance or Prohibited Method (Article 2.8) consistent with the provisions of an applicable TUE issued pursuant to the International Standard for Therapeutic Use Exemptions shall not be considered an anti-doping rule violation.*
>
> *4.5.2 If an International-Level Athlete is using a Prohibited Substance or a Prohibited Method for therapeutic reasons:*
>
> > *4.5.2.1 Where the Athlete already has a TUE granted by his National Anti-Doping Organisation for the substance or method in question, that TUE is not automatically valid for international-level Competitions. However, the Athlete may apply to the FIA to recognise that TUE, in accordance with Article 7 of the International Standard for Therapeutic*

Use Exemptions. The request shall be accompanied by a copy of the TUE and the original TUE application form and supporting materials. An English or French version of the dossier shall be made available to the FIA.

If that TUE meets the criteria set out in the International Standard for Therapeutic Use Exemptions, then the FIA shall recognise it for purposes of international-level Competitions as well. If the FIA considers that the TUE does not meet those criteria and so refuses to recognise it, the FIA shall notify the Athlete and his National Anti-Doping Organisation promptly, with reasons. The Athlete and the National Anti-Doping Organisation shall have 21 days from such notification to refer the matter to WADA for review in accordance with Article 4.5.7. If the matter is referred to WADA for review, the TUE granted by the National Anti-Doping Organisation remains valid for national-level Competition and Out-of-Competition Testing (but is not valid for international-level Competitions) pending WADA's decision. If the matter is not referred to WADA for review, the TUE becomes invalid for any purpose when the 21-day review deadline expires.

[Comment to Article 4.5.2.1: If the FIA refuses to recognise a TUE granted by a National Anti-Doping Organisation only because medical records or other information are missing that are needed to demonstrate satisfaction of the criteria in the International Standard for Therapeutic Use Exemptions, the matter should not be referred to WADA. Instead, the file should be completed and re-submitted to the FIA.]

4.5.4 An application to the FIA for the grant or recognition of a TUE shall be made as soon as the need arises. For substances prohibited In-Competition only, the Athlete shall apply for a TUE at least 30 days before his next Competition unless it is an emergency or an exceptional situation.

4.5.4.1 An Athlete may only be granted retroactive approval for his TUE request if:
a. an emergency treatment or the treatment of an acute medical condition was necessary; or
b. due to other exceptional circumstances, there was insufficient time or opportunity for the Athlete to submit, or for the TUEC to consider, an application for the TUE prior to Sample collection; or
c. the applicable rules required the Athlete or permitted the Athlete (see Code Article 4.4.5) to apply for a retroactive TUE; or
d. it is agreed, by WADA and by the FIA, that fairness requires the grant of a retroactive TUE.

4.5.5 The FIA shall appoint a TUEC, which is a committee to consider requests for TUEs in accordance with the International Standard for Therapeutic Use Exemptions. The TUEC members shall evaluate the request in accordance with the International Standard for Therapeutic Use Exemptions and render a decision on such request, which, subject to Article 4.5.7, shall be the final

decision of the FIA. The decision shall be reported to WADA, the Athlete's National Anti-Doping Organisation and the Athlete's parent ASN, through ADAMS (except for the ASN), in accordance with the International Standard for Therapeutic Use Exemptions.

4.5.7 Reviews and Appeals of TUE Decisions

4.5.7.1 WADA shall review any decision by the FIA not to recognise a TUE granted by the National Anti-Doping Organisation that is referred to WADA by the Athlete or the Athlete's National Anti-Doping Organisation. In addition, WADA shall review any decision by the FIA to grant a TUE that is referred to WADA by the Athlete's National Anti-Doping Organisation. WADA may review any other TUE decisions at any time, whether upon request by those affected or on its own initiative. If the TUE decision being reviewed meets the criteria set out in the International Standard for Therapeutic Use Exemptions, WADA will not interfere with it. If the TUE decision does not meet those criteria, WADA will reverse it.

4.5.7.2 Any TUE decision by the FIA that is not reviewed by WADA, or that is reviewed by WADA but is not reversed upon review, may be appealed by the Athlete and/or the Athlete's National Anti-Doping Organisation exclusively before the CAS, in accordance with Article 13."

FIA ADR 13.7 (*"Time for Filing Appeals"*) provides in its pertinent part:

"13.7.1 Appeal to CAS
The time to file an appeal to CAS shall be twenty-one days from the date of receipt of the decision by the appealing party. The above notwithstanding, the following shall apply in connection with appeals filed by a party entitled to appeal but which was not a party to the proceedings that led to the decision being appealed:
a) Within fifteen days from notice of the decision, such party/parties shall have the right to request a copy of the case file from the body that issued the decision;
b) If such a request is made within the fifteen-day period, the party making such request shall have twenty-one days from receipt of the file to file an appeal to CAS.

The above notwithstanding, the filing deadline for an appeal or intervention 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."

FIA ADR 18 (*"FIA Compliance Reports to WADA"*) provides:

"The FIA will report to WADA on its compliance with the Code in accordance with Article 23.5.2 of the Code."

FIA ADR 19 ("*Education*") provides:

> *"19.1 The FIA and the ASNs shall plan, implement, evaluate and monitor information, education and prevention programmes for doping-free sport, and shall support active participation in such programmes by Athletes and Athlete Support Personnel.*
>
> *The programmes shall provide Participants with updated and accurate information on at least the following issues, pursuant to Article 18.2 of the Code:*
> *- Substances and methods on the Prohibited List;*
> *- Anti-doping rule violations;*
> *- Consequences of doping, including sanctions, and health and social consequences;*
> *- Doping Control procedures;*
> *- Athletes' and Athlete Support Personnel's rights and responsibilities;*
> *- Therapeutic Use Exemptions;*
> *- Managing the risks of nutritional supplements;*
> *- Harm of doping to the spirit of sport;*
> *- Applicable whereabouts requirements.*
>
> *The programmes shall promote the spirit of sport in order to establish an anti-doping environment that is strongly conducive to doping-free sport and will have a positive and long-term influence on the choices made by Athletes and non-Athletes.*
> *The FIA Race True E-Learning Programme covers all of the above (https://racetrue.fia.com).*
>
> *19.2 To each application/renewal form for an FIA international licence shall be appended the "Recognition and Acceptance Form" appended to the Regulations (Supplement C), in the form currently approved by the FIA."*

FIA ADR 20 ("*Amendment and Interpretation of the Regulations*") provides in its pertinent part:

> *"20.6 The Regulations have been adopted pursuant to the applicable provisions of the Code and shall be interpreted in a manner that is consistent with the applicable provisions of the Code. The Introduction shall be considered an integral part of the Regulations."*

IX. EVIDENCE

The Appellant's request for additional documents

61. On 11 January 2017, the Appellant requested the Panel, pursuant to Article R44.3 of the Code, to order the production of the following:

- Minutes of the meeting of the TUEC wherein the Appellant's request for a retroactive TUE was discussed;

- The actual contemporaneous written decision issued directly by the TUEC detailing the result of the discussion of the Appellant's request for a retroactive TUE;
- Communication of said decision by the TUEC to the FIA Head of Medical Affairs;
- Any other contemporaneous document that evidences the reasons for which the TUEC denied the Appellant's request for a retroactive TUE;
- The full case file, including the above-mentioned documents and information.

62. This followed the Appellant's earlier efforts to obtain similar documents, both in direct communication with the FIA on 25 August 2016 and prior to the initiation of these proceedings before CAS, as well as in the statement of appeal in which the Appellant requested CAS to order the FIA, pursuant to Article R57 of the Code, to produce the full case file including the detailed reasons for the rejection of the retroactive TUE application.

63. The parties made efforts during the period commencing immediately following the filing of the statement of appeal to consensually resolve the issue of the disclosure of documents requested by the Appellant and these resulted in the FIA providing the Appellant with correspondence between itself and WADA; namely, WADA's letter of 6 May 2016 and the FIA's response to WADA of 25 July, 2016.

64. The Appellant's application for disclosure of 11 January 2017 was based on the Appellant's argument that it could not accept the FIA's position during the discussions between the parties that there exist no other documents besides the exchange with WADA, indicating that the disclosed documents could not constitute the reasoned decision which the TUEC was required to issue and that the disclosed email dated 25 July 2016 from the Head of Medical Affairs of the FIA, summarising the reasons for which the retroactive TUE was denied, must have been based on some decision containing such reasons.

65. On 16 January 2017, the FIA responded to the Appellant's request for documents stating that the FIA complied with the requests for disclosure and that in response to the original request the FIA responded that "*to the best of our knowledge there were no formal documents setting out detailed reasons for the FIA TUEC's decision other than the exchange on emails with WADA.*" The FIA confirmed that there are no minutes of meetings in relation to the TUEC's decision and that other than the email exchange with WADA which was already disclosed "*there are no further formal documents elaborating on the FIA TUEC's reasons for denying the Appellant a retroactive TUE on the basis of fairness.*"

66. On 20 January 2017, the CAS advised the parties that the Panel denied the Appellant's request for further disclosures. In doing so, the Panel accepted the FIA's statements that "*there were no formal documents setting out detailed reasons for the FIA TUEC's decision other than the exchange on emails with WADA*" and that "*there are no further formal documents elaborating on the FIA TUEC's reasons for denying the Appellant a retroactive TUE on the basis of fairness*" and this arbitral award will be based in part on this position of the FIA, which constitutes part of the factual basis of this case.

X. SUBMISSIONS OF THE PARTIES

A. The Appellant

67. The Appellant's submissions, in essence, may be summarized as follows:

- The Appellant was not bound by the FIA ADR at the time of the doping control, since the Appellant did not have an international license and was not an international level athlete. No form signed by the Appellant contained any reference to the FIA ADR. The Appellant did not explicitly or implicitly accept the FIA ADR.

- No valid decision was issued by the TUEC with regard to the Appellant's application for a retroactive TUE. The Appellant has not received any decision from the TUEC. The communication addressed to the Appellant in this regard arrived by an email of Ms Camargo who is not a member of the TUEC and had she been appointed as a secretary to the TUEC it was not reported to the Appellant.

- The Challenged Decision is null since such a decision should be reported with reasons, in accordance with WADA's International Standard for Therapeutic Use Exemptions ("ISTUE") and here it was reported with no reasons.

- There was no formal process for applying for a TUE in Paraguay.

- The Appellant acted with good faith and disclosed his medical condition and the medications subscribed and taken on applying for a national license as well as when tested at the Santa Cruz Rally.

- There was no educational program and no reference to the TUE process or reference to the FIA ADR in the forms signed in connection with the Santa Cruz Rally and the CODASUR.

- The Appellant should be granted a retroactive TUE pursuant to Article 4.5.4.1(b) FIA ADR since there was insufficient opportunity to submit an application for and be granted a TUE from the FIA and there were exceptional circumstances in this case (no clear rules, no system in the country and events, the Appellant did what he could, etc.).

- The Appellant should be granted a retroactive TUE pursuant to Article 4.5.4.1(c) FIA ADR which applies to lower level athletes that are not always expected to apply for and be granted a prospective TUE in such circumstances.

- The Appellant should be granted a retroactive TUE pursuant to Article 4.5.4.1(d) FIA ADR since there are grounds for fairness, WADA recognized such grounds and the FIA's refusal to also support the application in those circumstances is subject to review by CAS.

- Fairness requires that the Appellant be granted a retroactive TUE in the circumstances of this case.

68. In his statement of appeal the Appellant sought from CAS the following relief:

"I. The appeal is upheld.

II. Diego Hugo Dominguez Stroessner is granted a retroactive TUE [...]

III. The Federation Internationale de l'Automobile shall be ordered to bear all arbitration costs, if any, and to reimburse Diego Hugo Dominguez Stroessner the minimum CAS court office fee of CHF 1000.

IV. The Federation Internationale de l'Automobile shall be ordered to pay Diego Hugo Dominguez Stroessner a contribution towards the legal and other costs incurred in the framework of these proceedings in an amount to be determined at a later stage or at the discretion of the Panel."

69. In his appeal brief the Appellant sought from CAS the following relief:

"Diego Hugo Dominguez Stroessner applies for the Court of arbitration for Sport to rule as follows:

I. The appeal is upheld.

II. The FIA decision denying the retroactive TUE to Mr Diego Hugo Dominguez Stroessner is null, respectively annulled.

Ruling de novo:

III. Diego Hugo Dominguez Stroessner is granted a retroactive TUE for the use of lisdexamphetamine, 50mg once daily, and dextroamphetamine sulphate, 10 mg three times daily, as from 17 March 2015.

IV. The Federation Internationale de l'Automobile shall be ordered to bear all arbitration costs, if any, and to reimburse Diego Hugo Dominguez Stroessner the minimum CAS court office fee of CHF 1000.

V. The Federation Internationale de l'Automobile shall be ordered to pay Diego Hugo Dominguez Stroessner a contribution towards the legal and other costs incurred in the framework of these proceedings in an amount to be determined at a later stage or at the discretion of the Panel."

B. The FIA

70. The FIA's submissions, in essence, may be summarized as follows:

- The Appellant is an international level athlete successfully competing for years in international events.
- CODASUR is an international series.
- The Appellant signed forms containing references to the FIA's rules and regulations which include the FIA ADR.
- The Appellant submitted explicitly but at the very least tacitly to the FIA ADR.

- The Appellant was made aware by his doctor, Dr Gross, well before the Santa Cruz Rally, about the need to apply for a TUE and the Appellant had specific knowledge regarding what he is required to do but he knowingly failed to do so.

- Well before the Santa Cruz Rally, the FIA provided an educational program including in South America.

- The Challenged Decision is valid because it was issued by a competent body, the TUEC.

- The Challenged Decision complies with the FIA ADR and is not null and void. The Challenged Decision was sent to the Appellant promptly and in writing. It clearly states the reason for the decision and there is no requirement to provide any more detailed reasoning.

- If the Challenged Decision in nevertheless considered null by CAS, the TUEC will issue the same decision in a proper form.

- Article 4.5.4.1(b) FIA ADR does not apply because the Appellant did not seek a retroactive TUE from the TUEC under this sub-section.

- Even if the CAS were to consider Article 4.5.4.1(b) FIA ADR as the basis for a retroactive TUE, the Appellant had plenty of time and opportunity to apply and obtain a retroactive TUE and there were no "*exceptional circumstances*" in this case permitting the grant of such application.

- Article 4.5.4.1(c) FIA ADR does not apply either in this case, since the Appellant failed to raise also this argument before the TUEC and, therefore, it also falls outside the scope of CAS's review on this appeal.

- Additionally, Article 4.5.4.1(c) FIA ADR applies only where there is a specific provision in the FIA's rules that allows for the grant of a retroactive TUE while there are no such additional grounds for a retroactive TUE under the FIA ADR.

- ISTUE Article 4.3(d) precludes an appeal against the FIA's assessment of fairness.

- Even if the FIA's assessment of fairness is subject to review, such a review is very limited and is only permitted if the TUEC's assessment can be shown to be arbitrary, grossly disproportionate, irrational or perverse or otherwise outside the margin of discretion, and the CAS cannot simply replace its assessment of fairness with that of the TUEC.

- The TUEC's stance is very far from being grossly disproportionate or irrational and it is clearly entirely reasonable, and certainly well within the TUEC's margin of appreciation.

- Motor sport is unique in that it involves heightened safety issues, since drivers are operating vehicles and any mistake could result in a serious injury or even death, and there is a strong policy rationale to require that TUEs be obtained prior to a race, except in the most exceptional of circumstances.

- The TUEC is best placed to determine what those limited exceptional circumstances might be and the TUEC's assessment was fair and reasonable and well within its broad margin of appreciation.

- The FIA concludes that the Appellant should not be excused for failing to make an application for a TUE in advance of the CODASUR, thereby completely circumventing the checks and controls that the TUE application system puts in place in order to protect the health and safety of all participants in driving events.

71. In its requests for relief, the FIA seeks the following:

"Based on the foregoing, the FIA respectfully asks the CAS Panel:

8.1.1 To find the appeal is inadmissible; or

8.1.2 (alternatively) to dismiss the appeal; and

8.1.3 To order the Appellant to pay the arbitration costs, as well as a contribution towards the FIA's legal fees and other expenses incurred in connection with these proceedings, in accordance with CAS Code Article R64.5."

C. Hearing

72. At the hearing, Dr Edgar Molas, President of the Sports Commission of the TACPy, testified that he was a rally driver from 1971 to 1995 and the founder of the drivers' association and later had additional positions including in the sporting commissions of events. He indicated that the level of drivers at the CODASUR was lower than at national championships, that there were no pre requirements for participation other than being a licensed driver. No doping tests were carried out at the CODASUR events and no educational programs carried out. The testing at the Santa Cruz Rally was the only one carried out until that time and only the Appellant was tested. He confirmed that there is no knowledge in Paraguay regarding how to apply for a TUE.

73. Dr Oscar Santacruz, Medical Officer of the TACPy, confirmed the same facts, indicated that in Paraguay testing was carried out only in the sport of soccer and further highlighted that when the Appellant applied to the TACPy for his license and provided Dr Gross' Letter as an application for a TUE no additional documents or actions were asked of him.

74. The Appellant testified as to the facts substantiating and confirming his arguments as these appear in various sections of this award or otherwise considered by the Panel.

XI. MERITS

A. Scope of Panel's Review

75. Pursuant to Article R57 of the Code, *"[t]he Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. [...]"*.

B. Overview of the Panel's Legal Analysis

76. The FIA does not challenge the legitimacy of the ADHD diagnosis or the medication prescribed to the Appellant to treat the ADHD. Furthermore, the FIA does not dispute that had the Appellant applied in the right form and to the FIA for a TUE to cover such medication, sufficiently in advance of the Santa Cruz Rally, he would have been granted a TUE to cover such use, similar to the approval granted by the FIA for the prospective use of similar medication by the Appellant. The FIA further acknowledges that it "*accepts that the Appellant is not a cheat, that he was using amphetamine only for therapeutic reasons, and that he was not trying to conceal his use of amphetamine*".

C. Main Issues

77. The following are the main issues which arise in this appeal:

(i) Was the Appellant subject to the FIA ADR at the time of the Santa Cruz Rally?

(ii) Does CAS have the authority to review TUEC's decisions under Article 4.5.4.1(d) FIA ADR?

(iii) Is the Challenged Decision a valid decision?

(iv) The application of Articles 4.5.4.1(b), (c) and (d) FIA ADR to this matter.

i. Was the Appellant subject to the FIA ADR at the time of the Santa Cruz Rally?

78. The Appellant contends that he was not bound by the FIA regulations, including the FIA ADR, at the time of the anti-doping control at the Santa Cruz Rally. The Appellant claims that he never explicitly or tacitly accepted the FIA regulations and consented to be subject to them, as required for example in CAS 2010/A/2268 *I. v. FIA*.

79. The Appellant argues that he did not have an international licence and was not an international level athlete and that he did not sign any form which contained any reference to the FIA ADR. The Appellant further highlighted that participation at a prize giving ceremony for winners of events on the FIA International Sporting Calendar is not an indication that the person attending is an international level athlete.

80. The Appellant argues that CAS 2010/A/2268 *I. v. FIA* highlights the requirement that the documents signed by the athlete should explicitly refer to the FIA regulations in order for the athlete to be bound by them, while there was no explicit reference to the FIA ADR on any document signed by the Appellant or on the doping control form. The papers signed by the Appellant in connection with obtaining the "local" driver license and in connection with the CODASUR events, including the CODASUR statutes themselves, did not make any reference whatsoever to the FIA ADR.

81. The Appellant has never submitted to an anti-doping control before the one at the Santa Cruz Rally. Consequently, the Appellant argues that he cannot be held to have tacitly submitted to the FIA ADR through prior knowledge or experience of doping controls.

82. The Appellant further argues that the lack of explicit reference to the FIA ADR or other FIA regulations in any of the documents signed by the Appellant means that he was not once given the opportunity to either choose whether or not to participate in competition and be bound by the mentioned regulations or alternatively opt out of the competition in order to not be bound by the purportedly applicable regulations.

83. The Appellant claims that if the Santa Cruz Rally was to be considered a true international competition, it was up to the FIA/TACPy/CODASUR to ensure that the FIA regulations including the FIA ADR were specifically referenced, adhered to and implemented and that they have failed to do so. Consequently, the Appellant did not submit himself to the regulations of the FIA until he was notified of the ADRV and chose to participate in the disciplinary proceedings.

84. Therefore, the Appellant argues that, similar to other national competitors in his country, he was not under any obligation to apply for a TUE in accordance with the provisions of the FIA ADR, and that, even if he had been under such an obligation, he was denied an opportunity to correctly apply for a TUE in accordance with the FIA ADR.

85. The FIA accepts that its rules are binding only on those who agree to them, but argues that such agreement may be either express (e.g., in an entry form or application for accreditation signed by the athlete) or tacit, and that consent may be implied objectively from the athlete's conduct, without any requirement of a signed document.

86. The Panel agrees that tacit agreement suffices as is made clear by authors dealing with the subject and other CAS awards (Sullivan, The World Anti-Doping Code and Contract Law, in 'Doping in Sport and the Law' (Bloomsbury 2016), p.68; Haas / Martens, Sportrecht – Eine Einführung in die Praxis, Schulthess Zurich 2011, p.72; CAS 2016/A/4697 *Dorofeyeva v International Tennis Federation*, paras. 84-86). The regulation of international sports is important in order to ensure sporting fairness, safety and in essence maintain the attractiveness of sports to fans, media and sponsors thus ensuring the sports' viability. Sportsmen and sportswomen often engage in sport, even at its highest level, without analysis of the legal principals and regulations governing such sport. Yet, the legitimate expectation of other participants, fans and persons involved is that all participants will be bound by the same legal system and this is logically understood by all athletes. Such tacit consent, stemming, for example, from the mere participation in international events, suffices to bind these sportsmen and sportswomen by the regulations of the specific sport.

87. The Panel further agrees with the FIA that just because some athletes are required to sign a consent form explicitly agreeing to be bound by the FIA ADR and are thus bound by express consent, does not mean that other participants in the same sport cannot be bound by implied consent. Nothing in the FIA rules suggests the contrary.

88. The Panel agrees with the FIA that CAS jurisprudence is clear that all those participating in organised sport are deemed to know that, in order to ensure a level playing-field for all, there are strict anti-doping rules that must be complied with, and they are deemed to be bound by those rules whether or not they have ever explicitly signed up to them, or even read them *(Roberts v FIBA*, Swiss Federal Tribunal decision number 4P 230/2000, 2001 ASA Bull 523, 7 February 2001, p.4; CAS 2009/A/910, *Telecom Egypt Club v EFA*, para. 9; CAS 2007/A/1284 *WADA v FECNA & Prieto*, para. 47; CAS

2011/A/2675, *Overvliet v IWF*, para. 7.26; CAS 2011/A/2398 *WADA v WTC & Marr*). In particular, an athlete who competes at the international level of a sport cannot claim ignorance of the applicable anti-doping rules (CAS 2010/A/2268 *I. v FIA*, para. 93; CAS 2012/A/2959 *WADA v Nilforushan and FEI*, paras. 8.17–8.18; CAS 2012/A/2822 *Qerimaj v International Weightlifting Federation*, para. 8.21(2)).

89. The Santa Cruz Rally is one of five CODASUR regional championships staged across the South American continent in five different countries. The CODASUR is an International Rally Championship sanctioned by the FIA that has been registered on the FIA International Sporting Calendar since 2011. The Panel accepts that it is, therefore, governed by the FIA International Sporting Code, including the FIA ADR.

90. The FIA highlights that the Appellant "*is not some callow and inexperienced youth, unaware of his environment and heedless of his responsibilities. To the contrary, he is a mature businessman from an important family in Paraguay, having at his disposal the significant resources, commitment and support of doctors and others that enable him to participate at the elite level of motorsport in South America*". The Appellant participated in the CODASUR five times since 2012, and won the CODASUR Championship in both 2014 and 2015.

91. The Panel accepts that the Appellant is experienced in motor sports even if the sport is "only" a hobby for him. Many sports are still practiced by amateurs having other professional careers, yet some of these athletes are most successful in the sports they exercise and win major tournaments and championships.

92. Furthermore, the letter dated 7 August 2015 from TACPy to the organising committee of the CODASUR requested that the Appellant be authorized and permitted to compete in accordance with Article 3.9 of the FIA International Sporting Code. The driver registration form for the Santa Cruz Rally contained a declaration that the driver understands and accepts the applicable rules, even if these were not specified. As an event on the FIA International Sporting Code it was definitely governed by the FIA regulations including the FIA ADR.

93. The Appellant's statement that he "*was not given the opportunity to either choose whether or not to participate in competition and be bound to the mentioned regulations or alternatively to opt out of the competition in order to not be bound by the purportedly applicable regulations*" is irrelevant. The Appellant agreed to be bound by "*the applicable rules*" without making any attempt to find out what they were. The Appellant tried to comply with what he thought were his TUE obligations (submitting Dr Gross' Letter to TACPy and to the doping control personnel at the Santa Cruz Rally). The Appellant tried to obtain clearance for the use of medication before the race, but has not studied the regulations confirming the proper form and appropriate channels through which this should be done.

94. The FIA ADR define international athletes as "*Athletes taking part in any Competition registered on the FIA International Sporting Calendar*". The Appellant argues that "*the definition of an international athlete matters not if there has been no explicit acceptance of the FIA ADR*". The Panel does not accept this argument and is of the view that tacit or implied acceptance of the rules suffices and that participation in the CODASUR events clearly meant that the Appellant submitted to the FIA regulations including its

FIA ADR. The Panel is of the opinion that in this specific case the Appellant was also aware of those rules even if he did not give much attention to the details of the correct formalities regarding the application for and receipt of a TUE.

ii. Does CAS have the authority to review TUEC's decisions under Article 4.5.4.1 (d) FIA ADR?

95. Article 4.5.4.1(d) FIA ADR is based on ISTUE Article 4.3(d) which states that one of the grounds for granting a retroactive TUE is if:

> *"It is agreed, by WADA and by the Anti-Doping Organization to whom the application for a retroactive TUE is or would be made, that fairness requires the grant of a retroactive TUE."*

96. The FIA argues that the comment to ISTUE Article 4.3(d) precludes an appeal against the FIA's assessment of fairness. The comment to ISTUE Article 4.3(d) clearly states that: *"[i]f WADA and/or the Anti-Doping Organization do not agree to the application of Article 4.3(d), that may not be challenged either as a defense to proceedings for an anti-doping rule violation, or by way of appeal, or otherwise"*.

97. The Appellant argues that the FIA's "*reliance on a comment in the WADA ISTUE is misplaced*" because "*the rules on an appeal to the CAS are clear, the WADA ISTUE is not directly applicable to the Appellant, not least where it might deprive him of the appeal remedy to the CAS [...]. If the FIA intended to deny its athletes the right to appeal to the CAS against a decision issued pursuant to article 4.5.4.1 (d) FIA ADR, it should have provided explicitly for in the applicable regulations*".

98. The Panel is of the view that, pursuant to Article 4.4 FIA ADR, the International Standards, including the ISTUE, "*constitute an integral part of the Regulations and it is obligatory to respect them*". These should have been known to the Appellant and are elsewhere relied upon by the Appellant himself (i.e., Article 6.8 ISTUE).

99. The Panel agrees with the FIA that there is no conflict between the general right of appeal under Article 4.5.7 FIA ADR (Article 4.4.7 WADC) and the comment under Article 4.3(d) ISTUE. Such comment simply limits the right on appeal to replace the TUEC's fairness assessment with that of CAS.

100. The FIA cites as examples CAS cases that applied Article 4.3.3 WADC, which precludes a challenge to WADA's decision that a substance is performance enhancing and so should be prohibited for use in sport (CAS 2005/A/921 *FINA v Kreuzmann & German Swimming Federation*, para. 32; CAS 2007/A/1252 *FINA v Mellouli*, paras. 75-76; CAS 2007/A/1312 *Adams v CCES*, paras. 152-153) and also refers to the Swiss Federal Tribunal (the "SFT") in *Schafflützel and Zöllig v Fédération Suisse de courses de chevaux,* SFT decision 5C.248/2006 dated 23 August 2007, in which the SFT accepted that the autonomy of the association is limited by mandatory provisions of Swiss law, including the protection of personality rights (Swiss Civil Code Articles 27/28), but also confirmed that it is not disproportionate to exclude challenges based on the absence of performance-enhancing effect in an individual matter, and also that threshold values are better determined by sports federations than by courts.

101. It is allowed to provide a discretion to the association and courts should not lightly exercise their power of review over the association's decisions made in the exercise of such discretion, especially in cases in which sports governing bodies have special expertise and experience in relation to their respective sport.

102. The Panel notes that: *"[i]n respect to disputes relating to the grant or denial of a TUE the Panel confirms that the exercise of the jurisdiction conferred upon it by the pertinent arbitration clause and by the Code must be restrained in two directions: (i) role of the CAS Panel is not that of substituting itself for the TUE Committee of the relevant anti-doping organization (see TAS 2004/A/709 B c./UCI & WADA)...."* (see CAS 2004/A/717 *International Paralympic Committee v/ Brockman & WADA*, at paras. 50-51). However, the Panel also notes that "*the extensive nature of the powers conferred on a CAS appeal panel has become well entrenched in CAS jurisprudence and we see nothing ....which would restrict the express power of an appeal panel to review the facts and the law*" (see CAS/2009/A/1948 *Robert Berger v. WADA*, at para. 76, a decision also issued in relation to the grant of a TUE).While the Panel accepts that CAS cannot replace its assessment of fairness with that of the TUEC, it is nevertheless of the opinion that appeals may still be permitted on the ground that the decision was arbitrary, grossly disproportionate, irrational or perverse or otherwise outside of the margin of discretion, or taken in bad faith or without the due process rights provided to the athlete.

iii. Is the Challenged Decision a valid decision?

103. The Appellant argues that the Challenged Decision is not valid or is null and void because: (i) it was issued by an incompetent body and because it was sent to the Appellant by Ms Camargo (who has no known position with the TUEC); (ii) it was communicated by email, was not in proper form and no formal decision document or letter was provided; and (iii) it failed to contain any reasons.

104. Pursuant to Article 4.5.5 FIA ADR, the TUEC has "*to consider requests for TUEs in accordance with the International Standard for Therapeutic Use Exemptions. The TUEC members shall evaluate the request in accordance with the International Standard for Therapeutic Use Exemptions and render a decision on such request ... in accordance with the International Standard for Therapeutic Use Exemptions.*"

105. The Appellant claims that the Challenged Decision is not a valid decision because the Appellant has not received any decision from the TUEC and, therefore, there is no proof that a TUEC appointed by the FIA in accordance with Article 4.5.5 FIA ADR as the competent body has addressed the issue of the retroactive TUE and decided upon it. The Appellant further claims that Ms Camargo provided the Challenged Decision and that she is not a member of the TUEC, and if she was appointed as a secretary of the TUEC, the Appellant was never notified of such. Consequently, the Appellant argues, there was either no decision of the TUEC or the decision to deny the Appellant a retroactive TUE was taken by an incompetent body.

106. The FIA highlights that the TUEC is the competent body within the FIA to determine TUE applications, pursuant to Article 4.5.5 FIA ADR. The FIA further corrects that the Challenged Decision was contained in an email to the Appellant sent by the "*Secretariat of the FIA Therapeutic Use Exemption Committee*", from the official FIA TUEC's email address: tue@fia.com. The FIA clarifies that Ms Camargo's details are not mentioned

in this email chain, but rather in the follow-up communication with WADA relating to the Challenged Decision, which she sent on behalf of the TUEC.

107. The Panel accepts that while the communication may have been clearer (e.g., a formal letterhead, specifically indicating who took the decision), it was possible to understand that the communication embodied a decision taken by the TUEC. This was further clarified in the later correspondence with WADA in which the Appellant took part.

108. The Panel also accepts the FIA's position that the Challenged Decision was sent to the Appellant in writing, i.e. by email; and that the form of a decision (i.e., whether email, letter, fax) is not determinative. "*What constitutes a decision is a question of substance not form*" (CAS 2010/A/2315 *Netball New Zealand v IFNA*, para. 7.4; see also, CAS 2005/A/899 *FC Aris Thessaloniki v FIFA & New Panionios FC*, paras. 61 and 63). Here the decision, the ruling by the TUEC, was conveyed to the Appellant and the Appellant received the communication.

109. While the Panel recommends that sporting organisations communicate decisions which are legal in nature (rather than mere information) in a way that easily identifies the organ taking a decision, particularly if such a decision impacts an athlete, and that efforts should be made to have formatted documents identifying when a decision was taken, by whom, who was present, what documents were reviewed and the like, the Panel recognizes that such associations are free to formulate their activities within their legal framework and the laws of the jurisdiction in which they operate, particularly in a case such as the present one in which the substance of the communication was conveyed and should have been understood.

110. The Challenged Decision rejected the Appellant's application for a retroactive TUE, stating that the FIA was "*unable to grant a retroactive TUE in this case, since the members do not consider that the explanations provided fulfil the criteria to grant a retroactive TUE on the basis of fairness*".

111. In essence the TUEC repeated in its decision the exact wording of Article 4.5.4.1(d) FIA ADR and gave no further explanation for the rejection of the TUE application.

112. The Appellant made efforts through several requests for disclosure to receive any document containing more complete reasoning, a detailed decision, minutes of meeting or any other evidence describing the reasons for the rejection. Other than the exchange with WADA on the subject which was is summarized in paras. 15 – 18 (inclusive) to this award and which was not contemporaneous to the time of issuance of the challenged Decision, the FIA's letter to CAS dated 16 January 2017 confirms that no such additional documents exist.

113. Article 4.4.5 FIA ADR mandates that the TUEC report its decision to the athlete in accordance with the ISTUE.

114. The ISTUE states that the decision must be reported with reasons:

> *"6.8 The TUEC's decision must be communicated in writing to the Athlete and must be made available to WADA and to other Anti-Doping Organizations via*

ADAMS or any other system approved by WADA, in accordance with Article 5.4. (...)

b. A decision to deny a TUE application must include an explanation of the reason(s) for the denial."

115. Article 4.5.2.2 FIA ADR states that "*[i]f the FIA denies the Athlete's application, it must notify the Athlete promptly, with reasons*".

116. The FIA argues that the Challenged Decision complies with the requirement of Article 4.5.2.2 FIA ADR since it explains the reason for its decision clearly; namely, the TUEC did not consider that the Appellant's application fulfilled the fairness criterion.

117. The Appellant cites CAS 2007/A/1298 *Wigan Athletic FC v Heart of Midlothian*, in which a FIFA Dispute Resolution Chamber ("DRC") decision was found to be invalid because it did not contain "*reasons for its finding*" and did not provide information as to how it arrived at the amount of compensation, in compliance with Article 13.4 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber.

118. The FIA distinguishes the present case from CAS 2007/A/1298 *Wigan Athletic FC v Heart of Midlothian* and claims that in FIFA there was a specific provision (Article 17 of the FIFA Regulations on the Status and Transfer of Players) setting out a number of criteria to be considered in determining the amount of compensation, and the DRC did not set out what weight it gave to those criteria, while no equivalent provision exists in the present case directing the TUEC to consider certain factors in its assessment of fairness.

119. The FIA further argues that the TUEC has a wide discretion to determine fairness, and so stating its view that fairness does not apply is sufficient ground for the Challenged Decision. The FIA also argues that there is no specific requirement to provide any more detailed reasoning, particularly given that there is no right of appeal against that decision. The FIA also refers to the communication with WADA as further elaborating on the reasons not to grant a TUE and responding to WADA's queries.

120. The Appellant argues that according to CAS jurisprudence, "*an association must correctly apply its own regulations, another being that its regulations must be applied and its decisions made in a predictable and cognisable manner, notably to ensure equality of treatment and due process.*" CAS 2007/A/1298 *Wigan Athletic FC v Heart of Midlothian*, CAS 2007/A/1299 *Heart of Midlothian v. Webster & Wigan Athletic FC*, CAS 2007/A/1300 *Webster v. Heart of Midlothian* (paras. 32 – 37).

121. The Panel determines that merely stating that "*fairness criteria*" was not met, does not provide "*an explanation of the reason(s) for the denial*" of the TUE application as required under Article 6.8.b ISTUE incorporated to the case herein through Article 4.5.5 FIA ADR. This is an explicit rule on point. The literal meaning of the word "*explanation*" is a reason or justification, a statement or account that makes something clear. A repetition of the rule which states that a retroactive TUE should be granted when "*fairness requires the grant of a retroactive TUE*" and merely stating that

"*fairness criteria*" was not met cannot be considered "*an explanation of the reason(s) for the denial*".

122. An athlete has a legitimate expectation to understand the rationale of a decision which is a legal ruling affecting his status and which may impact claims of ADRV and possible defences as well as the athlete's handling of such ADRV case. The decision may be challenged on appeal as shown in this award (see Section XI.b.ii above), albeit to a limited degree, and, therefore, the FIA's argument that the Challenged Decision is not subject to review and there is no reason to provide a reasoned decision is not acceptable. The later communication with WADA does not remedy the Challenged Decision. Both the Appellant and WADA were entitled to have a reasoned decision which would have allowed them to properly review and assess their respective positions immediately following the issuance of such a decision. This may even be more relevant in the present case in which WADA itself seems to have questioned the TUEC's decision, although it is not clear whether this was based on an agreed set of facts; a reasoned decision may have assisted WADA is formalising a position regardless of whether this carries a mandatory weight in regard to the application of the "*fairness criterion*". The FIA argues that the Appellant could not add additional grounds for the grant of a retrospective TUE when addressing WADA. In the same way the FIA could not "cure" its defective decision which failed to specify the reasons thereto through the later communication with WADA.

123. Details of the TUE decision may be crucial for the FIA's doping bodies' consideration and any possible sanction regarding the ADRV. If the Appellant were to be found guilty of an ADRV, the FIA's disciplinary bodies may need to know the full grounds and reasons relating to the TUEC's decision preferably from the wording of the decision itself.

124. The Panel could envisage that a reasoned decision in this case may confirm that no bad faith appears in the application for a retroactive TUE, that the Appellant's medical condition and treatment received are not disputed and that the alleged violation is merely a technical disregard to the format of the application (required in order to safeguard the entire community of drivers, fans and sponsors). This may have clarified the respective positions of the parties in the ADRV case and crystalized the Appellant's position in regard to the decision by the TUEC as well. This does not imply that a retroactive TUE in this case should necessarily be granted, since all facts should be fully considered also against the FIA's and the WADA's other decisions applying the "*fairness criterion*" and the FIA's legitimate policy concerns. It merely implies that the Appellant is entitled to the receipt of a reasoned decision.

125. The Appellant argues that: "*the impossibility of the member of an association to challenge a decision issued by the latter – or in other words the power by the FIA to impose a decision without any possibility of its affiliated members to have it reviewed by an arbitral or judicial authority – would constitute an excessive duty, that would be contrary Swiss law, in particular articles 27 and 75 of the Swiss Civil Code. Specifically, depriving the Appellant of the right to challenge a decision based on the fairness criterion would amount to illegally preventing him from disputing the possible arbitrariness of such decision*".

126. While French law applies subsidiarily to this appeal, neither party has specifically pleaded French law and, in any case and furthermore, Swiss public policy is still applicable. Even if the Panel were to accept that it was within the FIA's discretion to deny the retroactive TUE, the FIA's decision must still be annulled for violating the Appellant's personality rights since he has a legitimate expectation to understand the rationale of the decision and this must be respected. This is a fundamental right which may outweigh the argument that there has not been any misuse of discretion by the FIA.

127. The FIA argues that the Appellant's arguments on point are futile, since if the Challenged Decision is considered null by the CAS, then it would have to be remitted to the TUEC so that it could render a decision in a valid form and that this new decision "*would be exactly the same substantive decision, with the same reasons, and the parties would end up back at CAS with the same dispute. This would be contrary to procedural efficiency and the best interests of both parties*".

128. The Panel holds that the FIA cannot assume that the TUEC will take the same substantive decision if the matter is brought before it again considering that the TUEC's decision will have to be a reasoned one. The TUEC is an independent body of the FIA and is not the FIA itself as is represented in these proceedings and its discretion cannot and should not be assumed by the FIA. Furthermore, the mere process of formulating the reasons for the decision may result in a different decision. Even if it were the same decision, its reasoning may have an impact on the proceedings relating to the ADRV.

129. In CAS 2007/A/1293 *FC Kabat v FIFA*, para. 14, CAS found that a fax sent by the FIFA Disciplinary Committee did not comply with the requirements for a decision under the FIFA Disciplinary Code and as a result the matter had to be remitted to the FIFA Disciplinary Committee so that it could render a new decision in good and valid form.

130. The Panel thus decides to set aside the Challenged Decision and requires the TUEC to issue a new decision in relation to the Appellant's application for a retroactive TUE dated 4 February 2016 which should be a reasoned decision.

iv. The Application of Articles 4.5.4.1(b), (c) and (d) FIA ADR to this matter

131. The Panel does not need to decide whether Articles 4.5.4.1(b), (c) or (d) FIA ADR (ISTUE 4.3(b), (c) or (d)) apply to the Appellant and whether he should have been granted a retroactive TUE based on one or more of these grounds, since the Panel has already decided that the Challenged Decision is null and is set aside and is returned to the TUEC for consideration and issuance of a new reasoned decision.

XII. COSTS

132. Article R64.4 of the Code provides the following:

> *"At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of the arbitration, which shall include: the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators, the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale, a contribution towards the*

expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties."

133. Article R64.5 of the Code reads as follows:

"In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties."

134. Having taken into account the outcome of the present proceedings, the appeal being upheld, the Panel is of the view that the FIA should bear the costs of the arbitration, as calculated by the CAS Court Office, which shall also include the CAS Court Office fee of CHF 1,000 (one thousand Swiss Francs), which has already been paid by the Appellant and which is retained by the CAS. The Court Office fee and the share of the advance of costs already paid by the Appellant shall be reimbursed by the FIA to the Appellant.

135. Furthermore, pursuant to Article R64.5 of the CAS Code, and in consideration of the complexity and outcome of the proceedings, as well as the conduct of the parties and their respective financial positions and considering that the ADRV case is still pending, that the entire proceedings may have been prevented had the Appellant timely provided the TUE application in the proper form and to the proper body and in the exercise of its discretion, the Panel awards the Appellant CHF 2,500 (two thousand five hundred Swiss Francs) which shall be paid by the FIA in order to partially reimburse the Appellant for amounts expended in connection with such proceedings.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 31 August 2016 by Mr Diego Hugo Dominguez Stroessner against the decision of the Therapeutic Use Exemption Committee of the Fédération Internationale de l'Automobile issued on 5 April 2016 is upheld.
2. The decision issued by the Therapeutic Use Exemption Committee of the Fédération Internationale de l'Automobile on 5 April 2016 in the matter of Mr Diego Hugo Dominguez Stroessner is set aside and the case is referred back to the Therapeutic Use Exemption Committee of the Fédération Internationale de l'Automobile which shall issue a new reasoned decision in due course.
3. The costs of the arbitration, as calculated by the CAS Court Office, which shall also include the CAS Court Office fee of CHF 1,000 (one thousand Swiss Francs) shall be entirely borne by the Fédération Internationale de l'Automobile.
4. The Fédération Internationale de l'Automobile shall pay Mr Diego Hugo Dominguez Stroessner CHF 2,500 (two thousand five hundred Swiss Francs) as a contribution towards the legal fees and expenses incurred in connection with this arbitral proceeding.
5. All other or further motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 12 January 2018

THE COURT OF ARBITRATION FOR SPORT

Ken **Lalo**
President of the Panel