Arbitration CAS 2019/A/6344 Marco Polo Del Nero v. Fédération Internationale de Football Association (FIFA), award of 31 August 2021

Panel: Mr Mark Hovell (United Kingdom), President; Prof. Martin Schimke (Germany); Prof. Massimo Coccia (Italy)

Football
Disciplinary sanctions against a FIFA official for infringement of the Code of Ethics
Standard of proof and criterion of personal conviction
Prayers for relief not repeated in the Appeal Brief
Hearing de novo and procedural violations before internal judicial bodies
Use of illegally obtained evidence
Nature of transcripts of witness testimonies obtained in foreign criminal proceedings
Circumstantial evidence
Bribery
Discretion to impose sanction and de novo powers of review
Consistency and correctness of disciplinary decisions
Measure of the sanction
Application of the principles of proportionality, predictability and legality in disciplinary sanctions

1. **Although Article 51 of the FIFA Code of Ethics (FCE), stating that *"[t]he members of the Ethics Committee shall judge and decide on the basis of their personal convictions"* is entitled "Standard of proof", this is a provision that seems to have less to do with the notion of standard of proof (as usually understood by arbitral tribunals, including CAS panels) than with the consistent approach of Swiss jurisprudence to adjudication, under which the judging body must not look for the objective truth but for the subjective truth, i.e. whether or not the judging body is personally convinced of a certain fact. The problematic characterization of "personal conviction" as an effective standard of proof, and the relative lacuna in FIFA rules, has led several CAS panels dealing with disciplinary cases involving FIFA officials to apply the flexible standard of proof of "comfortable satisfaction", i.e. less than the standard of "beyond a reasonable doubt" but more than the standard of "balance of probabilities" while bearing in mind the seriousness of the allegations made, in conjunction with the criterion of personal conviction as provided for in Article 51 FCE. It is a standard of proof which may be recognized as part of *lex sportiva*.**

2. **In view of the fact that prayers for relief in the Appeal Brief must be considered to supersede those contained in the Statement of Appeal, prayers for relief contained in the Statement of Appeal but not repeated in the Appeal Brief must be considered to have been abandoned.**

3. **Pursuant to Article R57 of the CAS Code a panel in an appeals proceeding hears the**

case *de novo* and must make an independent determination of the correctness of the parties' submissions on the facts and the merits, without limiting itself to assessing the correctness of the procedure and decision of the first instance. The *de novo* principle grants the panel the entitlement not only that procedural flaws of the proceedings of the previous instance can be cured in the proceedings before the CAS and parties' rights (such as those enshrined in Article 6(1) ECHR) are respected, but also that the panel is authorized to admit new prayers for relief and new evidence and hear new legal arguments, subject to some limited restrictions.

4. **From a procedural perspective CAS proceedings are governed by Swiss law and on a substantive level by the various regulations of FIFA and, subsidiarily, by Swiss law. Accordingly, the question of whether evidence is admissible is to be answered by Swiss law. The FCE does not explicitly permit or prohibit the use of illegally obtained evidence. Absent any such provision, pursuant to Article 182(2) of the Private International Law Act (PILA), it is up to the panel to fill this *lacuna*. In doing so, it takes guidance with the respective rules governing the taking of evidence before state courts in civil matters. Swiss law does not deem illegal evidence to be *per se* inadmissible in civil proceedings and, rather, requires a balancing of various aspects and interests, such as the nature of the infringement, the interest in getting at the truth, the evidentiary difficulties for the interested party, the behaviour of the victim, the parties' legitimate interests and the possibility to obtain analogous evidence in a lawful manner. The discretion of CAS arbitrators to decide on the admissibility of evidence is exclusively limited by Swiss public policy, which is violated only in the presence of an intolerable contradiction with the sentiment of justice, to the effect that the decision would appear incompatible with the values recognized in a State governed by the rule of law.**

5. **Transcripts of witness testimonies obtained in foreign criminal proceedings are not witness declarations *per se* in the CAS proceedings, but documentary evidence reflecting what happened in these foreign criminal proceedings.**

6. **Corruption is, by nature, concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing. As such, in bribery and corruption cases such as FIFA-Gate, sports governing bodies inevitably have no choice but to rely on circumstantial evidence.**

7. **The acceptance of an advantage (and not actually receiving it) suffices in order to this requirement to be met. The timing of promise, not payment is decisive. Bribery occurs when one enters into an agreement to bribe and payment could be agreed to be paid before but actually paid after the event to which it relates.**

8. **Whenever an association uses its discretion to impose a sanction, the panel shall consider that association's expertise and proximity but, if having done so, the panel considers nonetheless that the sanction is disproportionate, it must, given its *de novo* powers of review, be free to say so and apply the appropriate sanction. Any sanction must be proportionate and the object must be to make the punishment fit the crime.**

9. Although precedents are a useful guide, there is no principle of binding precedent (*stare decisis*) at the CAS. Each case must be decided on its own facts and although consistency of sanctions is a virtue, correctness remains a higher one. Otherwise unduly lenient (or, indeed, unduly severe) sanctions may set a wrong benchmark inimical to the interests of sport.

10. Deciding bodies are given a wide discretion by the applicable regulations to decide the kind and measure of a sanction. However, some criteria related to the violation at hand and the offender's profile/behaviour must be adopted to guide the exercise of such discretion. The criteria can act as either aggravating or mitigating factors.

11. As long as there are no corresponding clear rules on the respective federation level, a lifetime ban cannot be the inevitable consequence or automatic sanction in every case of bribery. Any other approach in this regard would be inconsistent with the principles of proportionality as well as predictability and legality which are satisfied whenever the disciplinary rules have been properly adopted, describe the infringement and provide directly or by reference, for the relevant sanction. In other words, to adopt such an approach would represent an unjustified application of a rule which in fact affords CAS panels a very wide margin of discretion.

I. PARTIES

1. Mr Marco Polo Del Nero (the "Appellant" or "Mr Del Nero"), is a Brazilian citizen born in São Paulo, Brazil on 22 February 1941. Mr Del Nero has been a high ranking football official since 2012, most notably he was the President of the Brazilian Football Federation – Confederação Brasileira de Futebol (the "CBF") from 16 April 2015 until 15 December 2017. Prior to that, he was the vice-President of the CBF between 2012 and 2015. Between 2012 and 2015, Mr Del Nero was also a member of the Executive Committee of the South American Football Confederation – Confederación Sudamericana de Fútbol ("CONMEBOL"). In addition, Mr Del Nero was a member of the FIFA Executive Committee (the "FIFA ExCo", today the FIFA Council) and of several Standing Committees of FIFA such as the FIFA Beach Soccer Committee and the Organising Committee for the FIFA World Cup from 27 March 2012 until his resignation on 24 November 2015.

2. Fédération Internationale de Football Association ("FIFA" or the "Respondent") is the governing body of world football and has its registered office in Zurich, Switzerland. FIFA is an association under Articles 60 et seq. of the Swiss Civil Code.

Together referred to as "the Parties".

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions and evidence submitted with those submissions. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.

A. INTRODUCTION

4. This case concerns the alleged participation of Mr Del Nero in a bribery scheme with other football officials involving the sale of media and marketing rights of several football tournaments, which was revealed following a lengthy investigation of the United States Department of Justice (the "DOJ"). As a result of the investigation, a number of individuals including Mr Del Nero were indicted in the United States on several criminal counts including racketeering, money laundering and wire fraud conspiracies. These events have come to be known colloquially as *'FIFA-Gate'*.

5. As a result, after an investigation and proceedings at the FIFA Ethics Committee (the "FIFA EC") and FIFA Appeals Committee, FIFA imposed a life ban from any football related activity at national or international level, and a fine of CHF 1,000,000 on Mr Del Nero. This case is an appeal by Mr Del Nero against that decision.

B. PROCEEDINGS BEFORE THE UNITED STATES' JUDICIAL AUTHORITIES

6. On 27 May 2015, an indictment was filed before the United States District Court, Eastern District of New York (the "District Court") by the DOJ (the "Indictment"). The 47-count Indictment had been unsealed charging 14 defendants with U.S. federal crimes such as, *inter alia*, racketeering, wire fraud and money laundering conspiracies. Mr Del Nero was not one of the defendants in this Indictment.

7. The Indictment led to the arrests of several high ranking football officials in Zurich, Switzerland on that day, including CONMEBOL representatives in the FIFA ExCo and Mr José Maria Marin (the former President of the CBF).

8. A day later, on 28 May 2015, Mr Del Nero (who was also in Zurich at the time) returned to Brazil instead of remaining in Switzerland to attend and vote in the FIFA Presidential election that was to take place on 29 May 2015 during the 65th FIFA Congress.

9. On 3 December 2015, the DOJ announced that a 92-count superseding indictment (the "Superseding Indictment") had been unsealed, charging a further 16 defendants – including Mr Del Nero – with U.S. federal crimes such as, *inter alia*, racketeering, wire fraud and money laundering conspiracies in connection with their alleged participation in a 24-year scheme to enrich themselves through the corruption of international football. Several indicted individuals had been arrested, but not Mr Del Nero as he was based in Brazil – therefore avoiding

extradition to the United States of America. Mr Del Nero had not left Brazil since his return on 28 May 2015 and had stopped attending any FIFA ExCo meetings in Zurich (on 20 July, 24 and 25 September and 20 October 2015) which led to his eventual resignation the day before the Superseding Indictment was released.

10. Between 13 November and 26 December 2017, three officials who were also indicted by the DOJ – Mr José Maria Marin, Mr Juan Ángel Napout (former President of CONMEBOL and former head of the Paraguayan Football Association) and Mr Manuel Burga (former President of the Peruvian Football Association) – were tried before a jury in the District Court in New York (the "Jury Trial"). Mr Marin and Mr Napout were found guilty of racketeering conspiracy, wire fraud conspiracy and money laundering conspiracy, while Mr Burga was acquitted from the charge of racketeering conspiracy (this being the only of the five charges for which he was tried, as per the conditions of Mr Burga's extradition to the United States).

C. INVESTIGATION BY THE INVESTIGATORY CHAMBER OF THE FIFA EC

11. On 23 November 2015, the Investigatory Chamber of the FIFA EC (the "Investigatory Chamber"), through its Chairman ("IC Chairman") informed Mr Del Nero of the opening of investigation proceedings relating to possible violations of Articles 13, 14, 15, 18, 19, 20, 21 and 22 of the FIFA Code of Ethics (the "FCE").

12. On 13 December 2017, the IC Chairman requested the Chairperson of the Adjudicatory Chamber (the "AC Chairman") to impose provisional measures against Mr Del Nero.

13. On 15 December 2017, the AC Chairman rendered a decision granting the request and provisionally banned Mr Del Nero from all football-related activities for a period of 90 days.

14. On 13 March 2018, the Investigatory Chamber completed the investigation proceedings and submitted a final report together with the investigation files (the "Final Report") to the Adjudicatory Chamber of the FIFA EC (the "Adjudicatory Chamber"), in accordance with Articles 28(5) and 67 of the FCE.

D. PROCEEDINGS BEFORE THE ADJUDICATORY CHAMBER OF THE FIFA EC

15. On 14 March 2018, the AC Chairman informed Mr Del Nero that after having examined the Final Report and deeming it to be complete, he had decided to proceed with the adjudicatory proceedings in this case and asked for his position on the Investigatory Chamber's Final Report. Moreover, Mr Del Nero was informed that he could request an oral hearing.

16. On 25 April 2018, a hearing was held before the FIFA Adjudicatory Chamber in Zurich, Switzerland. Mr Del Nero did not attend the hearing but was represented by his counsels.

17. On 25 April 2018, the Adjudicatory Chamber rendered its decision (the "FIFA EC Decision"), ruling as follows:

"1. The FIFA Ethics Committee is competent to deal with the present matter in accordance with art. 27 of the FIFA Code of Ethics.

2. Mr. Marco Polo Del Nero is found guilty of infringement of art. 21 (Bribery and corruption), art. 20 (Offering and accepting gifts and other benefits), art. 19 (Conflicts of interest), art. 15 (Loyalty), and art. 13 (General rules of conduct) of the FIFA Code of Ethics.

3. Mr. Marco Polo Del Nero is hereby banned from taking part in any kind of football-related activity at national and international level (administrative, sports or any other) for life as of notification of the present decision, in accordance with art. 6 lit. h) of the FIFA Code of Ethics in conjunction with Article 22 of the FIFA Disciplinary Code.

4. Mr. Marco Polo Del Nero shall pay a fine in the amount of CHF 1,000,000 within 30 days of notification of the present decision. […]

5. Mr. Marco Polo Del Nero shall pay costs of these proceedings in the amount of CHF 10,000 within 30 days of notification of the present decision, which shall be paid according to the modalities stipulated under point 4. above.

6. Mr. Marco Polo Del Nero shall bear his own legal and other costs incurred in connection with the present proceedings. […]*".*

18. The grounds of the Adjudicatory Chamber Decision were notified to Mr Del Nero on 26 July 2018.

E. PROCEEDINGS BEFORE THE FIFA APPEALS COMMITTEE

19. On 30 July 2018, Mr Del Nero submitted his intention to appeal to the FIFA Appeals Committee, which was followed by his appeal brief on 7 August 2018.

20. On 7 February 2019, a hearing was held before the FIFA Appeals Committee in Zurich, Switzerland. Mr Del Nero was represented by his counsels and attended the hearing by video-conference from Rio de Janeiro.

21. Later that same day, the FIFA Appeals Committee rendered its decision (the "Appealed Decision"), ruling as follows:

"1. The appeal filed by Mr. Marco Polo Del Nero against the [FIFA EC Decision] *is dismissed.*

2. The [FIFA EC Decision] *is confirmed.*

3. Mr Marco Polo Del Nero is found guilty of infringements of art. 21 (Bribery and corruption), 20 (Offering and accepting gifts and other benefits), 19 (Conflicts of interest), 15 (Loyalty), and 13 (General rules of conduct) of the FCE.

4. Mr Marco Polo Del Nero is banned from taking part in any football-related activity (administrative, sports or any other) at national and international level for life, in accordance with art. 6 par. 1 let. h of the FIFA Code of Ethics in conjunction with art. 22 of the FIFA Disciplinary Code.

5. Mr Marco Polo Del Nero shall pay a fine in the amount of CHF 1,000,000 within 30 days of notification of the present decision. […]

6. Mr Marco Polo Del Nero shall pay costs of the proceedings of the FIFA Ethics Committee in the amount of CHF 10,000 within 30 days of notification of the present decision, which shall be paid according to the modalities stipulated under point 5 above.

7. The costs of the present proceedings are established in the amount of CHF 3,000 and shall be borne by Mr Marco Polo Del Nero. This amount is set off against the appeal fee of CHF 3,000 already paid by Mr Marco Polo Del Nero.

8. Mr Marco Polo Del Nero shall bear his own legal and other costs incurred in connection with the present proceedings. […]*".*

22. The grounds of the Appealed Decision were notified to Mr Del Nero on 27 May 2019.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

23. On 17 June 2019, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code") Mr Del Nero filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS"). In his Statement of Appeal, Mr Del Nero appointed Prof Dr. Martin Schimke, Attorney-at-Law in Dusseldorf; Germany, as an arbitrator. Mr Del Nero also requested an extension of time in which to file his Appeal Brief, until 12 August 2019.

24. On 1 July 2019, FIFA wrote to the CAS Court Office stating *inter alia*, that it nominated Prof. Massimo Coccia, Law Professor and Attorney-at-Law in Rome, Italy, as an arbitrator. FIFA also stated that it did not oppose the extension requested by Mr Del Nero *"so long as FIFA is granted a similar extension to file its answer to the appeal".*

25. On 4 July 2019, Mr Del Nero wrote to the CAS Court Office stating that in view of the recent *Pechstein* and *Mutu* cases at the European Court of Human Rights (*I ECHR 324 (2018) Mutu and Pechstein v. Switzerland (Applications no. 40575/10 and no. 67474/10*), Mr Del Nero requested that the President of the Panel be jointly chosen by the co-arbitrators, and not by the President of the Appeals Arbitration Division.

26. On 5 July 2019, the CAS Court Office wrote to the Parties stating inter alia:

"The parties are advised that the CAS Court Office disputes that Mutu supports the proposition put forward by the Appellant. Nevertheless, on an exceptional basis, the parties are invited to state whether they would like to jointly nominate a President of the Panel ***within three (3) days****. If both parties agree, a short deadline will be provided to the parties to propose a President of the Panel, failing which the President of the Appeals*

Arbitration Division will make such appointment in accordance with Article R54 of the Code of Sports-related Arbitration (the "Code").

The parties are advised that any such joint nomination will only be deemed appointed after confirmation by the President of the Appeals Arbitration Division in accordance with Article R54 of the Code. Moreover, the parties are cautioned that depending on the circumstances, the President of the Appeals Arbitration Division may apply R65.4 to this procedure".

27. On 8 July 2019, FIFA wrote to the CAS Court Office stating that whilst it agreed with the CAS Court Office regarding the irrelevance of the *Mutu* case, it agreed to jointly nominate a President of the Panel together with Mr Del Nero as suggested.

28. On 8 July 2019, Mr Del Nero wrote to the CAS Court Office stating that he agreed to the suggestion to jointly nominate an arbitrator with FIFA, failing which he proposed that the matter be submitted to the co-arbitrators for the respective nomination of a President.

29. On 9 July 2019, the CAS Court Office wrote to the Parties inviting them to confirm their joint nomination of a President within 5 days, failing which a President of the Panel was to be appointed by the President of the Appeals Arbitration Division in accordance with Article R54 of the CAS Code. Accordingly, Mr Del Nero's request that the co-arbitrators be permitted to jointly nominate the President of the Panel was denied.

30. On 15 and 16 July 2019, the Parties wrote to the CAS Court Office confirming that no agreement was reached regarding the joint nomination for the President of the Panel.

31. On 16 July 2019, the CAS Court Office wrote to the Parties stating that since the Parties failed to jointly nominate a President of the Panel, the latter will be appointed by the President of the CAS Appeals Arbitration Division, in accordance with Article R54 of the CAS Code.

32. On 26 July 2019, Mr Del Nero wrote to the CAS Court Office submitting the following evidentiary request, pursuant to Article R44.3 of the CAS Code:

    "a) Provide the Appellant with copy of the Arbitral Awards of cases CAS 2014/A/3537 and CAS 2017/A/5086, cited in the Appealed Decision, but not published in the CAS website;

    b) Order FIFA provide to the Appellant with a copy of any and all decisions (grounds included) rendered by the FIFA EC related to the application of articles 13, 15, 19, 20 and/or 21 of the 2012 FCE, including (i) if passed in the form of a simple letter, (ii) if refusing the opening of adjudicatory proceedings, (iii) if partially or fully acquitting the accused party add/or (iv) homologating an agreement between the accused party and FIFA;

    c) Order FIFA to provide him with copy of any and all decisions (grounds included) rendered by the FIFA AC in appeals against the decisions specified in letter 'b' above;

    d) Provide him with copy of any and all decisions (grounds included) rendered by CAS in appeals against the decisions specified in letter 'b' and 'c' above; and

e) While the requests above are being decided and, if granted, the relevant documents are being collected by FIFA and CAS, suspend the deadline for the Appellant to file his Appeal Brief".

33. On 2 August 2019, FIFA wrote to the CAS Court Office stating *inter alia* that it rejected Mr Del Nero's evidentiary request as a 'fishing expedition'. Regarding the request for a suspension of the time limit to file the Appeal Brief, FIFA noted that Mr Del Nero had already been granted a 40-day extension.

34. On 6 August 2019, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to this case was constituted as follows:

President:	Mr Mark A. Hovell, Solicitor, Manchester, United Kingdom
Arbitrators:	Prof. Dr. Martin Schimke, Attorney-at-law, Dusseldorf, Germany
	Prof. Massimo Coccia, Law Professor and Attorney-at-law, Rome, Italy

35. On 16 August 2019, the CAS Court Office wrote to the Parties on behalf of the Panel, informing them that the Panel's decision regarding Mr Del Nero's evidentiary request was as follows:

"(a) Copies of awards CAS 2014/A/3537 and CAS 2017/A/5086 are attached.

(b) & (c) FIFA is directed to produce all decisions (in whatever form) rendered by the FIFA Appeals Committee, but only to the extent that such decisions concern appeals involving FIFA officials. In doing so, FIFA is permitted to redact any confidential information on any such decisions. To the extent any redactions take place, FIFA shall also provide an un-redacted version of the decision to the Panel who will review such unredacted decision(s) in camera only.

(d) FIFA is further directed to provide the Appellant copies of all decisions (grounds included) rendered by CAS on appeals against the decisions specified in above (b) & (c) over the last 20 years".

The CAS Court Office also confirmed that Mr Del Nero's time limit to file his Appeal Brief was suspended.

36. On 26 August 2019, FIFA wrote to the CAS Court Office providing some of the requested documents.

37. On 28 August 2019, the CAS Court Office wrote to the Parties stating as follows:

"The Parties are advised that in referencing "FIFA Officials" in its letter dated 16 August 2019, the Panel intended to refer to all individuals that, under the FIFA disciplinary regulations, were qualified as "officials" and subjected to disciplinary proceedings in such capacity.

To the extent necessary, FIFA is requested to amend its response accordingly by 3 September 2019".

38. On 3 September 2019, FIFA wrote to the CAS Court Office stating as follows:

"[…] *we wish to inform you that all decisions passed by the Appeal Committee concerning violations of art. 21 of the FIFA Code of Ethics (or its equivalent article in different editions of the FCE) have already been provided with our letter of 23 August 2019.*

Given that this is the only article for which Mr Del Nero has been sanctioned, we consider that providing the Appellant with additional decisions passed by the Appeal Committee on the basis of different violations of the FCE is unnecessary and irrelevant for the case at stake. The contrary would solely corroborate our initial position put forward in our letter of 2 August 2019 according to which, the Appellant's "general request for non-specific decisions appears to be a "fishing expedition" in order to obtain through CAS decisions that are unrelated to the present proceedings". This refusal to continue providing unrelated decisions is based on art. 9 par. 2 a) of the IBA Rules on the Taking of Evidence in International Arbitration.

In order for the Panel to be able to corroborate the above, we will provide copies of the remaining decisions passed by the Appeal Committee for the Panel's in camera review only".

39. On 16 September 2019, Mr Del Nero wrote to the CAS Court Office stating *inter alia*:

"[…] *the Appellant wishes to highlight, first, that according to* [the FIFA EC Decision] *and* [the Appealed Decision]*, Mr Del Nero was explicitly found guilty of infringements not only of art. 21, but also of art. 13 (General rules of misconduct), art. 15 (Loyalty), art. 19 (Conflict of interest) and art. 20 (Offering and accepting gifts and other benefits).*

In addition, we draw the attention of the Panel to the fact that several of the decisions first provided by FIFA on 23 August 2019 actually do not deal with the foregoing art. 21.

In light of the above, the Appellant respectfully understands that it is not a matter for FIFA to decide which decisions are relevant or not in the context of the present dispute and, thus, kindly requests the Panel also to provide him with the decisions produced by FIFA on 3 September 2019 […]*".*

40. On 18 October 2019, in accordance with Article R51 of the CAS Code, Mr Del Nero filed his Appeal Brief with the CAS Court Office.

41. On 29 October 2019, FIFA wrote to the CAS Court Office stating as follows:

"After having analysed the appeal brief, we consider necessary to request an extension of the deadline to submit our answer to the appeal.

In this respect, we recall that the Appellant has had 144 days to file his appeal brief (between 28 May and 18 October 2019). Therefore, we respectfully request an initial extension until 31 January 2020 in order to submit our answer to the appeal".

42. On 1 November 2019, Mr Del Nero wrote to the CAS Court Office stating *inter alia* that he rejected FIFA's request for an extension as total time which FIFA asserted that Mr Del Nero had (144 days) was calculated to the day the Appealed Decision was issued. Mr Del Nero stated that he would agree a maximum extension of 46 days.

43. On 8 November 2019, FIFA wrote to the CAS Court Office *inter alia* reiterating its request for an extension until 31 January 2020 *"in view of the need to respect the equal treatment of the parties and FIFA's difficulty to produce a brief by 2 January 2019* […]*"*.

44. On 13 November 2019, the CAS Court Office wrote to the Parties confirming that the Panel had determined to extend FIFA's deadline to submit its Answer to 31 January 2020.

45. On 24 December 2019, the CAS Court Office wrote to the Parties informing them that Mr Tiran Gunawardena, Solicitor, London, United Kingdom had been appointed as an *ad hoc* clerk in this matter.

46. On 27 January 2020, FIFA wrote to the CAS Court Office requesting a further extension to file its Answer to 28 February 2020.

47. On 30 January 2020, Mr Del Nero wrote to the CAS Court Office *inter alia* objecting to FIFA's further extension request.

48. On 3 February 2020, the CAS Court Office wrote to the Parties confirming that FIFA's request for a further extension to file its Answer until 28 February 2020 was granted. The CAS Court Office noted that *"such extension is similar to that granted to the Appellant in filing his appeal brief. No further extension requests will be granted"*.

49. On 26 February 2020, in accordance with Article R55 of the CAS Code, FIFA filed its Answer to Mr Del Nero's Appeal.

50. On 12 March 2020, Mr Del Nero wrote to the CAS Court Office stating his request for a hearing to be held in this matter. On the same day FIFA wrote to the CAS Court Office stating its preference for an award to be issued solely on the written submissions, without a hearing.

51. On 13 March 2020, the CAS Court Office wrote to the Parties stating as follows:

> *"As an initial matter, on review of the Parties' written submissions and while the Panel considers whether a hearing is warranted, the Panel invites the Parties to file a focussed, second round of written submissions. In this respect, the Appellant is invited to file a reply to the Respondent's answer within 20 days. This second round of written submissions should not be a reiteration of the Parties' appeal brief and answer, but instead should be a reply focussed on the core issues in this appeal. The reply submissions should not exceed 20 pages (12-point format)"*.

52. On 16 April 2020, Mr Del Nero filed his reply to FIFA's Answer with the CAS Court Office.

53. On 22 May 2020, FIFA filed its reply to Mr Del Nero's second submission with the CAS Court Office.

54. On 10 June 2020, the CAS Court Office informed the Parties that the Panel had determined to convene a hearing on 13 October 2020.

55. On 8 October 2020, FIFA filed a signed copy of the Order of Procedure with the CAS Court Office. The Appellant did not return a signed copy of the Order of Procedure within the prescribed time limit.

56. A hearing was held on 13 October 2020 by video conference. The Parties did not raise any objection as to the composition of the Panel at the outset of the hearing. The Panel were all present and was assisted by Mr Brent Nowicki, Managing Counsel at the CAS and Mr Gunawardena as *ad hoc* clerk. The following persons attended the hearing:

i. Mr Del Nero: Mr Del Nero himself; Messrs. Marcos Motta, Bichara Neto, Victor Eleuterio, Xavier Favre-Bulle, Adam Cashman (all counsel); Mr Vandenbergue dos Santos Sobreira Machado (witness); and Ms Allana Paula Durand Pereira (translator);

ii. FIFA: Messrs Miguel Liétard Fernández-Palacios, Jaime Cambreleng Contreras and Luis Villas Boas (all counsel).

57. In addition to Mr Del Nero, who was there as the Appellant, Mr Vandenbergue dos Santos Sobreira Machado gave evidence before the Panel during the hearing.

58. Mr Del Nero and Mr Sobreira Machado were invited by the President of the Panel to tell the truth subject to the sanctions of perjury. The Parties and the Panel had the opportunity to examine and cross-examine the witnesses. The Parties then were given the opportunity to present their cases, to make their submissions and arguments and to answer questions posed by the Panel.

59. Upon the closing of the hearing, the Parties were asked whether they had any objections in relation to their respective rights to be heard and that they had been treated equally in these arbitration proceedings. FIFA confirmed that they had no objections. Mr Del Nero's representatives stated as follows:

– If the Panel was to rule in favour of FIFA despite Mr Del Nero's objections regarding not being able to cross-examine witnesses from the Jury Trial, Mr Del Nero would consider that his right to be heard was violated.

– Mr Del Nero requested an updated disclosure from the Panel regarding any appointments in matters involving FIFA.

60. The hearing was then closed and the Panel reserved its detailed decision to this written Award. The Panel has carefully taken into account in its subsequent deliberation all the evidence and the arguments presented by the Parties, both in their written submissions and at the hearing, even if they have not been summarised in the present Award.

61. On 16 October 2020, the CAS Court Office sent the Parties copies of the Panel's updated disclosures, as requested by Mr Del Nero during the hearing held on 13 October 2020.

62. On 21 October 2020, Mr Del Nero wrote to the CAS Court Office requesting further information on disclosures from Mr Hovell and Mr Gunawardena.

63. On 23 October 2020, Mr Del Nero filed a petition to challenge the appointment of Mr Hovell (as arbitrator) and Mr Gunawardena (as ad-hoc clerk) (the "Challenge Petition").

64. On 26 October 2020, the CAS Court Office wrote to the Parties stating that as Mr Hovell and Mr Gunawardena had not yet provided their responses to the request for further information made, the Challenge Petition was premature. Once that information was provided, Mr Del Nero could choose to re-file his Challenge Petition if he wished to.

65. On 27 October 2020, the CAS Court Office provided the Parties with the respective responses to Mr Del Nero's request for further information.

66. On 3 November 2020, Mr Del Nero re-filed the Challenge Petition.

67. On 13 November 2020, Mr Hovell and Mr Gunawardena provided their respective responses to the Challenge Petition.

68. On 17 November 2020, Mr Del Nero wrote to the CAS Court Office confirming that he wished to maintain the Challenge Petition. The CAS Court Office informed the Parties that the Challenge Commission of the International Council of Arbitration for Sport ("ICAS Challenge Commission") would render its decision on the Challenge Petition in due course.

69. On 29 April 2021, Mr Del Nero filed a request for a stay of execution of the Appealed Decision with the CAS Court Office ("Request for Provisional Measures").

70. On 10 May 2021, the ICAS Challenge Commission issued its decision, dismissing the Challenge Petition.

71. On 18 May 2021, in response to a request by Mr Del Nero that the Panel issue an Award within 60 days, the CAS Court Office wrote to the Parties on behalf of the Panel stating as follows:

> *"*[…] *the Parties are advised that the Panel will use its best endeavours to complete and issue the award within the requested 60 days. With this, and in the interest of procedural economy, the President of the Panel proposes that the deadline for the Respondent's response on provisional measures be suspended until 16 July 2021. If the Award is rendered by this time, the Appellant is invited to seek a further update from the Panel and/or inform the CAS Court Office that it intends to proceed with its application. The CAS Court Office, on instruction from the Panel, will then set a deadline for the Respondent's response (or provide any further instruction as directed by the Panel)".*

72. On 25 May 2021, the CAS Court Office wrote to the Parties confirming that in the absence of any objection within the prescribed deadline, FIFA's deadline to file its response to the Request for Provisional Measures was suspended until 16 July 2021.

73. On 8 July 2021, the CAS Court Office wrote to the Parties on behalf of the Panel stating that the Award would most likely not be issued by 16 July 2021, but may be issued by the end of

July 2021. Accordingly, Mr Del Nero was invited to confirm whether he was proceeding with his Request for Provisional Measures or whether he would agree to extend the suspension of FIFA's deadline to file its Answer to the request until 30 July 2021.

74. On 13 July 2021, Mr Del Nero wrote to the CAS Court Office confirming his agreement to extend the suspension of FIFA's deadline to file its Answer to the Request for Provisional Measures until 30 July 2021.

IV. SUBMISSIONS OF THE PARTIES

75. The following summary of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Panel however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in what immediately follows.

A. MR DEL NERO'S SUBMISSIONS

1. Prayers for relief

76. In his Statement of Appeal, Mr Del Nero submitted the following prayers for relief:

"a) Admit the present appeal;

b) Grant the evidentiary requests to be specified in the Appeal Brief;

c) Uphold the present appeal and set aside the Appealed Decision, replacing it by an Arbitral Award which:

i. To the extent that any issues regarding contracts related to Copa Libertadores, Recopa, Copa Sudamericana and/or Copa America are concerned, declares that the FIFA EC had no jurisdiction to rule on the present matter, pursuant to article 27, par. 4, of the 2012 FIFA Code of Ethics;

ii. To the extent that any issues regarding contracts related to Copa do Brasil are concerned, declares that the FIFA EC had no jurisdiction to rule on the present matter, pursuant to article 27, par. 5, of the 2012 FIFA Code of Ethics;

Subsidiarily, in the event the FIFA EC is deemed to have jurisdiction (either in full or in part) for the present case

iii. Annuls the proceedings conducted by FIFA ab initio, including the sanctions imposed against Mr. Del Nero, ordering the Investigatory Chamber to complete the Final Report with the translation of any and all evidence not in the language of the proceedings, pursuant to articles 34, par. 1, and 69 of the 2012 FIFA Code of Ethics;

iv. Annuls the Appealed Decision, acquitting Mr. Del Nero and declaring him innocent from all charges put forward in the Final Report, as manifestly unfounded;

v. Cancels any sanction might imposed against Mr. Del Nero ab initio, including the provisional ban from taking part in any football-related activity imposed by the Chairperson of the Adjudicatory Chamber on 15 December 2017;

vi. Orders FIFA to publish a media release in its website, social medias and all communication channels announcing that Mr. Del Nero has committed no violation whatsoever of the FCE, the FIFA Statutes and of any other regulations of FIFA.

Subsidiarily, in the event Mr Del Nero is deemed to have violated any provision of the FCE

vii. Determines that any sanction imposed on him be limited to a warning, a reprimand and/or fine, pursuant to article 9 et. seq. of the 2012 FIFA Code of Ethics;

In any case

viii. Orders FIFA to bear any and all costs and fees of the present arbitration, as well as to reimburse Mr. Del Nero of all fees and expenses incurred in connection with the proceedings before the FIFA EC and the FIFA AC, including any legal and/or appeal fees;

ix. Orders FIFA to pay Mr. Del Nero a contribution towards legal fees and other expenses incurred in connection with the proceedings, pursuant to article 65.3 of the CAS Code, in an amount to be fixed by the Panel at its own discretion but in no event lower than CHF 100,000 (one hundred thousand Swiss Francs)". (emphasis in original)

77. In his Appeal Brief, Mr Del Nero submitted the following prayers for relief:

"a) Declare the present appeal admissible;

b) Grant the evidentiary request specified in Section II and X above;

c) Allow a second round of written submissions for the reasons set out in section X above, pursuant to article R56 of the CAS Code;

d) Uphold the present appeal and annual the Appealed Decision; and

e) Refer the present matter back to FIFA, with an order for the completion of the Final Report and the referral of any adjudicatory proceedings against Mr. Del Nero to a different Panel before the Adjudicatory Chamber and, if it is the case, the FIFA AC;

Subsidiarily, in the event the matter is not referred back to FIFA

f) Hold Mr. Del Nero not guilty of any infringements of the FCE;

g) Cancel any sanction imposed against Mr. Del Nero ab initio, including the provisional ban from taking part in any football-related activities imposed by the Chairperson of the Adjudicatory Chamber; and

h) Order the publication of a media release in FIFA's website, social medias and all other communication channels announcing the findings that Mr. Del Nero has committed no violation whatsoever of the FCE, the FIFA Statutes and of any other regulations of FIFA;

Subsidiarily, in the event Mr. Del Nero is deemed to have violated any provisions of the FCE

i) Determine that any sanction imposed on Mr. Del Nero be limited to a warning, a reprimand and/or a fine, pursuant to article 9 et seq. of the FCE; or

j) Deduct any period of ban already served by Mr. Del Nero from the final sanction;

In any case

k) Determine that the present proceedings are free of costs for the Parties, pursuant to article R65 et. seq. of the CAS Code;

l) Grant Mr. Del Nero a contribution towards all his legal fees and other expenses incurred in connection with the proceedings before FIFA and CAS, pursuant to Article R65.3 of the CAS Code, in an amount to be fixed by the Panel after a specific submission of Mr. Del Nero on costs at the end of the arbitration;

m) Determine that the notification of the Arbitral Award be made to Mr. Del Nero and his counsel at least 24 (twenty-four) hours prior to any public announcement, either orally or in writing, to be made by FIFA in its website, social medias or other communication channels" (emphasis in original).

78. In his second submission, Mr Del Nero submitted the following requests for relief:

"a) Dismiss the arguments put forward by FIFA and uphold the present appeal, as detailed in the Appeal Brief;

b) Determine that the present proceedings are free of costs for the Parties, pursuant to article R65 et. seq. of the CAS Code;

c) Grant Mr. Del Nero a contribution towards all his legal fees and other expenses incurred in connection with the proceedings before FIFA and CAS, pursuant to Article R65.3 of the CAS Code, in an amount to be fixed by the Panel after a specific submission of Mr. Del Nero on costs at the end of the arbitration;

d) Determine that the notification of the Arbitral Award be made to Mr. Del Nero and his counsel at least 24 (twenty-four) hours prior to any public announcement, either orally or in writing, to be made by FIFA in its website, social medias or other communication channels".

79. In summary, Mr Del Nero submitted the following in support of his Appeal:

2. Procedural issues before FIFA

80. Mr Del Nero argued that there were numerous procedural violations committed during the proceedings before FIFA.

a) The independence of FIFA Judicial Bodies and the fairness of proceedings

81. Mr Del Nero noted that even if the SFT does not provide for a direct application of the ECHR to arbitration, *"CAS Panels have at several occasions recognized an indirect application of some of the ECHR guarantees, such as article 6.1, to sport arbitration"* (citing *inter alia*, *CAS 2011/A/2426*). Moreover, Article 6(1) ECHR, which contains the guarantee of a fair proceeding within a reasonable time by an independent and impartial arbitral tribunal, encompasses procedural principles that are part of the Swiss procedural public policy. The fairness of proceedings is applicable to arbitral institutions and dispute resolution bodies seated in Switzerland (citing *inter alia*, ATF 127 III 429).

82. Mr Del Nero argued that in the present case, the FIFA EC and FIFA Appeals Committee *"blatantly violated their duty of independence in the adjudication of the present matter"*, pursuant to, *inter alia*, Article 85 para. 1 of the FIFA Disciplinary Code and Article 34 para. 1 of the FCE.

b) The independence of the members of the FIFA EC and the FIFA Appeals Committee

83. Mr Del Nero claimed that despite agreeing with FIFA that English would be the language of the proceedings, a significant number of enclosures of the Final Report were either in Portuguese (not an official language of FIFA) or Spanish (which was not the agreed language of the proceedings), without appropriate English translations. Mr Del Nero submitted that out of the 159 exhibits to the Final Report, the Chief of Investigation and the three members of the FIFA Adjudicatory Chamber and the FIFA Appeals Committee *"were not able to read more than 20%"*.

84. Despite this, on 14 March 2018, the Chairperson of the Adjudicatory Chamber announced that the Final Report was deemed complete and proceeded with adjudicatory proceedings against Mr Del Nero. Further, both the members of the FIFA EC and the FIFA Appeals Committee in charge of the present case admitted to not being able to read all the evidence produced by the Investigatory Chamber. In particular, aside from Mr Simango, none of the other members were able to read Portuguese and/or Spanish. Yet, the Appealed Decision held that:

> *"[T]he reference to the most relevant documents in the final report that are in Portuguese are duly translated into English. On the other hand, the appellant failed to show what documents that were in Portuguese or Spanish that the Adjudicatory Chamber relied upon to take the appealed decision, which could lead to a violation of Mr Del Nero's right to be heard"*.

85. Mr Del Nero claimed that the above findings were *"embarrassing and cannot be taken seriously by the Panel"*, given that the Appealed Decision directly relied on numerous documents which were not in English and not translated. Other documents were presented only in translated versions, without their originals. Mr Del Nero argued that these issues prevented him from examining the contents of that evidence or the accuracy of the translations. Mr Del Nero stated that because of all the above, the members of the FIFA EC and the FIFA Appeals Committee lacked the ability to properly assess the evidence of the case for themselves and/or judge and sanction him for any alleged violations of the FCE. Conversely, they *"were entirely dependent on the FIFA administration and, in particular, on their respective secretariats in order to deal with the case* […]*"*.

86. Mr Del Nero argued that this was a *"blatant violation"* of his right to be heard and to a fair trial, be it under the FIFA Statutes, Swiss law and the ECHR. Mr Del Nero stated that the Appealed Decision therefore had to be annulled and the matter was to be referred back to FIFA, with an order for the completion of the Final Report, and for it to be heard by a different Panel before the FIFA Adjudicatory Chamber.

c) Independence of the secretaries of the FIFA EC and the FIFA Appeals Committee

87. According to Article 30(1) of the Swiss Federal Constitution, *"[a]ny person whose case falls to be judicially decided has the right to have their case heard by a legally constituted, competent, independent and impartial court"*. The notion of a 'court', as defined by the case law of the SFT, encompasses not only judges, but also secretaries and court clerks, and is not limited to State courts, extending to arbitral tribunals and associative jurisdictions. On this basis, the SFT decided that a cantonal law enabling a court clerk to successively take part in a criminal investigation and then in the criminal proceedings, as a member of judging authority, violates both Article 30(1) of the Swiss Federal Constitution and Article 6(1) of ECHR, as it disregards the right to an independent and impartial court (ATF 115 Ia 224). In that regard, Mr Del Nero claimed that the FIFA secretariats were *"spoon-feeding the FIFA EC and FIFA AC in the present case"* and also appeared not to be independent.

88. Mr Del Nero claimed that although the FCE establishes that each member of the FIFA Appeals Committee shall have their own secretariat, the secretariats at FIFA interchangeably worked on matters before the FIFA Investigatory Chamber, Adjudicatory Chamber and/or the FIFA Appeals Committee. Moreover, some of those same secretariats represent FIFA in appeal proceedings before the CAS. Mr Del Nero submitted that the separation of secretariats is meant to safeguard independence, but no such separation appears to exist in reality.

89. Mr Del Nero also noted that when comparing the FIFA EC Decision and the Appealed Decision, there were *"entire sections and several paragraphs with identical wording"*, suggesting that both decisions *"seem to originate from the very same working draft"*.

90. Mr Del Nero claimed that the above was a further blatant violation of his right to be heard and to a fair trial, which should result in the Appealed Decision being annulled and the matter to be sent back to FIFA.

3. Evidentiary issues

91. Mr Del Nero noted that FIFA's decision to impose sanctions on him was based almost exclusively on evidence adduced at the Jury Trial in December 2017. Mr Del Nero was not a defendant in that trial. He was not present, nor represented by legal counsel and did not have the opportunity to challenge any evidence or present evidence of his own. The evidence presented at that trial was mainly focussed on proving the guilt or innocence of the respective defendants in that trial – i.e. Messrs. Napout, Marin and Burga.

92. Moreover, Mr Del Nero claimed that the trial in the U.S. generated thousands of pages of evidence and witness testimony, but FIFA appears to have based the Appealed Decision on just a fraction of this evidence.

a) The burden of proof and presumption of innocence

93. Mr Del Nero submitted that the right to access to justice is a fundamental principle of law, reflected both in Swiss law and in the ECHR, and also forms part of procedural public policy in Switzerland. Its notion encompasses *inter alia* the right to a fair trial, from which derives the presumption of innocence. The presumption of innocence is directly consecrated by Article 10, paras. 1 and 3 of the Swiss Code of Criminal Procedure and by Article 6, para. 2 of the ECHR.

94. Mr Del Nero claimed that the European Court of Human Rights ("ECtHR") interprets the term *"criminal offence"* in Article 6 ECHR as encompassing not only typical criminal and/or civil proceedings, but also disciplinary matters like the case at hand. Similarly, under Swiss law all procedural rights granted by Article 6 of the ECHR are applicable in the present case.

95. The FCE also explicitly recognises the presumption of innocence as one of the principles to be followed in ethics proceedings before FIFA. Pursuant to Article 52 of the FCE, the *"burden of proof regarding breaches of provisions of the Code rests on the Ethics Committee"*. As such, when acting as *"legislator, prosecutor and judge"*, FIFA is bound to observe the principle of legal certainty, as well as the rules it has issued to govern football (*patere legem quam ipse feticit*).

96. Based on the above, Mr Del Nero argued that FIFA has failed to discharge its burden of proving, *inter alia* that:

- Mr Del Nero solicited or accepted any bribe from any person;
- Mr Del Nero was aware that Mr Marin had allegedly solicited or accepted bribes on his behalf;
- Mr Del Nero was in Argentina at any time in April and/or June 2012 and participated in the alleged meetings where bribes in connection with the CONMEBOL agreements would have been agreed;
- Mr Del Nero had a meeting in May 2013 in London, with Mr Burzaco to discuss bribes;

- Mr Del Nero had a meeting in October 2014, in Asunción, with Mr Burzaco, or even that Mr Burzaco was in Paraguay at any time during that month;

- Mr Del Nero participated in the negotiation, or had a fundamental role in the approval of, the contracts signed by CONMEBOL with respect to Copa Libertadores, Copa Sudamericana, Recopa Sudamericana and/or Copa America;

- Mr Wagner Abrahão had a *"special friendship"* akin to a family relationship and was a *"long-time friend and business partner"* of Mr Del Nero;

- Mr Del Nero received any bribe through funds of CONMEBOL;

- Mr Del Nero was the beneficiary, or anyhow benefitted from, the payment allegedly made by Arco Business and Development to Support Travel on 7 June 2013;

- Mr Del Nero was the beneficiary or anyhow benefitted from the payment allegedly made by FPT Sports to Support Travel on 5 July 2013;

- Mr Del Nero was the beneficiary or anyhow benefitted from the payment allegedly made by Valente to Support Travel on 29 May 2014;

- Support Travel, Expertise Travel or Pallas Operação Turistica Ltda. ("Pallas") made any payment or gave any benefit to Mr Del Nero;

- Mr Abrahão, his relatives and/or any company belonging to Mr Abrahão and/or his relatives, made any undue payment or gave any undue benefit to Mr Del Nero;

- Any transaction between Mr Del Nero and Mr Abrahão, his relatives and/or any of their companies involved the acquisition or sale of overpriced/undervalued properties;

- Mr Kleber Leite and/or any of his companies made any payment or gave any benefit to Mr Del Nero; and

- Mr Marin ever shared with Mr Del Nero any bribe he had allegedly solicited or received.

b) The standard of proof

97. With respect to the applicable standard of proof, Mr Del Nero noted that pursuant to Article 51 of the FCE, members of the Ethics Committee *"shall judge and decide on the basis of their personal convictions"*. Historically, CAS jurisprudence has equated the standard of *"personal conviction"* to a *"comfortable satisfaction"*, which is the minimum standard normally applied by the Court in matters involving unethical behaviours such as doping, match fixing and corruption (*CAS 2011/A/2625* and *CAS 2016/A/4501*). This is higher than the civil standard of 'balance of

probability', but lower than the criminal standard of 'proof beyond a reasonable doubt' (*CAS 2009/A/1920* and *CAS 2010/A/2172*).

c) Admissibility of evidence

98. Mr Del Nero made the following observations regarding the admissibility of various pieces of evidence relied on by FIFA.

i. Illegally obtained evidence / chain of custody issues

99. Mr Del Nero claimed that the Appealed Decision relied to a large extent on handwritten and typed notes allegedly drafted by Mr Leite ("Leite's Notes"), and purported found in a safe in the offices of his company Klefer Produções e Promoções Ltda. ("Klefer"), in Rio de Janeiro. Leite's Notes were allegedly collected on 27 May 2015 in a raid involving cooperation between the Brazilian Federal Prosecution Office and U.S. authorities.

100. Mr Del Nero argued that the cooperation procedure leading to the raid in question failed to respect the formalities stipulated under Article 105(I), lit. 'I' of the Brazilian Federal Constitution. Mr Del Nero claimed that before a search warrant could have been granted, the prosecution should have obtained an exequatur order from the Brazilian Superior Court of Justice. In light of this, Leite's Notes should be considered as illegally obtained evidence.

101. Regarding the prospect of admitting illegally obtained evidence in the present proceedings, Mr Del Nero acknowledged that under Swiss law, disciplinary matters within an association are in principle not governed by criminal, but only civil standards, save where Swiss procedural public policy comes into play (*CAS 2011/A/2425*, SFT decision ATF 119 II 271).

102. This public policy control – which stems from Article 6 of the ECHR and Article 29 of the FCSC, is intimately related to the principle of procedural fairness and aims at guaranteeing the right to an independent ruling on the conclusions and facts submitted to a tribunal (SFT decision ATF 127 III 429). Based on this premise, and Chapter 12 of the Swiss Act on Private International Law (PILA), the freedom enjoyed in arbitration – and *mutatis mutandis* in disciplinary proceedings – for the determination of procedural rules is quite significant, including with respect to the rules of evidence.

103. Whilst the FCE might establish that the admissibility of evidence may *prima facie* only be restricted in cases of violation of human dignity, it is not enough for FIFA only to respect its own rules (*CAS 2011/A/2425*). CAS and SFT jurisprudence generally determine that, in order to authorise whether or not to use illegally obtained evidence in private proceedings, the arbitral tribunal or disciplinary body shall assess whether an *"overriding private or public"* interest exists *vis-à-vis* the personality rights of the victim (*CAS 2009/A/1879*).

104. Mr Del Nero argued that circumstances justifying the use of illegally obtained evidence do not exist in this case. Rather, the private and public interests in finding the truth, as established by reliable, competent and credible evidence shall prevail in the present case. Evidence not meeting

that standard, especially when obtained in violation of law, cannot form the basis of any sanction, much less the draconian punishment meted out by FIFA.

105. Mr Del Nero noted that the chain of custody of Leite's Notes were proven to be defective and could not be guaranteed by the U.S. or Brazilian authorities in the raid – something which was acknowledged by the Judge in charge of the Jury Trial, after the testimony of Mr Jose Schettino (the chief prosecutor of the Federal Prosecution Service of Rio de Janeiro).

106. Mr Del Nero stated that after Mr Schettino's testimony at the Trial, Mr Marin's counsel raised two important concerns: (i) first, that Mr Schettino was unable to assure that Leite's Notes indeed came from Klefer's offices, and (ii) second, that a mere statement from the witness that *"these look like the documents"* collected in the raid is not sufficient to guarantee a proper and reliable chain of custody evidence.

107. Moreover, *"it is rather curious, not to say suspicious"* that notes allegedly drafted by Mr Leite, who in thousands of pages of evidence was never linked to CONMEBOL, contain information regarding bribes allegedly paid in connection with a contract with Datisa S.A. ("Datisa Contract") – as alleged by the Investigatory Chamber and accepted in the Appealed Decision. In that regard, Mr Del Nero claimed that paragraphs 182 and 189 of the FIFA EC Decision were *"grossly mistaken"* as Mr Leite never gave any testimony to any judicial authority or FIFA about the FIFA Gate scandal. There is *"not a single piece of evidence in the file"* proving that Mr Leite ever confirmed the authenticity or authorship of the relevant notes. The Panel should disregard any evidence submitted by FIFA that suggests otherwise.

ii. Untested evidence

108. Mr Del Nero cited (i) Article 6, para. 3, lit. d of ECHR, (ii) Article 155, par. 3, Swiss Code of Civil Procedure, (iii) Article 182, para. 3 of PILA, and (iv) Article 39, para. 1 of the FCE, to argue that he had *"the right to confront statements made by a witness in an adversarial manner"*. However, the Appealed Decision *"relies almost entirely on transcripts of testimonies of persons whom were not made available for examination by the FIFA Adjudicatory Chamber or FIFA AC"*, and cross-examination by Mr Del Nero's counsels. Mr Del Nero claimed that the witness evidence relied on by FIFA from *inter alia* Mr Burzaco and Mr Schettino, was collected from a foreign jurisdiction based on different standards and laws, and none of the evidence was ever confirmed or tested by or on behalf of any member of the FIFA EC, FIFA Appeals Committee and/or by Mr Del Nero.

109. Mr Del Nero noted that it *"is a common practice"* before the CAS to exclude or disregard written statements or transcripts of testimonies if the relevant witness or party fails to appear in front of the Panel to confirm its contents and to be examined/cross-examined.

110. Mr Del Nero argued that the *Bin Hamman* case (*CAS 2011/A/2625*) *"is very similar – not to say identical – to the present case"* in that FIFA is relying on circumstantial evidence, which the panel in the *Bin Hamman* case refused to take into account. Accordingly, Mr Del Nero claimed that the transcripts of testimonies used by the FIFA Investigatory Chamber must not be admitted to the present file, unless the witness was made available to cross-examine.

iii. Oral inquiries conducted by the Secretariat to the Investigatory Chamber

111. Mr Del Nero claimed that the FIFA Chief of Investigation (Ms Janet Katisya) assigned the role of conducting Mr Alexandre Silveira's (a former employee of the CBF's) interview to two members of the FIFA Secretariat – Mr Luis Villas-Boas Pires and Mr Octavian Bivolaru. Those two secretaries directly asked questions to Mr Silveira, expressing opinions and *"to a great extent"* substituted for the Chief of Investigation. In doing so, they acted beyond their powers (*ultra vires*) and consequently, this interview transcript should be disregarded and/or deemed void.

iv. The Minutes of CONMEBOL ExCo Meetings

112. Mr Del Nero argued that the minutes of the CONMEBOL Executive Committee ("ExCo") meetings which alleged his involvement in the conclusion of agreements with T&T Sports Marketing Ltd ("T&T") and Datisa for Copa Libertadores and Copa America, are unreliable and in any event do not prove his involvement in any schemes.

113. Mr Del Nero claimed that it was the common practice in Brazil/South America for signatories to a contract to initial every page, *"in order to ensure the reliability of formal records"*. Mr Del Nero argued that the minutes in question were not initialled and argued as much before the FIFA Appeals Committee. However, the FIFA Appeals Committee incorrectly refused to exclude these records on the basis that Mr Del Nero had failed to provide evidence of this 'common practice' of initialling (Mr Del Nero claimed there were at least 40 contracts submitted which evidenced this). In light of this, Mr Del Nero claimed that these minutes should be disregarded.

v. Torneos Ledgers

114. The Appealed Decision also refers to ledgers ("Torneos Ledgers") obtained from Torneos y Competencias ("Torneos") as corroboration of the testimony of Mr Burzaco and Mr Rodriguez. Mr Del Nero argued that the Torneos Ledgers do not implicate him at all, and in fact his name is not mentioned anywhere. Rather, there are several payments to someone referred to as the *"Brazilian"*. Mr Del Nero claimed there was no evidence whatsoever to suggest that name refers to him.

115. In particular, neither witness provided direct evidence of any payment to him, rather they merely assumed (i.e. guessed), that it was Mr Del Nero who would be receiving those payments because he was often seen with Mr Marin. Mr Del Nero submitted that FIFA's conclusion linking him to these ledger entries *"was based entirely on testimony that was speculative, uninformed, and completely unreliable"* and must be set aside.

d) Evaluation of the evidence

116. Mr Del Nero argued that FIFA failed to present evidence capable of establishing a causal link between his conduct and the elements forming the relevant offence. The evidence FIFA do rely on is *"rather circumstantial, vague, speculative and thus unreliable"*.

i. Reliability of the witnesses' testimonies

117. Mr Del Nero noted that the United States judicial system is adversarial, and founded on the notion that truth is best uncovered by having two opposing parties present their competing versions of events, supported by competent evidence, and allowing a factfinder to determine which side's position is more persuasive.

118. Unlike in other legal systems where judges/magistrates can act as independent investigators, the U.S. system relies on representatives of the parties to perform this function. Thus, *"zealous advocacy from both sides is a fundamental requirement if a legal proceeding is to uncover the truth and render a fair result. Absent such competing advocacy, the system does not function properly and any result derived from a process that fails to fully comply with this fundamental structure and procedure is not trustworthy. Stated otherwise, absent competent legal representation on both sides, no evidence proffered during a U.S. legal proceeding may be relied on, and no sanction based on such evidence may be imposed"*.

119. In addition to the right to competent counsel, the U.S. justice system also requires that criminal defendants be afforded the right to confront their accusers. No evidence obtained in violation of these rights can be considered trustworthy or reliable, it is instead the uncorroborated and untested "say-so" of persons, who are incentivised through plea bargains to accuse others of wrongdoing – even when those parties are innocent.

120. Whilst Mr Del Nero acknowledged that FIFA procedural rules and Swiss arbitration law are not subject to the requirements of the U.S. Constitution, he nevertheless argued that if the evidence is untrustworthy or inadmissible in the U.S., then it is *a fortiori* even less trustworthy and competent in a collateral proceeding taking place in another jurisdiction.

ii. Reliability of co-operating witnesses

121. Mr Del Nero noted that the evidence relied on by FIFA was largely given by two cooperating witnesses, Mr Alejandro Burzaco (CEO of Torneos) and Mr Eladio Rodriguez (employee of Torneos), and he submitted that neither provided credible or competent evidence to support any wrongdoing by him.

122. Mr Del Nero stated *"it cannot be disputed"* that the witnesses did not testify truthfully in the Jury Trial. For example, Mr Burzaco testified that he met with Mr Del Nero in Buenos Aires in April and June 2012, but was later contradicted by documentary evidence *"demonstrating conclusively"* that Mr Del Nero was not in Argentina at that time. Another witness, Mr Jose Hawilla (Owner of Traffic Sports), *"admitted outright that he lied"* to the Federal Bureau of Investigation (FBI) and government officials numerous times. Taken together, these examples demonstrate that government witnesses repeatedly lied regarding important matters, even when testifying under oath. Mr Del Nero submitted that *"FIFA never explained why it credited testimony given by witnesses that either admitted or were proven to be serial liars"*.

123. Specifically, Mr Del Nero claimed that Mr Burzaco and Mr Rodriguez *"had ample motivation to extrapolate, embellish, and otherwise not testify truthfully and accurately"*. Both men entered into agreements with prosecutors. Mr Burzaco was indicted for conspiracy to commit racketeering,

money laundering and wire fraud. He pleaded guilty to those changes, and was facing 60 years in prison. Mr Del Nero claimed it is *"extremely common in criminal prosecutions in the United States that a prosecutor will offer leniency to a witness who stands to serve substantial prison time if that witness agrees to implicate others. The prosecutor will follow through on those offers if, and only if, the witness actually delivers evidence to incriminate others. This incentivizes witnesses to falsely implicate others"*. Similarly, the U.S. government promised not to bring charges against Mr Rodriguez at all if he agreed to testify against others in criminal proceedings. In other words, Mr Rodriguez was given a free pass so long as he helped establish the guilt of others.

124. Mr Del Nero claimed that it is well known in the U.S. that these cooperation agreements encourage witnesses to embellish facts, 'fill in the blanks' and even outright lie, in order to benefit themselves. According to Mr Del Nero, the principle check on this dynamic is the ability to cross-examine cooperating witnesses, including by impeaching them and presenting countervailing evidence in response.

125. Given the charges they were facing, and the potential for the witnesses to avoid prison altogether and/or allow their families to make a home in the United States, it is no exaggeration to say that it was virtually a matter of life or death for FIFA's two primary witnesses. Therefore, FIFA's conclusion that these witnesses had no apparent motivation to testify untruthfully *"ignores sense, legal precedent and human nature"*.

iii. The cooperating witnesses lacked personal knowledge of any illegal payments to Mr Del Nero

126. Mr Del Nero also claimed that Mr Burzaco's and Mr Rodriguez's testimony lacked any first person knowledge regarding him. Mr Burzaco simply grouped Mr Del Nero together with Mr Marin on the basis they were often together, and even conceded that he did not know whether Mr Del Nero actually held a position with CONMEBOL. Mr Burzaco never personally witnessed Mr Del Nero doing anything wrong or improper, or made any payment to Mr Del Nero.

127. Mr Rodriguez's testimony was similarly speculative. Mr Rodriguez could not specify whether Mr Marin or Mr Del Nero was Mr Teixeira's successor as President of the CBF, and apparently included Mr Del Nero as one of the alleged recipients of bribes paid to Mr Marin because Mr Del Nero and Mr Marin *"were always together"*. Mr Del Nero submitted that this was *"classic guilt by association, a logical fallacy routinely rejected by U.S. courts because it is fundamentally incapable of proving by any standard that one person (here, Mr Del Nero) is guilty for crimes committed by or on behalf of another (Mr Marin)"*. Indeed, Mr Rodriguez claimed that all his testimony regarding alleged bribes came from what he claims other people told him.

128. Mr Del Nero submitted that bodies such as the FIFA EC and FIFA Appeals Committee should not take decisions based on unfounded and circumstantial evidence, as this is contrary to basic principles of justice, Swiss law and due process.

iv. The reliability of the cooperating witnesses

129. By November 2017, Mr Del Nero was arguably one of the only 'survivors' of the FIFA- Gate scandal, and in those circumstances, *"FIFA cannot deny that Mr Del Nero had a bounty on his head"*. In any event, Mr Del Nero submitted that Mr Burzaco, Mr Rodriguez and Mr Hawilla were not only criminals, but frequent liars.

130. Mr Hawilla admitted that he was repeatedly dishonest about the very same transactions and subject matter underlying FIFA's disciplinary proceedings and that he actively attempted to obstruct justice while deceiving the government about his illicit activities. Against that background, nothing Mr Hawilla said could be credited.

131. Mr Burzaco alleged to have attended a meeting in Paraguay in October 2014 with Mr Napout and Mr Del Nero, and asserted *inter alia* that Mr Del Nero had suggested an increase in the bribes payable to Mr Napout due to his position as CONMEBOL President. However, in January 2018, there was a declaration from the Ministry of the Interior and the Immigration Services of Paraguay that Mr Burzaco was not present in Paraguay in October or even November 2014. Mr Burzaco was not in Paraguay when he claims to have met Mr Del Nero and Mr Napout.

132. Similarly, Mr Burzaco alleged that Mr Del Nero participated in two meetings in April and June 2012 in Argentina, where bribes in connection with Copa Libertadores, Copa Sudamericana and Recopa Sudamericana were allegedly solicited and agreed. However, Mr Del Nero's passports do not contain any stamps for Argentina anywhere close to the two months specified in Mr Burzaco's testimony. In addition, in the event FIFA argues that Brazilian citizens do not need passport stamps to visit Argentina, Mr Del Nero obtained a declaration from the Brazilian Federal Police attesting that he did not fly to Argentina in April or June 2012. Therefore, it was clear that Mr Burzaco repeatedly lied about meeting Mr Del Nero, and his fabricated testimony should not be given any weight at all.

133. Mr Del Nero argued that Mr Burzaco's testimony significantly resembles the situation of Mr Jack Warner's in the *Bin Hamman* case ((*CAS 2011/A/2625*)). According to the Panel in that case, a *"large part of* [FIFA's] *case turns on evidence in the form of information or statements provided by Mr Jack Warner. He* [was] *plainly a central figure in this case* (…)*"* and therefore, if *"taken out of the equation, the record of evidence in relation to* [FIFA's] *case* [was] *founded on extremely limited sources, to put the point generously"*.

134. The panel in the *Bin Hamman* case found Mr Warner to be an unreliable witness, and similarly, Mr Burzaco clearly has *"a detached relationship with the truth"* and should be considered by this Panel as an unreliable witness.

135. Moreover, Mr Rodriguez's testimony was based solely on what he heard from Mr Burzaco (who was Mr Rodriguez's boss at Torneos). Accordingly, his evidence should also be viewed *"with extreme caution and given reduced evidentiary weight"*. Even if that was not the case, Mr Del Nero noted that Mr Rodriguez's testimony was that they provided money to Mr Marin, and then assumed

that Mr Marin gave money to Mr Del Nero. There was no direct testimony or other evidence showing that Mr Marin ever shared part of his payment with Mr Del Nero.

136. Mr Del Nero also noted that Mr Burga was acquitted by a jury in the Trial due to a lack of evidence, and argued that he was in a similar position to Mr Burga. *"Despite years of investigation, millions of pages of documents, and the considerable power of the DOJ, prosecutors have never located any bank statements, wire transfers, cashed checks, or other independent, documentary evidence to support its witnesses' speculation that he received illicit payments through Mr Marin. That lack of corroboration means that the government's witnesses' testimony cannot be taken at face value as it relates to Mr Del Nero".*

v. Transcripts of witnesses' testimonies

137. Aside from all the above, Mr Del Nero argued that the transcripts of witnesses' evidence should be given low probative value, if any, because transcripts eliminate the assessment of core elements of an oral statement, such as pause, emphasis, intonation, tone of voice, hesitation and stuttering. Many witnesses also relied on translators.

138. Lastly, Mr Del Nero argued that what any witness may have testified to under oath in the U.S. is not material for the present case, as nothing in the law applicable to the present proceedings (FCE and Swiss law) gives higher probative value or a special status to this type of evidence, especially not in comparison to testimony collected in a CAS hearing under the sanction of perjury in Switzerland. In other words, testimony under oath in the U.S. under different laws *"gives no increased assurance with respect to the truthfulness or reliability of its contents".*

4. Merits of the Appeal

139. Mr Del Nero submitted the following in response to the merits of the Appeal.

a) Elements of a bribery infringement under Article 21 of the FCE

140. Mr Del Nero submitted that Article 21 of the FCE could be broken down into six parts:

- **The offender**: a person bound by the FCE;
- **The agreement**: the act of the offender (*"offer, promise, give or accept"*);
- **The bribe**: the personal or undue pecuniary or other advantage offered, promised or given to or accepted by the offender;
- **The counterpart**: anyone within or outside FIFA;
- **The advantage**: the consideration given by the offender in exchange for the bribe (*"obtain or retain business or any other improper advantage"*);

- **The intermediary/related party**: where the offender is accused of having received a bribe through an 'intermediary' or 'related party', a subjective and objective link between the offender and his/her intermediary/related party must also be proven.

141. For the reasons outlined below Mr Del Nero claimed that an analysis of the second, fifth and sixth factors demonstrates that he has not infringed the FCE.

b) Mr Del Nero's functions and powers within the CBF

142. Mr Del Nero did not deny holding a position as CBF Vice-President, but noted that he was one of five such Vice-Presidents. Mr Del Nero also noted that under CBF Statutes, it was the CBF President that had exclusive powers to sign agreements on behalf of the entity. It was only after he took office as President in April 2015 that this exclusive power and responsibility was modified in the CBF Statutes. Mr Del Nero noted that as of the 2015 edition of the CBF Statutes, any contract to be executed by the entity would have to be approved and signed not only by the President, but also the Chief Financial Officer, the Treasury Officer or one Statutory Director.

143. Accordingly, any allegations that Mr Del Nero contracted and/or agreed any document on behalf of the CBF before he took office in April 2015 *"is crassly erroneous"* and should be disregarded by the Panel. In addition, the mere fact that Mr Del Nero replied to some emails from CBF contractors cannot be interpreted as him bypassing Mr Marin, sharing the CBF Presidency or acting as a *de facto* President. The same logic applied to any orders given by Mr Del Nero to CBF employees.

c) Mr Del Nero's functions and powers within CONMEBOL

144. Mr Del Nero strongly rejected FIFA's assertion that he participated in the negotiation/approval and/or ratification of the Copa Libertadores and Copa America contracts (by virtue of his signature of various meeting minutes) – thereby implicating him in the bribery schemes. Mr Marin was present in all the relevant meetings, and had the final say in any decision by the CBF.

145. Conversely, Mr Del Nero claimed that his presence in these meetings was *"entirely passive"*, linked to his position within the FIFA ExCo. He attended the CONMEBOL ExCo meetings mostly to receive instructions and pass-on information about his activities. Although he had the right to vote during its deliberations, he had no active role in the negotiation or approval of any contracts. Mr Del Nero also claimed that he did not sign any CONMEBOL contracts on behalf of the CBF, and it was Mr Marin who did so.

d) The relationship between Mr Del Nero and his alleged 'related parties'

i. In general

146. Mr Del Nero noted that FIFA had access to documents from various sources: foreign judicial proceedings, banks, personal and financial data etc. Despite this, FIFA was not able to produce

"a single piece of evidence of any payments being made or any consideration being received by Mr Del Nero in exchange for his alleged wrongdoings". Therefore, in order to *"fill in the blanks and satisfy its own narrative"* regarding Mr Del Nero, FIFA points the finger at alleged intermediaries or related parties of his.

147. Mr Del Nero notes that for the purposes of the FCE, *"intermediaries or related parties"* are, *inter alia*, *"anyone else, whether by blood or otherwise, with whom the individual has a relationship akin to a family relationship"*. FIFA therefore argued that Mr Del Nero had a very close relationship, *"akin to a family relationship"* with Mr Abrahão and Mr Leite.

ii. Mr Abrahão

148. Mr Del Nero submitted that Group Águia has provided services to the CBF since at least 1993, especially in the transportation of football teams that participate in the Brazilian National Championship. Mr Abrahão is a major shareholder and a director of Group Águia, and has worked in football for over 30 years, so it was unsurprising that he developed relationships with officials from FIFA, the International Olympic Committee (IOC) and the CBF. The mere fact that Mr Del Nero had a relationship with Mr Abrahão did not mean that they were *"like a family"* or that he was the beneficiary of payments made to Mr Abrahão's companies.

149. In particular, Mr Del Nero argued that (i) the friendship between Mr Del Nero's and Mr Abrahão's ex-girlfriends, (ii) the fact that Mr Del Nero once travelled in Mr Abrahão's jet, (iii) the fact that Mr Abrahão once assisted the CBF in the purchase of an airplane; and (iv) the fact that Mr Del Nero once purchased an apartment from Mr Abrahão's son, cannot be construed as a 'family-like' relationship between the two, much less that Mr Abrahão would be an intermediary or related party to Mr Del Nero in the sense of Article 21 of the FCE.

150. Moreover, the Final Report and the Appealed Decision failed to evidence any transactions between the two. In any event, Mr Del Nero strongly denied being *"an important business partner"* of Mr Abrahão.

151. Mr Del Nero noted that the dates in which Mr Abrahão's companies received the alleged bribes in the present file were June 2013, July 2013, February 2014 and May 2014. Given that timeline, it made no sense that Mr Del Nero had not received a single penny of this alleged money by April 2015 (when the FIFA-Gate scandal was unveiled). The Appealed Decision *"clearly exaggerates"* in the interpretation of every single allegation and evidence against Mr Del Nero with the sole objective of questioning his reputation and finding a way to link him to the alleged bribes. In the absence of proof to the contrary, the Panel could not exclude the possibility that the alleged bribes were in fact for the benefit of any of the many other individuals involved in the FIFA-Gate scandal.

iii. Mr Leite

152. Mr Leite is a major shareholder of Klefer, a marketing company which has entered into a few contracts with the CBF since 2009 for the exploitation of commercial rights, TV rights and

friendly matches. Prior to that, Mr Leite was the President of the Brazilian club Clube de Regatas do Flamengo. Although Mr Del Nero and Mr Leite may have been at same events hosted by the CBF, they only had an *"institutional and respectful relationship"* and nothing more.

153. Further, the Final Report does not even indicate that Mr Leite was an intermediary for the receipt of any bribes on behalf of Mr Del Nero. In any case, this relationship cannot be artificially construed as proof that Mr Del Nero ever requested or received illicit payments to or from Mr Leite – or that Mr Leite was somehow an intermediary or related party to Mr Del Nero in the sense of Article 21 of the FCE.

e) Charges related to Copa Libertadores

154. According to the Appealed Decision, there were two main reasons for Mr Del Nero to receive bribes in connection with Copa Libertadores: (i) to give *"support"* to several existing contracts between T&T and CONMEBOL, which involved the exclusive worldwide broadcasting rights of Copa Libertadores, Copa Sudamericana and Recopa Sudamericana in the period between 2000 and 2020; and second, to approve the extension of T&T's Copa Libertadores contract until 2022.

155. Based on the testimonies of Mr Burzaco and Mr Rodriguez, the Appealed Decision determined that the bribes were agreed in two supposed meetings taking place in April and June 2012 in Buenos Aires (Argentina). Mr Del Nero claimed that it was *"astonishing"* FIFA concluded that he was in attendance at those meetings, given the evidence to the contrary. Firstly, Mr Del Nero noted that his alleged participation in these meetings were based exclusively on the testimony of Mr Burzaco, a self-confessed criminal and cooperating witness in the Jury Trial.

156. Mr Del Nero argued that Mr Burzaco's allegations can be rebutted in these proceedings by *"substantial documentary evidence"*, which prove that he did not catch any flights to Argentina during the period in question. Mr Del Nero stated that the FIFA Adjudicatory Chamber's and FIFA Appeals Committee's conclusions that he may have simply driven all the way to Buenos Aires for over 30 hours to avoid stamping his passport, was untenable.

157. Regarding the CONMEBOL ExCo meetings of 24 October and 20 December 2012, whilst he admitted to participating in these meetings, Mr Del Nero claimed that there was no evidence (other than from allegations from 'serial liars') that he violated his duties as an official.

158. Mr Del Nero also noted that there was nothing he could do alone, either in favour or against T&T within such a short period of time at the CONMEBOL ExCo. The same also appears to be true in relation to Mr Burga, who was present in the exact same meetings and was acquitted in the Jury Trial. Further, the Appealed Decision failed to explain exactly what it purports to be the *"support"* Mr Del Nero gave to contracts that already existed, had been approved and more signed several years before he joined the CONMEBOL ExCo.

159. The evidence on file also failed to demonstrate any particular favour made by Mr Del Nero to conclude the new contract for Copa Libertadores. Mr Del Nero submitted that he did not participate in the negotiations of such contracts and indeed, was not even aware of their

contents. He also denied attending any meetings with Mr Burzaco and other officials to discuss bribes (particularly in Asunción in December 2012 and October 2014 and London in May 2013). In relation to the supposed meeting of October 2014, Mr Burzaco lied about his own whereabouts, as he did not go to Paraguay that month.

160. Regarding the ledgers drafted by Mr Rodriguez, there was no reference to Mr Del Nero or any of his bank accounts. The fact that Mr Rodriguez may have chosen to label some payments under the word *"Brazilian"* did not mean that it was a reference to Mr Del Nero. It was contradictory of Mr Rodriguez to claim that this reference related to payments for both Mr Del Nero and Mr Marin, when it stated 'Brazilian' and not 'Brazilians'. Indeed, Mr Burzaco sought to argue in the Jury Trial that the term 'Brazilian' was the same originally used to refer to Mr Teixeira, being thereafter maintained for the *"two persons replacing"* him. Mr Del Nero claimed that this was simply not credible.

161. Regarding the emails exchanged between Mr Burzaco and Mr Rodriguez on 29 May 2013, they do not confirm or prove that Mr Del Nero ever solicited or complained about delays in any bribe payments. The Appealed Decision concluded that Mr Del Nero and Mr Marin received a total of USD 2.4 million in bribes related to Copa America, but this was incorrect. The Final Report and Appealed Decision alleged that Mr Del Nero *"used techniques to conceal the nature, source, location, ownership or control of the bribe payments"* but failed to evidence these alleged techniques.

162. In summary, the U.S. authorities and FIFA have not been able to present a single piece of evidence to demonstrate that Mr Del Nero received a bribe either in cash or into his bank account. He argued that he should therefore be acquitted from all charges in connection with Copa Libertadores, Copa Sudamericana and Recopa Sudamericana.

f) Charges related to Copa America

163. Mr Del Nero noted that a contract was signed on 25 May 2013 in London between CONMEBOL and Datisa (which was formed by Traffic, Full Play Group S.A. and Torneos), but stated that whilst he was in London at the time he did not participate in the negotiation and conclusion of the contract. Mr Del Nero submitted that the Datisa Contract was instead signed by 12 other CONMEBOL officials, and stated that there was no evidence in the file that he ever solicited, accepted or received any money or undue advantage as a result of this agreement. So, the fact that he signed the minutes of the subsequent CONMEBOL ExCo meeting on 29 May 2013 adds nothing to FIFA's case. Mr Del Nero noted that Mr Burga indeed signed the Datisa Contract and was still acquitted in the Trial.

164. Further, Mr Del Nero claimed that the ledgers by Mr Rodriguez were unreliable evidence. The supposed beneficiary of the alleged Copa America payment was identified by Mr Rodriguez as the 'Brazilian'. In this regard, Mr Del Nero noted that the only direct evidence related to payments under the 'Brazilian' nickname related to Mr Marin and Firelli International Ltd (owned by Mr Marin), whereas no such direct evidence was presented or found to incriminate him. Similarly, Mr Del Nero found it *"rather intriguing"* how Leite's Notes could contain information about schemes involving CONMEBOL, given that in several weeks of testimonies no link was ever made between him and CONMEBOL.

165. Mr Del Nero stated that he never requested, accepted or received bribes in relation to Copa America. Even if Mr Abrahão or his companies received any such payment, that did not mean that Mr Del Nero was involved in those schemes. FIFA *"clearly failed to meet its burden of proving that Mr Abrahão and Mr Del Nero exchanged or were planning to exchange any undue consideration"*. Rather, it appeared that the payments which the Appealed Decision claimed to be bribes for Mr Del Nero were in fact aimed at benefitting Mr Abrahão, Mr Marin, Mr Teixeira, the Datisa partners, or one of the 12 CONMEBOL executives who signed the Datisa Contract.

166. For the above reasons, Mr Del Nero requested the Panel to acquit him from all charges related to Copa America.

g) Charges related to Copa do Brasil

167. Mr Del Nero argued that the arguments in the Final Report and Appealed Decision with respect to the Copa do Brasil contract between the CBF and Klefer ("Copa Do Brasil Contract") were *"extremely vague and purely speculative"* and failed to prove any wrongdoing by him. In that regard, Mr Del Nero claimed that the testimony by Mr Hawilla at the Trial was *"plagued by lies, assumptions and hearsay"*. Any alleged evidence regarding his involvement should be considered as pure speculation or circumstantial evidence.

168. Mr Del Nero noted that the Appealed Decision concluded that alleged payments were aimed at guaranteeing that Mr Marin and Mr Del Nero (as newcomers to the CBF) would not challenge, cancel or renegotiate the contract signed in December 2011 with Klefer. However, the Appealed Decision failed to present any reason for Mr Leite or Mr Hawilla to actually fear such a possibility.

169. Moreover, if the then CBF President (Mr Teixeira) signed the Copa do Brasil Contract after approval from the entity's legal department, why would Mr Leite then need the 'services' of Mr Del Nero? Further, how could Mr Del Nero threaten the existence of Klefer's contract if the CBF legal department needed to be consulted prior to any decision?

170. Mr Del Nero rejected the wiretaps and recordings produced in the Final Report as *"unclear, ambiguous and incomplete"* and stated that they should be ignored by the Panel. He also noted that no copy of the alleged phone conversation between Mr Hawilla and Mr Leite on 28 March 2014 was produced as evidence by FIFA. Therefore, the Appealed Decision relied entirely on *"a farfetched interpretation"* of the transcript of Mr Hawilla's testimony. The Investigatory Chamber failed to meet its burden of proof in this regard, and all quotes should be disregarded. Even if that was not the case, the alleged wiretaps were inconsistent with the Final Report.

171. Mr Del Nero stated that the mere fact that Mr Marin mentioned Mr Del Nero's name in a single wiretapped meeting with Mr Hawilla does not prove, not even under a balance of probabilities – let alone under the comfortable satisfaction standard – that Mr Del Nero has ever negotiated, requested, accepted or received bribes.

172. With respect to Leite's Notes, Mr Del Nero disputed the meaning of "MPM" which according to the Appealed Decision stood for *"Marco Polo and Marin"*. In a blog post on 23 March 2017,

Mr Leite alluded to MPM standing for *"Meta por Mérito"* (translated to *"Objective for Merit"*). Mr Del Nero also submitted a letter signed by Mr Leite on behalf of Klefer, in which the company declares having always acted in an ethical manner in line with the principle of good faith, and to have never committed any illegal act in dealing with the CBF.

173. In summary, Mr Del Nero stated that the Investigatory Chamber failed to meet its burden of proving that he ever solicited, accepted or received any bribes in connection with the Copa Do Brasil Contract. He requested the Panel to acquit him from all charges in connection with this.

h) Other provisions allegedly violated

i. Article 13 of the FCE (General Rules of Conduct)

174. Mr Del Nero denied infringing Article 13 of the FCE and stated *inter alia* that he has *"always respected the applicable laws and regulations, as well as FIFA's regulatory framework, having always showed commitment to an ethical attitude, behaving in a dignified manner and acting with complete credibility and integrity, never abusing his positions in any way, particularly not taking advantage of his position for private aims or gains"*.

ii. Article 15 of the FCE (Loyalty)

175. Mr Del Nero denied infringing Article 15 of the FCE, citing the *"absence of any concrete evidence"* by FIFA in this regard. He stated that he has always respected FIFA's values and his fiduciary duty towards FIFA, the confederations and its member associations.

iii. Article 19 of the FCE (Conflicts of Interest)

176. Mr Del Nero denied infringing Article 19 of the FCE, claiming that he avoided any type of situation that could lead to conflicts of interest.

iv. Article 20 of the FCE (Offering and Accepting Gifts and Other Benefits)

177. Mr Del Nero denied infringing Article 20 of the FCE, noting that in order for such a violation to exist the person in question must have offered, promised or accepted *"gifts"* or other *"advantages"* – commonly defined in this context as non-cash benefits or benefits in the form of goods. Mr Del Nero stated that there is no allegation that he ever accepted gifts or goods. He is only accused of receiving bribes in the form of money, which he strongly denied.

i) Subsidiarily: The determination of any possible sanction

178. In the event that he is found guilty of violating any of the provisions above, Mr Del Nero submitted the considerations below regarding the determination of any possible sanction against him.

i. The principle of 'Lex Specialis Derogat Legi Generali'

179. Mr Del Nero stated that all the infringements he was found guilty of were based *"on the exact same conduct that had already been sanctioned"* under Article 21 of the FCE. Neither decisions by FIFA refer to any separate conduct in finding him guilty under Articles 13, 15, 19 and 20 of the FCE. Both automatically derive these violations from the infringement of Article 21.

180. Mr Del Nero noted that *"where a specific provision entirely covers the incriminated conduct, the accused may not be sanctioned again for that same conduct under a more general provision* […]*"* (*CAS 2017/A/5003*, which was corroborated by *TAS 2016/A/4474*).

181. In light of the above, if Mr Del Nero was found guilty of violating a specific provision of the FCE, he submitted that he should not simultaneously also be found guilty of violating a more general provision pursuant to the *lex specialis derogat legi generali* principle.

ii. The determination of any possible sanction

182. Pursuant to Article 9, para. 1 of the FCE, the sanction imposed should take into account all relevant factors in the case, including the offender's assistance and cooperation, the motive, the circumstances and the degree of the offender's guilt. Mr Del Nero noted that the Appealed Decision has imposed the highest and most severe sanction applicable for the infringements he is alleged to have committed – i.e. a life ban from football activity and a fine of CHF 1 million.

183. In order to justify this, the main reasons put forward in the FIFA EC Decision were:

- Mr Del Nero was the President of the CBF and thus the highest ranking official of one of the most prominent FIFA member associations. He was also a former Vice-President of the CBF and a member of the FIFA ExCo and CONMEBOL ExCo;
- The amount of the alleged bribes were significantly high;
- Copa Libertadores, Copa Sudamericana, Recopa Sudamericana and Copa America are very relevant competitions within Brazil and South America;
- Offences of Article 21 of the FCE are one of the most serious offences under the FCE;
- Mr Del Nero's actions were solely based on personal motives; and
- Mr Del Nero's actions caused significant reputational damage to football and FIFA in particular.

184. Mr Del Nero submitted that the Appealed Decision failed to observe the principle of proportionality as well as its own case law when determining the sanctions applicable in the present case.

185. In the cases of Mr Blatter and Mr Platini, the FIFA EC and FIFA Appeals Committee took a *"much more lenient approach"*, initially imposing an 8-year ban which was reduced to 6 years. In the case of Mr Platini, the CAS reduced it further to 4 years. Numerous other football officials have been involved in ethics related offences (such as Messrs. Jérôme Valcke, Harold Mayne-Nicholls, Ahongalu Fusimalohi, Amos Adamu, Amadou Diakité, Moog Joon Chung, Wolfgang Niersbach), but none of them received a life ban. Indeed, Mr Fusimalohi (*CAS 2011/A/2425*), Mr Adamu (*CAS 2011/A/2426*) and Mr Diakité (*CAS 2011/A/2433*) were former FIFA ExCo members who were found guilty of bribery infringements *"but were only banned for a couple of years each"*.

186. The Appealed Decision also failed to take into account mitigating factors. Under Article 9, the degree of an offender's assistance and cooperation was to be taken into account. In this context, even though Mr Del Nero was refused access to the jurisprudence of the FIFA EC, the FIFA Appeals Committee and the CAS in matters relating to the application of Articles 41 and 42 of the FCE, *"he is absolutely convinced that his assistance, cooperation and behaviour during the present proceedings has been remarkable and unprecedented"*.

187. Mr Del Nero stated that he had been cooperating with FIFA since 2015 to clarify any doubts about his activities, and provided documents to FIFA that went far beyond his duty of cooperation under Article 41 of the FCE (including full access to his bank accounts). Despite this, Mr Del Nero claimed that he was treated unfairly by the FIFA Appeals Committee, which did not allow him to testify and to hear his witnesses by video conference, while the Investigatory Chamber was simply *"released"* from calling its witnesses for the hearing of 25 April 2018.

188. Mr Del Nero also cited other alleged unfair procedural decisions by the FIFA EC and FIFA Appeals Committee, such as providing him with a three-week time limit to respond to FIFA's *"fishing expedition"* which was carried out for over two and a half years.

189. The Panel was also invited to consider Mr Del Nero's advanced age (78) as well as the valuable activities and services he has rendered in almost five decades of service to football.

190. In that context, Mr Del Nero submitted that any sanction should be limited to a warning, reprimand and/or fine pursuant to Article 9 et seq. of the FCE.

5. Mr Del Nero's second submissions

191. In his second written submissions, Mr Del Nero largely reiterated similar arguments to his first written submissions, and also stated the following:

a) Procedural fairness in disciplinary proceedings

192. It does not suffice that the tribunal and its judges act independently and impartially, they must also appear to act as such – *"justice must not only be done, it must also be seen to be done"* (R *v. Sussex ex parte McCarthy* [1924] 1 KB 256).

b) The lack of independence of the members and secretaries of FIFA's judicial bodies

193. Mr Del Nero claimed that FIFA openly admitted in its written submissions that members of the FIFA EC and the FIFA Appeals Committee in charge of his case relied on their secretariats to *"have certain documents translated to them"*. Mr Del Nero submitted that this demonstrated that the findings in the Final Report and Appealed Decision were *"simply spoon-fed"* by the FIFA Administration to the FIFA EC and FIFA Appeals Committee, *"whose only task was literally to undersign whatever work they were requested to"*.

194. Mr Del Nero also noted that the time (or lack thereof) spent by the Chairman of the Adjudicatory Chamber to review the request for provisional measures and the Final Report (2 days and 1 day respectively) was clearly not sufficient. Had this scrutiny been made by independent eyes, *"the results would have been completely different"*.

195. Mr Del Nero also noted that FIFA admitted to rotating its secretaries among its judicial bodies, and gave no legal justification for doing so. FIFA claiming that this does not influence the outcome of the present case is *"cynical and wilfully ignores common sense, human nature and the hierarchy"* among employees within FIFA's Ethics Department. Given that various secretariat would work on different, but connected FIFA-Gate cases, no independent or fair judgement could have taken place. Mr Del Nero noted that the ability of FIFA's judicial bodies to act independently from the FIFA administration has *"long been publicly questioned by the press"*, as well as by the Council of Europe and by former Chairpersons of the Investigatory Chamber and Adjudicatory Chamber.

196. For these reasons, Mr Del Nero submitted that the matter should be referred back to FIFA, with an order for the completion of the Final Report and the referral of the case to different members and secretaries before the FIFA EC and FIFA Appeals Committee.

c) The nature of the present proceedings

197. Mr Del Nero acknowledged the longstanding jurisprudence of the CAS that ethics related proceedings before a sports federation are of a civil nature, and do not leave room for the application of criminal law principles. Any such references in his written submissions were *"either supported by the case-law of the ECtHR, the SFT and CAS, based on the FCE, or made by analogy"*.

d) The burden and standard of proof

198. Mr Del Nero submitted that:

> *"Where serious difficulties may exist for a party to discharge its burden of proof, the Appellant acknowledges the content and effects of the Beweisnotstand principle under Swiss law. In this respect, whenever a party needs to prove negative facts or depends on information that is out of its control, procedural fairness requires the contesting party to substantiate and explain in detail why it deems the facts submitted by the alleging party to be wrong (see CAS 2011/A/2384 & 2386, para. 102 et seq.)"*.

199. Mr Del Nero stated that this did not mean a shift in the burden of proof, but a duty of cooperation for the contesting party. He further stated that be it under the *Beweinsnotstand* or the FCE, it *"is beyond doubt that Mr. Del Nero employed a commendable and unprecedented level of cooperation with FIFA. The other way around, the least FIFA was expected to do was to make its witnesses available for cross-examination, which it did not, in spite of Mr. Del Nero's repeated requests and protests"*.

200. In light of all the above, to the extent the *Beweinsnotstand* principle is deemed applicable to the present matter, Mr Del Nero submitted that it shall be interpreted to his benefit, particularly with respect to negative facts.

e) Admissibility of evidence

i. Illegally obtained evidence / chain of custody issues

201. Mr Del Nero submitted that Mr Leite's alleged notes were only admitted in the U.S. proceedings because the relevant Court failed to account for the inconsistencies detailed in the Appeal Brief between the content of the notes in relation to (i) Mr Del Nero and (ii) the fact that Mr Leite was never alleged to have any "role" in the Copa Libertadores and Copa America schemes. In light of this, regardless of whether these notes were illegally obtained Mr Del Nero submitted that the deficiency in their chain of custody was a sufficient reason for the Panel to exclude them from the present file or, otherwise, disregard them.

ii. Untested evidence

202. Mr Del Nero rejected FIFA's assertion that evidence from the Jury Trial had already been evaluated. Mr Del Nero stated that:

> *"*[…] *the evidence in question was obtained from a Jury Trial involving third-parties only (i.e. Messrs. Marin, Napout and Burga) and therefore could not, under any standards or before any courts of law, be held against Mr. Del Nero. If untested, this evidence is not only worthless in this arbitration, but in any other proceeding, be it of a civil or of a criminal nature. Should Mr. Del Nero be on trial in the United States (quod non), the DOJ would have to retake all this evidence again, including witness and expert evidence, specifically against him.*
>
> *In this regard, the fact that Mr. Del Nero was able to comment, before the FIFA EC and the FIFA AC, on the witness statements produced in relation to Messrs. Marin, Napout and Burga is irrelevant when it comes to his own individual conduct, since he was not able to cross-examine the relevant witnesses"*.

203. Mr Del Nero stated that FIFA's interpretation of which of these transcripts should be admitted and treated as documentary evidence, not testimonies, is *"absolutely flawed and contradictory (venire contra factum proprium)"*. Mr Del Nero also rejected the relevance and applicability of the CAS precedents cited by FIFA in this regard (*CAS 2010/A/2266* and *CAS 2016/A/4501*). Mr Del Nero noted that according to CAS jurisprudence, even where a party files detailed witness statements, it is still obliged to make its witnesses available for cross-examination.

204. Mr Del Nero argued that the fact a witness is not an official under FIFA's umbrella or entered into a plea bargaining or non-prosecution agreement with the DOJ *"is absolutely irrelevant, and*

admitting otherwise would render the system of production of witness evidence in CAS arbitration impracticable and ineffective". In light of this, to the extent FIFA wished to rely on any testimony or expert report, Mr Del Nero stated that he must be provided with such testimony or report, and be afforded the opportunity to cross-examine the relevant witness or expert in a hearing, otherwise they shall be excluded from the present file.

f) Evaluation of the evidence

205. In the event the Panel decided to admit the transcripts of the Jury Trial to the present file, Mr Del Nero submitted that FIFA misunderstands, or wilfully misconstrues, the problems created by the lack of cross-examination. The key issue in that is that lack of cross-examination by Mr Del Nero's representatives renders the evidence untrustworthy under any standards of law. For instance, according to U.S. law, this evidence could not be used in any proceeding, civil or criminal, for any purpose whatsoever. If, as here, the laws of the forum where the evidence was generated prohibit its use for any purpose whatsoever, that should be very persuasive authority that the Panel should not deem it trustworthy or admissible in this arbitration.

206. FIFA's reliance on the threat of perjury being a sufficient check to the reliability of the witness testimony is unpersuasive given that perjury requires a showing of a *"knowing, intentional lie, which is an extremely high standard"*. Witnesses can easily avoid liability by claiming that they, *inter alia*, misspoke. The witnesses all had motivations to lie, and testified about issues that they had no personal knowledge of. Moreover, despite an extensive search of Mr Del Nero's entire life, no evidence was found about the alleged bribes ever being received by Mr Del Nero.

i. The Asuncion meeting

207. Mr Del Nero rejected FIFA's arguments regarding Mr Burzaco's testimony about the meeting in Asuncion (Paraguay) in October 2014, claiming that this was never confirmed. Mr Del Nero claimed it was clear *"that on the date Mr Burzaco claimed to have met and discussed bribes with Messrs. Napout and Del Nero he was simply not in Paraguay, where he said the meeting took place. His testimony shall therefore be discredited as manifestly unreliable"*.

g) As to the merits

208. Mr Del Nero rejected FIFA's assertions that he was desperately trying to deny every factual allegation in the Final Report and/or the Appealed Decision, claiming that he had *"fearlessly rebutted all FIFA's arguments in a realistic and non-evasive manner"*. Conversely, FIFA sought to artificially connect unrelated circumstantial evidence to satisfy its own narrative. For example, contrary to FIFA's assertions, Mr Burzaco's and Mr Hawilla's testimonies did not actually contain 5 identical statements. Mr Del Nero urged the Panel to be *"cautious in the analysis of FIFA's Answer, particularly where it purports to establish perfect connections between different pieces of evidence on file or discredits the exonerating evidence produced by Mr Del Nero"*.

i. The division of powers between Mr Del Nero and Mr Marin

209. Mr Del Nero rejected FIFA's attempt to hold him accountable for the approval/maintenance of the contracts at the centre of the present dispute during Mr Marin's tenure as CBF President. Moreover, any allegation that Mr Del Nero had an active role in the negotiation, approval or maintenance of any of the agreements at the centre of the present dispute, or otherwise that he could be reasonably expected to go against a decision of the then CBF President, Mr Marin, to approve or sign any such agreements should be dismissed.

ii. Article 21 of the FCE and the specific charges against Mr Del Nero

210. Mr Del Nero submitted that FIFA failed to prove – even less to the comfortable satisfaction of the Panel – that he had an agreement with anyone to receive bribes, particularly because there is no evidence in the file to demonstrate that he (i) ever solicited or accepted any undue advantage, (ii) effectively received or collected any undue advantage; and/or (iii) failed to refuse or to return an undue advantage in circumstances where his position as an official would require so (see *CAS 2011/A/2625)*.

211. Mr Del Nero claimed that in fact, due to his powers within CBF and CONMEBOL and several circumstances explained in his written submissions, he was not even in a position to secure the "advantages" that FIFA accuses him of giving. Finally, as regards to his alleged intermediaries or related-parties, FIFA's arguments and evidence were *"absolutely poor, superficial and unpersuasive"*.

a) The charges related to Copa Libertadores and Copa America

212. Mr Del Nero rejected FIFA's arguments regarding Copa Libertadores and Copa America, and stated that none of the alleged payments and arrangements were corroborated by the newly presented testimony of Mr Jose Margulies (Owner of Valente) – which was purely based on assumptions, rather than actual knowledge about Mr Del Nero or the CONMEBOL schemes.

b) The charges related to Copa do Brasil

213. In relation to the Copa do Brasil, Mr Del Nero stated that *"apart from a self-serving analysis of selected parts of the confusing and incomplete wiretaps of conversations between Mr. Leite and Mr. Hawilla,* […] *FIFA apparently attempted to withdraw from the allegation that Mr. Del Nero and Mr. Leite had a relationship akin to a family relationship"*. This was in contrast to the FIFA EC and FIFA Appeals Committee's position in upholding such allegations. Mr Del Nero stated that this *"complete shift in FIFA's position"* was not only contradictory (exposing the fragility of the Copa do Brasil charges) but also *"not legally possible"* in a disciplinary case such as this. All charges related to Copa do Brasil should therefore be dismissed.

B. FIFA'S SUBMISSIONS

1. Prayers for relief

214. In its Answer, FIFA submitted the following prayers for relief:

> *"391. Based on the foregoing, FIFA respectfully requests the Panel to issue an award on the merits:*
>
> *(a) Rejecting the reliefs sought by the Appellant;*
>
> *(b) Confirming the Appealed Decision;*
>
> *(c) Ordering the Appellant to bear the full costs of these arbitration proceedings; and*
>
> *(d) Ordering the Appellant to make a contribution to FIFA's legal costs".*

215. In its second submission, FIFA reiterated the prayers for relief contained in its Answer.

216. In summary, FIFA submitted the following in support of its response:

2. Preliminary issues

a. The independence of FIFA Judicial Bodies and its secretariats

217. FIFA referred to Mr Del Nero's attack on the FIFA Judicial Bodies and their secretariats as *"futile"*, and stated that they reflect the fragility of his Appeal. FIFA claimed the fact that certain members of the Judicial Bodies may have had to rely on their secretariats to have certain documents translated to them did not affect in any manner whatsoever their independence or their ability to pass a reasoned decision.

218. FIFA stated that Mr Del Nero's arguments regarding the Judicial Bodies' secretariats is also irrelevant to this case, as they performed their tasks in line with their competences as foreseen in Articles 33 and 66(1) FCE, they did not pass any decision and always acted following the instructions of the Chief of Investigation or the relevant chairpersons of the different Judicial Bodies. Moreover, Mr Del Nero himself has confirmed that the members of the secretariats differed on every instance. The fact that they may have acted as secretaries to other instances in the context of different proceedings does not influence the outcome of this case.

219. FIFA stated that Mr Del Nero's surprising request to send this matter back to FIFA *"can only be seen as a desperate attempt to delay the confirmation of the sanctions imposed on Mr Del Nero"*.

b. Mr Del Nero's right to be heard before FIFA Judicial Bodies

220. FIFA noted that even if any of Mr Del Nero's procedural or due process rights were violated in any way (which FIFA denied), those breaches were in any event cured by the *de novo* power of review under Article R57 of the CAS Code.

3. Burden and standard of proof, admissibility and evaluation of evidence

a. The nature of the present disciplinary proceedings

221. FIFA noted that Mr Del Nero implied throughout his Appeal Brief that criminal law principles and standards should be followed by the Panel in this case. FIFA submitted the present appeal does not concern a criminal procedure, but a civil one. As noted *CAS 2001/A/317*, *"the legal relations between an athlete and a federation are of a civil nature and do not leave room for the application of principles of criminal law"*.

222. Similarly, the ECtHR has expressly held in the recent Mutu/Pechstein decision that disciplinary proceedings before federations are without doubt of civil nature, i.e. only Article 6(1) ECHR is applicable. In doing so, the ECtHR confirmed the jurisprudence of the SFT in this respect. In short, *"CAS, the SFT and the ECtHR have already and clearly established that according to Swiss law, sporting measures imposed by Swiss associations are subject to Swiss civil law and must be clearly distinguished from criminal penalties"*. FIFA therefore rejected any references by Mr Del Nero to criminal law and his attempts to apply such reasoning analogously to the present proceedings.

223. FIFA also noted that:

> *"If Mr Del Nero wishes to be subjected to higher standards of proof and stricter rules on the admissibility of evidence, he may agree to his extradition to the US or voluntarily appear before the US authorities as other officials and businessmen involved in the same bribery scheme have already done"*.

b. The burden of proof

224. FIFA did not dispute that the burden of proof initially fell on FIFA, pursuant to Article 8 of the Swiss Civil Code ("SCC"), each party must prove the facts upon which it is relying on to invoke a right. FIFA cited the *Beweisnotstand* principle acknowledged by Swiss law and frequently used in anti-doping matters.

225. In this respect, FIFA submitted that Mr Del Nero:

> *"[…] has a certain duty to participate in the administration of evidence so as to show, to the applicable standard, that it has not infringed the FCE. In particular, "the more detailed are the factual allegations (made by FIFA), the more substantiated must be their rebuttal […] The onus of proof remains on FIFA, but the evidential burden of contesting the facts submitted by FIFA and adducing evidence shifts""* (FIFA cited *CAS 2014/A/3537*, in this regard).

226. FIFA stated that in this context, none of the arguments and evidence brought forward by Mr Del Nero point in that direction. FIFA therefore submitted that it complied with its burden of proof.

c. The standard of proof

227. FIFA submitted that the appropriate standard of proof is clear – the Panel shall judge and decide based on their *"personal convictions"* which coincides with *"comfortable satisfaction"*, as has been repeatedly confirmed by the CAS (*inter alia*, *CAS 2017/A/5086*) and as confirmed by the current version of the FCE (Article 48).

228. FIFA reiterated however, that the CAS *"has confirmed in integrity and bribery cases that the evidence has to be assessed bearing in mind that "corruption is, by nature, concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing""* (*CAS 2010/A/2172*).

229. FIFA stated that:

> *"This view is particularly relevant in corruption and match-fixing cases in light of the fact that the investigative powers of sports governing bodies are extremely limited. In this context, the assessment of the evidence plays an important role when having to decide based on the "comfortable satisfaction" standard, reason why CAS panels have confirmed that the "personal conviction" (and hence, also the "comfortable satisfaction") standard does not oblige hearing bodies to "establish the objective truth""* (*CAS 2014/A/3537*).

230. FIFA also stated that in cases involving breaches of the FCE, *"specific attention should be paid to the importance of fighting corruption (of any kind) in sport and the nature and restricted powers of investigation authorities of the governing bodies of sport have in comparison with national authorities. Consequently, direct evidence in relation to corrupt activities will be rather the exception and indirect evidence the standard"*.

231. FIFA firmly rejected Mr Del Nero's approach regarding an analogous application of the line of thought followed in *CAS 2011/A/2625 Mohamad Bin Hammam v FIFA*, given that the panel in that case adopted a standard more akin to 'beyond reasonable doubt'. FIFA considered that Mr Del Nero was *"frivolously and tacitly"* attempting to increase the applicable standard of proof from 'comfortable satisfaction' to 'proof beyond reasonable doubt'. FIFA requested the Panel to reject those arguments and instead decide the matter solely on whether they are comfortably satisfied that Mr Del Nero is guilty of violating Article 21 FCE, without a need to *"establish the objective truth"*.

d. Admissibility of evidence

232. In response to Mr Del Nero's objections to the admissibility of various documents relied on by FIFA Judicial Bodies, FIFA noted that the relevant rules are set out in Article 49 FCE, which expressly states that any type of proof may be produced in the scope of FIFA ethics proceedings and lists as admissible evidence *"documents"* as well *"all other proof that is relevant to the case"*. Furthermore, according to Article 46 FCE such evidence should be disregarded only if it *"has been obtained by means or ways involving violations of human dignity or that obviously does not serve to establish relevant facts"*. In this respect, when analysing the content of these two provisions of the FCE, FIFA stated that the CAS has acknowledged that *"such liberal attitude in the admission of evidence should not come as a surprise, given that intra-association disciplinary proceedings are, by their very nature, less formalistic and guarantee-driven than criminal proceedings"* (*CAS 2011/A/2426*, *CAS 2011/A/2433*).

i. Leite's Notes

233. FIFA contested Mr Del Nero's claim that Leite's Notes were obtained illegally and therefore should not be admitted to the file. FIFA stated that even if this were true, it is irrelevant.

234. FIFA submitted that in the absence of any evidence, *"it is impossible to corroborate if the decision actually concerns the raid of Klefer's offices where Leite's Notes were seized"*. Despite confirming that that such raid involved the *"cooperation between the Brazilian Federal Prosecution Office and the US authorities"* no reference is made in the evidence to the U.S. authorities nor to the bi-lateral treaties with such country and, instead, the Brazilian court's decision explains how the request was lodged by the Swiss authorities and quotes case law regarding other requests by Swiss authorities. In addition, no reference is made in the transcripts of the Jury Trial to Leite's Notes being obtained during a raid that was later annulled. FIFA claimed that should this have been the case, this matter would have been brought up during the criminal proceedings. Therefore, *"it is not possible to conclude that* [Mr Del Nero's] *exhibits concern the raid during which Leite's Notes were seized. In the absence of any other proof that may confirm this, it results that Leite's Notes cannot be deemed to have been obtained illegally"*.

235. In this regard, FIFA stated that Mr Del Nero had *"purposely omitted"* to mention that the documents he claimed to have been illegally obtained were in fact admitted to the file during the Jury Trial. Instead, Mr Del Nero quoted some preliminary correspondence on the matter between the Judge and the lawyers, whilst conveniently omitting the final decision of the Judge to admit the documents. The Judge's decision stated (emphasis added):

> *"I think there is enough of a basis in the evidence I have seen and the Government will introduce through the recorded conversation to establish the authenticity of the records,* ***namely that they are what the Government claims they are; notes made by Mr. Leite in connection with this alleged conspiracy to pay bribes*** *and that were then stored in his safe or in his office and were discovered at the time of the search by the Brazilian authorities. I am going to allow in those other exhibits, 305 through 309"*.

236. FIFA stated that if Leite's Notes were accepted in a criminal procedure which is subject to much stricter rules on the admissibility of evidence than the current arbitration proceedings, it was difficult for FIFA to understand how this evidence could deemed as illegally obtained and therefore inadmissible.

237. With respect to Article 46 FCE, FIFA submitted that the concept of "human dignity" refers to the civil law protection of personality rights contemplated by Article 28 SCC, and so the use by an association's disciplinary bodies of allegedly illegal evidence is admissible *"provided that it would not constitute an illegal infringement of the personality rights of the persons against whom the evidence is used"*. In the present case, FIFA argued that the overriding interest of the public in being informed of wrongdoings committed by a high-ranked football official (and, in particular, member of the FIFA and CONMEBOL ExCos) clearly outweighs Mr Del Nero's interest in the contents of his alleged bribes not being disclosed. FIFA's interest to expose Mr Del Nero's wrongdoings by investigating and sanctioning them constitutes *"an overriding private* [and] *public interest"* within the meaning of Article 28(2) SCC.

238. FIFA also stated that in the interests of protecting its reputation – which had been tarnished due to FIFA-Gate – it needed to clarify the situation and distance itself from Mr Del Nero, which justifies the admissibility of Leite's Notes even if the Panel considered that it was illegally obtained. FIFA noted that Mr Del Nero did not even attempt to argue that his 'human dignity' would have been violated by the use of Leite's Notes, and instead has sought to equate the rules on admissibility of evidence applicable in criminal proceedings to the present arbitration proceeding.

239. FIFA stated that Leite's Notes reveal Mr Del Nero's *"proneness to accept bribes"* and not *"any sensational aspect of his private life"* so when balancing the interests at stake, Mr Del Nero's interests are outweighed by FIFA's interests to, *inter alia*, restore the truth, sanction wrongdoings amongst its officials and expose illegal/unethical conduct. This has been repeatedly confirmed by the ECtHR and the CAS.

240. Moreover, it has been very clearly established in CAS jurisprudence (*inter alia*, *CAS 2011/A/2426*) and Swiss doctrine specialised in international arbitration, that the CAS is not impeded from taking into account evidence that could have been obtained illegally. The CAS panel in *CAS 2011/A/2425* stated:

> *"*[…] *internal Swiss legal order does not set forth a general principle according to which illicit evidence would be generally inadmissible in civil proceedings before State courts. On the contrary and according to the long-standing jurisprudence of the Federal Tribunal, whether the evidence is admissible or inadmissible depends on the evaluation of various aspects and legal interests. For example, the nature of the infringement, the interest in getting at the truth, the evidentiary difficulties for the interested party, the behaviour of the victim, the parties' legitimate interests and the possibility to obtain the (same) evidence in a lawful manner are relevant in this context [...] The above described principles are only a feeble source of inspiration for arbitral tribunals.* [...] *In particular, the prohibition to rely on illegal evidence in State court proceedings is not binding per se upon an arbitral tribunal* [...] *As seen above, the discretion of the arbitrator to decide on the admissibility of evidence is exclusively limited by procedural public policy. In this respect, the use of illegal evidence does not automatically concern Swiss public policy, which is violated only in the presence of an intolerable contradiction with the sentiment of justice, to the effect that the decision appears incompatible with the values recognised in a State governed by the rule of law".*

241. Accordingly, FIFA concluded that Leite's Notes should be admissible in the present case.

ii. Testimonies given during the Jury Trial

242. In response to Mr Del Nero's claim that his right to access justice pursuant to Article 6 ECHR was not respected because he has been unable to cross-examine any witnesses in the present proceedings, FIFA stated that Article 6(3) ECHR is *"strictly related to criminal proceedings and, as a result, it is not applicable to the present case"*. Therefore, the applicable procedural guarantee is Article 182(3) PILA, according to which *"[i]rrespective of the procedure chosen, the arbitral tribunal shall accord equal treatment to the parties and their right to be heard in an adversarial proceeding"*.

243. In the present case, Mr Del Nero had the right to participate in the proceedings before the FIFA Judicial Bodies (and now before the CAS), to adduce evidence and to submit evidentiary requests, as well as to express his views on all the facts of the case. The issue Mr Del Nero raises

is his inability to cross-examine individuals who testified in the Jury Trial, which he claims should lead to the exclusion of all those written statements.

244. In response to this, FIFA stated:

> *"149. In this respect, and contrary to* [Mr Del Nero's] *allegations, the transcript of interviews of individuals given under oath during separate criminal proceedings before the US Courts shall not be considered as 'witness statements'. Indeed, these documents constitute written/documentary evidence, which FIFA received directly from the DOJ and adduced in the context of these proceedings to support its claims against Mr Del Nero. In other words, the individuals heard during the Trial before the US Courts are not to be considered FIFA's witnesses.*
>
> *150. This has been confirmed by another CAS panel* [CAS 2010/A/2266] *in a similar case, where the panel admitted to the record the "documents containing the minutes of examinations of people accused of corruption by the German prosecutors", but specifically stated in this respect that these documents "would not be considered 'witness statements'". Importantly, it does not follow from that award that the individuals that had been heard by the German criminal authorities were heard by the Panel during the hearing. In fact, the Panel held that it admitted these documents in the file based notably on the fact that "the Appellants had ample opportunity to discuss [these documents], both in writing and orally".*
>
> *151. In another CAS case* [CAS 2016/A/4501]*, the panel also appears to have made a difference between witness evidence heard in the arbitration and the transcript of an interrogation, even when the latter was conducted before the previous instances in the same proceedings. Specifically, the CAS panel rejected the Respondent's request to exclude a witness statement from the file, based on the fact that the same witness' transcript of interrogation before the FIFA Ethics Committee was already part of the file".*

245. FIFA therefore rejected Mr Del Nero's suggestion that the written witness evidence from the Jury Trial should be excluded. FIFA noted that it could not be expected to summon those witnesses, namely because they are under U.S. authorities' custody and do not fall under its realm (i.e. they are not, and have never been, football officials). Moreover, even assuming that the transcripts should be considered as witnesses' statements (which FIFA denied), the mere fact that they cannot be tested under cross-examination does not mean that they ought to be disregarded. The only question in this regard is the way in which the Panel will assess such evidence.

246. FIFA noted that in the *Bin Hammam* case cited by Mr Del Nero, the CAS panel stated that *"the statements of persons who were not available for examination should not be rejected in their entirety, but that this circumstance should be taken into account when weighing the evidentiary value of such statements"*. Therefore, FIFA submitted that the *Bin Hammam* case only confirmed that the FIFA Appeals Committee was correct in determining that the issue here is a matter of the assessment of the evidence – rather than its admissibility.

247. Lastly, as the testimonies were given in the Jury Trial under oath and under the threat of perjury, and given the lack of investigative or coercive powers of associations when investigating

conduct involving criminal components, FIFA stated that the written witness testimony from the Jury Trial should be admissible.

iii. Oral inquiries conducted by the FIFA Investigative Chamber secretariat

248. FIFA also rejected Mr Del Nero's *"desperate attempt"* to have evidence obtained from an interview of Mr Silveira by the secretariat to the Investigative Chamber be deemed void. FIFA stated that a proper understanding of Article 33(3) and (5) FCE reveals that secretaries may *"provide support"* to the Chief of Investigation. FIFA noted that this was specifically explained to Mr Silveira at the outset of the interview:

"With regard to your third question, the legitimacy. This comes from our chief investigator and also from the FIFA Code of Ethics that allow Ms Katisya to then delegate authority to myself and Mr Bivolaru. All of those provisions are contained in the FIFA Code of Ethics. Therefore we are entitled to carry out this investigation in close collaboration with Ms Katisya. Therefore all this process was carried out by our chief of investigation who allowed us to carry out this interview. Please let me know if your questions were not fully answered, and I will be glad to provide you with more clarification".

249. In response to the above, Mr Silveira's lawyer responded as follows:

"Thank you very much. All my questions were clarified. I would just would like to then take note of all the questions that I have raised".

250. FIFA therefore rejected Mr Del Nero's *"self-serving and narrow interpretation of the FCE"* and stated that Mr Silveira's interview cannot be excluded from the file.

iv. Minutes of the CONMEBOL ExCo meetings

251. FIFA rejected Mr Del Nero's arguments relating to the lack of signatures/initials on documents. FIFA stated that an analysis of minutes of various CONMEBOL ExCo meetings show that some contained a signature only on the last page, or only the signature of one person on each page, or signatures of several persons in the odd pages and final page. Accordingly, there was no established practice throughout South America, let alone an essential requirement, to sign all pages of each document.

v. Torneos Ledgers

252. FIFA noted that Mr Del Nero's arguments regarding the Torneos Ledgers do not concern the admissibility of evidence (no such arguments were raised), but rather the evaluation of such evidence. FIFA's arguments regarding the evaluation of this evidence is summarised further below.

e. Evaluation of the evidence

253. FIFA stated that the concept of evaluation of proof refers to the judicial process of weighing/assessing the evidence on the record (*appréciation des preuves*). Under Swiss law, in particular under Swiss arbitration law, the governing principle is that, failing any specific provision agreed by the parties, the deciding body is free in its evaluation of the evidence (*libre appréciation des preuves*). There is no such agreement between the parties, meaning the Panel is free to evaluate the evidence. Indeed, this is exactly what is provided for by Article 50 FCE (current Article 47 FCE 2019) when it states that the *"Ethics Committee shall have absolute discretion regarding proof"*.

254. FIFA contested Mr Del Nero's assertion that there is no direct evidence on file demonstrating his acceptance to receive bribes. Telephone conversations were recorded implicating Mr Del Nero, ledgers and notes that are in line with those conversations implicate Mr Del Nero and two of the persons that offered and paid bribes to him have admitted to doing so under oath. In addition, there is also proof that may qualify as circumstantial evidence – which Mr Del Nero unsurprisingly rejects. Despite Mr Del Nero's objections, FIFA stated that the CAS (e.g. *CAS 2015/A/4059*) and the SFT have confirmed on numerous occasions that circumstantial evidence can be valid and reliable.

255. In that regard, the panel in *CAS 2018/O/5713* stated that:

> *"*[…] *the Athlete's violations are clearly established, despite her very extensive challenge to each and every separate element of proof against her. Looking at the totality of the matter, there might be some analogy with the logic and common sense of English law, which has recognised for at least 150 years that "Circumstantial evidence might be compared to a rope comprised of several cords: one strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength* […]*"*.

256. FIFA stated that when all the circumstantial evidence on file is combined, it allows the Panel to shed light on the underlying scheme, which, by its very nature, is concealed, it follows that *"considerable weight must also be granted by the Panel when evaluating it"*. FIFA also stated that the Panel must bear in mind that this plot was so secretive and concealed by Mr Del Nero and his co-conspirators that it managed to escape detection not only be FIFA but by public authorities for years – and decades in some cases – which shows the lengths these persons went through to hide their wrongdoings.

i. The testimonies given during the Trial

a) Irrelevance of the elements required during U.S. criminal proceedings

257. FIFA considered that Mr Del Nero erroneously claimed to be entitled to the same procedure in these arbitration proceedings that was granted to Mr Napout and Mr Marin during the U.S. criminal proceedings. FIFA reiterated that this was a civil procedure, not a criminal procedure. Given his vehement insistence on being subject to the requirements of a criminal procedure, FIFA queried why Mr Del Nero *"is hiding in Brazil instead of accepting his extradition to the United*

States and demonstrating his purported absence of any responsibility in the bribery scheme before a criminal court".

b) No proof of false testimonies

258. FIFA rejected Mr Del Nero's extensive efforts to undermine the credibility of the testimonies given by Mr Burzaco, Mr Rodriguez and Mr Hawilla during the Jury Trial. FIFA noted that Mr Del Nero openly stated that 'cooperating witnesses' within the U.S. judicial system *"incentivizes witnesses to falsely implicate others"*. FIFA stated that the threat of perjury (which could result in several additional years of imprisonment and void any agreement which he had reached), combined with the inquisitive examination to which a cooperating witness is subjected to, constitute powerful deterrents for any person to lie while being under oath.

259. FIFA cited the case *Hoffa v United States 385 U.S. 293, 311 (1966)*, in which an appellant argued that his conviction should be overturned because *"the risk that* [the cooperating witness]' *testimony might be perjurious was very high"*. This is so, the appellant said, because the cooperating witness would receive a reduced sentence for his own crimes in exchange for his testimony against the appellant. The U.S. Supreme Court rejected this argument, explaining that *"*[c]*ourts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly".*

260. In addition, *"common sense, legal precedent and human nature"* dictate that if a cooperating witness provides false testimony, such statement will become worthless for the prosecution. In such scenario, the whole purpose of the cooperation – i.e. to reveal the truth in order to enable the incrimination of other criminals – disappears. Further, a jury already relied on these testimonies during the Jury Trial. Accordingly, the Panel can and should rely on this evidence.

c) Mr Hawilla

261. Mr Del Nero stated that Mr Hawilla's testimony is unreliable because he initially lied to the FBI when interrogated. FIFA stated that contrary to such argument, that the fact that Mr Hawilla confirmed – while being under oath – having lied to the FBI, precisely demonstrated that he was telling the truth during his testimony at the Jury Trial. The risk of committing perjury and of not obtaining a more lenient approach in his own trial were sufficient deterrents to avoid any lies at that stage.

262. Moreover, Mr Hawilla's testimony matched several other documents on file and these pieces of contemporary evidence obtained from other persons involved in the bribery scheme, match with the facts described by Mr Hawilla and therefore corroborate the veracity of his testimony.

d) Mr Burzaco

263. With respect to Mr Del Nero's claim that Mr Burzaco was not in Paraguay in October 2014, FIFA stated that the Mercosur 2008 agreement allowed Mr Burzaco (as an Argentinean citizen)

to enter Paraguay without a passport but with an identification card only. FIFA also stated that it was likely no immigration controls were conducted on travellers arriving by private jet – especially on high ranking officials visiting CONMEBOL (whose headquarters had diplomatic immunity at the time). The above, combined with the lack of any evidence supporting Mr Del Nero's claim that Mr Burzaco was effectively committing perjury by lying during the Jury Trial, means that it cannot be concluded that he lied about being present in Paraguay in October 2014.

264. With respect to Mr Del Nero's claim that he did not travel to Argentina in April or June 2012, FIFA stated that the Mercosur 2008 agreement allowed him to travel to Argentina without a passport. Therefore, the absence of a stamp in Mr Del Nero's passport is irrelevant as he could have travelled with his identification card. Indeed, a declaration from the Brazilian police clearly stated that it was possible for Mr Del Nero to travel internationally without being registered in the consulted databases.

265. Thus, in the absence of any contradictory evidence, the fact that he was travelling to discuss bribe payments (thereby having an interest in maintaining these trips as concealed as possible) and in view of the perjury that Mr Burzaco would be committing if he lied during the Jury Trial, it can be established that Mr Del Nero did attend the meetings in Buenos Aires in April and June 2012. Moreover, there is no evidence to infer that Mr Burzaco's testimony during the Jury Trial is not reliable.

266. FIFA also stated that various pieces of evidence obtained from other persons involved in the bribery scheme corroborate the veracity of Mr Burzaco's testimony. It follows that his statements are reliable.

e) Mr Rodriguez

267. FIFA rejected Mr Del Nero's attempts to discredit Mr Rodriguez's allegations against him. FIFA stated that Mr Rodriguez was aware of the scheme of bribes since 2004, even before Mr Burzaco became the CEO of Torneos. He was one of the few persons within Torneos who was aware of the illegal acts, and was the person responsible for keeping track of various bribe payment obligations acquired by Torneos. So the fact that Mr Rodriguez was instructed by Mr Burzaco did not mean that the former was unaware of the destination of the bribe payments – on the contrary the emails suggested that he had direct knowledge of the recipients.

f) Irrelevant comparisons to Mr Burga

268. FIFA rejected Mr Del Nero's arguments regarding any similarity to his case that that of Mr Burga who was acquitted in the Jury Trial from the count of *"racketeering conspiracy"*. FIFA stated that this was immaterial to the present arbitration.

g) Mr Burzaco, Mr Rodriguez and Mr Hawilla's evidence is direct evidence

269. FIFA rejected Mr Del Nero's argument that Mr Burzaco and Mr Rodriguez lacked personal knowledge of the payments made to Mr Del Nero. The reason there is no direct evidence of

the bribes landing in Mr Del Nero's account is the *"furtive scheme"* he designed to hide those payments through the companies of Mr Margulies and Mr Abrahão.

270. FIFA pointed to the evidence on the file regarding Mr Burzaco's numerous direct interactions with Mr Del Nero, including at various meetings (notably in Buenos Aires in April and June 2012, December 2012 CONMEBOL meeting, May 2013 London meeting and October 2014 Asuncion meeting), where it was discussed and agreed whom bribes should be paid to and in what amounts.

271. Mr Rodriguez was the person executing the transfers and keeping track of them. He was therefore aware of the scheme each official – including Mr Del Nero – had organised to receive the bribes, and was aware when bribes were paid. He was also directly aware of the existence of fake service contracts through which payments were made to other companies to disguise the bribes.

272. FIFA noted that Mr Del Nero did not contest Mr Hawilla's direct knowledge of his bribery scheme.

ii. Transcripts of testimonies

273. FIFA stated that the transcripts of witness testimonies from the Jury Trial were submitted as written evidence, not as FIFA's witness evidence. The transcripts *"serve to establish facts otherwise impossible to demonstrate given the concealed and furtive nature of Mr Del Nero's conduct"*. There is no need for the Panel to assess *"pause, emphasis, intonation, tone of voice, hesitation and stuttering"* to prove the reliability of statements that can be cross-checked and verified with numerous other statements and documents.

f. Conclusion on the evidence

274. FIFA concluded that there is plenty of direct evidence demonstrating Mr Del Nero's implication in the bribery scheme. Moreover, the circumstantial evidence also points in the same direction and is necessary in cases like this one in which the accused person is always behaving with the overriding objective of concealing their illegal acts to avoid being caught. FIFA submitted that the Panel should therefore rely on all of its evidence.

4. Merits of the Appeal

a. First requirement – Person bound by the FCE

275. FIFA noted that it is undisputed that Mr Del Nero is a person bound by the FCE, due to his roles with the CBF, CONMEBOL and FIFA.

b. Second requirement – Offering, promising, giving or accepting

276. FIFA stated that Article 21 FCE materialises every time a person offers, promises, gives or accepts a personal or undue pecuniary or other advantage. In Mr Del Nero's case, it is irrefutable that he accepted multimillion-dollar bribes from Mr Burzaco, Mr Hawilla, Mr Hugo Jinkis and Mr Mariano Jinkis. He has also received many of those amounts. He has not received all the amounts, due to the criminal investigation which put an end to his bribery scheme.

277. However, as confirmed by the FIFA Appeals Committee, *"the acceptance of an advantage (and not actually receiving it) suffices in order to this requirement to be met"*. This conclusion was based on a previous finding of CAS according to which *"the timing of promise, not payment is decisive. Bribery occurs when one enters into an agreement to bribe and payment could be agreed to be paid before but actually paid after the event to which it relates"*.

278. From a legal perspective, whether or not Mr Del Nero actually received the bribes is not a decisive issue, as acceptance of those bribes is sufficient to violate Article 21 FCE. This is crucial because Mr Del Nero's defence focuses almost exclusively on the alleged absence of evidence that he actually received the bribery amounts.

i. CONMEBOL Copa Libertadores

279. FIFA submitted that the evidence – Mr Berryman's testimony, ledgers, and payment sheets and emails contemporaneously prepared by Mr Rodriguez – with respect to Copa Libertadores proves that Mr Del Nero:

- accepted payments of USD 600,000 in 2012, and USD 900,000 in 2013 (executed through Arco and Support Travel) and in 2014 (executed through Valente and Support Travel), of which he received a total of USD 1.2 million; and

- accepted the offers and promises of another USD 900,000 for each edition of the competition between 2015 and 2022, of which he received a total of USD 3.6 million.

280. These amounts were paid to the company Support Travel that belongs to Mr Abrahão – a close friend of Mr Del Nero. Unsurprisingly, Mr Del Nero now denies having a close friendship with him in *"an obvious (and futile) attempt to demonstrate that he did not channel the bribes through Mr Abrahão's companies Support Travel, Pallas and Expertise Travel"*.

281. Nevertheless, the evidence points to their relationship being *"akin to that of family members"*, and goes beyond that of a mere commercial partner:

- Mr Del Nero acknowledged having a friendly and personal relationship with Mr Abrahão;

- He also explained that they both got closer because *"in 2014 my girlfriend and his girlfriend became friends"*;

- Mr Abrahão (through his companies) has been providing services to the CBF since (or before) 1993 (which is when Mr Silveira started to work at the CBF);

- Mr Abrahão regularly attends lunches and meetings with Mr Del Nero in the CBF headquarters;

- Mr Abrahão was providing his assistance in the acquisition of a plane to CBF, later confirmed by Mr Del Nero in his interview;

- Mr Abrahão has travelled with Mr Del Nero to the CONMEBOL headquarters in Paraguay and from Rio de Janeiro to São Paulo in one of CBF's airplanes. In this regard, Mr Silveira expressed that such privilege would not be normal;

- Mr Del Nero confirmed that he had travelled from Miami to New York in a private jet that belonged to Mr Abrahão;

- Mr Abrahão might have paid part of the purchase price of the private vehicle of Mr Del Nero;

- Mr Del Nero further confirmed having bought an apartment from a company that belonged to the sons of Mr Abrahão, after having discussed it with him.

282. It is only later, when he realised the consequences of confirming their close relationship that Mr Del Nero sought to undermine it to the greatest extent possible. FIFA stated *"there can be no doubt that Mr Abrahão was using his vast corporate structure to channel and receive Mr Del Nero's bribes and this, due to the close family-like relationship existing amongst them"*.

283. FIFA also stated that Mr Del Nero supported the extension of the contract between T&T and CONMEBOL for the commercialisation of the rights related to Copa Libertadores in exchange for the bribe that he had previously accepted.

284. FIFA rejected Mr Del Nero's attempts to convince the Panel otherwise as a *"one sided and unsubstantiated version of the facts"*, in comparison to Mr Burzaco's testimony during the Jury Trial.

285. In the Jury Trial, Mr Burzaco provided a detailed explanation of the content of the meeting held in Asuncion in December 2012. Mr Burzaco stated:

> *"Q. Did the amounts, the bribe amounts that you were paying to Marin and Del Nero in connection with the Copa Libertadores change over time?*
>
> *A. Yes, sir.*
>
> *Q. When?*
>
> *A. It was decided in December of 2012.*

Q. And what was the change?

A. I was in CONMEBOL offices in Asuncion, Paraguay, and I was approached by three soccer executives; Julio Grondona, Marco Polo Del Nero, and Jose Maria Marin.

Q. And what, if anything, did Julio Grondona say to you?

A. If I recall correctly, he said that Brazil is a powerhouse, that these two gentlemen were now occupying the executive position so now they have to split the money. So, $600,000 – 300 each -- it was not enough to reflect the importance of Brazil. And he asked me with the other ones if we were willing to increase the amount to $900,000 per year for Copa Libertadores and Sudamericana --

Q. And what response did you give?

A. I agreed.

Q. After that point, did the mechanism for making the payments to Del Nero and Marin in connection with the Copa Libertadores change in any way?

A. Yes, sir.

Q. How?

A. In 2013, when they were to start collecting $900,000 per year, those funds came out -- they didn't come out anymore from CONMEBOL's treasury but out of sight companies that we created to pay these bribes. And, also, given bigger restricts in the financial markets and more controls and also more corruption in soccer that was appearing, it was more difficult to get the payment release, as I call, exotic or more difficult to reach locations. So, after long discussions, they changed instructions in order for those payments to be feasible".

286. When combined with the minutes of the CONMEBOL ExCo meeting held on 20 December 2012, it was clear that Mr Del Nero and other officials wanted to secure an increase of their bribes, i.e. from USD 600,000 to USD 900,000, which were later reflected in Mr Rodriguez's ledgers.

287. With regards to the absence of Mr Del Nero's name in the ledgers, FIFA submitted that the use of nicknames (such as 'the Brazilian') was simply a way to conceal the real nature of the illegal payments. As noted in the Appealed Decision:

"Mr Rodríguez confirmed that the term "Brazilian" in the ledgers refers to Mr Del Nero. On the other hand, it is clear that a company such as Torneos, that is trying to buy/acquire influence, would need CBF - one of the most important power force within the CONMEBOL. At that time, on the basis of the evidence contained in the relevant file, it is established that two CBF officials - Mr Del Nero and Mr Marin (the former a FIFA and CONMEBOL ExCo member, and the latter the CBF President) - were the power forces of this association. As they shared the "power" and had leading positions in association football, the Appeal Committee is comfortably satisfied that those payments would be shared among them".

288. Further, throughout several other documents on file, the nickname 'Brazilian' is also used and followed by the initials 'MP', which are the ones that Mr Del Nero himself used to sign his emails (i.e. Marco Polo). The term 'Brazilian' and 'MP' are also followed by Mr Marin's name or the initials of other high ranking officials of CONMEBOL, thereby leaving no doubt that the payments recorded in those documents correspond to those bribes that Mr Del Nero accepted, and received.

289. In response to Mr Del Nero's claim that there was no direct evidence of the techniques he used to conceal the nature of the bribes, FIFA stated that there was sufficient proof of Mr Del Nero's secretive plan:

- Mr Burzaco confirmed that in 2013 the *modus operandi* to pay the bribes changed in view of the increasing number of restrictions and controls resulting from the increasing corruption in football. As a consequence, the bribes started to be paid from phantom companies created for that purpose rather than doing so from CONMEBOL's accounts.

- This description matches with the fact that no records could be secured with respect to the 2012 payments, which must have been done to banks located in untraceable tax havens. Instead, in 2013, the *modus operandi* clearly changed towards paying the bribes through other Brazilian companies that would act as intermediaries such as Support Travel (belonging to Mr Abrahão) or Valente (belonging to Mr Margulies).

290. In summary, FIFA stated that it was *"undisputable that Mr Del Nero solicited, accepted and even received undue pecuniary advantages from Mr Burzaco in connection with CONMEBOL's Copa Libertadores"*.

ii. CONMEBOL Copa America

291. FIFA stated that there was also plenty of evidence that Mr Del Nero accepted the following bribe payments in connection with Copa America:

- USD 1.5 million regarding the approval of the contract between Datisa and CONMEBOL (executed through FPT Sports and Support Travel). A payment for USD 3 million was executed and was meant to be shared amongst Mr Del Nero and Mr Marin:

  - Mr Burzaco confirmed how Mr Del Nero solicited this bribe prior to CONMEBOL's approval of the Datisa Contract which took place during a meeting held in London in May 2013:

    "Q. And what was the purpose of the meeting with Marco Polo Del Nero and Jose Maria Marin?

    A. The purpose of the meeting were two, or at least for them, they were two. One […]. And the second was making clear, and establishing very clear, that the $3 million that they were to collect for the signature of these Datisa-CONMEBOL contracts, was something totally different than the $2 million that was still pending to pay the

Brazilian debt for the 2015 edition, as I explained, and that it was going to be done in June 2015, right before the Copa America 2015.

Q. Did you confirm that; that fact?

A. Yes, sir.

Q. Did you, in fact, end up paying $3 million to Jose Maria Marin and Marco Polo Del Nero in connection with the Datisa contract signature?

A. Yes. We ended up paying and Torneos was responsible for that payment".

- Like with the Copa Libertadores scheme, emails exchanged between Mr Burzaco and Mr Rodriguez on 29 May 2013 show that Mr Burzaco was having discussions with people from Brazil regarding payment instructions, which both Mr Rodriguez and Mr Burzaco confirmed to be Mr Del Nero and Mr Marin.

- During the Jury Trial, Mr Rodriguez confirmed that a payment of USD 3 million was made to Mr Del Nero and Mr Marin in exchange for their support in the approval process of the Datisa Contract concerning Copa America.

- This payment of USD 3 million is reflected in Mr Rodriguez's:

  - Ledger;

  - Payment sheet, where the expression *"Pagar a Brasileros"* was contained, and

  - Reminder emails that he sent to himself. In particular, on 6 June 2013 shortly after the London meeting, Mr Rodriguez wrote to himself an e-mail, reminding himself to *"Call Marco Polo about the transfer"*. Mr Rodriguez wrote himself additional reminders, one of which explicitly stated *"3.000.000. Brazil. Divided MP 1.500.000 Marin 1.500.000"*.

- The bank account statement of the company FPT Sports evidences a payment made on 5 July 2013 from FPT Sports to Support Travel for USD 3 million. The dates coincide with the ledgers created by Mr Rodríguez. These documents, together with the subsequent payment of USD 1.5 million from a company called Expertise Travel (owned by Mr Abrahão) to the company Firelli (owned by Mr Marin), corroborates that Mr Abrahão's companies were used as a vehicle to split and transmit the bribes to Mr Del Nero and Mr Marin.

- During a recorded telephone conversation on 1 May 2014, Mr Burzaco confirmed to Mr Hawilla and the Jinkis brothers that the bribes that had been agreed in exchange for the signature of the Datisa Contract were *"already paid out and it was settled"*.

- Even Mr Leite, who confirmed to Mr Hawilla during a recorded phone conversation that he was aware of the different payments, took notes of such bribes in handwritten notes that he deposited in his safe. These notes further indicate under the acronym "MPM" (which was later confirmed to stand for Marco Polo and Marin) that both officials would receive *"3"* for the *"Copa America"*.

– USD 1 million for the 2015 edition of the Copa America:

- Mr Burzaco testified as follows:

> *"Q. Okay. And if you could describe, again, just the amounts of the bribes to be paid, in total.*
>
> *A. The amounts to be paid were the following:*
>
> *For the first edition, Copa America 2015, […] $3 million to the Brazilian highest representatives, Ricardo Teixeira, Jose Maria Marin and Marco Polo Del Nero".*

- This statement also matches Mr Burzaco's description of the discussion held in London according to which Mr Del Nero and Mr Marin wanted to make sure that this payment was not mixed with the bribe that was due for the signing of the Datisa Contract.

- The fact that two different bribes had to be paid (one for signing the Datisa Contract and one for the 2015 Copa America) was actually confirmed later on:

  - By Mr Jinkis to Mr Hawilla during a phone conversation recorded by the latter:

> *"M JINKIS: [OV] You paid to us 33% of those 20.*
>
> *HAWILLA: [OV] No, I paid 33% of 40.*
>
> *M JINKIS: Of 40, because-but it was 20 plus 20 more at the signing of the new contract".*

  - In Leite's Notes, where it was stated that Mr Del Nero and Mr Marin (i.e. MPM) were to receive USD 3 million per Copa America that was played and an additional USD 3 million resulting from the contract's signature:

> *"6) Copa America*
>
> *Partes: Full Play-Traffic Torneos*
>
> *Periodo: 2015-2023*
>
> *MPM: us$3M por cada CA jugada + us$3M por firma contrato*

Monto total estimado: us$15M / pendiente de pago us$11M (si se juega Copa Centenario)".

– USD 1 million for the remaining Copa America editions (2016, 2019 and 2023):

- As confirmed by Mr Burzaco, the same conditions were agreed with the different officials receiving the bribes – including Mr Del Nero – for all future editions of Copa America. In particular, out of the overall USD 16.5 million bribes, Mr Del Nero and Mr Marin would receive USD 3 million to be shared amongst themselves:

  "Then there was a commitment of an equal amount of 16-and-a-half million dollars for the Copa America Centenario, The Centennial Cup, that were to take place in 2016 in the U.S. territory.

  Then for 2019, Copa America that was going to take place, or is going to take place in Brazil, an additional 16-and-a-half million dollars.

  And for 2023, the same; 16-and-a-half million dollars just as I described the signature bribe payment and commitment. Commitment and payment".

- During a recorded telephone conversation held on 1 May 2014 between Mr Burzaco, Mr Hawilla and the Jinkis brothers, it was confirmed that on top of the previously arranged bribes, there was a commitment to pay additional ones for the subsequent editions of Copa America in the same terms that had been agreed:

  "Hawilla: There is another one?

  Burzaco: There is another one that covers-

  H Jinkis: [OV] 2019 and 2023

  Burzaco: -- what will come out as an obligation when Copa America is held".

292. FIFA stated that this overview confirmed that Mr Del Nero solicited, accepted and actually received bribes in connection with CONMEBOL's approval of the different contracts that had been signed to sell the rights connected to different editions of the Copa America.

293. The different pieces of evidence on file match with one another despite the fact that they were provided by different individuals involved in different stages of the scheme. Moreover, the evidence contains original documents that were created during the relevant period, which adds more to their weight. This also applies to the conversations among the persons that were directly involved in the relevant meetings, thereby having valuable first-hand information that, in turn, matches the testimonies given during the Jury Trial.

294. FIFA submitted that:

"Despite this, Mr Del Nero attempts to undermine the documents that clearly place him at the centre of the scheme and confirm that he accepted the bribes. FIFA refers to its comments regarding the admissibility, authenticity and reliability of the evidence on file. In particular, it is to be recalled that Mr Del Nero's defence focuses on the alleged absence of a link between the payments done in favour of Mr Abrahão and the receipt of these amounts in his personal bank accounts. While CAS has confirmed that the receipt of the bribes is not a mandatory element and the acceptance in itself is sufficient, FIFA contends that the above- described documentary evidence corroborates that the only plausible explanation is that Mr Abrahão did act as [Mr Del Nero's] *intermediary when collecting such bribes. The absence of Mr Abrahão's involvement in the different commercial agreements surrounding Copa América, the parallel payment of amounts to Mr Marin's off-shore company, the numerous references to Mr Del Nero in the documents and conversations created and held at that time to keep track of the different bribes and the execution of subsequent payments through several companies, reveals that a surreptitious scheme was implemented precisely to disguise this illegal act – i.e. receiving bribes – and conceal it from the authorities".*

iii. CBF Copa do Brasil

295. FIFA stated that there was the following evidence that Mr Del Nero accepted bribes in relation to CBF's Copa do Brasil:

- BRL 1.5 million (approximately USD 750,000) for each of the 2013 and 2014 editions of the Copa do Brasil:

  - Mr Hawilla confirmed during the Jury Trial that one month after Traffic and Klefer signed their agreement, Mr Leite contacted Mr Hawilla about the bribe of BRL 1.5 million that he had agreed to pay to Mr Teixeira, which would, as from then onwards be divided equally between three officials, i.e. Mr Teixeira, Mr Marin and Mr Del Nero:

    "Q. Now, during the period after this contract was signed, what if anything did Kleber Leite say to you about payment of bribes in connection with this contract?

    A. He called me a month or so later, he told me he made an agreement to pay bribes.

    Q. What was the nature of that agreement?

    A. Initially he told me that every year we had to pay 1.5 million Reals.

    Q. Reals, is that the Brazilian currency?

    A. Yes.

    Q. And how, if it all, did he tell you the 1.5 million Reals were to be divided?

    A. He said, it was five hundred thousand for each one.

    Q. And when you say, each one, who you are referring to?

A. He was referring to Teixeira, Marco Polo, and Marin".

- This testimony is corroborated by recordings made by Mr Hawilla of conversations he had with Mr Leite, during which bribes to Mr Del Nero were discussed in connection with Copa Do Brasil:

- During a phone conversation held on 24 March 2014, it was confirmed that bribes had been paid to several people. FIFA stated that Mr Leite's attempt to say that he did not know whether the bribes were paid, was just him being evasive and not wanting to confirm this over the phone:

"HAWILLA: I see, but have you paid an instalment yet?

LEITE: We've already paid-- I'm absolutely sure.

HAWILLA: Paid to Ricardo, Marco Polo, and Marin?

LEITE: [UI, breaking up] uh, I don't know-- let's not talk about this over the phone, because it is very dangerous, man, that last thing that happened with that guy was enough. To talk about that shit is complicated. We'll talk about this in person. I am not in Brazil and the telephone is a fuck -- the phone is a shitty problem".

- During a phone conversation held on 2 April 2014, when discussing about the payment of the bribe for BRL 1.5 million, Mr Leite confirmed that Mr Del Nero was aware of the different payments and that the bribes were shared amongst the three officials. Mr Leite said, while referring to Mr Del Nero and Mr Marin:

"They are participating in a way – they cannot complain. […] They are aware that the other is also participating".

- FIFA stated that a complete reading of this conversation reveals that Mr Leite was aware that Mr Del Nero and Mr Marin did share the bribes and that they were aware of the amounts being received by Mr Teixeira. The fact that he confirmed being unaware of the concrete distribution amongst Mr Del Nero and Mr Marin does not eliminate the fact that Mr Del Nero had accepted and was receiving a bribe. The following section of the conversation is particularly telling in this regard:

"HAWILLA: Uh- uh- uh Klebinho—Marin and Marco Polo—do they know you're paying Ricardo more?

LEITE: Nuh—Of course they know!

HAWILLA: That you pay more?

LEITE: They know! The same—Of course!

HAWILLA: *That you pa—*

LEITE: *No, I don't pay more, Hawilla, it's one and one.*

HAWILLA: *But that one—for—for Marin, he shares it with Marco Polo, does he not?*

LEITE: *He does share—how they do it, I have not the slightest idea—*

[…]

LEITE: *They are participating in a way—they cannot complain. And they have not complained. Anyway—They have not complained—The—they are aware that the other is also participating".*

- FIFA stated that the above transcript shows that Mr Del Nero was sharing bribes paid by Klefer with Mr Marin, and also reveals that he was aware of Mr Teixeira's involvement in the scheme, which in itself constitutes a breach of Article 18 FCE. The fact that Mr Leite, i.e. the person paying the bribes, confirmed this constitutes direct evidence of Mr Del Nero's violation of Article 21 FCE.

- FIFA noted that Mr Hawilla had recorded a meeting with Mr Marin on 30 April 2014, during which Mr Marin claimed that the bribe still had not been paid, but he would confirm this with Mr Del Nero:

"HAWILLA: *Ah, then it is the Cup in Brazil.*

MARIN: *It could be.*

HAWILLA: *He hasn't paid?*

MARIN: *Not that I know.*

HAWILLA: *He told me he has paid. [pause] He told me he had paid it. Do you want me to look into it?*

MARIN: *Please look into it. And I will also check with Marco Polo. [UI] was 900,000 dollars. Please look into it. [UI].*

HAWILLA: *He told me that everything was okay. We've paid our share.*

MARIN: *I see. [pause] I will talk—*

HAWILLA: *Hmm.*

MARIN: *--with Marco Polo, it has to be in person, and then I'll call you on your cell—*

HAWILLA: Hmm.

MARIN: --and yes: Yes, Cup in Brazil, all well, everything is fine".

- In his handwritten notes, under the title "MPM", Mr Leite indicated different payments that he had committed to pay. The term "MPM" stands for Marco Polo and Marin. In particular, the first notes refer to "Copa do Brasil", and indicate the amount of BRL 1,000,000. FIFA submitted that this matches with the aforementioned pieces of evidence as it confirms that said amount was agreed to be paid and accepted by Mr Del Nero and Mr Marin.

- FIFA rejected Mr Del Nero's argument that "MPM" might mean *"Meta por Merito"* as *"useless"*. FIFA stated that:

  "[…] the amounts mentioned in Mr Leite's notes match with the different pieces of evidence described above that confirm the bribes accepted and received by the Appellant. Secondly, Mr Del Nero brings this argument by relying on an article authored by Mr Leite on 23 March 2017 – i.e. almost 2 years after the Indictment was published and the scheme was unveiled. In view of the timing and the senselessness of the article, the only plausible explanation seems to be that Mr Leite must have published said article with the exclusive purpose of creating an explanation for his own involvement in the scheme and the documents that he drafted several years before. This makes even more sense when one appreciates the unnatural need to introduce the acronym NPM by previously referring to the different acronym MPM that would have no relation whatsoever to the rest of the article. Similarly, there is no evidence that this expression – "Meta por Mérito" – really exists or is actually used "[i]n our commercial vocabulary".

  This conclusion is also in line with Klefer's letter of 13 September 2017, signed by Mr Leite, in which he denies having carried out "any act that may be considered illegal or offensive to morals and accepted practice" in the company's dealings with CBF.

  These two documents constitute proof of Mr Leite's attempt to deny his undisputable implication the bribery scheme and, by doing so, to avoid any kind of criminal or civil responsibility while, at the same time, attempting to protect his long-lasting partners in crime such as Mr Del Nero".

– BRL 2 million (approximately USD 1 million) for the following editions of the competition to be held between 2016 and 2022:

  - On 31 March 2014, Mr Leite confirmed via text message to Mr Hawilla their agreement to increase the amounts from a bribe of USD 1.5 million in the past, to a bribe of USD 2 million for the *"present and future"*,

  - During the phone conversation held between Mr Hawilla and Mr Leite on 2 April 2014, it was corroborated that the bribe was increased as mentioned above and that Mr Del Nero shared the payment with Mr Marin (aside from the other payment

that was done to Mr Teixeira in parallel). Mr Hawilla confirmed this during the Trial.

- Mr Leite also stated to Mr Hawilla that Mr Teixeira receives the same thing as Mr Marin and Mr Del Nero and that *"there is past and present. You have to respect the past because that's when the decision was made. […] And so they agreed! And we settled it. Present and future"*.

- Mr Hawilla and Mr Flavio Grecco Guimarães (financial director of Traffic) held a phone conversation on 24 March 2014 during which they discussed that the BRL 2 million bribes' payment had to be disbursed by Traffic and Klefer (BRL 1 million to be paid by each entity) to Mr Del Nero and Mr Marin, as confirmed during his testimony.

- Contrary to Mr Del Nero's misrepresentation of this conversation, Mr Guimarães did not claim *"that all payments therein discussed had already been made to their corresponding beneficiaries"*. Instead, he mentioned that two payments had been done to Klefer as follows:

  "GUIMARÃES: *So, we paid 900-- uh, 450,000 dollars to Klefer International—*

  HAWILLA: *Hum--*

  GUIMARÃES: *-- paid by TSI. That money was paid by TSI, a letter from TSI.*

  HAWILLA: *Hum.*

  GUIMARÃES: *From Delta.*

  HAWILLA: *Hum--*

  GUIMARÃES: *And we paid-- 450,000 dollars uh-- converted into reais which would be, uh, 1,000,000 reais, right, here in Brazil, to Klefer Brazil*".

- The proper understanding of this conversation reveals that Traffic (i.e. Mr Hawilla's company in which Mr Guimarães worked), paid its share of the bribes (ultimately owed to Mr Del Nero, Mr Marin and Mr Teixeira) to Klefer sometime before 24 March 2014. Thereafter, Klefer (where Mr Sergio Campos worked) disbursed the bribes as corroborated by the email sent on 1 April 2014 from Mr Campos to Mr Guimarães. Therefore, the conclusions drawn by Mr Del Nero from his initial misrepresentation of the facts fall under their own weight.

- Overall, this recording allowed to confirm what Mr Leite said in the phone conversation of 2 April 2014 that the amount to be paid to all three officials (past, present and future) was increased to BRL 2 million.

296. FIFA stated that Mr Del Nero *"desperately tries to discredit the wiretaps and recordings by focusing on the argument that they are incomplete"*. FIFA submitted that the wiretaps and recordings are *"perfectly contextualised as the incriminating part of each conversation is contained in the middle of a broader conversation between the different interlocutors"*. Moreover, the fact that the FBI or DOJ chose to file only the exhibits containing the parts of the wiretaps and phone conversations does not undermine their validity. Further, all parties in the Jury Trial agreed that the transcripts of conversations contained true and accurate English translations of the original dialogues in Spanish and/or Portuguese.

297. FIFA stated that Mr Del Nero's argument that Mr Leite and/or Mr Marin were using his name without his knowledge to enrich themselves was not supported by any proof. This statement was nothing more than mere speculation and constituted another farfetched and desperate attempt to come up with impracticable excuses. The evidence described in detail above (as well as in the Final Report and the decisions of the FIFA Judicial Bodies) served to confirm that Mr Del Nero solicited and accepted numerous bribes connected to Copa Libertadores, Copa América and Copa do Brasil. In addition, there was also evidence leading to the only plausible explanation that Mr Del Nero did receive many of those bribes.

c. Third requirement – Personal or undue pecuniary or other advantage

298. FIFA stated that there can be no doubt that the amounts under analysis constitute bribes, i.e. pecuniary or other advantages pursuant to Article 21(1) FCE, given that:

- The persons in charge of negotiating and paying them (i.e. Mr Burzaco, Mr Rodriguez and Mr Hawilla) have confirmed so;

- Additional evidence demonstrates that:

  - Several payments were paid under fake advisory agreements between companies;

  - one payment was done to a luxury yacht company, whose business was completely unrelated to the business of the payee enterprise or to the Copa do Brasil.

- Evidence on file shows that the persons discussing these matters over the phone were reluctant to address the topic over the phone, and that Mr Del Nero was especially cautious as these matters had to be addressed in person with him – as confirmed by Mr Marin;

- Other officials have been convicted as a result of their participation in this same bribery scheme for racketeering, wire fraud conspiracy and money laundering, all of which revolve around the offering, acceptance and/or receipt of illegal monies, thereby serving as indicators as to the nature of those monies.

299. Additionally, the extraordinarily high payments at stake (which range from USD 600,000 to USD 3,000,000) lack a clear and proper basis, which is a strong indicator that the payments constituted bribes.

300. It is therefore clear that the FIFA Judicial Bodies correctly concluded that *"Mr Del Nero accepted both the offers and promises of payments as well as actual transfers of payments to him totalling USD 11.8 million and USD 3.45 million, respectively. […] Accordingly, the relevant payments, offers and promises of payments are undue advantages to Mr Del Nero within the meaning of Art. 21 par. 1 of the FCE. The third requirement is also met for all schemes"*.

d. Fourth requirement – Ratio of equivalence

301. FIFA noted that the following elements needed to be present in order to identify the existence of a breach of Article 21 FCE:

- Act that is related to official activities: acts of bribery require that they aim at an act which is related to the official activities of the offeree or recipient;

- Act contrary to duties or falling within discretion: the targeted official act must, then, be either contrary to the duties of the official or, despite not being contrary to his duties, be based on illegitimate motives or flawed conduct on his part;

- Incitement of the execution or omission of the act: the undue advantage must, then, specifically be given in exchange for the execution or omission of the act (*quid pro quo*);

- Intention to obtain or retain business or any other improper advantage: with regard to the term *"advantage"*, it shall be pointed out that it must be interpreted in a broad sense, i.e. any kind of betterment or advancement of economic, legal or personal, material or non-material nature.

i. Acts related to his official activities

302. The activities under scrutiny are those that relate to approving new contracts with media and marketing companies (T&T/Torneos, Datisa and Klefer) for Copa Libertadores, the Copa America and the Copa do Brasil, as well as to provide its support regarding existing contracts. The persons offering the bribes agreed to pay them to Mr Del Nero as a result of his positions as a member of the CONMEBOL ExCo (for Copa Libertadores and the Copa América) and as CBF Vice-President (for Copa do Brasil). Approving and supporting such contracts – in particular through participating and voting in CONMEBOL ExCo meetings– are, quite evidently, acts that are related to the official activities of Mr Del Nero as an official within the meaning of Article 21(1) FCE.

303. FIFA stated that Mr Del Nero has sought to depict himself as a powerless official who had no influence over the decision-making process of the CONMEBOL ExCo. This argument was

"nothing else than a futile attempt to detract the attention from his high-ranking status within football and the powerful positions that he held".

304. Mr Del Nero was one of the 11 members of the CONMEBOL ExCo between 2012 and the first half of 2015, and as such he had a substantial voting capacity. FIFA does not contend that Mr Del Nero could have changed the CONMEBOL ExCo's decision by himself. However, this did not mean that his unconditional approval of the contracts entered into or extended by CONMEBOL cannot constitute sufficient evidence to demonstrate his interest in securing the bribes that had previously been negotiated and agreed to.

305. Mr Del Nero, as one of the persons having powers to approve or reject the decision of CONMEBOL to continue its contractual relationship with T&T or to initiate it with Datisa, did have a relevant role in the confederation's decision-making process. The fact that other members of the CONMEBOL ExCo may have also been involved in the bribery scheme and, thus, also voted in favour, does not eliminate Mr Del Nero's liability and hence the *quid pro quo* element. In fact, and most relevantly, the contracts with those companies were approved unanimously by the CONMEBOL ExCo, including Mr Del Nero.

ii. Acts contrary to duties or falling within discretion

306. Approving new contracts and supporting existing contracts over media and marketing rights for CONMEBOL's and CBF's competitions with the respective companies are acts that fell within the discretion of Mr Del Nero's duties as CONMEBOL ExCo and CBF Vice-President. Accordingly, FIFA stated that it needed to be examined whether these acts were based on illegitimate motives or flawed conduct on Mr Del Nero's part.

307. FIFA submitted that in view of the evidence submitted, it had been established that Mr Del Nero accepted several payments, as well as offers and promises of payments, from Mr Burzaco, Mr Leite and Mr Hawilla (including their companies, subsidiaries and shelf companies) without a proper basis justifying the offers, promises and payments. Therefore, for this reason alone, the Panel shall confirm that Mr Del Nero's acts must be considered as having been based on illegitimate motives and flawed conduct and thus meeting the relevant requirement of Article 21(1) FCE.

308. FIFA also noted that during a CONMEBOL ExCo meeting, Mr Del Nero (as well as others) declined to receive an offer from a company other than Torneos, which was interested in buying the commercial rights for Copa Libertadores. FIFA stated that Mr Del Nero's refusal to listen to other offers revealed the underlying illegitimate motives that drove his actions.

309. Moreover, *"it is obvious that the amounts paid to Mr Del Nero and other officials as multimillionaire bribes should – and could – have been paid to CONMEBOL and CBF by the companies that acquired the commercial rights of those competitions. Instead, it is safe to conclude that such organisations received lower amounts in exchange for the sale of the commercial rights of their competitions as a result of the commitment by Torneos, Datisa and Klefer to pay those bribes"*.

iii. Incitement of the execution or omission of the act

310. As a third element, it must be established that the undue advantages identified in section (ii) above were specifically given in exchange for the execution or omission of the act as outlined in section (i) above – i.e. *quid pro quo* between the advantage and the act. FIFA noted that the CAS has confirmed on numerous occasions that *"'corruption is, by its nature, concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoings (CAS 2010/A/2172; CAS 2013/A/3258)".*

311. As a result, obvious difficulties appear when trying to establish a correlation between a particular offer or payment and a specific act of an official. In order to impede that justice is frustrated by furtive and illegal schemes, the SFT and the legal doctrine have referred to objective indicators such as, for instance, the amount of the offer or payment, the timing between the offer or payment and the act of the official, as well as the occurrence and frequency of contacts between the parties involved.

312. With these indicators in mind, the FIFA Appeals Committee rightly concluded that the evidence on file was sufficient to identify the *quid pro quo* between the undue pecuniary advantages accepted and received by Mr Del Nero and the execution of several acts from his side. In particular, it had been established that the promises and payments to Mr Del Nero were incitements and/or rewards that aimed at obtaining his approval for new contracts or his support for existing contracts between CONMEBOL and CBF, on one hand, and the marketing and media rights companies, on the other. All evidence leads to that conclusion.

313. FIFA noted that there were numerous payments made without any legal basis whatsoever:

- Copa Libertadores: USD 600,000 and two USD 900,000 payments (half of which was for Mr Del Nero);

- Copa America: USD 4.5 million was promised, out of which USD 1.5 million was paid to Mr Del Nero;

- Copa do Brasil: approximately USD 2.5 million was promised, out of which USD 750,000 was paid to Mr Del Nero.

314. Further, FIFA stated that the timing between the promises, the payments and Mr Del Nero's acts were revealing:

- For Copa Libertadores, the approval of extension of the contracts took place in October and December 2012:

  - USD 600,000: The bribe was agreed in April and June 2012, and the payment was done in 2012 from CONMEBOL's funds;

  - USD 900,000: The bribe was increased in October and December 2012, and the payment was made six months later, on 7 June 2013, and only two weeks after the

meeting in London in which Mr Burzaco received complaints about the delay in the payments;

- USD 900,000: The bribe was agreed at the same time as the previous one (i.e. in October and December 2012), where it was mentioned that yearly instalments would be paid, and the payment was executed on 28 May 2014.

– The Datisa Contract for Copa America was approved on 25 May 2013:

- USD 3 million: The amount and nature of the bribes were clarified during the days prior to the meeting in London and the payment was done on 5 July 2013;

- The remaining bribes (USD 3 million for the 2015, 2016, 2019 and 2023 editions) were not paid due to the start of the criminal investigations. Nevertheless, during the London meeting held in May 2013, Mr Del Nero and Mr Marin were eager to clarify that the signing-bribe was a different one for the bribe that was due for the 2015 edition of Copa America.

- The agreement signed between CBF, Traffic and Klefer for the marketing rights related to Copa do Brasil was signed in August 2012. The amount of the initial bribe that had been originally paid to Mr Teixeira was (i) re-directed towards Mr Del Nero and Mr Marin, (ii) scheduled to be paid *"by the end of November"* 2013 and (iii) increased to BRL 2 million between 24 March and 2 April 2014, the agreement being to pay the amounts on a yearly basis.

315. FIFA submitted that this breakdown shows the short periods between the conclusion of the contracts, the offers and acceptances of the bribes and their payments (when they did take place). FIFA also argued that the frequent contact between Mr Burzaco and Mr Del Nero in the relevant periods regarding the payments that were being offered and accepted in relation to Copa Libertadores and Copa America, *"are strong indicators of the existence of a quid pro quo element"*. The same rationale applied to Mr Del Nero's frequent contact with Mr Leite regarding the Copa do Brasil scheme.

316. Lastly, FIFA stated that:

"Mr Burzaco, Mr Rodríguez and Mr Hawilla have consistently testified that these promises and payments were bribes, given in exchange for Mr Del Nero's approval and support of their contracts with CONMEBOL and CBF. The available meeting and phone conversation recordings, as well as (other) documentary evidence, confirm this finding, repeatedly referring to these promises and payments as bribes or bribe payments (see also the term "lighting" – "illuminaciones" used by Mr Rodríguez for bribe). Moreover, in one particular conversation (between Mr Leite and Mr Hawilla of 24 March 2014), the payments in relation to the CBF Copa do Brasil were labelled a "payoff"".

317. All the above confirms that the bribes were paid for Mr Del Nero's continued support in approving and/or maintaining the contractual relationships between different companies and CONMEBOL or CBF.

iv. Intention to obtain or retain business or any other improper advantage

318. As a final element, Article 21(1) FCE establishes that the undue advantage must be given *"in order to obtain or retain business or any other improper advantage"*.

319. FIFA argued that in the present case, Mr Burzaco, Mr Hawilla and Mr Leite (or their respective companies T&T, Traffic and Klefer) sought to do business with CONMEBOL and CBF by acquiring the media and marketing rights for several football competitions (Copa Libertadores, Copa America and Copa do Brasil) and exploiting them commercially. The advantage for the individuals and companies involved lay in the fact that they were able to extend and maintain their contracts with CONMEBOL and CBF without any competition from other contenders, thus improving their contractual position by circumventing any competition.

320. The issue at stake is that those companies were using unlawful means to secure, extend or maintain those contracts, by offering bribe payments in this respect to the decision-makers within CONMEBOL and CBF, including Mr Del Nero. In doing so, the companies ensured to avoid any competition from other contenders, thus improving their contractual position by circumventing any competition.

321. FIFA noted that Mr Del Nero questioned why Mr Leite and Mr Hawilla would have wanted to ensure that he did not challenge, cancel or renegotiate the contract signed in December 2011 with Klefer. FIFA stated that the reason for this was simple. Mr Del Nero was aware that the previously concluded agreement concerning Copa do Brasil was based on illegal acts such as the payment of bribes to Mr Teixeira. Mr Del Nero could have exposed this and granted CBF the possibility to terminate the contract. In this scenario, *"it is safe to say that Mr Leite and Mr Hawilla wanted to ensure that Mr Del Nero would accept the pre-existing arrangement in order to ensure its continuation and even to secure future contracts whenever this one came to an end"*.

322. Accordingly, the advantages in question should be characterised as improper.

e. Conclusion

323. The above considerations demonstrate that Mr Del Nero breached Article 21(1) FCE given that he accepted several undue pecuniary advantages from several individuals and their companies for the execution of official acts connected to the CONMEBOL Copa Libertadores, the CONMEBOL/CONCACAF Copa América and CBF's Copa do Brasil. Mr Del Nero also breached said provision the moment he failed to report to the Ethics Committee the numerous offers that he received.

324. Further, Article 21(3) FCE was also infringed by Mr Del Nero in view of his failure to refrain from any activity or behaviour that might give rise to the appearance or suspicion of improper conduct as described in Article 21(1) FCE.

325. Lastly, FIFA stated that with respect to Mr Del Nero's arguments concerning the other provisions of the FCE, the Adjudicatory Chamber considered that the violations of Articles 20, 19, 15 and 13 were materially absorbed by the breach of Article 21(1) FCE, and therefore they

did not serve as an additional basis to sanction Mr Del Nero. For this reason, Article 11 FCE on concurrent breaches was not be applied in the present case. Therefore, Mr Del Nero's arguments to the contrary were moot.

5. The sanction and its proportionality

326. With respect to the sanction, FIFA submitted that it was just and proportionate, and is in no way grossly disproportionate or arbitrary.

a. General comments on the principle of proportionality

327. FIFA noted that the FCE does not establish a maximum limit on a ban, so the life ban imposed on Mr Del Nero was permissible. Acts of bribery are one of the most serious offences under the FCE, and FIFA stated that the sanction imposed must serve *"repressive, preventative and restorative purposes"*.

328. FIFA also noted that notwithstanding the *de novo* powers in Article R57 of the CAS Code, a CAS panel could only amend a FIFA disciplinary sanction in cases where FIFA are deemed to have acted arbitrarily. Pursuant to established CAS jurisprudence, the principle of proportionality requires an assessment of whether a sanction is appropriate to the violation committed in each case. This does not mean that a CAS panel should amend a sanction merely because it disagrees with it – it should only amend the sanction if it is considered evidently and grossly disproportionate to the offence. In that regard, FIFA noted that it:

> *"takes a strong stance again any potential unethical act, especially of bribery, which frontally harms the good governance, integrity and viability of football. In this respect, FIFA vehemently prohibits, and has to apply a zero-tolerance policy against any conduct from any football direct or indirect stakeholder that commits acts of bribery related to FIFA, the confederations, associations leagues or clubs.* […]
>
> *Moreover, when imposing a sanction and in order to restore, vis-à-vis the public opinion, the trust relationship that has been damaged by the misconduct of an individual, the deciding body shall first take into consideration the negative consequences that the misbehaviour caused to the proper functioning and/or reputation of the institution to which the person is directly or indirectly affiliated (i.e. FIFA, CONMEBOL and CBF), the personality of the accused, the severity of the fault, the motives of the infringement as well as the responsibility and status of the person. Taking into consideration such elements will ensure that the sanction imposed meets the adequate purpose of prevention and the adequate remedy to restore the public's trust. In particular, it is common knowledge that over the last years, FIFA's image has been seriously tarnished by numerous scandals perpetrated by officials (directly or indirectly) affiliated to it – the most scandalous of all being the one under scrutiny in which Mr Del Nero was involved".*

329. In the present circumstances, FIFA stated that its Judicial Bodies needed to issue a sanction that not only punished the offender, prevented recidivism, dissuaded others to act similarly, but also restored the public's trust in FIFA.

b. Proportionality of the FIFA Judicial Bodies' decisions

330. FIFA noted that as a member of CONMEBOL's and FIFA's ExCos and as Vice-President of CBF, Mr Del Nero held several very prominent and senior positions in association football both at national and international level. He had a responsibility to serve the football community as a role model, but the evidence of file demonstrates a pattern of disrespect for core values of the FCE, violating the provision on bribery and corruption on various occasions.

331. FIFA stated that Mr Del Nero's degree of guilt is the highest and his offences must be regarded as being severely reprehensible as he decided to behave in a way that bluntly contradicts and violates the content of Article 21 FCE.

c. Mr Del Nero's failure to demonstrate the disproportionality of the sanction

332. FIFA rejected Mr Del Nero's reliance on the cases of Amos Adamu, Amadou Diakité and Ahongalu Fusimalohi given that those cases were decided almost 10 years ago, and the jurisprudence of FIFA Judicial Bodies with respect to bribery has evolved significantly since then. Moreover, the Panels deciding those cases openly considered the sanctions to be lenient.

333. FIFA also noted that with respect to comparisons to the cases of Sepp Blatter, Michel Platini and Jérôme Valcke, there was not sufficient evidence to establish bribery and corruption within the definition of Article 21 FCE. FIFA also rejected Mr Del Nero's arguments regarding the alleged lenient or negligent treatment by its chief of investigations in other cases. FIFA stated that if the Chief of Investigation in a specific case chose not to appeal a decision of the FIFA Adjudicatory Chamber, it was because he/she accepted the reasoning in that case. That was irrelevant to the present case. FIFA also rejected Mr Del Nero's assertion to draw a general conclusion that FIFA's Judicial Bodies have generally had a more lenient approach to that taken here.

334. FIFA stated that:

> *"The reality is that the aforementioned cases do not concern acts of bribery but rather of conflicts of interest as well as accepting and giving gifts and other benefits whereas, in the present case, we are faced with numerous and continuous acts of bribery and corruption – a far more serious offence than the ones for which those officials were sanctioned".*

335. FIFA stated that Mr Del Nero was also seeking to rely on other cases where officials were not sanctioned for acts of bribery. In particular, Mr Del Nero relied on the cases of:

- Mong Joon Chung – who was found to have breached Articles 3 (General Rules) FCE 2009, and 18 (Duty of disclosure, cooperation and reporting), 41 (Obligation of third parties to collaborate), and 42 (General obligation to collaborate) FCE;

- Harold Mayne-Nicholls – sanctioned for breaching Articles 13 (General Rules of Conduct), 15 (Loyalty) and 19 (Conflicts of interest) and acquitted by the CAS from violating Article 20.

- Wolfgang Niersbach – who was found to have infringed Articles 18 (Duty of disclosure, cooperation and reporting) and 19 (Conflicts of interest);

- Patrick John – who was sanctioned for breaching Articles 3 (General rules), 7 (Discrimination), 8 (Protection of personal rights), and 9 (Loyalty and confidentiality) FCE 2009.

336. FIFA stated that all these cases involved significantly lesser offences than those related to Article 21 FCE and the offences committed by Mr Del Nero. FIFA claimed that it was problematic to equate the present matter to other cases as each case must be decided on a case by case basis. Moreover, the CAS has confirmed that *"similar cases must be treated similarly, but dissimilar cases could be treated differently"* (*CAS 2012/A/2750*).

337. However, in the event the Panel wished to draw comparisons to other cases involving bribery and corruption, FIFA provided the following table:

Name of the official	**Articles breached**	**Date of the decision**	**Sanction**
Chuck Blazer	Articles 13, 15, 16, 18, 19, 20 and 21 FCE	2 July 2015	• Ban for life
Jeffrey Webb	Articles 13, 15, 18, 19 and 21 FCE 2012	5 September 2016	• Ban for life • Fine of CHF 1,000,000
Rafael Esquivel	Article 21 FCE 2012	15 September 2017	• Ban for life • Fine of CHF 1,000,000
Costas Takkas	Article 21 FCE 2012	6 July 2018	• Ban for life • Fine of CHF 1,000,000
Aaron Davidson	Article 21 FCE 2012	14 June 2018	• Ban for life • Fine of CHF 1,000,000
Miguel Trujillo	Article 21 FCE 2012	5 July 2018	• Ban for life • Fine of CHF 1,000,000
Jose Maria Marin	Article 27 FCE 2018	22 January 2019	• Ban for life • Fine of CHF 1,000,000
Luis Chiriboga	Article 27 FCE 2018	22 January 2019	• Ban for life • Fine of CHF 1,000,000
Romer Osuna	Article 27 FCE 2018	28 March 2019	• Ban for life • Fine of CHF 1,000,000
Nicolas Loez	Article 27 FCE 2018	26 July 2019	• Ban for life • Fine of CHF 1,000,000

Eugenio Figueredo	Article 27 FCE 2018	8 June 2019	• Ban for life • Fine of CHF 1,000,000
Eduardo Deluca	Article 27 FCE 2018	26 July 2019	• Ban for life • Fine of CHF 1,000,000
Jose Luis Mesizner	Article 27 FCE 2018	26 July 2019	• Ban for life • Fine of CHF 1,000,000

338. FIFA stated that the Panel should be guided by the above decisions.

d. Absence of mitigating circumstances

339. FIFA rejected Mr Del Nero's arguments with respect to the following alleged mitigating circumstances:

- Mr Del Nero's cooperation during the proceedings;
- The alleged violation of his right to be heard; and
- His advanced age.

340. FIFA noted that Mr Del Nero had an obligation to cooperate with FIFA, under Article 18(2) and 41 of the FCE. The fact that he did so cannot be considered a mitigating factor as it is the normal behaviour in disciplinary proceedings. If anything, the failure to do so could be considered an aggravating circumstance.

341. With respect to the alleged violation of his right to be heard, FIFA disputed this and stated that in any event this would be cured during the *de novo* CAS proceedings. Moreover, Mr Del Nero failed to establish how this was a mitigating factor for the duration of his sanction.

342. Mr Del Nero has also failed to establish why his work in football and advanced age should lower the sanction imposed. Indeed, it was precisely through his work in football that Mr Del Nero enriched himself through bribes. In any event, his services to football were duly considered by the FIFA Judicial Bodies when imposing the sanction, and therefore cannot be factored into further mitigation. Moreover, FIFA expects its highest ranked officials to always act within the rules applicable to them. Violations as blatant as those by Mr Del Nero cannot be diminished due to any alleged positive contributions to football in the past.

e. Conclusions

343. FIFA noted that the CAS needs to show restraint or reservation in evaluating whether a sanction is disproportionate. FIFA submitted that the sanction imposed on Mr Del Nero is justified by the overall interest in football, and as a commitment to the eradication of bribery in football. Therefore, the Panel should not reduce the sanction.

6. FIFA's Second Submissions

344. In its second submissions, FIFA largely reiterated the same arguments as in its Answer, and stated that the absence of a *"smoking gun"* does not mean that Mr Del Nero's breach of Article 21 FCE has not been proven. FIFA also stated the following:

a. Proceedings before FIFA's Judicial Bodies

345. FIFA rejected Mr Del Nero's repeated arguments regarding the alleged procedural flaws during the FIFA proceedings, and stated that:

> *"It is not uncommon in legal proceedings to have an accused party that feels trapped attacking indiscriminately all elements of the case in a desperate attempt to avoid an almost certain defeat. This is exactly why Mr Del Nero dedicates so much space of his limited Reply to bring unwarranted and, more importantly, unproven arguments against FIFA's proceedings, employees and officials instead of focusing on the material elements, most of which he tellingly omits to refer to under the excuse of the limited length of the submission".*

346. FIFA also noted again that the *de novo* CAS proceedings would cure any alleged procedural violations in the first instance proceedings.

b. Burden of proof

347. FIFA stated that instead of genuinely collaborating with FIFA's bodies, Mr Del Nero chose to claim he was unaware of the illegal arrangements that members of the CONMEBOL ExCo were carrying out, in a clear attempt to deny his own involvement. Whilst Mr Del Nero seeks to give the impression of abiding by FIFA's requests for information, FIFA stated that *"in view of his clear knowledge of – and involvement in – the bribery schemes, it is evident that Mr Del Nero is keeping to himself all the information that could incriminate him".*

348. Moreover, despite being indicted twice by the DOJ and denying all the charges being brought against him, Mr Del Nero:

> *"has surprisingly chosen to remain in Brazil rather than contesting those (according to him) baseless charges and thereby clearing his name. Simply put, despite (allegedly) having nothing to hide, Mr Del Nero has chosen to live the rest of his life under the stigma of being considered a criminal by the DOJ, with the subsequent effect that this has to his reputation worldwide.* […]
>
> *In other words, the evidence on file demonstrates that* [Mr Del Nero] *has not discharged his duty to collaborate in good faith with respect to the taking of evidence. This only reveals that Mr Del Nero is avoiding to self-incriminate himself (a right which he is entitled to invoke if he wishes). Despite this, FIFA has managed to discharge its burden of proof in order to demonstrate in detail the facts that lead to Mr Del Nero's violations of the FCE".*

c. Admissibility of evidence

i. No illegally obtained evidence

349. FIFA reiterated that Mr Del Nero's arguments regarding the chain of custody of Leite's Notes does not stand, as he was trying to hold onto an argument which – as FIFA explained in its Answer – respondents in the Jury Trial brought, but one which was ultimately dismissed in the Jury Trial.

ii. Written evidence as opposed to witness statements

350. FIFA reiterated that CAS jurisprudence has confirmed the testimonies of persons that were examined during proceedings conducted by State courts may well be relied upon by a sport's governing body.

351. FIFA noted that in *CAS 2010/A/2266*, documents which were not even made available to the accused during the first instance proceedings were still admitted into the file and taken into account by the panel in its decision. Accordingly, there is no reason that documents provided to Mr Del Nero years ago should not be admitted into the file in the present proceedings. FIFA also noted that FIFA themselves have never been able to examine the relevant persons either, so both Parties have been granted the same treatment vis-à-vis the evaluation of the evidence.

352. FIFA stated that the only relevance of *CAS 2016/A/4501* to the present case is that even if a witness failed to appear (which was not even applicable in the present case, unlike in *CAS 2016/A/4501*), their statements may be admitted to the file as evidence.

353. FIFA stated:

> *"FIFA does not challenge the general approach according to which witnesses shall be made available for cross-examination. Nonetheless, this is not the case here. Instead, we are arguing that FIFA, a private association, shall be able to base its disciplinary proceedings, among others, on the testimonies of persons that testified during criminal proceedings closely related to the facts under analysis without having to, mandatorily, call those persons (which, as in this case, are out of FIFA's reach) as witnesses.* […]
>
> *FIFA's lack of resources and coercive powers, as opposed to those at the disposal of the public authorities, warrant the admissibility of such approach, as accepted by CAS in previous integrity-related cases.* […]
>
> *In fact, in the case at hand, FIFA has done, and continues to do, everything in its power to have all persons relevant to these proceedings appear at an eventual hearing. However, this approach has to this moment proven difficult – to say the least – precisely in light of the fact that most of the individuals concerned are out of FIFA's jurisdiction or subjected to other criminal proceedings which prevent them from cooperating in the case at hand".*

d. Evaluation of the evidence

354. FIFA stated that the rules on the evaluation of evidence allegedly contained in U.S. law are irrelevant in this case, as this matter is governed by the FCE, and Article 50 FCE sets the

framework governing the evaluation of evidence and grants the Panel full discretion to evaluate evidence. FIFA rejected again Mr Del Nero's arguments regarding the alleged motivation for witnesses to lie in the Jury Trial.

355. FIFA noted that:

"Some of the central pieces of evidence of this case are the transcripts of conversations made by persons that, while not being aware of their recording, were talking cautiously and in code about their multimillionaire bribery schemes that were being carried out. During those conversations, Mr Del Nero's figure came up on several occasions even though such persons had no reason or benefit to falsely implicate him in the scheme. The fact he was not caught talking over the phone about such issues (precisely because, as a former criminal lawyer, he was extremely secretive and much more cautious than others, as Mr Marin even confirmed in one conversation) does not mean that the numerous references made to him over the phone by different persons directly involved in the bribery schemes lose any value".

356. FIFA also noted that even if some specific details of one meeting may not be deemed to be completely accurate, this does not affect the remaining evidence on file.

e. FIFA's response as to the merits

357. FIFA stated that:

"When it comes to addressing Mr Del Nero's decision-making power in CBF and CONMEBOL, the Appellant fails –once again– to explain how he occupied all the highest international positions instead of his (alleged) direct superior, Mr Marin. Instead, he simply argues that this is not prohibited in FIFA's and CONMEBOL's respective statutes –which has never been argued by FIFA – and hides behind the fact that currently other members of the FIFA council (including the positions reserved for female members) are not presidents of their respective member associations. […]

While this may be true, it still does not change this anomaly which remains unanswered by Mr Del Nero, as the real explanation reveals that he was the de facto holder of power in CBF and therefore also in the international organisations in representation of its member association. Only this explains why Mr Del Nero, a newcomer to the CONMEBOL ExCo, would be immediately fast-tracked to the highest representation of his confederation at FIFA level, thereby being at the same level as top-ranked and influential officials like Mr Leoz and Mr Grondona. This further confirms the already evidenced 'joint' succession of Mr Teixeira by both Mr Marin and Mr Del Nero: the first became president of the CBF and the second became a member of the FIFA ExCo and CONMEBOL ExCo; both attained the different positions of power formerly held by Mr Teixeira, the Appellant getting the bigger piece of the cake".

358. FIFA also denied that it had abandoned its conclusion that Mr Leite had a relationship akin to a family member. FIFA stated that it had *"described and proven that all the elements required to confirm Mr Del Nero's breach of Article 21 FCE exist. In doing so, the obvious and only plausible conclusions that can be drawn from the account of facts and documents on file have been identified. Instead of* [Mr Del Nero] *bringing any realistic arguments that may have rebutted FIFA's position, is has limited itself to discredit our conclusions as "totally speculative and unpersuasive" while maintaining his theory about his lack of decision-making power in CBF and, thereby, indirectly, in the bribery scheme".*

V. JURISDICTION OF THE CAS

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

> *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.*
>
> *An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".*

360. Article 81, para. 1 of the FCE states:

> *"Decisions taken by the Appeal Committee are final, subject to appeals lodged with the Court of Arbitration for Sport (CAS) in accordance with the relevant provisions of the FIFA Statutes".*

361. Article 58, para. 1 of the FIFA Statutes states:

> *"Appeals against final decision passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question".*

362. Both Parties accepted the jurisdiction of the CAS. In his Statement of Appeal, the Appellant acknowledged as *"undisputed"* the *"jurisdiction of CAS to hear the present appeal"*. The jurisdiction of the CAS was not disputed by FIFA, which further confirmed it by signing the Order of Procedure. It follows that the CAS has jurisdiction to hear this dispute.

VI. ADMISSIBILITY

363. The Statement of Appeal, which was filed on 17 June 2019, complied with the requirements of Articles R47, R48, R49 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee.

364. FIFA did not object to the admissibility of the appeal. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

365. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS:

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

366. Article 57, para. 2 of the FIFA Statutes states that:

"[t]he provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".

367. The Parties were in agreement that the applicable law in this case were the various regulations of FIFA – in particular the FCE – and additionally Swiss law.

368. The Panel, therefore, determines that the FIFA regulations, namely the FCE (2012 edition), are applicable in the present matter, with Swiss law applying subsidiarily to fill in any *lacuna* in the FIFA regulations.

VIII. MERITS OF THE CLAIM

A. SUMMARY OF THE MAIN ISSUES

369. Mr Del Nero requests the Panel to set aside the Appealed Decision, which sanctioned him with a lifetime ban from taking part in any football-related activity at national or international level and a fine of CHF 1,000,000 for various violations of the FCE. FIFA, for its part, seeks full confirmation of the Appealed Decision. The Parties submitted numerous detailed arguments, both in respect of procedural issues as well as to the substance of the Appeal.

370. In summary, the issues which the Panel needs to address are as follows:

Preliminary issues

i. The applicable standard and burden of proof

ii. Mr Del Nero's requests for relief

iii. What is the impact of the alleged procedural violations before the FIFA Judicial Bodies?

iv. Should this matter be sent back to FIFA?

Issues relating to the evidence

v. Are Leite's Notes admissible evidence in these proceedings?

vi. Are the Jury Trial witness transcripts admissible evidence in these CAS proceedings?

vii. If admissible, what weight should the Panel place on the Jury Trial witness transcripts given the witnesses did not testify before the CAS?

viii. Validity of the oral enquiries made by the FIFA Secretariat

ix. The authenticity of the CONMEBOL ExCo Meetings minutes

x. The authenticity of the Torneos Ledgers

Merits of the Appeal

xi. The 'money trail' to Mr Del Nero

xii. Did Mr Del Nero violate Article 21 FCE (Bribery and Corruption)?

xiii. Did Mr Del Nero violate Article 20 FCE (Offering and accepting gifts and other benefits), Article 19 FCE (Conflicts of interest), Article 15 FCE (Loyalty), and Article 13 FCE (General rules of conduct?

xiv. If so, how should Mr Del Nero be sanctioned?

The Panel will address these issues in turn.

B. PRELIMINARY ISSUES

1. The applicable standard and burden of proof

371. As a preliminary matter, the Panel notes that the Parties made various submissions about the applicable standard of proof in this matter. At the hearing, Mr Del Nero submitted that ethics violations can, and should, be proven strictly as there is nothing in its nature that prohibits strict proof. Moreover, there is nothing inherent in corruption that makes it impossible to prove, and mere evidentiary difficulties cannot lead to a reduction of the burden of proof.

372. FIFA, for its part, argued that Mr Del Nero was incorrectly seeking to imply a standard of proof akin to that in criminal law proceedings (i.e. beyond a reasonable doubt). FIFA noted that the Panel in *CAS 2001/A/317* stated that *"the legal relations between an athlete and a federation are of a civil nature and do not leave room for the application of principles of criminal law"*. Moreover, FIFA noted that the ECtHR held in the recent *Mutu/Pechstein* decision that disciplinary proceedings before federations are without doubt of civil nature, i.e. only Article 6(1) ECHR is applicable. In doing so, the ECtHR confirmed the jurisprudence of the SFT in this respect. In short, FIFA stated that *"CAS, the SFT and the ECtHR have already and clearly established that according to Swiss law, sporting measures imposed by Swiss associations are subject to Swiss civil law and must be clearly distinguished from criminal penalties"*.

373. In summary, the Panel agrees with FIFA's reasoning above. The relevant standard of proof is set out in Article 51 FCE, which is that *"[t]he members of the Ethics Committee shall judge and decide on the basis of their personal convictions"*. The Panel considers the comments made by the Panel in *CAS 2017/A/5003* in this regard to be a useful and succinct summary as to how this is applied in practice by CAS panels (emphasis added):

> *"175. The Panel notes that, although Article 51 FCE (2012 edition) is entitled "Standard of proof", this is a provision that seems to have less to do with the notion of standard of proof (as usually understood by arbitral tribunals, including CAS panels) than with the consistent approach of Swiss jurisprudence to adjudication, under which the judging body must not look for the objective truth but for the subjective truth, i.e. whether or not the judging body is personally convinced of a certain fact. The problematic*

> *characterization of "personal conviction" as an effective standard of proof, and the relative lacuna in FIFA rules, has led several CAS panels dealing with disciplinary cases involving FIFA officials to* ***apply the flexible standard of proof of "comfortable satisfaction", i.e. less than the standard of "beyond a reasonable doubt" but more than the standard of "balance of probabilities", while bearing in mind the seriousness of the allegations made*** *(CAS 2017/A/5086, at para. 136; CAS 2011/A/2426, at para. 88; CAS 2011/A/2625, at para. 153; CAS 2016/A/4501, at para. 122). It is a standard of proof which may be recognized, more than two decades after its adoption in CAS jurisprudence, as part of lex sportiva; the Panel will thus apply such standard of proof in conjunction with the criterion of personal conviction as provided by Article 51 FCE (2012 edition)"* (emphasis added).

374. The Panel fully agrees with the reasoning quoted above, and will thus apply such a standard of proof of "comfortable satisfaction" in conjunction with the criterion of personal conviction as provided for in Article 51 FCE.

375. The Panel notes that the 2019 edition of the FCE has in fact amended the equivalent provision (Article 48) to state that the standard of proof is on the basis of 'comfortable satisfaction', which is a reflection – as quoted above – of decades of CAS jurisprudence on the issue. For the avoidance of doubt, the applicable regulations in the present case are the FCE (2012 edition), and not the FCE (2019 edition), and this change in the regulations are merely noted by the Panel for the sake of completeness.

376. As for the burden of proof, the Panel notes that FIFA bears the burden of proving Mr Del Nero's violations pursuant to Article 52 FCE, which states *"[t]he burden of proof regarding breaches of provisions of the Code rests on the Ethics Committee"*. That said, in accordance with Swiss law, each party bears the burden of proving any fact or allegation on which it relies.

377. The Parties in this case, naturally, had diametrically opposite views as to whether the relevant burden of proof has been met with respect to almost every allegation made against, or indeed by, Mr Del Nero. The Panel will keep in mind the above-mentioned principles when assessing all the evidence, and will consider that a party has discharged its burden of proof if/when the Panel is personally convinced that a fact has been established to its comfortable satisfaction, bearing in mind the seriousness of the allegations made.

2. Mr Del Nero's requests for relief

378. The Panel notes that in the prayers for relief in his Statement of Appeal, Mr Del Nero requested the Panel to, *inter alia*:

> *"c) Uphold the present appeal and set aside the Appealed Decision, replacing it by an Arbitral Award which:*
>
> *i. To the extent that any issues regarding contracts related to Copa Libertadores, Recopa, Copa Sudamericana and/or Copa America are concerned, declares that the FIFA EC had no jurisdiction to rule on the present matter, pursuant to article 27, par. 4, of the 2012 FIFA Code of Ethics;*

ii. To the extent that any issues regarding contracts related to Copa do Brasil are concerned, declares that the FIFA EC had no jurisdiction to rule on the present matter, pursuant to article 27, par. 5, of the 2012 FIFA Code of Ethics".

379. However, Mr Del Nero did not make the same request in the prayers for relief in his Appeal Brief. Indeed, Mr Del Nero did not explain why the Panel should determine that the FIFA EC did not have jurisdiction with regards to contracts relating to Copa Libertadores, Recopa, Copa Sudamericana and/or Copa America. This issue was not addressed by Mr Del Nero at the hearing either.

380. In light of the above, and the fact that the prayers for relief in the Appeal Brief must be considered to supersede those contained in his Statement of Appeal, the Panel considers that Mr Del Nero had abandoned his request for the Panel to grant the above-mentioned prayers.

381. The Panel will therefore not consider the above-mentioned prayers for relief any further.

3. What is the impact of the alleged procedural violations before the FIFA Judicial Bodies?

382. Mr Del Nero alleged that numerous procedural violations took place during the proceedings before FIFA, including *inter alia*:

- Numerous documents relied on by the FIFA Judicial Bodies were not translated into English and/or languages understood by the judges;
- Members and the secretariat of the FIFA EC and FIFA Appeals Committee were not independent, and judges were *"spoon-fed"* the findings by the secretariat;
- Insufficient time was spent by the Chairman of the Adjudicatory Chamber in determining Mr Del Nero's request for provisional measures; and
- He was not allowed to cross-examine the witnesses cited in the Jury Trial witness transcripts.

383. Mr Del Nero also claimed that there were evidentiary issues before FIFA, but that issue is addressed further below in this Award. FIFA, for its part, denied that any procedural violations occurred and stated that Mr Del Nero was only making these allegations to distract the Panel from his corrupt actions.

384. With respect to the alleged procedural violations before FIFA, the Panel notes that Article R57 of the CAS Code states:

"[t]he Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance …".

385. According to long-standing CAS jurisprudence, pursuant to this provision a panel in an appeals proceeding hears the case *de novo* and must make an independent determination of the

correctness of the parties' submissions on the facts and the merits, without limiting itself to assessing the correctness of the procedure and decision of the first instance (see e.g. *CAS 2016/A/4871*, at para. 119). The *de novo* principle grants the Panel the entitlement not only that procedural flaws of the proceedings of the previous instance can be cured in the proceedings before the CAS, but also that the Panel is authorized to admit new prayers for relief and new evidence and hear new legal arguments (see MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Edition 2015, comment under article R57, n. 12, p. 508) subject to some limited restrictions (see, *inter alia*, *CAS 2009/A/1881 & 1882* and *CAS 2015/A/4346*).

386. As a result, the Panel finds that it is unnecessary to consider whether the FIFA Judicial Bodies committed any procedural violations as alleged by Mr Del Nero. The Panel makes no finding that any such violations were in fact committed, since, even if any of Mr Del Nero's rights were infringed by FIFA, the *de novo* proceedings before CAS will be deemed to have cured any such infringements in any event. All of Mr Del Nero's arguments in this regard are therefore rejected.

387. Notwithstanding the above, Mr Del Nero also argued that the procedural violations before FIFA were a violation of Article 6(1) ECHR. In that regard, the Panel finds the reasoning set out by the Panel in *CAS 2009/A/1920* (para. 28) particularly relevant:

"According to article R57 of the Code, the CAS has full power to review the facts and the law. The consequences deriving from this provision are described in the consistent CAS jurisprudence, according to which "if the hearing in a given case was insufficient in the first instance (…) the fact is that, as long as there is a possibility of full appeal to the Court of Arbitration for Sport, the deficiency may be cured" (CAS 94/129, par. 59). Later the CAS has reaffirmed this principle, holding that "the virtue of an appeal system which allows for a rehearing before an appeal body is that issues relating to the fairness of the hearing before the Tribunal of First instance "fade to the periphery"" (CAS 98/211, par. 8). More recently, the CAS has further relied on the Swiss Federal Tribunal case law, which held that "any infringement of the right to be heard can be cured when the procedurally flawed decision is followed by a new decision, rendered by an appeal body which had the same power to review the facts and the law as the tribunal of first instance and in front of which the right to be heard had been properly exercised" (CAS 2006/A/1177, par. 7.3). For another recent case, see for instance, CAS 2008/A/1594, para. 109, "However, as CAS has complete power to review the facts and the law and to rule the case de novo, the procedural deficiencies which affected the procedures before FILA disciplinary bodies may be cured by virtue of the present arbitration proceedings (see e.g. CAS 2006/A/1175, paras. 61 and 62, CAS 2006/A/1153, para. 53, CAS 2003/O/486, para. 50)". ***This CAS jurisprudence is actually in line with European Court of Human Rights decisions, which in par. 41 of the Wickramsinghe Case concluded that "even where an adjudicatory body determining disputes over civil rights and obligations does not comply with Article 6 (1) [ECHR1] in some respect, no violation of the Convention will be found if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 (1)****"* (emphasis added).

388. The Panel also notes that in the recent ECtHR case of *Ali Rıza and Others v. Turkey, 30226/10,* it was found that proceedings before the Turkish Football Federation ("TFF") Arbitration Committee violated 6(1) ECHR. However, a crucial issue in that case was that there was no right for a party to appeal a decision by the TFF Arbitration Committee, and as such – especially

given that it had exclusive and compulsory jurisdiction – the TFF Arbitration Committee had to provide all guarantees foreseen by Article 6(1) ECHR.

389. In contrast, all decisions by FIFA Judicial Bodies are subject to appeals before the CAS. Accordingly, even assuming that the proceedings involving Mr Del Nero before FIFA Judicial Bodies did violate Article 6(1) ECHR (and the Panel makes no determination on this point as it does not need to), Mr Del Nero has had the right to file an appeal before an independent arbitral tribunal (i.e. the CAS) which does comply with Article 6(1) ECHR. Mr Del Nero's complaints in this regard are therefore moot.

390. Notwithstanding the above conclusion, the Panel acknowledges Mr Del Nero's complaints regarding the alleged procedural violations before FIFA Judicial Bodies and accepts that there does appear to be some room for improvement by FIFA in this regard. However, the Panel also considers that disciplinary proceedings before a sport's governing body such as FIFA cannot be entirely independent in a strictly legal sense as, for example, the secretariat involved in the matters are employees of the prosecuting body (i.e. FIFA in this case; as confirmed by *CAS 2014/A/3848* paras. 57, 58: *'*[…] *The Panel finds that a first element to be taken into account is that internal judicial bodies are not independent arbitration tribunals… The Panel finds that the FIFA DRC is such an internal judicial body.*[…]*'*). This is precisely why there is a right to appeal to the CAS, which is an independent arbitral tribunal that can hear the appeal *de novo*, and guarantees that parties' rights (such as those enshrined in Article 6(1) ECHR) are respected.

391. Lastly, with respect to alleged procedural violations, the Panel notes that Mr Del Nero also alleged that not being able to cross-examine witnesses during these CAS proceedings amounted to a violation of his right to be heard. This is a separate issue to the alleged procedural violations at FIFA, and the Panel has addressed that issue further below.

4. Should this matter be sent back to FIFA?

392. As an ancillary issue to the above, due to the aforementioned alleged procedural violations at FIFA, Mr Del Nero requested the Panel to:

"Refer the present matter back to FIFA, with an order for the completion of the Final Report and the referral of any adjudicatory proceedings against Mr. Del Nero to a different Panel before the Adjudicatory Chamber and, if it is the case, the FIFA AC".

393. The Panel finds it curious that, on one hand, Mr Del Nero considers there to be significant structural inadequacies with the FIFA Judicial Bodies including with respect to independence (as noted above) but, on the other hand, wishes for the Panel to send this matter back to those same FIFA Judicial Bodies to determine again.

394. Nevertheless, the Panel refers again to Article R57 of the CAS Code, which states:

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

395. Pursuant to this provision, the Panel is perfectly entitled to annul the Appealed Decision and render a decision on the substance of the case to replace the Appealed Decision, i.e. to stand in the FIFA Judicial Bodies' shoes and determine whether Mr Del Nero has violated the FCE and if (and how) he should be sanctioned. Whilst the Panel has the discretionary power to refer the matter back to FIFA, the Panel sees no need to do so in the present case. Indeed, doing so would only unnecessarily delay a final resolution of this matter.

396. Accordingly, the Panel rejects Mr Del Nero's request to refer this matter back to FIFA and, in exercising its discretion, determines to be more fair and efficient and, ultimately, in the interest of both Parties and of the sport, to rule *de novo* and issue a final decision on this case.

C. ISSUES RELATING TO THE EVIDENCE

1. Are Leite's Notes admissible evidence in these proceedings?

397. The Appealed Decision relied on numerous pieces of evidence including Leite's Notes, which were found in a safe in the Klefer offices in Rio de Janeiro. Leite's Notes were allegedly collected on 27 May 2015 in a raid involving cooperation between the Brazilian Federal Prosecution Office and U.S. authorities. Mr Del Nero argued that not only were Leite's Notes illegally obtained (under Brazilian law), but the chain of custody of Leite's Notes were *"proven to be defective and could not be guaranteed by the US or Brazilian authorities* […]*"* – which Mr Del Nero claimed was acknowledged by the Judge in the U.S. Trial.

398. Conversely, FIFA denied that Leite's Notes were illegally obtained or that there were any chain of custody issues. Further, even if this were true, it was irrelevant as it did not prevent the evidence from being admissible in these proceedings.

399. In this regard, FIFA stated that Mr Del Nero had *"purposely omitted"* to mention that the documents he claimed to have been illegally obtained were in fact admitted to the file during the Jury Trial. The final decision of the U.S. Judge in respect of this issue so stated (emphasis added):

> *"I think there is enough of a basis in the evidence I have seen and the Government will introduce through the recorded conversation to establish the authenticity of the records,* ***namely that they are what the Government claims they are; notes made by Mr. Leite in connection with this alleged conspiracy to pay bribes*** *and that were then stored in his safe or in his office and were discovered at the time of the search by the Brazilian authorities. I am going to allow in those other exhibits, 305 through 309".*

400. FIFA stated that if Leite's Notes were accepted in a criminal procedure which is subject to much stricter rules on the admissibility of evidence than the current arbitration proceedings, it could not understand how this evidence could be deemed as illegally obtained and therefore inadmissible in the present CAS proceedings.

401. The Panel acknowledges Mr Del Nero's arguments that the raid leading to the authorities obtaining Leite's Notes were allegedly in violation of Brazilian law – including *inter alia* failing to respect formalities stipulated in the Brazilian Federal Constitution. However, no evidence

(e.g. a judgment from a Brazilian court) was provided by Mr Del Nero to establish this. Indeed, it appears that it was admissible evidence in the Jury Trial. Accordingly, based on the evidence available before it, the Panel does not consider Leite's Notes to be illegally obtained evidence, or that there were any chain of custody issues. To determine otherwise would be to effectively conclude that the U.S. Court in the Jury Trial made a mistake on this issue, and there is simply no evidence before this Panel to reach such a conclusion. Moreover, whilst Leite's Notes may arguably not be admissible evidence in criminal/state court proceedings, that is a decision for the relevant criminal/state court to make (as occurred in the Jury Trial). The present proceedings before the CAS are not criminal proceedings and are not subject to strict, criminal law rules of evidence and procedure. The Panel therefore considered that Leite's Notes are admissible evidence in these proceedings.

402. Notwithstanding the above conclusion, for the sake of completeness the Panel wishes to note that even if Leite's Notes were illegally obtained evidence and/or had chain of custody issues as Mr Del Nero purports, it would still have considered this to be admissible evidence in these proceedings.

403. The Panel notes that the present CAS proceedings are governed from a procedural perspective by Swiss law and on a substantive level by the various regulations of FIFA and, subsidiarily, by Swiss law. Accordingly, the question of whether Leite's Notes are admissible evidence is to be answered by Swiss law, as the law applicable in these proceedings. Given the seat of the present arbitration is Switzerland, the Panel considers that PILA is applicable. Article 184 PILA states: *"[t]he arbitral tribunal shall itself take the evidence"*.

404. Article 46 FCE states:

> *"1. Any type of proof may be produced.*
> *2. Types of proof include, in particular:*
> *a) Documents*
> *b) Reports from officials*
> *c) Declarations from the parties*
> *d) Declarations from witnesses*
> *e) Audio and video recordings*
> *f) Expert opinions*
> *g) All other proof that is relevant to the case"*.

405. Article 49 FCE states:

> *"Proof that violates human dignity or obviously does not serve to establish relevant facts shall be rejected"*.

406. Accordingly, the FCE does not explicitly permit or prohibit the use of illegally obtained evidence. Absent any such provision, pursuant to Article 182(2) PILA it is up to the Panel to fill this *lacuna*. The Panel notes that the Panel in *CAS 2020/A/6785* were faced with this very issue, and noted the following:

> *"96. Absent any procedural provision agreed upon by the Parties, it is up to the Panel according to Article 182(2) PILA to fill this lacuna. In doing so, the Panel takes guidance with the respective rules governing the taking of evidence before state courts in civil matters. In this respect reference is made to Article 152(2) of the Swiss Code of Civil Procedure (the "CPC") to which the Parties also referred in their submissions. The provision requires in case of illegally obtained evidence a balancing of interests, i.e. whether or not there is an overriding interest in finding out the truth, or whether MCFC's personality rights prevail".*

407. As the Panel in that case went on to note (para. 97), this test has been applied in CAS jurisprudence on various occasions:

> *"If a means of evidence is illegally obtained, it is only admissible, if the interest to find the truth prevails (Art. 152, 168 Swiss Code of Civil Procedure ("CCP"); HAFTER, Commentary to the Swiss Code of Civil Procedure, 2nd ed., para. 8). According to the Swiss Federal Tribunal and the ECHR, the courts shall balance the interest in protecting the right that was infringed by obtaining the evidence against the interest in establishing the truth. If the latter outweighs the first, the courts may declare a piece of evidence admissible for assessment even though it was unlawfully acquired (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., p. 461).*
>
> […]
>
> *Finally, the Sole Arbitrator notes that, according to the Swiss Federal Tribunal, not only the interest of a complainant in abstaining from obtaining evidence in an illegal manner is relevant in this balancing, but also the interest of not having this evidence used against him:* […]*" (CAS 2016/O/4504, paras. 66, 69* […]*)".*

408. The Panel also notes that CAS jurisprudence has established that that a sports federation or arbitration tribunal is not prevented from taking evidence into account that may prove inadmissible in a civil or criminal state court (e.g. *CAS 2013/A/3297* and *CAS 2009/A/1879*). In particular, in *CAS 2009/A/1879*, notwithstanding a Spanish judge's order not to use certain evidence outside of Spanish criminal proceedings, the CAS panel stated that such order did not render illegal the submission of that evidence before an arbitral tribunal sitting in Switzerland, as Swiss law – as interpreted by the Swiss Federal Tribunal – does not deem illegal evidence to be *per se* inadmissible in civil proceedings and, rather, requires a balancing of various aspects and interests, such as the nature of the infringement, the interest in getting at the truth, the evidentiary difficulties for the interested party, the behaviour of the victim, the parties' legitimate interests and the possibility to obtain analogous evidence in a lawful manner (*CAS 2009/A/1879*, at para. 69). The CAS panel also underlined (i) that the discretion of CAS arbitrators to decide on the admissibility of evidence is exclusively limited by Swiss public policy, which is violated only in the presence of an intolerable contradiction with the sentiment of justice, to the effect that the decision would appear incompatible with the values recognized in a State governed by the rule of law (*CAS 2009/A/1879* at paras. 37 and 70), and that, in any event, (ii) the personality rights of the accused person were not violated as the interest of an effective fight against doping is an overriding public interest in Switzerland, as evidenced by the fact that Switzerland has ratified two anti-doping treaties (*CAS 2009/A/1879*, at para. 74).

409. Lastly, the Panel notes FIFA's submissions that, with respect to Article 46 FCE, the concept of 'human dignity' refers to the civil law protection of personality rights contemplated by Article 28 SCC. The use by an association's disciplinary bodies of allegedly illegal evidence is admissible *"provided that it would not constitute an illegal infringement of the personality rights of the persons against whom the evidence is used"*.

410. Taking all of the above into account and embarking on a balancing of interests exercise, the Panel observes the following:

411. Firstly, Mr Del Nero did not argue that his *"human dignity"* would be violated by the admission of this evidence. Rather, his objection to the admissibility of this evidence focussed on the argument that Leite's Notes were not *"reliable, competent and credible evidence"* and were illegally obtained. The Panel considers that the question of whether Leite's Notes provided sufficient (*"reliable, competent and credible"*) evidence for the Panel to find that provisions of the FCE were proven is a separate question as to whether that evidence is admissible in the first place.

412. Secondly, FIFA did not conduct the raid that obtained Leite's Notes – the raid was conducted by the Brazilian and U.S. authorities. There is no indication that FIFA violated the integrity of the arbitral process and/or obtained Leite's Notes through any bad faith actions / illegal raids or hacking etc. They were simply provided this evidence by U.S. authorities.

413. Thirdly, the Panel notes that Mr Del Nero was one of the highest ranking football officials in the world during the relevant periods in question, and is being accused of being involved in one of the most (if not the most) scandalous bribery schemes in football history (i.e. FIFA-Gate) which undoubtedly tarnished FIFA's reputation. Indeed, Mr Del Nero is accused of accepting bribes amounting to millions of dollars.

414. Accordingly, on balance the Panel considers that the overriding interest of (i) FIFA in restoring the truth, sanctioning wrongdoing amongst its officials and exposing illegal/unethical conduct, and (ii) the public in being informed about alleged wrongdoings by a high ranking football official, outweighs Mr Del Nero's interest in the contents of his alleged bribes not being disclosed. Moreover, the fight against corruption at international level is certainly an overriding public interest in Switzerland, as proven by the fact that Switzerland is a contracting party to (a) the United Nations Convention against Corruption of 31 October 2003, (b) the Council of Europe's Criminal Law Convention on Corruption of 27 January 1999 with its related Additional Protocol of 15 May 2003, and (c) the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 17 December 1997.

415. Accordingly, the balance of interest exercise concludes that even if Leite's Notes were illegally obtained and/or had chain of custody issues, the Panel would still consider them as admissible evidence in these proceedings.

416. For all the reasons stated above, the Panel therefore concludes that Leite's Notes are admissible evidence in these proceedings.

2. Are the Jury Trial witness transcripts admissible evidence in these CAS proceedings?

417. One of the key issues for the Panel to determine in this case is the admissibility of the transcripts of witness testimony from the Jury Trial.

418. Mr Del Nero strongly objected to the admissibility of this evidence, stating that it was collected in a foreign jurisdiction based on different standards and laws, and none of this evidence was ever tested by the FIFA Judicial Bodies or Mr Del Nero. Mr Del Nero submitted that this was witness evidence, not documentary evidence, and noted that it was *"common practice"* at the CAS for written witness statements to be disregarded if that witness fails to appear before the Panel to be cross-examined.

419. At the hearing, Mr Del Nero's U.S. counsel (Mr Cashman) explained *inter alia* that having counsel represent a defendant and being able to cross-examine witnesses to test the veracity of evidence was a fundamental tenet of the U.S. legal system. Mr Del Nero was not represented by any counsel in the Jury Trial, so unlike the defendants in that trial he did not have the opportunity to challenge any of the evidence. Mr Cashman submitted that the system that gave rise to that evidence (i.e. the witness transcripts) did not observe the proper procedures towards Mr Del Nero so even if that evidence was valid against others, it was not valid against Mr Del Nero. Mr Cashman went on to state that the witness testimony could never be used against Mr Del Nero in any U.S. legal proceedings whatsoever, because U.S. law deems that evidence to be so unreliable as to be entirely inadmissible. The reason the law makes such a presumption is due to the lack of legal representation. Mr Cashman then went on to state that even if the Panel was to admit this evidence to the file, no weight should be given to this evidence at all. Mr Cashman stated that this type of witnesses in trials such as the Jury Trial are beholden to prosecutors and are incentivised to lie and falsely implicate others in order to receive a better plea bargain deal.

420. On the other hand, FIFA submitted that the transcripts of interviews from the Jury Trial are not 'witness evidence', and are instead written/documentary evidence. Those 'witnesses' were not FIFA's witnesses, were not questioned by FIFA and have never been under FIFA's remit as they were not football officials. The Panel notes that FIFA sought to have Mr Burzaco attend the hearing but was informed by the U.S. Attorney's Office that he could not attend.

421. Further, FIFA stated that (i) Mr Del Nero had full access to the transcripts and ample opportunity to comment on them, (ii) the testimonies were given in the context of different proceedings, (iii) the testimonies were given under oath, (iv) perjury is a felony under the New York State Law, punishable by imprisonment of up to seven years, and (v) the testimonies should be considered in light of the lack of investigative or coercive powers of a Swiss association when investigating conduct which involved criminal components.

422. It is common ground between the Parties that the Jury Trial was a criminal law proceeding, subject to the criminal law rules of evidence and procedure. The testimonies provided in the Jury Trial were made under oath, and subject to perjury (punishable by imprisonment). Accordingly, whilst the Panel can understand the logic in Mr Del Nero's arguments with respect to his lack of representation in the Jury Trial, the Panel struggles to arrive at the conclusion that

the testimonies by the witnesses should be disregarded as entirely unreliable. In particular, the Panel struggles to accept Mr Del Nero's argument that all the witnesses in the Jury Trial lied (effectively committing perjury) as they were simply saying what prosecutors wanted to hear in order to receive a better deal for themselves. The Panel considers that this would be quite an extraordinary conclusion to reach. The Panel notes that these witnesses at the Jury Trial were perhaps incentivised to give evidence that was pro-prosecution, but Mr Del Nero was not on trial at the Jury Trial. The prosecutors were seeking evidence against Mr Marin and the others. What was said about Mr Del Nero was unlikely to benefit those witnesses' plea bargaining arrangements. Moreover, aside from Mr Del Nero's broad assertions that all cooperating witnesses are incentivised to lie, there is simply no evidence on file to justify a conclusion that all the relevant witnesses in the Jury Trial did, in fact, lie.

423. Moreover, after examining the various transcripts the Panel were left with the distinct impression that, unsurprisingly, the respective witnesses were mainly answering questions aimed at implicating other individuals subject to the Jury Trial, such as Mr Marin. Mr Del Nero was named sporadically in the transcripts almost as a side note, in answers implicating other individuals. Indeed, the Panel notes that Mr Del Nero acknowledged in his written submissions that the evidence presented at the Jury Trial was mainly focussed on proving the guilt or innocence of the respective defendants in that trial – i.e. Messrs. Napout, Marin and Burga. In conclusion, the Panel considered that this lent more credibility to this evidence vis-à-vis Mr Del Nero's actions, because the witnesses did not appear to be looking for credit for testifying against Mr Del Nero (as opposed to the other individuals).

424. The Panel also takes note of the case cited by FIFA, *Hoffa v. United States 385 U.S. 293, 311 (1966)*, in which the U.S. Supreme Court rejected the argument by an appellant that *"the risk that* [the cooperating witness]' *testimony might be perjurious was very high"*. FIFA submitted that the U.S. Supreme Court concluded in that case that *"[c]ourts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly"*. Mr Del Nero did not dispute the validity of this case.

425. The Panel also notes that Mr Del Nero chose not to contest the charges made against him by the DOJ. FIFA submitted that:

> *"despite being indicted twice (in view of the new Superseding Indictment dated 18 March 2020) by the DOJ and refusing all charges brought against him, he has surprisingly chosen to remain in Brazil rather than contesting those (according to him) baseless charges and thereby clearing his name. Simply put, despite (allegedly) having nothing to hide, Mr Del Nero has chosen to live the rest of his life under the stigma of being considered a criminal by the DOJ, with the subsequent effect that this has to his reputation worldwide"*.

426. Mr Del Nero did not deny that he had not left Brazil since his indictment in 2015. The Panel does not wish to make any comment whatsoever about the consequences of Mr Del Nero's decision not to contest the charges against him by the DOJ. However, the Panel notes that FIFA did not have the opportunity of examining the witnesses at the Jury Trial either. It might have even gleaned additional evidence against Mr Del Nero from that process too. Moreover, in the context of the present proceedings, keeping in mind that the investigative powers of

sports governing bodies are extremely limited, the Panel finds the reasoning of the Sole Arbitrator in *CAS 2018/O/5704* compelling:

"the IAAF is not a national or international law enforcement agency. Its investigatory powers are substantially more limited than the powers available to such bodies. Since the IAAF cannot compel the provision of documents or testimony, it must place greater reliance on the consensual provision of information and evidence and on evidence that is already in the public domain. The evidence that it is able to present before the CAS necessarily reflects these inherent limitations in the IAAF's investigatory powers. The Sole Arbitrator's assessment of the evidence must respect those limitations. In particular, it must not be premised on unrealistic expectations concerning the evidence that the IAAF is able to obtain from reluctant or evasive witnesses and other source".

427. The question of what weight to give these witness transcripts (addressed below) is a separate issue to its admissibility. For all the reasons set out above the Panel is satisfied that the witness testimonies were admissible evidence in this case not as witness declarations *per se* but as documentary evidence reflecting what happened in a U.S. criminal proceeding (as explained in the following sub-section).

3. If admissible, what weight should the Panel place on the Jury Trial witness transcripts given the witnesses did not testify before the CAS?

428. Having concluded that these witness transcripts are admissible evidence, the Panel now turns to the issue raised by Mr Del Nero that this evidence should be disregarded as he did not have an opportunity to cross-examine the witnesses in these present proceedings. The Panel notes that Mr Del Nero's counsels repeatedly stated during the hearing that if the Panel was to uphold the Appealed Decision despite Mr Del Nero not being able to cross-examine the witnesses, they would consider this to amount to a violation of Mr Del Nero's right to be heard.

429. The Panel considers that the crux of this issue related to the nature of the witness transcripts – is this evidence considered to be 'witness evidence' for FIFA (as Mr Del Nero claims), or documentary evidence (as FIFA claims)?

430. The Panel is satisfied that the witness transcripts should be considered as documentary evidence, and not FIFA's witness evidence. This evidence amounts to verbatim transcripts of testimony given by individuals in foreign criminal court proceedings. This evidence was given to FIFA by U.S. authorities. FIFA was not involved in the Jury Trial and, as noted above, Mr Del Nero chose not to involve himself in the Jury Trial. Accordingly, neither Party has been able to examine those individuals, so there has not been any unequal treatment in that regard. None of the individuals testifying in the Jury Trial are football officials within FIFA's remit or control, and in any event FIFA is not a law enforcement agency that can compel compliance with an investigation. Therefore, the Panel is satisfied that the relevant individuals cannot be considered as FIFA's witnesses.

431. The Panel notes that similar issues have arisen in other cases before the CAS. In *CAS 2010/A/2266,* none of the persons interviewed during judicial proceedings in Germany testified during the CAS hearing, but their evidence was still considered admissible and taken into account by the Panel.

432. The Panel acknowledges that, as a matter of course, it would have been preferable for the Jury Trial witnesses to have been available for examination by FIFA, Mr Del Nero and the Panel in these proceedings. However, that was not possible through no fault of either Party. Nevertheless, given that the Panel considers the Jury Trial witness transcripts to be documentary evidence and not witness evidence, it follows that Mr Del Nero was not denied an opportunity to cross-examine any of FIFA's witnesses. The Jury Trial witness transcripts were provided to Mr Del Nero during the FIFA proceedings (i.e. a long time ago), and in these CAS proceedings he has been provided every opportunity to provide any submissions or contradicting evidence he wished to. Indeed, Mr Del Nero cited excerpts of the Jury Trial witness transcripts in his lengthy submissions. Accordingly, the Panel does not consider there to have been any violation of Mr Del Nero's right to be heard in this regard.

433. Lastly, with respect to what weight to give this evidence in these proceedings, the Panel notes it would not simply accept all the testimonies in the transcripts as proof that Mr Del Nero violated the FCE. It was still incumbent on FIFA to prove its case to the Panel's comfortable satisfaction by corroborating the statements in the witness transcripts with other evidence. Whether FIFA successfully did this is considered further below.

4. Validity of the oral enquiries made by the FIFA Secretariat

434. Mr Del Nero claimed that Mr Silveira was interviewed by two members of the FIFA Secretariat instead of the Chief of Investigation and, in doing so, they acted beyond their powers (*ultra vires*) and consequently the interview should be disregarded and/or deemed void.

435. However, the Panel notes that Articles 33(3) and 33(5) FCE allow the FIFA Secretariat to *"provide support"* to the Chief of Investigation. More significantly however, when questioned by Mr Silveira's legal counsel as to the validity of the interview, the FIFA Secretariat stated:

> *"With regard to your third question, the legitimacy. This comes from our chief investigator and also from the FIFA Code of Ethics that allow Ms Katisya to then delegate authority to myself and Mr Bivolaru. All of those provisions are contained in the FIFA Code of Ethics. Therefore we are entitled to carry out this investigation in close collaboration with Ms Katisya. Therefore all this process was carried out by our chief of investigation who allowed us to carry out this interview. Please let me know if your questions were not fully answered, and I will be glad to provide you with more clarification".*

436. In response Mr Silveira's legal counsel explicitly stated *"all* [his] *questions were clarified"*. Accordingly, the Panel sees no reason why the transcript of Mr Silveira's interview should be deemed *ultra vires* or disregarded. Mr Del Nero's arguments in this regard are rejected.

5. The authenticity of the CONMEBOL ExCo meetings minutes

437. Mr Del Nero argued that the various CONMEBOL ExCo meetings minutes which allege his involvement in the conclusion of agreements with T&T and Datisa for Copa Libertadores and Copa America, are unreliable as, *inter alia*, they were not initialled on every page – which Mr Del Nero claimed was a *"common practice"* in Brazil/South America.

438. Conversely, FIFA stated that an analysis of minutes of various CONMEBOL ExCo meetings show that some contained a signature only on the last page, or only the signature of one person on each page, or signatures of several persons in the odd pages and final page. Accordingly, there was no established practice throughout South America, let alone an essential requirement, to sign all pages of each document.

439. On balance, the Panel agrees with FIFA's position. If Mr Del Nero was asserting that the minutes should be deemed as invalid due to a common practice of initialling every page, then he bore the burden of proof in this regard (Article 8 SCC). The Panel determines that Mr Del Nero failed to meet his burden of proof as, based on the evidence before the Panel, there does not appear to be any legal requirement or common practice for minutes to be initialled on every page in order for it to be valid.

440. Accordingly, Mr Del Nero's arguments in this regard are rejected.

6. The authenticity of the Torneos Ledgers

441. Mr Del Nero claimed there was no evidence that the references in the Torneos Ledgers to, *inter alia, "the Brazilian"* and *"MP"* were references to him. He claimed that FIFA's conclusions linking these references to him *"was based entirely on testimony that was speculative, uninformed, and completely unreliable"* and must be set aside.

442. However, FIFA stated that Mr Del Nero's arguments did not relate to the admissibility of this evidence, but rather to the evaluation of such evidence. The Panel agrees with FIFA's position. The Panel sees no reason to disregard the Torneos Ledgers and/or deem it inadmissible. Whether the Torneos Ledgers help prove Mr Del Nero violated the FCE is separate question, and is dealt with further below.

D. MERITS OF THE APPEAL

1. The 'money trail' to Mr Del Nero

443. As a preliminary matter with respect to the merits of this Appeal, the Panel notes that Mr Del Nero's defence in this case largely focussed on the absence of evidence that he actually received the alleged bribery amounts – i.e. there was no proven 'money trail' leading to him. At the hearing, Mr Del Nero's counsels referred to the lack of a 'smoking gun', and stated that FIFA were relying on circumstantial evidence and innuendo, as well as testimony from the Jury Trial (which as noted above they considered inadmissible/unreliable).

444. FIFA, for its part, did not deny that there was no 'smoking gun'. However, FIFA stated that this did not equate to there not being any 'direct evidence' of bribery. FIFA pointed to the numerous pieces of evidence (summarised in detail in this Award) which, when considered together, provide ample proof of Mr Del Nero's involvement in a bribery scheme.

445. In that regard, the Panel wishes to make the following comments.

446. Firstly, based on the evidence available before it, the Panel is not comfortably satisfied that all the alleged bribes were actually paid to Mr Del Nero. The Panel also concurs with the Parties that there does not appear to be a 'smoking gun' in this case. However, the Panel does not consider this to be terminal for FIFA's case. Indeed, the Panel considers it unlikely that there would be a 'smoking gun' in bribery cases such as these, given that parties involved in bribery schemes go to great lengths to conceal their involvement and receipt of funds (e.g. through banks in tax havens) for the very reason that there would be minimal evidence (if any) that could be used against them in legal proceedings. As FIFA noted, the CAS *"has confirmed in integrity and bribery cases that the evidence has to be assessed bearing in mind that "corruption is, by nature, concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing"*. (*CAS 2010/A/2172*).

447. Indeed, Mr Burzaco testified in the Jury Trial that third party/intermediary companies had to be created in order to circumvent detection (emphasis added):

> *"Q. After that point, did the mechanism for making the payments to Del Nero and Marin in connection with the Copa Libertadores change in any way?*
>
> *A Yes, sir.*
>
> *Q. How?*
>
> *A. In 2013, when they were to start collecting $900,000 per year, those funds came out – **they didn't come out anymore from CONMEBOL's treasury but out of sight companies that we created to pay these bribes**. And, also, given bigger restricts in the financial markets and more controls and also more corruption in soccer that was appearing, it was more difficult to get the payment release, as I call, exotic or more difficult to reach locations. So, after long discussions, they changed instructions in order for those payments to be feasible".*

448. As such, in bribery and corruption cases such as FIFA-Gate (a bribery scheme so sophisticated that it evaded law enforcement all over the world for many years), sports governing bodies inevitably have no choice but to rely on circumstantial evidence. Moreover, Mr Del Nero stated in his testimony at the hearing that he has been a lawyer for over 50 years. If anything, his decades of legal experience suggested to the Panel that he was likely to have been even more conscious of leaving no evidentiary trail than an ordinary individual would be.

449. That said, the Panel agrees entirely with Mr Del Nero that he cannot be found 'guilty by association'. Accordingly, the fact that other individuals involved may have been found guilty of corruption/bribery (either in FIFA disciplinary proceedings or before criminal courts) does not mean that Mr Del Nero is also guilty. The onus was on FIFA to present enough convincing evidence that corroborated any allegations to the comfortable satisfaction of the Panel that Mr Del Nero violated Article 21 FCE.

450. Secondly, the Panel agrees with the reasoning of the FIFA Appeals Committee that *"the acceptance of an advantage (and not actually receiving it) suffices in order to this requirement to be met"*. This is supported by the conclusion reached by the panel in *CAS 2014/A/3537*, according to which *"the timing of*

promise, not payment is decisive. Bribery occurs when one enters into an agreement to bribe and payment could be agreed to be paid before but actually paid after the event to which it relates".

451. Accordingly, so long as the Panel is comfortably satisfied that Mr Del Nero accepted bribes, it does not matter whether there is sufficient evidence of him receiving the bribery payments – the latter is not a prerequisite for a violation of Article 21 FCE to be established.

452. The Panel undertakes the below analysis with the above principles in mind.

2. Did Mr Del Nero violate Article 21 FCE (Bribery and Corruption)?

453. The Panel recalls that Article 21 FCE states as follows:

> *"1. Persons bound by this Code must not offer, promise, give or accept any personal or undue pecuniary or other advantage in order to obtain or retain business or any other improper advantage to or from anyone within or outside FIFA. Such acts are prohibited, regardless of whether carried out directly or indirectly through, or in conjunction with, intermediaries or related parties as defined in this Code. In particular, persons bound by this Code must not offer, promise, give or accept any undue pecuniary or other advantage for the execution or omission of an act that is related to their official activities and is contrary to their duties or falls within their discretion. Any such offer must be reported to the Ethics Committee and any failure to do so shall be sanctionable in accordance with this Code.*
>
> *2. Persons bound by this Code are prohibited from misappropriating FIFA assets, regardless of whether carried out directly or indirectly through, or in conjunction with, intermediaries or related parties, as defined in this Code.*
>
> *3. Persons bound by this Code must refrain from any activity or behaviour that might give rise to the appearance or suspicion of improper conduct as described in the foregoing sections, or any attempt thereof".*

454. The above provision was broken down by both Parties into 6 elements, as follows:

i. **The offender**: a person bound by the FCE;

ii. **The agreement**: the act of the offender (*"offer, promise, give or accept"*);

iii. **The bribe**: the personal or undue pecuniary or other advantage offered, promised or given to or accepted by the offender;

iv. **The counterpart**: anyone within or outside FIFA;

v. **The advantage**: the consideration given by the offender in exchange for the bribe (*"obtain or retain business or any other improper advantage"*); and

vi. **The intermediary/related party**: where the offender is accused of having received a bribe through an 'intermediary' or 'related party', a subjective and objective link between the offender and his/her intermediary/related party must also be proven.

455. The Panel notes that the first, third and fourth elements listed above are uncontested by Mr Del Nero. The Panel will therefore focus on the elements of Article 21 FCE that are in dispute between the parties, i.e. the second, fifth and sixth elements.

a. Second Element: The act of the offender ("offer, promise, give or accept")

456. The various payments Mr Del Nero is alleged to have accepted and/or received, and the corresponding corroborating evidence submitted by FIFA have been set out in detail in the 'Submissions by the Parties' section of this Award. For the sake of brevity, it will not be repeated at length here.

457. For convenience, the alleged payments can be briefly summarised as follows:

Copa Libertadores

- Accepted payments of USD 600,000 in 2012, and USD 900,000 in 2013 (executed through Arco and Support Travel) and in 2014 (executed through Valente and Support Travel), of which he received a total of USD 1.2 million; and

- Accepted the offers and promises of another USD 900,000 for each edition of the competition between 2015 and 2022, of which he received a total of USD 3.6 million.

Copa America

- Accepted a payment of USD 1.5 million regarding the approval of the contract between Datisa and CONMEBOL (executed through FPT Sports and Support Travel). A payment for USD 3 million was executed and was meant to be shared amongst Mr Del Nero and Mr Marin;

- Accepted a payment of USD 1 million for the 2015 edition; and

- Accepted payments of USD 1 million each for the remaining Copa America editions (2016, 2019 and 2023).

CBF Copa do Brasil

- Accepted a payment of BRL 1.5 million (approximately USD 750,000) for each of the 2013 and 2014 editions of the Copa do Brasil;

- BRL 2 million (approximately USD 1 million) for the future editions of the competition to be held between 2016 and 2022;

458. In total, FIFA submitted that Mr Del Nero accepted bribes amounting to over USD 23 million, of which he received payments amounting to over USD 6 million.

459. As summarised in detail in the 'Submissions by the Parties' section of this Award, FIFA cited various pieces of evidence from, *inter alia,* the following sources to verify and corroborate these payments:

- Excerpts from the Jury Trial witness transcripts, including testimony from Mr Burzaco, Mr Rodriguez, Mr Hawilla and Mr Berryman (IRS special agent);
- Torneos Ledgers;
- Payment sheets and emails contemporaneously prepared by Mr Rodriguez;
- Emails between Mr Burzaco and Mr Rodriguez;
- Bank account statements from FPT Sports evidencing payments to Support Travel, which appears to have been used as a vehicle/intermediary for payments to Mr Del Nero;
- Leite's Notes;
- Minutes of CONMEBOL ExCo meetings; and
- Excerpts of various wiretapped calls involving Mr Burzaco, Mr Hawilla, Mr Leite and others.

460. The Panel carefully considered all the evidence on file. Whilst each individual piece of evidence in isolation may not have been sufficient to prove Mr Del Nero either accepted or received the respective amounts, the Panel considers that all of the evidence considered in conjunction with each other is emphatic. The Panel finds it particularly persuasive that different pieces of evidence on file match with one another despite the fact that they were provided by different individuals involved in different stages of the bribery scheme. The Panel also finds it convincing that wiretapped conversations with individuals involved matched testimonies given during the Jury Trial, which are then also corroborated by other written documentation (such as ledgers, meeting minutes or notes/emails). The Panel considers that this consequently adds more weight and credibility to each individual piece of evidence.

461. Aside from the numerous objections with respect to the admissibility of various pieces of evidence (which have already been addressed above), Mr Del Nero's defence largely relied on *inter alia*, claiming that the witnesses in the Jury Trial lied and/or used his name to enrich themselves, the wiretapped conversations were misleading or incomplete, and the references to "MP" or "MPM" in the ledgers/notes were not actually references to him. On balance, given the sheer weight of evidence against him, the Panel considers Mr Del Nero's arguments and position to be implausible.

462. Moreover, the Panel notes that Mr Del Nero did not deny the existence of a bribery scheme (i.e. FIFA-Gate) and that other individuals involved in FIFA-Gate (such as *inter alia* Mr Marin and Mr Teixeira) were offered and/or received bribes. As FIFA noted, it would be impossible

for him to deny this. What Mr Del Nero does claim however, is that despite his senior executive positions in football and central involvement on various ExCos, he was entirely innocent and was neither offered bribes nor accepted them. In this regard, the Panel also notes that, despite claiming that everyone was lying about his involvement in the bribery scheme, the fact remains that Mr Del Nero chose not to go to the U.S. to clear his name in the criminal proceedings; and indeed he has not left his homeland of Brazil (where he would be safe from extradition to the U.S.) since his indictment in 2015. As noted previously, Mr Del Nero cannot be found 'guilty by association'. However, having considered all the evidence cited against him, the Panel considers Mr Del Nero's position that everyone else involved in the events in question could be guilty, whilst he is simply an innocent victim/bystander, to be extremely unlikely.

463. At this juncture, the Panel also wishes to address one of the other arguments raised by Mr Del Nero relating to the reliability of Mr Burzaco's testimony against him. Specifically, Mr Del Nero claims that Mr Burzaco (i) lied about being present in Asunción, Paraguay in October 2014 at a CONMEBOL meeting, and (ii) falsely claimed that Mr Del Nero travelled to Argentina in April or June 2012. Mr Del Nero claims Mr Burzaco's entire testimony should therefore be disregarded an unreliable.

464. Mr Del Nero bases his argument with respect to the meeting in Asunción in October 2014 on an alleged declaration from the Immigration Services of Paraguay that stated that they had no record of Mr Burzaco entering the country at that time. In response, FIFA notes that Argentinean citizens could enter Paraguay without a passport (and only needed an ID card) due to the Mercosur 2008 agreement. Moreover, it appears that Mr Burzaco travelled to Paraguay on a private jet and, therefore, likely did not go through ordinary customs/border controls. In addition, he was travelling in a group including high ranking football officials to visit CONMEBOL – whose headquarters had diplomatic immunity at the time. Ultimately, the Panel does not have sufficient evidence to conclude that Mr Burzaco lied about his presence in Paraguay. Indeed, FIFA's explanation seems entirely plausible to the Panel. Moreover, as FIFA noted, the fact that Mr Burzaco would have been committing perjury by falsely claiming this fact in the Jury Trial only makes it more unlikely that he lied.

465. With respect to the meetings in Argentina in April and June 2012, Mr Del Nero claimed that his passport did not show stamps for Argentina during those dates. Mr Del Nero also presented a declaration from the Brazilian police that he did not fly to Argentina in April or June 2012. In response, FIFA stated that the Mercosur 2008 agreement allowed Brazilian citizens to travel to Argentina without a passport, and the declaration from the Brazilian police additionally stated that it was possible for him to have travelled without it being registered in the database. There was evidence that he was there (from Mr Burzaco) and it was for him to rebut or counter that evidence. Once again, the Panel considers that it does not have sufficient evidence before it to disprove the evidence that it does have that Mr Del Nero did travel to Argentina on those dates. When questioned by the Panel at the hearing on this issue, Mr Del Nero did not deny that he could have travelled with an ID card, but stated that it was implausible he would do this just to create an alibi. The Panel also notes that the declaration by the Brazilian police relied on by Mr Del Nero stated that *"it is possible that the persons in question had travelled internationally, which are not found in the consulted systems. Furthermore, we observe that the consultation result may be compromised due*

to the inconsistencies in the searched data". Accordingly, the Panel does not consider this convincing evidence in Mr Del Nero's favour.

466. The Panel notes that Mr Del Nero bore the burden of proof in the above-mentioned issues, and concludes that that he failed to meet this burden. Whilst he may not have been able to obtain more evidence about Mr Burzaco's whereabouts, the Panel felt that Mr Del Nero could have provided more convincing evidence regarding not being in Argentina. Whilst it could be difficult to prove a negative (i.e. that he was not in Argentina), given the significance of these allegations and the amount of time Mr Del Nero has had to build his defence, the Panel would have expected Mr Del Nero to provide more compelling evidence regarding where he claims to have been at that time, if not Argentina, especially since, when asked by the Panel about his whereabouts at the times in question, he himself replied he was somewhere *"in Brazil"*. For example, Mr Del Nero could have provided evidence of his calendar/diary, or meetings he attended at that time in some other place, or a witness statement from an individual he was with at the time etc. He did not do so and ultimately, the Panel concludes that Mr Del Nero failed to meet his burden of proof with respect to both the above issues.

467. Moreover, and in any event, the Panel considers that even if some of the specific details about dates of a meeting may not be entirely accurate, this does not automatically equate to the entirety of Mr Burzaco's testimony being unreliable. So long as the other evidence provided by Mr Burzaco could be corroborated and verified by other evidence, it could be relied on. Mr Del Nero's arguments in this regard are rejected.

468. In summary, having considered all the evidence available before it, the Panel is comfortably satisfied that Mr Del Nero accepted bribes, and indeed received payments in relation to some of those bribes. As noted previously, the Panel accepts that there is no 'smoking gun' that proves that Mr Del Nero received the alleged bribe payments. However, the Panel notes once again that these proceedings are not criminal/state court proceedings so the evidence does not need to be assessed to such a standard. The Panel needs only to be comfortably satisfied that the allegations are proven – which it is. The Second Element of Article 21 FCE is therefore satisfied.

b. Fifth Element: The advantage ("obtain or retain business or any other improper advantage")

469. A further element of Article 21 FCE requires that an undue advantage must be given in order to obtain or retain business or any other improper advantage.

470. FIFA noted that Mr Burzaco, Mr Hawilla and Mr Leite (or their respective companies T&T, Traffic and Klefer) sought to do business with CONMEBOL and CBF by acquiring the media and marketing rights for several football competitions (Copa Libertadores, Copa America and Copa do Brasil) and exploiting them commercially. Further, an advantage for the involved individuals and companies lay in the fact that they were able to extend and maintain their contracts with CONMEBOL and CBF without having any competition from other contenders, thus improving their contractual position by circumventing any competition.

471. In response, Mr Del Nero claimed *inter alia* that in fact, due to his powers within CBF and CONMEBOL, he was not even in a position to secure the *"advantages"* that FIFA accused him of giving. Mr Del Nero claimed that he was only one of five CBF Vice-Presidents, and it was actually the CBF President (Mr Marin) who had exclusive powers to sign agreements on behalf of CBF. Similarly, Mr Del Nero claimed that his involvement on COMMEBOL meetings was *"entirely passive"*, as he attended the meetings mostly to receive instructions and pass-on information about his activities. Whilst he admitted that he had the right to vote, he claimed that it was Mr Marin who signed CONMEBOL contracts on behalf of the CBF.

472. The Panel does not find Mr Del Nero's arguments convincing in this regard for numerous reasons.

473. Firstly, despite Mr Del Nero's attempts to downplay his significance and involvement within CBF and CONMEBOL, the fact remains that he was a Vice-President of the CBF, had voting rights in CONMEBOL ExCo meetings, and held a position on the FIFA ExCo. It is plainly evident to the Panel that Mr Del Nero was not only one of the most influential and powerful football executives in South America (given the CBF's importance in this regard), but also in world football. The Panel rejects his attempts to portray himself as a powerless individual who had no influence in decision making within the CBF and CONMEBOL. The Panel also does not accept Mr Del Nero's attempts to portray himself as having to be entirely deferential to Mr Marin in this respect.

474. Secondly, it is true that Mr Del Nero was not the only decision maker within those entities. The Panel considers that this is precisely why numerous individuals involved in the decision making process are bribed in bribery schemes such as this. The fact that other members of the CONMEBOL ExCo, such as Mr Marin, were involved in the bribery scheme does not absolve Mr Del Nero of liability. Indeed, the Panel considers this only makes it more likely that Mr Del Nero and others were offered bribes to secure their votes. It is telling in this regard that various contracts with the relevant companies were approved unanimously by the CONMEBOL ExCo.

475. Thirdly, the Panel considers that Mr Del Nero did not need to sign or negotiate the relevant contracts in order to be in violation of this provision. The Panel agrees with FIFA that *"the relevant act for the purpose of this case was his participation in the various meetings were such contracts were discussed and approved"*. The Panel considers that the task that individuals involved in the bribery scheme needed to do was to ensure that existing contracts with the relevant entities (such as T&T) were renewed, initiate contracts with relevant companies (such as Datisa) and ensure that any competing independent offers were rejected or not properly considered. They only needed to use their influence and/or vote to ensure that outcome, regardless of whether they ultimately signed the final contract entered into. Further, even if he was a relative newcomer to the CONMEBOL ExCo, he still had influence and a vote. The Panel also notes that Mr Del Nero claimed he was not even aware of the contents of some of the contracts he was approving. The Panel does not consider this to help Mr Del Nero's case, given that it was his job to be aware of this information and, more importantly, if he still proceeded to approve the contracts without any scrutiny this only adds to the premise that his task was to simply approve the contracts that were subject to bribes.

476. In summary, the Panel is comfortably satisfied this element of Article 21 FCE is satisfied.

c. Sixth Element: The intermediary / related party

477. The Panel notes that Article 21 FCE states that bribery could occur *"regardless of whether carried out directly or indirectly through, or in conjunction with, intermediaries or related parties as defined in this Code"*.

478. Mr Del Nero claimed that because FIFA could not find any proof of Mr Del Nero receiving bribes, in order to *"fill in the blanks"* FIFA claimed that these payments were being made through intermediaries/related parties. The Appealed Decision stated that the relationship between Mr Del Nero and Mr Abrahão was *"akin to a family relationship"*, and described Mr Leite as a *"close personal friend"* of Mr Del Nero. Mr Del Nero denied both these claims. The Parties made numerous submissions about whether Mr Leite and Mr Abrahão were, in fact, 'close personal friends' and/or whether they had relationships with Mr Del Nero that were *"akin to a family relationship"*.

479. The Panel notes that '*intermediaries and related parties'* are defined in the FCE as:

> *"a) agents, representatives and employees;*
>
> *b) spouses and domestic partners;*
>
> *c) individuals sharing the same household, regardless of the personal relationship;*
>
> *d) immediate family members, i.e. such as individual's spouse or domestic partner, parents, grandparents, uncles, aunts, children, stepchildren, grandchildren, siblings, mother-in-law or father-in-law, son-in-law or daughter-in-law, brother-in-law or sister-in-law and the spouses of such persons, and including anyone else, whether by blood or otherwise, with whom the individual has a relationship akin to a family relationship;*
>
> *e) legal entities, partnerships and any other fiduciary institution, if the person bound by this Code or the person receiving an undue advantage alternatively:*
>
> *i. holds a management position within that entity, partnership or fiduciary institution;*
>
> *ii. directly or indirectly controls the entity, partnership or fiduciary institution;*
>
> *iii. is a beneficiary of the entity, partnership or fiduciary institution;*
>
> *iv. performs services on behalf of such entity, partnership or fiduciary institution, regardless of the existence of a formal contract"*.

480. On balance, the Panel is not comfortably satisfied that either Mr Leite or Mr Abrahão had relationships with Mr Del Nero that were *"akin to a family relationship"*. However, the Panel considers this issue to be a bit of a 'red herring' as it does not ultimately make a difference as to whether Article 21 was violated. The Panel is comfortably satisfied that Mr Leite and Mr

Abrahão were 'agents' or 'representatives' of Mr Del Nero within the definition of an 'intermediary' or 'related party' in the FCE.

481. The Panel also notes that Mr Burzaco confirmed that in 2013 the *modus operandi* to pay the bribes changed in view of the increasing number of restrictions and controls resulting from the increasing corruption in football. As a consequence, the bribes started to be paid from phantom companies created for that purpose rather than doing so from CONMEBOL's accounts. FIFA noted that *"this description matched with the fact that no records could be secured with respect to the 2012 payments, which must have been done to banks located in untraceable tax havens. Instead, in 2013, the modus operandi clearly changed towards paying the bribes through other Brazilian companies that would act as intermediaries such as Support Travel (belonging to Mr Abrahão) or Valente (belonging to Mr Margulies)".*

482. Mr Del Nero unsurprisingly looks to distance himself from Mr Leite and Mr Abrahão but, based on the evidence on file, the Panel is comfortably satisfied that Mr Abrahão was using his corporate structure (e.g. Support Travel) to channel and receive bribes on behalf of Mr Del Nero.

483. Accordingly, this element of Article 21 FCE is also satisfied.

d. Conclusion

484. For all the reasons stated above, the Panel is comfortably satisfied that Mr Del Nero acted in violation of Article 21 FCE.

3. Did Mr Del Nero violate Article 20 FCE (Offering and accepting gifts and other benefits), Article 19 FCE (Conflicts of interest), Article 15 FCE (Loyalty), and Article 13 FCE (General rules of conduct)?

485. The Panel notes that, in addition to Article 21 FCE, the Appealed Decision concluded that Mr Del Nero also acted in violation of Articles 20, 19, 15 and 13 of the FCE. Mr Del Nero denied violating these provisions, and also submitted that in any event he should not be sanctioned twice for the same conduct.

486. FIFA stated that the Adjudicatory Chamber considered the violations of Articles 20, 19, 15 and 13 were materially absorbed by the breach of Article 21(1) FCE and, therefore, they did not serve as an additional basis to sanction Mr Del Nero. For this reason, Article 11 FCE on concurrent breaches was not to be applied in the present case. FIFA did not make any submissions in these CAS proceedings specifically about these additional provisions of the FCE.

487. Given FIFA's position, and the Panel's conclusion that Mr Del Nero did violate Article 21 FCE, the Panel sees no need to determine whether Mr Del Nero also violated Articles 20, 19, 15 and 13 of the FCE.

4. How should Mr Del Nero be sanctioned?

488. Having concluded that Mr Del Nero violated Article 21 FCE, the Panel turns to the question of whether the sanction imposed on him in the Appealed Decision was appropriate. In assessing the adequacy of the sanction, the Panel wishes to stress that it considered all the arguments and evidence submitted by Mr Del Nero and FIFA.

489. Article 6(1) FCE sets out the potential sanctions that could be applied to Mr Del Nero:

> *"a) warning;*
> *b) reprimand;*
> *c) fine;*
> *d) return of awards;*
> *e) match suspension;*
> *f) ban from dressing rooms and/or substitutes' bench;*
> *g) ban on entering a stadium;*
> *h) ban on taking part in any football-related activity;*
> *i) social work"*

490. In the Appealed Decision, the FIFA Appeals Committee ruled that Mr Del Nero *"is banned from taking part in any football-related activity (administrative, sports or any other) at national and international level for life"* and imposed a fine in the amount of CHF 1,000,000. As Mr Del Nero noted, this is indeed the highest and most severe sanction that could have been applied to him.

491. Mr Del Nero argued that FIFA failed to abide by the principle of proportionality and requested that any sanction *"be limited to a warning, a reprimand and/or a fine, pursuant to article 9 et seq. of the FCE"*. Conversely, FIFA submitted that this was an entirely proportionate sanction in the present circumstances. FIFA stated, *inter alia,* that Mr Del Nero's degree of guilt is the highest and his offences must be regarded as being severely reprehensible as he behaved in a way that bluntly contradicts and violates Article 21 FCE.

492. The Panel appreciates FIFA's position that, notwithstanding the *de novo* powers in Article R57 of the CAS Code, a CAS panel could only amend a FIFA disciplinary sanction in cases where FIFA are deemed to have acted arbitrarily. That said, as noted by the panel in *CAS 2019/A/6326 (para. 224)*:

> *"According to the CAS jurisprudence, whenever an association uses its discretion to impose a sanction, the panel shall consider that association's expertise and proximity but, if having done so, the panel considers nonetheless that the sanction is disproportionate, it must, given its de novo powers of review, be free to say so and apply the appropriate sanction (see CAS 2015/A/4338)".*

493. With respect to the principle of proportionality which Mr Del Nero claims FIFA failed to abide by, the Panel notes that any sanction must be proportionate and the object must be to make the punishment fit the crime. As noted by the panel in *CAS 2019/A/6219 (para. 119)* (emphasis added):

"Overall, and in any case, the principle of proportionality must be respected. In that regard, the Panel notes that, ***as recognized by CAS in several compelling precedents*** *(ex multis CAS 2005/C/976&986, paras 139-140),* ***the principle of proportionality under Swiss law (which applies subsidiarily in this arbitration) implies that there must be a reasonable balance between the kind of the misconduct and the sanction****. More specifically, to be observed, the principle of proportionality requires that: (i) the measure taken by the disciplinary body is capable of achieving the envisaged goal; (ii) the measure is necessary to reach the envisaged goal; and (iii) the constraints which the affected person will suffer as a consequence of the measure are justified by the overall interest to achieve the envisaged goal.* ***In other words, to be proportionate a measure must not exceed what is reasonably required in the search of a justifiable aim****".*

494. The Panel reviews the sanction in the Appealed Decision with the above principles in mind.

a. Precedents

495. In assessing Mr Del Nero's sanction, the Panel considers that jurisprudence in football ethics related cases could be a helpful guide, whilst noting that there is no principle of binding precedent (*stare decisis*) at the CAS. Further, although precedents are a useful guide, each case must be decided on its own facts and *"although consistency of sanctions is a virtue, correctness remains a higher one; otherwise unduly lenient (or, indeed, unduly severe) sanctions may set a wrong benchmark inimical to the interests of sport"* (*CAS 2011/A/2518*, para. 10.23). The Panel considers this to be a particularly important principle to keep in mind, as no two cases are identical so reading across sanctions from one case to another is not an exact science. As noted by the panel in *CAS 2019/A/6326*, *"[o]ne panel might think that a previous panel was too lenient. Focusing on the facts of the case in front of it avoids the possible perpetuation of error".*

496. The Parties cited numerous precedents in their submissions that they claimed to be of assistance to their case.

497. Mr Del Nero cited *inter alia*:

- **Amos Adamu (*CAS 2011/A/2426*)** – The former FIFA ExCo member, President of the West African Football Union, Chairman of the CAF Ethics Committee and Director General of Sports in Nigeria was secretly filmed and recorded by undercover *Sunday Times* journalists. He was found to have accepted a bribe of USD 800,000 in exchange for fixing his vote for the future host of the FIFA World Cup. He was found guilty of infringing Article 3 (General Rules), Article 9(1) (Loyalty and Confidentiality) and Article 11(1) (Bribery) of the 2009 FCE. The CAS panel upheld a ban of 3 years, with a fine of CHF 10,000. The panel acknowledged that it *"might even be deemed a relatively mild sanction given the seriousness of the offence".*

- **Amadou Diakité (*TAS 2011/A/2433*)** – The former FIFA ExCo member was also secretly filmed and recorded by undercover *Sunday Times* journalists. He was found guilty of failing to refuse an improper offer made by apparent lobbyists in contravention of

Articles 3 (General Rules), 9 (Loyalty and Confidentiality) and 11 (Bribery) of the 2009 FCE. He was banned for 2 years with a fine of CHF 7,500.

- **Ahongalu Fusimalohi (*CAS 2011/A/2425*)** – The former FIFA ExCo member was also secretly filmed and recorded by undercover *Sunday Times* journalists. He was found in breach of Articles 3 (General Rules) and 9 (Loyalty and Confidentiality) of the 2009 FCE. He was banned for 2 years with a fine of CHF 7,500.

- **Michel Platini (*CAS 2016/A/4474*)** – The former FIFA Vice-President was found to have received an undue gift of CHF 2 million, and for violating Article 20 of the 2012 FCE. He was banned for 4 years, with a fine of CHF 60,000.

- **Joseph S. Blatter (*CAS 2016/A/4501*)** – The former FIFA President was found to have authorised and directed an undue gift and therefore committing a violation of Article 20 of the 2012 FCE. He was banned for 6 years, with a fine of CHF 50,000.

- **Jérôme Valcke (*CAS 2017/A/5003*) –** Was found to have violated Article 19 FCE in relation to his involvement in the re-sale of FIFA World Cup tickets, Article 10 of the 2009 FCE, Article 20 of the 2012 FCE in relation to the offer of an undue benefit to the Caribbean Football Union as well as Article 18 and Article 41 for his failure to cooperate in the investigation. He was also found guilty of violating Article 13 FCE in relation to his travel expenses as well as Article 19 and Article 16 FCE in relation to his involvement in the FIFA-EON Reality Inc transaction. He was banned for 10 years, with a fine of CHF 100,000.

498. In reply, FIFA rejected Mr Del Nero's reliance on the cases of *Adamu*, *Diakité* and *Fusimalohi* on the basis that those cases were decided almost 10 years ago, and *"the jurisprudence of FIFA Judicial Bodies with respect to bribery has evolved significantly since then"*. Moreover, FIFA stated that the Panels deciding those cases openly considered the sanctions to be lenient. If the Panel was to consider precedents, FIFA submitted a table of precedents it considered relevant, included again here for convenience:

Name of the official	**Articles breached**	**Date of the decision**	**Sanction**
Chuck Blazer	Articles 13, 15, 16, 18, 19, 20 and 21 FCE	2 July 2015	• Ban for life
Jeffrey Webb	Articles 13, 15, 18, 19 and 21 FCE 2012	5 September 2016	• Ban for life • Fine of CHF 1,000,000
Rafael Esquivel	Article 21 FCE 2012	15 September 2017	• Ban for life • Fine of CHF 1,000,000
Costas Takkas	Article 21 FCE 2012	6 July 2018	• Ban for life • Fine of CHF 1,000,000

Aaron Davidson	Article 21 FCE 2012	14 June 2018	• Ban for life • Fine of CHF 1,000,000
Miguel Trujillo	Article 21 FCE 2012	5 July 2018	• Ban for life • Fine of CHF 1,000,000
Jose Maria Marin	Article 27 FCE 2018	22 January 2019	• Ban for life • Fine of CHF 1,000,000
Luis Chiriboga	Article 27 FCE 2018	22 January 2019	• Ban for life • Fine of CHF 1,000,000
Romer Osuna	Article 27 FCE 2018	28 March 2019	• Ban for life • Fine of CHF 1,000,000
Nicolas Loez	Article 27 FCE 2018	26 July 2019	• Ban for life • Fine of CHF 1,000,000
Eugenio Figueredo	Article 27 FCE 2018	8 June 2019	• Ban for life • Fine of CHF 1,000,000
Eduardo Deluca	Article 27 FCE 2018	26 July 2019	• Ban for life • Fine of CHF 1,000,000
Jose Luis Mesizner	Article 27 FCE 2018	26 July 2019	• Ban for life • Fine of CHF 1,000,000

b. Factors to take into account

499. With respect to the factors to take into account in determining a sanction, the Panel finds the reasoning of the panel in *CAS 2019/A/6219* helpful:

> *"The applicable regulations give the hearing body a wide discretion in deciding the kind and measure of the sanction. The Panel finds, however, that some criteria must be adopted to guide the exercise of such discretion. In the Panel's opinion, therefore, when imposing a sanction, account has to be taken (in general terms or with respect to the violation of "Bribery") of the following relevant factors:*
>
> - *the nature of the violation;*
> - *the impact of the violation on the public opinion;*
> - *the importance of the competition affected by the violation;*
> - *the damage caused to the image of FIFA and/or other football organizations;*
> - *the substantial interest of FIFA, or of the sporting system in general, in deterring similar misconduct;*
> - *the offender's assistance to and cooperation with the investigation;*
> - *the circumstances of the violation;*
> - *whether the violation consisted in an isolated or in repeated action(s);*
> - *the existence of any precedents;*

- *the value of the gift or other advantage received as a part of the offence;*
- *whether the person mitigated his guilt by returning the advantage received, where applicable;*
- *whether the offender acted alone or involved other individuals in, or for the purposes of, his misconduct;*
- *the position of the offender within the sports organization;*
- *the motives of the violation;*
- *the degree of the offender's guilt;*
- *the education of the offender;*
- *the personality of the offender and its evolution since the violation;*
- *the extent to which the offender accepts responsibility and/or expresses regret".*

500. The Panel notes that the above listed factors could act as either aggravating or mitigating factors, and considers this with respect to Mr Del Nero's specific circumstances below.

c. The Panel's decision

501. The Panel appreciates that it can only alter the sanction imposed on Mr Del Nero by FIFA if it considers it to be grossly and evidently disproportionate. However, what troubles the Panel the most – which is confirmed by the table of precedents produced by FIFA which is cited above – is that it appears FIFA have recently started using a life ban as a starting point for any cases involving bribery. This is indeed a significant shift from bribery cases many years ago (such as, *inter alia*, *Adamu* and *Diakité*).

502. The Panel accepts FIFA's position that its Judicial Bodies needed to issue a sanction that not only punished the offender, prevented recidivism, dissuaded others to act similarly, but also restored the public's trust in FIFA. However, this also needs to be balanced with the principle of proportionality. Further, the Panel struggles to understand the point in allowing a deciding body (i.e. the FIFA EC, Appeals Committee and now the CAS) any discretion on such a sanction, when FIFA effectively always seeks a life ban in any event.

503. In this regard, the Panel finds the reasoning of the panel in *CAS 2019/A/6220* compelling (emphasis added):

> *"159.* […] *The jurisprudence in this area has not sought to set a formal tariff, equivalent, for example, to that exemplified in CAS 2013/A/3327 in the anti-doping area concerned with the degree of fault. As such, the FIFA sanctioning regime for match-fixing is not a hybrid strict liability type system of the type seen in anti-doping, whereby a specific length of sanction is mandated as a "starting point" in certain cases, unless the individual responsible for that conduct can raise evidence to reduce the length of that sanction.*
>
> *160. In light of these principles,* ***the Panel does not view the indicated case law (with a tendency towards lifetime bans) as setting a floor*** *for or – spoken in the language of CAS 2017/A/4956 – "… as mandating a sanction of permanent ineligibility for match-fixing".*

Moreover, the Panel adds that ***a lifetime ban should not be the starting point for consideration of a period of ineligibility****.*

161. ***As long as there are no corresponding clear rules on the respective federation level*** *(e.g. a standardisation/categorisation of forms of particular forms of match-fixing to be specifically sanctioned with a lifetime ban)* ***or more broadly applied as in the global approach to anti-doping as seen in the WADA Code, a lifetime ban can never be the inevitable consequence or automatic sanction to be imposed in every case of match-fixing****.* ***Any other approach in this regard would be inconsistent with the principles of proportionality*** *as well as predictability and legality which are satisfied whenever the disciplinary rules have been properly adopted, describe the infringement and provide directly or by reference, for the relevant sanction. In other words, to adopt such an approach would represent an unjustified application of a rule which in fact affords the Panel a very wide margin of discretion (from a caution to a lifetime ban […])"".*

504. The above cited case related to match/spot fixing rather than ethics/bribery, however the Panel considers that the principles are analogous to the present case. In short, despite the recent jurisprudence cited by FIFA which appears to have a tendency towards a life ban, the Panel does not consider that any violation of Article 21 FCE should have a lifetime ban as a 'starting point' for a period of ineligibility. In the absence of a clear rule in the FIFA regulations, a lifetime ban cannot be the inevitable consequence or automatic sanction in every case of bribery. Any other approach would be, in the words of the panel in *CAS 2019/A/6220, "an unjustified application of a rule which in fact affords the Panel a very wide margin of discretion* […]*"*. The Panel therefore does not consider a lifetime ban as the starting point in this case.

505. As to what the starting point of the suspension should be in this case, the Panel wishes to note that it considered Mr Del Nero's actions on the whole to be particularly egregious. The precedents of, *inter alia*, *Adamu* (3 years) and *Diakité* (2 years) from over a decade ago do not provide a suitable comparison given (i) the panels in those cases were prevented from imposing a higher sanction than that imposed by the FIFA bodies and, accordingly, acknowledged that the sanctions could be considered as 'mild', (ii) the development in jurisprudence since then, and (iii) the Panel considers Mr Del Nero's actions to be significantly more egregious in comparison (not least because of the amounts involved).

506. As other precedents involved more than one charge, the Panel considers that it must examine the seriousness and nature of the offences identified in those cases in comparison to the most serious offence committed by Mr Del Nero. In that regard, the Panel observes that whilst *Platini* (4 years) and *Blatter* (6 years) were initially accused of violating Article 21 FCE, it was ultimately concluded that there was insufficient evidence to prove this infringement. That is not the case with Mr Del Nero. Had those infringements been proven for *Platini* and *Blatter*, the Panel considers it likely that longer suspensions would have been imposed. *Valcke* (10 years) was also not found to have violated Article 21 FCE.

507. On balance, having considered all the extensive evidence and submissions by the Parties in this case, the aforementioned principles and, not least, the principle that the most extreme sanction must not be imposed if a less extreme sanction can achieve the same justifiable aim, the Panel

determined that a ban of 15 years would be a more proportionate 'starting point' for Mr Del Nero's violation of Article 21 FCE – with that period to either increase or decrease subject to the aggravating and mitigating factors analysed below.

508. The Panel considers the following to amount to material aggravating factors:

- Mr Del Nero was one of the highest ranking football officials in the world during the events in question, as the President of the CBF, former Vice-President of the CBF and a member of the FIFA ExCo and CONMEBOL ExCo;

- The amounts of the bribes were significantly high (accepting bribes amounting to over USD 23 million, and receiving payments amounting to over USD 6 million);

- Mr Del Nero was one of many individuals involved in a wide-scale, far reaching and sophisticated bribery scheme that evaded law enforcement for many years. His infringements were not a one-off event – rather it was a sustained pattern of behaviour for a long period of time;

- Mr Del Nero has shown no remorse for his actions, and indeed throughout the entire duration of legal proceedings (before FIFA and the CAS), has maintained that all of the (considerable) evidence against him was false, incomplete, misleading, unreliable or inadmissible; and

- Mr Del Nero, by his own admission, has been a lawyer for over 50 years. As such, he cannot claim to not have understood or known the consequences of his actions or the rules applicable to him. Indeed, it appears from the evidence that Mr Del Nero relied on his legal knowledge in some respects to avoid detection – e.g. not speaking over the phone in case of wiretaps/secret recordings, routing bribes through intermediary / third party companies etc.

509. Conversely, the Panel considers the following to amount to mitigating factors:

- As a minor point, whilst the Panel is comfortably satisfied that Mr Leite and Mr Abrahão were acting as agents/intermediaries for Mr Del Nero in receiving payments, the Panel is not comfortably satisfied that – as submitted by FIFA – those two individuals had a relationship with him *"akin to a family relationship"*.

- Mr Del Nero has effectively been subject to a provisional ban by FIFA since 15 December 2017. Whilst the Panel does not consider this to be a factor justifying the reduction of the length of the ban, it does consider that this should be taken into account in the start/end date of the ban. The ban imposed by the Panel should therefore be considered to have commenced on 15 December 2017.

510. Mr Del Nero submitted that his advanced age, long history of services to football and the *"remarkable and unprecedented"* level of his cooperation with the FIFA investigation should also amount to mitigation in this case. However, the Panel does not agree. Mr Del Nero's advanced

age in and of itself does not amount to a mitigating factor, and Mr Del Nero failed to explain how this would be the case (if any, his age could even be considered as an aggravating factor, given his long experience as a football official). As for his long history of services to football, the Panel finds merit in FIFA's counter-argument that it is precisely through his long history of working in football (thereby obtaining senior administrative positions) that he enriched himself with bribes. Moreover, his experience and seniority meant that he had an even greater duty to act within the rules applicable to him. Lastly, whilst he did cooperate with the FIFA investigation process, the Panel agrees with FIFA that this is indeed what is expected of individuals subject to investigation. Further, given FIFA's lack of investigative powers, it is likely that Mr Del Nero is keeping to himself any evidence that could incriminate him.

511. On balance, the Panel considers that the aggravating and mitigating factors should result in a further 5 years of suspension to be added to the starting point of 15 years.

512. Once again, the Panel wishes to reiterate that it considers Mr Del Nero's actions to be extremely serious. However, the Panel determines that starting with a standard life ban as an automatic consequence of bribery is not the correct approach. A reasoned calculation should be made for any person in Mr Del Nero's position; the fact that Mr Del Nero will most likely not work in football again is certainly appropriate in light of his appalling conduct but such consideration should not influence the sanction to be imposed to Mr Del Nero or to any other individual in a similar situation.

513. In summary, the Panel concludes that Mr Del Nero should be subject to a 20-year ban (subject to time already served) from taking part in any football-related activity (administrative, sports or any other) at national and international level, starting from 15 September 2017. The Panel considers that a ban of 20 years is not only just and proportionate, but would achieve FIFA's aim of *"zero tolerance"* with respect to corruption as it provides a sufficient deterrent to such behaviour being repeated in the future. In other words, this sanction does not exceed what is reasonably required in the search of a justifiable aim.

514. With respect to the fine, the Panel does not consider this to be excessive or manifestly disproportionate given the circumstances of this case. The Panel notes that in recent jurisprudence from the CAS, panels have imposed fines of (i) CHF 100,000 in a case where bribes of USD 65,000 were accepted (*CAS 2018/A/6072*), and (ii) CHF 500,000 where an individual benefitted from the misappropriation of funds totalling USD 900,000 (*CAS 2019/A/6326*). The Panel also notes the jurisprudence cited by FIFA in which fines of CHF 1 million were imposed.

515. In the present case, the Panel is comfortably satisfied Mr Del Nero accepted bribes amounting to over USD 20 million, and received bribes amounting to over USD 6 million. Accordingly, a fine of CHF 1 million does not even reclaim the benefit which Mr Del Nero obtained through bribes – indeed it is less than one-fifth of the amount. In other words, the fine imposed is not disproportionate compared to the benefit which Mr Del Nero received from his actions. Consequently, the Panel concludes that a fine of CHF 1 million is neither excessive nor manifestly disproportionate, and even too lenient considering the amounts unduly received by Mr Del Nero; however, it is not within the remit of this Panel to increase such fine.

E. CONCLUSION

516. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Panel finds that the Appeal is partially upheld.

517. The lifetime ban imposed on Mr Del Nero from all football-related activities in the Appealed Decision should be reduced to a ban from all football-related activities for 20 (twenty) years, commencing from 15 December 2017 – to take into account the suspension already served. The Appealed Decision is maintained in all other respects.

518. All other prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 17 June 2019 by Mr Marco Polo Del Nero against the decision rendered by the FIFA Appeals Committee is partially upheld.

2. The decision rendered by the FIFA Appeals Committee on 7 February 2019 is amended as follows:

   "4. Mr Marco Polo Del Nero is banned from taking part in any football-related activity (administrative, sports or any other) at national and international level for 20 (twenty) years, commencing on 15 December 2017, in accordance with art. 6 para. 1 let. h of the FIFA Code of Ethics in conjunction with art. 22 of the FIFA Disciplinary Code".

3. (…).

4. (…).

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