



**Arbitration CAS 2011/A/2562 Fédération Internationale de Football Association (FIFA) v. Federación Venezolana de Fútbol (FVF) & José Javier Villafranz Quintero, award of 28 August 2012 (operative part of 19 April 2012)**

Panel: Mr Mark Hovell (United Kingdom), President; Mrs Margarita Echeverria Bermúdez (Costa Rica); Prof. Ulrich Haas (Germany)

*Football*

*Doping (modafinil)*

*Hierarchy of norms and exceptions to the principle*

*FIFA Anti-Doping Regulations as *lex specialis* for appeals regarding doping related issues*

*Scope of the appeal*

*Power of review of the International Federation over decisions taken at national level*

*Substantial delay*

- 1. It follows from the principle of hierarchy of norms that rules and resolutions enacted by an association must be in compliance with the highest regulatory framework, *i.e.* the Statutes of the associations. In case of contradiction between lower ranking norms and the Statutes it is the latter that take precedence. However, there are also exceptions to the principle of hierarchy of norms. One of them is a – certain – standing practice by the respective organs of the association. Obviously the threshold for such a deviating standing practice should not be set too low, because otherwise Statutes would lose their status as supreme and predominant rules of an association.**
- 2. Doping cases within FIFA are on a constant basis handled according on the basis of the FIFA Anti-Doping Regulations. This happens even with the knowledge of the supreme organ of FIFA, the General Assembly, since the latter is not only competent to decide on amendments of the Statutes, but also enact the FIFA ADR. In view of all of this, FIFA for its appeals regarding doping related issues can rely on the provisions in the FIFA ADR, which constitutes a proper *lex specialis*.**
- 3. When the appealed decision confirms (or modifies) the original decision, after a review by the same judging authority, it is that latter decision that forms the basis of any appeal and the receipt of which that starts deadlines running. This is different from two separate judging authorities (even where they are both constituted under one governing body or federation) where the second hears an appeal by a party from the decision of the first and often annuls, confirms or replaces the decision of the first judging body.**
- 4. The role of an International Federation is to ensure that the national associations and federations are properly complying with its regulations, so it should “step in” only after all appeals or reviews at a national level are complete. The final decision (the appealed decision) of a national body is final and binding upon an athlete at national level only.**

**It cannot be right to state that an internal review could have the effect of making a decision final and binding upon the International Federation.**

5. **22 months from the sample date to a final hearing constitute a “substantial delay” for an adverse finding where the B sample had not been requested, the infraction itself not contested nor any arguments regarding fault or negligence advanced.**

## **1. THE PARTIES**

- 1.1 Fédération Internationale de Football Association (hereinafter referred to as “FIFA” or the “Appellant”) is the world governing body for football with its headquarters in Zurich, Switzerland.
- 1.2 Federación Venezolona de Fútbol (hereinafter referred to as the “FVF” or the “First Respondent”) is the governing body for football in Venezuela and is a member of FIFA, with headquarters in Avda, Venezuela.
- 1.3 José Javier Villafraz Quintero (hereinafter referred to as the “Player” or the “Second Respondent”) is a professional football player, playing for the club Deportivo Tachira FC (hereinafter referred to as the “Club”) which plays in the highest division, the Primera Division, in Venezuela.

## **2. FACTUAL BACKGROUND**

- 2.1 Below is a summary of the main relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced at the hearing. 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 its award only to the submissions and evidence it considers necessary to explain its reasoning.
- 2.2 On 23 May 2010, the Player was submitted to an in-competition doping control after playing a match for the Club. The urine sample provided by the Player was analysed by the “Laboratorio Anti-Doping del Instituto de Medicina del Deporte” in Cuba (hereinafter referred to as “the Laboratory”), which is accredited by the World Anti-Doping Agency (hereinafter referred to as “WADA”).
- 2.3 The Laboratory reported an adverse analytical finding for the presence of the substance “Modafinil”. Modafinil is a prohibited substance, which is classified under Class 6a of the 2010 WADA Prohibited List and defined as non-specified stimulant.

- 2.4 The Player was provisionally suspended on 27 August 2010. He did not request the analysis of his “B” sample.
- 2.5 On 13 January 2011, the “Consejo de Honor” of the FVF suspended the Player for one year and imposed a 5,000 VEB fine, running from 27 August 2010 (hereinafter referred to as the “First Decision”).
- 2.6 On 14 January 2011, FIFA, having become aware of the adverse test, wrote to the First Respondent to enquire what action was being taken.
- 2.7 On 15 February 2011, the First Respondent wrote to FIFA and informed it of the First Decision and that the Player had appealed that decision. A copy of the First decision was enclosed, but FIFA were not sent a copy of the Player’s appeal.
- 2.8 On 21 April 2011, FIFA wrote again to the First Respondent and stated:  
*“We have duly noted that the player lodged an appeal and we ask you to inform us of whether a final decision has been reached at this stage. If so, we would ask you to please forward a copy of this decision to us so that we can extend the possible period of ineligibility to have international effect...furthermore ...FIFA is entitled to appeal to the Court of Arbitration for Sport against any doping-related decisions reached by a member association”.*
- 2.9 On 17 May 2011, FIFA wrote once again to the First Respondent enquiring as to the progress of the Player’s appeal and again reminding the First respondent of its right to appeal any decision itself.
- 2.10 The Player appealed the First Decision requesting that the suspension imposed should have started before 27 August 2010.
- 2.11 On 22 June 2011, the “Consejo de Honor” of the FVF delivered a second written decision, confirming the First Decision (hereinafter referred to as the “the Appealed Decision”).
- 2.12 The Appealed Decision was received by FIFA on the 23 June 2011.
- 2.13 On 30 June 2011, FIFA requested that the FVF send the full case file in relation to the Appealed Decision.
- 2.14 On 13 July 2011, FIFA received a package of 114 documents from the FVF.
- 2.15 On 22 July 2011, FIFA requested that the FVF send the following documents:  
*“a. a copy of the Statutes of the Venezuelan Football Fédération ;  
b. a copy of the Venezuelan Laws on sport;  
c. a copy of the Code of Ethics of the Venezuelan Football Fédération ;*

- d. *a copy of its National sporting Regulations against the Use of Prohibited Substances in Football; and*
- e. *the laboratory package of the doping control authority in Cuba pertaining to the sample analysis in question”*

[free translation].

- 2.16 On 25 July 2011, the FVF notified FIFA by letter that it had requested the laboratory package from the Laboratory, adding that this laboratory package had never been requested by either the Player nor the FVF during the proceedings and had therefore never been part of the case file which led to the First Decision and Appealed Decision.
- 2.17 FIFA received the majority of the requested documents on 5 August 2011.
- 2.18 FIFA received a copy of the laboratory package on 17 August 2011 via email.

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

- 3.1 On 7 September 2011 FIFA filed its Statement of Appeal with the Court of Arbitration for Sport (hereinafter referred to as the “CAS”) against the FVF and the Player submitting the following request for relief:
  - i. the appeal of FIFA is admissible;*
  - ii. the decision rendered by the “Consejo de Honor” on 22 June 2011 is set aside;*
  - iii. José Javier Villafraz Quintero is sanctioned with a 2 year period of ineligibility starting the date on which the CAS award enters into force. Any period of ineligibility already served by the Player shall be credited against the total period of ineligibility to be served.*
  - iv. The costs of the proceedings have to be borne by the Federación Venezolana de Fútbol and FIFA shall be granted a contribution to its legal fees”.*
- 3.2 On 16 September 2011, FIFA filed its Appeal Brief with the CAS.
- 3.3 On 3 November 2011, the Player requested provisional measures and requested a preliminary award regarding the admissibility of FIFA’s appeal.
- 3.4 Pursuant to Article R37 of the Code of Sports-related Arbitration (hereinafter referred to as “the Code”), the CAS Court Office invited the Appellant and the First Respondent to file their positions with respect to the Player’s request by 10 November 2011.
- 3.5 On 10 November 2011, the FVF filed its answer to the Player’s request for a preliminary award. The FVF’s confirmed that it did not wish to make “*any consideration*” regarding the admissibility of the Appeal, stating that it wished to leave any decision in this regard for the Panel to make on the basis of the submissions made by the Appellant and the Second Respondent. It did,

however, confirm that in its opinion it had passed its entire case file to FIFA under cover of its letter of 7 July 2011.

3.6 On 10 November 2011 the CAS Court Office granted an extended deadline of 7 days for the Appellant to file its comments on the issue of admissibility.

3.7 On 16 November 2011, the Appellant filed its answer to the Player's request for preliminary measures.

3.8 On 9 December 2011, the Panel notified the parties that it had determined that the appeal was admissible and that full reasons would be included within this award.

3.9 On 9 January 2012, the FVF filed its Answer to the Appeal Brief with the following request for relief:

- a. Dismissal of the appeal lodged by FIFA;*
- b. Confirmation the decision rendered by the Consejo de Honor of the Venezuelan Football Federation passed on 22 June 2011;*
- c. That the Appellant bear the cost of the arbitral proceedings”.*

3.10 On the same date (9 January 2012) the Player filed his Answer to the Appeal Brief with the following request for relief:

- 1. Dismiss the present appeal of FIFA against the decision of the Consejo de Honor of the Federación Venezolana de Fútbol of 22 June 2011.*
- 2. Order FIFA to pay the full costs of these full arbitral proceedings.*
- 3. Order FIFA to pay a contribution towards Mr Villafranz' attorney's fees in the amount of 10,000 Euros.*

*Alternatively in the case that the Panel considers that FIFA's appeal of the Appealed Decision is admissible, Mr Villafranz respectfully request the Panel to:*

- 1. Confirm the decision of the Consejo de Honor of the Federación Venezolana de Fútbol of 22 June 2011.*
- 2. Establish that the Consejo de Honor correctly determine that the suspension imposed on the player was to commence on 27 August 2010.*
- 3. Dismiss any other request made by FIFA.*
- 4. Order FIFA to pay the full costs of these arbitral proceedings.*
- 5. Order FIFA to pay a contribution towards Mr Villafranz' attorney's fees in the amount of 10,000 Euros”.*

3.11 The Player made the following alternative requests for relief:

*"In the event that the principle request for relief ... [as above] ... were rejected and if the Panel considers it appropriate to issue an award in relation to the anti-doping rule violation and the period of the sanction imposed ... then Mr Villafranz requests that the Panel:*

1. *Confirm the decision of the Consejo de Honor of the Federación Venezolana de Fútbol of 13 January 2011 in its entirety.*
2. *Dismiss any other requests made by FIFA.*
3. *Decide not to impose any sporting sanction on the player.*
4. *Order FIFA to pay the full costs of these arbitral proceedings.*
5. *Order FIFA to pay a contribution towards Mr Villafranz' attorney's fees in the amount of 10,000 Euros.*

*Alternatively and in the case that the Panel accepts the Appeal vis-à-vis the First Decision and accepts the request for relief of FIFA, Mr Villafranz requests that the Panel:*

1. *Decide that any period ineligibility imposed upon Mr Villafranz longer than the one imposed on the First Decision shall start on the date of the sample collection 23 May 2010 in accordance with article 53.2 FIFA ADR, given that the substantial delays to which these proceedings have been subject to cannot be attributed to the player but rather to the additional documentation made by FIFA in order to file the present appeal.*
2. *Take into consideration the one year suspension already served by the Player and reduce this amount from any final period of ineligibility imposed.*
3. *Reduce any further amounts imposed taking into consideration the principle of proportionality.*
4. *Order FIFA to pay the full costs of these arbitral proceedings".*

#### **4. THE CONSTITUTION OF THE PANEL AND THE HEARING**

- 4.1 By letter dated 19 October 2011, the CAS informed the parties that the Panel to hear the appeal had been constituted as follows: Mr Mark Hovell, President of the Panel, Mrs Margarita Echeverria Bermúdez and Mr Ulrich Haas, arbitrators.
- 4.2 A hearing was held on 15 March 2012 at the CAS premises in Lausanne, Switzerland. All the members of the Panel were present. The parties did not raise any objection as to the constitution and composition of the Panel. In addition, William Sternheimer, Counsel to the CAS, was in attendance.
- 4.3 Mr Volker Hesse and Mr Benoit Pasquier represented the Appellant at the hearing. Mr Philippe Govaert for the Player and Mr Miguel Lietard for the FVF also attended the hearing.
- 4.4 There were no witnesses or experts providing evidence or opinions at the hearing, but the representatives of the Appellant spoke and were examined by the Panel and the Respondents.

- 4.5 The parties were given the opportunity to present their cases, submit their arguments and to answer the questions posed by the Panel. A summary of their submissions is detailed below. After the parties' final, closing submissions, the hearing was closed and the Panel reserved its detailed decision to its written award. Upon closing the hearing, the parties expressly stated that they had no objections in relation to their right to be heard and to have been treated equally in these arbitration proceedings.

## 5. THE PARTIES' SUBMISSIONS

### A. Appellant's Submissions

- 5.1 In summary, the Appellant submitted the following in support of its Appeal:

5.1.1 As to Player's submissions regarding the scope of the Appeal.

- a. At the hearing the Appellant had the opportunity to address the submissions made by the Player regarding the fact that the Appeal was directed against the Appealed Decision and not the First Decision; the significance being that the Player argued that the First Decision concerned itself with the 1 year sanction and the Appealed Decision concerned itself with the start of such sanction.
- b. The Appellant argued that Article R57 of the Code enabled the Panel to deal with the matter at hand *de novo*. As such, the Panel could review the entire facts and reach its own decision.
- c. The Appealed Decision did review and expressly refer to the length of the sanction, the fine and reviewed the start date of the ban. In particular it confirmed the reasoning of the "Consejo de Honor" in giving a 1 year ban – that is the proportionality of that sanction and the conduct of the Player.
- d. The Appellant cited CAS jurisprudence in the cases of CAS 2010/A/2162; CAS 2009/A/1782; and CAS 2008/A/1585 and CAS 2008/A/1586 (which was confirmed by the Swiss Federal Tribunal 4A\_624/2009) which it maintained all supported its view that the Panel using its power under Article R57 of the Code to hear matters *de novo* is not limited to review solely the Appealed Decision, but by the requests made by the parties in their written submissions to the CAS.
- e. The Appellant also produced translated copies of the correspondence it had conducted with the First Respondent between January and June 2011. Whilst it had been provided with a copy of the First Decision, it was already aware that the Player had appealed it at a national level. FIFA did not consider that the First Decision had become final and binding on it. It had not seen a copy of the actual appeal, so was not aware of the grounds of such appeal, but did write to the First Respondent demonstrating its interest in the outcome of that appeal and informing the First Respondent of its own subsequent right to appeal to CAS, if it saw fit.

- f. Eventually, it received the Appealed Decision and determined to appeal that decision to the CAS.

#### 5.1.2 As to the Anti-Doping rule violation.

- a. The Appellant directed the Panel to article 5 of the FIFA Anti-Doping Regulations (hereinafter referred to as the “FIFA ADR”):

- i. it is each player’s personal duty to ensure that no prohibited substance enters his body. Players are responsible for any prohibited substance or its metabolites or markers found to be present in their samples. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the player’s part be demonstrated in order to establish an anti-doping violation under this article;*
- ii. sufficient proof of an anti-doping rule violation under this article is established by either of the following: the presence of a prohibited substance or its metabolites or markers in the player’s “A” sample where the player waives analysis of the “B” sample and the “B” sample is not analysed or where the player’s “B” sample is analysed and the analysis of the player’s “B” sample confirms that the presence of the prohibited substance or its metabolites or markers found in the player’s “A” sample.*
- iii. excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a prohibited substance or its metabolites or markers in a player’s sample shall constitute an anti-doping rule violation;*
- iv. as an exception to the general rule of this article, the Prohibited List or international standards may establish special criteria for the evaluation of prohibited substances that can also be produced endogenously”.*

- b. Further in accordance with article 14 FIFA ADR:

*“WADA accredited laboratories are presumed to have conducted sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Player or other person may rebut this presumption by establishing that a departure from the international standard analytical laboratories occurred that could reasonably have caused the adverse analytical finding”.*

- c. The Appellant noted that the “A” sample of the Player showed the presence of the substance “Modafinil”;
- d. Article 15 FIFA ADR provides that prohibited substances comprise everything on the prohibited list published and revised by WADA. Modafinil is classified under class S6a of the 2010 WADA Prohibited List and defined as a non-specified stimulant;
- e. The Player did not request the analysis of the B sample and did not contest the analysis procedure or the results of the analysis; and
- f. With the objective presence of Modafinil in the Player’s urine sample, regardless of the Player’s subjective attitude (i.e. his possible intent, knowledge, fault or negligence) the anti-doping rule violation in the sense of Article 5 FIFA ADR was therefore established.

#### 5.1.3 As to the sanction, the Appellant submitted:

- a. According to Article 45 FIFA ADR, the period of ineligibility imposed for a violation of article 5 FIFA ADR should be 2 years unless the conditions for eliminating or reducing the period of ineligibility, as provided under Articles 47 to 50 FIFA ADR, or the conditions for increasing period of ineligibility, as provided under article 51 FIFA ADR, were met;
- b. As Modafinil is defined as a non-specified substance, a possible reduction under article 47.1 FIFA ADR is excluded and only paragraph 2 and 3 have to be analysed;
- c. Article 47 paragraph 2 and 3 FIFA ADR read as follows:
  - “2. *No fault or negligence (exceptional circumstances).*  
*If a player establishes in an individual case that he bears no fault or negligence, the otherwise applicable period of ineligibility shall be eliminated. When a prohibited substance or its markers or metabolites is detected in a player’s sample in violation of article 5, the player must also establish how this prohibited substance entered his system in order to have the period of ineligibility eliminated. In the event that this article is applied and the period of ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of ineligibility if multiple violations under article 52.*
  3. *No significant fault or negligence (exceptional circumstances).*  
*If a player establishes in an individual case that he bears no significant fault or negligence, then the otherwise applicable period of ineligibility may be reduced, but the reduced period of ineligibility may not be less than one half the period of ineligibility otherwise applicable. If the otherwise applicable period of ineligibility is a lifetime, the reduced period under this article may not be less than 8 years. When a prohibited substance or its markers or metabolites is detected in a player’s sample in violation of article 5, the player must also establish how the prohibited substance entered his system in order to have the period of ineligibility reduced”;*
- d. The Appellant submitted that the burden of proof is on the Player to establish that he does not bear any fault or negligence or no significant fault or negligence. Further the Player has to establish how the prohibited substance entered his system. The proof of the Player on how the prohibited substance entered his system is therefore a necessary precondition in establishing a lack of fault or no significant fault or negligence;
- e. The Player has not brought forward any convincing evidence on how the prohibited substance entered his body. The Player has simply alleged that he felt unwell and took some medicine. The team doctor and physiotherapist of the Player’s club have both denied providing the Player with any medication containing Modafinil. The Player has also failed to provide any proof that the other medications he had allegedly taken were contaminated with a prohibited substance. The Player’s arguments therefore were pure speculations which were not substantiated with any proof whatsoever;
- f. As the Player failed to establish, on the balance of probability, how the prohibited substance entered his body, the ordinary 2 year period of ineligibility according to article 45 FIFA ADR is therefore applicable.
- g. In case the Panel should find that the Player established how the prohibited substance entered his body, quod non, FIFA also examined whether the Player could demonstrate

that he bore no fault or negligence or no significant fault or negligence which could have justified a reduction of the standard 2 year period of ineligibility.

- h. It is confirmed by the jurisprudence of the CAS that the burden on an athlete to establish no fault or negligence is extremely high. From the case file, FIFA noted that the Player did not request an elimination of his 1 year suspension when he appealed the First Decision;
- i. In relation to no significant fault or negligence, the reasons indicated in the First Decision and the Appealed Decision for a reduction of the period of ineligibility to one year, namely "*the clean previous record, the exceptional circumstances or the occurrence, the advantage gained and the age of the player*" are not mitigating factors according to the applicable regulations of the FIFA ADR. FIFA concluded that the "Consejo de Honor" of the First Respondent wrongly applied the FIFA ADR in taking these elements into account.
- j. Finally, the Player did not provide any evidence showing that he bears no fault or negligence or no significant fault or negligence.

#### 5.1.4 As to the start of the period of ineligibility:

- a. According to article 53 FIFA ADR the period of ineligibility shall start in principle with the communication of the CAS Award;
- b. The Player seemed to argue that due to delays in the result management process, his period of ineligibility should have started before 27 August 2010. The Player was actively playing until 27 August 2010 in the national competition. There were no substantial delays which would allow the period of ineligibility to start before the date defined in the FIFA ADR. Any suspension served by the Player as of 29 August 2010 until the award taken by CAS in the case at hand should be taken into account; and
- c. At the hearing, the Appellant also pointed to the fact that the Player made a request for an extension to appoint an arbitrator, another request for preliminary measures and a final request for the Panel to reconsider its decision, all of which further delayed the process.

## **B. First Respondent's Submissions**

### 5.2 In summary, Respondent submitted the following in its defence:

- a. The First Decision rendered by the Consejo de Honor on 13 January 2011 established that the Player had committed an anti-doping rule violation. Therefore a 1 year suspension was imposed on the Player, as well as a fine of 5,000 Venezuelan Bolivars;
- b. The duration of the suspension was set by taking into account diverse factors which include the Player's clean disciplinary record, particularly in relation to doping (as the 23 May 2011 sample was the first of many samples taken throughout his long career to result in an adverse analytical finding) and the lack of sporting advantage obtained by the Player from the detected substance. Taking all of the factors into account, the "Consejo de Honor" considered it appropriate to apply the constitutional principle of proportionality

- to the case at hand, and it determined that the Player was to be suspended for a period of 1 year;
- c. The “Consejo de Honor” considered that the 1 year suspension should commence as of 27 August 2010;
  - d. The Player appealed the First Decision and requested the ineligibility period start on 23 May 2010 instead of 27 August 2010;
  - e. The “Consejo de Honor” determined that there had been no substantial delays that would justify setting a date for the commencement of the sanction different from 27 August 2010;
  - f. In consequence the “Consejo de Honor” declared the Player’s appeal inadmissible and confirmed the First Decision in its entirety;
  - g. The FVF did not see any reason for which the decision rendered by the “Consejo de Honor” on the 22 June 2011 must be modified, as the disciplinary body of the FVF correctly determined that the Player’s 1 year suspension imposed on 13 January 2011 was to commence on 27 August 2010.
  - h. At the hearing, the First Respondent added that FIFA were aware of the contents of the First Decision and could have asked to see the Player’s appeal against that decision.
  - i. Finally, the First Respondent confirmed that, in its opinion, the Appealed Decision related to the single issue as to when the start date should be – that was the only issue the Player appealed and wanted to be reviewed.

### **C. Second Respondent’s Submissions**

5.3 In summary, the Second Respondent submitted the following in its defence:

- a. The present Appeal was filed by FIFA after the appropriate deadline had expired and therefore the CAS should reject FIFA’s appeal and terminate the proceedings without entering into the merit;
- b. However, if the Panel determined to allow the appeal, in accordance with article R57 of the Code, the Panel’s power of review is limited to object of the Appealed Decision alone.
- c. So, whilst the Panel has the power to review any decision and to issue an award by taking into account new arguments from the parties which might not have been made in the previous instance, these can only be taken into account when they fall within the scope of the object of the decision appealed before the CAS;
- d. FIFA have appealed the Appealed Decision in which the debate was exclusively focused on the commencement date of the suspension since this was the only aspect of the First Decision which had been appealed by the Player;
- e. In the Player’s opinion, the commission of an anti-doping rule violation, the duration of the suspension and the amount of the fine imposed, became final and binding from the

moment in which the Player did not appeal them, subject only to FIFA's ability to appeal that decision.

- f. FIFA did not appeal the First Decision;
- g. The Appealed Decision can therefore only be reviewed by the Panel within its object, which is none other than the revision of the commencement date of the period of ineligibility imposed on the Player in the First Decision;
- h. The Player accepted the rulings of the First Decision other than the commencement of the suspension. Therefore the rulings of the First Decision which were not appealed by the Player became final and binding;
- i. FIFA only chose to lodge its appeal before the CAS against the Appealed Decision even though it was entitled to appeal against the First Decision in accordance with Article 62.4 and 64 of the FIFA ADR, which state:  
*“Article 62.4: FIFA and WADA shall have the right to appeal to CAS against any internally finding and binding doping related decision in accordance with Article 63 paragraph 5 and 6 of the FIFA Statutes.*  
*Article 64: where FIFA has the right to appeal under chapter 13 and no other party has appealed a decision within the anti-doping organisations process, FIFA may appeal such a decision directly to CAS without having to exhaust other remedies in the anti-doping organization process”;*
- j. Further the Appellant failed to provide a copy of the First Decision as required by Article R48 of the Code, in the event it was seeking to appeal against it;
- k. The complete case file of both decisions were sent to FIFA by the FVF and received by the Appellant on 12 July 2011; therefore making the Appellant aware of both their contents and their “clearly” different objects; as the First Decision dealt with the anti-doping rule violating committed by the Player, whilst the Appealed Decision exclusively dealt with the commencement day of the sanction;
- l. The only consequence of FIFA not filing an appeal against the First Decision is that the decision can no longer be appealed before the CAS.
- m. At the hearing, the Player took the view that all the CAS jurisprudence relied upon by the Appellant was irrelevant to the matter at hand. The Player acknowledged the Panel's ability to hear this matter de novo, but maintained that the Panel can only consider those issues under consideration by the “Consejo de Honor” when rendering the Appealed Decision. The Player submitted that in the CAS jurisprudence cited each of those cases involved entire appeals from an initial decision. In the matter at hand only one aspect (the commencement date of the ban) was appealed and was under consideration by the “Consejo de Honor”.
- n. The Player again confirmed that he was not advancing any argumentation regarding fault or negligence.
- o. However, if the Panel decides to review the First Decision then the Panel should take the following into account:

- i. the disciplinary proceedings before the “Consejo de Honor” in relation to the anti-doping rule violating were initiated on 27 August 2010 more than 3 months after the samples were taken on 23 May 2010;
  - ii. that the Player has already served the 1 year suspension and has subsequently resumed his activities as a professional footballer even before the date that FIFA filed its appeal; so that imposing a further suspension would cause irreparable harm to both the Player’s career and to his employer. That in this sense the legal principle of proportionality should apply; and
  - iii. FIFA has taken over 3 months to appeal the “Consejo de Honor’s” decision of 22 June 2011 which had been notified on the following day to FIFA; so
- that the Panel should rule that any sanction imposed commence on the sample collection date, 23 May 2010.

## 6. JURISDICTION OF THE CAS

6.1 Article R47 of the Code provides as follows:

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

6.2 The Player has submitted to the rules and regulations of the FVF. The latter refer to the rules and regulations of FIFA (see marg. no 7.2 below). The FIFA ADR at Article 62 par. 4 provides that:

*“FIFA and WADA shall have the right to appeal to CAS against any internally final and binding doping related decision in accordance with Article 63 par. 5 and 6 of the FIFA Statutes”.*

6.3 Article 63 par. 5 of the FIFA Statutes provides that:

*“FIFA is entitled to appeal to CAS against internally final and binding doping-related decision passed by the Confederations, Members, or Leagues under paragraph 1 and 2 above”.*

6.4 Further Article 63 par. 1 of the FIFA Statutes provides that:

*“Appeals against final decisions passed by FIFA’s legal bodies and against decision passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question”.*

6.5 In its Appeal Brief, FIFA stated *“the case is based on a doping control conducted in a national competition. The Player is not in the FIFA International registered testing pool or in his confederations testing pool. He is therefore considered as a national level player pursuant to the definition in appendix A of the FIFA Anti-Doping Regulations”.*

6.6 The Player acknowledged, in his request for provisional measures, the right of appeal to the CAS under those Statutes and Regulations. Furthermore, none of the parties has contested the jurisdiction of this Panel (based on the existence of a valid arbitration agreement).

6.7 As the Appealed Decision is final and binding at national level, FIFA has the right to appeal the decision to CAS, whether it be through its Statutes, through the FIFA ADR or through a combination of both. As such, the Panel determines that the CAS has jurisdiction to deal with this matter.

## 7. APPLICABLE LAW

7.1 Article R58 of the Code provides as follows:

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

7.2 The Appellant submitted that Article 10 paragraph 7 of the Statutes of the FVF provides that the FVF respects the statutes, regulations, directors and decisions of FIFA. The “Reglamento Deportivo Nacional contra el Uso De Sustancias Prohibidas en el Deporte” provides in chapter 5, article 33 that the sanctions imposed must be in accordance with the international Federation, which in the case at stake is FIFA.

7.3 The First Respondent submitted that the applicable law is Venezuelan law and the statutes and regulations of the FVF. Further the FVF submitted that article 33 of the Venezuelan National Regulations Against the Use of Prohibited Substances in Sport provides for doping related sanctions to be imposed in accordance with the Regulations of the international Federation. As the FVF is a member association of FIFA, the FIFA ADR shall also apply to the case in hand.

7.4 The Panel noted that the Second Respondent submitted that the statutes and regulations of the FVF shall apply and additionally Venezuelan law. Also as the Venezuelan and FVF Regulations remit to the FIFA ADR, that these are also applicable.

7.5 Further the Panel noted that the Appeal is based on the FIFA ADR.

7.6 The Panel determined that the applicable law in these appeal proceedings shall be the FIFA Anti-Doping Regulations which supersede the FVF Regulations and determined that there was no need to consider Venezuelan Law.

## 8. ADMISSIBILITY

8.1 The Player challenged the admissibility of FIFA's appeal. The arguments of the Player may be summarised as follows:

- a) That the Statement of Appeal filed by FIFA was lodged after the deadline to appeal had expired and therefore the appeal is inadmissible.

### FIFA Statutes

- b) Article 63 par.7 of the FIFA Statutes establishes that:

*“Any internal final and binding doping-related decision passed by the Confederations, Members or Leagues shall be sent immediately to FIFA and WADA by the body passing that decision. The time allowed for FIFA or WADA to lodge an appeal begins upon receipt by FIFA or WADA, respectfully, of the internally final and binding decision in an official FIFA language”.*

- c) FIFA has based its appeal on Article 62 par. 4 and 62 par. 5 of its FIFA ADR, the latter of which states that:

*“Any internally final and binding doping-related decision shall be sent immediately to FIFA and WADA by the body passing that decision. The filing deadline for FIFA and WADA to lodge an appeal to CAS shall be 21 days after receipt of both the internally final and binding decision and the complete case file in an official FIFA language”.*

- d) There is a discrepancy between the wording of Article 63 par. 7 of the FIFA Statutes and Article 62 par. 5 of the FIFA ADR in relation to the right of FIFA to appeal an internally final and binding doping related decision before the CAS: while the former allows for FIFA to lodge an appeal upon receipt of a decision, the latter states that FIFA may file an appeal after receipt of the decision and the complete case file (emphasis added).
- e) When such a discrepancy arises between two norms of the same sports federation, the principal of hierarchy must apply and the content of the norm of the higher ranking must prevail (CAS 2008/A/1705).
- f) Article 62 par. 5 FIFA ADR does not compliment the statutory provision of Article 63 par. 7 of the FIFA Statutes, but that it actually changes these by adding an additional requirement for appeals to be lodged by FIFA or WADA: that the complete case file is received by those entities. This is evidence that the FIFA ADR is amending the relevant article in the FIFA Statutes in clear contravention of the principal of hierarchy of norms.
- g) The reason for which FIFA considers in its Statutes that the deadline to lodge an appeal begins upon notification of the motivated decision is because the interested party would already have all the necessary information to formalise an appeal – *“... it is clear that the knowledge of the facts and grounds of the decision by the parties with the right to appeal is a sufficient guarantee to, after analyzing it, decide whether or not to appeal a decision that they consider does or does not adjust to Law”.*
- h) The fact that the timeline to appeal is linked to the notification of the complete case file violates the norm of higher rank and that it would appear that the Appellant exclusively

has decided what must be considered or not as a complete case file which breaches the most elementary principles of legal certainty by leaving the requirements and timelines to an appeal to the expense of one of the parties.

- i) The Appealed Decision was notified to FIFA on 23 June 2011 in Spanish, which is an official FIFA language, regardless of further submissions in relation to the case file, the 21 day deadline for FIFA to lodge its appeal began on the day following the notification of the Appealed Decision, which was final and binding, in accordance with Article 63 par. 7 of the FIFA Statutes.
- j) Ultimately FIFA should therefore have lodged its appeal before the CAS on or before 14 July 2011. The Statement of Appeal was filed at the CAS on 7 September 2011 and therefore CAS has no jurisdiction as the Appeal is not admissible.

#### Complete Case File

- k) In the alternative, should Article 62 par. 5 FIFA ADR apply, then the appeal again has been filed after the expiry of the deadline in the FIFA ADR, as the complete case file was sent by the FVF on 7 July 2011 and received by FIFA on 12 July 2011.
- l) FIFA's request to the FVF for additional documentation on 22 July 2011 cannot change the fact that they had already received the complete case file relating to the Appealed Decision from the FVF on 12 July 2011. That the documents requested by FIFA, notably the Venezuelan Laws, the FVF Regulations and the complete Laboratory reports have never been part of the case file.
- m) FIFA was aware that the documents that it requested were never part of the case file as explained in the letter from the FVF dated 7 July 2011 and that the "complete case file" must always be understood as being "*all of the material that was in the hands of the competent body in order to make its decision*".
- n) The complete case file of the Appealed Decision must therefore be considered to be the one received by FIFA on 12 July 2011.

#### CAS proceedings

- o) The right to appeal must have a deadline, which must be complied with to safeguard the legal process. There are numerous CAS awards and orders determining the inadmissibility of appeals that have been filed outside deadlines established by statutes or by the Code.
- p) FIFA should have requested the production of the documents from the FVF within the context of the arbitral proceedings.
- q) FIFA should have attempted to obtain the documents or made a request for further information or disclosure of the documents that are not in the case file after initiating the arbitral proceedings before the CAS.

8.2 The Appellant's submissions in response can be summarised as follows:

### FIFA Statutes

- a) That the Second Respondent wrongly claims that according to the FIFA Statutes the time limits of appeal would start with the receipt of the “reasoned decision”. Article 63 par. 7 of the FIFA Statutes stipulates that FIFA’s deadline shall start with the receipt of the internally final and binding decision in an official FIFA language.
- b) FIFA may not make a detailed assessment on a possible appeal to CAS if it is only in possession of the decision. According to CAS jurisprudence a decision is considered as “*a communication that contains the ruling, whereby the body issuing the decision intends to effect the legal situation of the addressee of the decision or other parties*”. The strict application of the CAS case law in these kinds of appeals would lead to situations in which FIFA’s time limit to appeal starts when FIFA is aware only of the player’s name and the sanction imposed by an association.
- c) This interpretation however does not consider the special nature of FIFA’s right to appeal in these cases, bearing in mind that FIFA was not a party in the proceedings at national level.
- d) The FIFA Statutes at Article 57 par. 4 stipulate that the Executive Committee shall draw up the FIFA Disciplinary Code.
- e) That Article 63 of the Disciplinary Code makes reference to the FIFA ADR. Therefore the FIFA Statutes delegated the competence to draw up special regulations in disciplinary and anti-doping matters in the provision in the FIFA ADR consequently do not violate the principle of “hierarchy of norms”.
- f) The FIFA ADR have a special ranking among FIFA by-laws as they were not adopted by the FIFA Executive Committee but by the FIFA Congress in Sydney. Therefore the FIFA Anti-Doping Regulations were adopted by the highest body of FIFA, as were the FIFA Statutes themselves.

### Complete Case File

- g) FIFA relies upon Article 62 par. 5 of the FIFA ADR and the Player’s argument that FIFA have not complied with Article 62 par. 5 of the FIFA ADR is incorrect.
- h) “*FIFA’s uncontested right of appeal is of a special nature. In regular appeal proceedings, the appealing party was a party in the proceedings and therefore had the right to access the file, to call witnesses, to attend the hearing, to receiving a reasoned decision, etc. FIFA however is never a party in doping related proceedings at national level and as such cannot attend hearing nor has it access to any documentation during the proceedings. It is only after the decision has been issued at national level, that FIFA as the International Federation may get involved in the proceedings in the way of a possible appeal to CAS*”.
- i) The objective of the right of appeal of an international federation against doping related decisions taken on a national level is to make sure a worldwide harmonisation in doping matters. Therefore only once FIFA is in possession of detailed information of a case, the proper assessment can be made, whether an appeal shall be lodged to the CAS or not.

That without a complete picture of the case, FIFA's appeals to CAS will be based on hazard rather than on a serious legal assessment.

- j) At clause 11 of the Appealed Decision it expressly refers to the regulations requested by FIFA in its communication dated 22 July 2011. Therefore the Second Respondent's assertion that these regulations are not part of the proceedings is not correct.
- k) It is in accordance with CAS jurisprudence the regulations applied and considered at national level are therefore of utmost importance for assessment of each case. Further the FVF Regulations are not available on the internet.
- l) The Laboratory's package is an extended version of the regular laboratory report. As such, the laboratory package is also part of case file even if it has not been expressly requested by one of the parties at national level. Where the laboratory package was considered during the proceedings at national level is not decisive, does CAS have the power to decide "*de novo*" and is not limited to documents and evidence provided by the parties at proceedings at what is previously adjudicating the same matter.
- m) It has to be considered that in various doping proceedings the Laboratory's package was the key element for the respective deciding authority.
- n) Even the Player himself raised doubts about the analysis process at the doping laboratory during the proceedings before the FVF indicating that the analysis process of the sample took an unusual long time. Moreover, the sample transport to the laboratory took 10 days from the date the sample was collected, until the sample arrived in the Laboratory in Cuba. That in contrast with high temperature such as Venezuela and Cuba and quick and cooled sample transport is necessary to ensure proper results of the analysis.
- o) Bearing in mind the unusual long sample transport under hot temperatures combined with the Player's doubts and proper result management policies, FIFA's request for a Laboratory package before and if it was lodged to CAS was proportionate. FIFA has only the Player's position in mind when it asked the FVF to produce the Laboratory package.
- p) The Regulations applied by the judging authority and the laboratory package are therefore among the "*essentialia*" in each doping case.
- q) Moreover that FIFA mentioned expressly in its fax dated 22 July 2011 that it deems that it has not yet received the complete case file and expressly referred to the respective provision in the ADR. Therefore, the Respondents must have been well aware of the on-going assessment process at FIFA and the argument by the Second Respondent that the principle of the legal certainty was jeopardised becomes consequently void.

#### CAS Proceedings

- r) The possession of the complete case file before an appeal is lodged to CAS became even more important after the amendment of Article R 65.2 of the CAS Code which entered into force on 1 January 2010. As any appeal filed at CAS by an international federation against doping related decision taken by national associations and not free of costs anymore. It is therefore in the interest of the players and serves the principle of procedural

economy that FIFA exercise its rights to appeal the due diligence and only in consideration as much information as possible.

- 8.3 The Panel had to determine the following:
- a) Was there any conflict between the FIFA Statutes and the FIFA ADR and, if so, how shall it be resolved in this matter?
  - b) What was meant by the “*complete case file*”?
  - c) Was FIFA’s appeal admissible?

**a) Was there any conflict between the FIFA Statutes and the FIFA ADR and, if so, how shall it be resolved in this matter?**

8.4 The Player submitted that there is a hierarchy between the FIFA Statutes and the FIFA ADR, arguing that the latter is subordinate to the former and that the Statutes take precedence. FIFA submitted that the Statutes and the Regulations were both created by the same body ie FIFA Congress and that there is no hierarchy between them.

8.5 Whilst the Panel noted the potential conflict between the two, the appeal has been brought by FIFA expressly under Article 62 par. 4 of the FIFA ADR and that was the most appropriate route, in the Panel’s opinion. On the Player’s argumentation, there would have been no need for FIFA to have referred to the FIFA ADR, it could have appealed under Article 63 par. 5 of its Statutes.

8.6 In the matter CAS 2011/O/2422 the Panel has held – *inter alia* – that (cf. no. 8.33 seq.):

*“By Rule 44 of the OC [Olympic Charter], the IOC has incorporated the WADA Code into the IOC’s own Statutes. The IOC further provides in Rule 41 of the OC that a competitor must respect and comply with all aspects with the WADA Code. Accordingly, the IOC has by virtue of its own statutes and in particular, Rule 44, accepted the binding nature of the WADA Code. Because the Panel has found that the IOC Regulation [the “Osaka Rule”] is not in compliance with the WADA Code, and because the WADA Code has been incorporated into the OC, the IOC Regulation is not in compliance with the IOC’s Statutes, i.e. the OC, and is therefore invalid and unenforceable”.*

8.7 It appears that the CAS Panel in the above decision based its conclusion – “invalidity of the Osaka Rule” - on the principle of hierarchy of norms (in this sense see also the interpretation in CAS 2011/A/275, no. 7.25). It follows from this principle that – subject to well-defined exceptions – rules and resolutions enacted by an association must be in compliance with the highest regulatory framework, i.e. the statutes of the associations (BK-ZGB/RIEMER, 1990, ST no. 320; OSWALD D., Associations, fondations et autres formes de personnes morales au service du sport, 2010, p. 138 *et seq.*; see also BADDELEY M., L’association sportive face au droit, Les limites de son autonomie, 1994, p. 208; HEINI/PORTMANN/SEEMANN, Grundriss des Vereinsrechts, 2009, no. 58). In case of contradiction between lower ranking norms and the statutes it is the latter – subject to well-defined exceptions – that take precedence.

8.8 In the present case the FIFA Statutes are – in comparison to the FIFA ADR – the higher ranking rules. Therefore, the FIFA ADR must – in principle – be in compliance with the FIFA Statutes. In case of contradiction, it is the Statutes that take preference. In the case at hand both sources of regulation are in contradiction in respect of the time limit of appeal. This contradiction cannot be solved by interpretation, since the Statutes do not stipulate (eg. by reference) any priority of the contents of the lower ranking norms. However, it must be kept in mind that there are also exceptions to the principle of hierarchy of norms. One of the accepted exceptions from this principle is a – certain – standing practice by the respective organs of the association (HEINI/PORTMANN/SEEMANN, *Grundriss des Vereinsrechts*, 2009, no. 56). Obviously the threshold for such a deviating standing practice should not be set too low, because otherwise Statutes would lose their status as supreme and predominant rules of an association. The Panel finds, that in the case at hand the threshold is met. Doping cases within FIFA are on a constant basis handled according on the basis of the FIFA ADR. This happens even with the knowledge of the supreme organ of FIFA, the General Assembly, since the latter is not only competent to decide on amendments of the Statutes, but also enact the FIFA ADR. In view of all of this, this Panel accepts that FIFA for its Appeal relies on the provisions in the FIFA ADR, which constitutes a proper *lex specialis* for doping related issues. Having said that the Panel would like to encourage FIFA to clarify the relevant rules related to this issue in order to avoid any confusion.

**b) What was meant by the “complete case file”?**

8.9 The Panel then analysed the wording of the last sentence of Article 62 par. 5 of the FIFA ADR: what was meant by “the complete case file”?

8.10 A literal interpretation would be the physical file of papers that the association’s reviewing body (the “Consejo de Honor” of the FVF) compiled and used when reaching the Appealed Decision, as has been submitted by the Player. The Panel assumes this is the 114 pages that were sent to FIFA on 7 July 2011 and received by it on 12 July 2011.

8.11 However, the Panel notes the request for more information made by FIFA on 22 July 2010 was in effect two fold – a copy of all the relevant statutes, rules and regulations that the FVF considered or were applicable; and a copy of the packaging from the Laboratory.

8.12 Whilst it was unlikely that all the relevant statutes, rules and regulations that the FVF considered or were applicable would physically have been printed off a computer or photocopied from a book and placed in a file of papers and documentation, the Panel does consider that these are a part of the decision maker’s file. They are required by the decision maker and set the context and scope of any decision that is taken. The Panel notes the position of FIFA resulting from the case CAS 2008/A/1575 where the Maltese Doping Regulations were a key component of that decision – FIFA should have access to the relevant statutes, rules and regulations of the national association’s decision making body, before it has to decide whether to exercise its right

of appeal pursuant to its FIFA ADR, as if the same had been placed within the decision maker's file and as such, in the Panel's determination, is to be treated as part of the complete case file.

- 8.13 The second part of the request was for the Laboratory's packaging. In this instance, the FVF did not request this nor utilise it in coming to the First Decision, nor the Appealed Decision. As such, the Panel make a distinction between rules and regulations used by a decision maker and a document or other piece of evidence that a decision maker could have, but did not request and use in coming to its decision.
- 8.14 The distinction made, the Panel noted that it deals with appeals *de novo*. In addition, such an appeal under the FIFA ADR is the first time that FIFA contributes to the matter. If the decision maker at a national level has not requested a piece of evidence, that could be crucial in finally determining the matter, then the Panel determines that something so important that it would have reasonably expected to have been in the physical file, should be deemed to be part of the complete case file for the purposes of FIFA ADR. The Panel agrees with FIFA's position that it should be able to consider such evidence before it decides whether to appeal and is further comforted by R44.3 of the Code, which would have enabled FIFA once it had commenced the appeal, to request the Panel direct the Respondents to produce documentation and evidence, but not third parties, such as the Laboratory.
- 8.15 The Player submitted that everything FIFA would need to decide whether to appeal or not was sent to it on 7 July 2011, however, the Panel determined that only when it was in possession of all the relevant statutes, rules and regulations and the Laboratory's packaging, would FIFA be in such a position and then the Panel could review all of this, with the documents sent on 7 July 2011 in a *de novo* hearing.

**c) Was FIFA's appeal admissible?**

- 8.16 As FIFA received the last part of the complete case file on 17 August 2011, it had 21 days from then (until 7 September 2011) to file its appeal, which it duly did on 7 September 2011, and as such the Panel determined the Appeal was admissible.

**9. SCOPE OF THE APPEAL**

- 9.1 The Panel noted the argumentation of the Player – basically, whilst it acknowledged FIFA's right to appeal, FIFA chose only to appeal against the Appealed Decision. It had a copy of the First Decision and, before it made the Appeal, it had a copy of the Player's appeal against the First Decision. It could have seen that the Player's appeal was solely directed at the commencement date of the 1 year sanction. If it wanted to appeal against the length of the sanction, it should have appealed against the First Decision. Further, it should have appended that to its Statement of Appeal, pursuant to Article R48 of the Code. As such, this Panel scope

is limited to the scope of the “Consejo de Honor” in its appeal, that is, solely to consider the commencement date of the 1 year sanction.

- 9.2 The First Respondent agreed with the Player’s position.
- 9.3 FIFA, on the other hand, did not agree. Its position was that it “steps in” once the matter has been completely dealt with at a national level. It was unaware of the nature or content of the Player’s internal appeal, but made its position clear to the FVF, that once that appeal was completed, FIFA would consider its own right of appeal to the CAS. The decision made at national level only becomes final and binding upon FIFA once the deadline for its right to appeal to CAS has passed.
- 9.4 The Panel were impressed by the Player’s argumentation, but ultimately determined that they had the power to fully review the merits and the sanction imposed by the First Respondent.
- 9.5 Firstly, the appeal of the First Decision was not an appeal to a separate body. The Player referred the First Decision back to exactly the same people that constituted the “Consejo de Honor” of the FVF. They were asked to reconsider one part of their First Decision, which they ultimately refused to do, and they then produced the Appealed Decision. Effectively the “Consejo de Honor” reviewed the aspect it was asked to and then confirmed its decision – this was all encompassed in the Appealed Decision, which was the subject of the Appeal and was appended in accordance with Article 48 of the Code. If FIFA were then to appeal the First Decision, which had been sent to it long before the Appealed Decision was sent to them, then no doubt the Player would have argued that FIFA had missed the deadline to appeal. When the Appealed Decision confirms (or modifies) the original decision, after a review by the same judging authority, it is that latter decision that forms the basis of any appeal and the receipt of which starts deadlines running. The Panel determines that this is different from two separate judging authorities (even where they are both constituted under one governing body or federation) where the second hears an appeal by a party from the decision of the first and often annuls, confirms or replaces the decision of the first judging body. This situation is a review by the same judging authority and as such is more a second chapter in the same book.
- 9.6 Secondly, the Panel agrees with the view of FIFA. Its role is at an international level, so it should “step in” only after all appeals or reviews at a national level are complete. Its role is to ensure that the national associations and federations are properly complying with its regulations, the FIFA ADR. The FIFA ADR at Article 62 par. 4 provides that:

*“FIFA and WADA shall have the right to appeal to CAS against any internally final and binding doping related decision in accordance with Article 63 par. 5 and 6 of the FIFA Statutes”* [emphasis added].

Once the “Consejo de Honor” of the FVF rendered its final decision (the Appealed Decision) it had become final and binding upon the Player at a national level. The “Consejo de Honor” of the FVF does not have the jurisdiction to enforce an international sanction, as such, the matter is referred to FIFA for that purpose. If it is not satisfied that the FIFA ADR has been complied with at a national level, then it uses Article 62 to appeal to CAS. It cannot be right to

state that an internal review could have the effect of making a decision final and binding upon FIFA.

- 9.7 Thirdly, the Panel noted that, whilst FIFA were in possession of the First Decision, it was not made aware of the actual nature of the Player's appeal. It could not see until after the Appealed Decision had been delivered to FIFA what the Player was appealing about. This gives the Panel further comfort to determine that this internal appeal could not be a mechanism to render part of the decisions of the "Consejo de Honor" of the FVF as final and binding on FIFA.
- 9.8 Fourthly, FIFA advanced a number of prior CAS awards which it argued supported its position that pursuant to Article R57 of the Code, the Panel could hear the matter in hand *de novo*. The Respondents queried whether these awards assisted at all. The Panel noted both parties' positions and tended to agree with the Respondents that the cases cited, whilst correct, had little relevance here, as they did not deal with a partial appeal. Ultimately the Panel could hear the matter *de novo* in accordance to Article R57 of the Code.
- 9.9 In conclusion, the Panel determined that the Appeal is unfettered by any internal appeal or review, as is the Panel ability to fully review the merits and the sanction on a *de novo* basis.
- 9.10 In addition, the Panel considered the alternative request of the Second Respondent to "*decide that any period ineligibility imposed upon Mr Villafraz longer than the one imposed on the First Decision shall start on the date of the sample collection 23 May 2010 in accordance with article 53.2 FIFA ADR ...*" to go beyond a confirmation of the Appealed Decision and as such represent a counterclaim.
- 9.11 During the hearing the representatives of FIFA were expressly asked whether it wanted the Panel to render a decision on Article 53.2 FIFA ADR. FIFA had already asked the Panel to render a *de novo* decision – it would like the Panel to consider the merits and to decide the sanction on the Player. FIFA confirmed at the hearing that it would agree to the Panel also determining the start date of any sanction. As the parties were able to make representations on this issue, with the consent of all the parties, any procedural issues regarding admissibility of any counterclaim could be cured and the Panel would be in a position to render a full decision on the merits.
- 9.12 As such, the Panel determined to consider the merits and to render a decision that would replace the Appealed Decision.

## 10. MERITS OF THE APPEAL

- 10.1 The Panel, having determined the Appeal is admissible and that it will render a new decision in which it will hear the merits in full, had to consider:
- a. Was there an anti-doping offence?
  - b. What is the starting sanction for such an offence?

- c. Were there any grounds for reducing the sanction?
  - d. From when should the sanction commence?
- 10.2 The Panel notes it is uncontended that the Player committed the anti-doping offence when the Laboratory confirmed the presence of the substance “Modafinil” in the urine sample the Player produced on 23 May 2010. “Modafinil” is a prohibited substance, which is classified under Class 6a of the 2010 WADA Prohibited List and defined as non-specified stimulant. The presence of a prohibited substance triggers a violation of Article 5 of FIFA ADR.
- 10.3 The Panel notes it is uncontested that such a violation, pursuant to Article 45 of FIFA ADR, results in a 2 year period of ineligibility.
- 10.4 Under FIFA ADR, there are specific Articles that deal with any possible reduction of that 2 year sanction. These are under “no fault or negligence” and “no significant fault or negligence”. The Panel notes that the Player has at no time sought to utilize these articles.
- 10.5 However, both the Player and the First Respondent submit that the factors the “Consejo de Honor” considered (that is the Player’s clean disciplinary record, the lack of sporting advantage gained and the “*constitutional principles of proportionality*”) should act to reduce the sanction.
- 10.6 The Panel has already determined that the applicable law in the matter in hand is the FIFA ADR. This has no provisions allowing a judging authority to take any of those matters into consideration and as such the Panel determines there are no grounds for reducing the standard 2 year period of ineligibility in this case.
- 10.7 The final determination for the Panel is to consider the commencement date of any sanction. Whilst FIFA suggested it commences with the date of the operative part of this award, giving consideration to the period of time already served by the Player; the Player argued that the Panel should consider commencement date as the date of collection of the sample, pursuant to Article 53 FIFA ADR.
- 10.8 The Panel note that Article 53 FIFA ADR states:
- “1. *Except as provided below, the period of ineligibility shall start as soon as the decision providing for ineligibility is communicated to the player concerned. Any period of provisional suspension (whether imposed or voluntarily accepted) shall be credited against the total period of ineligibility imposed.*
  2. *Where there have been substantial delays in the hearing process or other aspects of doping control not attributable to the player, the FIFA Disciplinary Committee may start the period of ineligibility at an earlier date commencing as early as the date of sample collection or the date on which another anti-doping rule violation last occurred.*
  3. *Where the player promptly (which, in all events, for a player means before the player competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by FIFA, the period of ineligibility may start as early as the date of sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this article is applied, the player shall*

*serve at least one half of the period of ineligibility going forward from the date the player accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed”.*

- 10.9 The Panel noted that the adverse finding resulted from a sample taken on 23 May 2010. The provisional suspension (and ultimately the 1 year ban) commenced on 27 August 2010. The matter took some 5 months for the “Consejo de Honor” to first deal with and then another 5 months to review the question of the commencement date of the 1 year ban. As such, within a couple of months of the Appealed Decision, the Player recommenced his career at the Club. For reasons the Panel shall now analyse, the matter was not then heard by the Panel for another 7 months.
- 10.10 In total, the Panel was satisfied that 22 months from the sample date to a final hearing and 23 months to the date of the Operative Part of this Award constituted a “substantial delay” for an adverse finding where the B sample had not been requested, the infraction itself not contested nor any arguments regarding fault or negligence advanced.
- 10.11 The Panel noted that the first 5 months after the provisional ban resulted in the First Decision. That in itself was neither the shortest nor the longest period of time for an initial hearing. However, the Panel struggled to see why the “Consejo de Honor” required a further 5 months to review one part of its own decision.
- 10.12 The Panel noted that the next delay in this matter was the debate between FIFA and the First Respondent as to what constituted the complete case file. The Panel has above determined that FVF should have provided FIFA with all they asked for. This delay again prejudiced the Player. Finally, the Panel felt the argumentation regarding the scope of the Panel’s ability to review both the First Decision and the Appealed Decision was justified and needed clarifying. Further the reason behind this Appeal was the clear misinterpretation of the FIFA ADR by the “Consejo de Honor” in taking into account factors to reduce a 2 year sanction to a 1 year sanction which cannot be taken into account by a judging authority.
- 10.13 The Panel noted its discretion to start the period of ineligibility, which it has determined should be a 2 year period, at an earlier date and that it can go as far back as the date of sample collection. In the matter at hand, the Panel has determined to commence the 2 year ban from that earliest date – 23 May 2010.
- 10.14 The principle reasons are twofold. The Player has not contested the violation itself – his submissions were of a technical legal nature. Secondly, had the review by the “Consejo de Honor” been dealt with quicker and had it provided all FIFA asked for, then the hearing by this Panel could have occurred during the currency of the 1 year ban, instead of 7 months later. The Panel recognised the effect of a ban on any athlete. They are unable to even train with the team during that period. There is therefore a period of time after any ban during which an athlete (a footballer in this case) has to bring the level of their performance back up to where it was. Football is a team game – whilst a player may keep himself fit during a ban and even practice

ball skills, these are not integrated into training and performing with a team. It takes many weeks or months of team practice and reserve matches under his belt before he would be ready to play first team matches again. To effectively give an athlete 2 separate 1 year bans, would double the rehabilitation period after a ban and severely prejudice an athlete's career. This Panel was not prepared to do this.

10.15 The Panel takes some comfort in coming to this decision when reviewing the CAS jurisprudence in CAS 2009/A/1870. In that case it was recognised at paras 128 of that decision, that “rebanning” an athlete would be “particularly harsh and disproportionate”.

## **11. CONCLUSION**

11.1 The Panel is satisfied that the Player has committed a doping violation of the FIFA ADR which results in a sanction of a 2 year period of ineligibility, such sanction to commence on 23 May 2010.

11.2 All other motions and prayers for relief are dismissed.

## **ON THESE GROUNDS**

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

1. The appeal filed by Fédération Internationale de Football Association on 7 September 2011 against the decision of the Consejo de Honor of Federación Venezolona de Fútbol dated 22 June 2011 is allowed.
2. Mr José Javier Villafraz Quintero is hereby sanctioned with a two year period of ineligibility starting on 23 May 2010 and therefore expiring on 22 May 2012.
- (...)
5. All other or further claims are dismissed.