



**Arbitration CAS 2010/A/2307 World Anti-Doping Agency (WADA) v. Jobson Leandro Pereira de Oliveira, Confederação Brasileira de Futebol (CBF) & Superior Tribunal de Justiça Desportiva (STJD), award of 14 September 2011**

Panel: Mr Christian Duve (Germany), President; Mr Efraim Barak (Israel); Mr Quentin Byrne-Sutton (Switzerland)

*Football*

*Doping (cocaine)*

*CAS Jurisdiction ratione personae over the STJD*

*CAS Jurisdiction ratione personae over any athlete registered with a Brazilian federation*

*Impossibility to re-classify a substance*

*Standard of utmost care*

*Player's age and degree of experience*

*Commencement of the suspension period*

- 1. The STJD is a justice body which is an integral part of the organizational structure of the CBF, with no legal personality of its own. At least for international purposes the decisions of the STJD, although independently reached, must be considered to be the decisions of the CBF. As a result, the STJD has no autonomous legal personality and may not be considered as Respondent on its own in a CAS appeal arbitration concerning one of its rulings. Consequently, the CAS does not have jurisdiction *ratione personae* over the STJD.**
- 2. According to Brazilian law, official sports practice in Brazil is governed by national and international rules and by sporting practice rules of each type of sport, accepted by the respective national federations. In particular, athletes practicing professional sport have the duty to abide by international sports rules. As a result of these provisions and in accordance with CAS jurisprudence, international sports rules are directly applicable to Brazilian sport. Hence, any athlete registered with a Brazilian federation is directly bound by the international rules accepted by that federation, including any provision therein giving jurisdiction to the CAS.**
- 3. Under the FIFA Anti-Doping Regulations (ADR), the inclusion of a substance in the Prohibited List and its classification is final. Thus, a panel is bound by the fact that cocaine was classified as a prohibited substance and it cannot re-classify it as a specified substance.**
- 4. In accordance with the applicable strict standard of utmost care, except only in the most “truly exceptional cases”, the presence of prohibited substances in an athlete’s system constitutes a failure in fulfilling that duty. A cocaine-dependency syndrome is not specific and decisive, and cannot be considered an exceptional circumstance which is**

so “truly exceptional” as to explain a player’s departure from the expected standard of behavior.

5. **The age and experience of an athlete must be considered in the context of all the relevant circumstances in order to determine whether they might mitigate the athlete’s fault or negligence.**
6. **Four months after the decision was rendered appears to be a reasonable span of time to hear a doping case. In case of an adjudicating process of almost twenty months since the date of the sample collection, with this duration not attributable to the player, it is fair to apply the principle set forth in Article 53 (2) of the FIFA ADR and to start the period of ineligibility at an earlier date than the day of notification of the award.**

The World Anti-Doping Agency (WADA; the “Appellant”) is an independent international anti-doping agency, constituted as a foundation under Swiss Law and having its headquarters in Montreal, Canada, whose aim is to promote, coordinate and monitor, on an international level, the fight against doping in sports in all its forms.

Mr Jobson Leandro Pereira de Oliveira (the “First Respondent” or “Mr Jobson” or the “Player”) is a Brazilian professional football player born on 15 February 1988 in Conceição do Araguaia, Pará, Brazil. Between September and December 2009, he was registered with the Brasiliense Futebol Clube (“Brasiliense”) but was on loan to the Brazilian club Botafogo de Futebol e Regatas (“Botafogo”), which plays in the *Série A* of the CBF’s *Campeonato Brasileiro* (in English: Brazilian championship). Since June 2010, the Player has been registered with Botafogo. In January 2011, he was loaned to Clube Atlético Mineiro (“Atlético Mineiro”). However, later in the 2011 season, the Player was loaned to Esporte Clube Bahia (“Bahia”), where he currently plays. All of these clubs are affiliated with the CBF.

The Confederação Brasileira de Futebol (CBF; the “Second Respondent”) is the Brazilian football association, governing the sport of football in Brazil.

The Superior Tribunal de Justiça Desportiva de Futebol (STJD; the “Third Respondent”) is the highest sports court in Brazilian football.

The Player was selected for two in-competition anti-doping controls (respectively) on 8 November 2009 on the occasion of the *Série A* match between Botafogo and Coritiba Football Club and on 6 December 2009 on the occasion of the *Série A* between Botafogo and Sociedade Esportiva Palmeiras. The tests were performed by the WADA-accredited UFRJ Rio de Janeiro Doping Control Laboratory. The urine samples provided by the Player revealed the presence of cocaine-metabolites. Cocaine is listed as prohibited substance in-competition in accordance with the heading “*S6 a) Non-Specified Stimulants*” in the Prohibited List contained in Appendix B to the FIFA Anti-Doping Regulations (the “FIFA ADR”) (incorporated to the FIFA ADR pursuant to their article 15 (1) FIFA ADR).

On 17 December 2009, the STJD's Vice-President provisionally suspended the Player for thirty days following the positive laboratory test result from 10 November 2009. Additionally, following the second positive laboratory test result of 11 December 2009, another provisional suspension of thirty days was imposed on the Player on 21 December 2009.

The two proceedings against the Player were combined for reasons of procedural economy. Thus, on 19 January 2010 the Second Disciplinary Commission of the STJD imposed on the Player a period of ineligibility of two years pursuant to article 10.2 of the World Anti Doping Code of the WADA (WADC) due to the fact that the two in-competition tests performed on the Player's bodily samples of 8 November and 6 December 2009 had tested positive for cocaine metabolites (the "Original Decision"). The Original Decision was reached by a majority vote. The two dissenting judges voted for a one-year period of ineligibility in accordance with article 10.5.2 WADC.

On 22 February 2010, the Chairman of the FIFA Disciplinary Committee decided that the period of ineligibility imposed on the Player was to be applied worldwide for the duration imposed in the Original Decision.

Subsequently, the Player lodged an appeal against the Original Decision before the STJD. On 6 May 2010, the STJD decided by majority vote – with three dissenting judges out of eight – to reduce the period of ineligibility imposed on the Player from two years to six months (the "Appealed Decision"). This reduction was based on general principles of law, the provisions of the *Código Brasileiro de Justiça Desportiva* (in English: Brazilian Code of Sports Justice) and the rules of international sports law, especially article 10.5.2 WADC.

After serving a period of ineligibility of six months, pursuant to the information publicly available on the official website of the CBF the Player played for Botafogo against Clube Regatas do Flamengo on 14 July 2010.

The Appealed Decision was sent to FIFA by the CBF via fax on 21 July 2010. Subsequent to a request made by WADA on 16 November 2010, FIFA sent the Appealed Decision to the Appellant by an email dated 19 November 2010. In this email, the Head of FIFA's Anti-Doping Unit clarified that FIFA decided not to lodge an appeal against the Appealed Decision before CAS.

On 10 December 2010, WADA filed its statement of appeal against the Player, the CBF and the STJD (the "Respondents") against the Appealed Decision issued by the STJD.

On 17 January 2011, the CBF informed the CAS Court Office that it deemed its participation in the present arbitration as *"a party merely passive and therefore unnecessary. (...) As a result, we kindly ask you to accept our renounce to participate [in] this proceeding, and as a consequence that any and all costs of the present arbitration be borne solely by the Respondent player and / or WADA"*. In addition, the CBF filed a copy of the entire case file before the STJD, which included a copy of the Appealed Decision.

On 17 February 2011, the STJD informed the CAS Court Office that it would not pay the advance on costs because, according to CAS jurisprudence, the STJD could not be summoned as a party to this arbitration.

On 23 February 2011, WADA filed its Appeal Brief.

On 22 March 2011, the Player sent his Answer to the Appeal Brief. On the same day, the STJD sent its Answer to the Appeal Brief. Also on the same day, the CBF sent a fax to the CAS Court Office reverting to its letter of 17 January 2010 and stating that it would not be part of the proceedings. The CBF also informed that it refrained from submitting an Answer and requested that the costs of the present arbitration be borne solely by the aggrieved party.

On 20 April 2011, the CAS Court Office informed the parties that a hearing would be held on 21 June 2010 at the CAS Headquarters in Lausanne, Switzerland.

On 31 May 2011, the Procedural Order was forwarded to the parties, who were asked to sign it and return it to the CAS Court Office. WADA did so on 7 June 2011. The Player and the CBF returned a signed copy of the Procedural Order on 8 June 2011. On 15 June 2011, the STJD informed the CAS Court Office that it did not consider itself a party to this arbitration in light of the fact that CAS does not have jurisdiction *ratione personae* over the STJD and declined to sign the Procedural Order.

At the hearing, the Panel heard the Player, who was examined and cross-examined by his counsels and WADA, as well as questioned by the Panel. The Panel also heard the evidence presented by Ms Maíra Ruas Justo, Botafogo's in-house psychologist, and Mr Luiz Fernando Batista de Medeiros, Botafogo's in-house doctor (both called by the Player), who were examined and cross-examined by the parties, as well as questioned by the Panel.

After the parties' final submissions, the Panel closed the hearing and reserved its final award. The Panel heard carefully and took into account in its discussion and subsequent deliberation all the evidence and the arguments presented by the parties. Neither during nor after the hearing did the parties raise with the Panel any objection, including in respect of the composition of the panel, the procedure, their right to be heard and to be treated equally in the present arbitral proceedings.

## LAW

### Jurisdiction of the CAS

1. The jurisdiction of CAS in international football disputes derives in principle from article R47 CAS Code in connection with articles 62 and 63 FIFA Statutes. The relevant provisions read:

*“Article R47 CAS Code – Appeal*

*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 said sports-related body.*

Article 62 FIFA Statutes

1. *FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players' agents.*
2. *The provision 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.*

Article 63 FIFA Statutes

1. *Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question.*
2. *Recourse may only be made to CAS after all other internal channels have been exhausted.*
3. *CAS, however, does not deal with appeals arising from:*
  - (a) *violations of the Laws of the Game;*
  - (b) *suspensions of up to four matches or up to three months (with the exception of doping decisions);*
  - (c) *decisions against which an appeal to an independent and duly constituted arbitration tribunal recognized under the rules of an Association or Confederation may be made. (...)*
2. Furthermore, the scope of the Panel's jurisdiction is defined in article R57 CAS Code, which provides that "[t]he Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged (...)". As a result, the Panel finds that it is not bound by the facts as established by the Appealed Decision if the parties present new facts in the present proceedings.
3. The Panel notes that the appeal is directed against a decision of a sports-related body. It is undisputed by WADA, the Player and the CBF that the CAS has jurisdiction *ratione personae* over them and *ratione materiae* over the Appealed Decision. In turn, the STJD explicitly recognizes the CAS' jurisdiction *ratione materiae* over the Appealed Decision but contests the jurisdiction *ratione personae* of the CAS over the STJD. Hence, the Panel must determine whether it has jurisdiction *ratione personae* over the STJD.
4. Pursuant to articles 69 and 70 (1) and (2) of the CBF Statutes, the STJD and the Disciplinary Commissions of the STJD are the sports justice bodies in Brazil which are competent to hear disputes concerning disciplinary violations committed by anyone directly or indirectly affiliated to the CBF. In other words, the CBF has wholly entrusted its vested disciplinary power to the STJD and the Disciplinary Commissions.
5. Moreover, pursuant to article 70 (3) of the CBF Statutes, the STJD is obliged "*to comply with the Statutes, regulations, circulars and decisions and Code of Ethics of FIFA*", as well as "*to respect the principles and rules of the FIFA Disciplinary Code, of universal application, and the Brazilian Code of Sports Justice (CBJD), of national application*".

6. Furthermore, the Panel notes that CAS jurisprudence has already dealt with the question at hand and has found that *“the STJD is a justice body which is an integral part of the organizational structure of the CBF, with no legal personality of its own”* (CAS 2007/A/1370 & 1376, para 85) and that *“(at least) for international purposes the decisions of the STJD, although independently reached, must be considered to be the decisions of the CBF. In their words, the CBF is to be considered responsible vis-à-vis FIFA (or other international sports bodies) for the decision adopted by the STJD”* (CAS 2007/A/1370 & 1376, para 88). As a result, it has been established by CAS jurisprudence that *“the STJD has no autonomous legal personality and may not be considered as Respondent on its own in a CAS appeal arbitration concerning one of its rulings; consequently, the procedural position of the STJD before the CAS must be encompassed within that of the CBF”* (CAS 2007/A/1370 & 1376, para 89).
7. As a result, following CAS jurisprudence and in line with STJD’s position, the Panel holds it has jurisdiction *ratione materiae* over the Appealed Decision but does not have jurisdiction *ratione personae* over the STJD. However, the Panel holds that it does have jurisdiction *ratione personae* over WADA, the Player and the CBF.

### Applicable Law

8. Abiding by article R58 CAS Code, the CAS settles disputes:  
*“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”.*
9. Moreover, article 62 (2) of the FIFA Statutes provides that the:  
*“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”.*
10. Furthermore, the Player is registered as a professional athlete with the CBF, which has its registered seat in Rio de Janeiro, Brazil. Therefore, the Panel finds that Brazilian law is applicable subsidiarily.
11. Article 1 (2) and article 5 (V) of the CBF Statutes expressly provide that the CBF (and those directly or indirectly affiliated to it) will comply with the FIFA rules. These provisions respectively read as follows:  
*“All members, bodies and components of CBF, as well as clubs, athletes, referees, trainers, physicians, and other officers belonging to clubs or leagues of the affiliated federations must comply and enforce the compliance, in Brazil, with the Statutes, regulations, guidelines, decisions and the Code of Ethics of the Federation Internationale de Football Association – FIFA and the Confederacion Sudamericana de Futbol – CONMEBOL”.*  
*“The CBF has the following basic purposes: (...) V- respect, comply with and enforce compliance with the statutes, regulations, guidelines, decisions and other acts issued by the FIFA, CONMEBOL and other international entities to which CBF is affiliated”.*

12. Furthermore, article 1 (2) of the CBF Statutes provides, inter alia, that all athletes must comply with the rules of FIFA. Moreover, the status of international sports rules within the Brazilian sports system are strengthened by article 1 (1) of the Brazilian Law no. 9.1615/88 (commonly known as “Lei Pelé”) which expressly states that official sports practice in Brazil is governed by national and international rules and by sporting practice rules of each type of sport, accepted by the respective national federations. In particular, article 3 (3) of Lei Pelé specifically imposes on athletes practicing professional sport the duty to abide by international sports rules, besides Lei Pelé and national sports rules.
13. As a result of these provisions and in accordance with CAS jurisprudence, international sports rules are directly applicable to Brazilian sport (cf. CAS 2007/A/1370 & 1376, paras 71 *et seq.* and para 102). Hence, any athlete registered with a Brazilian federation is directly bound by the international rules accepted by that federation, including any provision therein giving jurisdiction to the CAS, as is the case here with doping-related decisions under article 63 of the FIFA Statutes.
14. Additionally, the parties have based their arguments on the FIFA ADR (edition 2009). The Panel confirms the applicability of the 2009 FIFA ADR, as well the 2009 FIFA Disciplinary Code (the “FIFA DC”) based on the fact that the tests were conducted on the Player’s bodily samples on 8 November and 6 December 2009 when the 2009 edition of the FIFA ADR was in force.
15. In conclusion, the various regulations applicable to this case are the FIFA Statutes, the FIFA DC, the FIFA ADR, and, subsidiarily, the CBF rules and Brazilian law. In case of a conflict between these regulations, the FIFA regulations shall prevail. Swiss law may also be additionally applied, particularly in reference to the interpretation and application of FIFA rules, being rules issued by a private association incorporated in Switzerland.

### Admissibility

16. The Panel rules that the appeal is admissible. WADA’s right to appeal, which has not been disputed by Respondents, stems from article 63 (6) FIFA Statutes, which reads:  
*“The World Anti-Doping Agency (WADA) is entitled to appeal to CAS against any internally final and binding doping-related decision passed by FIFA, the Confederations, Members or Leagues (...).”*
17. Moreover, article 62 (4) FIFA ADR states that:  
*“FIFA and WADA shall have the right to appeal to CAS against any internally final and binding doping – related decision in accordance with art. 63 par. 5 and 6 of the FIFA Statutes”.*
18. The Appealed Decision was notified to FIFA on 21 July 2010 and FIFA forwarded the decision to WADA on 19 November 2010. WADA filed its Statement of Appeal on 10 December 2010 and thus the filing was done within the 21-day deadline set forth in article 63 (1) of the FIFA Statutes. In addition, WADA filed its Appeal Brief on 23 February 2011, i.e. within the ten-day

deadline granted by the CAS Court Office on 14 February 2011 (see paragraph **Error! Reference source not found.** above). Hence, the Panel finds that the appeal is admissible.

## Merits

19. The main issues to be resolved by the Panel in deciding the present dispute are the following:
  - a) Has the Player committed an anti-doping rule violation?
  - b) If the answer to question a) is affirmative, what would be the appropriate sanction to be imposed on the Player?
  - c) What would be the legal consequences of the Panel's findings?
20. The Panel shall consider each of the said questions separately.
  - A. *Has the Player Committed an Anti-Doping Rule Violation?*
21. The presence of cocaine-metabolites in the bodily samples of the Player from 8 November and 6 December 2009 is not disputed. Cocaine is a prohibited substance, which is classified under "S6a non-specified stimulants" of the Prohibited List. Cocaine is prohibited only in-competition, as indicated in the Prohibited List.
22. The Player does neither contest the scientific accuracy of the analysis carried out by the WADA-accredited UFRJ Rio de Janeiro Doping Control Laboratory nor the scientific conclusion as to the identification of the cocaine-metabolites in the bodily samples. In fact, the Player admitted to the voluntary use of cocaine. WADA accepted that the Player's admission of voluntary use of cocaine suffices to establish how the prohibited substance entered the body.
23. Article 5 (3) FIFA ADR provides that "*the presence of any quantity of a prohibited substance or its metabolites or markers in a player's bodily sample shall constitute an anti-doping rule violation*". Furthermore, article 5 (1) FIFA ADR establishes the concept of strict liability by stating that "*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-rule violation under this article*".
24. Furthermore, the Panel notes the concept of strict liability has been applied consistently by international sport federations and CAS Panels and ultimately prescribed in the WADC, as well as echoed in most anti-doping regulations, including the FIFA ADR. According to CAS jurisprudence, "*the principle of strict liability means that an athlete is responsible for whatever substance is in his body, without having regard to the reasons for such presence and the degree of any respective fault of the athlete. While there are exceptions to this principle under the anti-doping regulations inspired and influenced by the WADC, every athlete must be considered to be aware of the fact that he is responsible for any substance found in his body. This also means that every athlete must be concerned about substances he or she is ingesting (...)*" (CAS 2004/A/690).



25. As a result, the Panel finds that the objective presence of cocaine-metabolites in the Player's bodily samples, regardless of the Player's subjective attitude (*i.e.* his possible intent, knowledge, fault or negligence) constitutes an anti-doping rule violation under article 5 FIFA ADR proven to the Panel's comfortable satisfaction bearing in mind the seriousness of the allegation.
- B. *What is the Appropriate Sanction to Be Imposed on the Player?*
26. Considering that the Panel has already determined that the Player has committed an anti-doping rule violation pursuant to article 5 (1) FIFA ADR, the Panel now has to determine what the appropriate sanction to be imposed on the Player is.
27. The Player argues that imposing a two-year period of ineligibility on the Player would result, *in casu*, in a violation of the principles of protection of the individual's health and life, of proportionality of the sanction and of equal treatment under Swiss law. Additionally, the Player submits that the sanction shall be reduced based on article 47 (1) FIFA ADR or, alternatively, article 47 (3) of the FIFA ADR. Lastly, at the hearing the Player submitted that the subject of addiction to a social drug without sporting performance-enhancing effects like cocaine was not covered by the FIFA ADR and, therefore, requested the Panel to fill this gap.
28. In contrast, WADA maintains that the Player should be subject to a period of ineligibility of two years pursuant to article 45 FIFA ADR as the conditions for an elimination or reduction of the sanction under article 47 FIFA ADR have not been met and because no principles of law have been violated in the present case. Lastly, at the hearing WADA submitted that the issue of addiction to social drugs was contemplated in the FIFA ADR and that, therefore, there was no legal *lacuna* for the Panel to fill in this regard.
29. Under article 45 FIFA ADR the period of ineligibility for a first time offence shall be two years. However, the Panel also notes that pursuant to article 47 FIFA ADR a period of ineligibility may be reduced or eliminated in case of specific circumstances (article 47 (1) FIFA ADR) or exceptional circumstances (article 47 (2) and 47 (3) FIFA ADR). Generally speaking, paragraph 1 of article 47 FIFA ADR provides for the possibility of reducing or eliminating the period of ineligibility in cases involving certain types of substances classified as "specified". In turn, paragraphs 2 and 3 of article 47 provide for the possibility of reducing or eliminating the period of ineligibility based on the degree of fault of the player.
30. As a result of the above, the Panel shall consider separately whether the Player is entitled to an elimination or reduction of his sanction based on:
- (a) specific circumstances involving a specified substance under article 47 (1) FIFA ADR;
  - (b) exceptional circumstances affecting the Player's degree of fault or negligence under articles 47 (2) and 47 (3) FIFA ADR; and
  - (c) the fact that imposing a two-year period of ineligibility on the Player would be incompatible with international law and human rights requirements.

a) Specific Circumstances Involving a Specified Substance under Article 47 (1) FIFA ADR

31. Article 47 (1) FIFA ADR provides:

*“1. Specified substances under specific circumstances*

*Where a player can establish how a specified substance entered his body or came into his possession and that such specified substance was not intended to enhance the player’s sporting performance or mask the use of a performance-enhancing substance, the period of ineligibility imposed under art. 45 shall be replaced with the following: at a minimum, a reprimand and no period of ineligibility from future competitions, and at a maximum, two years of ineligibility.*

*To justify any elimination or reduction, the player must produce corroborating evidence in addition to his word that establishes to the comfortable satisfaction of the FIFA Disciplinary Committee the absence of intent to enhance sporting performance or mask the use of a performance-enhancing substance. The player’s degree of fault shall be the criterion considered in assessing any reduction of the period of ineligibility”.*

32. As mentioned in paragraph 21 above, cocaine is listed as a prohibited substance classified under the heading “S6a non-specified stimulants” of the Prohibited List. In fact, Appendix B to the FIFA ADR, expressly provides that S6a non-specified stimulants are not to be considered as a ‘specified substances’:

*“All prohibited substances shall be considered as ‘specified substances’ except substances in classes (...) S6.a (...)”.*

33. However, the Player submits that even though cocaine is a prohibited substance, *i.e.* a non-‘specified substance’ and the wording of article 47 (1) FIFA ADR refers to ‘specified substances’, this article should be deemed applicable to the present case in line with the principle of equal treatment and of proportionality of the sanction. The Player bases his submission on the fact that he suffers from an addiction to a non performance-enhancing social drug, a situation that according to the Player is not covered by the FIFA ADR In contrast, WADA maintains that no reduction of the period of ineligibility under article 47 (1) FIFA ADR is possible because, pursuant to article 15(3) FIFA ADR, the inclusion of a substance in the Prohibited List and its classification “*is final and shall not be subject to challenge*”. Furthermore, WADA submits that the fact that addiction is not given as an example of a reason that cannot be used to challenge, this does not mean that the subject of addiction to social drugs is not covered by the FIFA ADR, *i.e.* there is no legal *lacuna* in this respect.

34. In the present case, the Panel rules that article 47 (1) FIFA ADR is not applicable to the case at hand, as cocaine is not considered a ‘specified substance’ under the FIFA ADR Moreover, the Panel concludes that this finding does not violate the principle of equal treatment, due to the fact that all cases involving a non-‘specified substance’ in the world of organized football are treated alike under the FIFA ADR Additionally, the application of 47 (1) FIFA ADR only to ‘specified substances’ does not violate the principle of proportionality. The Panel finds that this principle is guaranteed under WADC and that FIFA is entitled under Swiss law to limit in its rules the circumstances to take into account when fixing the sanctions and restrict the application of the doctrine of proportionality.

35. The Panel arrives at the above-mentioned conclusion as a result of adopting the following approach.
36. First, the Panel observes that under article 15 (3) FIFA ADR and as expressed by WADA, the inclusion of a substance in the Prohibited List and its classification *“is final and shall not be subject to challenge by a player or other person based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk or violate the spirit of sport”*.
37. The Panel is bound by the FIFA ADR and the fact that cocaine was included in the Prohibited List and was classified as a prohibited substance. Thus, the Panel agrees with WADA’s position and holds that it cannot re-classify cocaine as a ‘specified substance’ (cf. CAS OG 06/001, para 4.8), regardless of whether the Player is addicted to cocaine or whether it has performance-enhancing effects (cf. CAS 2009/A/2012, para 60). The Panel finds that there is therefore no legal lacuna in this respect and, hence, the Panel rules that cocaine is to be considered a ‘prohibited substance’ and not a ‘specified substance’.
38. Subsequently, the Panel notes that while the wording of articles 47 (2) and 47 (3) FIFA ADR refers to ‘prohibited substances’, the wording of article 47 (1) FIFA ADR only mentions ‘specified substances’. The difference between ‘prohibited substances’ and ‘specified substances’ is found in article 16 FIFA ADR, which states:
- “all prohibited substances shall be specified substances except substances classified as anabolic agents and hormones and those stimulants, hormone antagonists and modulators so identified in the Prohibited List”*.
39. Furthermore, the Panel notes that doping offences involving specified substances are subject to a more lenient treatment under the FIFA ADR, e.g. they are subject to an optional provisional suspension based on an “A” sample adverse analytical finding under article 36 FIFA ADR (as opposed to a mandatory provisional suspension for non-specified substances under article 35 FIFA ADR).
40. The FIFA ADR does not explain the reasoning behind this differentiation nor define the term ‘specified substance’. However, FIFA has accepted the WADC and the language of article 47 FIFA ADR is similar to that of article 10 WADC. In addition, the FIFA ADR has been established on the basis of the WADC, whose main intention was the harmonization of the worldwide fight against doping. As recognized by CAS jurisprudence, in order to achieve this goal of harmonization *“it is necessary to interpret anti-doping rules that have been established on the basis of the WADC in harmony with the WADC, the respective set of rules of other international sport federations and the respective CAS case law”* (CAS 2004/A/690). Lastly, the preamble to the FIFA ADR expressly provides that comments to the provisions of the WADC can be used to construe the FIFA ADR. This view has been shared by previous CAS Panels, who found that:
- “The (official) comments on the WADC can be viewed as laying down an initial guideline as to how this qualifying element should be interpreted. Although these comments are not binding upon the Panel in formulating its decision, they form a body of information which can be taken into account when interpreting the rules and regulations in the WADC”* (CAS 2005/A/847; cf. CAS 2004/A/690).

41. Hence, the Panel turns to the comment to article 10.4 WADC edition 2009, which provides for the elimination or reduction of the period of ineligibility for specified substances under specific circumstances. The comment to article 10.4 WADC reads:

*“Specified Substances are not necessarily less serious agents for purposes of sports doping than other Prohibited Substances (for example, a stimulant that is listed as a Specified Substance could be very effective to an Athlete in competition); for that reason, an Athlete who does not meet the criteria under this Article would receive a two-year period of Ineligibility and could receive up to a four-year period of Ineligibility under Article 10.6. However, there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation (...).”*

42. Additionally, the Panel considers the comment to the article dealing with specified substances in the 2003 edition of the WADC, article 10.3 WADC. The comment states:

*“this principle is carried over from the [Olympic Movement Anti-Doping Code] and allows, for example, some flexibility in disciplining Athletes who test positive as a result of the inadvertent use of a cold medicine containing a prohibited stimulant”.*

43. In light of the above, the Panel shares the ruling of another CAS Panel which decided that article 10.3 WADC 2003 could not be applied to validate a reduction of a sanction for an offence involving a non-‘specified substance’. That Panel ruled as follows (CAS 2005/A/830):

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

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

44. Concerning the principle of equal treatment, the Panel takes into consideration that the Advisory Opinion delivered by CAS in relation to the implementation of the WADC into the FIFA DC expressed that *“sanctions imposed by associations must comply with the principle of equal treatment, e.g. insofar as all members or constituents of that association must be treated alike”*. In this regard, the Panel observes that pursuant to article 1 FIFA ADR, the FIFA ADR are applicable to all doping controls over which FIFA or its associations have jurisdiction, as well as to everyone involved in football which is directly or indirectly affiliated to FIFA:

*“1. These regulations shall apply to FIFA, its member associations and the confederations and to players, clubs, player support personnel, match officials, officials and other persons who participate in activities, matches or competitions organised by FIFA or its associations by virtue of their agreement, membership, affiliation, authorisation, accreditation or participation.*

*2. These regulations shall apply to all doping controls over which FIFA and, respectively, its associations have jurisdiction”.*

45. With regard to the principle of proportionality, the Panel considers that in the opinion of the Swiss Federal Tribunal sports bodies can limit in their rules the circumstances to be taken into account when fixing sanctions and thereby also restrict the application of the doctrine of

proportionality (cf. CAS 2005/A/847 and CAS 2009/A/2012, para 69 making reference to the Decision dated 31 March 1999, in: REEB M. (ed.), *Digest of CAS Awards II 1998-2000*, 2002, p. 775). Furthermore, CAS jurisprudence has found that the principle of proportionality was guaranteed under the WADC (CAS 2005/C/976 & 986, para 139). Lastly, the Legal opinion of Prof. G. Kaufmann-Kohler, Prof. G. Malinverni and Dr A. Rigozzi stated that even though the rigid system of fixed sanctions in the WADC considerably restricted the doctrine of proportionality, this system was compatible with human rights and general legal principles in light of the legitimate aim of harmonizing doping sanctions (KAUFMANN-KOHLER/MALINVERNI/RIGOZZI, *Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law*, 26 February 2003, p. 5 and 6).

- b) The Player's Degree of Fault or Negligence under Articles 47 (2) and 47 (3) FIFA ADR
46. The Player asks for the reduction of the period of ineligibility based on the fact that he bore no significant fault or negligence because he was suffering from an irresistible coercion caused by his cocaine-dependence syndrome that did not allow him to control the cocaine use at the relevant time. The Player argues that the circumstances of the case at hand are exceptional, in view of the fact that (a) his case is truly exceptional being an individual suffering from a dependence syndrome; (b) the evidence filed is specific and decisive to explain how the Player, being cocaine-addicted, did not follow the expected standard of behavior; and (c) the Player was young and lacked experience at the time. As a result, the Player submits that pursuant to article 47 (3) FIFA ADR, the period of ineligibility imposed on him shall not in any case be longer than one year.
47. In contrast, WADA argues that the Player may not be granted an elimination or reduction of the period of ineligibility under article 47 (3) FIFA ADR based on the fact that, in spite of his duty to ensure that no prohibited substances enter his body under article 5 FIFA ADR, the Player voluntarily used cocaine. WADA submits that the Player's voluntary action constitutes a paradigm violation: not only did he fail to exercise caution to ensure that the prohibited substance did not enter his body, but he voluntarily administered the substance himself. According to WADA, there were no third party errors or coercion involved. In addition, WADA submits that arguments concerning the Player's addiction or his possible intention to enhance or not his performance must be deemed irrelevant to determine whether there was a violation of article 5 FIFA ADR. Moreover, WADA submits that the effects the sanction might have on the Player's career or on his earning potential are also irrelevant to assess the Player's degree of fault or negligence. Finally, WADA maintains that by consuming a prohibited substance voluntarily the fault of the Player with respect to the anti-doping violation is flagrant and subsidiary factors – such as youth and inexperience – cannot be (mis)used to justify a reduced sanction under article 47 (4) (d) FIFA ADR.
48. Therefore, the Panel must determine whether the Player is entitled to an elimination or reduction of his sanction based on exceptional circumstances affecting the Player's degree of fault or negligence under articles 47 (2) and 47 (3) FIFA ADR. Articles 47 (2) and 47 (3) read:

“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 art. 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 for multiple violations under art. 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 of 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 eight years.*

*When a prohibited substance or its markers or metabolites is detected in a player’s sample in violation of art. 5, the player must also establish how the prohibited substance entered his system in order to have the period of ineligibility reduced. (...)”.*

49. With respect to the applicable standard of care, the Panel shares the following opinion of previous CAS Panels concerning the duty of caution required under the applicable rules:

*“ ‘No fault’ means that the athlete has fully complied with the duty of care. (...) ‘No significant fault’ means that the athlete has not fully complied with his or her duties of care. The sanctioning body has to determine the reasons which prevented the athlete in a particular situation from complying with his or her duty of care. For this purpose, the sanctioning body has to evaluate the specific and individual circumstances. However, only if the circumstances indicate that the departure of the athlete from the required conduct under the duty of utmost care was not significant, the sanctioning body may (...) depart from the standard sanction” (CAS 2005/C/976 & 986, paras 74 and 75; CAS 2007/A/1370 & 1376, para 141; CAS 2009/A/2012, para 53).*

50. Hence, the Panel subsequently considers the wording of article 47 FIFA ADR as well as the interpretation given by CAS jurisprudence on the subject and notes that, in order to determine the degree of fault or negligence, the Player must prove:

- aa) how the prohibited substance came to be present in his body and, thus, in his urine samples, and
- bb) that his level of fault or negligence, when viewed in the totality of the circumstances, was not significant in relation to the anti-doping rule violation.

- aa) Evidence of How the Prohibited Substance Entered the Player’s Body

51. With regard to the first prerequisite, *i.e.* proving how the prohibited substance entered his body, the Panel notes that the Player admitted to having voluntarily used cocaine because he suffered

from cocaine dependency syndrome. WADA agreed at the hearing that the Player had proved how the substance had entered his body by admitting to the voluntary use of cocaine. Accordingly, the Panel holds that, the Player has established how the prohibited substance entered his system.

bb) Evidence of the Player's Caution and Degree of Fault or Negligence

52. Regarding the Player's fault or negligence, the Panel turns to article 47 (4) FIFA ADR It refers to the applicable principles used to determine what constitutes 'specific' or 'exceptional' circumstances. Article 47 (4) FIFA ADR provides:

*"4. Principles for specific or exceptional circumstances*

*All decisions taken under the FIFA Anti-Doping Regulations regarding specific or exceptional circumstances must be harmonised so that the same legal conditions can be guaranteed for all players. Therefore, the following principles shall apply:*

*a) Specific or exceptional circumstances will exist **only in cases where the circumstances are truly exceptional** and not in the vast majority of cases.*

*b) The **evidence considered must be specific and decisive** to explain the player's departure from the expected standard of behaviour.*

*c) Taking into consideration the player's personal duty to ensure that no prohibited substance entered his body tissues or fluids (art. 5 par. 1), a sanction cannot be completely eliminated on the basis of no fault or negligence (art. 47 par. 2) in the following circumstances: a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement, the administration of a prohibited substance by the player's team physician or coach without disclosure to the player, sabotage of the player's food or drink by a spouse, coach or other person within the player's circle of associates. However, depending on the unique facts of the particular case, any of the referenced circumstances could result in a reduced sanction based on no significant fault or negligence (art. 47 par. 3).*

*d) Minors are not given special treatment per se in determining the applicable sanction, but **youth and lack of experience are relevant factors** to be assessed in determining the player or other person's fault under art. 47 par. 1 to 3"*

[Emphasis added].

53. Furthermore, the Panel notes that the burden of proving the above is a very high hurdle for an athlete to overcome (cf. CAS 2005/A/830; TAS 2007/A/1252, CAS 2007/A/1370 & 1376, para 126; CAS 2009/A/2012, para 50). In addition, the Panel observes that in accordance with article 13 (2) FIFA ADR and CAS jurisprudence, the Player must establish the facts that he alleges to have occurred by a 'balance of probability' (cf. CAS 2004/A/602, para 5.15; TAS 2007/A/1411, para 59; CAS 2007/A/1370 & 1376, para 127). Article 13 (2) FIFA ADR reads as follows:

*"[t]he burden of proof is placed upon the player or other person alleged to have committed an anti-doping rule violation (...) to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability (...)"*

54. As a result, the Panel shall analyze the evidence put forward by the parties to determine whether the Player has proven, on the balance of probability, his allegation that he bore no significant fault or negligence because he was suffering from an irresistible coercion caused by his cocaine-dependence syndrome that did not allow him to control the cocaine use at the relevant time. For that purpose, the Panel will have to consider whether the cocaine-dependency syndrome alleged by the Player can be considered an ‘exceptional circumstance’ which is ‘truly exceptional’ (under article 47 (4) (a) FIFA ADR); and whether the evidence of the cocaine-dependency syndrome is specific and decisive to explain the Player’s departure from the expected standard of behavior (under article 47 (4) (b) FIFA ADR). In doing so, the Panel will consider the Player’s age and level of experience pursuant to article 47 (4) (d) FIFA ADR

#### The Player’s Case

55. The Player has put forth the following evidence to establish that he bore no significant fault or negligence because, at the relevant time, he was allegedly suffering from an irresistible coercion caused by his cocaine-dependence syndrome that did not allow him to control the use of cocaine:
- a) the Player’s oral statements at the hearing;
  - b) the written evidence provided by Dr Jorge Jaber, the psychiatrist who treated the Player between June and October 2010;
  - c) the oral and written evidence provided by Ms Maíra Ruas Justo, Botafogo’s in-house psychologist who treated the Player between September and December 2009 and between June and December 2010;
  - d) the oral evidence provided by Mr Luiz Fernando Batista de Medeiros, the coordinator of Botafogo’s medical department; and
  - e) documentary evidence in relation to the Player’s good character.

The Panel summarizes separately the evidence presented by the Player below.

#### The Player’s oral statements at the hearing

56. At the hearing, the Player told the Panel about the financial difficulties that he had to endure back in his hometown and upon arrival in Brasilia until he finally signed with Brasiliense. Moreover, the Player confirmed that he had started drinking alcohol at the age of 15 and using drugs at the age of 17, when he started to play for Brasiliense. The Player explained that no doping controls had been conducted in the Brazilian state championship in which Brasiliense played. Therefore, he consumed cocaine without the fear of being caught for having committed a doping offence. According to the Player, in 2008 his consumption of drugs increased. However, the Player said that during the time he played in South Korea in 2009 he had not taken cocaine but had consumed vast quantities of alcohol. When he arrived at Botafogo in 2009, he continued using cocaine although could have been subject to doping controls, as



Botafogo played in the *Série A*, where doping controls were carried out. The Player stated that during this time he had consumed drugs in social events after matches and on weekends and parties but not in the morning and not before the matches. At that time, he had been in training and could not get hold of drugs. However, he would have taken drugs in the days before training.

57. Subsequently, the Player described his reaction to the two-year suspension imposed on him on 19 January 2010. He stated that at that point in time he had become desperate and even more dependent on drugs and that he started consuming crack. The Player referred to this period as the 'worst period of his life'. He further explained that he had started to take care of himself when he received the news that the suspension had been reduced to six months, as he could see football as the way out and therefore started training again with Brasiense.
58. When his ban was lifted, the Player returned to Botafogo in June 2010 and started treatment with Dr Jaber. The Player mentioned that he had stopped the treatment with Dr Jaber despite the disagreement of the doctors of Botafogo, and then continued the treatment with the doctors of Botafogo and started attending meetings of both narcotics anonymous and alcoholics anonymous. The Player confirmed that he had continued his treatment when he changed clubs to Atlético Mineiro and to Bahia. The Player explained that, as part of his treatment, he did not take any medication and that he refrained from taking alcohol. Moreover, the Player expressed that he submitted himself to voluntary doping tests at Bahia.
59. In addition, the Player expressed his fear of going back to drugs if he was suspended again, as the fight against his illness was very hard and he saw football as his way out. The Player indicated that his contract with Bahia would be immediately terminated. The Player confirmed that he knew that a second doping offence would result in a life ban and explained that this was the reason why he was taking care of not relapsing. Finally, the Player stated that it had been very difficult for him to admit his addiction in public, in particular because the clubs in Brazil and Europe 'shut the doors' on him, and he had lost the chance to sign with Cruzeiro Esporte Clube.

The written evidence provided by Dr Jorge Jaber, the psychiatrist who treated the Player between June and October 2010

60. As evidence of his cocaine-dependency syndrome, the Player presented the Panel with a diagnosis made by Dr Jaber on 15 June 2010 when the Player began his treatment at his clinic. In this document, Dr Jaber stated that "[the Player] allegedly started consuming marijuana at age 17 and went on to use large amounts of alcohol. Started using cocaine 2 years ago and recently started consuming crack". However, it does not state when the Player's drug-dependency syndrome began.
61. In his written statement dated 21 March 2011, Dr Jaber said that "*the patient is a professional football player with history of drug use. He started treatment in June 2010. **He has not participated often [in] medical and psychological treatment and when he did not compl[y] with the treatment he left it.** The last treatment session was on 05 October 2010*". [Emphasis added].

62. The Player failed to make Dr Jaber available to participate in the hearing.

The oral and written evidence provided by Ms Maíra Ruas Justo, Botafogo's in-house psychologist who treated the Player between September and December 2009 and between June and December 2010.

63. As further evidence of his cocaine-dependency syndrome, the Player filed a written statement of Ms Maíra Ruas Justo dated on 19 January 2011. In this document, she stated that “[*the Player*] was in treatment between September and December 2009 and between June and December 2010. The chemical addiction became evident”.
64. However, at the hearing Ms Ruas Justo clarified that in the period between September and December 2009, the Player had not shown signs of being drug dependent or signs of lack of discipline. On the contrary, she stated that at that time the Player had a very high profile in the team, complied with all his obligations and, since in Brazil it would be part of the culture that players drink and party, she had not identified anything unusual in his behavior, in particular his drug dependency. Moreover, she testified that the Player showed a completely normal behavior and performance and that he had helped the team stay in the first division and avoid relegation. However, Ms Ruas Justo also stated that her job was to prepare the players psychologically to perform better in the field and, since she was not aware of his drug dependency, in 2009 she only helped the Player increase his performance. In addition, she testified that she had had no contact with the Player at the time of his samples tested positive for doping, as this had occurred outside of the season.
65. Furthermore, Ms Ruas Justo testified at the hearing about the Player's behavior and treatment in 2010, both with Botafogo and with Dr Jaber. She clarified that she knew about his treatment with Dr Jaber because she had attended his clinic approximately seven times in order to report to the Botafogo medical team. She stated that, since the drug use had been a very high level before the suspension was reduced to six months, the Player showed withdrawal symptoms. However, with the help of Dr Jaber and Botafogo's medical team, the Player began treatment to readjust to a life without drugs. She mentioned that the Player's treatment did not include medication but that it included him attending meetings of both narcotics anonymous and alcoholics anonymous. When asked by the Panel, Ms Ruas Justo did not recall whether Dr Jaber had stated when the Player's drug dependency had started but mentioned that it was typically a problem that evolved over time. Therefore, it would be difficult to pinpoint a time at which the dependency would have started. In addition, she mentioned that if the Player would be suspended again he would lose the support of the medical teams that have been helping him in the past. He would not be able to play football. In her view, these would be fundamental for his treatment and recovery.
66. Finally, Ms Ruas Justo testified that she did not have other experience with players who are addicted to drugs.

The oral evidence provided by Mr Luiz Fernando Batista de Medeiros, the coordinator of Botafogo's medical department:

67. The Player also relied on the oral testimony of Mr Batista de Medeiros to prove his cocaine-dependency and the treatment he had undergone. At the hearing, Mr Batista de Medeiros stated that he had met the Player in mid-2009 when he presented himself to Botafogo. He mentioned that during 2009 the Player had complied with his duties (*i.e.* had duly turned up for training and playing football) but that his behavior had been a bit restless. Mr Batista de Medeiros stated that he had had no contact with the Player at the time of his samples tested positive for doping due to the fact that the loan contract between the Player and Botafogo had ended in December 2009.
68. With regard to the period between June and December 2010, Mr Batista de Medeiros stated that the Player had complied with his obligations towards the club and that he had undergone treatment for his drug dependency. According to Mr Batista de Medeiros, the diagnosis of the Player's dependency had been done by the clinic of Dr Jaber in June 2010 when the Player's ban was lifted and that, since then, Botafogo made all medical and psychological resources available to the Player. Mr Batista de Medeiros testified that between October and December 2010 the Player had been subject to weekly doping tests at Botafogo in the period between matches and that no tests had turned positive results. In addition, he mentioned that the Player had been chosen for doping tests by raffle on two occasions and that both results had been negative. Finally, Mr Batista de Medeiros stated that, if the Player was to be banned, he would then relapse as he would lose his motivation to stay keep: the ability to play football, the major part of his treatment.

Documentary evidence regarding the Player's good character

69. Lastly, to prove his good character, the Player produced, in addition to his oral statements at the hearing stating that he had been clean since July 2010, his disciplinary record with the STJD showing that he had only been suspended once in 2008 for two matches; and the results of a screening test conducted on a sample collected on 21 February 2011 which resulted negative for amphetamines, cannabinoid (marijuana) and cocaine.

WADA's Case

70. WADA, in turn, pointed to the following elements to show that this would not be a case of 'truly exceptional circumstances'. According to WADA, all of the below shows that the temptation of taking the substance was not irresistible. In other words, the Player was not suffering from an irresistible coercion or addiction to the substance that would make this case of 'truly exceptional circumstances' with 'specific' and 'decisive evidence' to explain the player's departure from the expected standard of behavior, as required under article 47 (4) FIFA ADR

71. The Player stated that he typically consumed cocaine in parties or socially but, at the same time, recognized that he would not bring the substance to the training camps.
72. The Player admitted to not having consumed drugs between January and September 2009 while he was in South Korea.
73. Ms Ruas Justo testified that in the period between September and December 2009, including the time when the bodily samples were collected, the Player had not shown signs of addiction. To the contrary, the Player fulfilled his duties and played an important role in the team in a difficult time when Botafogo was facing relegation.
74. Both, the Player and Ms Ruas Justo, recognized that the Player's condition actually got worse after the two-year suspension was imposed on him in the beginning of 2010.
75. The diagnosis made by Dr Jaber on 15 June 2010 (mentioned in paragraph above) was made between six and seven months after the doping offence was committed in November and December 2009.
76. The Player recognized that many athletes take drugs in Brazil and that cocaine was highly addictive.
77. The Player was not a minor but 21 years old at the time of the doping offence. He was playing as a professional athlete in the Brazilian championship.
78. In any case, there would be no specific proof that the Player would relapse or worsen if another suspension were to be imposed on the Player.

#### The Panel's Analysis

79. The Panel has carefully reviewed the facts and the various pieces of evidence available, summarized above. On their basis, the Panel finds that the elements offered by the Player are not sufficient to establish, on the balance of probability, that he bore no 'significant fault or negligence'. The Panel does not find the evidence presented by the Player to be specific and decisive to explain the Player's departure from the expected standard of behavior. Moreover, the Panel is not convinced that the circumstances of the present case are 'truly exceptional' so as to reduce the Player's responsibility. In fact, the Panel finds that the Player's degree of fault or negligence, viewed in the totality of the circumstances, is clearly 'significant' in relation to the anti-doping rule violation.
80. The Panel arrives at this conclusion after taking the following approach:
81. First, the Panel underscores that in accordance with the applicable strict standard of utmost care, except only in the most 'truly exceptional cases', the presence of prohibited substances in an athlete's system constitutes a failure in fulfilling that duty. Athletes have a personal duty to

be aware of what substances are in their bodies, and are deemed to know what substances are included on the prohibited list (cf. CAS OG 06/001, para 4.11). Furthermore, failure to know what substances are included on the prohibited list or taking a risk with respect to the detection period of a substance which is prohibited in competition have repeatedly been regarded by CAS jurisprudence as negligence (cf. CAS 2008/A/1479, para 51; CAS 2004/A/690; and CAS 2009/A/2012).

82. For example, in the H. case, before playing at the tournament in Chile, H. visited a friend in Tucuman, a town of Northeastern Argentina at a level of more than 3,000 metres above sea level. H. stayed there for three to four days and suffered from headaches and an upset stomach caused by the altitude sickness. H. was therefore advised to drink a certain herbal tea and chew certain leaves, which were given to him. At that time, H. did not know that he was eating coca leaves or that sipping coca tea or eating coca leaves were a source of cocaine. The Panel sitting in the H. case considered that the athlete's lack of inquiry about what he was consuming was negligent (CAS 2004/A/690).
83. Another example of negligent behaviour can be found in the L. case, where the athlete was sanctioned for failing to monitor the prohibited list every year, in accordance with his duty as an athlete. L. tested positive for the presence of a drug known as finasteride, a substance contained in a hair restoration formulation used by the athlete for a number of years. Given that finasteride is often employed as a steroid-masking agent, finasteride was added to the prohibited list in 2005. However, although he had previously scrutinized the prohibited list with care, he failed to do so in 2005 and was therefore unaware of the fact that the medicine he used for a hair treatment contained a prohibited substance.
84. Second, the Panel highlights the very high standard to be complied with by the athletes at the time of proving that they bear no fault or negligence. Pursuant to article 47 (4) (c) FIFA ADR, in cases where the player had no influence at all on the substance entering his body the sanction can be reduced but cannot be eliminated completely. CAS jurisprudence on the issue of accidental and inadvertent doping is very strict; doping offences occur usually with athletes who are fully aware of the risks of doping (e.g. CAS 2003/A/484; CAS 2005/A/951; CAS 2005/A/830; and CAS OG 04/003). Neither the unsuspecting use of a cream to treat a skin affection nor the ingestion of a medication which the athlete knows has gone through several hands after being prescribed by a tournament doctor were sufficient to lead to the elimination of ineligibility sanction based on 'no fault or negligence' provision (cf. CAS 2006/A/1025, para 11.4.11).
85. The present case does not concern accidental or inadvertent doping. To the contrary, despite the fact that "[i]t is each player's personal duty to ensure that no prohibited substance enters his body" (article 5 FIFA ADR), the Player voluntarily used cocaine, admittedly on a regular basis. Based on the strict standard of the FIFA ADR and of CAS jurisprudence, the Player's behavior would have been significantly negligent under the circumstances even if the Panel were to find that the Player suffered from the cocaine-dependency syndrome at the relevant time. The Player voluntarily and knowingly ingested the prohibited substance, and any peer pressure he may have

felt, or his ignorance that doping controls were carried in the Brazilian *Série A* championship, do not make this case ‘truly exceptional’ so as to reduce his responsibility.

86. Third, although it might have slipped his mind at the day of the matches, the Player knew that he had consumed cocaine during the football season. However, there was no evidence presented to the Panel indicating that the Player told anybody about having taken drugs in an ‘in-competition’ period, or that he made a comment on the Doping Control Form, or that he sought any medical advice to determine whether he was committing a doping offence, or that he tried to get treatment for his drug dependency. Instead, the evidence indicates that the Player just played the matches on 8 November 2009 and 6 December 2009. Under these circumstances, the Panel finds that the Player knowingly and willfully accepted the risk that a prohibited substance would still be present in his body during these matches (cf. CAS 2009/A/2012, para 57).
87. In line with the rulings of previous CAS Panels that heard doping cases involving cocaine, the Panel cannot accept that these circumstances would mitigate the Player’s fault or negligence significantly. If it were to do so, this Panel would be creating a loophole enabling athletes who have been found guilty of a doping offence to obtain an unwarranted reduction of the sanction provided for by the applicable anti-doping regulations (cf. CAS 2006/A/1067; paras 6.14 & 6.15; CAS 2007/A/1364, paras 7.10 & 7.11; CAS 2008/A/1479, para 53; and CAS 2009/A/2012, para 58).
88. Fourth, the Player did not discharge his burden of proving, on the balance of probability, that at the time when the bodily samples were collected he bore no ‘significant fault or negligence’. The Panel is not convinced that the evidence presented by the Player regarding his cocaine-dependency syndrome is specific and decisive to explain the Player’s departure from the expected standard of behavior.
89. The Player recognized that he had used drugs socially, mainly at parties or on the weekends, but never in the morning or before matches because he would be in concentration. Furthermore, the Player acknowledged that he had not used drugs while he played in South Korea before joining Botafogo, but that instead he had switched to alcohol. In the Panel’s view, these facts might indicate that the Player had at least some control over his drug intake and knew when he could take it and when not. The Panel is therefore not convinced that the Player has proved, on the balance of probability, that he could not have taken precautions to avoid using cocaine during ‘in-competition’ periods while playing for Botafogo and thus follow the expected standard of behavior.
90. Even though the Player stated that his use of cocaine increased in the period between 2008 and 2009, the Player admitted to not having consumed drugs other than alcohol between January and September 2009 while he was in South Korea. Moreover, Ms Ruas Justo, Botafogo’s in-house psychologist who treated the Player between September and December 2009, testified that she had not seen any signs of his addiction at the time of the doping offence (*i.e.* in November / December 2009). To the contrary, during that period not only did the Player fulfill his duties but was also able to perform at a high level in the Brazilian *Série A* championship,

score goals and help his team avoid relegation. This might indicate to the Panel that the Player was not suffering then from an irresistible coercion (as alleged by his counsel) while still being able to achieve such a high performance at such important championship as well as being able to 'hide' from the team's psychologist his allegedly very serious drug-dependency syndrome. Hence, the Panel finds that the evidence presented is not specific and decisive to explain the Player's departure from the expected standard of behavior as required under article 47 (4) (b) FIFA ADR

91. As evidence of his cocaine-dependency syndrome, the Player presented the brief diagnosis of Dr Jorge Jaber dated 15 June 2010, which states: "*[the Player] allegedly started consuming marijuana at age 17 and went on to sue large amounts of alcohol. Started using cocaine 2 years ago and recently started consuming crack*". However, the Panel notes that Dr Jaber's diagnosis was performed several months after the date of the sample collection and does not state when this syndrome began. Furthermore, in the written statement Dr Jaber produced for these proceedings, he expressly stated that the Player had only attended the clinic for a few months (from June to 5 October 2010) and had not followed the medical or psychological treatment. In the Panel's view, Dr Jaber's written statement may indicate that the degree of drug-dependency was not irresistible enough to explain the Player's departure from the expected standard of behavior, as the Player was able to get clean without following the treatment advised by the expert and within a considerably short timeframe.
  
92. The Panel and WADA were prevented from questioning the only expert on the subject of addiction presented by the Player because, although Dr Jaber had been originally scheduled to attend the hearing, the Player failed to make him available to participate. The Panel, therefore, concludes that Dr Jaber's evidence is not enough to find that the Player at the time of the sample collection was suffering an irresistible coercion or addiction to the substance that would make this a case of 'truly exceptional circumstances' as alleged by the Player's counsel. Moreover, the Panel finds that the evidence presented is not specific and decisive to explain the Player's departure from the expected standard of behavior as required under article 47 (4) (b) FIFA ADR.
  
93. Fifth, concerning the Player's age and degree of experience pursuant to article 47 (4) (d) FIFA ADR, the Panel considers that previous CAS Panels have reduced sanctions in cases involving minors, such as WADA v. USADA & E. (CAS 2008/A/1490) and R. v. UEFA (CAS 2005/A/958). However, the age and experience of the athlete was considered in the context of all the relevant circumstances in order to determine whether they mitigated the athlete's fault or negligence. For instance, the E. case involved an inexperienced high school athlete had admitted to social use the night before the junior national championship. E. had never competed at the international level and was his first competition at the national level, he lacked consistent coaching, lacked anti-doping education and lacked knowledge that cocaine was a prohibited substance. The Panel sitting in the E. case therefore found that "*the athlete clearly lacked the knowledge and experience to understand the risk consuming cocaine at his graduation party represented in respect of his participation at the championship*" (CAS 2008/A/1490, paras 8.21 & 8.22). These considerations do not apply in the present case. Although the Player did not finish his primary education due to his difficult childhood, the Player was not a minor like E. but 21 years old at

the time he committed the anti-doping rule violation. Unlike E., the Player was an experienced professional athlete playing in the *Série A* of the CBF's Campeonato Brasileiro, one of the most competitive leagues in South America. Furthermore, also unlike E., at the relevant time the Player not only had consistent coaching but also had access to Botafogo's medical team, which especially worked to improve his performance in the field. Hence, in line with the findings of the Panel sitting in the E. case, the Panel finds that the age and degree of experience of the Player, view in the totality of the circumstances, do not mitigate the Player's fault or negligence significantly in the present case.

94. Finally, the good character evidence submitted by the Player, which the Panel accepts, cannot mitigate his culpability so as to reduce his sanction. Whether an athlete has committed an anti-doping offence in the past, for example, is relevant only for determining the applicable range of sanctions, not to reduce the sanction given for a first offence (cf. CAS 2005/A/847, para 7.5.2 and CAS 2007/A/1364, para 7.12).
- c) The Compatibility of a Two-Year Suspension with International Law and Human Rights Requirements
95. The Player argues that imposing a two-year period of ineligibility on the Player would result, *in casu*, in a violation of the principles of protection of the individual's health and life, of proportionality of the sanction and of equal treatment under Swiss law, which are applicable in the present case in light of the fact that FIFA is a private association constituted under Swiss law.
96. In contrast, WADA maintains that the principles of protection of the individual's health and life, of proportionality of the sanction and of equal treatment under Swiss law are not violated by the imposition of a two-year suspension, as it has been recognized by both the jurisprudence of CAS and the Swiss Federal Tribunal, as well as by the legal opinions of prominent scholars on the subject, that the imposition of a fixed two-year sanction for a first doping offence is not incompatible with international law and human rights requirements.
97. Imposing a two-year period of ineligibility on the Player is compatible with international law and human rights requirements. In particular, the Panel took into account that in the opinion of the Swiss Federal Tribunal, the sport associations exceed their autonomy if these rules constitute an attack on personal rights, the nature and scope of which is extremely serious and totally disproportionate to the behavior penalized. The Panel finds that this threshold has not been exceeded in the present case.
98. The Panel arrives at the above-mentioned conclusion as a result of adopting the following approach.
99. First, the Panel takes into consideration that both CAS jurisprudence and various legal opinions confirm that the WADC mechanisms are not contrary to human rights legislation (cf. CAS 2004/A/690; CAS 2005/A/830; CAS 2009/A/2012, para 47; KAUFMANN-



KOHLER/MALINVERNI/RIGOZZI, Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law, 26 February 2003, p. 5 and 6; and ROUILLER C., Legal Opinion, 25 October 2005, p. 33 *et seq.*

100. This view was also shared by the Swiss Federal Tribunal in an appeal concerning a motion to set aside a CAS award imposing a two-year suspension under the applicable anti-doping rules of FINA (Decision dated 31 March 1999, in: REEB M. (ed.), Digest of CAS Awards II 1998-2000, 2002, p. 775, in particular p. 780, cons. 3 (c)). In that case, the appellants had claimed that the challenged award constituted a serious and unjustified infringement of their personal liberties and personal rights and would, therefore, be disproportionate and against public policy. The Swiss Federal Tribunal dismissed the appeal and held that the issue of proportionality of the penalty could only arise, from the restricted standpoint of incompatibility with public policy, if the arbitral award were to constitute an attack on personal rights, which was extremely serious and totally disproportionate to the behavior penalized. As a result, the Swiss Federal Tribunal found that the two-year suspensions in question were only a moderate restriction on the athletes due to the fact that the suspensions resulted from a proven doping violation under rules that had been accepted by the athletes.
101. Subsequently, the Panel notes that the jurisprudence of the Swiss Federal Tribunal shows that infringements of personality rights such as sanctions imposed by sports organizations for doping offences are not to be considered incompatible with public policy under article 190 (2) (e) of the Swiss Private International Law Act (cf. Decision dated 31 March 1999, in: REEB M. (ed.), Digest of CAS Awards II 1998-2000, 2002, p. 778 *et seq.*; Decision dated 4 August 2006, in ASA Bull. 2007, p. 105; cited in RIGOZZI A., Legal Opinion on the Conformity of the Exclusion of 'Team Athletes' from Organized Training during their Period of Ineligibility with Swiss law, including the General Principles of Proportionality and Equal Treatment, 9 July 2008, p. 28).
102. Furthermore, the Panel observes that the imposition of a two-year ban for a first violation of anti-doping rules has been generally regarded as proportionate under Swiss law by the Swiss Federal Tribunal (Decision dated 31 March 1999 of the Swiss Federal Tribunal discussed in paragraph 100 above; HAUSHEER/AEBI-MÜLLER, Sanktionen gegen Sportler – Voraussetzungen und Rahmenbedingungen, unter besonderer Berücksichtigung der Doping Problematik, RSJB 2001, p. 372, cited on page 22 of the legal opinion of RIGOZZI mentioned in paragraph 101 above).
103. In line with CAS jurisprudence, if the Panel could apply a proportionality analysis to reduce a sanction, it would only be able to do it in extremely rare and unusual circumstances. Although the Player invokes the rulings of previous CAS Panels in the cases P. v. International Tennis Federation (CAS 2006/A/1025), FINA v. M. (CAS 2007/A/1252) and S. v. FINA (CAS 2005/A/830), these decisions involved extenuating or unusual circumstances that merited a finding of 'no significant fault or negligence', or where the Panel found the appropriate sanction to be unjust or disproportionate to the circumstances surrounding the positive test result. These considerations do not apply in the present case. For example, in the P. case the athlete tested positive for etilefrene, a prohibited substance, after drinking water he had poured into a glass

he believed to be his own, but which had in fact been used by his wife moments earlier to take a colorless, odorless and tasteless liquid medication to ease hypertension and menstrual pain. Unlike P., the Player was not a victim of “an extraordinary and unpredictable sequence of events”. The Player knowingly and voluntarily took the prohibited substance and, for the reasons described above, his behavior was significantly negligent under the circumstances. As a result, in the Panel’s view the facts of this case do not warrant a reduction of the Player’s period of ineligibility based on a proportionality analysis. The proportionality doctrine gives the Panel flexibility in cases involving extreme or exceptional circumstances. Such circumstances are not present in this case (cf. CAS 2008/A/1489 & 1510, paras 7.20 and 7.21)

104. Lastly, the Panel takes into consideration that the comment to article 10.5.2 WADC edition 2009 expressly excludes as circumstances to be considered the effect that the sanction might have on the athlete’s career or on his earning potential:

*“For purposes of assessing the Athlete’s or other Person’s fault under Articles 10.5.1 and 10.5.2, the evidence considered must be specific and relevant to explain the Athlete’s or other Person’s departure from the expected standard of behaviour. Thus for example, **the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete only has a short time left in his or her career** or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article”* [Emphasis added].

105. Therefore, in accordance with the jurisprudence of the Swiss Federal Tribunal establishing that sports bodies can limit the circumstances to be taken into account when fixing sanctions and thereby also restrict the application of the doctrine of proportionality (see paragraph 45 above), the Panel finds that imposing a two-year period of ineligibility on the Player does not violate the principle of proportionality.

### C. Conclusion

106. The Panel has found that article 47 (1) FIFA ADR is not applicable to the case at hand, as cocaine is not considered a ‘specified substance’ under the FIFA ADR. Furthermore, the Panel has found that the Player’s degree of fault or negligence, viewed in the totality of the circumstances, was clearly ‘significant’ in relation to the anti-doping rule violation. In addition, the Panel has found that imposing a two-year period of ineligibility on the Player is compatible with international law and human rights requirements.
107. As a result, the Panel finds and holds that the Appeal is upheld, that the Appealed Decision must be amended and that, pursuant to the FIFA ADR, the Player’s anti-doping rule violation shall be sanctioned with a full two-year period of ineligibility.
108. With regard to the starting point of the ineligibility period, the Player requests the Panel to consider the length of the CAS proceedings and the fact that having a possible sanction pending over him per se constitutes a prejudice to the Player. Therefore, the Player asks the Panel to establish the start of any eventual period of suspension of the Player at an earlier date than the notification of the CAS award.

109. As a result, the Panel must decide when the period of ineligibility shall start. For that purpose, the Panel takes into consideration article 53 FIFA ADR, which reads:

*“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 as early as the date of sample collection or the date on which another anti-doping rule violation last occurred.*

*(...)*

*4. If a provisional suspension is imposed and respected by the player, then the player shall receive credit for such period of provisional suspension against any period of ineligibility that may ultimately be imposed. (...).”*

110. The Panel has carefully reviewed the course of the proceedings as well as the career of the Player. In particular, the Panel considered that it took almost 20 (twenty) months since the date of the sample collection to have a final decision in this matter. Although the Appealed Decision was notified by FIFA roughly two months after it was made, it took FIFA almost four months to send it to WADA. Furthermore, these CAS proceedings lasted long given the size and complexity of the file. Due to this duration of the adjudicating process, not attributable to the Player, the Panel deems fair to apply the principle set forth in article 53 (2) FIFA ADR and start the period of ineligibility at an earlier date than the day of notification of this award.
111. Accordingly, the Panel holds that, taking into consideration the totality of the circumstances, the two-year period of ineligibility must start on 6 September 2010, *i.e.* four months after the Appealed Decision was rendered. This would be a reasonable span of time to hear a doping case (cf. CAS 2007/A/1370 & 1376, para 157). In accordance with article 59 FIFA ADR, this will not have any effect on the results of the Player’s team during this period (assuming that no other player from the Player’s team has been sanctioned for doping in that period).
112. Based on the starting date, the ineligibility of the Player would end on 6 September 2012. However, the period of suspension already served by the Player must be credited against the two-year suspension. Taking into consideration that the Player requested the Panel to consider the six months suspension he already served and given that WADA has not contested this, the Panel finds that the period to be credited amounts to six months. Therefore, the last day of suspension would be 6 March 2012.

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

1. The CAS has jurisdiction both *ratione materiae* and *ratione personae* to entertain the appeal of the World Anti-Doping Agency (WADA) against the Confederação Brasileira de Futebol (CBF) and Mr Jobson Leandro Pereira de Oliveira, while it has no jurisdiction *ratione personae* in respect of the Superior Tribunal de Justiça Desportiva (STJD).
  2. The Appeal of WADA against the decision of the STJD dated 6 May 2010 of the STJD is upheld.
  3. The decision dated 6 May 2010 of the STJD is set aside.
  4. Mr Jobson Leandro Pereira de Oliveira is suspended from 6 September 2010 for a period of two years, less the period of suspension of six months already served.
- (...)
7. All other prayers for relief are dismissed.