Arbitration CAS 2011/A/2621 David Savic v. Professional Tennis Integrity Officers (PTIOs), award of 5 September 2012

Panel: Mr Dirk-Reiner Martens (Germany), President; The Hon. Michael Beloff QC (United Kingdom); Mr David Rivkin (USA)

Tennis
Corruption/match fixing
Standard of proof
Proof of the violation of the regulations
Proportionality of the sanction

1. **According to the applicable regulations and to CAS case law, the standard of proof in connection with corruption offences in tennis shall be whether the disciplinary authority has established the commission of the alleged offences by a "preponderance of the evidence", unless (i) the applicable national law mandatorily suggests otherwise, or (ii) the application of such standard is incompatible with some relevant aspect of *ordre public*.**

2. **Voice recognition over the phone has been previously accepted by CAS jurisprudence as a reliable form of identification.**

3. **According to CAS jurisprudence, the sanction imposed on an athlete must not be disproportionate to the offence and must always reflect the extent of the athlete's guilt. Match fixing is the most serious corruption offence in tennis and a threat to the integrity of professional sport, as well as to the physical and moral integrity of players. It also constitutes a violation of the principle of fairness in sporting competitions. These are compelling interests to balance against a player's rights to work. Therefore a sanction of life ban does not violate public policy and is not disproportionate to a match fixing offence. However, the life ban in itself has a sufficiently severe financial impact on the player and an additional fine would be inappropriate.**

David Savic (the "Appellant") is a Serbian professional tennis player who is a member of the Association of Tennis Professionals ("ATP").

The Professional Tennis Integrity Officers ("PTIOs" or the "Respondent") are appointed by each of the following governing bodies of professional tennis: ATP Tour, Inc. (ATP Tour), Grand Slam Committee (GSC), International Tennis Federation (ITF) and WTA Tour, Inc. (WTA). These governing bodies participate in the Uniform Tennis Anti-Corruption Program, which they adopted in

2009 in order to put in place a stringent code of conduct to combat gambling-related corruption worldwide. The objectives of the Uniform Tennis Anti-Corruption Program (2010 version, "UTAP" or the "Program"), as stated in the Program's introduction, are to:

> *"(i) maintain the integrity of tennis, (ii) protect against any efforts to impact improperly the results of any match and (iii) establish a uniform rule and consistent scheme of enforcement and sanctions applicable to all professional tennis events and to all Governing Bodies".*

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.

X. is a […] professional tennis player and a member of the ATP, […]. He and the Appellant came to know each other and became close friends […]. They last met in person in Belgrade, Serbia, in […], and on that occasion they exchanged their mobile telephone numbers.

[…].

X. was in his hotel room […]. Late in the evening he received two calls on his mobile phone from the telephone number […], which is the mobile telephone number that the Appellant had provided to X. in Belgrade […]. He did not answer the calls. Soon after that, X. answered a call on his hotel room telephone. X. claims to have recognised the voice of the caller as that of the Appellant, who also identified himself by the Appellant's name. Shortly thereafter, they agreed to continue their conversation on Skype. On the Skype call, the caller who was using the Skype account name "David Savic", offered X. USD 30,000 if he would agree to lose the first set of his first round match […] against Y., which was scheduled for […]. The caller added that if X. would do so, Y. would allow him to win the second and third set and, therefore, the match itself. No Skype video call was used and both conversations were held in English. X. rejected the offer.

[…].

X. reported the telephone and Skype conversations […] to […].

[…] Jeff Rees, Director of Integrity at the Tennis Integrity Unit ("TIU"), together with Nigel Willerton, an investigator with the TIU, interviewed X. about the events of […]. The interview was recorded. During the interview, X. also showed the TIU investigators the missed calls on the display of his mobile phone, as well as the contents of his Skype account.

[…] X. received a text message on his mobile telephone from the Appellant's telephone number […], which read: *"I have the same question for u like 2 weeks ago … Did u change your mind? David"*. X. phoned Rees immediately and, since they were both staying at the same hotel in Moscow, they met shortly thereafter. X. showed Rees the text message on his mobile telephone and Rees advised him to reply

"No", which he did. Rees also asked X. to forward to Willerton the text message he had received, which he did as well.

Following X.'s allegations, TIU initiated an investigation against the Appellant in order to ascertain whether he had committed an offence of corruption contrary to the UTAP regulations.

On 21 December 2010, Willerton contacted the Appellant by e-mail and requested him to provide to TIU all information related to the telephone and mobile telephone numbers in his possession, the billing records of such telephone numbers, as well as statements of his bank accounts and betting accounts, if any.

On 11 January 2011, the Appellant replied to Willerton and confirmed that his mobile telephone number is […] and that he owns two bank accounts but no betting accounts. He also sent to him scanned copies of the contract and the billing records of his mobile telephone. These records did not show any outgoing calls made from the Appellant's mobile telephone number to X.'s mobile telephone or his hotel […]. There was only one entry of a text message sent through the server of the Appellant's mobile telephone service provider […] at 14:22:51.

On 15 February 2011, the Appellant was interviewed by Willerton and Dee Bain, who is also a TIU investigator. The Appellant denied all the allegations […] and was not able to provide an explanation for them.

On 22 March 2011 in Miami, USA, Willerton and Bain interviewed Y. and Y.'s coach. They both denied being aware of any of X.'s allegations and also denied having any information relative to attempts by the Appellant or anyone else to influence the outcome of […] the match […].

On 24 May 2011, the PTIO sent an e-mail to the Appellant charging him with Corruption Offences under the UTAP.

A copy of the e-mail was sent to Professor Richard H. McLaren who holds an appointment as the Anti-Corruption-Hearing Officer under Article F.1 of the UTAP ("AHO").

On 12 September 2011, the case was heard in London, UK, where both parties presented their case before the AHO.

On 30 September 2011, the AHO issued a decision ("AHO Decision"), finding that the Appellant had violated three sections of the Corruption Offences portion of the Program and ordered that:

> *"Savic (a Covered Person) having committed a Corruption Offense under Article D.1.c, d. and f. is to be fined in the amount of US $100,000 and declared to be permanently ineligible to compete or participate in any event organized or sanctioned by any Governing Body as all of these terms are defined under the 2010 Program and in particular Rule H.1.c.".*

On 4 October 2011 the Appellant received the AHO Decision.

On 27 October 2011, the Appellant filed a statement of appeal dated 18 October 2011 with the Court of Arbitration for Sport (CAS) pursuant to the Code of Sports-related Arbitration (the "Code") to challenge the AHO Decision. He submitted the following prayers for relief:

> *"… this Court is invited to re-visit the facts and the law de novo, annulling the original Decision and either substituting its own Decision or remitting the case for re-hearing by a different AHO",*
>
> and/or
>
> *"… to impose a different and much lower fine which there is some hope of the Appellant being able to pay within a reasonable period of time, which is proportionate and which the public would consider fair".*

By letter dated 31 October 2011, the CAS Court Office invited the Appellant to nominate an arbitrator. The CAS Court Office also requested the Appellant to pay the Court Office fee and to provide information on and proof of the date on which he received the challenged decision.

By letter dated 1 November 2011, the Appellant informed the CAS Court Office that he had received the challenged decision by e-mail on 4 October 2011, attaching the relevant correspondence.

By letter dated 2 November 2011, the Appellant nominated the Hon. Michael J. Beloff QC as arbitrator.

On 4 November 2011, the Appellant filed the Appeal brief including an expert report from the telecommunications expert Goran Bozic.

By letter dated 8 November 2011, CAS acknowledged receipt of the Court Office fee, notified the appeal to the Respondent and noted that English would be the language of the present arbitration proceedings.

By letter dated 16 November 2011, the Respondent requested a thirty day extension of the deadline to submit its answer in order to be able to consult with an expert with respect to the issues raised by the expert report filed on behalf of the Appellant.

By letter dated 17 November 2011, the Respondent nominated Mr. David W. Rivkin as arbitrator.

On 24 November 2011, the CAS Court Office granted the Respondent an extension of time until 29 December 2011 to file its answer.

On 5 December 2011, the CAS Court Office advised the parties that the Panel had been constituted as follows:

President:	Mr. Dirk-Reiner Martens, Attorney-at-law in Munich, Germany
Arbitrators:	The Hon. Michael J. Beloff QC, Barrister in London, UK
	Mr. David W. Rivkin, Attorney-at-law in New York, USA

By letter dated 7 December 2011, the CAS Court Office forwarded to and invited comments from the parties on an e-mail received by Mr. Dirk-Reiner Martens, arbitrator appointed as President of the Panel, with the following content:

> *"When taking a first look at the papers I noticed that the appeal is directed against a decision rendered by Richard McLaren. In this context I want to bring to your attention that Richard McLaren is the President of the Basketball Arbitral Tribunal (BAT), a court of arbitration which has been created by me and which is managed by my law firm. I continue to be independent of the parties in this matter, but wanted to inform you about the above circumstances".*
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> No comments from the parties were received by CAS.

By letter dated 20 December 2011, the Respondent requested an additional thirty day extension for its response in order to complete its examination and report.

By letter sent on 23 December 2011, the Appellant agreed to an extension of time for a maximum of two (2) weeks for the Respondent to file its answer.

On 23 December 2011, the Panel granted the Respondent until 16 January 2012 to file its answer.

By letter dated 13 January 2012, the CAS Court Office informed the parties that the proposed date for a hearing was 29 March 2012 and requested them to confirm their availability.

On 13 January 2012, the Respondent filed its answer to the appeal accompanied by 34 exhibits on CD-ROM including expert reports by John David Cross, telecommunications security consultant at Diligence BSB Forensic, and by Michael George, senior forensic consultant at Diligence BSB Forensic, as well as witness statements from X., Willterton and Rees. The Respondent requested CAS to decide that:

> *"… the sanction of a lifetime period of ineligibility and a $100,000 fine imposed by the Anti-Corruption Hearing Officer is not disproportionate to the offences committed by Mr. Savic and should be upheld by the Panel".*

By letter dated 16 January 2012, the Respondent provided the CAS Court Office with an audio recording of the hearing held on 12 September 2011 before the AHO.

On 17 January 2012, the CAS Court Office informed the parties that in accordance with Article R56 of the Code,

> *"unless the parties agree otherwise or the Panel order otherwise on the basis of exceptional circumstances, the parties shall not be authorised to supplement or amend their requests or their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer".*

By letter dated 30 January 2012, the Respondent requested permission that pursuant to Article R44.2 of the Code, X. be allowed to testify at the hearing via tele- or video-conference, should he be unable to appear in person due to his tennis schedule.

By letter to the parties dated 31 January 2012, the CAS Court Office informed the parties that the hearing would be held on 29 March 2012. Further, the parties were invited to provide the CAS Court Office on or before 29 February 2012 with the names of all persons who would be attending the hearing.

By letter dated 10 February 2010, the CAS Court Office invited the parties pursuant to Article R44.3 of the Code to file a second round of submissions, in order to allow the Appellant to respond to the PTIO's answer. Moreover, procedural directions were made by the Panel, including *inter alia* the following:

> *"1. The Panel requests the personal presence of both Mr. Savic and X. at the hearing. A video-conference will only be permitted if good grounds are shown for their non-availability.*
>
> *(…)*
>
> *3. In order to ensure that the hearing will finish in one day, the Panel will apply the "chess clock" system, with both parties having a set number of hours for their case; the parties will be free to divide their time between evidence and pleadings as they choose.*
>
> *(…)*
>
> *5. In order to give the parties an opportunity to raise procedural issues in advance of the hearing, the President of the Panel suggests holding a conference call with counsel in advance of the hearing; the President of the Panel would be available on 20 March 2012 at 4 pm for the call. (…)".*

By letter dated 16 February 2012, the Respondent […] renewed its request to the Panel for X.'s testimony to be taken by video-conference.

By letter to the CAS Court Office dated 22 February 2012, the Appellant requested an extension of time of ten days to file its second written submission.

By two letters dated 23 February 2012, the Respondent provided the CAS Court Office with a list of the persons that would attend the hearing, and addressed some procedural matters it wished to raise during the conference call between the President of the Panel and the parties, scheduled for 20 March 2012.

By letter sent on 26 February 2012, the Appellant communicated to the CAS Court Office a list of the persons who would attend the hearing. Further, and in regards to the Respondent's letter of 16 February 2012, the Appellant suggested that, given the importance of the personal presence of X. at the hearing, the Panel should order X. to appear in person at the hearing.

On 28 February 2012, the Appellant filed with CAS his second submission, including his response to the answer and statement of defence of the Respondent, a witness statement by the Appellant and a second expert opinion by Mr. Goran Bozic. In his response, the Appellant requested that the Panel order the experts to file an agreed document setting out the areas of agreement/disagreement between them in the form of an addendum report by 27 March 2012.

On 1 March 2012, the CAS Court Office informed the parties that Mr. Ioannis Mournianakis would act as *ad hoc* clerk in the present arbitral proceedings.

On 8 March 2012, the CAS Court Office informed the parties that the Panel directed the experts of the parties, Messrs. Bozic and Cross, to file an agreed document setting out the areas of agreement/disagreement between them in the form of an addendum report by 27 March 2012.

On 9 March 2012, the Order of Procedure was communicated to the parties by the CAS Court Office. Signed copies of it were returned to CAS on 12 March 2012 by the Respondent and on 14 March 2012 by the Appellant.

On 19 March 2012, the Respondent filed with CAS its reply to the Appellant's response to the answer and statement of defence, including witness statements by X., Rees and Willerton.

On 20 March 2012, a telephone conference was held between the President of the Panel, counsel for the parties and CAS counsel Louise Reilly. During the conference, the procedural issues included in the CAS letter of 10 February 2010 were addressed and clarified for the parties, as were issues raised in the Respondent's letter of 23 February 2012, namely the order in which the witnesses would testify, whether written witness statements or expert reports could be used in lieu of direct examination and whether experts needed to be present for cross-examination or whether a video-conference could be used instead.

By letter dated 23 March 2012, the Respondent submitted to the CAS Court Office the agreed document prepared by the experts of the parties setting out the areas of agreement between them.

By letter sent directly to the Respondent on 26 March 2012, the Appellant repeated his request to invite X. to appear in person at the hearing, […].

On 27 March 2012, the Respondent informed the CAS Court Office that […] X. would not be able to attend the hearing in person, but would give his testimony during the hearing via video-conference, assisted by his counsel […].

A hearing was held on 29 March 2012 at the CAS premises in Lausanne, Switzerland.

The hearing was attended:

a) for the Appellant: by Mr. David Savic, the Appellant; assisted by Mr. Jim A. Sturman QC, lead counsel, Mr. Richard J. Livingston QC, Mr. Dragan Grebo, attorney-at-law, Ms. Alice Bricogne (junior counsel), and Ms. Slavka Cogley, interpreter.

b) for the Respondent: by Mr. William Babcock, PTIO (GSC), Mr. Gayle David Bradshaw, PTIO (ATP), Mr. Stephen D. Busey and Mr. John F. MacLennan, counsel.

The parties confirmed that they had no objections to the composition of the Panel.

At the hearing, the Panel heard together with the parties the testimony of the Appellant, as well as those of Nigel Willerton and Jeffrey Rees. Testimony was also given by Messrs. Goran Bozic and John David Cross (called as expert witnesses by the Appellant and the Respondent respectively). X. testified via video-conference.

After the examination of the witnesses, counsel for the parties made their closing statements and, upon closure, both parties expressly stated that they had no objection to the conduct of the hearing.

By CAS letters dated 13 and 19 April 2012, the parties were invited to comment on whether the Judgment of the Swiss Federal Tribunal in *Matuzalem v. FIFA* (4A_558/2011), issued on 27 March 2012, and of the award in CAS 2011/A/2490, issued on 23 March 2012, would have any impact on the present case.

On 27 April 2012 the Appellant submitted his comments.

On 30 April 2012 the Respondent submitted its comments.

LAW

Jurisdiction of the CAS

1. The jurisdiction of CAS is not disputed by the parties and has been confirmed by the signing of the Order of Procedure by the parties. In addition, it is provided for in Article I.1 of the UTAP.

2. The Panel is satisfied that CAS has jurisdiction to decide the present dispute between the parties.

Applicable Law

3. 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".

4. Pursuant to Article C.1 of the UTAP, *"(A)ll Players, Related Persons, and Tournament Support Personnel shall be bound by and shall comply with all of the provisions of this Program and shall be deemed to accept all terms set out herein"*. Furthermore, Article B.18 of the UTAP provides that *""Player" refers to any player who enters or participates in any competition, event or activity organized or sanctioned by any Governing Body".*

5. The Appellant is a member of the ATP and, therefore, the Panel finds that in this case the applicable regulations are all pertinent UTAP rules and regulations. Since the alleged offences occurred in 2010, the 2010 version of the Program shall be applicable.

6. The applicable UTAP rules are the following:

*"**D. Offenses***

Commission of any offense set forth in Article D or E of this Program or any other violation of the provisions of this Program shall constitute a Corruption Offense for all purposes of this Program.

1. Corruption Offenses

(…)

c. *No covered Person shall, directly or indirectly, contrive or attempt to contrive the outcome or any other aspect of any event.*

d. *No covered Person shall, directly or indirectly, solicit or facilitate any Player to not use his or her best efforts in any event.*

(…)

f. *No covered Person shall, directly or indirectly, offer or provide any money, benefit or Consideration to any other Covered Person with the intention of negatively influencing a Player's best efforts in any event.*

G. Due Process

(…)

3. Burdens and Standards of Proof

a. *The PTIO (which may be represented by legal counsel at the Hearing) shall have the burden of establishing that a Corruption Offense has been committed. The standard of proof shall be whether the PTIO has established the commission of the alleged Corruption Offense by a preponderance of the evidence.*

(…)

H. Sanctions

1*. The penalty for any Corruption Offense shall be determined by the AHO in accordance with the procedures set forth in Article G, and may include:*

a. *With respect to any Player, (i) a fine of up to $250,000 plus an amount equal to the value of any winnings or other amounts received by such Covered Person in connection with any Corruption Offense, (ii) ineligibility for participation in any event organized or sanctioned by any Governing Body for a period of up to three years, and (iii) with respect to any violation of clauses (c) - (i) of Article D.1, ineligibility for participation in any event organized or sanctioned by any Governing Body for a maximum period of permanent ineligibility.*

(…)

> ***c.*** *No Player who has been declared ineligible may, during the period of ineligibility, participate in any capacity in any event (other than authorized anti-gambling or anti-corruption education or rehabilitation programs) organized or sanctioned by any Governing Body. Without limiting the generality of the foregoing, such Player shall not be given accreditation for, or otherwise granted access to, any competition or event to which access is controlled by any Governing Body, nor shall the Player be credited with any points for any competition played during the period of ineligibility.*
>
> *(…)*
>
> ***I. Appeals***
>
> ***1.*** *Any Decision (i) that a Corruption Offense has been committed, (ii) that no Corruption Offense has been committed, (iii) imposing sanctions for a Corruption Offense, or (iv) that the AHO lacks jurisdiction to rule on an alleged Corruption Offense or its sanctions, may be appealed exclusively to CAS in accordance with CAS's Code of Sports-Related Arbitration and the special provisions applicable to the Appeal Arbitration Proceedings, by either the Covered Person who is the subject of the Decision being appealed, or the TIB.*
>
> ***2.*** *Any Decision appealed to CAS shall remain in effect while under appeal unless CAS orders otherwise.*
>
> ***3.*** *The deadline for filing an appeal with CAS shall be twenty business days from the date of receipt of the Decision by the appealing party.*
>
> ***4.*** *The decision of CAS shall be final, non-reviewable, non-appealable and enforceable. No claim, arbitration, lawsuit or litigation concerning the dispute shall be brought in any other court or tribunal".*

7. Article J.3 of the UTAP further provides that:

> *"This Program shall be governed in all respects (including, but not limited to, matters concerning the arbitrability of disputes) by the laws of the State of Florida, without reference to conflict of laws principles".*

8. It follows that the laws of the State of Florida also apply complementarily.

Admissibility

9. The statement of appeal was filed within the deadline set out in Article I.3 of the Program. It further complies with the requirements of Articles R47 and R48 of the Code.

10. Accordingly, the appeal is admissible.

Merits

11. According to Article R57 of the Code, the Panel has *"full power to review the facts and the law"*. As repeatedly stated in CAS jurisprudence, by reference to this provision the CAS appellate arbitration procedure entails a de novo review of the merits of the case, and is not confined merely to deciding whether the ruling appealed was correct or not. Accordingly, it is the function

of this Panel to make an independent determination as to merits (see CAS 2007/A/1394, para. 21).

12. In that context, the Panel must address the following three main issues:

A. the applicable standard of proof;

B. whether the evidence relative to the alleged events of […] supports a finding of violation and

C. if a finding of violation be established, the proportionality of the imposed sanctions.

A. The applicable standard of proof

13. Pursuant to Article R58 of the Code, the regulations and rules of law that govern the present dispute are primarily those chosen by the parties. Accordingly, the regulations of the UTAP and the law of the State of Florida are applicable.

14. The UTAP provides that the applicable standard of proof shall be whether the PTIO have established the commission of the alleged corruption offences by a preponderance of the evidence (Article G.3).

15. With respect to the limits in the application of the rules of law chosen by the parties, the Panel endorses the position articulated in CAS 2009/A/1926 & 1930, para. 11:

"(…) The application of the (rules of) law chosen by the parties has its confines in the ordre public (HEINI A., Zürcher Kommentar zum IPRG, 2nd edition 2004, Art. 187 marg. no. 18; see also KAUFMANN-KOHLER/RIGOZZI, Arbitrage International, 2006, marg. no. 657). Usually, the term ordre public is thereby divested of its purely Swiss character and is understood in the sense of a universal, international or transnational sense (KAUFMANN-KOHLER/RIGOZZI, Arbitrage International, 2006, margin no. 666; HEINI A., Zürcher Kommentar zum IPRG, 2nd edition 2004, Art. 187 margin no. 18; cf. also PORTMANN W., causa sport 2/2006 pp. 200, 203 and 205). The ordre public proviso is meant to prevent a decision conflicting with basic legal or moral principles that apply supranationally. This, in turn, is to be assumed if the application of the rules of law agreed by the parties were to breach fundamental legal doctrines or were simply incompatible with the system of law and values (TF 8.3.2006, 4P.278/2005 marg. no. 2.2.2; HEINI A., Zürcher Kommentar zum IPRG, 2nd edition 2004, Art. 190 margin no. 44; CAS 2006/A/1180, no. 7.4; CAS 2005/A/983 & 984, no. 70)".

16. Therefore, the Panel notes that the applicable standard of proof in this particular case will be "preponderance of the evidence", unless (i) the law of the State of Florida mandatorily suggests otherwise, or (ii) the application of such standard is incompatible with some relevant aspect of *ordre public*.

B. Evaluation of the evidence relative to the alleged events of […]

17. When evaluating the evidence, the Panel is well aware that corruption is, by its very nature, likely to be concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing.

18. In the appealed Decision, the AHO reached the following conclusions:

"I have found that it has been proven on a preponderance of the evidence that in the Skype conversation during the late evening on […], Savic by verbal communication approached X. and offered to pay him if he would contrive to lose the first set of his professional tennis match […]. In so doing, a Corruption Offence was committed under the provisions of D.1.c to contrive the outcome of a professional tennis match. The Player also committed an offence under D.1.d in that he directly solicited X. to not use his best efforts in the first set of the match. Finally, in committing the above two offences a third rule infraction occurred in that he offered money to X. with the intention of negatively influencing his best efforts in the first set of the match in violation of D.1.f of the 2010 Program. […] an SMS was sent by Savic to X. in a further attempt to entice X. to contrive the outcome of some future match in violation of Article D.1.c of the Program" (paragraphs 30, 31 of the AHO Decision).

19. As previously explained, the Appellant alleges that he never attempted or successfully managed to contact X. by using telephone and Skype calls or text messages, either on […], and that it was some third person who contacted X. on all occasions.

20. The Panel will examine separately the two occasions on which the contested facts allegedly occurred, and will then establish if the disputed offences took place or not.

a) The telephone and Skype calls of […]

21. The Panel is satisfied that on […] X. received two calls on his mobile telephone from a number that was the same as the one the Appellant had provided to X. […]. The Panel also accepts the testimony of X. that later that night he received a Skype call by someone who was using the Skype account name "David Savic".

22. X. indeed showed to Rees and Willerton the entry of a missed call dated […] from the Appellant's mobile telephone number appearing on the display of his mobile telephone, as well as the screen of his laptop on which the Appellant's name was shown as a friend on X.'s Skype account. Photographs were taken of both the telephone and the laptop.

23. The Panel notes that, contrary to the Appellant's submission, X. testified not only at the hearing before the CAS, but also before the TIU investigators and the AHO, that he recognised the voice of the Appellant in the person who called him on his hotel room telephone and on Skype […] and that the Appellant made him an offer to fix his […] first round match […]. During the video-conference on the day of the CAS hearing, he clearly stated that he was certain that it was the Appellant's voice, and that the voice was not distorted as a result of the long-distance calls.

24. The Appellant suggested that the billing records of his mobile telephone provided no evidence of him making any calls to X.

25. The Panel notes, however, that, as both experts of the parties agreed in their common statement of 23 March 2012, missed calls are not billable and therefore they do not appear on the billing records. Moreover, the call on X.'s hotel room telephone could have easily been made using another telephone number or even the same Skype account that was used for the Skype call to X. later that same evening and would therefore also not have appeared in the Appellant's billing records.

26. The Appellant further suggested that voice recognition cannot be a reliable form of identification, given the fact that during the last years he and X. had met only very rarely.

27. The Panel is of the opinion that it is possible to recognise a person's voice if one was a close friend of that person and has spent considerable time with him, even if only when both were younger. In addition, the Appellant had met with X. in […], where they discussed for a few minutes and X. was thus acquainted with the adult voice of the Appellant as well. It accepts X.'s testimony that he accurately recognized the Appellant on the occasions in issue.

28. The Appellant's explanation for those calls was that some third person impersonated him by "spoofing" his mobile telephone and Skype communications.

29. The Panel accepts that it is possible to "spoof" telephone, text message and Skype communications, in line with the joint statement of both parties' experts of 23 March 2012.

30. However, the Appellant failed to provide any evidence that such an impersonation actually occurred on the occasions in issue or any reason why someone would choose to impersonate him or who that person might be, in particular since such person must have been able convincingly to imitate the Appellant's voice, tone and content, which would significantly limit the field of potential candidates.

31. It is true that the former relationship between the Appellant and X. could explain why an alleged impersonator would choose to impersonate the Appellant to approach X. It is equally true, however, that the very fact of the relationship between the two would also explain why the Appellant himself might select X. as the object of his corrupt offer.

32. Finally, it was suggested by the Appellant that there was no evidence that Y. was approached in order to fix his match with X.; in fact, Y. denied that such an approach was made. This, however, does not seem to the Panel to be of itself significant. There are a number of explanations, all as consistent with the Appellant's guilt as with his innocence, the most obvious being that without X.'s cooperation, no purpose would be served by approaching Y. as well.

33. The Panel therefore accepts the testimony of X. as to the existence and content of the telephone and Skype calls of […] and as to the fact that he was able to recognise the voice of the Appellant over the phone. There is no apparent reason why X. would try to invent such a story so

damaging to the Appellant – and none was successfully advanced by the Appellant either; the Panel discounts the suggestion that X. had himself unsuccessfully invited the Appellant to 'throw' a match when both were juniors.

34. Furthermore, voice recognition over the phone has been also accepted by the CAS in its award in the case CAS 2011/A/2490, which was the first case brought before this Court under the UTAP.

b) The text message […]

35. The Panel notes that the content of the text message is undisputed.

36. The Appellant argued that the mere coincidence of timing of the text messages on his billing records and on X.'s mobile telephone is not sufficiently strong evidence to inculpate him.

37. The Panel agrees that it cannot be determined from the billing records of the Appellant who was the final recipient of the text message. However, the Panel also notes that the Appellant has made no efforts to prove who that final recipient was – for instance, by requesting information from the mobile telephone service provider or by conducting a forensic examination of his telephone, even if the chances of gathering such information may have been low because of the lapse of time.

38. The Panel notes that the content of the text message received by X. […], as well as its relationship in terms of subject matter with the communication that took place […], convincingly demonstrate that the sender of that text message was the same person who initiated the calls […].

39. In addition, as regards the third person scenario put forward by the Appellant, the Panel is of the opinion that it would make little sense, if any, for any such third person to try to approach X. impersonating the Appellant for a second time, given the outcome of his first effort.

Conclusion

40. The Panel in summary finds that the logical explanation for both telephone calls and text is that they were initiated by the Appellant and not by any third person. Not only is the Appellant's version entirely speculative but it defies common sense. Why, for example, should a third person having reached X. by telephone […] hang up and start a new Skype call? The Panel had the advantage of seeing and hearing both the Appellant and, albeit by video conferencing facility only, X.. It does not accept the former's evidence, and does accept the latter's.

c) The applicable standard of proof

41. In the light of the above, the Panel concludes that the disputed facts have been proven not only by preponderance of the evidence, but indeed to the Panel's comfortable satisfaction. The evidence provided by the Respondent was sufficiently strong and convincing to persuade the Panel even if applying a higher standard of proof than that required under Article G.3 of the Program.

42. Therefore, the Panel finds it does not need to determine what standard of proof was required. However it would, given the debate, make these observations.

(i) Florida law does not seem to prevent an application of preponderance of the evidence as a standard of proof, since it accepts that such a standard does not violate due process (see The Florida Bar v. Mogil, 763 So.2d 303 (Fla. 2000)). The same opinion is endorsed in CAS 2011/A/2490, para. 85.

(ii) The comfortable satisfaction standard applied by the Panel is in line with constant CAS jurisprudence and does not constitute a violation of *ordre public*. According to CAS 2011/A/2490, para. 30, even the application of a lower standard of proof, such as the preponderance of the evidence, cannot lead to a violation of public policy.

(iii) The Judgment of the Swiss Federal Tribunal in *Matuzalem v. FIFA*, while acknowledging that public policy has both substantive and procedural contents and is violated when some fundamental legal principles are disregarded (para. 4.1), says nothing more precise about the applicable standard of proof in a case such as the present.

(iv) In principle, the criminal standard "beyond reasonable doubt" does not apply in a disciplinary case in the context of a private association. The Swiss Federal Tribunal has pointed out in its review of several CAS decisions that: *"the duty of proof and assessment of evidence are problems which cannot be regulated, in private law cases, on the basis of concepts specific to criminal law"* (2nd civil Division, Judgement of 31 March 1999, 5P.83/1999, Par. 3.d).d).

(v) According to constant CAS jurisprudence in doping cases: *"To adopt a criminal standard (at any rate where the disciplinary charge is not of one of a criminal offence) is to confuse the public law of the state with the private law of an association (…)"* (CAS 98/208, para. 13).

C. Proportionality of the sanctions

a) The lifetime ban

43. The Panel takes account of the following matters:

(i) Pursuant to the provisions of the Program, the AHO has a measure of discretion in setting a sanction.

(ii) According to CAS jurisprudence, the sanction imposed on an athlete must not be disproportionate to the offence and must always reflect the extent of the athlete's guilt (CAS 2001/A/330).

(iii) CAS has accepted in match-fixing cases in football that a life ban can constitute a proportionate sanction because of the damage caused to the integrity and the image of the sport (CAS 2010/A/2172).

(iv) Match fixing is the most serious corruption offence in tennis and a threat to the integrity of professional sport, as well as to the physical and moral integrity of players. It also constitutes a violation of the principle of fairness in sporting competitions.

(v) In the case at hand, the Appellant tried to corrupt another player.

(vi) Applying a similar reasoning, the Panel in CAS 2011/A/2490, deemed it irrelevant whether a person is successful in actually fixing a match or not (para. 63) and found for the reasons expressed there:

"no option other than to confirm the lifetime ban imposed by the AHO. As explained in detail by the Governing Bodies, the sport of tennis is extremely vulnerable to corruption as a match-fixer only needs to corrupt one player (rather than a full team). It is therefore imperative that, once a Player gets caught, the Governing Bodies send out a clear signal to the entire tennis community that such actions are not tolerated. This Panel agrees that any sanction shorter than a lifetime ban would not have the deterrent effect that is required to make players aware that it is simply not worth the risk. Therefore, the Panel concludes that the sanction of a life ban imposed by the AHO Decision is not disproportionate to the offence" (para. 66).

The Panel agrees with that reasoning. (Moreover while stare decisis does not apply to CAS decisions, comity suggests that respect ought in any event be paid to previous decisions of obvious relevance).

(vii) In *Matuzalem*, the Swiss Federal Tribunal approached the question of whether disciplinary sanctions violated public policy not *in abstracto*, but by reference to the specific interest the sanctioning sport governing body wishes to pursue.

"The measures taken by such sport federations which gravely harm the development of individuals who practice the sport as a profession are licit only when the interests of the federation justify the infringement of privacy" (para. 4.3.3 in fine).

44. Applying that test in the present case, the interest that the sanctioning authority is seeking to enforce is the protection of the integrity of sport against corruption, a fundamental sporting principle explicitly mentioned in the UTAP provisions. This is a compelling interest to balance against the Appellant's rights to work unlike the obviously lesser interest of contractual stability sought to be relied on by FIFA in *Matuzalem* to justify a life ban. There are other means to enforce a debt than as lifetime ban; but such a ban is the only truly effective means of purging a sport of corruption.

45. Therefore for all these reasons, the Panel concludes that the sanction of a life ban imposed by the AHO Decision does not violate public policy and is not disproportionate to the offences committed in the present case.

b) The fine of USD 100,000

46. In CAS 2011/A/2490, where, as noted, a professional tennis player was found guilty of match-fixing under the provisions of the UTAP. The Panel upheld the imposed sanction of a lifetime ban on the athlete for the reasons there expressed, but did not confirm the financial penalty of USD 100,000 imposed by the AHO in the contested decision.

47. In the same award, the Panel expressly acknowledged that any sanction should be sufficiently high to confirm that corruption offences are not taken lightly. It added however that

*"it would be inappropriate to impose a financial penalty in addition to the lifetime ban, as the sanction of permanent ineligibility provides for the deterrence that corruption offences call for" (*CAS 2011/A/2490, para. 70)

taking into account that

"The lifetime ban also has a considerable financial effect on the Player because it significantly impacts the Player's future earnings by eliminating tennis as a source of revenue. In this respect, the AHO noted that the Player's means are limited (…). Indeed, no evidence was put forward that the Player benefited (financially or otherwise) from any of the charges for which he has been found liable" (CAS 2011/A/2490, para. 72).

48. In the present case, the Panel is content to adopt the position articulated by the CAS in the CAS 2011/A/2490 case for the reasons expressed there and, therefore, considers that the life ban in itself is sufficiently severe to reflect the gravity of the corruption offences. The Panel therefore sets aside the part of the AHO Decision imposing a fine of USD 100,000.

Conclusion

49. The Panel finds, consistently with the AHO, that the Appellant has committed the corruption offences under Articles D.1.c, d and f of the Program.

50. The Panel finds that the life time ban is not disproportionate given the nature of the offences committed and, therefore, upholds the sanction of life time ineligibility of the Appellant to compete or participate in any event organised or sanctioned by any Governing Body under the Program.

51. The Panel lifts the fine of USD 100,000 imposed by the AHO Decision.

52. As a result, for all the above reasons, the Appeal is partially upheld.

The Court of Arbitration for Sport rules:

1. The appeal filed by Mr. David Savic on 27 October 2010 against the decision issued on 30 September 2010 by the Anti-Corruption-Hearing Officer under the provisions of the Uniform Tennis Anti-Corruption Program, is partially upheld.

2. The decision issued on 30 September 2010 by the Anti-Corruption-Hearing Officer finding that a corruption offence had occurred and declaring the Appellant to be permanently ineligible to compete or participate in any event organized or sanctioned by any tennis Governing Body is confirmed.

3. The decision issued on 30 September 2010 by the Anti-Corruption-Hearing Officer to impose a fine of USD 100,000 on the Appellant is set aside.

4. All other motions or prayers for relief submitted by the parties are dismissed.

5. (…).