

**CAS 2011/A/2425 Ahongalu Fusimalohi v/ FIFA**

**ARBITRAL AWARD**

delivered by the

**COURT OF ARBITRATION FOR SPORT**

sitting in the following composition:

**President:** Mr Massimo **Coccia**, Professor and Attorney-at-Law, Rome, Italy

**Arbitrators:** Ms Catherine Anne **Davani**, Judge of the National and Supreme Court,  
Papua New Guinea

Mr Michele **Bernasconi**, Attorney-at-Law, Zurich, Switzerland

**Ad hoc clerk:** Mr Patrick **Grandjean**, Attorney-at-Law, Lausanne, Switzerland

in the arbitration between:

**Ahongalu Fusimalohi**, Kingdom of Tonga

Represented by Mr Graeme **Christie**, Solicitor, Auckland, New Zealand

*Appellant*

and

**Fédération Internationale de Football Association**, Switzerland

Represented by Mr Antonio **Rigozzi**, Attorney-at-Law, Geneva, Switzerland

*Respondent*

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## I. INTRODUCTION

1. This appeal is brought by Mr Ahongalu Fusimalohi (hereinafter also the “Appellant”), former member of the Executive Committee of the Fédération Internationale de Football Association (hereinafter “FIFA” or the “Respondent”), against a decision of the FIFA Appeal Committee, which held him responsible for breaching articles 3, 9, 11 and 14 of the FIFA Code of Ethics and which imposed on him a ban from taking part in any football-related activity at national and international level for a period of two years as well as a fine of CHF 7,500.
2. The facts from which the appeal emanates are that the Appellant was secretly filmed and recorded by a hidden camera and an audio recording device, while meeting with an undercover *Sunday Times* journalist posing as a lobbyist purporting to support the United States football federation’s bid for the 2018 and 2022 FIFA World Cups. The video and audio recordings of that meeting (hereinafter “the Recordings”), passed on by the *Sunday Times* to FIFA, are the evidentiary basis of the case against Mr Ahongalu Fusimalohi.

## II. THE PARTIES

3. At the time the Appellant met with the *Sunday Times* journalist, he was the General Secretary of the Tonga Football Association (hereinafter “Tonga FA”), a member of the Executive Committee of the Oceania Football Confederation (hereinafter also the “OFC”) and a member of the FIFA Organising Committee for the Olympic Football Tournaments (the “FIFA Olympic Tournaments Committee”). He had been a member of the FIFA Executive Committee from 2002 to 2007.
4. FIFA is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the governing body of international football at worldwide level. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players worldwide.

### **III. BACKGROUND**

5. This section of the award sets out a summary of the relevant facts, as taken from the parties' written and oral submissions. Additional relevant facts ascertained by the Panel are set out within other sections of this award.

#### **III.1 THE 2018 AND 2022 FIFA WORLD CUPS**

6. The FIFA World Cup is an international football tournament held every four years. It is one of the most watched sporting events in the world and involves huge economic interests, particularly in terms of media rights, ticket sales, sponsoring and merchandising. Senior men's National Teams who have progressed through a qualification phase held in the various continents participate in this final tournament. The current format of the final tournament involves thirty-two national teams, which compete over a period of about a month in the host country appointed several years earlier by the FIFA Executive Committee.
7. The FIFA Executive Committee is the FIFA's executive body (articles 21.2 and 30 ff of the FIFA Statutes). It consists of twenty-four members: the President, elected by the FIFA Congress, seven vice-presidents and fifteen members, appointed by the Confederations, and one vice-president appointed by the four British Football Associations (article 30 of the FIFA Statutes). In particular, the Oceania Football Confederation has the right to appoint only one vice-president. The FIFA Executive Committee's role includes deciding the host countries and dates of the final phases of all FIFA tournaments (article 31 para. 11 of the FIFA Statutes).
8. In relation to the 2018 FIFA World Cup, the national football federations of the following countries submitted bids for the right to host the final phase: Russia, England, Belgium jointly with the Netherlands, and Spain jointly with Portugal. The bidders to stage the 2022 edition of the FIFA World Cup were the national federations of Qatar, Australia, Korea Republic, Japan and USA. The United States federation had initially submitted bids to FIFA for both editions of the World Cup but, in October 2010, withdrew from the 2018 bid process to focus solely on the 2022 contest.

9. On 2 December 2010, the FIFA Executive Committee chose Russia to host the 2018 FIFA World Cup and awarded the 2022 FIFA World Cup to Qatar.

### **III.2 THE UNDERCOVER JOURNALISTS' INVESTIGATIONS**

10. On 17 October 2010, the British weekly newspaper *Sunday Times* published an article entitled "*Foul play threatens England's Cup bid; Nations spend vast amounts in an attempt to be named World Cup host but as insight finds, \$ 800,000 offered to a Fifa official can be far more effective*". The newspaper reported strong suspicions of corruption within FIFA in connection with the selection process to host the FIFA World Cups. The article suggested that corruption was widespread within FIFA and came to the conclusion that, in the current state of affairs, it was more effective and less costly to obtain the organisation of the World Cup by offering bribes rather than by preparing and filing a thorough and well-documented bid. As a final point, the article concluded that "*Football has enough trouble maintaining fair play on the field. Fifa has to ensure that there is fair play off it, too, by stamping out corruption and cleaning up the World Cup bidding process. Fifa badly needs to introduce more transparency into the process and keep its decision makers under tighter control. That means an end to payments into private bank accounts or pet projects. It means each committee member judging the merits of the bids, not the bribes on offer. The Olympics has cleaned up its act after a series of bribery scandals, culminating in Salt Lake City in 2002. We have a right to expect no less of the World Cup*".
11. The covert inquiry was conducted by some *Sunday Times* journalists, who had approached several current and former high-ranking FIFA officials pretending to be lobbyists working for a private company called *Franklin Jones*, allegedly hired by a group of United States companies eager to secure deals in order to unofficially support the official bids presented by the United States football federation for the 2018 and the 2022 FIFA World Cups.
12. With specific regard to Mr Fusimalohi, on 22 July 2010, a *Sunday Times* journalist who did not reveal her true identity and profession but introduced herself as "Claire Murray", Director of *Franklin Jones*, sent to the Appellant the following e-mail:

*« I work for a London based communication company. To meet our client's needs we will be expanding our International Advisory Board and are looking for a small number of authoritative figures to help us develop our expertise.*

*One of the areas we are interested in developing is Sport and your name came up as someone who has tremendous expertise and contacts in this area.*

*I wonder if we could arrange a telephone call to discuss the possibility of you working with us in the future? I would very much like to arrange a meeting, but perhaps we can talk about that when we speak on the telephone. »*

13. On 27 July 2010, the Appellant had a first phone conversation with “Claire Murray”, who subsequently e-mailed him the following message:

*« [...]*

*However, our search for the right person has become more urgent as we have recently taken on a major client: a Chicago based consortium of American companies who are willing to make substantial investments to bring the USA's faltering bid for the 2018 World Cup (the 2022 is their second target) back in contention.*

*This means that the person we require, our “Sports Board Member”, needs to be someone who is familiar with the inner workings of the [FIFA]. Our clients recognise that 2018 is a tough field and the Europeans are favourites but they want us to aim high and hope to gain some ground on the 2022 bid if they fail on 2018. If you were to become our “Sports Board Member” we would be looking for advice on how the USA could identify key decision makers and maximise its votes from the members of the FIFA executive committee.*

*We feel that a key part of our expansion involves developing our presence in Asia and the Pacific – something we think you are well placed to help us achieve in terms of contacts and location! Our board members usually do about one day a month for us, although if you wished to be more involved, we would be happy to develop your role. Other areas we are looking to develop are sports travel, ticketing and stadium security at major events. It would be great if we could meet to discuss this proposal further.*

*You will appreciate that in order to give you a flavour of the job, we have had to reveal some of our business plans. So we appreciate it if you could keep the contents of this email private. »*

14. On 28 July 2010, the Appellant wrote back to Ms Claire Murray, confirming his interest in joining Franklin Jones in “*an advisory capacity*” and in “*receiving further information on [his] recruitment*”.
15. On 25 September 2010, the Appellant met an undercover reporter of the *Sunday Times* who presented himself as a colleague of “Claire Murray” named “David Brewster” (hereinafter the “Reporter”), working for the (fictitious) company *Franklin Jones*. The meeting took place in a hotel in Auckland, New Zealand (hereinafter the “Auckland Meeting”). It lasted about two and a half hours and was video and audio recorded by the Reporter, without the knowledge of the Appellant.
16. The following transcript of the video and audio recordings of the said meeting (the Recordings”) was prepared on behalf of FIFA at the request of the Panel, and checked for accuracy by the Appellant, who approved it with the exception of two minor corrections. For convenience sake, only the relevant excerpts of the transcript are quoted; in addition, the unintelligible parts or the mere exclamations are skipped:

*(Greetings. It was obviously the first time that the two men met. The Appellant informed the journalist that he had arrived at five in the morning of the very same day, after a two to three hours long flight. He also explained that he was at the moment involved in local politics, in Tonga).*

- 1 Reporter: ...your, your background, I just had, took a couple of notes here, is that you are chief executive of the...
- 2 Ahongalu Fusimalohi: Tonga football.
- 3 Reporter: Tonga football association. And you're, and that you were in FIFA...
- 4 Ahongalu Fusimalohi: Yes.
- 5 Reporter: ... 2002 to...
- 6 Ahongalu Fusimalohi: 2002 to 2007.
- 7 Reporter: ...2007, and you were also in several committees, finance, emergency and media.
- 8 Ahongalu Fusimalohi: Media.
- 9 Reporter: But...
- 10 Ahongalu Fusimalohi: I was also marketing and national associations before that, but now I'm all Olympics.

- 11 Reporter: Oh are you?
- 12 Ahongalu Fusimalohi: And, but before that I was with Tonga broadcasting, my initial background is in broadcasting.
- 13 Reporter: Oh so you're a ....
- 14 Ahongalu Fusimalohi: A broadcaster.
- 15 Reporter: A broadcaster, so you're on telly?
- 16 Ahongalu Fusimalohi: No, radio really, but I created, I set up the first national television service in Tonga.
- (Follows a discussion regarding the Appellant's academic background namely at the Cardiff University).*
- 17 Reporter: Shall I, shall I explain where, where we come into this. I understand you've been speaking to Claire.
- 18 Ahongalu Fusimalohi: Yes, yes.
- 19 Reporter: Who is my colleague. And she asked me, because I was already over here doing something football related for a client of ours and, to have a word with you, because. We're a public affairs communications company, we've got lots of different clients all over the place, some in the UK some internationally. And, one of the areas which we, we're quite interested in expanding to is sport and football. And this is particularly because we've in the last few months we've taken on a contract for a consortium in the U.S. Now they, the consortium basically, and this, this is what we're hoping to take you on from first instance and we could talk after, after this about your further role after, after that, but basically they, they are a, they are a number of U.S businesses... ..who are very very keen obviously for the World Cup to come to the U.S. Now as you know, the vote for the World Cup will be on December the 2nd this year and so actually it's a very small window but this is actually the crucial time at which all the different FIFA executive members will be deciding and so we have been asked to go and talk to people. Now, it's pretty clear from the work that we've done already that you have to know people.
- 20 Ahongalu Fusimalohi: Yes, yes.
- 21 Reporter: And it's you know, we're not from a sporting background, and we were wondering whether, whether if we were to hire you, then you might be able to open doors for us, talk to people you knew in FIFA, maybe sound out some of the FIFA Executive Committee members. I mean one of the, one of, one of the things that we were quite interested in was, because we are not part of the U.S bid, we have more freedom. And, and we were looking at ways that maybe we could invest in youth sport projects to, to further the sort of links between America and the various countries. But it doesn't have to be youth sports, there are all sorts of possibilities that we could, could do. And I would just like, and I wondered, your background in all of this is, is from FIFA. You're not still involved in FIFA at all are you?
- 22 Ahongalu Fusimalohi: I'm on Olympic, the Olympic (inaudible) because in the last four years, when my term had finished, I joined, I came back to Oceania here in Auckland and I'm the executive committee of Oceania football. And to me five years of non-stop activities and work at FIFA was a bit too much for me. I joined FIFA in a very young age, you know, probably youngest ever, that will ever join FIFA, at 35 while I'm now 43, David Cameron's age. So I thought I'd run for politics. And I thought I'd run for politics, maybe govern a country for once. But anyway, yes, I'm actively involved in football here in Oceania region, but then I will go back on to FIFA next year as a committee member. But it doesn't deny me the many privileges of contacts at FIFA.
- 23 Reporter: And so...
- 24 Ahongalu Fusimalohi: I have a great deal of friends out there...



- 25 Reporter: Yeah. You, so you, it's the Olympic committee is it?
- 26 Ahongalu Fusimalohi: Yeah, the Olympic organizing committee for football.
- 27 Reporter: Right.
- 28 Ahongalu Fusimalohi: For 2012 in London.
- 29 Reporter: Right. And that's, and so, what, if, the struggle we have is, I don't know, have you been keeping up with this particular votes?
- 30 Ahongalu Fusimalohi: Sort of, well I can't let you in much of it, but I can background on my, and I'd like to know a little bit more about what these offers, offers me...
- 31 Reporter: Yeah.
- 32 Ahongalu Fusimalohi: What does it cover and ...
- 33 Reporter: What do you mean what does it cover?
- 34 Ahongalu Fusimalohi: I'm here on my own expenses, what does the...
- 35 Reporter: Oh we, we'll pay for all the (inaudible), yeah, yeah, yeah.
- 36 Ahongalu Fusimalohi: Alright, yeah, so you come like then, what possible, is there any remunerations or something to that effect. Claire pointed out that all this could be answered by you.
- 37 Reporter: Yeah.
- 38 Ahongalu Fusimalohi: And (inaudible) that's fine, but at the end of the day we'd, I, I'd like to have a fair idea more of...
- 39 Reporter: I don't know, I don't know, what, what, what rate do you charge?
- 40 Ahongalu Fusimalohi: Apparently I don't charge a rate other than the rate I have been offered, always been paid at FIFA, which is a hundred U.S k, a hundred k U.S in a year.
- 41 Reporter: In a year, right ok. And so if we were to pay you something along those lines would that be ok?
- 42 Ahongalu Fusimalohi: Well, that's fine with me. But, I wouldn't go less. Probably, well maybe it's negotiable. If it's not, can't make that much, but it all depends on the amount of work.
- 43 Reporter: Well yeah you see this is, this is, then the question is, how much time have you got to commit to it. Because as you say you've got your political...
- 44 Ahongalu Fusimalohi: Oh yes I'm just going in (inaudible), I will not leave football.
- 45 Reporter: Oh I see, yeah.
- 46 Ahongalu Fusimalohi: See, if I go in parliament, I'm going to be a back bencher because my, I wouldn't give football up just for a small career like that.
- 47 Reporter: Right.
- 48 Ahongalu Fusimalohi: Jack Wallace just made government, but he's still FIFA vice-President and still in football.
- 49 Reporter: Right, ok.
- 50 Ahongalu Fusimalohi: So it, it's all negotiable.
- 51 Reporter: Ok, because in these months coming it's gonna be quite crucial obviously for this particular, particular project. And, so I don't know, I don't know how many days it's going to,

it probably would involve some travel as well I would've, I would've thought, I mean it's, you know, I, I get the impression that it's good to meet people.

- 52 Ahongalu Fusimalohi: Yeah, I would probably think of all those along those lines as well, but maybe we can sit down, go through the list of the 24 members, and I can probably tell you right now that I know seven people are voting for Australia in 2022.
- 53 Reporter: Yeah.
- 54 Ahongalu Fusimalohi: So you've got seven minus twenty four, fourteen.
- 55 Reporter: Who are the seven?
- 56 Ahongalu Fusimalohi: Well I would reckon the President.
- 57 Reporter: I,e Sepp Blatter.
- 58 Ahongalu Fusimalohi: Yeah, Blatter. The Oceania President, Reynald Temarii.
- 59 Reporter: Yeah.
- 60 Ahongalu Fusimalohi: Because, he can not afford not to vote for, for Australia.
- 61 Reporter: Why?
- 62 Ahongalu Fusimalohi: Australia is on our back-yard and it's really that, but there are many reasons, but we can overcome those reasons, I'm just pointing out the seven. And then you have the three South-Americans, because...
- 63 Reporter: Yeah, Texeira, Grondona and ...
- 64 Ahongalu Fusimalohi: Leoz.
- 65 Reporter: Leoz.
- 66 Ahongalu Fusimalohi: Yeah. Because the three South-Americans have made friends with the Spanish President, Villar, Angel Villar.
- 67 Reporter: Oh yeah?
- 68 Ahongalu Fusimalohi: Yeah, because they made, they made an agreement, not really a written agreement by mutual understanding.
- 69 Reporter: What, what, so that...
- 70 Ahongalu Fusimalohi: ...Oceania...
- 71 Reporter: So that, so that Spain...
- 72 Ahongalu Fusimalohi: ...get's the 2018. The three favourites for 2018 right now are Spain, England and Russia.
- 73 Reporter: Yeah.
- 74 Ahongalu Fusimalohi: But England's gonna drop by, I can guarantee you that, so it's going to be between Russia, unless Putin can pull something off in the last minutes, Spain will get the World Cup in 2018.
- 75 Reporter: You think so?
- 76 Ahongalu Fusimalohi: But, you never know, Putin has done a great deal of magic to turn things around, but right now Spain are the real favourites.
- 77 Reporter: Do you think the ...

- 78 Ahongalu Fusimalohi: Around the corridors you'll find more about that.
- 79 Reporter: Yeah.
- 80 Ahongalu Fusimalohi: And the Spaniards have been very good, and which is probably something USA might want to commit to now, if they want Oceania's vote. Sign a deal. Some assistance.
- 81 Reporter: What sort of assistance you think?
- 82 Ahongalu Fusimalohi: Well, right now we've got, you see, Australia really hasn't done much for Oceania and people are just frustrated that because of the fact that as a (inaudible) and as a region, there's always the reason for us to support Australia.
- 83 Reporter: Yeah.
- 84 Ahongalu Fusimalohi: But, they haven't really been much of our assistance to us. I think we've got more from America, but we're just not willing to look into it. But then you've got Frank Lowy, he's a strong man.
- 85 Reporter: Yeah.
- 86 Ahongalu Fusimalohi: Australia's Frank Lowy is very strong. He's a, he's, and he's got Blatter by the balls. I don't know what the deals are, but whatever they put in their accounts is a lot.
- 87 Reporter: It's a lot: And so what are, well how's, so...
- 88 Ahongalu Fusimalohi: You have the three South-Americans and then the two, and then also the three, sorry, Villar, that's six, Angel Villar who's Spanish, because the South-Americans are supporting Spain, so that means they'll vote Australia.
- 89 Reporter: Yeah, yeah.
- 90 Ahongalu Fusimalohi: So that's three South-Americans, three South-Americans, the Oceania President, Blatter there's seven, there's five, where did the other two come from, South-American, I mean, Spanish President.
- 91 Reporter: Spanish President and I don't know if there are any of the other Europeans or?
- 92 Ahongalu Fusimalohi: No.
- 93 Reporter: I don't know the Africans...
- 94 Ahongalu Fusimalohi: No. The Africans? You're guaranteed to win the three South-Americans, CONCACAF.
- 95 Reporter: Yeah, of course.
- 96 Ahongalu Fusimalohi: I mean, Central-America, but these three South-Americans, you can change them as well. I mean, once they win the World Cup in 2018, it's just that you don't know the results and you won't have time to work between the 2018 and the 2022.
- (Follows a discussion regarding the fact a) that the 2018 and 2022 World Cups would be awarded at the same time, which was unusual, b) that Japan, Korea and Qatar did not stand a chance to host the event, c) that Oceania would support Spain).*
- 97 Reporter: Has, has, have they struck a deal with Spain, is that what?
- 98 Ahongalu Fusimalohi: It's all that, I'm saying, the only way for USA is to strike a deal, but you don't necessarily have to live up to it immediately. You can draw, I mean Spain was very good to come up with that idea that they will support every winning national team to, for assistance in training and development and preparation for the World Cup for example under 17, under 18.

99 Reporter: Oh I see.

100 Ahongalu Fusimalohi: These are small time. But it's big time here in Australia. If USA uses it's technical, or even the government, if it uses it's government to pull back some sort of assistance to a football region, regional football. But something that it affects is from now until December you can always request, but I need to, I need to be clear with you, I need to be kept quiet...

101 Reporter: Yeah.

102 Ahongalu Fusimalohi: ... in any negotiations that you do with anybody.

103 Reporter: Right, right, ok.

104 Ahongalu Fusimalohi: Because I'm supposed to be silent on all of this.

105 Reporter: Yeah.

106 Ahongalu Fusimalohi: And this is all strictly confidential.

107 Reporter: Yeah.

108 Ahongalu Fusimalohi: But I'm letting you in on lot of information.

109 Reporter: Basically, basically what you're say, what you're say, what you're saying is that the way to win the vote is, is, is money?

110 Ahongalu Fusimalohi: Yeah. Yes, yes, of course. But you don't necessarily have to pull up the money because there are obviously you'll be discounted... ..eliminated straight away. It doesn't have to show. But you can go into series of deals and Oceania, if you enter, if USA enters into a deal in bringing or developing a relationship, a long term relationship to host, to be of host to every national team that wins a qualifying tournament in preparation for their participation at that tournament, it's already good enough.

111 Reporter: Yeah. And that's what Spain do is it?

112 Reporter: Well yes. But I'm talking Australia now. Now Australia, football Australia has gone to the government and the government, well before Gillard, but Kevin Rudd coming, signed an, three assistance to regional football with eight million Australian dollars assistance and that comes through AusAID, which is the development assistance program to Oceania, to the Oceania region.

*(Follows a discussion regarding how the Australian government allegedly paid eight million Australian dollars to the OFC in support of Oceania football, securing OFC vote for the 2022 World Cup edition).*

113 Ahongalu Fusimalohi: But if you develop something that's just as good as what Australia is offering, I can guarantee you it will be seriously considered, because we've got debt already and we've, we've, we've got the, the offer from America for tomorrow.

*(Follows a discussion about the exchange rate of Australian dollars into British pounds).*

114 Reporter: I was, I went to see Mr. Temarii while I was here and he was telling me they had had two offers of, he said, of ten million and twelve million or is it between ten and twelve million U.S dollars.

115 Ahongalu Fusimalohi: From?

116 Reporter: He wouldn't say which bid teams.

117 Ahongalu Fusimalohi: I wouldn't buy that. Mr. Temarii is trying to get the stakes higher.

118 Reporter: Oh you think so? Just trying to ...

- 119 Ahongalu Fusimalohi: If you're going to make an offer, be higher, make sure it's higher than that.
- 120 Reporter: He said he's hardly getting anything from Australia.
- 121 Ahongalu Fusimalohi: No, not directly. Soccer Australia, they've never given us anything.
- 122 Reporter: Oh I see, but they do from the Australian...
- 123 Ahongalu Fusimalohi: What they did was they pushed the Rudd government, because Frank Lowy of course will never spend a dime... ..he get's other people to spend it for him. And that's how Lowy was able to get us eight million Aussie dollars through the Australian government and it's direct assistance to football in Australia.
- 124 Reporter: A I that unusual, I mean, do they normally give you much assistance....
- 125 Ahongalu Fusimalohi: Never.
- 126 Reporter: The Australians?
- 127 Ahongalu Fusimalohi: Never, they've never.
- 128 Reporter: Never.
- 129 Ahongalu Fusimalohi: They've never given, this is the first time. As I said, they were playing dirty just as much as any other person would do that.
- 130 Reporter: Yeah.
- 131 Ahongalu Fusimalohi: I mean you're the FIFA, it's to the game altogether.
- 132 Reporter: Yeah.
- 133 Ahongalu Fusimalohi: I mean I'm being frank with you.
- 134 Reporter: Sorry, it's, it's.
- 135 Ahongalu Fusimalohi: I'm being very frank with you on this because I remember 2006, phew, if I had taken something, I would've taken, well they were trying to buy me cheaply, but my selling price would've been a full retirement and in shame if I was to ever get caught, so I said sorry gentlemen.
- 136 Reporter: This would be 2004 wouldn't be it?
- 137 Ahongalu Fusimalohi: Yeah, for the 2010.
- 138 Reporter: 2010. Who was, who was offering money in those days?
- 139 Ahongalu Fusimalohi: Well we had a couple of good bids, and they're all Arabs.
- 140 Reporter: Oh what Bin Hammam?
- 141 Ahongalu Fusimalohi: Well, you had five countries bidding.
- 142 Reporter: I'll tell you who it was, it was Morocco. 'Cos other people have told us that. How much were they offering?
- 143 Ahongalu Fusimalohi: Well something like a hundred to a hundred fifty.
- 144 Reporter: Thousand?
- 145 Ahongalu Fusimalohi: U.S.
- 146 Reporter: Hundred and fifty thousand U.S.
- 147 Ahongalu Fusimalohi: Yeah.

148 Reporter: For you to vote for...

149 Ahongalu Fusimalohi: Well for those that they were trying to offer to vote.

150 Reporter: Yeah. And that was, this is interesting for me because some of....

151 Ahongalu Fusimalohi: And they'll put it in a separate bank account and I said bullshit, I get caught, I mean, that's a waste of my whole career.

152 Reporter: Yeah, of course.

153 Ahongalu Fusimalohi: I mean, I'm not buying into this small time petty cash money..

154 Reporter: So, so Morocco, so Morocco offered you hundred fifty thousand which was for you personally, not for Oceania.

155 Ahongalu Fusimalohi: No. Let's just say they made offers.

156 Reporter: Right.

157 Ahongalu Fusimalohi: I don't like to be told, I mean, to be asked directly that it was done to me but let's just say there were people being offered.

158 Reporter: So it's ...

159 Ahongalu Fusimalohi: A hundred and fifty, something to that effect, maybe more. I'm not sure. But I'm not really trying to...

160 Reporter: Who was making the offer in that particular case?

161 Ahongalu Fusimalohi: It comes in brochures, it comes in all sorts of forms, but the first thing you do is just destroy it and throw it in the rubbish.

*(Follows a discussion regarding how South-Africa did not make any offer and how Morocco only obtained two votes in spite of the bribes it allegedly paid).*

162 Reporter: 'Cos I, that's quite instructive, it's quite interesting for me to know what happened in 2004, because it will obviously go along a similar line. At what point, at what point in the, in the campaign do all these offers get made? Where, where...

163 Ahongalu Fusimalohi: Any time.

164 Reporter: So it could be at any time in the last two years?

165 Ahongalu Fusimalohi: Along the corridor, under your room.

166 Reporter: I just, 'cos, 'cos, the thing I'm conscious about is that we're late.

167 Ahongalu Fusimalohi: Yes you are, but I would suggest that you go out strong... ..and offer assistance to Oceania. But you've got fourteen, fourteen votes.

168 Reporter: Well yeah.

169 Ahongalu Fusimalohi: People will sympathize.

170 Reporter: Just on, just on Oceania alone, how much would you offer them?

171 Ahongalu Fusimalohi: Well I said, mostly assistance.

172 Reporter: 'Cos I couldn't get that from Temarii yesterday.

173 Ahongalu Fusimalohi: No, you gotta offer him directly.

174 Reporter: Oh I see.

175 Ahongalu Fusimalohi: Probably a hundred. Easily bought. Or not bought.

176 Reporter: You think he would be?

177 Ahongalu Fusimalohi: No, see I won't be easily bought.

178 Reporter: No, but he.

179 Ahongalu Fusimalohi: You might wanna try that.

*(Follows a discussion on how the Appellant made up an excuse in order to meet the Reporter in the hotel without raising suspicion from his surroundings. Then the conversation turns on how the Reporter should make an offer to Mr Temarii).*

180 Reporter: Do you think I should just do it directly, just phone him up? Or is there somebody I could do it through?

181 Ahongalu Fusimalohi: It might be best that you handle it directly with him.

182 Reporter: Yeah.

183 Ahongalu Fusimalohi: Yeah, I think he'll be more comfortable.

184 Reporter: Yeah.

185 Ahongalu Fusimalohi: But if you go directly to him, then you should meet somewhere and discuss a possible deal or something to that effect.

186 Reporter: Right, ok. And, of course, that, that, that's, that's, that's one...

187 Ahongalu Fusimalohi: That's just one.

188 Reporter: That's just one problem, yeah, I mean, there are, there are...

189 Ahongalu Fusimalohi: But I think that's, that's the least of your problems. The first problem you might wanna try work the fourteen first. And sympathies with America would definitely be Jack Warner, Chuck Blazer and Eduardo Salguero will definitely vote America.

190 Reporter: I'm just counting those in as a, as a certainty.

191 Ahongalu Fusimalohi: Yeah. So they're certain. So you've got three and they've got seven right now. And... then you've got eleven more to go. And I know the Europeans are not that sympathetic with Australia. And I know the Africans won't.

*(Follows a discussion regarding the fact that once Qatar would withdraw, only the Australian and American bids would remain in the race for the 2022 edition of the World Cup. Under such conditions, the parties agreed that the effort must be on the African voters).*

192 Reporter: What do you think, do you think we need to offer Hayatou something?

193 Ahongalu Fusimalohi: I think those are the three people. Hayatou for Africa, you might just as well (inaudible), but I'm not really sure Hayatou can be easily bought. I think the OC President will be a better deal. Almost a certainty to be bought.

194 Reporter: GOC?

195 Ahongalu Fusimalohi: The OFC.

196 Reporter: OFC.

197 Ahongalu Fusimalohi: Mr Temarii.

198 Reporter: Right. And what about, do you know any of the others, I don't know, the Africans I mean, they've changed since you were there probably, but there's a chap in Nigeria called Adamu.

199 Ahongalu Fusimalohi: Adamu.

200 Reporter: There is a chap in ...

201 Ahongalu Fusimalohi: Egypt.

202 Reporter: Ivory Coast called, well in Egypt it's Jack Rida. There's a chap in Ivory Coast called Anouma. I don't know, I don't know whether in the, I got the impression that....

203 Ahongalu Fusimalohi: I know Adamu, but I don't know the other two.

204 Reporter: Right.

205 Ahongalu Fusimalohi: Where, but I still believe that it will be leadership of Hayatou, the Africans will vote America.

206 Reporter: Right, ok. Because, I also got the impression that, you know, you were talking about the Moroccans earlier, the last time in 2004, didn't the Moroccans pay the Africans to vote for them?

207 Ahongalu Fusimalohi: Like I said, with me, I can't confirm that they did offer me anything, but I know for a fact that they did offer. I think they actually did pay. Especially the Muslim countries and the Africans and the Arabs.

*(Follows a discussion regarding several personalities of the football world, how Oceania voted for South-Africa without being offered anything and the next meeting of the OFC Executive Committee to be held in Tonga on 15 October 2010).*

208 Ahongalu Fusimalohi: And they're [the members of the OFC Executive Committee] all coming in Tonga, which is quite a bit of a headache for me, because it's during my campaign. But after that, I would suggest if, if you agree, that we should meet.

209 Reporter: Yeah.

210 Ahongalu Fusimalohi: To go through ...

211 Reporter: Through the list.

212 Ahongalu Fusimalohi: ... the whole list. Because I will be able to get more inside information (inaudible), but straight after that everybody heads off to Zurich. But I've also sent out an apology so I don't have to go to Zurich.

*(Follows a discussion regarding a) the Asian voters, who presumably were incline to support the American bid and b) people likely to run for the FIFA presidency).*

213 Ahongalu Fusimalohi: But I can only identify to you those I firmly believe will vote for Australia.

214 Reporter: Yeah.

215 Ahongalu Fusimalohi: And those were the seven, but otherwise everybody else is still undecided.

216 Reporter: Yeah.

217 Ahongalu Fusimalohi: And I know that Qatar is going to be eliminated.

218 Reporter: Yeah.

*(Follows a discussion regarding why the American bid had greater chance to host the 2022 World Cup than Korea or Japan and why Asia was going to support the American bid instead of the Australian one. Then, the conversation turns on how the Australian government offered a 8 millions Australian dollars to assist the Oceania football, how this assistance was made public and how, in that respect, Mr Temarii signed a memorandum with the representatives of Australia).*



219 Ahongalu Fusimalohi: So it was a government assistance to all the (inaudible) countries football.

220 Reporter: So they, so as a result of that, they are bound to vote for Australia?

221 Ahongalu Fusimalohi: Well, more or less bound to it, but it's secret ballot, you never know if the offer came in or something else.

222 Reporter: Well of course, that, because people don't always vote as they say, which is actually a problem in it's self, 'cos when you, if you strike a deal with someone, you won't be sure don't you that they, and how can you make sure?

*(Follows a discussion on who would certainly not be bought, on the FIFA President, Mr Sepp Blatter, on whether it was opportune for the Americans to submit bids for both the 2018 and 2022 editions of the FIFA World Cup, on why England did not stand a chance to be awarded the FIFA World cup, the corruption allegations made against certain bids, how Spain made promises and/or offers to get support from various countries).*

223 Ahongalu Fusimalohi: Everybody heads back to Zurich by, in October for various FIFA meetings. But I've sent my apology for the meetings that I should be going to.

224 Reporter: Is that, is that enough...

225 Ahongalu Fusimalohi: At that time, I think you need to organize a meeting out there in Zurich.

226 Reporter: Yeah.

227 Ahongalu Fusimalohi: Because there's gonna be a hell of a lot of people from around the globe coming to FIFA meetings. Either you organize a meeting there or or.

228 Reporter: You're gonna be in your election at that time?

229 Ahongalu Fusimalohi: No, the election is not until November, I could spend probably about a week out.

230 Reporter: ok.

231 Ahongalu Fusimalohi: But I can't afford more than a week.

232 Reporter: Ok.

233 Ahongalu Fusimalohi: I was thinking probably like either you come back here or I can actually fly out to, we can meet halfway.

234 Reporter: Yeah.

235 Ahongalu Fusimalohi: Probably America.

236 Reporter: Yeah.

237 Ahongalu Fusimalohi: Or in Chicago, so we can do everything and bring all our information together.

*(Follows a discussion on a) how Spain – with the assistance of South-American federations – made promises to the OFC in order to secure Mr Temarii' s vote and b) the circumstances around the vote awarding the FIFA World Cup to South-Africa).*

238 Reporter: So how do you, how do you know that someone was trying to offer you money in Morocco.

239 Ahongalu Fusimalohi: There was always the pamphlets and the letters were always in my room. And, you know, things stuck (inaudible).

240 Reporter: Oh I see, yeah.

241 Ahongalu Fusimalohi: See, if I go in parliament, I'm going to be a back bencher because my, I wouldn't give football up just for a small career like that.

242 Reporter: Oh, they actually made you offers in writing?

243 Ahongalu Fusimalohi: indirectly.

244 Reporter: Indirectly?

245 Ahongalu Fusimalohi: Indirectly in writing. No wonder that Morocco this and this and that. But then, the, the Moroccan (inaudible) kept hinting, I figured what it was all about, what was my problems in Tonga, what was this, and they wanted to know about what my mortgage was, wanted to know if it was that kind of.

246 Reporter: Oh I see.

247 Ahongalu Fusimalohi: And what difficulties I had at Tonga, so. It's difficulties of life (inaudible) paid off (inaudible) help, if you need help.

248 Reporter: Oh I see. So they don't actually come and say you, we can offer you fifty thousand dollars?

249 Ahongalu Fusimalohi: To me no, because, I think...

250 Reporter: How did you know it was a hundred and fifty thousand dollars?

251 Ahongalu Fusimalohi: Well, let's just say one of my colleagues had actually told me.

252 Reporter: Oh I see.

253 Ahongalu Fusimalohi: He was actually offered one fifty.

254 Reporter: Oh right.

255 Ahongalu Fusimalohi: And he said it was a good deal.

256 Reporter: Did he take it?

257 Ahongalu Fusimalohi: I know he did. But although he keeps saying he didn't, I know he did.

258 Reporter: Who was that?

259 Ahongalu Fusimalohi: Let's just keep that confidential.

260 Reporter: Is he still at FIFA executive?.

261 Ahongalu Fusimalohi: No, no, no, he's out. From Africa.

262 Reporter: Oh, (inaudible) Bhamjee?

263 Ahongalu Fusimalohi: Well that was the easiest, anybody can guess it was Bhamjee. But he, I was so surprised how he could just in an overnight turn and make a whole u-turn and, and then go against South-Africa, when South Africa was his born and bred country, everything was South Africa until he moved to Botswana. But I think the Moroccans, they had their own people inside FIFA.

264 Reporter: Yeah.

265 Ahongalu Fusimalohi: And like what you're telling me, what you and I are discussing, trying to figure out people, I think the colleagues, the colleagues at FIFA figured me out right and said (inaudible) you won't buy that kid. He's too young, he won't give his career up.

*(Follows a discussion namely on Mr Sepp Blatter, his actions in favour of Oceania and other smaller federations and his re-election).*

- 266 Reporter: (inaudible, name Jack mentioned) what you wanted to try and do is, I guess, is to get others to vote. He obviously has a quite a lot of sway doesn't he.
- 267 Ahongalu Fusimalohi: Well, Jack would be a key person. For me, he would be a key person for the vote. And I think it would be a very good idea if you (inaudible)
- 268 Reporter: Are you able to do that is, is, I suppose the. Yeah or no?
- 269 Ahongalu Fusimalohi: Really I can't be seen to not support the Australia, so with Jack I'll have to give it a few, give it a bit more thought.
- 270 Reporter: Yeah, ok. Question mark over Jack. I still don't know quite what to do about him. And, Temarii, do you think we should approach him directly rather than you, you can't do it.
- 271 Ahongalu Fusimalohi: No, I can't do it.
- 272 Reporter: Do you not get on with him more or?
- 273 Ahongalu Fusimalohi: Well in terms of debating in a meeting, yes, sometimes he doesn't enjoy my scrutiny, but...
- 274 Reporter: Oh I see.
- 275 Ahongalu Fusimalohi: ...but over casual conversation, I don't sit down with him that often.
- 276 Reporter: Right, ok.
- 277 Ahongalu Fusimalohi: No but it be, it would be not wise for me to approach him on your American bid, but what I intend to do is question Australia's stand in this ex-co meeting.
- 278 Reporter: Right. Because you don't feel that they should be...
- 279 Ahongalu Fusimalohi: I'm just going to raise an issue, because I know that it, we have a, I feel that USA and Australia will decide the 2022 World Cup.
- 280 Reporter: Yeah.
- 281 Ahongalu Fusimalohi: And, would it not be wise for our President to entertain what America has to offer.
- 282 Reporter: Yeah, well that's (inaudible).
- 283 Ahongalu Fusimalohi: And then come back to us.
- 284 Reporter: Yeah.
- 285 Ahongalu Fusimalohi: Because we have two, a month to go before December.
- 286 Reporter: Yeah, yeah. I mean if we were to combine that with some offer to Oceania, I don't know, I don't.
- 287 Ahongalu Fusimalohi: We've been concentrating on Spain for 2018 on the understanding that we will support Australia for 2022.
- (Follows a speculative discussion regarding the chances of Spain and the consequences following the unlikely failure of Spain to be awarded the 2018 World Cup edition).*
- 288 Reporter: Of course. But what actually, what, what Temarii told me was that, because a one of things that we were discussing was whether we could finance a project that they have, which is they want to, they want to, it's a special project for a regional football academy which they want to site at, at.....where the headquarters are now, what's the stadium called, the?
- 289 Ahongalu Fusimalohi: Ericsson.
- 290 Reporter: Sorry?

291 Ahongalu Fusimalohi: Ericsson.

292 Reporter: Ericsson stadium.

293 Ahongalu Fusimalohi: But who is going to build it?

294 Reporter: Well, they say that, that the English FA have sent somebody over and he, who's sort of looking at the project for them, but they were, so I said could America finance that and they said yes. And they said that would cost around about three million New Zealand dollars. Did you know about this project at all?

295 Ahongalu Fusimalohi: I know about the academy, but I never thought it was the English, I always thought it would come from Europe.

296 Reporter: Yeah, I don't know.

297 Ahongalu Fusimalohi: So I don't know where England comes in in all of this.

298 Reporter: Well it could, I don't know, I don't know either because, because he was, he seemed quite interested in America funding that.

299 Ahongalu Fusimalohi: Yes, well that could be an answer to the, to the whole issue about your assistance, I mean Americas assistance. (inaudible) regional headquarters for them.

300 Reporter: But the problem I had with that was that he wouldn't say that if, if, if he did that then he would offer, then he would vote in your favour. All he would say is you know, can't, so he, he, so, so while I go back to our consortium in America, they're gonna say well what do we get for this. 'Cos they're business men. And they...

301 Ahongalu Fusimalohi: But that's a risk that you take for that one vote.

302 Reporter: Yeah, yeah, yeah, because, because if you do it, then it's likely he will, yeah. Yeah, I suppose so. What I can't get him to do is to vote for USA first rather than Australia, that's difficult.

303 Ahongalu Fusimalohi: No, you can't. He will vote Australia until (inaudible).

304 Reporter: Yeah. Yeah, I take your point. But I need to go back and talk to them, I only had the conversation about this with him yesterday. I suppose it, I suppose I'm probably being, it's probably wishful thinking to think that we had a contract saying...

305 Ahongalu Fusimalohi: (inaudible) just write up a memorandum of understanding, you don't have to commit yourself. But...

306 Reporter: I mean he was, he was talking about providing the money before the vote.

307 Ahongalu Fusimalohi: Ah, that wouldn't be, that would be too much of a risk.

308 Reporter: Yes, I was wondering about that.

309 Ahongalu Fusimalohi: Developing, developing, committing to building an academy, a regional academy and ongoing assistance by the U.S FA is really what you wanna do.

310 Reporter: Yeah. What sort of level of ongoing assistance do you think?

311 Ahongalu Fusimalohi: Well technical, well all sorts of, all really, technical, referees, I mean coaching referees, medical, provide medicine, (inaudible), administration, there's so many things in America.

*(Follows a discussion about artificial pitches, about the Appellant's career within FIFA, the remuneration and benefits which come with it).*

312 Reporter: If we were to design you the ideal deal, one of the things we talked about was a hundred thousand, what a, what currency are we talking about here?

313 Ahongalu Fusimalohi: U.S.

314 Reporter: U.S. What, what other, all your travel expenses obviously, what, what, what other benefits would you require?

315 Ahongalu Fusimalohi: Not really much other than just travel insurance.

316 Reporter: Travel insurance, yeah.

317 Ahongalu Fusimalohi: So that travel insurance covers medical..

318 Reporter: Medical, yeah. How you, in terms of travel, presumably we're talking business class are we?

319 Ahongalu Fusimalohi: Yes. We can always agree on the level of travel. For example, flight here in the Oceania region less than five hours it doesn't have to be business.

320 Reporter: Right.

321 Ahongalu Fusimalohi: More than five hours, it has to be business. I mean, I'm not going to sit.

322 Reporter: Well, you know. But I think what you do is just, we put this to the consortium who'll be picking up the bill and we, we get you the best package we can. So let's, let's leave it at business class for that.

323 Ahongalu Fusimalohi: So that would basically be where I am at the moment with FIFA, I'm no fussy about anything, being a small island.

324 Reporter: Yeah. Was it, is it worth talking to Bhamjee actually? Is he someone who would be well connected or is he?

325 Ahongalu Fusimalohi: Bhamjee?

326 Reporter: Yeah.

327 Ahongalu Fusimalohi: I wouldn't want to talk to him anyway. He is in serious disgrace that nobody wants to talk to him.

328 Reporter: Oh right.

329 Ahongalu Fusimalohi: I would, because he's, he was a good friend and his wife was a good friend of my wife, but that's just about it.

330 Reporter: Right.

331 Ahongalu Fusimalohi: But he is living in captivity out in Botswana.

332 Reporter: Oh is he? One of the things we thought, one of the things we thought was well, wondered whether maybe we could, we could offer people property in some way?

333 Ahongalu Fusimalohi: In America?

334 Reporter: Actually, we were thinking more in the UK 'cos it would be easier for us 'cos were based in the UK, not in America.

335 Ahongalu Fusimalohi: Well that might be a good idea.

336 Reporter: Because one of the things, one of the things you can do is you can buy a property in the name of an off-shore company in London and then all you have to do is transfer the ownership off-shore from wherever your nominating director is to whoever wants to, overtakes, takes ownership of it, which is something I suppose we could offer to Mr. Temarii.

337 Ahongalu Fusimalohi: That sounds good. I mean, he can always hold it as an investment where he...

338 Reporter: Yes, exactly.

339 Ahongalu Fusimalohi: That would be a good idea, I think it's better than giving him money because in that sense, sometimes somebody can actually trace it to him.

340 Reporter: Yeah.

341 Ahongalu Fusimalohi: But something that nobody is able to trace. So the least...

*(Follows a discussion on Mr Bhamjee, the form and the amount of the bribe he allegedly received).*

342 Ahongalu Fusimalohi: Well, yeah. But if anybody was going to offer me something, you know, my standard reply is ten million. That's indirectly saying no. But if somebody is so desperate and does offer me that, to be honest, I'm gonna take it, because I'll go home, I'll retire, I'll do what they want, go ho in shame, but live happily the rest of my life and afford the rest of my life to my kids. (laughs) I mean in Tonga, it's a small country, I've had the exposures of a global experience that, phew, you can always go out on holiday, you don't have to be involved in any more business.

343 Reporter: No, exactly.

344 Ahongalu Fusimalohi: But the idea is really to say no.

345 Reporter: Yeah, yeah of course.

*(Follows a discussion on a) Mr Charlie Dempsey, b) how people representing the German bid allegedly tried to bribe him, c) how those same people presumably offered German cars to other voting members, d) how FIFA Executive Committee members were regularly offered many benefits such as estates, e) internal quarrels within the OFC).*

346 Reporter: There's no, there's no worry about the position regarding FIFA is there for all this? I mean, if, I mean if FIFA were to find out that we were offering members incentives, would they do anything about it?

347 Ahongalu Fusimalohi: Who, me?

348 Reporter: No, no not you personally, I didn't mean you personally, I meant just one was, say if we were.

349 Ahongalu Fusimalohi: Oh yes, yes, it's going to be a big problem.

350 Reporter: Yeah. So it has to be quite.

351 Ahongalu Fusimalohi: It has to be strictly confidential.

352 Reporter: I just got the impression that to a certain extent the whole organization works like that.

353 Ahongalu Fusimalohi: Yes. It just, I mean, the eleventh commandment of the CIA, just don't get caught, don't get caught, that's it.

354 Reporter: Yeah.

355 Ahongalu Fusimalohi: But that's true, it is really what's happening.

*(Follows a discussion on Mr Sepp Blatter and about some writer who had published stories regarding the President of the FIFA).*

356 Reporter: So when would you be free to start then? Given that, I mean, I, I, if I were, you, between now and sort of October, how much time realistically would you, would you have?

357 Ahongalu Fusimalohi: Well apart of my, from my campaign, you see, this is all about campaigning, otherwise I'm free right through.

358 Reporter: 'Right, ok.

359 Ahongalu Fusimalohi: I'm always free; I'm free to start any time.

360 Reporter: Right.

361 Ahongalu Fusimalohi: But apart from my campaigning.

362 Reporter: Right, ok.

363 Ahongalu Fusimalohi: I just have to try to figure out something. But if you, for example after our meeting, on fourteenth October, I think a good time to meet would be the week that follows, because that will give me time to sneak out and come back in.

364 Reporter: Fourteenth of October.

365 Ahongalu Fusimalohi: Yeah, that's when we'll finish our meeting. I can probably catch a flight on Saturday to somewhere.

366 Reporter: Yeah and...

367 Ahongalu Fusimalohi: If you guys want to meet.

368 Reporter: And then of course, it's the, October 22nd is, is the big sort of, is the meeting of executive committee isn't it?

369 Ahongalu Fusimalohi: Oh yes.

370 Reporter: Yeah. Which would be good to have you around then. 'Cos you know all these people. Well you don't know all of them, but.

371 Ahongalu Fusimalohi: But I can't think it's, it's right for me...

372 Reporter: Oh I see, you don't...

373 Ahongalu Fusimalohi: ...to be out there.

374 Reporter: Oh I see, you want to just...

375 Ahongalu Fusimalohi: Because OC, I'm supposed to be back in Australia.

376 Reporter: Right.

377 Ahongalu Fusimalohi: See us back in Australia. So this is strictly confidential.

378 Reporter: Oh I see yes. So, so, if you would go out, yeah, no I understand that, yeah

379 Ahongalu Fusimalohi: But I'm happy to give you as much advice and inside information to what's going on and after the FIFA, or OC meeting on the fourteenth, fourteenth and fifteenth, I can always catch a flight to meet somebody somewhere.

380 Reporter: It would be interesting for me...

381 Ahongalu Fusimalohi: And we can go one by one with the whole 24 members.

382 Reporter: Work out.

383 Ahongalu Fusimalohi: And work out exactly.

384 Reporter: What, yeah. It would be interesting for me to know, what the, I don't know whether you will be able to find this out quickly or not, what the offers the Oceania football association have had, association or federation, have had, I don't know, what are the, what are the ten million twelve million offers he's referring to?

385 Ahongalu Fusimalohi: After the fourteenth I will know.

386 Reporter: Yeah, 'cos.

387 Ahongalu Fusimalohi: As I said, I should know everything by then. And then we can use it as a benchmark to other offers, but I don't think it's gonna be ten million. It would be a bit outrageous for anyone to offer ten million to us.

388 Reporter: Well he said ten million U.S dollars and then compared to Australia, they've only offered us a million.

389 Ahongalu Fusimalohi: Well that was, see, he doesn't have his figures right, well maybe he does, but he's not giving you enough information (inaudible).

*(Follows a discussion on how the information which Mr Reynald Temarii gave to the Reporter did not match with the information he gave to the OFC board members).*

390 Ahongalu Fusimalohi: That means Reynald is not really supporting the U.S bid unless he sees something concrete.

391 Reporter: Yeah.

392 Ahongalu Fusimalohi: So really, just go to him directly this is what we can give you.

393 Reporter: Yeah.

394 Ahongalu Fusimalohi: If you support our bid.

395 Reporter: Yeah.

396 Ahongalu Fusimalohi: And then ...

397 Reporter: See what he says.

398 Ahongalu Fusimalohi: Underneath that document give you personal property in England.

399 Reporter: Yeah.

400 Ahongalu Fusimalohi: And it let's see whether he (inaudible).

401 Reporter: Yeah, yeah. But do you think he might?

402 Ahongalu Fusimalohi: I think it's highly likely.

*(Follows a discussion on how the Appellant's political success could help him promote his career in the world of football and about his family).*

403 Reporter: But what I have to do is, I have to go, go back and I have to put a proposal up to the consortium in which I tell them that I've now met you that I'm obviously I'm very impressed with you and I like you and I think that they, they would, it would benefit their cause greatly to take you on as a consultant and put these terms to the them up in the file, I don't, I don't think the terms are an issue. And, and then, and obviously also, you're gonna have to bill us with your plane ticket and your hotel. You've got, you've Claire's email?

404 Ahongalu Fusimalohi: Yeah, yeah.

405 Reporter: Yeah.

406 Ahongalu Fusimalohi: (inaudible) on these travels?

407 Reporter: Yeah we could, yeah, yeah, yeah, I'm sure we can facture in a pocket allowance. What's, that's like a day allowance.

408 Ahongalu Fusimalohi: Yeah. For the days you are...

409 Reporter: For food and things like that. Yeah, yeah.



410 Ahongalu Fusimalohi: Because FIFA has a five hundred dollar, U.S dollar.

411 Reporter: Five hundred dollar.

412 Ahongalu Fusimalohi: Yes, five hundred.

413 Reporter: So basically we're designing, basically we're designing a package just like a FIFA executive member package.

414 Ahongalu Fusimalohi: But the pocket allowance doesn't include hotel or accommodation, FIFA covers all that.

415 Reporter: Yeah, I just don't, comes with the travel expenses, travel expenses mean....

416 Ahongalu Fusimalohi: Return ticket and accommodation.

417 Reporter: Accommodation yeah.

418 Ahongalu Fusimalohi: I mean the pocket allowance really just covers taxi, things like that, so if I were to bill you, I would be billing you five hundred for today plus my accommodation and my return ticket.

419 Reporter: Ok.

420 Ahongalu Fusimalohi: I don't have to show you my whole internet... ..connection, you know, miscellaneous, laundry.

421 Reporter: Yeah, I don't know actually, we may have to, it would probably help if we had some sort of receipt or something.

422 Ahongalu Fusimalohi: Yes, I'm billing the hotel room.

423 Reporter: Yeah.

424 Ahongalu Fusimalohi: For the cost of the hotel.

425 Reporter: Yeah.

426 Ahongalu Fusimalohi: And my return ticket..

427 Reporter: Yeah.

428 Ahongalu Fusimalohi:. And on top of that it's five hundred U.S dollar pocket allowance.

429 Reporter: Ok, well, yeah, I'll have to get that signed, I'll have to get that signed off.

430 Ahongalu Fusimalohi: Oh yes, yes, sure. I mean it's easier that way so we don't have, you know, for every cup of coffee and every...

431 Reporter: No. Of course not.

*(Follows a discussion of phone details, e-mail addresses).*

432 Ahongalu Fusimalohi: How long does the, well how long does the consulting (inaudible).

433 Reporter: Our company?

434 Ahongalu Fusimalohi: No, no. I mean my consulting obviously if I was to come on board the.

435 Reporter: Initially, initially we're talking about until December with a view to keeping it going for the rest of the year.

436 Ahongalu Fusimalohi: For next year.

437 Reporter: I.e. so, so, if, if say you start the first of October and go, go to the first of October next year. I mean obviously that vote will have gone, but I think payments factored into the fact

that what we're gonna try and do is find other sporting projects that you might be able to help us on. But it's not dependent on that. It's dependent mostly on the work we're doing now.

438 Ahongalu Fusimalohi: Because, I mean, I've got other, my background is in communications and media, in the (inaudible), just in case there's other work opportunities.

439 Reporter: Yeah, I know, that's true and we do a fair amount of communications work, it's not my end of the business but. Yeah, I think that covers almost everything.

440 Ahongalu Fusimalohi: Yeah.

(Follows a discussion on how the Appellant would scan his plane tickets and send it to Franklin Jones in order to be reimbursed).

441 Reporter: Ok, great. Oh well. And if you hear anything, let us know if you hear any sort of, I mean I, you're obviously moving in the right circles to hear, hear things about what the, what's going on. Give Claire or I a ring. And, but I would imagine, I'll go to them, then I'll come back, it's the 24th of September now so, it's gonna be early October probably before we talk.

442 Ahongalu Fusimalohi: The 25th.

443 Reporter: Oh is it 25th?

444 Ahongalu Fusimalohi: Here, here in...

445 Reporter: Oh of course, mine is on UK time.

446 Ahongalu Fusimalohi: Here we're twelve hours behind.

447 Reporter: Yeah. So it's gonna be early October and then we'll try and arrange it so that we, we meet after the 14th and before the 22nd, yeah?

448 Ahongalu Fusimalohi: Yes. That would be, I think, the most appropriate time to quickly go through everything before the ex-co meeting on the 22nd. And probably we might wanna meet again between the 22nd and the 2nd of December.

449 Reporter: Yeah.

450 Ahongalu Fusimalohi: By then, my campaign would have been finished anyway.

451 Reporter: Yeah.

452 Ahongalu Fusimalohi: And elections will have been over then and I'll be more free to work around my (inaudible) schedules.

17. On 15 October 2010, the "Insight Editor" of the *Sunday Times* sent an email to the Appellant informing him of the fact that an article was about to be published in the coming week-end, and that the article would report his meetings with the supposed representatives of *Franklin Jones* and his acceptance to assist the company in its project of bribing some members of the FIFA Executive Committee. The *Sunday Times'* Insight Editor gave a short summary of what was allegedly said during the Appellant's interaction with the undercover Reporter and gave him the opportunity to state his position, if he so wished.

18. On 16 October 2010, the Appellant signed a statement of apology dated 15 October 2010 to the attention of the OFC President, OFC Executive Members, OFC Member Associations' Presidents and OFC staff. In this document, he acknowledged having declared to the Reporter (i) that the OFC members would vote for the Australian bid for the 2022 FIFA World Cup only because the Australian Football Federation persuaded its government to pay Oceania 4 million Australian dollars, (ii) that Mr Reynald Temarii – at the time OFC President and vice-president of FIFA – would vote for the Spanish bid in exchange of training facilities in South America for Oceania national teams, (iii) that Mr Temarii's vote could certainly be bought for the American bid and that, in this regard, a direct offer should be made to him. Then, the Appellant stated (iv) that the above declarations made to the Reporter were « *pure lies* », (v) that in a 2008 meeting, the members of the OFC Executive Committee unanimously agreed to support the Australian bid based on their common history as well as on very objective criteria, and (vi) that the OFC President committed himself to vote in accordance with the decision of the OFC Executive Committee members, who were regularly consulted and updated about his meetings with the bidding committees.
19. At the hearing, the Appellant claimed that he did not write the above letter but that it was prepared for him by Mr Temarii and Mr Tai Nicholas, the OFC General Secretary, who made him sign it while he was sick at home, and that he was too sick to actually read or understand what he was signing.
20. On 17 October 2010, the *Sunday Times* published on paper and on its website the already mentioned article entitled “*Foul play threatens England's Cup bid [...]*” (see *supra* at 10). In particular, the article contained an account of the contacts between the undercover journalists and the Appellant as well as excerpts of the Recordings secretly taken in Auckland, quoted verbatim (paras. 135 ff and 349 ff of the transcript).

### **III.3 THE PROCEEDINGS BEFORE FIFA**

21. On 18 October 2010, upon FIFA's request just after the publication of the article, the *Sunday Times* sent to FIFA a copy of the Recordings.

22. On the same day, the FIFA Secretary General requested the chairman of the FIFA Ethics Committee to commence disciplinary proceedings against the Appellant, in accordance with article 16 of the FIFA Code of Ethics (hereinafter “FCE”).
23. On 20 October 2010, the FIFA Ethics Committee provisionally suspended the Appellant from taking part in any football related activity at national or international level.
24. On 21 October 2010, the FIFA Ethics Committee commenced proceedings against the Appellant on grounds of possible violations of article 7 of the FIFA Statutes, article 62 of the FIFA Disciplinary Code (hereinafter FDC) and articles 3, 5, 6, 9, 10, 11, 12 as well as 14 of the FCE. The Appellant was notified of the said charges in a letter of the same date.
25. On 27 October 2010, the Appellant received, via the Tonga FA, a package containing a copy of the Recordings.
26. On 5 November 2010, the Appellant filed his written position before the FIFA Ethics Committee within the allotted time limit. In his submission he explained, *inter alia*, that he was not in a financial position to attend, or to be represented at, a hearing to be held in Switzerland.
27. On 16 November 2010, the FIFA Ethics Committee decided the following:
  - «1. *The official, Mr Ahongalu Fusimalohi, is found guilty of infringement of art. 3 par. 1, par. 2 and par. 3 (General Rules), art. 9 par. 1 (Loyalty and confidentiality), art. 11 par. 1 (Bribery) and art. 14 par. 1 (Duty of disclosure and reporting) of the FIFA Code of Ethics.*
  2. *The official, Mr Ahongalu Fusimalohi, is hereby banned from taking part in any kind of football-related activity at national and international level (administrative, sports or any other) for a period of three (3) years as from 20 October 2010, in accordance with art. 22 of the FIFA Disciplinary Code and in connection with art. 17 of the FIFA Code of Ethics.*
  3. *The official, Mr Ahongalu Fusimalohi, is ordered to pay a fine to the amount of CHF 10,000, in accordance with art. 10 c) of the FIFA Disciplinary Code and*

*in connection with art. 17 of the FIFA Code of Ethics. The fine is to be paid within 30 days of notification of the decision. (...)*

*4. Costs and expenses of these proceedings, in the amount of CHF 2,000 are borne by the official, Mr Ahongalu Fusimalohi, in accordance with art. 105 par. 1 of the FIFA Disciplinary Code and shall be paid according to the modalities stipulated under point no. 3 above.*

*5. The official, Mr Ahongalu Fusimalohi, shall bear his own legal and other costs incurred in connection with the present proceedings.*

*6. This decision has been sent to Mr Ahongalu Fusimalohi [...] by fax, in accordance with art. 103 par. 1 of the FIFA Disciplinary Code.»*

28. On 17 January 2011, the full reasoning for such decision was issued and notified to the Appellant.
29. The Appellant lodged with the FIFA Appeal Committee a timely appeal against the decision of the FIFA Ethics Committee.
30. On 2 February 2011, the FIFA Appeal Committee held a hearing by telephone conference attended by the Appellant and his counsel. On 14 April 2011, the FIFA Appeal Committee issued its full decision (hereinafter the “Appealed Decision”), which was received by the Appellant on 15 April 2011 (Oceania date).
31. The FIFA Appeal Committee found among other things that the proceedings before the FIFA Ethics Committee were properly carried out and that the Recordings constituted admissible evidence as the investigations conducted by the *Sunday Times* were necessary and appropriate, served a justified purpose (i.e. the information of the public of the possibility of corruption among high ranking FIFA officials) and were achieved in the public interest, which “*clearly outweighed any disadvantages to the Appellant that might have resulted from the breach of any law during the procurement of the information in question*”. The FIFA Appeal Committee held that there was sufficient evidence to establish that the Appellant accepted unjustified advantage against his services in favour of the American bid and that the requirements of article 11 para. 1 of the FCE (Bribery) were met. The FIFA Ethics Committee deemed that the Appellant violated the principles set forth in article 9 of the FCE (Loyalty and confidentiality) as his behaviour was clearly in

breach of the specific standard of conduct requested by a “*CEO / Secretary of the Tonga Football Association a person who was in FIFA from 2002 to 2007 and during this time was a member of several FIFA committees among which the FIFA Executive Committee, a member of the Executive Committee of the OFC and of the board of the OFC*”. The FIFA Appeal Committee also confirmed that the Appellant did not respect his general obligations (as provided by article 3 of the FCE) as well as his duty of disclosure of illicit approaches prescribed by the applicable regulations, in failing immediately to report to FIFA that he had been in receipt of offers by certain individuals to take an active part in their illegitimate scheme. On account of his violation of article 11 para. 1 of the FCE, the FIFA Appeal Committee deemed appropriate to sanction the Appellant with a 16 months ban from taking part in any football-related activity, to be increased due to the violation of articles 3, 9 para. 1 and 14 para. 1 of the FCE by 8 months to a total of two years.

32. The FIFA Appeal Committee also imposed upon the Appellant a fine of CHF 5,000 for the infringement of article 11 para. 1 of the FCE and a fine of CHF 2,500 for the infringement of articles 3, 9 para. 1 and 14 para. 1 of the FCE, to a total fine of CHF 7,500.
33. As a consequence, the appeal lodged by the Appellant was partially upheld as the decision of the FIFA Ethics Committee was confirmed but the sanctions were reduced to a two-year ban from taking part in any football-related activity (instead of a three-year ban) and a fine of CHF 7,500 (instead of CHF 10,000).
34. On 15 April 2011, the Appellant was notified of the reasoned decision issued by the FIFA Appeal Committee (hereinafter the “Appealed Decision”).

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

35. As a preliminary, the Panel wishes to point out that the brief summaries of the parties’ submissions set out hereunder do not repeat every contention put forward by the parties, because this is compensated by the fact that the Panel has thoroughly considered in its discussion and deliberation all of the evidence and arguments

submitted by the parties, even if there is no specific or detailed reference to those arguments in the ensuing analysis.

#### IV.1 THE APPEAL

36. On 2 May 2011, the Appellant filed a statement of appeal before the Court of Arbitration for Sport (hereinafter referred to as the “CAS”). On 16 May 2011, he lodged his appeal brief. This document contains a statement of the facts and legal arguments accompanied by supporting documents. He challenged the above-mentioned Appealed Decision, submitting the following prayers for relief:

*«The appellant requests the following relief:*

- (a) that the appellant’s conviction of guilty be overturned, being conviction in relation to alleged infringements under article 3 paragraphs 1 to 3 (General Rules), article 9 paragraph 1 (Loyalty and confidentiality), article 11 paragraph 1 (Bribery) and article 14 paragraph 1 (Duty of disclosure and reporting) of the FIFA Code of Ethics;*
- (b) that the appellant’s ban from taking part in any kind of football-related activity at national and international level (for a period of two years from 20 October 2010), be overturned in order that he may be reinstated to his position;*
- (c) that the appellant’s fine of CHF 7,500 be cancelled; and*
- (d) that the appellant be awarded costs incurred thus far in defending the allegations; and*
- (e) in the alternative that the sentence is too harsh and be reduced to take into account the appellant’s circumstances and financial position and the effect of such a sentence on his livelihood. »*

37. The Appellant’s submissions, in essence, may be summarized as follows:

- Following the Auckland Meeting, the Appellant had further phone conversations with the representatives of Franklin Jones, which were recorded. The fact that the FIFA refused to obtain those other recordings and that they have not been made available to the Appellant, constitute a fundamental breach of justice and of articles 94 and 96 FDC. *« The Ethics Committee*

*simply relied on the evidence that the Sunday Times chose to supply, knowing that it was incomplete and that further evidence was held by the Sunday Times. »*

- The secret audio and video recordings of the Auckland Meeting failed to meet the following undisputed key criteria to then be rendered admissible:
  - *« The undercover investigation or deception of the party concerned must serve to achieve a justified purpose. »*
  - *« With regard to the achievement of the purpose, the undercover investigation or the deception of the party concerned must be a necessary and appropriate method and therefore constitute the only possible means. »*
  - *« The legal asset compromised by the undercover investigation must be less significant than the interest that the investigator seeks to protect. »*
- Should the evidence not be considered as inadmissible, it does not establish that the Appellant has breached any provisions of the FCE.
- The Appellant is not guilty of any violation of article 11 of the FCE, the requirements of which are not met: No offer or promise was made by the Reporter to the Appellant in return for the information given and the Appellant had never confirmed that a salary for his services as a board member of Franklin Jones was agreed. *« Any possible salary including any possible involvement was still being negotiated, so could not possibly be said to be “Agreed” »*. In this case, the Appellant accepted or received nothing and the *« information that was given at the 25 September meeting was given freely and without any certainty or commitment of a money payment or actual engagement for services on the Advisor Board »* of Franklin Jones.
- In his mind, the Appellant was convinced that the Auckland Meeting was a job interview as he was originally approached to be engaged as a “Sports Board Member”, in order to assist Franklin Jones on a wide range of sports related matters, including advice on sports travel, ticketing and stadium security for



major events. He actually submitted Ms Claire Murray's e-mail of 22 July 2010 to a lawyer, who did not find anything suspicious or inappropriate about it. His submissions were that there was nothing improper about entering into such an employment contract for a yearly salary of USD 100,000.

- Since the Appellant cannot be found guilty of bribery, he cannot be found to be in breach of articles 3 and/or 9 of the FCE, the requirements of which are also not met in the present case. In particular, it is untenable to conclude that, during the Auckland Meeting, the Appellant « *acted in the performance of his duties* » as he genuinely believed that he was being interviewed for a job, in which case it was natural for him to outline his previous and expected future role.
- The sanction imposed upon the Appellant is disproportionate. The disciplinary proceedings against the Appellant were conducted in a precipitated manner and caused him to lose his both jobs within 2 days, before he even had a chance to exercise his right to be heard. Such rush was unjustified in view of the fact that he was not a FIFA Executive Committee member any more and, therefore, was not in a position to vote for the 2018 and 2022 FIFA World Cup editions. In any event, it appears that his actions were not as reprehensible as those of the other persons cited in the *Sunday Times*.

#### **IV.2 THE ANSWER**

38. On 11 May 2011, the FIFA Secretary General, Mr Jérôme Valcke, requested the *Sunday Times* Insight Editor “to remit to [FIFA] any other piece of evidence [he] might be in possession of and which has not been sent to FIFA beforehand, if any”.
39. On 14 May 2011, the *Sunday Times* Insight Editor confirmed that FIFA had received all the relevant information from the Reporter's investigation.
40. On 20 June 2011, FIFA submitted an answer containing the following prayers for relief:

« *Based on the foregoing developments, FIFA respectfully requests the CAS to issue an award:*

- *Rejecting Mr Fusimalohi's prayers for relief.*
- *Confirming the Decision under appeal.*
- *Ordering Mr Fusimalohi to pay in full, or pay a contribution of no less than CHF 25,000 towards the legal fees and other expenses incurred by FIFA in connection with these proceedings. »*

41. FIFA's submissions, in essence, may be summarized as follows:

- There were no procedural errors at the previous instances and the prosecution of the Appellant for breaches of the FCE were correctly and extensively carried out. In particular, FIFA is not in possession of recordings of telephone conversations, which took place after the Auckland Meeting. The *Sunday Times* did not provide FIFA with the alleged recordings. *« This evidence, if it exists, is in the possession of a third party and that third party advised FIFA that it had already provided FIFA with all available evidence. To the extent that FIFA did have a responsibility to seek evidence, [...] it fulfilled such responsibility. [...] In addition, even if the recordings say what the Appellant says they do, this will not change the facts of what happened at the Auckland Meeting ».*
- The Recordings constitute admissible evidence for the purpose of the present proceedings.
- The breach of the FCE by the Appellant is established by very objective evidence: a) the Recordings, which exactly report what the Appellant said, b) his emails and c) the Appellant's own testimony.
- The Appellant breached article 9 of the FCE, which imposes on officials an obligation to recognize their fiduciary duty, i.e. to comply with obligations of loyalty and good faith, which include the obligation not to do anything that could damage FIFA's interests and image. The fact that the Appellant was deceived about the real background and purpose of the Auckland Meeting is irrelevant to the application of article 9 para. 1 of the FCE. The Appellant cannot reasonably allege that he was not "*performing his duties*" (as provided by article 9 para. 1 of the FCE) during the Auckland Meeting, as he could not

ignore that the reason why he had been contacted by Franklin Jones was his position as an official.

- The wording of article 11 para. 1 of the FCE is very clear. For this provision to come into play, the advantage can take any form and can be merely suggested, as opposed to materialised in any form. In the presence of such an advantage offered/promised with the purpose to incite a breach of duty or dishonest conduct, the official has the obligation to actively refuse the offer immediately upon the making of the offer. In view of the facts and evidence, the Appellant breached article 11 para. 1 of the FCE. In particular:
  - The Appellant was aware of the connection between the offer/promise of an advantage by the Reporter and the Reporter's request that the Appellant would assist the American US World Cup bid. The *« e-mail to him from the journalists dated 27 July 2010 (...) clearly demonstrates that he was explicitly advised in advance of the Auckland Meeting that the reason why they wished to take him on was "to bring the USA's faltering bid for 2018 World cup back in contention" »*.
  - The Appellant accepted and/or failed to refuse the advantage being offered/promised to him by the Reporter and did not refuse to accept a payment. *« As soon as he became aware of the nature of the offer, months in advance of the Auckland Meeting, he should have refused it, but did not do so, the proof being that he attended the Auckland Meeting, which he flew to especially »*.
  - The fact that the parties to the Auckland Meeting were still negotiating the exact terms of the Appellant's remuneration does not have an impact in the core agreement, which basically consisted in the Appellant (a) providing Franklin Jones with confidential and/or privileged information about FIFA Executive Committee members and the voting process for the awarding of the FIFA World Cups 2018 and 2022, as well as (b) assisting the said company in the elaboration of the

best scheme to approach several members of the FIFA Executive Committee in order to ask them to vote for the American bid.

- Article 3 of the FCE also imposes general duties of behaviour, which were breached by the Appellant, who (a) did not refrain from anything that could be harmful to the aims and objectives of FIFA (article 3 para. 1), (b) did not behave with integrity during the Auckland Meeting (article 3 para. 2), and (c) obviously abused his position, which allowed him to enter into an agreement with the Reporter, namely in order to receive an advantage.
- The sanction imposed upon the Appellant is proportionate to the seriousness of the offense.

#### **IV.3 THE HEARING**

42. A hearing was held on 7 November 2011 at the CAS premises in Lausanne. The Panel members were present. The parties expressly confirmed that they did not have any objection to the constitution and composition of the Panel.
43. The following individuals attended the hearing:
  - The Appellant was present, accompanied by his legal counsel Mr Graeme Christie.
  - FIFA was represented by its Head of Corporate Legal Department, Mr Olivier Jaberg, and by its counsel, Professor Antonio Rigozzi.
44. The Panel heard at length the Appellant himself, whose attention was preliminarily drawn to the fact that he had the right to remain silent because of his status as a party. He nevertheless expressed the desire to speak and so he did. The Appellant was then examined by his counsel, cross examined by the Respondent's counsel and questioned by the Panel members.
45. The Appellant explained that he ignored who Mr David Brewster really was and did not receive any money during or following the Auckland Meeting, to which he flew at his own expenses. He pointed out that, during the Auckland Meeting, he had never understood that his job with *Franklin Jones* would consist in offering bribes or inciting others to any illegal activity. He acknowledged that he

understood that the initiative of *Franklin Jones* was not part of the official American bid and that he would be engaged to make the American bid look as attractive as possible to the Oceania representatives; however, he underlined that it was quite common for bidding committees to take promotional initiatives, without any disciplinary process being ever initiated. The Appellant insisted on the fact that he perceived the Auckland Meeting as a job interview, which was not untoward considering his professional skills. He was interested in the position at *Franklin Jones* not so much with regard to the activity related to the awarding of the FIFA World Cups but for all the other aspects involved, such as marketing and communication. However, he admitted that those other aspects of the job had not been discussed during the Auckland Meeting. He also complained that FIFA had never provided him with any guidelines instructing him on how to behave while he was working for FIFA or thereafter. Then, the FIFA counsel read passages from the transcript of the Auckland Meeting (in particular paras. 106, 110, 212, 353, 398 and the passage regarding the reimbursement of his plane ticket), asking the Appellant to take position on them. The Appellant did not challenge the content of the passages which were read to him and put forward his interpretation of the facts.

46. Then, the Panel heard the expert testimony of Professor Hans Michael Riemer, called by the Respondent as an expert in Swiss association law, who was examined and cross-examined by the parties, as well as questioned by the Panel.
47. The parties had then ample opportunity to present their cases, submit their arguments and answer to the questions posed 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 even if they have not been summarized herein. Neither during nor after the hearing did the parties raise with the Panel any objection in relation to their right to be heard and to be treated equally in these arbitration proceedings.
48. After the hearing, upon invitation by the Panel, the parties submitted their schedules of costs and their comments on the accuracy of the transcript of the Recordings.

## V. ADMISSIBILITY, JURISDICTION AND APPLICABLE LAW

### V.1 ADMISSIBILITY OF THE APPEAL

49. The appeal is admissible, as the Appellant submitted his statement of appeal within the deadline provided by article R49 of the CAS Code of Sports-related Arbitration (hereinafter the “CAS Code”) and complied with all the other requirements set forth by article R48 of the CAS Code.

### V.2 JURISDICTION

50. The jurisdiction of the CAS, which is not disputed, derives from articles 63 para. 1 of the FIFA Statutes, article 18 para. 2 of the FCE and Article R47 of the CAS Code. It is further confirmed by the order of procedure duly signed by the parties.
51. It follows that the CAS has jurisdiction to decide on the present dispute.

### V.3 DE NOVO REVIEW AND THE APPELLANT’S DUE PROCESS RIGHTS

52. Under article R57 of the CAS Code (“*The Panel shall have full power to review the facts and the law*”), the Panel has the authority to hear the case *de novo*. According to the long-standing jurisprudence of the CAS:

*«[I]t is the duty of a CAS panel in an appeals arbitration procedure to make its independent determination of whether the Appellant’s and Respondent’s contentions are correct on the merits, not limiting itself to assessing the correctness of the previous procedure and decision» (CAS 2009/A/1880-1881 FC Sion & El-Hadary v. FIFA & Al-Ahly SC, at para. 146).*

53. The Panel has taken note of the Appellant’s allegation that the FIFA disciplinary proceedings variously infringed his due process rights, in particular holding a hasty procedure and not granting him his full right to be heard. However, pursuant to the established jurisprudence of the CAS, never censured by the Swiss Federal Tribunal, any procedural defect of the previous disciplinary process is cured by virtue of the *de novo* character of the CAS arbitration proceedings and the procedural rights granted therein:

«[T]he appeal arbitration procedure cures any infringement of the right to be heard or to be fairly treated committed by a sanctioning sports organization during its internal disciplinary proceedings. Indeed, a CAS appeal arbitration procedure allows a full *de novo* hearing of a case with all due process guarantees, granting the parties every opportunity not only to submit written briefs and any kind of evidence, but also to be extensively heard and to examine and cross-examine witnesses or experts during a hearing” (CAS 2009/A/1545 *A. Anderson et al. v. IOC*, at para. 78; see also CAS 2003/O/486 *Fulham FC v. Olympique Lyonnais*, at para. 50; CAS 2008/A/1594 *Sheykhov v. FILA*, at para. 109).

54. In this appeal, under article R57 of the CAS Code and decided cases of the CAS jurisdiction, some of which are set out above, the Appellant was given the opportunity to fully plead his case and to be heard on the merits before an independent and impartial arbitral tribunal, which he duly exercised. Therefore, any procedural violation which the appellant believes may have occurred during the FIFA proceedings are deemed to have been cured by the Panel allowing the appeal to proceed *de novo*, which occurred in this instance.

#### **V.4 APPLICABLE LAW**

55. With regard to applicable law, article R58 of the CAS 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* ».

56. It is generally accepted that the choice of the place of arbitration may determine the law to be applied to arbitration proceedings. The Swiss Private International Law Act (hereinafter “PILA”) is the relevant arbitration law (B. DUTOIT, *Droit international privé Suisse, commentaire de la loi fédérale du 18 décembre 1987*, Bâle 2005, N. 1 on article 176 PILA, p. 614). Article 176 para. 1 of the PILA

provides that Chapter 12 of the PILA, governing international arbitration, applies to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its usual residence in Switzerland (cf. Judgement of the Swiss Federal Tribunal of 20 January 2010, 4A\_548/2009, consid. 2.1; ATF 129 III 727; B. DUTOIT, *op. cit.*, N. 2 ad. art. 176 LDIP, p. 615).

57. The CAS is recognized by the Swiss Federal Tribunal as a true court of arbitration (Judgment of the Swiss Federal Tribunal of 27 May 2003, 4P.267/2002, 4P.268/2002, 4P.269/2002, 4P.270/2002/ech). The CAS has its seat in Switzerland and Chapter 12 of the PILA must therefore apply, the Appellant having neither his domicile nor his usual residence in Switzerland.
58. With respect to the applicable substantive law, article 187 para. 1 PILA provides as follows: “*Le tribunal arbitral statue selon les règles de droit choisies par les parties ou, à défaut de choix, selon les règles de droit avec lesquelles la cause présente les liens les plus étroits*” (or translated in English: “*the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected*”).
59. The choice of law made by the parties can be tacit or indirect, by reference to the rules of an arbitral institution (P. KARRER, *Basler Kommentar zum Internationalen Privatrecht*, 1996, N. 92 and 96, ad. Art. 187 PILA; J.-F. POUURET ET S. BESSON, *Droit comparé de l'arbitrage international*, 2002, N. 683, p. 613; B. DUTOIT, *op. cit.*, N. 4 ad. art. 187 LDIP, p. 657; CAS 2004/A/574 *Associação Portuguesa de Desportos v. Club Valencia CF S.A.D.*).
60. In addition, within the meaning of article 187 para. 1 PILA, the rules of law chosen by the parties do not need to be national laws, but can be non-governmental regulations (P. LALIVE, J.-F. POUURET, C. REYMOND, *Droit de l'arbitrage interne et international en Suisse*, Lausanne, 1989, pp. 399-400), such as in particular the rules and regulations of international sport federations. It is common for the CAS to primarily apply the various rules and regulations of such federations. For example, in TAS 92/80 *Beeuwsaert c. FIBA* (Digest of CAS Awards I, p. 287, 292), the CAS panel stated as follows:



*«Si le parties n'ont pas déterminé un droit national applicable, elles sont, en revanche, soumises aux statuts et règlements de la FIBA [...]. Le droit fédératif adopté par la FIBA constitue une réglementation de droit privé, ayant une vocation internationale, voire mondiale, à s'appliquer dans le domaine des règles de sport régissant le basketball. Pour résoudre le présent litige, le tribunal arbitral appliquera donc ce droit fédératif, sans recourir à l'application de telle ou telle loi national au fond»;*

or in English:

*«If the parties have not chosen a national law, their dispute shall, however, be governed by the rules and regulations of FIBA [...]. The rules of law adopted by FIBA are private law rules, with an international and worldwide perspective when it comes to the regulations governing the sport of basketball. To solve this dispute, the arbitral tribunal will therefore apply the rules and regulations of the said federation, without resorting to any substantive national law».*

61. At the time of the relevant facts, the Appellant was a member (and General Secretary) of the Tonga FA, a member of the Executive Committee of the OFC and a member of the FIFA Olympic Tournaments Committee. In his triple capacity as member of a FIFA member association, member of the top body of a FIFA Confederation and member of a FIFA committee, he was at the time of the facts an indirect member of FIFA. The Swiss Federal Tribunal has recognized that rules and regulations of an association like FIFA also apply to indirect members, who have rights and obligations deriving therefrom (ATF 119 II 271; H.M. RIEMER, *Berner Kommentar* ad art. from 60 to 79 of the Swiss Civil Code No. 511 and 515; CAS 2004/A/574 *Associação Portuguesa de Desportos Club v. Valencia CF SAD*, para. 45). In expressly agreeing to be appointed as General Secretary of the Tonga FA, as a member of the OFC Executive Committee and as a member of the FIFA Olympic Tournaments Committee, the Appellant has submitted himself to the Statutes and regulations of FIFA. Indeed, the Appellant never challenged the application of the various rules and regulations of FIFA and expressly referred to them in his

submissions to the CAS. Therefore, the Appellant was (and is) subject to the FIFA Statutes and regulations.

62. Pursuant to article 62 para. 2 of the FIFA Statutes, “[t]he provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.
63. Therefore, because the parties have not said otherwise, than to submit to and rely on the FIFA rules and regulations, the Panel will apply, as the law applicable to this dispute, the various FIFA regulations. The Panel will also apply Swiss law complementarily, should the need arise.
64. The Panel also notes that the relevant facts arising from this appeal occurred after 1 January 2009, 1 September 2009 and 10 August 2010, which are the dates when, respectively, the revised FDC (2009 edition), the revised FCE (2009 edition) and the FIFA Statutes (2010 edition) came into force. In accordance with the principle of non-retrospectivity, these are the editions of the rules and regulations which the Panel will rely on to adjudicate this case (see articles 4, 146 FDC, 17 para. 2 FCE and 83 of the FIFA Statutes).

## **VI. ADMISSIBILITY OF THE EVIDENCE**

### **VI.1 THE ISSUE RAISED BY THE APPELLANT**

65. According to the Appellant, the Recordings that FIFA obtained from the *Sunday Times* must be considered as illegally obtained evidence because the journalists’ undercover investigation deceived the Appellant, did not serve to achieve a justified purpose, used unnecessary and inappropriate methods and compromised the Appellant’s right to privacy by pursuing a less significant interest than that of the Appellant. Therefore, it is the Appellant’s case that the evidence is procedurally inadmissible.

### **VI.2 IN GENERAL**

66. Primarily, the Panel observes that under Swiss law – as under most legal systems – associations, and in particular sporting associations, possess the power (i) to adopt

rules of conduct to be followed by their direct and indirect members and (ii) to apply disciplinary sanctions to members who violate those rules, on condition that their own rules and certain general principles of law – such as right to be heard and proportionality – be respected (cf. M. BADDELEY, *L'association sportive face au droit*, Bâle, 1994, pp. 107 ff., 218 ff.; M. BELOFF, T. KERR, M. DEMETRIOU, *Sports Law*, Oxford, 1999, pp. 171 ff.).

67. In this regard, the Panel points out that the authority by which a sporting association may set its own rules and exert its disciplinary powers on its direct or indirect members does not rest on public or penal law but on civil law. Indeed, the Swiss Federal Tribunal clearly affirmed that sanctions imposed by sporting associations are purely a matter of civil law and not of penal law:

*«Il est généralement admis que la peine statutaire représente l'une des formes de la peine conventionnelle, qu'elle repose donc sur l'autonomie des parties et peut ainsi être l'objet d'une sentence arbitrale [...]. En d'autres termes, la peine statutaire n'a rien à voir avec le pouvoir de punir réservé aux tribunaux pénaux [...], et ce même si elle réprime un comportement qui est aussi sanctionné par l'Etat»* (Judgement of the Swiss Federal Tribunal of 15 March 1993, *Gundel v. FEI*, consid. 5a , Digest of CAS Awards I, p. 545 ; partially published in ATF 119 II 271);

or in English (as translated in Digest of CAS Awards I, p. 571):

*«It is generally accepted that the penalty prescribed by regulations represents one of the form of penalty fixed by contract, is therefore based on the autonomy of the parties and may thus be the subject of an arbitral award [...]. In other words, the penalty prescribed by regulations has nothing to do with the power to punish reserved by the criminal courts, even if it is punishing behaviour which is also punished by the State».*

68. According to the established case law of the Swiss Federal Tribunal, only civil law standards are relevant to the disciplinary sanctions imposed by sport associations. In particular, the Swiss Federal Tribunal noted that criminal law principles may not be applied when dealing with evidentiary issues in disciplinary cases:

*«la charge de la preuve et [...] l'appréciation des preuves [...] ne peuvent pas être réglés, en matière de droit privé, à la lumière de notions propres au droit pénal, telles que la présomption d'innocence et le principe "in dubio pro reo", et des garanties correspondantes figurant dans la Convention européenne des droits de l'homme»* (Swiss Federal Tribunal, Judgement of 31 March 1999 [5P. 83/1999], *N., J. Y. W. v. FINA*, consid. 3d, making reference to its Judgement of 15 March 1993, *Gundel v. FEI*, consid. 8b);

or in English, as translated in Digest of CAS Awards II, p. 781:

*«the duty of proof and assessment of evidence [...] cannot be regulated, in private law cases, on the basis of concepts specific to criminal law such as the presumption of innocence and the principle of "in dubio pro reo" and the corresponding safeguards contained in the European Convention on Human Rights».*

69. The Swiss Federal Tribunal also stated, in a decision concerning a sport governing body's decision to suspend an athlete, that the European Convention on Human Rights ("ECHR") is meant to protect the individuals' fundamental rights vis-à-vis governmental authorities and, in principle, is inapplicable in disciplinary proceedings carried out by private entities:

*«The Appellant invokes Article 27 of the [Swiss] Constitution and 8 ECHR. However, he was not the subject of a measure taken by the State, with the result that these provisions are, as a matter of principle, inapplicable»* (translation of Swiss Federal Judgement of 11 June 2001, *Abel Xavier v. UEFA*, consid. 2 d, reproduced in *Bull. ASA*, 2001, p. 566; partially published in ATF 127 III 429).

70. However, the Panel is mindful that some guarantees afforded in relation to civil law proceedings by article 6.1 of the ECHR are indirectly applicable before an arbitral tribunal sitting in Switzerland – all the more so in disciplinary matters – because the Swiss Confederation, as a contracting party to the ECHR, must ensure that its judges, when checking arbitral awards (at the enforcement stage or on the occasion of an appeal to set aside the award), verify that parties to an arbitration are

guaranteed a fair proceeding within a reasonable time by an independent and impartial arbitral tribunal. These procedural principles thus form part of the Swiss procedural public policy.

71. Indeed, CAS panels have always endeavoured to ensure that fundamental principles of procedural fairness are respected in sports disciplinary proceedings, in accordance with the notion of procedural public policy as determined by the Swiss Federal Tribunal:

*«L'ordre public procédural garantit aux parties le droit à un jugement indépendant sur les conclusions et l'état de fait soumis au tribunal d'une manière conforme au droit de procédure applicable ; il y a violation de l'ordre public procédural lorsque des principes fondamentaux et généralement reconnus ont été violés, ce qui conduit à une contradiction insupportable avec le sentiment de la justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un Etat de droit»* (Judgement of the Swiss Federal Tribunal of 11 Jun 2001, 4P.64/2001, ATF 127 III 429, *Abel Xavier v. UEFA*, consid. 2d, *ibidem*);

or translated in English;

*«Procedural public policy guarantees the parties the right to an independent ruling on the conclusions and facts submitted to the tribunal in compliance with the applicable procedural law; procedural public policy is violated when fundamental, commonly recognized principles are infringed, resulting in an intolerable contradiction with the sentiment of justice, to the effect that the decision appears incompatible with the values recognized in a State governed by the rule of law».*

72. In view of the above, the Panel will not be guided by criminal law standards, and will not resort to rules of criminal procedure in order to assess the admissibility or inadmissibility of the Recordings relied on as evidence in this arbitration. However, the Panel will follow principles of procedural fairness and will endeavour to comply with all facets of Swiss procedural public policy.

### VI.3 ILLEGAL NATURE OF THE EVIDENCE?

73. Preliminarily, with regard to the alleged illegality of the evidence, the Panel notes that pursuant to the general duties of good faith and respect for the arbitral process a party to an arbitration may not cheat the other party and illegally obtain some evidence. Should that happen, the evidentiary materials thus obtained may be deemed as inadmissible by the arbitral tribunal (cf. B. BERGER, F. KELLERHALS, *International Arbitration in Switzerland*, 2<sup>nd</sup> Ed., London, 2010, p. 343). A couple of examples can be given of arbitral proceedings where a violation of the principles of good faith and of respect for the arbitral process occurred:
- an international arbitral tribunal made clear that all parties owe a general duty to the others and to the tribunal to conduct themselves in good faith during the arbitration proceedings and that it is not acceptable for a party to an arbitration to gather evidence by having private detectives covertly trespassing into the other party's office building (UNCITRAL, *Methanex Corp. v. United States*, Final Award, 3 August 2005, pt. II, ch. A, at 13);
  - another international arbitral tribunal, in a situation where a State who was a party to an ICSID arbitration had used its police powers and intelligence services to eavesdrop on the other party's telephone conversations, stated that “parties have an obligation to arbitrate fairly and in good faith and [...] an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; this principle applies in all arbitration” (ICSID Case No. ARB/06/8, *Libananco Holdings Co. v. Turkey*, Award on Jurisdiction, 23 June 2008 at 78).
74. On the basis of the evidence before it, the Panel finds that the case at hand is very different from the just mentioned examples, as FIFA did not perform any illegal activity and did not cheat the Appellant in order to obtain the Recordings. There is no evidence on file, and the Appellant does not contend, that the *Sunday Times*' investigation was prompted or supported by FIFA or by anybody close to FIFA. FIFA transparently solicited and received such evidentiary material from the *Sunday Times* immediately after the publication of the article on 17 October 2010 and the disclosure of important portions of the Recordings' content (see *supra* at

- 20). The Panel thus finds that FIFA did not violate the duties of good faith and respect for the arbitral process incumbent on all who participate in international arbitration; as a consequence, such procedural principles may not constitute a legal basis to exclude the disputed evidence from these arbitration proceedings.
75. However, the Appellant argues that the *Sunday Times*' Reporter intentionally intruded into his private life to gather the Recordings and, consequently, such evidence cannot be used in these arbitration proceedings, even if FIFA itself is not responsible for the journalists' conduct.
76. The Panel observes that, in assessing the lawfulness or not of the journalists' conduct, two different rights would have to be comparatively weighed – the right to respect for private life and the right to freedom of expression. Both rights are protected in any democratic society but neither one is absolute, being subject to a number of legitimate exceptions and restrictions (cf. articles 8.2 and 10.2 ECHR). According to the current jurisprudence of the European Court of Human Rights, neither right has automatic precedence over the other and, in principle, both merit equal respect (European Court of Human Rights, Judgment 23 July 2009, *Hachette Filipacchi Associés "Ici Paris" v. France*, Application no. 12268/03, at para. 41).
77. With specific regard to interferences by the media in a person's private life, the European Court of Human Rights has recently emphasised the vital role of the press in informing the public and being a "public watchdog", underlining that not only does the press have the task of imparting information and ideas on matters of public interest but the public also has a right to receive them (European Court of Human Rights, Judgment 10 May 2011, *Mosley v. UK*, Application no. 48009/08, at para. 112). According to the European Court (*ibidem*, at para. 114):

*«the pre-eminent role of the press in a democracy and its duty to act as a 'public watchdog' are important considerations in favour of a narrow construction of any limitations on freedom of expression. However, different considerations apply to press reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life. [...] the Court stresses that in assessing in the*

*context of a particular publication whether there is a public interest which justifies an interference with the right to respect for private life, the focus must be on whether the publication is in the interest of the public and not whether the public might be interested in reading it» (citations omitted).*

78. The Panel notes that the *Sunday Times* did not look for sensational or lurid aspects of the Appellant's strictly private life to lure the curiosity of the public. Rather, the *Sunday Times* tried to expose possible cases of corruption in the FIFA World Cup bidding process, thus acting as "public watchdogs" (to use the European Court's terminology). The Panel finds it difficult to maintain that the exposure of illegal conduct in relation to important sports events – be it corruption, doping or match-fixing – would not be in the interest of the public. Taking into account the above recent jurisprudence of the European Court of Human Rights, it is not self evident that the Reporter's conduct, albeit sneaky, was unlawful; if it were, the Appellant would be entitled to seek justice on that count by filing a criminal complaint and/or a civil action against the *Sunday Times* or its journalists. The fact that at the time of the hearing – about one year after the relevant facts – the Appellant had not started any lawsuit certainly does not lend support to the argument that the journalists illegally obtained the Recordings.
79. In any event, the Panel deems it unnecessary to assess whether or not the Recordings were illegally procured and whether or not the evidence remained illegal when it arrived in the hands of FIFA. The Panel is even prepared to assume in the Appellant's favour that the evidence was illegally obtained, given that an international arbitral tribunal sitting in Switzerland is not necessarily precluded from admitting illegally procured evidence into the proceedings and from taking it into account for its award (see B. BERGER, F. KELLERHALS, *op. cit.*, p. 343). Indeed, an international arbitral tribunal sitting in Switzerland is not bound to follow the rules of procedure, and thus the rules of evidence, applicable before Swiss civil courts, or even less before Swiss criminal courts. As emphasized in the Swiss legal literature on international arbitration:

*«La procédure arbitrale n'est pas soumise aux règles applicables devant les tribunaux étatiques. C'est d'ailleurs là un avantage souvent cité de*



*l'arbitrage» (G. KAUFMANN-KOHLER, A. RIGOZZI, Arbitrage international. Droit et pratique à la lumière de la LDIP, II Ed., Berne, 2010, at 294);*

Or translated in English :

*«Arbitral proceedings are not subject to the rules applicable before State tribunals. This is, after all, an often mentioned benefit of arbitration».*

80. Accordingly, with regard to the admissibility of evidence, the Panel endorses the position articulated by a CAS panel in the recent matter CAS 2009/A/1879 *Alejandro Valverde Belmonte v. CONI* paras. 134 ff (hereinafter “the Valverde case”):

*«L'ordre juridique interne suisse n'établit pas de principe général selon lequel des preuves illicites seraient généralement inadmissibles dans une procédure devant les cours civiles étatiques. Au contraire, le Tribunal Fédéral, dans une jurisprudence constante, est d'avis que l'admissibilité ou la non-admissibilité d'une preuve illicite est le résultat d'une mise en balance de différents aspects et intérêts juridiques. Sont pertinents, par exemple, la nature de la violation, l'intérêt à la manifestation de la vérité, la difficulté de preuve pour la partie concernée, le comportement de la victime, les intérêts légitimes des parties et la possibilité d'acquérir les (mêmes) preuves de façon légitime. La doctrine suisse prédominante suit cette jurisprudence du Tribunal Fédéral. L'approche adoptée par le Tribunal Fédéral et la doctrine dominante a, par ailleurs, été codifiée dans le nouveau CPC suisse (Article 152 alinéa 2), qui entrera en vigueur le 1er janvier 2011 [...].*

*Les principes qui viennent d'être décrits ne constituent qu'une faible source d'inspiration pour la pratique des tribunaux arbitraux. [...] En particulier, l'interdiction de se fonder sur une preuve illicite dans une procédure étatique ne lie pas en soi un tribunal arbitral. Selon le droit de l'arbitrage international un tribunal arbitral n'est pas lié par les règles applicables à l'administration de la preuve devant les tribunaux civils étatiques du siège du tribunal arbitral. Comme l'on a vu supra, le pouvoir discrétionnaire de l'arbitre de décider sur l'admissibilité de la preuve n'est limité que par l'ordre public procédural.*

*L'utilisation de preuves illicites ne relève par ailleurs pas automatiquement de l'ordre public suisse, car ce dernier est seulement atteint en présence d'une contradiction insupportable avec le sentiment de justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un Etat de droit.»*

Or translated in English:

*«The internal Swiss legal order does not set forth a general principle according to which illicit evidence would be generally inadmissible in civil proceedings before State courts. On the contrary and according to the long-standing jurisprudence of the Federal Tribunal, whether the evidence is admissible or inadmissible depends on the evaluation of various aspects and legal interests. For example, the nature of the infringement, the interest in getting at the truth, the evidentiary difficulties for the interested party, the behaviour of the victim, the parties' legitimate interests and the possibility to obtain the (same) evidence in a lawful manner are relevant in this context. The prevailing scholarly writings agree with the jurisprudence of the Swiss Federal Tribunal. The approach taken by the Federal Tribunal and by most of the scholars has actually been codified in the new Swiss Code of Civil Procedure (CCP) (Article 152 paragraph 2), which will come into force on 1 January 2011 [...].*

*The above described principles are only a feeble source of inspiration for arbitral tribunals. [...] In particular, the prohibition to rely on illegal evidence in State court proceedings is not binding per se upon an arbitral tribunal. According to international arbitration law, an arbitral tribunal is not bound by the rules of evidence applicable before the civil State courts of the seat of the arbitral tribunal. As seen above, the discretion of the arbitrator to decide on the admissibility of evidence is exclusively limited by procedural public policy. In this respect, the use of illegal evidence does not automatically concern Swiss public policy, which is violated only in the presence of an intolerable contradiction with the sentiment of justice, to the effect that the decision*

*appears incompatible with the values recognized in a State governed by the rule of law».*

81. In light of these principles and under the particular circumstances of that matter, the CAS panel in the Valverde case considered as admissible a piece of evidence – a blood sample – which a Spanish first instance judge, whose order was subsequently confirmed by the Madrid Court of Appeals, (a) had expressly declared to have been illegally obtained and (b) had expressly prohibited to be used in any judicial or disciplinary proceedings. The CAS panel in the Valverde case held on the basis of such evidence that the athlete had at least tried to engage in prohibited doping practices and, consequently, imposed on him a disciplinary sanction. Mr Valverde lodged an appeal before the Swiss Federal Tribunal, which upheld the decision without however dealing with this evidentiary issue (Judgment of 29 October 2010, 4A\_234/2010, ATF 136 III 605).
82. The Panel remarks that, in the case at hand, not only has there been no judicial court finding that the evidence was unlawfully obtained and prohibiting its use but, as observed (*supra* at 78), it is open to debate whether the *Sunday Times* Reporter acted illegally. In light of the foregoing considerations the Panel finds that, even assuming in the Appellant’s favour the illegal acquisition of the Recordings, this does not prevent their use as evidence in disciplinary proceedings conducted within a private association or in related appeal proceedings before an arbitral institution, in this case the CAS.

#### **VI.4 THE APPLICABLE RULES OF EVIDENCE**

##### ***a) Private autonomy and Swiss evidentiary rules***

83. Chapter 12 PILA grants an important role to private autonomy in international arbitration, as it gives the parties the option to determine their own procedural rules, including rules relating to evidence. In particular, article 182 para. 1 PILA states that “[t]he parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice”.

84. This provision confirms the Valverde panel's statement that "*an arbitral tribunal is not bound by the rules of evidence applicable before the civil State courts of the seat of the arbitral tribunal*" (see *supra* at 80). This is particularly so if the parties make use of their private autonomy to lay down some rules of evidence.
85. The Panel notes that the parties to this arbitration did make use of their private autonomy – FIFA by adopting its rules and the Appellant by accepting them when he voluntarily became an indirect member of FIFA – and did agree to the application of rules of evidence in FIFA disciplinary proceedings. Therefore, the Panel finds that the evidentiary issues in this case will be addressed applying those rules privately agreed between the parties and not the rules of evidence applicable before Swiss civil or criminal courts.
86. As a consequence, the criteria on the admissibility of evidence that can be found in the Swiss civil or criminal jurisprudence will not be relied on by the Panel. In particular, the Panel will not discuss some decisions of the Swiss Federal Tribunal, such as the judgments of 2 July 2010 (5A\_57/2010, ATF 136 III 410) and of 15 June 2009 (8C\_807/2008, ATF 135 I 169), that concern covert surveillance and secret video recordings of insured individuals made by private or public insurance bodies. Indeed, those cases do not concern arbitration proceedings but the application of Swiss rules of civil procedure. Incidentally, the Panel observes that those Swiss cases can be distinguished from the case at hand, as they concern intrusions into privacy committed with the objective of gathering evidence by the same party which then introduced the evidence before the court, whereas FIFA – as already noted (see *supra* at 74) – cannot be blamed for having spied on the Appellant. Rather FIFA was confronted with evidence derived from a *fait accompli*.
87. The applicable FIFA evidentiary rules in this case are those set forth by the FDC, which includes rules governing (i) the burden of proof, (ii) the standard and evaluation of proof, and (iii) the admissibility of evidence.

***b) The FIFA rule on burden of proof***

88. With regard to burden of proof, article 99 para.1 of the FDC provides as follows:

«ARTICLE 99 BURDEN OF PROOF

*1. The burden of proof regarding disciplinary infringements rests on FIFA».*

89. The Panel notes that this FIFA provision is in line with the general principle for disciplinary cases, which is that the burden of proof lies with the accuser. Hence, notwithstanding the fact that FIFA is the Respondent in this arbitration, it is up to FIFA to prove its case against the Appellant.

**c) *The FIFA rule on standard and evaluation of proof***

90. With regard to standard and evaluation of proof, article 97 of the FDC provides as follows:

«ARTICLE 97 EVALUATION OF PROOF

*1. The bodies will have absolute discretion regarding proof.*

*2. They may, in particular, take account of the parties' attitudes during proceedings, especially the manner in which they cooperate with the judicial bodies and the secretariat (cf. art. 110).*

*3. They decide on the basis of their personal convictions».*

91. The Panel notes that, under article 97 FDC, the Panel has wide powers and may freely form its opinion after examining all the available evidence. The applicable standard of proof is the “*personal conviction*” of the Panel.
92. The Panel is of the view that, in practical terms, this standard of proof of personal conviction coincides with the “comfortable satisfaction” standard widely applied by CAS panels in disciplinary proceedings. According to this standard of proof, the sanctioning authority must establish the disciplinary violation to the comfortable satisfaction of the judging body bearing in mind the seriousness of the allegation. It is a standard that is higher than the civil standard of “balance of probability” but lower than the criminal standard of “proof beyond a reasonable doubt” (cf. CAS 2010/A/2172 *Oriekhov v. UEFA*, para. 53; CAS 2009/A/1920 *FK Pobeda, Zabrcanec, Zdraveski v. UEFA*, para. 85). The Panel will thus give such a meaning to the applicable standard of proof of personal conviction.

**d) *The FIFA rule on admissibility of evidence***

93. With regards to the admissibility of evidence – the evidentiary issue in controversy here – article 96 of the FDC provides as follows:

*«ARTICLE 96 VARIOUS TYPES OF PROOF*

*1. Any type of proof may be produced.*

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

*3. The following are, in particular, admissible: reports from referees, assistant referees, match commissioners and referee inspectors, declarations from the parties and witnesses, material evidence, expert opinions and audio or video recordings».*

94. The Panel notes that, pursuant to Article 96 para. 1 FDC, all means of evidence may be admitted without restriction in disciplinary proceedings to which FIFA rules are applicable. The Panel also notes that para. 3 of this provision expressly includes “audio or video recordings”. It thus appears that the FDC allows virtually all types of evidence, with the exception of those that violate “human dignity” or that are obviously immaterial (para. 2), the latter exception being clearly irrelevant in the case at hand. Incidentally, the Panel observes that such a liberal attitude in the admission of evidence should not come as a surprise, given that intra-association disciplinary proceedings (and thus the ensuing appeal arbitration proceedings) are, by their very nature, less formalistic and guarantee-driven than criminal proceedings.
95. According to the Swiss Federal Tribunal, the normative content of “human dignity” cannot be determined explicitly and exhaustively. Nevertheless, the Federal Tribunal stressed that human dignity is inseparable from the human condition and from the human beings (ATF 132 I 49, at consid. 5.1). In view of this, the Panel is of the opinion that the quoted FIFA rule tends to exclude from the evidentiary process proofs obtained as a result of, or connected with, acts of physical or psychological violence, brutality or any other forms of inhuman or degrading treatment. In the Panel’s view, the facts of this case do not allow to conclude that

the taking of the Recordings violated human dignity. The Panel remarks that the Appellant was not subject to any threat or violence, his meeting with the Reporter was freely agreed upon and was comfortably held in a hotel bar, and his video images do not show him in any degrading situation. In short, the Recordings appear to be permissible evidence under article 96 of the FDC.

96. Nevertheless, it is not enough for FIFA to respect its own rules. Indeed, while Swiss law endows associations with a large autonomy, their regulations cannot infringe their members' personality rights, unless such infringement is legitimate (see *infra* at 100) within the meaning of Swiss law (V. JEANNERET, O. HARI, in Pichonnaz, Foëx, *Commentaire romand*, Bâle, 2010, ad art. 63, para. 2 and ff, p. 474; J.-F. PERRIN, C. CHAPPUIS, *Droit de l'association*, 3ème édition, Genève, Zurich, Bâle, 2008, ad art. 63, p. 41).
97. Accordingly, the evidence allowed by article 96 para. 2 FDC must in any event be in compliance with the principle of protection of personality rights within the meaning of article 28 CC.

#### **VI.5 THE PROTECTION OF THE APPELLANT'S PERSONALITY RIGHTS**

98. The legal basis for personality rights are articles 27 and 28 CC. Article 27 CC protects the personality from excessive contractual duties and article 28 CC from illegal infringements by a third party. Only the latter provision is relevant here.
99. Article 28 CC states the following:

- «1. *Celui qui subit une atteinte illicite à sa personnalité peut agir en justice pour sa protection contre toute personne qui y participe.*
2. *Une atteinte est illicite, à moins qu'elle ne soit justifiée par le consentement de la victime, par un intérêt prépondérant privé ou public, ou par la loi»;*

Or translated in English:

- «1 *Any person whose personality rights are unlawfully infringed may apply to the court for protection against all those causing the infringement.*

2 *An infringement is unlawful unless it is justified by the consent of the person whose rights are infringed or by an overriding private or public interest or by law».*

100. The guarantee of article 28 CC extends to all of the essential values of an individual that are inherent to him by his mere existence and may be subject to attack (ATF 134 III 193, at consid. 4.5, p. 200). According to article 28 para. 2 CC, an attack on personality is unlawful, unless it is justified by (i) the victim's consent, (ii) an overriding private or public interest, or (iii) the law. It follows from this provision that such an attack is in principle unlawful but it can be redeemed to lawfulness if one of the three listed justifications is proven by the perpetrator. Unlawfulness is an objective concept, such that it is not crucial that the perpetrator be in good faith or be ignorant that he is involved in harming a personality right (ATF 134 III 193, at consid. 4.6.2, p. 201). The Panel will need to assess the situation on the basis of an objective scale of values and not in consideration of the victim's perception or sensitivity (N. JEANDIN; in Pichonnaz, Foëx, *Commentaire romand*, Bâle, 2010, ad. art. 28, para. 67 and ff, p. 261).
101. The Panel harbours no doubt that, in general terms, the right to privacy lies within the personality rights protected by article 28 CC. The Panel is also convinced that the Reporter's furtive conduct intruded into the Appellant's private life, as he was not advised that his private conversation was being recorded. However, the question here at stake is not whether the Reporter violated the Appellant's right to privacy but, rather, whether the use of the Recordings as evidence in this arbitration might violate his personality rights.
102. Taking into account the three possible justifications under article 28 para. 2 CC (*supra* at 100), two can be easily discarded – the victim's consent and the law – as they are clearly inapplicable to the case at hand. Therefore, the case falls on the evaluation whether there is an “overriding private or public interest” that might justify the use of the Recordings as evidence in these proceedings.



## **VI.6 THE BALANCE BETWEEN THE APPELLANT'S AND OTHER PRIVATE OR PUBLIC INTEREST**

103. The Panel has to conduct a balancing exercise to decide which interest should prevail, namely the Appellant's private interest in not suffering an attack on his personality or the private interest of other individuals or entities, or the public interest, in perpetrating such attack. In this case, the balancing exercise must assess whether the Appellant's interest to keep his conversation private prevails over the FIFA's (and others') interest in disclosing them within these disciplinary proceedings.
104. With regard to the Appellant's interest, the Panel observes that at the time of the disciplinary proceedings some details of the Appellant's conversation with the undercover Reporter – including the most relevant and sensitive parts of the Recordings – had already fallen into the public domain with the publication of the article in the *Sunday Times* and on the Internet (publication that the Appellant, as said, has not attempted to judicially impede or restrain). The newspaper had not only reported the existence of the Recordings but also disclosed some of their contents. As a result, the Appellant's sphere of privacy with respect to his conversation with the Reporter has already been significantly narrowed. He can no longer reasonably expect to fully protect the privacy of a conversation that has already been partially read by hundreds of thousands of people. However, the Panel is persuaded that there still is a residual sphere of privacy of Mr Fusimalohi which is worth protecting, as (i) a good portion of his conversation with the Reporter has never been disclosed to the public so far and (ii) the publication of this award, including the transcript of the Auckland Meeting, will draw the public attention once again on that private conversation. Therefore, Mr Fusimalohi retains a concrete interest to impede the full disclosure of his conversation with the Reporter and, to that end, to block the use of the Recordings as evidence in these arbitral proceedings.
105. Yet, the Panel finds that the Appellant's interest in keeping the Recordings confidential is contradicted by the interest of FIFA and of other private and public

stakeholders in disclosing the full content of the Recordings and in using them for disciplinary purposes:

- There certainly exists a general public interest in the exposure of illegal or unethical conduct, such as corruption or other forms of dishonesty in relation to the awarding of the organization of a renown sporting event;
- There certainly is a private interest of FIFA to verify the accuracy and veracity of the information included in the *Sunday Times* article and, if necessary, to restore the truth and its image, given that the article described the whole FIFA organization as prone to corruption and questioned the impartiality and transparency of the bidding process for the organization of the World Cup;
- FIFA, like any other private association, has also a vested interest in identifying and sanctioning any wrongdoing among its officials and its direct or indirect members so as to dissuade similar conducts in the future;
- There is also a private interest of all the national football associations which were or will be candidates to host the FIFA World Cup in being fully informed and possibly reassured about the efficacy, transparency and correctness of the bidding process;
- Given the amount of public money notoriously spent by governments and public organisations to support the bids presented by their football federations and the well-known impact of the FIFA World Cup on a country's economy, there clearly is a public interest of each government pledging to support a bid (as well as of its taxpayers) to know whether the awarding of the FIFA World Cup is conditioned or altered by corrupt practices of football officials;
- Finally, there is an interest of the general public, and especially of the football fans and of the peoples of the unsuccessful candidate countries, in being comforted about the fact that the FIFA 2018 and 2022 World Cups were awarded in a fair, impartial and objective manner.

106. In light of the above, the Panel has no difficulty in finding that the balance of interests definitely tilts in favour of the disclosure and utilization as evidence in these arbitral proceedings of the evidentiary material collected by the *Sunday Times*

and passed on to FIFA. Considering that the infringement of the Appellant's personality rights is justified by overriding public and private interests, the Panel thus holds that the Recordings submitted by the Respondent must be admitted as evidence into these arbitral proceedings.

107. The Panel must also ascertain whether the use of the Recordings might be in violation of Swiss procedural public policy. To this end, the Panel deems it appropriate to take particularly into account the following elements:
- (i) the nature of the conduct in question and the seriousness of the allegations that have been made;
  - (ii) the ethical need to discover the truth and to expose and sanction any wrongdoing;
  - (iii) the accountability that in a democratic context is necessarily linked to the achievement of an elite position (be it in a public or private organization);
  - (iv) the general consensus among sporting and governmental institutions that corrupt practices are a growing concern in all major sports and that they strike at the heart of sport's credibility and must thus be fought with the utmost earnestness (cf. TRANSPARENCY INTERNATIONAL - CZECH REPUBLIC, *Why sport is not immune to corruption*, Council of Europe – EPAS, 1 December 2008); and
  - (v) the limited investigative powers of sports governing bodies in comparison to public authorities.
108. On the basis of those considerations, the Panel is of the view that in this case the use of the Recordings in a disciplinary context does not lead to an “intolerable contradiction with the sentiment of justice” and is not “incompatible with the values recognized in a State governed by the rule of law” (see *supra* at 79). Therefore, the Panel holds that the admission of the Recordings as evidence in these arbitration proceedings does not violate Swiss procedural public policy.
109. Finally, the Panel is not persuaded by the Appellant's contention that the evidentiary value of the Recordings is impaired by the fact that FIFA allegedly refused to obtain from the *Sunday Times* further phone conversations that the

Appellant had with the supposed representatives of *Franklin Jones* and which were probably recorded. First, the Panel notes that FIFA did request all the recordings and that if the *Sunday Times* did not provide everything it had, this is not the responsibility of FIFA. Second, the Panel is of the opinion that even if further recordings did exist, whatever their content, they could not change the content of what was said in the Auckland Meeting.

110. In this connection, the Panel remarks that the Appellant has not claimed, nor is there any proof, that the Recordings are not authentic or have been manipulated. In addition, the arbitrators have extensively and personally listened to and watched the Recordings, and find them to be absolutely reliable in showing in all details the Appellant's attitude and conduct during the Auckland Meeting with regard to the FIFA World Cup bidding process.
111. In conclusion, the Panel finds that the Recordings are admissible and reliable evidence in this arbitration and that no proof or convincing argument was adduced in this case indicating that FIFA has been acting improperly in relying on such evidence in the disciplinary proceedings against the Appellant and in the ensuing appellate arbitration.
112. However, these findings do not imply that the Panel believes FIFA is entitled to remain passive and to occasionally rely on accidental evidence in addressing issues of corruption. In order to promote transparency in its organization and correctly implement its ethical rules, FIFA is expected to continue to be proactive to prevent risks of corruption among its officials and to vigorously investigate, with lawful means and possibly seeking cooperation with judicial authorities, any attitudes or acts that appear suspicious.

## **VII. THE MERITS**

113. The FIFA Appeal Committee found the Appellant guilty of infringement of article 3 para. 1, article 3 para. 2, article 3 para. 3 (General Rules), article 9 para. 1 (Loyalty and confidentiality), article 11 para. 1 (Bribery) and article 14 para. 1

(Duty of disclosure and reporting) of the FCE. In this appeal arbitration the Appellant claims to be innocent while FIFA confirms its charges against him.

114. A common subjective requirement of the above mentioned provisions of the FCE is the status of “official” of the person committing the violation. Therefore, before examining the merits of the above quoted provisions, the Panel must ascertain, as a preliminary issue, whether the Appellant is an official under the applicable FIFA rules.

### **VII.1 OFFICIAL STATUS OF THE APPELLANT**

115. Article 1 para. 1 FCE reads as follows:

*«Officials are all board members, committee members, referees and assistant referees, coaches, trainers and any other persons responsible for technical, medical and administrative matters in FIFA, a confederation, association, league or club».*

116. In view of the high positions held by the Appellant within the Tonga FA (Secretary General), the OFC (member of the Executive Committee) and FIFA itself (member of the FIFA Olympic Tournaments Committee) at the time of the relevant facts (see *supra* at 3), the Panel has no hesitation in finding that the Appellant was then an “official” as defined in the FCE. In any event, the Appellant never claimed otherwise (the Appellant rather claimed that he was not performing his official functions at the time of the interview, but this argument will be dealt with *infra* at 156).

117. Given that the subjective requirement of being an “official” is met, the provisions of articles 3, 9, 11 and 14 are all applicable to the Appellant. The Panel will start the analysis from Article 11, both for its significance and because the Appellant claims that if he is not found guilty of bribery, he cannot be found in breach of articles 3, 9 or 14 FCE.

### **VII.2 ARTICLE 11 PARA. 1 FCE (BRIBERY)**

118. In essence, the Appellant claims that the available evidence does not establish that he has breached the FCE. He contends that the requirements of article 11 FCE are

not met, because the Reporter made no unequivocal offer or promise to him in return for the information given and the Appellant has never confirmed that a salary for his services as a board member of *Franklin Jones* was agreed. In addition, he has not accepted nor taken any money. Any possible salary including any possible involvement was still being negotiated and the “*information that was given at the 25 September meeting was given freely and without any certainty or commitment of a money payment or actual engagement for services on the Advisor Board*”. According to the Appellant, Article 11 para. 1 FCE “*requires that the official must not accept a bribe i.e. actually do it. To merely discuss, negotiate or do something that appear to be a bribery or possible bribery is not sufficient for a conviction under article 11*”. The Appellant alleges that, in his mind, he was having a job interview and was simply trying to impress his prospective employers.

119. Article 11 para. 1 FCE reads as follows:

«11. *BRIBERY*

*1. Officials may not accept bribes; in other words, any gifts or other advantages that are offered, promised or sent to them to incite breach of duty or dishonest conduct for the benefit of a third party shall be refused».*

120. The Panel observes that article 11 para. 1 FCE consists of two phrases. The first phrase reflects the basic principle according to which officials may not accept bribes. The second phrase makes clear that football officials must be liable to a high standard of ethical behaviour and actively turn down any potential involvement in dishonest practices, by setting out three cumulative elements of the offence:

- a) A gifts or other advantage must be offered, promised or sent to an official;
- b) The official must be incited to breach some duty or to behave dishonestly for the benefit of a third party;
- c) The official has an obligation to refuse.

121. Article 11 FCE requires that these three elements are all present in order to find a violation. They will be separately examined hereafter.

**a) *Gifts or other advantages offered, promised or sent***

122. With respect to the first element, the Panel notes that the wording of article 11 para. 1 FCE – “*any gifts or other advantages that are offered, promised or sent*” (see *supra* at 119) – is deliberately broad. The advantage can take any form and need not actually materialize as it is sufficient that someone “offers” or “promises” it. In other words, article 11 para. 1 FCE does not require that a gift or other advantage is actually agreed upon or received by the official.
123. The Panel also notes that article 11 para. 1 FCE makes reference to the offer, promise or delivery of “*any*” gifts or other advantage. In the Panel’s view, this means that the type or form of the advantage is of no relevance; it can be money or any other benefit, even not economically quantifiable (for instance, a career advancement).
124. The Panel is of the view that in the case at hand an advantage was indeed offered to the Appellant in connection with the pursuit of votes for the American bid. The offered position on the *Franklin Jones* advisory board would have been well paid and was clearly connected, at least in the first period, to the lobbying activity within FIFA. While the preliminary emails from “Claire Murray” could still be taken as making reference to a wholly transparent activity – this might explain why, when a Tongan lawyer (Mr Tevita Poasi Tupou KC) read those emails, that he did not find them suspicious or objectionable – the proposition made by the Reporter very early in the Auckland Meeting obviously linked the offered position to the Appellant’s task of lobbying in favour of the United States bid among the FIFA Executive Committee members:
- «... if we were to hire you, then you might be able to open doors for us, talk to people you knew in FIFA, maybe sound out some of the FIFA Executive Committee members ...»* (para. 21 of the transcript).
125. The evidence demonstrates that, immediately after that clear proposition, the Appellant wanted to know how his collaboration with *Franklin Jones* would benefit him (para. 30 of the transcript), what it would cover (paras. 32 ff of the transcript) and how much his remuneration would amount to (paras. 36 ff of the transcript).

The Appellant confirmed that he would not work for less than the rate fixed at FIFA level, which amounted to approximately USD 100,000 a year (paras. 40 ff and 311 of the transcript). The Appellant also entered into the details of his travelling expenses (paras. 314 ff of the transcript) and daily pocket allowance (paras. 406 ff of the transcript). Concerning the expenses incurred by the Appellant in connection with the Auckland Meeting, the Reporter expressly gave his word that they would be paid for (paras. 321 ff, 402 ff and 428 ff of the transcript).

126. In the Panel's view, the Appellant's explanation according to which he only went to a job interview does not lend much support to his case. The Panel remarks that the job for which the Appellant was being interviewed quickly appeared to be of objectionable nature; however, this did not hold him back and did not make him try to disengage from the interview. As already noted, at the outset of the Auckland Meeting the Reporter made clear that the idea was to find unofficial ways to promote the American bid, by looking for behind-the-scenes deals (paras. 19 ff of the transcript). This was clearly understood by the Appellant, who rapidly addressed the core issue, i.e. who were the members of the FIFA Executive Committee whose voting could be influenced (paras. 52 ff of the transcript).
127. The Panel finds also quite unpersuasive the Appellant's argument that he could perform a legitimate testimonial campaign for the United States' bid in the same way as Zinedine Zidane supported the Qatari bid. The argument is implausible because, independently of whether Mr Zidane is or is not a FIFA official, Mr Zidane's support for the Qatari bid was public and transparent while the Appellant did not want to be publicly acknowledged for his role in helping the American bid (he said at paras. 100-106 of the transcript: "*I need to be kept quiet*", "*I'm supposed to be silent on all of this*" and "*this is all strictly confidential*"). In addition, the notoriety of Mr Fusimalohi is not even comparable to that of Mr Zidane and it does not seem that he can seriously claim to be a celebrity that could play a testimonial role in a marketing campaign in favour of a bidding country.
128. The Panel is also not persuaded by the Appellant's argument that in Auckland he simply gave away his information and advice for free. In the Panel's opinion, the Appellant was clearly expecting to be rewarded for his valuable insider



information. The careful manner in which he negotiated with the Reporter the details of his remuneration, his reimbursements and his daily pocket allowance (paras. 30-42, 312-322 and 407-431 of the transcript) proves beyond any doubt that he expected a financial return.

129. At the hearing, the Appellant declared that he was interested in the position at *Franklin Jones* not so much with regard to the activity related to the awarding of the FIFA World Cups but for the other aspects involved, such as marketing and communication. However, as acknowledged by the Appellant himself, those other aspects of the job were not specifically discussed during the Auckland Meeting. The Panel notes that the Reporter made it clear that the Appellant's assistance was required until December 2010 but that their collaboration might be extended, depending on the success obtained with the World Cup bid project (paras. 434 ff of the transcript).
130. On the basis of the evidence before it, the Panel is of the view that the Appellant realized that he was offered some significant money in exchange for an improper and shady lobbying activity. In spite of this awareness, the Appellant set out the conditions under which he would assist *Franklin Jones*. The attitude of the Appellant throughout the whole Auckland Meeting clearly establishes that his collaboration with the alleged lobbyists was linked to the personal profit he could make.
131. In short, the Panel is comfortably satisfied that a gift or other advantage was offered to the Appellant and that, accordingly, the first requirement of article 11 para. 1 FCE is met.

***b) Incitement to breach duty or behave dishonestly for the benefit of a third party***

132. This second element of article 11 para. 1 FCE relates to the purpose for which the advantage is offered and focuses on the offeror's intent, not the offeree's. The offeror must aim at inciting football officials to breach their duties or to engage in dishonest conduct which would – if it eventually occurs – benefit a third party. It results from the wording of the provision that the offeror is not necessarily the

beneficiary of the offence and that there is no need for an actual breach of duty or dishonest conduct to occur, as it is enough for the offeror to “*incite*” (i.e. to encourage, instigate or provoke) such behaviour.

133. In view of the foregoing, it appears that the advantage offered or promised need not have effectively influenced the conduct of the official. As a matter of fact, article 11 para. 1 FCE links the official’s obligation to refuse the offer to the purpose for which the offer is made, that is to incite breach of duty or dishonest conduct. Article 11 para. 1 FCE does not require that the official actually breach duty or behave dishonestly. Obviously, the official must realize that the offer of an advantage is linked to some breach of duty or dishonest conduct that the offeror requires from him; otherwise, the official’s obligation to refuse would not be prompted.
134. In the Panel’s opinion, the evidence clearly shows that the offer made by the Reporter was to incite the Appellant to breach his duty or to act dishonestly for the benefit of a third party. The supposed lobbyist expressly mentioned the link between the advantage offered and the way the Appellant was required to act (*inter alia* paras. 19, 21, 51 ff, 233 ff, 266 ff, 285 ff, 402 ff, 440 of the transcript). In particular and in the beginning of the Auckland Meeting, the Reporter pointed out that the Appellant’s role was to use his connections to open doors (para. 21 of the transcript), to approach members of the FIFA Executive Committee in order to influence their vote (*ibidem*) and/or to advise *Franklin Jones* on the best possible ways to assist the American bid (*inter alia* paras. 19, 21, 51, 378, 402 of the transcript). In response, the Appellant confirmed that his personal status due to the various former and present positions within FIFA and OFC “*doesn’t deny [him] the many privileges of contacts at FIFA*” (para. 22 of the transcript) and so “[*he has*] a great deal of friends out there” (para. 24 of the transcript) and that he was “*happy to give [the Reporter/consortium] as much advice and inside information to what’s going on*” (para. 378 of the transcript).
135. The Panel finds that the Appellant understood the Reporter’s intention and purpose very well, because of the following circumstances:

- At an early stage of the conversation, the Appellant offered to “*sit down, go through the list of the 24 members*” (para. 52 of the transcript), obviously in order to identify who could and who could not be influenced (paras. 52 ff, 86 ff., 167, 189 ff; 213 ff, 380 ff of the transcript) and on whom *Franklin Jones* should concentrate its efforts (para. 189 of the transcript). The Appellant even offered to gather as much information as possible during the FIFA and OFC meetings to be held in October 2010, then to report to *Franklin Jones*, before they “*go one by one with the whole 24 members*” and work out exactly how to proceed from there (paras 378 ff of the transcript). The Appellant also concluded: “*As I said, I should know everything by then. And then we can use it as a benchmark to other offers, but I don’t think it’s gonna be ten million. It would be a bit outrageous for anyone to offer ten million to us*” (para. 386 of the transcript).
- More than once the Appellant gave his guidance or assent on how to influence members of the FIFA Executive Committee (paras. 98 ff, 110 ff, 117, 171, 193, 308, 331, 391 ff of the transcript). He suggested or approved the ideas to offer assistance in training and development for the national teams of the concerned members of the FIFA Executive Committee (paras. 98 ff, 171, 308 of the transcript), to buy the votes with plain money (paras. 110 ff, 193, 391 ff of the transcript) or with real estate in the United Kingdom owned by an off-shore company (paras. 332-341 of the transcript). He even said that to offer real estate owned by an off-shore company was a better solution than money as it does not leave any trace (paras. 339-341 of the transcript). The Appellant also suggested *Franklin Jones* to organize meetings in Zurich to meet as many people as possible (para. 225 of the transcript).
- The Appellant was also aware of the unethical nature of what he was doing and ready to do, as he underlined that he was “*supposed to be silent on all of this*” (para. 104 of the transcript), and despite the fact that “*this is all strictly confidential*” (para. 106 of the transcript), he was letting the Reporter “*in a lot of information*” (para. 108 of the transcript). He did not ignore the conflict of interests between his assistance to *Franklin Jones* and his position within the

OFC, as he could not be seen “*to not support Australia*” (paras. 269 and 277 of the transcript) or to be seen as being actively involved for another bid (paras. 370 ff of the transcript).

- When the Reporter asked him “*if FIFA were to find out that we were offering members incentives, would they do anything about it?*” (para. 345 of the transcript), the Appellant answered that “*Oh yes, yes, it’s going to be a big problem*” (para. 348 of the transcript), that “*It has to be strictly confidential*” (para. 350 of the transcript) and he suggested that many FIFA officials abide by the alleged eleventh commandment of the CIA “*just don’t get caught, don’t get caught*” (para. 352 of the transcript).
- The Appellant appears to be perfectly proficient in English. His international career, his conversations with the Reporter and his testimony at the hearing prove beyond any doubt that he understands and expresses himself in English very well.

136. In view of the above circumstances, the Panel is comfortably satisfied that the Appellant well understood that he was being incited by some American companies to behave dishonestly – i.e. to actively cooperate in corrupting the voting process related to the awarding of the FIFA World Cups – in order to enhance the chances of the United States bid and benefit the American companies. Accordingly, the Panel holds that the second requirement of article 11 para. 1 FCE is thoroughly satisfied in accordance with the required standard of proof (cf. *supra* at 92).

***c) Obligation to refuse the improper offer***

137. The third element of article 11 para. 1 FCE is the obligation for an official who receives an improper offer to positively refuse such offer upon its making rather than to merely omit to act upon it. In other words, an official cannot escape liability by remaining inactive or silent in response to an attempt to corrupt him. In that regard, the Panel remarks that if no obligation were provided to actively refuse an improper offer, bribery could only be found once the bribe was actually accepted and collected, which would often be impossible to prove for a private association with no investigative powers, compared to those of a judicial authority.

138. The Panel is of the view that there cannot be any ambiguity or uncertainty in fighting corruption in sports (cf. CAS 2009/A/1920 *FK Pobeda, Zabrcanec, Zdraveski v. UEFA*, para. 85). By the same token, there cannot be any ambiguity or uncertainty on the part of officials in refusing any improper offer. In particular, officials as highly ranked as the Appellant must always, in all manner of circumstances, display a behaviour that is completely honest and beyond any suspicion. In the absence of such flawless, impeccable and transparent behaviour by top football officials, the public at large and football stakeholders will seriously doubt the rectitude and integrity of football organizations as a whole. This public distrust may eventually extend to the authenticity of sporting results and can destroy the essence of the sport. In this respect, the Panel wishes to refer to a previous CAS award, whose words, *mutatis mutandis*, could serve as guidance in this case:

*«The Panel notes, quite obviously, that honesty and uprightness are fundamental moral qualities that are required in every field of life and of business, and football is no exception. More specifically, however, the Panel is of the opinion that the notion of integrity as applied to football requires something more than mere honesty and uprightness, both from a sporting and from a business point of view. The Panel considers that integrity, in football, is crucially related to the authenticity of results, and has a critical core which is that, in the public's perception, both single matches and entire championships must be a true test of the best possible athletic, technical, coaching and management skills of the opposing sides» (CAS 98/200 AEK Athens & Slavia Prague v. UEFA, para. 56).*

139. Indeed, in the Panel's opinion, the football officials' obligation to actively and unambiguously – one could even say loudly – refuse any bribe or other forms of corruption is importantly related to the fact that the public must perceive football organizations as being upright and trustworthy, otherwise both the sporting and business appeal of football would quickly decline. It is not merely of some importance but is of crucial importance that top football officials should not only be honest, but should always be seen to be honest. The required standard of behaviour

for top football officials is very high; therefore, their conduct both on and off the field, must be impeccable. They must not allow themselves to be dissuaded by an improper interference.

140. Therefore, the question is whether the Appellant's conduct was such that it was unambiguously a rejection of the offered bribe and that the offeror (as well as any bystander) would imply and conclude that the attempted corruption failed.
141. In the Panel's view, the answer to that question is clearly negative. For the reasons referred to above, the Appellant agreed to work for *Franklin Jones* and was ready to start "at any time" (para. 355 of the transcript). He is the one who suggested to meet again in the second half of October 2010 to discuss more thoroughly "the list of 24 members" (paras. 362 ff, 378 ff), in order to "quickly go through everything before the ex-co meeting of the 22<sup>nd</sup>" (para. 448).
142. The Appellant contends that, after the Auckland Meeting, there were some further phone conversations between him and the Reporter, implying that in those conversations he might have refused the *Franklin Jones*' offer. The Appellant argues that he has been prevented from proving his case because FIFA did not try to obtain those recordings from the *Sunday Times*. In this respect, the Panel is of the view that the recordings of those alleged further conversations would not have helped the Appellant's case. Indeed, even if he had in fact rejected the offer at that stage, it would have been too late. An obviously dishonest, shady and illegal offer such as that put forward by *Franklin Jones* should have been refused by the Appellant on the spot. As already noted, top football officials are held in high regard and must display a very high standard of behaviour, to prevent the obvious suspicion that they are being lured into a dishonest conduct (see *supra* at 139). In short, the Panel is of the view that the supposedly missing evidence, whatever its content, would not affect the outcome of this case.
143. In conclusion, in view of the evidence before it, the Panel is fully satisfied, bearing in mind the seriousness of the charge, that the Appellant actively, explicitly and specifically "accepted" the improper offer, rather than refuse it by his conduct, as he claims. Accordingly, the Panel holds that the third requirement of article 11 para. 1 FCE is also met.

*d) Conclusion with regard to article 11 para. 1 FCE*

144. In conclusion, the Panel is fully satisfied in light of all the above, including its personal conviction and the seriousness of the allegation, that the Appellant did violate article 11 para. 1 FCE.

**VII.3 ARTICLE 14 PARA. 1 (DUTY OF DISCLOSURE AND REPORTING)**

145. In his appeal brief, the Appellant did not submit any argument in relation to his alleged breach of duty of disclosure and reporting. At the hearing before the CAS Panel, he simply explained that he had nothing to report to FIFA as he felt like he had done nothing wrong.

146. Article 14 para. 1 FCE reads as follows:

*«14. DUTY OF DISCLOSURE AND REPORTING*

*1. Officials shall report any evidence of violations of conduct to the FIFA Secretary General, who shall report it to the competent body. »*

147. This provision lays down an obligation to disclose, in the sense that the officials must fully and immediately report to FIFA “*any evidence of violations of conduct*”, which obviously include any inappropriate approach made.

148. There is no doubt that the Appellant was well aware of the fact that the objectives pursued by *Franklin Jones* constituted a “violation of conduct”. He even informed the Reporter that, should FIFA know about the lobbyists’ scheme and intention, “*it’s going to be a big problem*” (para. 348 of the transcript). He insisted on the fact that their collaboration had to remain “*strictly confidential*” (para. 350 of the transcript). In that context, he even made reference to the alleged eleventh commandment of the CIA “*just don’t get caught, don’t get caught*” (para. 352 of the transcript).

149. In other words, the Appellant deliberately wanted concealed from FIFA deeds which he knew to be in breach of the FIFA rules of conduct. The evidence shows that he never had the intention to report to FIFA or to the OFC the fact that a company operating under the name *Franklin Jones* approached him and asked him to assist it in its scheme to bribe some members of the FIFA Executive Committee.

150. Finally, at the hearing before the CAS, the Appellant declared that, after the Auckland Meeting and because he had doubts about *Franklin Jones*' true identity, he allegedly contacted the Reporter to let him know that he would not work with him as long as he did not get more information regarding the said company. However and in spite of his suspicions, the Appellant did not feel compelled to immediately and spontaneously report to FIFA the Reporter's approach.

151. In conclusion, the Panel is comfortably satisfied, in accordance with its personal conviction and keeping in mind the seriousness of the allegation, that the Appellant did violate article 14 para. 1 FCE.

#### **VII.4 ARTICLE 3 (GENERAL RULES) AND ARTICLE 9 PARA. 1 FCE (LOYALTY AND CONFIDENTIALITY)**

152. The Appellant is of the opinion that during the Auckland Meeting he was not acting "*in the performance of his duties*" as he genuinely believed that he was being interviewed for a job. Besides, the Appellant asserts that the type of advice he gave to the Reporter was general and could have been given by anybody and was definitely not linked to his position as a FIFA official. Therefore, the requirements of articles 3 and 9 FCE are not met. He further insists that in the absence of any ethical guidelines from FIFA, officials cannot be expected to guess when the boundaries of what is acceptable are overstepped.

153. Article 3 FCE reads as follows:

*«1. Officials are expected to be aware of the importance of their function and concomitant obligations and responsibilities. Their conduct shall reflect the fact that they support and further the principles and objectives of FIFA, the confederations, associations, leagues and clubs in every way and refrain from anything that could be harmful to these aims and objectives. They shall respect the significance of their allegiance to FIFA, the confederations, associations, leagues and clubs and represent them honestly, worthily, respectably and with integrity.*



2. *Officials shall show commitment to an ethical attitude while performing their duties. They shall pledge to behave in a dignified manner. They shall behave and act with complete credibility and integrity.*

3. *Officials may not abuse their position as part of their function in any way, especially to take advantage of their function for private aims or gains ».*

154. This provision of the FCE provides for the manner in which an official can behave. The standards are high as the officials are required to “*refrain from anything that could be harmful to these [FIFA’s] objectives*” (article 3 para. 1 FCE), “*behave with complete credibility and integrity*” (article 3 para. 2 FCE) and “*not abuse their position as part of their function in any way, especially to take advantage of their function for private aims or gains*” (article 3 para. 3 FCE).
155. Article 9 para. 1 FCE states as follows: “*While performing their duties, officials shall recognise their fiduciary duty, especially to FIFA, the confederations, associations, leagues and clubs*”. This provision imposes on officials the duty to comply with obligations of loyalty and good faith, which include the obligation to put FIFA’s interest first and abstain from doing anything which could be contrary to FIFA’s interests.
156. The Panel is not persuaded by the Appellant’s argument that he was not “*performing his duties*” when he took part in the Auckland Meeting and that, therefore, articles 9 para. 1 and 3 para. 2 FCE should not be applied. It is the Panel’s view that an official is “*performing his duties*” whenever he/she is involved in something (a conversation, an activity, etc.) that is related to or connected with his position(s) in football. The Panel finds that the Appellant was given an offer exactly because he still held important positions in football, both at national and international level; indeed, at the commencement of the Auckland Meeting the Appellant told the Reporter of his positions within the Tonga FA and the FIFA Olympic Tournaments Committee as well as his former position as a member of the FIFA Executive Committee (see paras. 1-26 of the transcript). The Appellant thus took part in the meeting being aware that he was sought after for his high-ranking positions within football; accordingly, the Panel is of the view that the Appellant was (disloyally) “*performing his duties*” during the Auckland Meeting and that,

whilst performing these duties, he always had to bear in mind, as a high ranking official, his “fiduciary duty” to FIFA, the OFC and the Tonga FA. The intent of articles 9 para. 1 and 3 para. 2 of the FCE should not be interpreted the way the appellant submits, that a violation may occur only during official meetings, because if that were to be so, then the rule would specifically state that officials perform their duties only during official meetings. But that is not the case here.

157. This said, the Panel is convinced that, through his actions (as described above in relation with article 11 FCE), the Appellant damaged FIFA’s image and credibility. The Appellant’s conduct was obviously harmful to FIFA’s objective of preventing all methods or practices which might jeopardise the integrity of matches or competitions or give rise to abuse of Association Football (article 2 b and e of its Statutes). By giving insider information to *Franklin Jones* on the Executive Committee members likely to be bribed, the Appellant took an active part in attempting to compromise the bidding process to host the World Cup. As said, the Appellant was approached by the journalists because of his former and present positions within FIFA and OFC and because of his connections which could “*open doors*” for *Franklin Jones* (paras. 19 ff of the transcript) and give access to “*inside information*”, which the Appellant was “*happy to give*”, in particular after he had attended an OFC meeting (paras. 212 and 379 of the transcript). He was eager to accept a job which was in clear contradiction with the interests of FIFA and of his own confederation, the OFC, which had a member federation (Australia) having submitted a bid for the right to host the World Cup. The Appellant was aware of this conflict of interests (paras. 269 ff, 277 and 370 ff of the transcript). Besides, he was willing to use his position as a member of the OFC Executive Committee to “*question Australia’s stand in [a] ex-co meeting*” (para. 279 of the transcript) and to help evaluate the chances of bribing the OFC President, Mr Reynald Temarii.
158. Therefore and contrary to his contentions, it appears that the Appellant did abuse his position and did not behave with integrity when he made himself available to assist *Franklin Jones* in its project.
159. Finally, in this regard, the Panel finds unconvincing the Appellant’s contentions that, in the absence of clear ethical guidelines from FIFA, he was not in a position

to appreciate whether his actions were in compliance with the standards of conduct and duty of loyalty expected from officials. On the one hand, in case of any doubt, he could have contacted FIFA and sought assistance to assess whether there was a contradiction between his official duties and the job offered by *Franklin Jones*. For the reasons already raised in relation to article 11 para. 1 FCE, the Appellant was very much aware of the said contradictions.

160. On the other hand, the Appellant was approached by a company willing to pay him a considerable amount of money for his active assistance to buy votes in favour of the American bid for the 2018 and 2022 FIFA World Cups. The alleged representative of the said company seemed all the more determined to implement his project laced with bribes, as he travelled across the world to meet the Appellant and was considering paying members of the FIFA Executive Committee several millions in cash and/or in properties. Under such circumstances, the Appellant cannot reasonably contend that he failed to see that such an approach would not be acceptable to FIFA or not be compliant with articles 3 and 9 FCE.

161. In view of the above, the Panel is comfortably satisfied, in accordance with its personal conviction and keeping in mind the seriousness of the allegation, that the Appellant breached article 3 para. 1, article 3 para. 2, article 3 para. 3 and article 9 para. 1 FCE.

## VIII. SANCTION

162. Article 17 FCE together with article 59 of the FIFA Statutes and articles 10 ff FDC indicate which types of sanctions are applicable.

163. The FDC provide as follows, so far as material:

*«ARTICLE 10 SANCTIONS COMMON TO NATURAL AND LEGAL PERSONS*

*Both natural and legal persons are punishable by the following sanctions:*

*a) warning;*

*b) reprimand;*

*c) fine;*

*d) return of awards.*

*ARTICLE 11 SANCTIONS APPLICABLE TO NATURAL PERSONS*

*The following sanctions are applicable only to natural persons:*

*a) caution;*

*b) expulsion;*

*c) match suspension;*

*d) ban from dressing rooms and/or substitutes' bench;*

*e) ban from entering a stadium;*

*f) ban on taking part in any football-related activity.*

*[...]*

*ARTICLE 15 FINE*

*1. A fine is issued in Swiss francs (CHF) or US dollars (USD). It shall be paid in the same currency.*

*2. The fine shall not be less than CHF 300, or in the case of a competition subject to an age limit not less than CHF 200, and not more than CHF 1,000,000.*

*3. The body that imposes the fine decides the terms and time limits for payment.*

*4. Associations are jointly liable for fines imposed on representative team players and officials. The same applies to clubs in respect of their players and officials. The fact that a natural person has left a club or association does not cancel out joint liability.*

*[...]*

*ARTICLE 22 BAN ON TAKING PART IN ANY FOOTBALL-RELATED ACTIVITY*

*A person may be banned from taking part in any kind of football-related activity (administrative, sports or any other).*

*[...]*

*ARTICLE 32 COMBINED SANCTIONS*

*Unless otherwise specified, the sanctions provided for in Chapter I (General Part) and Chapter II (Special Part) of this code may be combined.*

[...]

*ARTICLE 39 GENERAL RULE*

- 1. The body pronouncing the sanction decides the scope and duration of it.*
- 2. Sanctions may be limited to a geographical area or to one or more specific categories of match or competition.*
- 3. Unless otherwise specified, the duration of a sanction is always defined. The body shall take account of all relevant factors in the case and the degree of the offender's guilt when imposing the sanction.*

[...]

*ARTICLE 41 CONCURRENT INFRINGEMENTS*

- 1. If several fines are pronounced against someone as a result of one or more infringements, the relevant body bases the fine on the most serious offence committed and, depending on the circumstances, may increase the sanction by up to fifty per cent of the maximum sanction specified for that offence.*
- 2. The same applies if a person incurs several time sanctions of a similar type (two or more match suspensions, two or more stadium bans etc.) as the result of one or several infringements.*
- 3. The body that determines the fine in accordance with par. 1 is not obliged to adhere to the general upper limit of the fine (cf. art. 15 par. 2)».*

164. As held above, the Panel found the Appellant guilty of breaching article 3 FCE (general rules), article 9 para. 1 FCE (loyalty and confidentiality), article 11 para. 1 FCE (bribery) and 14 para. 1 (duty of disclosure and reporting) FCE.
165. Match-fixing, money-laundering, kickbacks, extortion, bribery and the like are a growing concern in many major sports. The conduct of economic and business affairs related to sporting events requires the observance of certain “rules of the game” for the related activities to proceed in an orderly fashion. The very essence

of sport is that competition must be fair. This is also true for the organization of an event of the importance and magnitude of the FIFA World Cup, where dishonesty has no place. In the Panel's view, it is therefore essential for sporting regulators not to tolerate any kinds of corruption and to impose sanctions sufficient to serve as an effective deterrent to people who might otherwise be tempted to consider adopting improper conducts for their personal gain. FIFA insiders are an obvious target for those who wish to influence the appointment of the host country for the FIFA World Cup.

166. When evaluating the degree of the Appellant's guilt, the Panel must take into account the objective and subjective elements constituting the infringement, the seriousness of the facts as well as the damage that the Appellant's deeds have caused, namely to those who are directly and indirectly involved with the FIFA World Cup selection process, to the image of the FIFA and to the sport of football in general.
167. In the present case, considering the extent and consequences of the Appellant's misconduct and the positions he held at the time of the relevant facts, the various violations of the FCE must be regarded as serious.
168. To summarize, the Appellant was involved in a bribery scandal over FIFA World Cup votes, which has received extensive media coverage. The Appellant did not act only in a negligent way but deliberately violated several provisions of the FCE. In spite of the fact that the alleged lobbyist rapidly revealed his intention to corrupt members of the FIFA Executive Committee, the Appellant continued to converse with the lobbyist for more than two hours and to actually offer his services, even though he was expected not to act against the general interest of FIFA and the specific interest of his own Confederation. For the reasons already stated and revealed, the fact that the Appellant did not receive anything is of no relevance. Significantly, the Appellant was willing to engage in this illicit activity and his conduct was obviously motivated by the pursuit of personal benefit and gain.
169. The Appellant's behaviour is particularly reprehensible given his position as a member of the OFC Executive Committee and of the FIFA Olympic Tournaments Committee, and even as a public figure politically involved at national level. Whilst

holding those positions and necessarily being familiar with the FCE, the Appellant could not have ignored the unethical and unlawful nature of the *Franklin Jones* lobbyists' approach. In fact, in light of his responsibilities within FIFA and OFC, he had an ethical duty to act responsibly, to comply with ethical standards and to be a role model.

170. In view of the importance of the FIFA World Cup, of the level of this competition and of the sporting and financial interests at stake, the highest standards of behaviour must be demanded of all the people involved, in particular of members of Executive Committees at Confederation level. The whole bribery scandal and in particular the allegation related to the manipulation of the voting process regarding the FIFA World Cup selection, tarnished the reputation of the entire FIFA organization.
171. In setting the sanction, it is also necessary to take into account the range of the applicable sanctions, which include a warning, a reprimand, a fine that shall be no less than CHF 200 or 300 and no more than CHF 1,000,000, a ban from dressing rooms and/or the substitutes' bench, a ban from entering a stadium and a ban from taking part in any football-related activity. These sanctions equally apply for each of the relevant violations (article 3, article 9 para. 1, article 11 para. 1 and article 14 para. 1) of the FCE.
172. As a source of inspiration, it is interesting to observe that article 62 FDC (which is not applicable under the *lex specialis* principle) punishes active as well as passive corruption with the three following cumulative sanctions: a) a fine of at least CHF 10,000, b) a ban on taking part in any football-related activity, and c) a ban on entering any stadium. In serious cases and in the case of repetition, the ban on taking part in any football-related activity may be pronounced for life (article 62 para. 3 FDC).
173. In the present case, the FIFA Appeal Committee confirmed the decision of the FIFA Ethics Committee but reduced the sanctions to a two-year ban from taking part in any football-related activity (instead of a three-year ban) and a fine of CHF 7,500 (instead of CHF 10,000).

174. The Panel finds no mitigating factor in the Appellant's case. Indeed, the Appellant did not express any regrets for the bad publicity and damage caused to FIFA's image by the coverage of his meeting with the Reporter. Moreover, he has constantly denied any wrongdoing, let alone the violation of any provision of the FCE. At the hearing before the CAS Panel, the Appellant even claimed that he had been forced to sign the statement of apology dated 15 October 2010, thus turning down another chance to at least partially redeem himself.
175. The Appellant submits that, given his clean record and the fact that he was not the instigator of the bribery, the sanction imposed is by far too severe. The Panel accepts that, until the recent events under scrutiny in this appeal, the Appellant's reputation was untarnished.
176. In weighing the proportionality of the sanction, the Panel has also taken into account a precedent CAS case where a life ban was imposed upon a referee who failed to report repeated contacts with a criminal organization which offered him EUR 50,000 to influence a UEFA Europa League match in November 2009 (CAS 2010/A/2172 *Oriekhov v. UEFA*).
177. Accordingly, the Panel finds that, pursuant to articles 22 and 10.c FDC in connection with art. 17 FCE, a ban from taking part in any football-related activity at national and international level (administrative, sports or any other) for a period of two years as from 20 October 2010 as well as a fine of CHF 7,500 is not a disproportionate sanction and might even be deemed to be a relatively mild sanction given the seriousness of the offence. Therefore, the Panel holds that the Appealed Decision must be upheld in its entirety, without any modification.
178. This conclusion makes it unnecessary for the Panel to consider the other requests submitted by the parties. Accordingly, all other motions or prayers for relief are rejected.



## IX. COSTS

179. Articles R65.2 of the CAS Code provides that, subject to articles R65.2 and R65.4, for disciplinary cases of international level ruled in appeal, the proceedings shall be free.
180. Article 65.3 of the CAS Code provides that the costs of the parties, witnesses, experts and interpreters shall be advanced by the parties and that, in the Award, the Panel shall decide which party shall bear them, or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.
181. In the present case, the appeal must be dismissed. However, FIFA certainly has larger financial resources than the Appellant. Moreover, the Appellant's procedural conduct has been irreprehensible. Accordingly, even though the statement of costs submitted by FIFA has been duly taken into account, the Panel does not believe that it would be appropriate for the Appellant to have to pay a large amount to FIFA. In view of this, the panel will award a relatively small amount of costs' as contribution in favour of FIFA. On the other hand, the schedule of costs submitted by the Appellant, although duly reviewed, is of no relevance in the present award because the Appellant's case has been dismissed and, accordingly, he is not entitled to costs.
182. Therefore, exercising the discretion accorded by the CAS Code, the Panel finds it appropriate to order the Appellant to bear his own costs and to contribute to the costs incurred by the Respondent in an amount of CHF 10,000.

**ON THESE GROUNDS**

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

1. The appeal filed by Mr Ahongalu Fusimalohi against the decision issued by the FIFA Appeal Committee on 14 April 2011 is dismissed.
2. The decision issued by the FIFA Appeal Committee on 14 April 2011 is confirmed.
3. This award is pronounced without costs, except for the Court Office fee paid by Mr Ahongalu Fusimalohi, which is retained by the CAS.
4. Mr Ahongalu Fusimalohi shall pay the amount of CHF 10,000 (ten thousand Swiss Francs) to FIFA as contribution towards its costs.
5. All other motions or prayers for relief are dismissed.

Done in Lausanne, 8 March 2012

**THE COURT OF ARBITRATION FOR SPORT**

**Massimo Coccia**

President of the Panel

**Catherine Anne Davani**

Arbitrator

**Michele Bernasconi**

Arbitrator

**Patrick Grandjean**

Ad hoc Clerk