Translation of the Order on the Dismissal of the Criminal Proceedings of May 11, 2010 with the Public Prosecutors own Anonymisation

Canton of Zug Prosecutor's Office

II Division

2A 2005 31601
2A 2008 137 united with 2A 2005 31601
2A 2008 138 united with 2A 2005 31601

Order on the Dismissal of the Criminal Proceedings of May 11, 2010

in the investigation against

Fédération Internationale de Football Association (FIFA), FIFA-Strasse 20, 8044 Zurich

represented by Dr. Dieter Gessler, Attorney-at-law, Nobel & Hug Attorneys-at-law, Dufourstrasse 29, Postal Office 1372, 8032 Zurich

concerning **Disloyal Management**

and against

Ricardo Terra Texeira, born on June 20, 1947, citizen of Brazil,

represented by lic. iur. Hans-Rudolf Wild, Attorney-at-law, Dammstrasse 19, 6300 Zug

concerning **Embezzlement possibly Disloyal Management,**

and against

Havelange Jean-Marie Faustin Godefroid, born on May 8, 1916, citizen of Brazil,

represented by Dr. Marco Niedermann, Attorney-at-law, Utoquai 37, 8008 Zurich

concerning **Embezzlement possibly Disloyal Management**

Facts

1. On August 8, 2005, the District Attorney's Office of the Canton of Zug opened a criminal investigation against an unknown party regarding disloyal management to the detriment of Fédération Internationale de Football Association (hereinafter FIFA). The initial suspicion that led to the opening of the proceedings resulted from the taking of evidence, which was done in the context of the investigation no. URA 2001/756. These proceedings were initiated on May 29, 2001 due to a complaint of FIFA against those responsible for the management of the ISMM/ISL Group and were closed on March 18, 2005 (HD 2/1). The initiation of the investigation was based on the following findings:

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1.1 At the end of 2000, the ISMM (ISL) Group (International Sports Media and Marketing) belonged to the most import media and marketing companies in the field of sports. The different activities were structured under the parent company ISMM X1 AG and its subsidiaries, and they were processed worldwide through independent media, marketing and service companies. The Group purchased event rights as a general license or on an agency basis ("rights-in") from international sport associations, processed these to integrated sport marketing concepts and "sold" them to sponsors, television broadcasters and licensees ("rights-out") (HD 2/4, p. 28. cipher 1.1). FIFA concluded the following contracts with the Company 1/ISMM X1 AG, which are of relevance in the current proceedings (HD 2/4, p. 105, cipher 3.2.1 et seq. / concerning the legal characterization of the contracts, which are not particularly relevant to the current proceedings see: HD 2/4, p. 103 et seq.):

- Agreement of December 12, 1997 between FIFA and ISL X2 AG (Regulation of the Market) signed on behalf of FIFA by the Accused Joao Havelange and P1. According to this Agreement, FIFA conferred the marketing interests in a comprehensive manner to the ISL X2 AG until December 12, 2006. In addition to fixed compensation of CHF 200'000'000.00 a very detailed compensation regulation was made (HD 2/4, p. 123, cipher 3.7.1).

- License agreement of May 26, 1998 between FIFA and the Company 1 (Regulation on the Utilization of the Worldwide Television and Radio Broadcasting Rights for the World Cup 2002 and 2006 except for Europe and the U.S.). This was signed on behalf of FIFA by Joao Havelange. With this contract, FIFA granted the exclusive utilization of the radio and television broadcasting rights for the World Cup 2002 and 2006 to the Company 1 with the exception of Europe and the U.S. (HD 2/4, p. 123, cipher 3.6). The granting of the exclusive rights for the utilization of the rights was to be compensated by at least USD 650'000'000.00 for the World Cup 2002 and USD 750'000'000.00 for the World Cup 2006. The details for the financial regulation are of subordinate importance for the current proceedings (see HD 2/4, p. 108, cipher 3.3.1 et seq.).

- Amendments to the License agreement of March 13, 2000 between FIFA and the Company 1 (Supplementary agreement to the License Agreement of May 26, 1998). This was signed on behalf of FIFA by P2, P3 (HD 2/4, p. 105, cipher 3.2.2).

- Amendments to the License agreement of July 21, 2000 between FIFA and ISMM X1 AG (Supplementary agreement to the License agreement of May 26, 1998). This was signed on behalf of FIFA by: P2, P3 (HD 2/4, p. 106, cipher 3.2.3)

  The Company 1/ISMM X1 AG, or one of its subsidiaries, concluded, on its part, the following sublicense agreement (amongst others):

  - Agreement of June 29, 1998, between ISMM X3 AG and the Company 2/the Company 3 (Sublicense agreement: utilization of the television and radio broadcasting rights World Cup 2002 and 2006 in Brazil [HD 2/4, p. 106, cipher 3.5]). With this agreement, ISMM X3 AG conferred the rights for the utilization of the radio and television broadcasting rights for the World Cup 2002 in Brazil to the Company 2 and the Company 3. The compensation amounted to USD 220'500'000.00 and had to paid within a certain time schedule. With the agreement of December 17, 1998, the payment schedule was amended and the compensation was increased to USD 221'000'000.00 (HD 2/4, p. 124, cipher 3.7.2.1).

1.2 On December 17, 1998, the Institution 1 established, under the name Foundation 1, a

foundation under Liechtenstein law. The foundation committee of the Foundation 1 was constituted, amongst others, by the members of the board of the ISMM (ISL) Group. The statutory purpose of the foundation was the investment and management of the assets of the foundation as well as the distribution of the net income and the assets of the foundation to certain, or determinable, beneficiaries. The Company 4 was already established on the British Virgin Islands on December 1, 1997, and all its shares were transferred to the Foundation 1 on February 8, 1999. From an economic point of view, the Foundation 1 was a business unit of the ISMM (ISL) Group (HD 2/4, p. 222 et seq. cipher 12.2 et seq.). Due to a transfer of the Company 1, CHF 36’130’220.05 was credited to the account no. 193.223.31 in the name of the Company 4 at the Bank 1 (HD 2/4, p. 224 cipher 12.4). According to the opening balance sheet of the Company 1, as per May 27, 1999, the amount transferred by the Company 1 was entered in the assets as current assets and in the liabilities as “provisions for right acquisition costs”. In summary, CHF 19’380’192.00 was entered under the heading “right acquisition costs” (HD 2/4, p. 227 cipher 12.5). Where funds were used under this heading, they are a matter of “commissions, remuneration”, “finder-fees or additional acquisition payments” or of donations to individuals and decision makers of global sports, and hence they were components of new acquisitions or of a prolongation of the world wide marketing rights (HD 2/4, p. 231 et seq. cipher 12.7 et seq.).

The funds were distributed to the following beneficiaries (HD 2/4, p. 224 et seq. cipher 12.4):

Valuta	**Recipient**	**Amount in CHF**	**Amount in CHF**
03.06.1999	E1/E2	1'550'000.00	
23.06.1999	E3/E4/Check	775'750.00	500'000.00
28.06.1999	E5/E6	386'875.00	250'000.00
14.07.1999	E1/E2	1'650'000.00	
03.08.1999	E7	3'691.55	2'461.04
22.09.1999	E5/E6	386'250.00	250'000.00
22.09.1999	E5/E6t	386'250.00	250'000.00
04.11.1999	E3/E4/Check	460'440.00	300'000.00
04.11.1999	E3/E4/Check	460'440.00	300'000.00
08.11.1999	E5/E6	184'656.00	120'000.00
26.11.1999	E8	1'000'000.00	
15.12.1999	E9	12'147.20	
15.12.1999	E10	100'000.00	
22.12.1999	E1/E2	429'246.00	270'000.00
23.12.1999	E3/E11/Check	15'975.00	10'000.00
19.01.2000	E8	l'000'000.00	
20.01.2000	E12	799'750.00	500'000.00

20.01.2000	E13	159'950.00	100'000.00
20.01.2000	E1/E2	431'865.00	270'000.00
07.02.2000	E5/E6	1'654'800.00	1’000'000.00
07.02.2000	E1/E2	364'870.00	220'000.00
23.02.2000	E14	701.25	430.20
10.03.2000	E1/E2	534'400.00	320'000.00
10.03.2000	E5/E6	835'000.00	500'000.00
29.03.2000	E15	125'035.00	
04.05.2000	E13	51'675.00	30'000.00
08.05.2000	E5/E6	866'500.00	500'000.00
04.05.2000	E3/E4/Check	868'000.00	500'000.00
15.05.2000	E1/E2	466'803.00	270'000.00
31.05.2000	E8	500'000.00	
02.06.2000	E5/E6	422'875.00	250'000.00
06.06.2000	ISL X2 AG	15'000'000.00	
27.06.2000	E8	500'000.00	
05.07.2000	E16	409'650.00	250'000.00
19.07.2000	E1/E2	446'040.00	270'000.00
21.07.2000	E14	2'347.05	1'390.84
27.07.2000	ISL X4 AG	3'000'000.00	
31.07.2000	ISLX4 AG	33'532.00	20'200.00
27.07.2000	ISL X4 AG	33'600.00	
16.10.2000	E8	500'000.00	
28.11.2000	E10	90'000.00	
15.01.2001	E8	500'000.00	
	Total:	37'399'114.05	

1.3 On May 20, 2003, ISMM X1 AG in liquidation and ISL X4 AG in liquidation, both represented by the private receivership, instituted an action for rescission with the Cantonal Court in Zug against Company 4, the Foundation 1 as well as shareholders of ISMM X1 AG. The subject of the action was the aforementioned transfer of CHF 36’130’220.05 (D 8/12 et seq.). Pursuant to the agreement of February 27, 2004, the Plaintiffs concluded a settlement with E10 (as one of the Defendants) according to which he undertook to pay CHF 2’500’000.00 to the “ISMM and ISL” bankruptcy estate. In the recital clause, it is, inter alia, stated that E-10 wishes that the direct and final recipients of the payment at issue, the latter to the extent that they are directly or indirectly linked with football business, will not be made subject to any further actions for repayment (D 8/7 et seq.). The settlement sum was transferred on March 17, 2004 by A1, attorney-at-law, to the account of ISL X4 AG in liquidation (D 8/18 et seq.). In response to an enquiry from the District Attorney’s Office of the Canton of Zug, K1 of the private receivership stated that Attorney A1 indicated during the negotiations that he represented FIFA and that FIFA had a legitimate interest not to be involved in unjustified speculation concerning the Company 4-action again. “That’s why FIFA intercedes to help bring about settlements where foreign football functionaries have received commission” (D 8/168).

1.4 At the time of the opening of the proceedings, the following was certain: that the settlement sum was transferred by A1, attorney-at-law, as the legal representative of FIFA; that the amounts claimed in the “action for rescission” were based on payments made by the Company 4 or the Foundation 1 or the Company 1, but not by FIFA; that with the payment of the settlement sum, part of the claimed amount was transferred to the “ISMM and ISL” bankruptcy estates; and finally that it was ultimately suspected that FIFA paid a “third-party debt” or a part thereof. It must be considered that the payment of the settlement sum did not inevitably have to come from FIFA itself. It was conceivable that a third party that was in a contractual relationship with FIFA or held positions in the (executive) body of FIFA paid the amount with the consent of FIFA to the bankruptcy estate; FIFA expressed an interest, according to its own statement, not to be involved in speculations in connection with the bribery payments. This initial suspicion was confirmed.

2. A (not fully complete) outline of the procedural steps that occurred after the opening of the investigation and the subsequent appointment of an investigating magistrate is set forth below:

In October 2005, documents concerning FIFA were obtained from the Commercial Register of the Canton of Zurich (D 4/1/1) and documents from the proceedings, no. 2001/756, were placed on file (D 2/4/3, D 3, D 5, D 6). On October 10 and November 11, 2007, two witnesses were questioned in the Canton of Zug (D 3/13, D 3/15). On November 3, 2005, a search warrant was executed at the headquarters of FIFA in Zurich and various documents were seized (D 2/2/9, D 9 and D 10). On November 8, 2005, the authorities in Liechtenstein were asked to reverse a special reservation that was issued in the context of the investigation, no. 2001/756, and after the reversal thereof, the documents that were gathered at that time were integrated into the current proceedings (D 2/5/2, D7). On November 24, 2005, June 9, 2006 and July 11, 2006, various disclosure orders were issued, and the documents provided were placed on file (D 11/1, D 13/1, D 14/1). On January 3, 2006, a request for judicial assistance (hearings and disclosures/ D 15/1/2) was made to Andorra; and, from November 15-17, 2006, various witnesses were questioned in Andorra (D 15/1/1), whereby the edited documents were informally sent to the requesting authorities on April 2, 2007 and the entire originals on December 21, 2007 (D 15/10). On November 28, 2006, the Bank 2 was served with a disclosure request that was based on the findings obtained at an early stage of the judicial assistance proceedings with Andorra (D 16/1), and the documents provided were placed on file. On January 16, 2007, a female witness was interviewed in Erlangen, Germany, in response to a request for judicial assistance. As soon as the files on the judicial assistance from Andorra were at hand (advance copies), the Office of the Public Prosecutor III of the Canton of Zurich received an inquiry concerning the place of jurisdiction (HD 3/1 et seq.). Since the authorities in Zurich did not undertake the proceedings in Zurich, the question on territorial jurisdiction had to be submitted to the Federal Criminal Court. According to the decision of the I. Appeals Chamber on December 19, 2007, the authorities of the Canton of Zug were authorized and obliged to pursue and to assess the imposed criminal acts to the detriment of FIFA against the unknown party (HD 3/46 et seq.) As a result, on January 4, 2008, disclosure orders were submitted to the Bank 3 and the Bank 2. The files were sent to the public prosecutor’s office on February 2, March 14 and April 2, 2008 (D 17 and 18). In a letter dated April 20, 2008, the relevant individual documents were requested and subsequently placed on file. On January 11, 2008, a disclosure order was issued to FIFA.

One part of the requested files was sent to the public prosecutor's office on March 3 and 25, 2008 and the other part of the information was given with the letter dated May 2, 2008. Furthermore, the files concerning criminal proceedings that had been initiated by 11 members of the executive committee of FIFA against the president of the association were obtained, evaluated and placed on file (D 21 et seq.). On June 20, 2008, a disclosure order was submitted to the bankruptcy administrator of ISMM X1 AG and ISL X4 AG in liquidation. The relevant files were sent on July 28, 2008, evaluated and placed on file (D 2/4/54 et seq., D 20). Between January 29 and August 7, 2008, 8 witnesses were questioned in the Canton of Zug.

Based on the findings from the pre-trial discovery, proceedings were initiated against Ricardo Terra Texeira (2A 2008 137/D 23/1) and Jean-Marie Faustin Godefroid Havelange (2 A 2008 138/D 24/1) on October 1, 2008.

3. The evidence that was obtained in the course of the proceeding, no. 2 A 2005 31601, led to the following findings.

3.1 The Fédération Internationale de Football Association (FIFA) is an association pursuant to Art. 60 et seq. of the Swiss Civil Code (CC) registered in the Commercial Register of the Canton of Zurich with its domicile in Zurich. The statutes of the association have been amended several times, namely in 1990, 1992, 1994, 2000 and in 2003 (D 4/1/2). The most recent statutes of the association that are on file were adopted in an extraordinary congress of FIFA on October 19, 2003 and entered into force on January 1, 2004 (D 4/1/40). According to this version of the statutes, the purpose of FIFA is to improve football continuously and to broadcast it globally, whereby the binding effect on nations - as well as the educational, cultural and humanitarian status of football - has to be taken in consideration. In particular, the latter is to be executed as follows: by encouraging football in youth and development programs; by organizing its own international competitions; by determining rules and regulations and guaranteeing their enforcement; by controlling the association football in all its forms by taking all necessary measures to prevent a breach of the statues, regulations and decisions of FIFA as well as its rules of the game; and by preventing the occurrence of methods or practices that would endanger the integrity of matches or competitions or that may lead to abuses of the association football (D 4/1/7, Article 2 of the statutes). According to statements of FIFA, it is a non-profit organization (D 2/1/86). The revision of the statutes that took place between 1990 and 2003 did not result in any substantial modification of the purpose of the association (D 4/2/46 to D 4/2/74).

According to the statutes of the association of January 1, 2004, the association consists of the following bodies: the congress as the supreme and legislative corporate body, the executive committee as the executive body, the general secretariat as the administrative body and the permanent as well as ad-hoc committees that advise and support the executive committee with fulfilling its duties (D 4/1/13, Article 21 of the statues). The executive committee consists of 24 members (1 president, 8 vice presidents and 15 members), nominated by the confederations and unions (D 4/1/16, Article 30 of the statutes). The President of FIFA represents the association and is especially responsible for executing the decisions of the congress and the executive committee by the general secretariat. He acts as chairman in the congress, in all meetings of the executive and emergency committees

and in those committees in which he is chairman (D 4/1/17, Art. 32 of the statutes). To the extent required, all relevant deviations in the organization pursuant to the statutes of 1992 (D 4/2/630 et seq.), 1994 (D 4/2/655 et seq.), 1996 (D 4/2/679 et seq.), 1998 (D 4/2/703 et seq.), 1999 (D 4/2/728 et seq.), 2000 (D 4/2/752 et seq.) and 2003 will be mentioned in the considerations.

3.2 From 1974 until November 20, 1998, Jean-Marie Faustin Godefroid Havelange (hereinafter Joao Havelange) was the president of FIFA (D 4/2/779, D 4/1/2). Concerning Ricardo Terra Texeira, the following is of relevance but not exhaustive: he was, already in 1990, a member of the organization committee for the 1994 FIFA World Cup in the U.S. and thereafter was also a representative in the organization committees for the World Cups (D 4/2/780, D 4/2/798, D 4/2/936). Furthermore, from 1994 onwards, he was member of the executive committee of FIFA (D 4/2/806, D 4/2/816, D 4/2/826, D 4/2/834, D 4/2/843, D 4/2/855, D 4/2/877, D 4/2/895, see also D 4/2/936). He is also president of the Brazilian Football Association.

3.3 The money transfer made by the Company 1 to the Company 4 amounting to CHF 36'130'220.05 concerned assets that the ISMM/ISL Group made available in order to make payments of commission for already acquired rights and rights to be acquired in the future (D 3/1/1, cipher 13). This practice is uncontested (D 3/1 – D 3/12). The chairman of the board of directors of the Company 1/ISMM X1 AG, for example, explained that the concept whereby well-known individuals in sports were favored in order to promote sports policy and economic goals originated in the 1970s, when sports became an important factor in the economy. He was informed of the fact that ISL had been using such practices since its foundation some time after he was appointed as a member of the board at the beginning of the nineties, and when he was confronted with the Company 1. When he repeatedly insisted on stopping such favoritism, his successor, P4 of ISL[1], made clear to him that these personal relations had led to further existing commitments. The activities were relocated to a special foundation (D 3/3/1, cipher 20, D 3/10/1, cipher 2). Also the CFO of the group stated that additional payments to the actual acquisition costs had to be made with regard to the acquisition of rights. These involved payments to individuals who had helped conclude the contract (D 3/1/1, cipher 15, cipher 16).

3.3.1 ISL X5 AG, a company in the ISMM/ISL Group, paid commission from 1989 until 1998, in the context shown above, amounting to a total of CHF 122'587'308.93 (D 20/1/27 et seq.), which however, as will be illustrated below, only partially concerned the Accused. Prior to 1989, millions were paid in "pre-investments" (D 20/1/17). The aforementioned vehicle Foundation 1/Company 4 was used from 1999 to continue the payments that were made between 1989 and 1998 by ISL X5 AG. The amount of CHF 36'130'220.05 that was transferred to account no. 193.223.31 in the name of the Company 4 at the Bank 1 corresponds to the remaining balance of the total volume that was placed at the disposal of the Group in order to pay the commissions (D 20/1/30). The reasons for outsourcing these assets to the Foundation 1 are not of decisive importance for the current proceedings.

[1] In order to understand the role of P4 in the development of sport marketing, see […].

The beneficiaries of the commission were, amongst others, Joao Havelange (D 20/1/29, D 3/32/4, cipher 21, D 3/41, cipher 22 et seq., D 3/80 cipher 17 et seq.). Institution 2 and E4 (D 20/1/29). E13, a longstanding member of the executive committee of FIFA (see D 4/2/895) was, inter alia, a recipient of payments.

3.4 Ricardo Terra Texeira is the beneficial owner of the Institution 2 (D 3/68, D 18/5/4). This company had a business relationship with the Bank 4 (the bank was dissolved in a merger with the Bank 5, which in turn merged with the Bank 3) (D 18/5 et seq.).

According to non-exhaustive findings, both Joao Havelange and the Ricardo Terra Texeira are the beneficial owners of E4 (D 23/10/5, D 23/10/8, D 23/10/13). In particular, the following payments have to be attributed to the Ricardo Terra Texeira and Joao Havelange:

Payments by ISL X5 AG:

Date	Beneficiary	Currency	Amount	Currency	Amount
10.08.1992	Institution 2	USD	1’000'000.00	CHF	1'320'000.00
16.02.1993	Institution 2	USD	1’000'000.00	CHF	1'510'000.00
11.05.1993	Institution 2	USD	1’000'000.00	CHF	1'440'000.00
07.09.1993	Institution 2	USD	1’000'000.00	CHF	1'460'000.00
04.02.1994	Institution 2	USD	500'000.00	CHF	720'000.00
31.05.1994	Institution 2	USD	500'000.00	CHF	700'000,00
04.11.1994	Institution 2	USD	500'000.00	CHF	625'000.00
31.01.1995	Institution 2	USD	250'000.00	CHF	330'000.00
31.01.1995	Institution 2	USD	250'000.00	CHF	330'000.00
31.05.1995	Institution 2	USD	500'000.00	CHF	590'000.00
31.05.1995	Institution 2	USD	500'000.00	CHF	590'000.00
29.08.1995	Institution 2	USD	500'000.00	CHF	575'000.00
31.01.1996	Institution 2	USD	250'000.00	CHF	287'500.00
31.01.1996	Institution 2	USD	250'000.00	CHF	287'500.00
03.07.1996	Institution 2	USD	250'000.00	CHF	312'500.00
03.07.1996	Institution 2	USD	250'000.00	CHF	312'500.00
06.11.1996	Institution 2	USD	500'000.00	CHF	630'000.00
03.03.1997	Joao Havelange			CHF	1'500'000.00
30.05.1997	Institution 2	USD	250'000.00	CHF	367'500.00
30.05.1997	Institution 2	USD	250'000.00	CHF	367'500.00
12.11.1997	Institution 2	USD	250'000.00	CHF	352'500.00
12.11.1997	Institution 2	USD	250'000.00	CHF	352'500.00
18.03.1998	E4	USD	2'000'000.00	CHF	2'920'000.00
18.03.1998	E4	USD	500'000.00	CHF	730'000.00

24.09.1998	E4	USD	500'000.00	CHF	745'000.00
D4.02.1999	E4	USD	500'000.00	CHF	705'000.000
18.06.1997	Institution 2/ **Annulation**	USD	250'000.00	CHF	**-367'500.00**
28.11.1997	Institution 2/ **Annulation**	USD	250'000.00	CHF	**-352'500.00**
	Subtotal				19'340'000.00

Payments via the Foundation 4/Company 4:

Date	Beneficiary	Currency	Amount	Currency	Amount
	Balance of subtotal from payments by ISL X5 AG				19'340'000.00
23.06.1999	E4	USD	500'000.00	CHF	775'750.00
04.11.1999	E4	USD	300'000.00	CHF	460'440.00
04.11.1999	E4	USD	300'000.00	CHF	460'440.00
04.05.2000	E4	USD	500'000.00	CHF	868'000.00
	Total				**21 '904'630**

(D 7/19/1 until 7/19/132, D 18/16, D 19/4, D 20/1/27 et seq., D20/3/5 et seq., D 20/1/29, D 3/32/4, cipher 21, D 3/41, cipher 22 et seq., D 3/80 cipher 17 et seq.)

3.5 The aforementioned settlement of February 27, 2004, which was a decisive factor on the question of the initiation of proceedings, was concluded on the basis of the major contribution by FIFA or its attorney, A1 (D 3/15/3, cipher 10 et seq., D 20/11/23, D 20/11/26, D 20/11/28, D 20/11/31 et seq., D 20/11/56, D 20/11/62 et seq., D 20/11/78 et seq., D 20/11/90 et seq., D 20/11/106 et seq., D 20/11/140, D 20/11/148, D 20/11/150, D 20/11/156, D 20/11/158, D 20/11/165 et seq., D 20/12/23, D 20/12/26 et seq., D 20/12/28 et seq.). The declaration of disinterest of FIFA that was given in the context of the aforementioned Investigation no. URA 2001/756 was part of the settlement of February 27, 2004 (D 9/15 et seq., D 9/19 et seq., D 9/31 et seq.). Prior to the conclusion of the settlement, FIFA dealt with the problematic nature of the commission payments and had expert reports concerning this issue prepared by Professors 1 and 2 (D 11/5, D 11/6). The expert report by Professor 2 was based on the following circumstances put forward by FIFA as a hypothesis and which also contained a note stating that the hypothesis was under no circumstances confirmed: “ISL X4 AG concluded marketing contracts with sport associations. These sport associations are associations within the meaning of Articles 60-79 of the Civil Code. There are no indications that better offers were made by other sport marketing agencies. ISL X4 AG made payments to several individuals in the sport associations’ environment, which presumably must be considered as commission payments. These commission payments did not occur on a specific date, but were rather spread over several years, with two to three payments being made each year. The payments were made both prior to and after the conclusion of the marketing contracts” (D 11/6/1).

3.6 The amount that attorney A1 transferred via the Bank 6 to the bankruptcy estates of ISMM X1 AG and ISL X4 AG, to an account at the Bank 7 came in advance in two installments from the Bank 8 to his account (D 15/1/8 et seq.). The principal of both transfers was the Company 5, which is domiciled in Andorra; the company's beneficial owner is the Andorran citizen P5, and he also processed the banking transaction on a trust basis through an account in the name of the company. According to the statement made by P5, he carried out the transactions on behalf of Ricardo Terra Texeira. The amount in question was transferred beforehand within the bank from an account in the name of Ricardo Terra Texeira to the account of the Company 5 (D 15/4/1 et seq., D 15/10 et seq.). Prior to the transfer, the account, no. 400428, at the Bank 8 in the name of Ricardo Terra Texeira, was fed with assets from various accounts at the Bank 2 in Zurich. The relevant transfers were as follows:

Principal of the transaction	Valuta in-payment	Amount in USD	Recipient Account	File reference
F1	11.04.2003	459'000.00	4004028	15/4/3, 15/4/68
F2	11.04.2003	418'500.00	4004028	15/4/3, 15/4/69
F3	11.04.2003	357'500.00	4004028	15/4/3,15/4/70
F4	11.04.2003	1'216'000.00	4004028	15/4/3. 15/4/71
Total		2'451'000.00		

P5 then withdrew the in-payments in cash and paid them in to the accounts of Ricardo Terra Texeira and F2 at the same bank in cash (D 15/4/1 et seq., D 15/10 et seq.). Three of the four accounts at the Bank 2 are in the names of F1 – F3. One account is in the name of F4 (D 16/54). The relevant accounts are as follows:

Account number	Account holder	Opening date	File reference
CQUE 206-P0078232.0	F1	01.07.1998	16, 17/33
CQUE 206-P0078233.0	F2	01.07.1998	16, 17/35
CQUE 206-P704605.60L	F3	03.11.1999	16, 17/37
CQUE 206-P790860.70P	F4	23.08.2001	16, 17/30

The accounts were opened, in two cases, by means of cash deposits made by the Accused 2 amounting to USD 300'000.00 each (CQUE 206-P0078232.0 and CQUE 206-P0078233.0), by a transfer of incoming securities worth USD 300'000.00 (CQUE 206-P704605.60L) and by a wire transfer of USD 1'000'000.00 from the Bank 9. The cash deposits at the Bank 2 were preceded by a cash withdrawal of USD 600'000.00 on June 29, 1998 from account no. 24,034-2-2.002 in the name of the Institution 2, at the former Bank 4 (D 16/54).

4 After all appeals before both the Justice Commission of the High Court of the Canton of Zug and the Federal Court were finally decided, it was possible to place on file and evaluate the documents that were originally under seal from the disclosure proceedings with FIFA (D 2/10/1-D 2/10/13). Furthermore, on July 14/17, 2009, an agreement on jurisdiction was concluded with the competent authorities of the Canton of Zurich, according to which the criminal authorities of the Canton of Zug would prosecute persons unknown and Ricardo Terra Texeira and Joao Havelange for alleged criminal acts to the detriment of FIFA (AZ: 2A 2005 31601 [formerly URA 2005 1601], AA 2008 137 and 2A 2008 138). In addition, various judicial assistance procedures were initiated for the purpose of annulling the reservations of speciality, and in some cases, the results of these were already available (D 2/5/9 et seq., D 23/4/91, D 24/4/127). The prosecutor's office initiated proceedings on July 14, 2009 in order to clarify whether the parties to the proceedings were willing, based on the evidence at hand, to pay damages for the losses incurred and whether they would agree to dismiss the proceedings based on Art. 53 of the Penal Code (hereinafter "PC").

4.1 FIFA was informed that the prosecutor's office thought it would be advisable to invite the representatives and P1 to a briefing. This was in view of the state of the documents at the time and the fact that it had not been possible to allow FIFA to inspect the case files and this would still not be possible in the near future. The purpose of the meeting was to disclose the facts established, and based thereon, to explain how the proceedings might develop from that point (D 2/1/50 et seq.). FIFA welcomed the procedure, so the terms for the meeting as proposed by the prosecutor's office were specified, and on September 21, 2009, a meeting took place in the presence of P1, Dr. Dieter Gessler, attorney for FIFA, P6, Chrisitan Aebi, Chief Public Prosecutor, and Thomas Hildbrand, lead prosecutor for the case. The details are contained in the minutes of the meeting, which were signed by the Chief Prosecutor, the lead Prosecutor and the attorney for FIFA (D 2/1/114). The prosecutor's office stated that, in its opinion, the physical components (actus reus) of disloyal management pursuant to Art. 158 PC were fulfilled. Based on this premise, it had to be determined whether the proceedings initiated against an unknown person should now be brought against FIFA as a company and/or against the individuals who would be formally responsible for the actions of FIFA with regard to the matters alleged. The decision as to whom the charges would be brought against could only be determined once the criminal liability had been finally clarified. Based on the information then available, the conclusions were as follows: if a criminal investigation were initiated against FIFA, then the dismissal of the proceedings could be taken into consideration based on Art. 53 PC. These findings were based on the assumption of the prosecutor's office that the conditions for a suspended sentence were fulfilled, that the interests of the public and of the aggrieved party in a prosecution were limited and thus the requirements of lit. a and b of Art. 53 PC would be fulfilled. However, the prosecutor's office made the dismissal of the proceedings conditional on the reparation[i] being made in full for injustice suffered, meaning the coverage of damages amounting to CHF 2'500'000.00, and FIFA agreeing to pay the costs of the legal proceedings. If criminal proceedings were to be initiated against individuals, then the dismissal of the proceedings would also be possible based on Art. 53 PC. However, such a decision could not be rendered at the moment as relevant basics were lacking (D 2/1/119 et seq.).

On October 7, 2009, following the meeting, Dr. Dieter Gessler suggested holding a further meeting without its client, stating that FIFA wanted to thoroughly consider the proposal made by the prosecutor's office. The request was granted and the meeting was set for November 17, 2009. The deadline that was set on October 31, 2009 for the purpose of submitting comments on the meeting of September 21, 2009 was extended until November 30, 2009 (D 2/1/64).

4.2 On October 14, 2009, the attorney Hans-Rudolf Wild, the legal representative of Ricardo Terra Texeira, called the Chief Prosecutor, Christian Aebi, and explained that he was aware of the meeting on September 21, 2009 and the planned meeting in November 2009. He proposed that he should attend this meeting with the aim of achieving an overall solution. On October 26, 2009, the lead prosecutor contacted the attorney Wild and informed him that there was no objection to his attendance. The prosecutor's office could imagine a discontinuation of the proceedings based on Art. 53 PC if the requirements of the elements of the offence were fulfilled. However, in the view of the prosecutor's office, the suggested overall solution would also involve Joao Havelange. Arrangement should be made – if contacts existed – for Joao Havelange or his attorney also to be included in the meeting of November 17, 2009 (D 23/2/59).

After Joao Havelange also engaged Dr. Marco Niedermann as his attorney, the latter was contacted by the lead prosecutor on November 16, 2009 and the basics concerning the upcoming meeting were outlined to him. Furthermore, he was informed that the proposed solution was the same as with respect to FIFA and Ricardo Terra Texeira. Dr. Marco Niedermann confirmed that he had knowledge of the minutes of the meeting of September 23, 2009.

On November 17, 2009, a meeting took place in the presence of Dr. Dieter Gessler, attorney for FIFA, lic. iur. Hans-Rudolf Wild, attorney for Ricardo Terra Texeira, Dr. Marco Niedermann, attorney for Joao Havelange, Chrisitan Abei, Chief Prosecutor and Thomas Hildebrand, lead prosecutor. Reference is made to the minutes of the meetings concerning the details of the meeting, which was signed by all participants (D 2/1/122 et seq., D 23/2/65 et seq., D 24/2/11 et seq.).

In result, the legal representatives of Ricardo Terra Texeira and Joao Havelange were informed that the prosecutor's office considered, based on the records, reparation in the amount of CHF 2'500'000.00 each as adequate, in consideration of criteria such as the statute of limitations, connected payments/contracts, currency etc. It stated that it would comment on the terms of a possible reparation by FIFA, Ricardo Terra Texeira and Joao Havelange, as soon as the general consent to the disposition of the proceedings according to Art. 53 PC were given. It was already stated at that time that the recipient of a reparation payment – provided that FIFA was involved – would have to be a non-profit institution. The costs of the legal proceedings would be a maximum of CHF 100'000.00.

Both attorney Hans-Rudolf Wild and attorney Dr. Marco Niedermann pointed out that in order to comply with their lawyer's duty of care, an inspection of the records

was essential (D 2/1/125 et seq.). Both attorneys were permitted to inspect the records between January 11 and 31, 2010 (D 23/2, D 24/2); however, in the end, attorney Hans Rudolf Wild waived his right (D 23/2/113).

4.3.1 In a submission dated November 20, 2009, the FIFA's legal representative requested the discontinuation of the proceedings for FIFA (D 2/1/72 et seq.), and within the meaning of an alternative request, the discontinuation of the proceedings based on Art. 53 PC (D 2/1/109). For the purpose of executing the alternative request, FIFA was informed in a letter, dated December 17, 2009, of the conditions for the discontinuation of the proceedings based on Art. 53 PC, namely the payment of CHF 2'500'000.00 by FIFA into a transaction account held by the Zug prosecutor's office and the written declaration that it would pay the costs of the legal proceedings comprising a maximum of CHF 100'000.00 (D 2/1/128). In a letter dated January 7, 2010, FIFA declared that it agreed to the conditions; however, in its letter dated January 8, 2010, it made its consent conditional upon the discontinuance of the proceedings against Ricardo Terra Texeira and Joao Havelange (D 2/1/130 et seq.).

4.3.2 On January 14, 2010, attorney Wild explained by phone that his client was waiving his right to inspect the records and that he was prepared to transfer CHF 2'500'000.00 as reparation at the beginning of February. He asked the prosecutor's office to inform him of the conditions for discontinuation (D 23/2/113). In a letter dated January 18, 2010, attorney Wild was informed that the case would be discontinued in return for the transfer of CHF 2'500'000.00 by Ricardo Terra Texeira to a FIFA account. The costs of the legal proceedings, comprising a maximum of CHF 100'000.00, would be taken over by FIFA. The prosecutor's office assumed that FIFA, Ricardo Terra Texeira and Joao Havelange would reach a settlement among themselves on the sharing of the costs for the legal proceedings. The proof of payment would be provided by his client submitting the debit advice and FIFA submitting the credit advice to the prosecutor's office (D 23/2/114). In a letter dated January 22, 2010, attorney Wild gave his consent to the discontinuation of the proceedings based on Art. 53 PC and he submitted the proof of payment on March 4, 2010 (D 23/2/116).

4.3.3 On January 27, 2010, attorney Dr. Niedermann stated by telephone that he would like to meet the lead prosecutor in order to discuss the terms for the discontinuation of the proceedings under Art. 53 PC and would like to submit documents concerning the financial circumstances of his client. The meeting, arranged at short notice, took place the same day. The legal representative submitted various documents with the prospect of having them translated. Dr. Niedermann outlined that under consideration of all relevant factors for the proceedings (statute of limitations, allocation of the payments to the contracts, the actual beneficiaries of the payments, the zeitgeist at the time of payments, financial circumstances and income as well as the age of the Accused etc.), he considered a reparation of CHF 250'000.00 as reasonable (D 24/2/57). In a submission dated February 1, 2010, he handed in the documents that he had previously promised; based on the documents, it is apparent that Joao Havelange generated an income of CHF 87'350.00 in 2008, and that the assets belonging to the married couple Havelange amounted to approx. CHF 5'211'000.00 (D 24/2/97 et seq.). Based on these circumstances, the prosecutor's office informed attorney Dr. Niedermann on February 12, 2010 that the sum of CHF 500'000.00 would be adequate reparation and that the reduction of the former amount set at CHF 2'500'000.00

would, firstly, take the income and financial circumstances of the married couple Havelange into consideration and, secondly, would also (and especially) take account of the advanced age of the Accused. The amount had to be transferred by Joao Havelange to an account of FIFA, and the proof of payment would be provided by his client submitting a debit advice and FIFA submitting a credit advice to the prosecutor's office (D 24/2/117). In a submission dated March 4, 2010, attorney Dr. Niedermann agreed to the discontinuation of the proceedings based on Art. 53 PC (D 24/2/120). In a letter dated March 17, 2010, he submitted the debit advice (D 24/2/123).

4.3.4 In a submission dated March 22, 2010, FIFA submitted the requested receipts (D 2/1/143). The amount of CHF 2'500'00.00 that FIFA had transferred had already been received in the account of the Zug prosecutor's office with valuta on March 18, 2010 (D 2/1/140 et seq.). In a letter dated April 8, 2010, the parties to the proceedings were informed that the conditions for the discontinuation of the proceedings were fulfilled. The prosecutor's office intended to unite the proceedings administratively and to terminate the issue in the course of one legal order for reasons of the matter itself and for procedural economy. The parties were requested to give their consent in this regard; due to the intended course of action, possible areas might be affected that might not be accessible to the other parties without further ado for reasons of personal privacy (D 2/1/148). The consent of the parties was given within the deadline (D 2/1/150, D 23/2/123, D 24/2/127).

4.3.5 Finally, it should be noted that the FIFA's legal representative denied any criminal conduct (D 2/1/72 et seq.), as did Ricardo Terra Texeira (D 23/2/15 et seq.). Joao Havelange did not comment on the accusation of criminal conduct (D 24).

Considerations

1. Any person who commits a felony or a misdemeanor[ii] in Switzerland is subject to the provisions of the Swiss Penal Code (Art. 3 para. 1 PC). A felony or a misdemeanor is deemed to be committed where the offender acted or failed to act contrary to duty, and where the result of the act occurred (Art. 8 para. 1 PC). Both Ricardo Terra Texeira and Joao Havelange are Brazilian citizens, and they both have their domicile in […]. Both are Accused of having breached their duties towards FIFA, which has its domicile in Zurich, by failing to disclose and deliver the payments to FIFA that they received from the ISMM/ISL Group. Joao Havelange acted as the president of FIFA in Zurich. The same applies to Ricardo Terra Texeira in so far as he was involved in the work of the association as a member of the executive committee or exercised organizational duties in other commissions. In all cases, the result of the omissions occurred in FIFA and the place where the offence was committed was in Switzerland, which is also FIFA's understanding of the matter (D 2/10/12/59, cipher 2.1).[2] Hence, Ricardo Terra Texeira, Joao Havelange, and also FIFA as an accused company, are subject to the provisions of the Swiss Penal Code.

[2] See, apart from that the judgement of the Federal Court 6P.190/2006 of May 30, 2007, consideration 6.3, according to which even in disputes without a close connection to Switzerland the Swiss jurisdiction is affirmed / JS 2008 82, 83, 87, 88, 92, 93, D 2/10/12/57 et seq.

2. If Swiss jurisdiction is confirmed, a determination must be made on the basis of Art. 340 et seq. PC as to which canton is competent to prosecute and try the case (FCD 108 IV 146). The application of these provisions implies Swiss jurisdiction (FCD 122 IV 167). After the cantons of Zug and Zurich stipulated to an agreement on jurisdiction, the jurisdiction of the Zug prosecutor's office was affirmed based on § 2 para. 1 of the Criminal Code of Procedure (hereinafter CCP) in conjunction with § 22 et seq. of the Court Organizational Act ("GOG").

3. According to § 1^{bis} para. 1 CCP, no referral should be made to a court if the requirements for an exemption from punishment under Art. 52-54 CCP are met.

   Art. 53 PC governs the exemption from punishment in the event of reparation being made. If the offender has paid for the damage or undertaken all reasonable endeavors to compensate for the injustice he caused, then the competent authority will refrain from prosecuting him, bringing him to court or punishing him; however, this applies only if the requirements for a suspended sentence under Art. 42 PC are met (lit. a) and the interests of the public and of the aggrieved party in a prosecution are negligible (lit. b).

   According to the Bill, the cornerstones of the aforementioned provision can be described as follows: The reparation serves, above all, the victim for whom the compensation of damages are (in reality) more important than the punishment of the offender. The sense of responsibility of the offender is appealed to. He should realize the injustice of his act. With reparation, the relationship between the offender and the victim will be improved; this restores public peace. Reparation for the damage caused justifies the exemption from punishment; the desire for punishment fades as the offender actively renders a social service that brings reconciliation and ensures public peace. The requirement of the negligible public interest in the prosecution takes account of cases in which no specific individual was injured or suffered loss. It also serves to prevent the bestowing of privileges on wealthy offenders who can buy their way out of punishment (Bill of September 21, 1998, BBl 1999 5. 2065 et seq.). According to the Federal Council draft, reparation is only possible if the requirements for a suspended sentence are met, and thus only for offences carrying a custodial penalty of up to one year (Art. 42 and Art. 53 of the draft, BBl 1999 5 2308, 2312). The Swiss Council of States, as the first council addressing this, linked reparation to the requirements of the suspended sentence (see Amtl. Bull SR 1999 5. 1119, meeting of December 14, 1999). The National Council then adopted this amendment (Amtl. Bull. NR 2001 p. 565, meeting of June 7, 2001). In view of the limits set in Art. 42 PC, reparation is now possible for offences carrying custodial sentences of up to two years (Art. 42 PC) (reproduced in FCD 6B_346/208).

   According to the wording of this provision, reparation with its related legal consequences is already possible prior to the initiation of a prosecution and is then possible at various stages of the proceedings, which is also what the legislature wanted (FCD 135 IV 27). If the question of reparation only arises after the initiation of the criminal investigation, but before the facts were presented to the court, the proceedings should be discontinued in an order. The time of the proceedings, and thus the stage of the proceedings, is important with respect to the evidence and the related legal consequences, as the amplitude of the evidence taken, depending on the stage of the proceedings, varies;

this may also have an effect on a final evaluation of the subject matter of the proceedings. A consequence of this is that a discontinuation, in the sense of waiving prosecution under Art. 52 or Art. 53 PC, cannot have the same quality as an exemption from punishment granted by a court. Irrespective of the time of conclusion of the proceedings, it is of relevance that in both situations (Art. 52 and Art. 53 PC), a finding of guilt is not required, but rather a sufficiently clear and onerous statement of the facts that would cause the law enforcement bodies to act[3]. The "deficiency" linked thereto with respect to the results of the evidence taken was deliberately accepted by the legislature and is compensated by the discontinuation of the proceedings being made substantially dependent on the will of the Accused; hence, reparation is precluded in those cases in which the facts determined by the investigating authority does not correspond to the historical happenings. Possible gaps in the evidence can be impliedly resolved by the Accused making reparation.

The discontinuation of the proceedings under Art. 53 PC is linked to flaws with respect to both the findings of fact and the application of law. These flaws can be compensated by the legal system or the institution of reparation in such a manner that the specific requirements designated in the provision (Art. 53 PC) are fulfilled. These premises put into perspective the comments made by FIFA's legal representative on November 30, 2009 (D 2/1/72). By considering the prerequisites from a procedural point of view, and independently from the reparation, they contain plenty of convincing arguments, which, however, in the light of the aforesaid exposition, do not apply. This will be given closer consideration below.

In any case, the circumstances of this case provide a sufficient basis for a procedural decision under Art. 53 PC. Imponderables that result from the incomplete findings have to be accepted for the reasons set out above and taking account of the purpose of the institution of reparation. Taking account of this, the accusation described below must be considered as non-exhaustive.

4. Based on the results of evidence outlined, the accusation, as subsumed under Art. 138 and 158 PC, may be explained as follows. For the time being, aspects that relate to the statute of limitations will not be considered.

4.1 The Accused Ricardo Terra Texeira unlawfully used assets entrusted to him for his own personal enrichment several times. In the sense of a contingent accusation, it should be noted that he was instructed on the basis of a legal transaction to manage the assets of another and, in violation of his duties, caused these assets to be damaged. He acted with intent to enrich himself unlawfully.

The physical components (actus reus) of an offence are thus fulfilled, as Ricardo Terra Texeira, as a member of the executive committee and other committees of FIFA, was given CHF 12'740'00.00 between August 10, 1992 and

[3] BSK Criminal law I, Riklin, N 31 to prior Art. 52 and N 30 to Art. 53 PC.

November 12, 1997 through the Institution 2; he was also given an amount (established but not entirely attributable to him) between March 18, 1998 and May 4, 2000 through E4. The payments were made by ISL X5 AG, which was a subsidiary of the Company 1. The latter concluded license and marketing contracts with FIFA for the utilization of the World Cup television and radio broadcasting rights at precisely defined prices; it also concluded, through one of its subsidiaries, ISMM X3 AG, sublicense contracts with the Company 2 as well as the Company 3 concerning rights for the utilization of radio and television broadcasting rights for the World Cup in 2002 in Brazil. These commissions, which Ricardo Terra Texeira received due to his position in FIFA, were pocketed by him (for his own use), and he failed to disclose or hand over the payments to FIFA. The payments that were made over a number of years were aimed at exploiting the influence of Ricardo Terra Texeira in FIFA in such a manner that contractual relationships were concluded between FIFA and the Company 1, in order to subsequently use his influence as president of the Brazilian Football Association to secure the conclusion of sublicense agreements. Ricardo Terra Texeira was enriched to the extent of the commissions he received and failed, contrary to his duty, to pass on; FIFA suffered an equivalent loss.

4.2 The Accused Joao Havelange unlawfully used assets entrusted to him for his own enrichment several times. In the sense of a contingent accusation, it should be noted that he was instructed on the basis of a legal transaction to manage the assets of another and, in violation of his duties, caused these assets to be damaged. He acted with intent to enrich himself unlawfully.

The physical components (actus reus) of an offence are thus fulfilled, as Joao Havelange as president of FIFA was given an amount of at least CHF 1’500’000.00 on March 3, 1997, and further, an amount established but not conclusively attributable to him between March 18, 1998 and May 4, 2000 through E4. The contributions occurred through ISL X5 AG, which was a subsidiary of the Company 1, which in turn not only concluded license and marketing contracts with FIFA for the use of the World Cup television and radio broadcasting rights at precisely defined prices, but also concluded, through one of its subsidiaries, ISMM X3 AG, sublicense contracts with the Company 2 as well as the Company 3 concerning the rights for the utilization of radio and television broadcasting rights for the 2002 World Cup in Brazil. Joao Havelange pocketed these commissions that he received due to his position in FIFA, and he refrained from disclosing or giving them to FIFA. The payments were aimed at using the influence of the Joao Havelange as president of FIFA with respect to the contracts ultimately concluded between FIFA and the Company 1 (“ISL”) that were signed by the Accused on December 12, 1997 and May 26, 1998. Joao Havelange was enriched to the extent of the commissions he received and failed, contrary to his duty, to pass on; FIFA suffered an equivalent loss.

4.3 FIFA is accused of having a deficient organization in its enterprise. The accusation is that it failed to ensure that it had strict internal regulations that guaranteed the disclosure of payments made to its bodies and employees outside their ordinary remuneration and for failing to establish a regular procedure within the association for such scenarios. By this omission, it not only hindered the establishing of principles reserving the decision on the use of such assets to a body within the association, but it also hindered the identification of those persons responsible for the underlying offence[iii] described below.

The unidentified person (or persons) was (or were) entrusted on the basis of a legal transaction to manage the assets of another and, in violation of his (their) duties, caused these assets to be damaged several times and another person to be enriched to same extent of this damage.

The physical components (actus reus) of the offence are thus fulfilled as the offender, from whom the required illicit properties are assumed to originate, refrained from ensuring the surrender of the commission payments to the association, despite having knowledge that the commission payments were made to the bodies and/or agents and/or employees of FIFA. In other words, FIFA refrained from enforcing its claim for surrender against the Joao Havelange and Ricardo Terra Texeira, who were, on the basis of their positions, obliged to surrender the assets to FIFA. As a result, FIFA was damaged to the extent of its omission, which was in breach of its duty, while the Ricardo Terra Texeira and Joao Havelange were thereby enriched to the same extent.

5. The investigation revealed that the commission payments made by the ISMM/ISL Group could be traced back to the eighties, which is why statue of limitations matters must first be considered. During this period, various revisions took place that resulted in new regulations on the statute of limitations for the prosecution of crimes. Various, and profound, amendments were also made to the first book (general provisions) and second book (specific offences) of the Swiss Penal Code.

5.1 The provisions concerning the statute of limitations for the prosecution of crimes were amended by the Federal Act of October 5, 2001. In the course of a second revision on March 22, 2002, various statutes of limitations in the specific offences section were adapted to the new statute of limitations system. The new provisions of the statute of limitations for the prosecution of crimes entered into force on October 1, 2002; these were modified again with a total revision of the general section of the Penal Code, which entered into force on January 1, 2007 with respect to and due to the new terminology for the sanctions. A partial revision had already occurred in the Federal Act of June 17, 1994. The principle of lex mitior pursuant to Art. 2 para 2 PC also applies to issues pursuant to which connecting factors are regulated both in the general and in the special section of the Penal Code.

The new provisions of the statute of limitations are, in principle, only applicable, with reservations for certain exceptions, if the criminal offence was committed after they came into force. If the offence was committed prior to the new provisions of the statute of limitations coming into force, the former law is applicable with respect to the statute of limitations for the prosecution of crimes, unless the new law is milder for the Accused. The principle of “lex mitior” is also applicable with respect to the statute of limitations (FCD 114 IV 1 consid. 2a, 105 IV 7, consid. 1 a) and applies on the basis of Art. 389 PC – apart from statutory exceptions – without restriction.

Prior to the partial revision of Art. 70 para. 2 PC (Federal Act of June 17, 1994), the limitation periods for offences carrying sentences of penal servitude were 10 years (relative: Art. 70 para. 2 former PC) and 15 years (absolute: Art. 72 cipher 2, para. 2 former PC). After the revision, these periods also applied to offences carrying a prison sentence of more than three years. Under the former law, the prosecution of an offence carrying a prison sentence was time-barred after five years (relative) and 7 ½ years (absolute). According to the current law (Art. 97 lit. b and c PC), prosecution is time-barred after 15 years if the offence carries a custodial sentence of more than three years, and 7 years if the offence is subject to any other sentence. The distinction between the relative and absolute limitation period was abolished as a consequence of the revision.

5.2 The revised criminal law on offences against property, and with it the section of the Penal Code on specific offences, entered into force on January 1, 1995. Prior to the revision of the criminal law on offences against property, embezzlement was regulated by Art. 140 PC, which provided for a sentence of imprisonment of up to five years for the basic offence and penal servitude of up to ten years for the aggravated offence. After the revision, Art. 138 PC provided for penal servitude of up to five years for the basic offence. Today, the penalty for the basic offence is imprisonment for up to five years.

Prior to the revision, disloyal management was regulated in Art. 159 PC, and the penalty was a prison sentence for the basic offence and imprisonment for up to five years for the aggravated offence (lucre). After the revision, the offence of disloyal management, which was regulated in Art. 158 PC, carried a penalty of imprisonment for the basic offence and penal servitude of up to five years for the aggravated offence (with a view to enrichment). In its current version, the penalty is imprisonment for up to three years or a monetary penalty for the basic offence, and imprisonment from one to five years for the aggravated offence.

5.3 Thus, whether the acts are time-barred, taking account of the lex mitior, must be determined on a case by case analysis.

5.3.1 Insofar as the situation concerning the settlement of February 27, 2004, is affected, the legal provisions are applicable as they came into force with the revision of October 1, 2002. If one assumes that the crime was committed at the moment that the transfer of CHF 2’500’000.00 took place (March 17, 2004), then the criminal prosecution is time-barred after 7 years, i.e., on March 17, 2011. The determination of the time of the crime is based on the assumption that the offence is completed when damage is caused to the assets. If one assumes there is intent to achieve enrichment (Art. 158 cipher 1 para. 3 PC), then, based on the penalty carried by the aggravated offence, the limitation period would be 15 years. The statute of limitations would apply on March 17, 2019. The accusation made in connection with the settlement on February 27, 2004 is thus also not time-barred according to the basic offence, which is why remarks concerning the question of a possible unlawful enrichment under a legal limitation of time aspect are obsolete.

According to the applicable opinion of the legal representative of FIFA (D 2/1/103), the principle of non-retroactivity of criminal offences must be considered in this case in that the criminal law for corporations and enterprises only entered into force on

October 1, 2003, and thus FIFA cannot be criminally liable for acts carried out prior to this date; this means any further remarks in this connection are unnecessary.

However, the opinion of the FIFA's legal representative that the offence of Art. 102 para. 1 PC is a contravention[iv] and thus subject to a limitation period of three years so that the underlying offence is time-barred (D 2/1/107 et seq.) cannot be shared. It is true that Art. 102 PC can be qualified as a contravention from a grammatical point of view, as Art. 103 PC defines a contravention as any act that carries a fine. However, the prevailing doctrine proceeds on the assumption, based on the correctly applied teleological interpretation, that no contravention is at hand[4], with the result that the limitation periods for the underlying offence currently under discussion are applicable[5]. Any other point of view would contradict the purpose of the provision and lead to unfair results. Thus, it should be noted that neither the underlying offence subsumed under Art. 158 PC nor the accusation of deficiency in organization under Art. 102 PC are time-barred.

5.3.2 Insofar as the acceptance is concerned, as well as the non-disclosure and non-forwarding of the commissions to FIFA by Ricardo Terra Texeira and Joao Havelange, the following has to be added to the already discussed legal basics (and this in consideration of the fact that the issue involves private bribery).

If an offender has committed a crime at various times, then the limitation period commenced, according to Art. 71 para. 2 former PC, on the day that the last criminal act was committed. The Federal Supreme Court based the concept of "unified acts" (FCD 126 IV 142, 127 IV 54, 129 II 393, see also 131 IV 90 et seq., 132 IV 53) on this provision, which is practically identical to Art. 98 para. 1 lit. b of the new PC. The term unified acts covered offences that were similar, directed against the same legally protected right and that established continued improper conduct. On the basis of this legal concept, the Federal Court affirmed, among other things, that in the event of acts of bribery (FCD 126 IV 143), disloyal management (FCD 117 IV 208) and a series of embezzlement (FCD 124 IV 6, 127 IV 55), there would be a unity of the statute of limitations. The concept of unity under a legal limitation of time or of a continued offence has meanwhile been abandoned (FCD 131 IV 93, 132 IV 54 et seq.).

In certain cases, several actual acts can still qualify as a unified act. This is the case when the unified act fulfils the legal criterion by which the criminal conduct by definition, in practice - or at least typically - requires that several individual acts be carried out[6]. With respect to the offences of disloyal management or embezzlement, where the facts involve private bribery, it can be concluded that there is the aforementioned unified act. This has something to do with the speciality of bribery facts of the case. It is noted that the current offences of bribery regulated in the PC govern the active and passive bribery of officials;

[4] BSK Strafrecht I, Niggli/Gfeller, N 41 to Art. 102 PC.
[5] Hanjabo, Schmitt, Sollberger, commented text output to the revised Penal Code, 105, see however BSK Strafrecht I, Niggli/Gfeller, N 45 et seq. to Art. 102 PC
[6] Andreas Donatsch, Schweizerisches Strafgesetzbuch, Commentary, 17th ed., Zurich 2006, 186, Critical: BSK Strafrecht I, Müller N 18 to Art. 98 PC.

similar cases of abusive influence and influence contrary to duty can also occur in the private sector[7]. Aspects concerning the specific relationship between the briber and the bribe, taking account of the timing, as well as the amount of the payments, the frequency and the temporal distribution of performance and counter-performance, as well as the intensity of the interim contacts are decisive. This applies to both the active and passive bribery of officials as well as to the private bribery. With respect to the current facts of the case, it must be noted that the bribery was on a long term basis (see in detail FCD 126 IV 142 et seq.; at that time, however, this was still under the aspect of the unity of the statute of limitations.)[8]

Following from the unified act, it can be assumed with respect to the facts of the case involving bribery (e.g., establishing a network of connections and maintaining this over a longer time period) that when such conduct is subsumed under the offence of disloyal management/embezzlement, the illegal conduct will in practice involve at least several individual acts; however, the statute of limitations only commences with the last commission payment, or with its retention or non-delivery to the employer or the principal. (The previous individual acts are included.)

It must be noted that the objective facts of the case, contrary to the view of the FIFA's legal representative (D 2/1/107) are not time-barred. In the absence of any specific Federal Supreme Court rulings, we must return to this finding to consider the aspect of the determination of the amount of reparation.

6. Concerning the subsumption of the facts of the case under the offence of embezzlement and disloyal management, from a legal point of view, the following can be said:

Embezzlement under Art. 138 PC may overlap with the offence of breach of trust by disloyal management under Art. 158 cipher 1 para. 3 PC when it is committed with the intention of enrichment. According to the prevailing doctrine, embezzlement takes precedence.[9]

6.1 Embezzlement is committed by any person who exercises control over something with the consent of the owner but contrary to his duties uses that thing for his own or another's benefit (FCD 111 IV 132).

An asset that is entrusted to someone and thus the economic property of another is an asset that a person receives with the obligation to use it in a certain way in the interest of another, particularly by retaining, maintaining or delivering it (FCD 80 IV 55, FCD 120 IV 119) and keeping it available to the trustor at all times (FCD 120 IV 121). This duty to maintain the value can be based on an explicit or tacit agreement (FCD 118 IV 239).

Under Art. 138 cipher 1 para. 2 PC, any person who unlawfully uses assets, as in the case in question, entrusted to him for his own or another's benefit, embezzles them. The criminal act under Art. 138 para. 2 PC consists in conduct of the offender

[7] Hans Dubs, Strafbarkeit der Privatbestechung in FS Nicklaus Schmid, 384 et seq.
[8] In detail Marco Balmelli, Die Bestechungstatbestände des Schweizerischen Strafgesetzbuches, Diss. Bern 1996, 243 et seq.
[9] Techsel/Crameri, Schweizerisches Strafgesetzbuch, Praxiskommentar, Zurich 2008, N 25 to Art. 138 PC/ see in addition the differentiated jurisprudence of the Federal Court in 111 in IV 22 et seq. consid. 4.

by which he clearly expresses the will to thwart the contractual right of the trustor (FCD IV 25), whereby he breaches his duty to maintain the value.

The physical elements of embezzlement require, by definition, the occurrence of a pecuniary loss. The tortuous damage, which is not mentioned in the Penal Code as an element of the offence, consists in the value of the embezzled object (FCD 111 IV 23 consid. 5, p. 23).

The mental element of the offence requires intent and, in addition, the intent to achieve unlawful enrichment. Enrichment occurs to the extent that the assets have increased or the liabilities decreased. Illegality occurs if the transfer of property is contrary to the law, thus there was not a right to performance[10] and the offender is not willing to replace the assets at any time. As a general rule, the intent to achieve enrichment exists as soon as the assets are appropriated (FCD 114 IV 137). Remarks on the ability to replace the assets are unnecessary in this case, although it should be mentioned that criminal intent is lacking when the offender had the will and the opportunity to fulfill his duty of loyalty on time[11] (FCD 71 IV 125, 74 IV 31, 77 IV 12, 81 IV 234, 91 IV 132, 91 IV 134).

In addition, the following can be said concerning the element of the offence specifically relating to being entrusted with something. It is not clear whether the business assets of a company must be regarded as being entrusted to its organs.[12] Niggli/Riedo[13] refute this, as the organs are not considered third persons in relation to the company, but rather part of the company itself and, as a consequence, Art. 158 PC is applicable. The authors base their arguments in particular on decision 6S.249/2002 of the Swiss Federal Supreme Court, which held that although a member of the board can decide what is to be done with the assets of the company, but only within the framework of its duties as an organ of the company. On being elected an organ, the elected person does not receive business assets to maintain them in the interest of the company. The company keeps custody of the assets concerned and continues to maintain them, albeit that this is done though by its organs. Stratenwerth assumes that the business assets of a company are entrusted to its organs[14]. The cantonal courts advance the same view[15]. The question of whether the assets of an association are entrusted to its organs does not have to be answered in the present case conclusively, due to both the aforementioned and the termination of the proceedings in accordance with Art. 53 PC, as well as the consequential particularities with respect to possible incomplete facts of the case and the resultant legal assessment.

6.2 Disloyal management is committed by any person who by law, an official order, a legal transaction or authorization granted to him, has been entrusted with the management of the property of another or the supervision of such management,

[10] BSK Strafrecht II, Niggli, N 75 to prior to Art. 137 PC
[11] Trechsel/Crameri, op. cit., N 19 to Art. 138
[12] BSK Strafrecht II, Niggli/Riedo, Art. 138 PC, N 34 b, N 195 / Andreas Donatsch, Strafrecht III, 17th ed., Zurich 2006, 127, 287, with omnibus remarks / Andreas Donatsch, in ZStrR 2002, 23 et seq. with numerous indications to doctrine and jurisprudence
[13] BSK Strafrecht II, Niggli/Riedo, Art. 138 PC, N 34 b, N 195
[14] ZStrR 1979, 90 and 95.
[15] See also SJZ-88-187

and, in the course of and in breach of his duties, causes or permits that the other person sustains financial loss. From an objective point of view, the offender must a prori have a legal or contractual duty to look after assets of another person, and in fact be in the position of an agent.

Put in other words, the criminal elements of disloyal management pursuant to Art. 158 PC require that the offender has management duties and duties of care with respect to the assets and that these duties have been intentionally violated; thus, damage is caused to the assets of the principal (FCD 120 IV 192).

Business management within the meaning of the offence is present when someone in an actual and formal independent and accountable position is obliged to take care of a not insubstantial property complex in the interest of another (FCD 81 IV 278, FCD 97 IV 13, FCD 100 IV 36, FCD 105 IV 307, FCD 118 IV 246, FCD 120 IV 192).

The act is committed by an action or omission that violates the duty of care with respect to the assets and thus leads to damage to the entrusted assets[16]. Acts or omissions have to contradict the contractual duties entered into (FCD 105 IV 313). The violation of duty may also arise from the law (FCD 97 IV 13).

Furthermore, the physical element of the offence requires damage to the entrusted assets, which occurs due to the improper conduct. In the event of an actual damage, the pecuniary loss is constituted by a reduction in the assets, an increase in the liabilities, a non-reduction of the liabilities and a non-increase of the assets. It is also established if the assets are endangered in such a manner that their economic value decreases.

The mental element of the offence lies in the intent to commit the act, whereby the intent must comprise the intent to cause damage. Dolus eventualis is sufficient (FCD 105 IV 191 et seq.).

6.3 To the extent that the subsumption of the facts of the case is of issue with respect to Ricardo Terra Texeira and Joao Havelange, it is noted that in consideration of the aforementioned remarks, the facts do not have to be conclusive. As already mentioned, the question of whether the assets paid out to them should be regarded as entrusted to them in accordance with Art. 138 PC does not have to be answered as, in any case, the non-forwarding of the assets to FIFA must be regarded as contrary to duty under Art. 158 PC. Furthermore, the legal consequences would be the same for both offences due to their form or the fact that the maximum penalty for each is the same; thus, with respect to the given initial situation, the “proper” view, and thus the “proper” subsumption are merely of an academic nature. Hence, the legal treatment is limited to the criminal elements of disloyal management.

In summary, both Ricardo Texeira and Joao Havelange are Accused of failing to disclose and deliver commissions to FIFA, which they received during their function with FIFA, be it as a member of the executive committee, further committees or as president.

[16] Martin Schubarth, Kommentar zum schweizerischen Strafrecht, Berne 1990, N 21 to Art. 159 PC.

They caused damage to FIFA by this behavior and they unlawfully enriched themselves.

As stated, four prerequisites are required to fulfill the offence: the capacity of the offender as an agent, breach of one of the connected duties, from which damage to the asset arises, and intent with regard to these elements.

6.3.1 Concerning the capacity of an agent, it should be noted that Joao Havelange, as president of FIFA, is entered in the commercial register as having the authority to sign alone for the association (D 4/1/2). Furthermore, he was authorized to sign on the accounts of the association and was thus able to dispose of the assets of FIFA independently (D 17/44 et seq.). Hence, his capacity as an agent is established. However, the authority to sign with respect to considerable assets is, depending on the situation, only classified as an indication of independence (FCD 100 IV 108, FCD 95 IV 65 et seq.); it is not required as an absolute necessity to affirm the aforementioned capacity. Independence may already arise from the considerable freedom a person has in his function within the organization (FCD 102 IV 90, 93), as well as from the organization of a company; it is thus substantiated that it is irrelevant whether the agent represents or may represent the principal externally or only internally (FCD 81 IV 276, 279). The legal organization of the principal, which may give indications for the affirmation or denial of a person's capacity as an agent, should be considered beforehand, but not exclusively.

To the extent that nothing specific can be derived from "the extremely limited"[17] legislative regulation of the law of associations for the assessment of the question at hand, reference must be made to the undisputed findings of the doctrine, according to which, it is not only the management of the assets of the association - within a strict sense - that belong to the internal management of the association but also the right of disposal over resources, in a broad sense. This arises for example in scenarios such as the organization of association events[18].It is obvious that persons on the FIFA committees who deal, from an economic point of view, with the most important periodically recurring football World Cup and who are responsible for the organizational aspects through to the realization of the events have a prominent role. Such persons thus have the same importance as those persons with similar responsibilities within an internal management, and hence they have the quality that fulfils the criminal element of an agent. Persons entrusted with these duties can dispose in a comprehensive manner of the assets of the association. Ricardo Terra Texeira was not only a member of the executive committee but also of the following committees that were provided with comprehensive responsibilities: Organization Committee for the FIFA World Cup (member), Organization Committee for the FIFA World Club Championships (deputy chairman), Committee for Futsal (chairman) and Committee for Safety Issues and Fairplay (member) (D 4/2/267 et seq., see also the indications under cipher 3.2 of the facts of the case). Hence, it has to be affirmed that Ricardo Terra Texeira must also be regarded as an agent.

[17] Piera Bereta, in Aktuelle Fragen aus dem Vereinsrecht, Wirtschaftliche Vereine und Corporate Governance, Zurich 2005, 3, which justifiably notes that FIFA is an association with big revenues (4), which will be discussed later on

[18] Wolfgang Portmann, Schweizerisches Privatrecht II/5, Das Schweizerische Vereinsrecht, 3rd ed., Basel 2005, 209, N 481.

6.3.2 As mentioned above, the damage that occurs to the principal must result from behavior that is contrary to a duty.

Members of the association have a general duty of loyalty; in other words, the duty not to do anything that might oppose interests commensurate with the objects of the association[19]. This duty of loyalty arises as an unwritten principle of law from the aim defined by the purpose (FCD 74 II 165). The specifics of this duty result in particular from the statutes of the association, but are also derived from the provisions on agency. Although the members of the association are the various national football associations (Art. 10 of the Statutes / D 4/1/8), that does not alter the fact that the aforementioned duty of loyalty also applies to the members of the committees, who also serve as administrative vehicles for implementing the objects of the association. It especially concerns those persons that act for FIFA as part of the statutory organs, and it applies unreservedly to both the president (Joao Havelange) and to a member of the executive committee (Ricardo Terra Texeira). Even though the current president is in an employment relationship with FIFA (D 21/6/33 et seq.), it must still be assumed, based on the information on file, that this is not adequate with respect to both of the Accused, as such a relationship was denied by FIFA. FIFA assumes that both of the Accused acted as organs of the company (D 2/1/90, D 24/9/6, see also the position of the legal representative of Ricardo Terra Texeira: D 23/2/19 et seq.).

According to the prevailing doctrine, the provisions on agency are applicable with respect to the management carried out by the board of the association[20]. This has to be endorsed. However, as a result, it can be said that the withholding of assets to which the association is entitled, which it requires to realize its objects and over which it has a legal claim, is contrary to the interests of the association. Thus, the breach of duty already arises from the basic relationship of trust based on the law on associations.

In view of the specific accusation, reference can be made to Art. 400 of the Code of Obligations ("CO"): Here, there is not only a duty to render account, but also a duty to surrender possession of what has been given, which subsequently determines whether the agent received the "thing" because of agency activities, and hence whether there is an inherent connection between the receipt and the mandate. This has been affirmed for example with respect to bribes, discounts and commissions granted by third parties[21]. Nothing different would result from an employment law. According to Art. 321 b CO, the employee has a comprehensive duty to render account and to surrender what he has been given.

The legal representative of FIFA rejects the duty of Ricardo Terra Texeira to surrender what he has been given, partly by citing the basic option that the principal has of waiving his right to make the agent surrender possession. This is in consideration of the fact that the duty to surrender possession stipulated in Art. 400 para. 1 CO is non-mandatory law (D 2/1/80, 83).

[19] Wolfgang Portmann, op. cit. 140, N 306.
[20] BK, Riemer, N 22 et seq. to Art. 69 of the Civil Code
[21] BK, Fellmann, 1992, N 127 + 128 to Art. 400 CO / see also FCD 4C.432/2005, Martin Hess, in AJP/PJA 11/99, 1432

This point of view can only be endorsed in theory, with the following limitations, and not when embedded in the concrete criminal context:

In accordance with the new doctrine, the federal court has held that an agreement by which the principal waives the delivery of certain assets is valid. The duty to surrender possession is given, as an agreement stating otherwise is lacking. Furthermore, there are barriers resulting from the altruistic nature of the mandate, which cannot be abolished by an agreement. However, the altruistic nature as such is not relevant if the delivery of revenues, such as so-called retrocessions, is a collateral duty under an asset management agreement and as a result thereof the agent earns an additional remuneration for his function. Still, in the case at hand, the duty to make delivery also creates a central element of the altruistic nature of the mandate, and it is so closely linked to the agent's duty to render account that it appears to be its consequence. A result of this is that the agent is obliged to inform the principal of expected retrocessions completely and faithfully, and his will to waive the delivery of retrocessions must be clearly stated in the agreement. This requirement is additionally justified if we consider that such an agreement may lead to conflicts of interest, as a considerable additional income can be achieved if there are frequent transactions (FCD 132 III 465 et seq. consid. 4.2).

As a consequence, the highest court holds quite clearly that an agreement is required, in which the informed principal clearly states his will to waive the delivery of the retrocessions that the agent receives within the framework of the mandate (FCD 132 III 467 consid. 4.3). There was no agreement between FIFA and the persons herein accused. At least, this is not on file. Moreover, the Accused could not argue that they were not even requested to surrender possession as they already breached their duty of disclosure. The disclosure could have been the basis for a more precise agreement.

Also the above argument of the legal representative for FIFA concerning the practice of non-disclosure and the retention of the bribe payments cannot hold water (D 2/1/84 et seq.). The federal court rejected the argument that the assumption that the requirement to deliver had been waived suggested that corresponding agreements were customary (FCD 132 III 466, consid. 4.3). Customs may play a role in assessing the mental elements of an offence, however not when determining whether a duty to disclose or to surrender possession exists.

The legal representative for FIFA denies the violation of duties by the Accused, mainly by referring to the civil aspects (D 2/1/80). Although it is correct to say that the duties of an agent arise, to a great extent, from civil law, the criminal view requires clarification, -i.e., what may be deemed valid within the framework of civil law, namely, a subsequent approval of an action or an omission, may not be of major relevance to the criminal law position. This is because a subsequent approval cannot be qualified as consent per se, as "such can only be validly given prior to the relevant act"[22]. Hence the conduct itself is contrary to duty and

[22] Andreas Donatsch, in ZStrR, volume 120 2002, 21

a possible approval can only have an effect on the damage caused, with the consequence that an attempt at disloyal management would have to be assumed. It must be noted that an approval is only effective if it was validly given by the responsible committee according to the form stated in the statues. This was not what happened in this case.

Concerning the “treatment of bribe payments according to civil law” discussed by the legal representative for FIFA, the following must be said. The acceptance of such pecuniary advantages has been repeatedly rated as contrary to duty[23]. Ultimately, nothing to the contrary can be derived from the cited FCD 129 IV 128. Indeed the Federal Supreme Court notes that the offence of disloyal management is only fulfilled if the recipient is induced by the payment of the bribe to behave in a manner that is contrary to the financial interests of the principal and thus has a damaging effect. This argument overlooks the fact that in cases such as the current one, where a claim to the assets exist, it is not possible to withhold the assets per se without causing damage and thus, according to the logical point of view of the laws, the conduct has to be contrary to the financial interest of the principal. Furthermore, nowadays at least, under the provisions of the law on unfair competition, not only the granting but also the acceptance of such payments is an offence. Correspondingly, at least by current standards, the facts of the case have to also be qualified as disloyal management[24].

It is further noted that Joao Havelange, as the former president of FIFA, was given comprehensive powers and helped to draw up the contracts with the Company 1. He was obliged to negotiate the best possible financial deal for the association. That would have included the amounts that he received and, thereby, he acted contrary to duty and put his own personal interests before the interests of the association; by such action, he damaged the financial interests of the association (FCD 129 IV 128). There is nothing different about the conduct of the Ricardo Terra Texeira, whose influence in FIFA was also of fundamental importance due to his close relationship (son-in-law) to Joao Havelange. According to the case law, it is irrelevant that payments were made after the conclusion of the contracts. This circumstance would only have been of relevance if the payments had no influence on the conclusion of contracts (FCD 129 IV 128), which is not the position in this case.

The question of whether FIFA’s aforementioned claim to the payments existed has to be affirmed. This is because a distinction must be made between the claim of FIFA and the assessment of the basic transaction between the person paying and the person receiving the bribe. In view of this requirement and of the arguments put forward by FIFA (as well as in view of its own responsibility) at this point, an assessment must be made of the bribes themselves.

[23] BSK Strafrecht II, Niggli N 104a to Art. 158 PC with further referrals
[24] BSK Strafrecht II, Niggli, N 104a to Art. 158 PC

Even if the Swiss Penal Code (as opposed to Art. 4 lit. b of the Unfair Competition Act[25]) does not explicitly make the bribery of private persons an offence, such “performances” are still considered by the Federal Supreme Court to be immoral[26]. According to Art. 20 para. 1 CO, a contract that is impossible, unlawful or immoral is null and void. Legal doctrine also qualifies contracts for the payment of bribes to employees or assisting persons of the cosignatory or a third person as immoral[27]. Also immoral is what is considered unfair within the meaning of the Federal Act on Unfair Competition (“UCA”). According to the former Art. 4 lit. b of this law, conduct giving rise to an act of unfair competition occurs where a person attempts to secure advantages for himself or another by granting or offering benefits to employees, agents or other auxiliary personnel of a third party to which they are not legally entitled and which are intended to induce such persons to act contrary to their duty in accomplishing their services or professional tasks. However, the former Art. 4 lit. b is not exhaustive. Other forms of bribery may fall under the general clause of Art. 2 of the Unfair Competition Act[28].

Any form of conduct or business practice that is deceptive or in some other way contravenes the principle of good faith and which influences the relationship between competitors or between suppliers and customers is and was unfair, and it was even unlawful prior to the revision of the Unlawful Competition Act. It is obvious that the millions that flowed must have led to a distortion of competition; however, the relationship underlying the transactions must be qualified as immoral and hence void.

However, a void contract cannot create any contractual effects. The nullity thus has an effect ex tunc from the very beginning. It is absolute and irremediable[29]. Its nullity is applicable ex officio (FCD 123 III 62). Despite the complete nullity of the business, restitution is not possible due to unjust enrichment principles. Under Art. 66 CO, the restitution of what has been given with the intention of obtaining an unlawful or immoral result is precluded. As far as the recipient of such payments is concerned, the position is taken in the legal doctrine that any obligation to repay what has been received is an obligatio naturalis[30], hence performance cannot be enforced[31].

[25] **Repealed** by Art. 2 cipher 1 of the Federal Decree of October 7, 2005 on the Approval and the Implementation of the Criminal Law Convention and the Additional Protocol of the Council of Europe on Corruption, with effect of July 1, 2006 / however with the same Decision Art. 4a para. 1 lit. b of the Act on Unfair Competition was brought into effect, according to which unfair shall also be qualified as, whoever requests, accepts a promise or accepts undue advantages for themselves or for a third party as employee, shareholder, agent or other auxiliary of a third party within the private sector for an action or omission, which is contrary to duty or in his discretion in connection with his official or corporative activity

[26] FCD 119 II 385: According to the Swiss legal understanding the promise of bribes is unlawful and due to its immoral content considered as void within the meaning of Art. 19 et seq. CO

[27] Von Tuhr Peter, Allgemeiner Teil des Schweizerischen Obligationenrechts, Vol. I, 3rd ed., Zurich 1979, 257

[28] Mario M. Pedrazzini, Frederico Pedrazzini, Unlauterer Wettbewerb, 2nd ed., Berne, 175, see also Carl Baudenbacher, Lauterkeitsrecht, Commentary to the Act of Unfair Competition („UWG“), Basel 2001, 703 et seq.

[29] BSK I, Huguenin, Schulin, Art. 1-529 CO, 4th ed., Basel 2008, N 53 to Art. 19/20, N 7 to Art. 66 CO

[30] BSK I Schulin, N 7 to Art. 66 CO

[31] Theo Guhl, Das Schweizerische Obligationenrecht, 6th ed., Zurich 1972, 43

Given these circumstances, the legal representative for FIFA rejects the contention that the recipient of a bribe has any lawful duty to forward the immorally received payment to a third party (D 2/1/81). This view cannot be shared. The decisive criterion as to whether Ricardo Terra Texeira and Joao Havelange have a duty to disclose and ultimately a duty to surrender possession of the money is not that of qualifying it as an immoral act, but rather the question of whether the agent received the “thing” on the basis of the agency relationship and hence whether there is an internal connection between receipt and the mandate. This question of whether there is such a connection as well as whether FIFA has such a claim must be answered in the affirmative. We will return to this in the following remarks.

The argument that any agreement between the Accused and FIFA would also be void as it amounted to the perpetuation of an immoral business cannot be accepted (D 2/1/81). The taboo payments made to Ricardo Terra Texeira and Joao Havelange have become what is regarded as immoral due to the intention of the payer and the recipient. The manipulation of competition, which is possible on the basis of the economic power, is not only morally reprehensible (D 3/10/4, cipher 22) but is also made subject to penalties by the governing law (“UCA”). FIFA’s claim is largely based on the fact that the commission payments were ultimately part of the remuneration for its own contractual agreements with the Company 1 and thus it should have received them as a contractual partner. There is nothing reprehensible to this and the claim has to be affirmed.

FIFA’s legal representative is also of the opinion that there is no requirement to hand over the commission payments, as the ISMM Group only paid these to the officials so that they could conclude the marketing and television contracts in the respective countries with the persons in authority in the football business there (D 2/1/83). It would be naive to assume that this allegation would in particular apply to Joao Havelange. He signed the contracts of 1997/1998 that contained, from an economic point of view, eminently important marketing and broadcasting rights. The economic destiny of the ISML/ISL Group depended, however, to a great extent thereon, and it clearly highlights the Group’s interests. With the constant feeding that took place over several years, the services of not just Joao Havelange but also those of Ricardo Terra Texeira were bought. The latter was the son-in-law of Joao Havelange – a circumstance from which the ISMM/ISL Group hoped, without doubt, to achieve appropriate benefits – coupled with the fact that he was the president of the most powerful member of FIFA (the Brazilian Football Association), a suitable way of scoring a brace of goals, as it were: first of all, the conclusion of the contract with FIFA and subsequently those with the Brazilian marketers of the assigned license rights in the form of sublicense contracts.

When it is additionally mentioned that the commission payments did not have any influence on the license fees that were negotiated between FIFA and the ISMM/ISL Group (D 2/1/83 et seq.), then it is thereby disregarded that this was not just a question of the amount of the remuneration but more particularly of the conclusion of contracts with the ISMM/ISL Group, in general, because there were potential competitors on the market (D 21). In circumstances such as those in the present case, this form of “feeding” is virtually a tradition.

The payments were not made not just prior to the conclusion of the contract, in order to place the recipient under an obligation – albeit an unenforceable one – but rather also subsequently, in order to work towards further contracts. These findings can, without further ado, be included in the specific facts of the case, whereby the contracts concerned recurring events (Football World Cup) within specific time periods; thus, new contracts had to be negotiated again and again. Therefore – taking account of the logic of such payments – the payments were made before and afterwards and over a long period of time (1993 to 2000).

Thus, the non-disclosure and the withholding of bribes have to be regarded as a violation of duties within the meaning of the offence of disloyal management. These findings are based on a differentiated analysis of the case law and a consideration of the prevailing doctrine[32] (see also the remarks of the Judicial Commission in the Decision and Judgment of April 16, 2009: JS 2008, 82, 83, 87, 88, 92 and 93).

The violation of duties, the damage causally linked thereto and the enrichment have to be affirmed. As enrichment requires the presence of an unlawful economic advantage, whether the advantage is the result of a lawful claim to the payment has to be assessed. It is disputed whether unlawfulness of enrichment only arises when enrichment is contrary to the legal system or whether it is sufficient that the offender had not actionable claim to the enrichment[33]. In relation to this, reference can be made to the remarks above, which lead to an affirmation of unlawfulness.

6.4 To the extent that the accusation concerns matters related to the settlement of February 27, 2004, only the element of offence involving the violation of duties requires closer consideration.

FIFA's legal representative denies there was disloyal management to the detriment of FIFA, as the management of FIFA was not obliged to request Ricardo Terra Texeira to hand over the CHF 2.5 million to FIFA. He further argues that FIFA's management saw no reason to request such a handover, which is why this omission can not be considered a violation of duty either. Those responsible did not simply not violate any duty, but rather acted in the objective interests of FIFA and its members. Likewise, it clearly acted in its own interests and in those of its members in that it actively made efforts to conclude a settlement with the bankruptcy estate (D 2/1/80). Furthermore, during the proceedings, the legal representative contended that a payment would have been, without further ado, consistent with FIFA's purpose, which was to promote football and to safeguard the interests of the members thereby. All payments that were covered by the objects of the company were basically already permitted under civil law. The principle of volenti non fit iniuria is applicable,

[32] BSK Strafrecht II, Niggli, N 104a to Art. 158 PCSee also Peter Ch. Hsu, Retrozessionen, Provisionen und Finder's Fees, in Bibliothek zur Zeitschrift für Schweizerisches Recht, supplement 45, Basel 2006, 45 et seq.
[33] BSK Strafrecht II, Niggli, N 75 prior to Art. 137

which is why very special circumstances must be at hand for such a payment to be regarded as disloyal management within the context of a settlement.

Whether there was a breach of duty is decided in the case of a non-profit organization or a charitable association by answering the question of whether the direct or indirect payment of a settlement sum and the decision not to request payment of the commissions from Ricardo Terra Texeira and Joao Havelange is compatible with the objects of the association. From this it follows that FIFA is not free to dispose of assets in cases where this is contrary to the purposes of the association. The endeavors of FIFA to achieve a settlement agreement, to induce Ricardo Terra Texeira to pay the settlement sum and thus to waive, at least to that extent, the surrender of the bribery payment, can only be interpreted as being in the interests of certain of its members, insofar as it was considered an attempt to avoid damage to the reputation of the association, as bribery payments are always associated with reprehensible conduct. Ultimately, it is not the alleged promotion of football and hence the safeguarding of the related interests of its members that is the main objective, but rather the personal, pecuniary advantages of a part of the organs of FIFA.

However, this circumstance has nothing to do with the promoting of football, the safeguarding of interests of the members or the promoting of amicable relations, which FIFA mentioned, but was misunderstood, during the proceedings (D 2/1/91). If the obligation of the Accused to make payment to FIFA is affirmed and if it waived the repayment, then a corresponding reduction in assets or a non-increase in the assets of the association occurred, which was lost for the “promotion of football”. This also cannot be covered by the purposes of the association if one interprets it within the meaning of the statutes as opposed to from the view of the beneficiaries.

Where an organ against whom an action is brought against can plead the liability defense of “volenti non fit iniuria” against a management liability claim of the company[34] when he acted with the approval of the damaged company, this can only contribute to clarifying possible liability “within” the association[v]; however, it does not help to clarify questions with regard to the criminally relevant elements of an offence that may arise in connection with disloyal management.

FIFA’s legal representative does not see a breach of duty in the failure to enforce its claims because the recovery of revenues from illicit transactions, to the extent it even had knowledge thereof, would have done the company more harm than good (D 2/1/96). As stated, the reclaiming of assets to which FIFA is entitled, cannot be considered something reprehensible. If FIFA links moral concerns to reclaiming what it is due and is faced with moral conflicts, then it is still free to avoid enrichment by forwarding the amounts transferred by the Accused to non-profit institutions. At this point, the question of whether, from an economic point of view, this has to be considered by the finance committee as reasonable does not have to be either decided or commented upon.

[34] SJZ (2006) 484

FIFA's legal representative is further of the opinion that the enforcement of FIFA's claim for surrender of the monies would barely have been possible. It justifies this, inter alia, with the argument that a claim made by FIFA in South America and Africa would hardly have been enforceable because bribery payments belong to the usual salary of the majority of the population (D 2/1/85 et seq.). This opinion does not change the fact that the Accused was obliged, as far as can be reasonably expected, to safeguard the interests of the association, which it however did not do. Indeed, it cannot be overlooked that under the circumstances, both factual and legal, the successful enforcement of FIFA's legitimate claims, if not impossible, was at least difficult, which could suggest, from an economic point of view, a waiver of claim and hence could be regarded as according with its duties. However, such a finding must be consistent with the actual facts of the case. The actual case involved the former president and members of the executive committee, who did a significant part of their work for FIFA in Switzerland and who were also paid their salaries in Switzerland (D 2/7/2). It would have been easy to enforce the legitimate claim in Switzerland by applying Swiss law and unnecessary to do so in one of the "countries of South America or Africa" as suggested by FIFA.

FIFA's legal representative also denies any violation of duty because the payment of bribes did not constitute a criminal offence (D 2/1/96). The question of whether the conduct was criminal does not have to be considered again. Nevertheless, it should again be mentioned that the duty to demand payment does not arise from the fact that FIFA did not consider it to be criminal, but rather as a result of the duties determined by the objects of the association, which would not be possible without the funds. The assets that are part of these proceedings would have represented a substantial contribution to what was needed to achieve the purposes. Hence, the confirmation that the duty exists does not result from an immoral qualified relation between performer and recipient, but rather from the purposes of the association.

6.5 FIFA's legal representative is further of the opinion that FIFA – if it had enforced its claim for the surrender of the payments – would have been obliged under Art. 290, and under the requirements of Art. 286 – 288 of the Swiss Debt Collection and Bankruptcy Act, to forward the commissions to the bankruptcy estate; thus he rejects the contention that it suffered any loss (D 2/1/89). Hence, the alleged duty is thus related to principles that can lead to an action to avoid gifts, voidability due to insolvency and voidability for intent. This view cannot be shared, especially since the legal prerequisites for lifting the corporate veil would not apply to FIFA. This is particularly the case in view of FIFA's lack of standing to be sued as a third party. As outlined, the benefits paid to the recipients (Havelange, Texeira, etc.) basically belong to the contractual remuneration under the agreements that FIFA negotiated. Thus, this finding concerns the circumstance which should be decisive when determining what could be the object of the remedy of avoidance[vi]. However, from FIFA's point of view with respect to the recipient, it is not about the settlement of an obligatio naturalis (imperfect obligation) but rather about the enforcement of an enforceable title. Given the facts of the case, an action cannot be brought against FIFA as a third party. Apart from that, FIFA is not in breach of its duty because it would perpetuate an unlawful situation as FIFA's legal representative argues, but rather because it did not safeguard the interests of the association by waiving legitimate pecuniary claims. Hence, the damage is affirmed to the extent of the waiver.

If it is alleged that the claims for surrender against Ricardo Terra Texeira were time-barred due to the ten-year statute of limitations with regard to the liability of the organ members of the association, it must nevertheless be noted that at the time of the conclusion of the settlement this did not apply to those payments that dated back to 1994. The question does not have be answered completely as in light of the statute of limitations aspects and the principle of non-retroactivity, only the settlement agreement as such has to be assessed.

6.6 The finding that FIFA had knowledge of the bribery payments to persons within its organs is not questioned. This is firstly because various members of the executive committee had received money, and furthermore, among other things, it was confirmed by the former chief financial officer of FIFA as a witness that a certain payment made to Joao Havelange by the Company 1 amounting to CHF 1'000'000.00 was mistakenly directly transferred to a FIFA account; not only the CFO had knowledge of this, but also, among others, P1 would also have known about it (D 3/41, cipher 22, see also D 3/76 et seq.).

7. If a felony or misdemeanor is committed in an enterprise while exercising a business activity within the scope of the enterprise and if, due to the deficient organization of the enterprise, the act cannot be attributed to a natural person, then according to Art. 102 para. 1 PC, the act will be attributed to the enterprise. In such case, the enterprise can be liable for a fine of up to 5 million francs.

7.1 According to Art. 102 para. 4 PC, enterprises are private law entities and this basically includes associations under Art. 60 et seq. of the Civil Code. Taking account of the economic theoretical definition of an enterprise pursuant to Art. 102 PC, the liability of an association requires economic activities that are not simply negligible and that could, for instance, become manifest in the provision of services[35]. That FIFA is an economic enterprise within the meaning of the offence is not of any doubt, despite its basic orientation as a non-profit organization; this is a result that already follows from the 2003-2006 budget, which was filed with the submission of November 30, 2009, according to which total revenues of CHF 2'041.8 m., total expenditures of CHF 1'871.90 m. and a result of CHF 169.9 m. were calculated (D 2/1/110 et seq.).

7.2 If a subsidiary liability of the enterprise is concerned[36], the enterprise is not accused of the underlying offence, but rather of being inadequately organized. The impossibility of holding it accountable for the underlying offence is a condition for the punishability of the enterprise. But, this is not the reason for the punishment because this lies in the deficient organization of the enterprise, which makes accountability impossible[37]. The mental

[35] Matthias Forster, Die strafrechtliche Verantwortlichkeit des Unternehmens nach Art. 102 StGB, Diss. 2006, 106
[36] Hansjakob, Schmitt, Sollberger, op. cit. 104
[37] BSK Strafrecht I, Niggli/Gfeller, N 207 to Art. 102 PC

and physical elements of the underlying offence must be fulfilled[38]. The underlying offence must be a felony or a misdemeanor.

7.3 The question of whether an enterprise that has become a victim of disloyal management can simultaneously be punished as the offender for this offence has not yet been decided by a court; it is also not necessary that an answer be provided in full at this stage, since the dismissal of the proceedings under Art. 53 PC essentially depends on the will of the parties involved, and in the event of complete reparation, this aspect and not such a formal legal approach should be the main issue. Nevertheless, it is noted that neither the laws nor the legislative materials, nor the concepts of the Swiss criminal law applicable to enterprises preclude the punishment of the damaged enterprise[39]. The enterprise does not stand in the pillory because of the underlying offence, but rather because of the accusation of a deficiency in its organization, as is described in the charge.

8. As mentioned above, Art. 53 PC governs the exemption from punishment in the event of reparation. Hence, whether the requirements for a suspended sentence under Art. 42 PC are met (lit. a) and whether the interests of the public and of the damaged party in a prosecution are negligible (lit. b) have to be examined.

8.1 Concerning the coverage of damage / reasonable efforts to compensate the injustice occasioned: in determining the damage, the civil assessment of damages is the starting point. Basically, the person found liable must cover the entire damage. According to Art. 43 para. 1 CO, the circumstances as well as the degree of fault are taken into account when determining the compensation[40]. From this it follows that when determining the liability covered, there is not inconsiderable latitude available within the scope of due discretion. This finding also results from the law itself, which does not request, in each case, a full liability cover, but also allows a dismissal of the proceedings provided the offender makes a reasonable effort to provide compensation for the injustice caused. Furthermore, the fault cannot be determined by mathematical criteria. With regard to the question of reasonableness, the income and asset situation has to be considered in cases where the damage is quantifiable, as a material component; this is usually the case with offences against property. Thereby, factors such as the age of the Accused have to be considered, as well as possible imponderables connected thereto that make it difficult or impossible to generate income. Both for FIFA, Ricardo Terra Texeira and Joao Havelange, the fruits of criminal acts have to be discounted if there can never be the subject of a conviction due to the application of the statute of limitations and/or because they cannot be conclusively attributed to one Accused or the other. As mentioned, the relations concerning E4 could not be entirely established, firstly with regard to the beneficial ownership of the Accused and secondly with regard to the specific participation of each of them. Furthermore, in the case of both Accused, in view of the fact that both have their domicile in […],

[38] Alain Macaluso, La responsabilité pénale de l'entreprise, Geneva 2004, N 711
[39] BSK Strafrecht I, Niggli/Gfeller, N 85 et seq. To Art. 102 PC
[40] BSK Strafrecht I, Riklin, N 7 to Art. 53 PC

the prosecutor has decided to forego any investigation in […] so far in the proceedings and thus, to the extent necessary, has relied on the facts given by the parties concerned.

8.1.1 Ricardo Terra Texeira: Taking account of the remarks on the statute of limitations, and consequently also the fact that the federal court has not yet commented in detail on the issues concerning unified acts in relation to the facts of this case, ultimately the period over which the offence was committed has to be taken into account, and it occurred during the limitation period of fifteen years. The issue is therefore about payments of CHF 4'305'000.00 to Institution 2 made from May 31, 1995 onwards. Despite the uncertainties with regard to E4, it can be assumed with sufficient legal certainty that the sum involved in the offence amounts to at least CHF 5'000'000.00. By taking account of the fact that Texeira has already paid CHF 2'500'000.00 to the bankruptcy estates, even without any enforceable legal basis, the amount of CHF 2'500'000.00 to make the damage good can be considered as reasonable.

8.1.2 Joao Havelange: the payment of CHF 1'500'000.00 on March 3, 1997 can be conclusively attributed to him; however, whether the transfer of CHF 1'000'000.00 (which was described by several witnesses) has to be added to this amount cannot be determined with absolute certainty. Considering this circumstance, and also the restrictions with regard to the payments toE4, and the age of the Accused, who is 94 (and thus has restricted income possibilities with respect to proceeds from assets and possible pensions), the amount of CHF 500'000.00 fixed by the prosecutor is reasonable.

8.1.3 FIFA: The omissions prior to October 2003 may not be considered due to the principle of non-retroactivity. The amount of CHF 2'500'000.00 that was fixed to make the damage good corresponds to the amount that Ricardo Terra Texeira paid to the bankruptcy estates. The economic performance of FIFA cannot be questioned based on the aforementioned remarks.

Finally, it has to be noted that the amounts paid by the parties (involved with knowledge of the overall circumstances and after careful reflection), were taken into consideration in the principles applied when deciding this case.

8.2 Concerning the prerequisites for a suspended sentence: The execution of a monetary penalty or of community service or imprisonment custodial sentence of more than six months but no more than two years will, as a rule, be suspended provided an immediate penalty does not seem necessary in order to prevent the offender from committing further felonies or misdemeanors (Art. 42 para. 1 PC). If, during the last five years prior to the offence, the offender has been sentenced to a suspended or unsuspended custodial sentence of at least six months or to a monetary penalty of at least 180 daily rates, then the suspension is only allowed if particularly favorable circumstances are at hand (Art. 42 para. 2 PC). The suspension of the execution of a sentence may also be refused if the offender failed to make reasonable reparation for the damage (Art. 42 para. 3 PC). A suspended sentence may be combined with an unsuspended monetary penalty or a fine pursuant to Art. 106 PC (Art. 42 para. 4 PC). The court can only partially suspend the execution of a monetary penalty, of community service or of a custodial sentence of at least one year and a maximum of three years.

if this is necessary in order to take the fault of the offender sufficiently into consideration (Art. 43 para. 1 PC).

It does not seem to be necessary to impose an unsuspended sentence in order to prevent the Accused from committing further felonies or misdemeanors. The current proceedings, the psychological stress connected therewith and ultimately also the surrender of not inconsiderable tangible assets should in future prevent the Accused from undermining the purposes of an association that is so clearly committed to activities that unite different peoples. If this finding applies to Ricardo Terra Texeira, then it is even more so the case with regard to Joao Havelange. This is not least of all due to his status as a retired person, which he has been for quite some time, and his advanced age, which will almost certainly preclude a criminal act. Furthermore, neither of the Accused have a criminal record in Switzerland, with the result that the requirements are met for a suspended sentence. The implied finding that any sentence that might be imposed would not exceed two years was made in the awareness of the fact that it is a borderline case. The extent to which the offence encompasses an objective fault component is immense and would basically entail imprisonment, which would not permit a deferral of the sentence. However, it must be considered in this case that both the mental and physical elements of the offence have not yet been sufficiently clarified; questions such as those with respect to a possible error of law cannot form part of the judgment at the current stage of the proceedings. As a result, it is held that the requirements for a conditional deferral of sentence can barely be affirmed.

Although fines cannot be suspended (Art. 105 para. 1 PC), Art. 53 lit. a PC has to be understood in such a manner that reparation is also possible, provided there is no unfavorable prognosis within the meaning of Art. 42 PC or if no “negative legal fulfillment prognosis”[vii] is at hand[41]. Furthermore, it may be assumed that FIFA will eliminate any existing deficiencies in its organization in order to avoid possible reputational damage.

8.3 Concerning the negligible interests of the public and of the damaged party in a prosecution: In its decision 6B_346/208 consid. 3.4 et seq., the Federal Supreme Court dealt in detail with the doctrine, its own jurisprudence and the comparative law of Germany’s legal framework and doctrine, which is why the following remarks are based on the arguments of the highest court.

The requirement of negligible public interest in a prosecution pursuant to Art. 53 PC is derived from the reduced need for punishment due to the reparation of the injustice[42]. The exemption from punishment due to the reparation is only permissible if the requirements for a suspended sentence are fulfilled. By taking Art. 42 PC into consideration, it follows that the interest of the public in a prosecution cannot be considered as

[41] Concerning the issue on fines see BSK Strafrecht I, Riklin, N 15 to Art. 53 PC and Niggli/Gfeller, N 331 to Art. 102 PC
[42] Günter Stratenwerth, Schweizerisches Strafrecht, Allgemeiner Teil II, 2nd ed., Berne 2006, § 7 N 12

negligible if the offence carries a custodial sentence of more than two years[43]. The interest in prosecution is negligible within this two year sentence range, provided the offender has taken steps to make reparation. The requirements concerning the efforts with respect to reparation of the offender increase with the level of the expected penalty. On the other hand, the interest of the public in prosecution decreases to the same extent as reparation has led to reconciliation between the Accused and to the restoration of public peace. But, even if the seriousness of the offence remains within the framework of Art. 53 lit. a PC and full compensation is paid, this does not necessarily mean that there is no public interest in prosecution. Thus, whether imposing a suspended sentence still remains necessary under the aspect of the special and general prevention of crime has to be evaluated[44].From a the point of view of the general prevention of crime, the confidence of the general public in the law can be increased if it is seen that the offender acknowledges the norm violation and makes an effort to restore law and order[45]. Considerations with regard to the special prevention of crime already had to be considered in the decision on the conditional punishment pursuant to Art. 42 PC. As the granting of a deferred sentence is a requirement of the reparation, considerations with respect to special prevention only play a minor role when determining the interest of the public pursuant to Art. 53 PC[46] (Federal court decision 6B_152/2007 of May 13, 2008, consid. 5.2.3). Whereas the purpose of the punishment has to be considered broadly, it is important that the legally protected rights are distinguished when determining the interests of the public in prosecution in a specific case. Art. 53 PC explicitly refers to the reparation for the injustice committed. Where this injustice lies is defined by the offences stipulated in the Penal Code as well as in the supplementary provisions outside of the Penal Code. In the case of offences against individual interests and of an aggrieved party who accepts the reparation, there is normally no public interest in prosecution. In the case of offences against individual interests, an assessment must be made of whether the matter should be closed with the payment of reparation or whether further criminal procedures are necessary in order to compensate for the wrong done and prevent further offenses. The public interest in the prosecution declines with the lapse of time since the offence was committed. Furthermore, there is a public interest in the equal treatment of the offenders. Wealthy offenders, for instance, should not be specially favored by the provision on reparation.

8.3.1 The aforementioned remarks illustrate that in the present case, the doctrine mingles aspects of other elements of offences with those of negligible interest of the public,

[43] Andreas Brunner, Geldstrafe, Busse und Freiheitsstrafe im strafrechtlichen Alltag sowie Wiedergutmachung, in B. Tag/M. Hauri (editors), Das revidierte StGB, Allgemeiner Teil, Erste Erfahrungen, Zurich 2008, 63 et seq.

[44] Felix Bommer, Bemerkungen zur Wiedergutmachung, forumpoenale 3/2008, 171 et seq.; Rainer Angst/Hans Murer, Das „Interesse der Öffentlichkeit“ gemäss Art. 53 lit. b StGB – Versuch einer Konkretisierung, Part 1 in: forumponenale 5/2008, 301 et seq. Part 2 in: forumpoenale 6/2008; Christian Schwarzenegger/Markus Hug/Daniel Jositsch, Strafrecht II, 8th ed., Zurich 2007, 64; André Kanyar, Wiedergutmachung und Täter-Opfer-Ausgleich im schweizerischen Strafrecht, Basel 2008, 217; differentiating to pettiness of interest in prosecution: M. Dubois/B. Geller/ G. Monnier/L. Moreillon/ C. Piguet, Petit Commentarie, Code Pénal I, Basel 2008, Art. 53 PV N 13, Andreas J. Keller, Art. 53 Wiedergutmachung, in: Hansjakob/Schmitt/Sollberger, op. cit., 50

[45] Silvan Fahrni, Wiedergutmachung als Voraussetzung einer diversionellen Verfahrenserledigung, in: B. Schindler/R. Schlauri (editors), Auf dem Weg zu einem einheitlichen Verfahren, Zurich 2001, 205

[46] BSK Strafrecht I, Riklin, N 4 and 16 to Art. 53 PC

which is not logical. In the specific legislative context, considerations with regard to special prevention need only be taken into account as regards the question of whether the suspended sentence is possible or not.

8.3.2 A central aspect with respect to a correct weighting of the factors (which lead to a negation of the interest in prosecution or as to whether the interest of the public can be considered as negligible) is the question of the protected legal interest. According to the system of the law, the acts or omissions that constitute both embezzlement and disloyal management are considered a general attack on property. Today's doctrine considers property[47] as the protected legal interest in offences against property; at this point, an analysis of the legal theoretical definition of the term "property" is not required. In this connection, a response to the question of whether Art. 102 PC is considered an offence and which legal right is considered protected if the answer is yes can be renounced. In this regard, what is decisive is the linking of social-ethical components with the addressee of the charge of deficiency in the organization of a legal entity structured according to economic criteria such as an enterprise. This is because in defining each legally protected interest, the social-ethical aspect constitutes a qualifying feature and ultimately is a factor in quantifying the injustice. In the present case, it involves, on the one hand, offences against individual and not public interests and, on the other hand, also the addressee of the charge of deficiency in organization has to be integrated in individual - and not public interests. Therefore, compensation for the injustice caused to an individual as a result of an offence is provided by material performance. It follows from this approach that if material compensation is actually provided, the public interest in prosecution is at least reduced.

8.3.3 A further consideration here is that the lapse of time since the infringement of legal interests also has an impact in quantifying of the public interest in prosecution. This finding is indirectly based on the fact that any failure to comply with the requirement to act expeditiously must have an impact on the sentence. If compensation is provided and an offence against property is involved and the infringement of legal interests happened years ago then it is obvious that the need to prosecute takes a back seat. The commission payments in certain cases date back to a time period that is no longer embraced by 15-year statute of limitations; the underlying offence that has to be judged in connection with the charge of deficiency in organization will become time-barred next year with respect to the basic offence. This is however a circumstance that the parties to the proceedings, and not the investigating authorities, have to take responsibility for. These factors show that the fact that the offences are far from recent also contributes to a need to refrain from imposing a drastic penalty.

8.3.4 The fact remains that the background to the offences against property are acts relating to the bribery of private individuals. The perception of such acts as nothing to be ashamed of no longer applies today; however, this is simply the result of noticeable socio-political trends, which only started at the beginning of the nineties and hence encompass the time period of offending. This socio-political development or the change of heart concerning this matter and the re-shaping

[47] BSK Strafrecht I, Niggli, N 13 to prior to Art. 137 PC

of the related conception of wrongdoing, which is reflected in the legislation (UCA), taken together with the fact that the acts reach back to the nineties, reduces the public interest in a prosecution (given the compensation provided for the injustice in this case). Within this framework, it must be noted that none of the accused parties explicitly acknowledged a breach of the law; however, this finding is put in perspective by the fact that reparation has been paid in the amount of millions of francs, which can be considered as an implied confession of criminal conduct.

8.3.5 As already outlined, reparation should also contribute to the restoration of public peace. This aspect is inherent in a component that goes beyond what is generally discussed with regard to the rule of law foundations of a functioning society with a legal philosophy approach. Where society obtains a material benefit from a settlement under Art. 53 PC, this represents a substantial contribution to restoring public peace. This has to be affirmed in the case at hand. The procedural scenario in which FIFA sustains damage on the one hand and is confronted with the charge of deficiency in the organization on the other (and hence simultaneously becomes an Accused) leads – even though it was deliberate on the part of the legislator – to a Gordian knot. That this could be solved has to do with the consent of FIFA that the assets for reparation could be used for non-profit projects and its willingness to hand over the corresponding implementation to the prosecution.

In view of the aforementioned factors, the public interest in prosecution within the meaning of Art. 53 PC has to be considered as negligible; based on this provision, the fulfillment of the requirements for the discontinuation of the proceedings has to be affirmed. Remarks on the interest of the aggrieved party are obsolete due to the aforementioned procedural scenario.

9. Under § 34 para. 2 of the Criminal Code of Procedure, in the event that the investigation proceedings are discontinued, the allocation of the costs of the proceedings is determined according to § 56 et seq. of the Criminal Code of Procedure. The question of who is to bear the costs under Art. 53 PC is not determined differently than in cases where there is an acquittal or a dismissal of the proceeding[48].

9.1 According to § 56bis para. 2 in conjunction with Art. 34 para. 2 of the Criminal Code of Procedure, in the event of a dismissal, the costs can entirely or partially be imposed on the Accused if the latter caused the initiation of the proceeding by reprehensible or careless conduct or obstructed the conduct of the proceedings.

According to the case law of the Federal Supreme Court, where costs are imposed on an Accused who has been acquitted or against whom proceedings have been discontinued, it is inconsistent with Art. 6 cipher 2 ECHR and Art. 32 of the Constitution (Art. 4 of the former Constitution) to justify the imposition of costs by claiming directly or indirectly that he made himself liable for criminal penalties or that he was guilty of an offence. However, it is consistent with the Constitution and the Convention to make the non-convicted Accused pay the costs, if he – in a reprehensible manner under civil law (i.e., applying the principles arising from Art. 41 of the Code of Obligations by analogy) –

[48] BSK Strafrecht I, Riklin, N 35 to prior to Art. 52 et seq. PC, N 31 to Art. 53 PC.

clearly violated a written or unwritten standard of conduct that can be derived from the entire Swiss legal system and that directly or indirectly prohibits damage or that requires specific conduct in order to prevent damage and he thereby causes criminal proceedings to be brought or obstructs its conduct (FCD 116 Ia 175). The unwritten civil law prohibits creating a situation likely to cause damage to others without taking the required measures to prevent its occurrence. Anyone who violates this rule may be required, based on Art. 41 CO, to pay for the damage caused. The direct and indirect costs of criminal proceedings, including the compensation that may have to be paid to the acquitted Accused, represent damage to the public. Criminal law implicitly prohibits creating – without necessity - the appearance that an infringement has been or could be committed; this is likely to cause the intervention of the criminal prosecution authorities and the initiation of a criminal proceeding. Consequently, it causes damage to the general public, in the form of the costs of the criminal proceedings that were initiated for nothing. Culpable behavior is given if the Accused, given the circumstances and his personal situation, should have been aware that his behavior entails a risk of causing the initiation of a criminal investigation (FCD 135 III 43 = Pra 2009 no. 69). However, unlawful conduct itself is not sufficient to make the Accused liable for costs. It is further necessary that the unlawful conduct was adequate cause for the initiation or obstruction of the criminal proceedings (FCD 116 Ia 170) (see also JS 2008 3).

9.2 In consideration of the foregoing remarks, the requirements for imposing the costs on the Accused are met, whereby it is unnecessary to deal with the relevant principles relating to the circumstances of the case as FIFA is taking over the costs of the proceeding up to an amount of CHF 100’000.00 and the Parties have agreed among themselves on how the costs are to be shared.

Based on §§ 34 para. 2 in conjunction with 56bis para. 2 CCP,

the Prosecutor orders as follows:

1. The criminal investigation against the Fédération Internationale de Football Association (FIFA) with regard to disloyal management is dismissed based on Art. 53 PC.

2. The criminal investigation against Ricardo Terra Texeira with regard to embezzlement, or alternatively disloyal management, is dismissed based on Art. 53 PC.

3. The criminal investigation against Havelange Jean-Marie Faustin Godefroid with regard to embezzlement, or alternatively disloyal management, is dismissed based on Art. 53 PC.

4. The costs of the proceedings are as follows:

CHF	87'000.00	Costs of the ruling
CHF	4'474.70	Outlays
CHF	496.00	Registry fees
CHF	91'970.70	Total

They shall be borne by the Fédération Internationale de Football Association (FIFA).

5. The translation costs amount to CHF 5’061.20 and shall be borne by the treasury.

6. No compensation shall be awarded.

7. The Parties to the procedure can appeal in writing against this Order within 10 days to the Justice Commission of the Supreme Court of the Canton of Zug. The appeal must contain specific prayers for relief, state the grounds therefor and must be submitted in duplicate enclosing the contested ruling (§§ 34 para. 5 and 80 et seq. of the Criminal Procedure Code).

8. Notification to:

- Attorney Dr. Dieter Gessler, Nobel & Hug Attorneys-at-law, Dufourstrasse 29, Postal Box 1372, 8032 Zurich, for himself and the Fédération Internationale de Football Association (FIFA)
- Attorney lic. iur. Hans-Rudolf Wild, Dammstrasse 19, 6300 Zug for himself and Ricardo Terra Texeira
- Attorney Dr. Marco Niedermann, Utoquai 37, 8008 Zurich, for himself and Jean-Marie Faustin Godefroid Havelange
- Immigration Office (once the Order is res judicata), only the disposition of the order
- Court cashier of the Canton of Zug (once the Order is res judicata)

Prosecutor of the Canton of Zug
II. Division

Thomas Hildbrand
[signature]
Special Prosecutor

Approved on:
[27.05.2010]

[i] Shall have the meaning of “Wiedergutmachung”according to the Swiss Penal Code.

[ii] Shall have the meaning of “Vergehen” according to the Swiss Penal Code.

[iii] Shall have the meaning of “Anlasstat” according to the Swiss Penal Code.

[iv] Shall have the meaning of “Übertretung” according to the Swiss Penal Code.

[v] «vereins“internen“ Haftung»

[vi] „Paulianische Anfechtung“

[vii] „negative Legalerfüllungsprognose“