



Arbitration CAS 2007/A/1287 Danubio FC v. Fédération Internationale de Football Association (FIFA) & FC Internazionale Milano S.p.A., award of 28 November 2007

Panel: Mr Stuart McInnes (United Kingdom), President; Mr Rui Botica Santos (Portugal); Prof. Luigi Fumagalli (Italy)

Football

Solidarity contribution

CAS jurisdiction in a dispute involving the application of EC law

Applicable law

Standing to be sued of FIFA in the appeal procedure before CAS

Interpretation of the FIFA applicable rules

Application of the FIFA rules on the solidarity mechanism to domestic transfers

Compatibility of the solidarity mechanism with EC competition law

1. Whether or not a dispute involving the application of EC law is capable of settlement by arbitration consists in a problem of arbitrability *ratione materiae* more than of jurisdiction *stricto sensu*. In this respect, it has been clearly confirmed by the settled jurisprudence of the Swiss Federal Court that a dispute involving the application of EC law, and notably of EC competition law, is capable of settlement by way of arbitration.
2. A panel has the power to apply EC rules, at least to the extent they can be considered to be “mandatory” for the purposes and with the meaning of art. 19 LDIP.
3. When merely acting as the competent deciding body of first instance in a dispute between two or more parties regarding transfer or contractual matters, FIFA cannot, in principle, be named as a respondent in the appeal procedure. Indeed, FIFA cannot be considered as the “passive subject” of the claim brought before the CAS by way of appeal against its decision, as its rights are not concerned by the relief sought by the appellant(s). It is hence clear that FIFA does not have any standing to be sued (*légitimation passive*). However, when deciding to proceed on the merits of the case by formally requesting from CAS that it rejects the appeal and confirms its decision, FIFA thus acts as a party intervening in the case.
4. As to the interpretation of the rules, Swiss law provides, under art. 1 of the Swiss Civil Code, that a rule must be interpreted according to its wording and its purpose. The historical background of the rule matters only when such rule is not clear or incomplete.
5. The FIFA system on solidarity does not find direct application to domestic transfers if the national federations do not provide for any national regulations on it.
6. The system of the solidarity mechanism currently in place, applicable only to

international transfers, does not lead to any violation of EC competition law, as it does not restrict competition. Such conclusion concerns both (i) the existence of a mechanism providing for the payment of a solidarity contribution in the event of international transfers and (ii) the absence in a domestic federative system of a similar mechanism to be applied to internal transfers.

Danubio FC (“Danubio” or the “Appellant”) is a football club with its registered office in Montevideo, Uruguay. It is affiliated to the Uruguayan Football Association.

FC Internazionale Milano S.p.A. (“Inter”) is a football club with its registered office in Milano, Italy. It is affiliated to the Italian Football Association.

The Federation International de Football Association (FIFA) is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the governing body of international football. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players, worldwide.

As a result, Danubio and Inter are subject to and bound by the applicable rules and regulations of FIFA.

Danubio asserts that, following the transfer of the player H. (the “Player”) from the Italian club Juventus Football Club S.p.A. (“Juventus”) to the fellow Italian club Inter, Inter must pay to Danubio an amount of EUR 350,000 as a solidarity contribution pursuant to the FIFA Regulations for the Status and Transfer of Players.

The Player was born in 1979 and was registered with Danubio from 11 January 1993 until 14 December 2000, i.e. between the ages of 13 and 20.

On 31 August 2004, the Player was transferred from Juventus to Inter. The transfer fee paid by Inter to Juventus was of EUR 10,000,000.

On 15 October 2004, Danubio lodged a complaint before FIFA against Inter claiming for the payment of a solidarity contribution.

FIFA referred Danubio to the jurisprudence of the Dispute Resolution Chamber (DRC) in similar cases, in accordance with which the principle of the solidarity mechanism is not applicable to national transfers. Danubio responded to FIFA that it was in total disagreement with the DRC’s jurisprudence and requested the DRC to review its jurisprudence and to recognise Danubio’s right to receive the corresponding solidarity contribution related to the transfer of the Player from Juventus to Inter. For its part, Inter informed FIFA that it categorically rejected Danubio’s claim on the basis that the FIFA regulations are not applicable to transfers between two clubs that belong to the same association.

On 21 November 2006, the FIFA Dispute Resolution Chamber passed a decision (the “Decision”).

In this Decision, the DRC first considered that, as the dispute was submitted to FIFA on 15 October 2004, it was competent, pursuant to the applicable procedural rules, to decide on disputes concerning the distribution of the solidarity contribution, and that the edition of September 2001 of the FIFA Regulations for the Status and Transfer of Players (the “Regulations” or the “FIFA Regulations”) was applicable to the case at hand.

The DRC then stated the following, in the relevant part of its Decision:

“6. (...) The Chamber referred to the contents of the Preamble of the Regulations and in particular to its par. 1 which establishes that the Regulations deal with the status and eligibility of players, as well as with the rules applicable whenever players move between clubs belonging to different associations. Like in previous decisions, the deciding body lent emphasis to the wording of the last part of the aforementioned clause and reiterated that, in fact, the Regulations are not applicable to transfers of players between two clubs affiliated to the same association. The deciding body did not see any reason which would justify the departure from this understanding, which as it was emphasised, is the result of the clear wording of the Regulations.

7. In continuation, the Chamber pointed out once again that the principle of the solidarity mechanism is not included in par. 2 of the Preamble of the Regulations and therefore, it is not binding at national level. (...)

11. (...) par. 3 of the Preamble of the Regulations, and also the current Regulations (edition July 2005) in its [sic] art. 1 par. 2 state that the specific regulations governing national transfers issued by the association concerned should also foresee a system to reward the clubs investing in the training and education of young players. Yet, the Chamber underlined that the member associations are free to decide on the kind of system they would like to introduce to reward the clubs investing in the training and education of players. In other words, they do not necessarily have to provide a solidarity mechanism which follows the role model of the Regulations. (...)

13. Finally, the Chamber pointed out that art. 26 par. 3 of the current Regulations (edition July 2005), establishes a deadline on 30 June 2007 for the member associations to submit their own regulations to FIFA for its approval”.

For the above-mentioned reasons, the DRC decided the following:

“1. The claim of the Uruguayan club, Danubio Futbol Club, is rejected.

2. According to the art. 61 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration of Sport (CAS). The statement of appeal must be sent to the CAS directly within 21 days of receipt of notification of this decision and shall contain all the elements in accordance with point 2 of the directives issued by the CAS, (...).”

FIFA served the Decision on Danubio and Inter on 19 April 2007.

On 21 May 2007, Danubio filed a statement of appeal with the Court of Arbitration for Sport (CAS), pursuant to the Code of Sports-related Arbitration (the “Code”), against Inter and FIFA. It challenged the Decision submitting the following request for relief:

“(a) that the decision taken by the Dispute Resolution Chamber of FIFA on 21 November 2006 (...) be annulled and Club FC Internazionale [sic] Milan Spa be ordered to pay to Danubio Fútbol Club the solidarity

contribution in the amount of € 375,000 (which, for avoidance of doubt, is 75% of the 5% of the total transfer fee in this case), plus 5% per annum from the due date (30 days after the date of the transfer) until the date of the effective payment. (...).

(b) And an order that Respondents should pay the costs of the arbitration and compensate Appellant for expenses incurred in defending its interest in this arbitration”.

In its appeal brief dated 21 May 2007, Danubio reduced its claim from EUR 350,000 to EUR 300,000 (which corresponds to 70% of the 5% of the total transfer fee). Danubio confirmed the reduction of its claim at the beginning of the hearing.

On 4 June 2007, FIFA wrote to CAS in order to inform it that FIFA did not consider that it was respondent in the case and to request that FIFA be excluded from the procedure. At the same time, FIFA reserved its right to claim against Danubio for the legal costs incurred in case of the unnecessary involvement in the procedure.

By means of a fax letter dated 11 June 2007 Danubio insisted in maintaining FIFA as a Respondent in the case for the following reasons: i) the DRC is not an independent body of FIFA, ii) the final award might have a direct effect into the future construction of the solidarity mechanism, iii) the Appellant's relief seeks also a declaration binding on FIFA's Regulations and future decisions, and iv) FIFA could have alleged a legitimate interest for joining this arbitration.

On 3 July 2007, FIFA and Inter provided separately their answers to the appeal lodged by Danubio.

After a full exchange of written pleadings and evidence, the hearing was held in Lausanne on 20 September 2007.

LAW

Jurisdiction of the Panel and admissibility of the appeal

1. Before entering into the merits of the present dispute, the Panel has to decide on the issue of lack of jurisdiction raised by Inter in its answer to the appeal brief.
2. Inter's position is in fact that this CAS Panel is not competent to adjudicate on complaints regarding alleged infringements of rules on competition set out in the Treaty Establishing the European Community (the “EC Treaty”), or to ensure the application of the same rules.
3. In this respect is to be noted that this CAS Panel has the power to decide upon its own jurisdiction, in accordance with art. 186 of the Swiss Private International Law Act (LDIP), which is applicable in these arbitral proceedings pursuant to art. 176 of the same, as this arbitration, in fact, has the seat in Switzerland (art. R28 of the Code) and two of the parties do

not have their domicile or habitual residence in Switzerland.

4. Art. 186 of the LDIP states in fact that “*the arbitral tribunal shall rule on its own jurisdiction*”.
5. The Panel, after checking the provisions on jurisdiction of CAS panels, comes to the conclusion that there is no reason to declare itself incompetent to deal with the present dispute.
6. In this respect it is to be noted that, in order for a CAS panel to have jurisdiction to hear an appeal, the statutes or regulations of the sports-related body from whose decision the appeal is being made must expressly recognise CAS as an arbitral body of appeal (art. R27 and art. R47 of the Code).
7. This CAS Panel unmistakably has jurisdiction to deal with the present case, as the Decision appealed from is a final decision passed by one of FIFA’s legal dispute resolution entities, in this case the DRC, and in art. 60 of FIFA Statutes, as currently in force, the CAS is expressly recognized as the body to “*resolve the disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Official and licensed match and player’s Agents*”. Furthermore, the appeal is not related to any of the topics mentioned in art. 61.3 of the FIFA Statutes.
8. In consequence the Panel considers that it has jurisdiction to rule on the present dispute.
9. The application of EC law, as invoked by the Appellant and objected to by Inter, involves however another issue, which could affect this Panel’s power to adjudicate on the appeal, i.e. whether or not a dispute involving the application of EC antitrust law, as per the Appellant’s request, is capable of settlement by arbitration. The issue, then, more than a question of jurisdiction *stricto sensu*, consists in a problem of arbitrability *ratione materiae*.
10. In this further respect, the Panel stresses first that it is not only allowed, but also obliged to deal with the issues involving the application of EC law in the present matter. The point is confirmed by the settled jurisprudence of the Swiss Federal Court (ATF 132 III 399). With this jurisprudence, the Swiss Federal Court confirmed clearly that a dispute involving the application of EC law, and notably of EC competition law, is capable of settlement by way of arbitration. Moreover, CAS panels have in the past applied EC law (CAS 98/200). Inter’s objection on the point must therefore be rejected.
11. As a consequence, the Panel concludes that the present dispute is capable of settlement by arbitration also in that it involves the application of EC antitrust law.
12. Under art. R57 of the Code, the Panel has the full power to review the facts and the law. The Panel, therefore, in the exercise of its jurisdiction, does not examine only the formal aspects of the appealed decision, but holds a trial *de novo*, evaluating all facts, including new facts, which had not been mentioned by the parties before the DRC, and all legal issues involved in the dispute.
13. The appeal was filed within the deadline provided by art. 60 of the FIFA Statutes and indicated

in the Decision, namely within 21 days after notification of the Decision. It complies with the requirements of art. R48 of the Code. It follows that the appeal is admissible, which is also undisputed.

Applicable law

14. Art. R58 of the Code provides that the Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate.
15. Art. 60 para. 2 of the FIFA Statutes, in their version in force, further provides that CAS shall primarily apply the various Regulations of FIFA, and, additionally, Swiss law.
16. In the present matter, it is undisputed that the FIFA Regulations are applicable. Those Regulations shall thus apply primarily, together with the other applicable rules of FIFA.
17. As mentioned above, in addition, this Panel has the power to apply EC rules, at least to the extent they can be considered to be “mandatory” for the purposes and with the meaning of art. 19 LDIP.

FIFA role in the appeal procedure

18. The role of FIFA in this proceedings is disputed. On one side, FIFA, in a first submission, stated that it could not be considered to be a respondent to the relief sought by the Appellant, and requested to be excluded from the procedure. On the other side, Danubio insisted in maintaining FIFA as a respondent.
19. The Panel shares FIFA’s opinion expressed in its letter addressed to CAS on 4 June 2007 and confirms that FIFA, since it acted as the competent deciding body of first instance and was not a party to the actual dispute between Danubio and Inter, could not be named as a respondent in this procedure. FIFA, indeed, cannot be considered as the “passive subject” of the claim brought before this Panel by way of appeal against the Decision, as FIFA’s rights are not concerned by the relief sought by Danubio. It is hence clear that FIFA does not have any standing to be sued (*légitimation passive*) and cannot, as such, be identified as a respondent in the present arbitration.
20. The Panel notes however that, in its answer dated 3 July 2007, FIFA asked that the appeal be rejected and the decision taken by the DRC on 21 November 2006 be confirmed. The Panel, in addition, notes that the Appellant expressly and insistently requested FIFA’s participation in the instant procedure and also that the present matter deals with an important question in relation to the material scope of application of the FIFA regulations on transfers, namely the

scope of application of the solidarity mechanism foreseen by the FIFA regulations.

21. In the present case, the Panel therefore considers FIFA as one of the respondents in these proceedings only as a result of an intervention in the proceedings, which became effective when the Appellant reiterated its will to address the appeal against FIFA and FIFA formally requested from CAS in its answer that it rejects the appeal and confirms the Decision. By doing so, FIFA, indeed, decided to proceed on the merits of the case and thus act as a party intervening in the procedure.

The merits of the dispute

1. *The position of Danubio*
22. Danubio submits, in support of its request for relief, that the FIFA Regulations should be construed to require the application of the solidarity mechanism therein provided also in the event of transfer of players within the same association (i.e., in the event of “internal transfers”), insofar as the national association in question
 - i. has not implemented the same or similar rules,
 - ii. is an association within a Member State of the European Union, in order to avoid that the construction of the rule results in an infringement of art. 81 and 82 of the EC Treaty.
23. Danubio’s submission in such respect may be summarized as follows:
 - (1) The FIFA Statutes (editions 2004, 2005 and 2006), notably art. 2 (Objectives of FIFA) and art. 3 (Non-discrimination and stance against racism), must be considered while interpreting the regulations passed by the various committees of FIFA. According to Swiss law and jurisprudence, the statutes of an association like FIFA, which were approved by all the members, must be considered as a constitution which sets the frame in which the various regulations issued by the executive bodies of the association must fit.
 - (2) Paragraph 2 of the preamble to the FIFA Regulations, provides that some (but not all) of the rules therein set forth are binding at national level. Paragraph 3 provides that “*each national association is obliged to provide a system for transfers that are effected within its own association and to draw up appropriate regulations which shall be approved by FIFA. Such regulations shall observe the general principles stipulated in the following articles and contain provisions for any dispute that may arise in connection with a national transfer (i.e. transfer within the same national association)*”. According to Danubio, this leads to the application of the relevant articles of the FIFA Regulations if the national associations do not implement their own rules.
 - (3) The Italian football association implemented national rules, not approved by FIFA yet, which do not provide for solidarity contributions and are only applicable to national clubs. This leads to the conclusion that Danubio, as a foreign club, has no ability to obtain any solidarity contribution, be it on the basis of the FIFA Regulations, or on the basis of the Italian rules. Danubio thus considers this situation as discriminatory.

- (4) In a decision of 2003 related to the transfer within England of the player R., FIFA admitted that this was a case of international transfer and thus applied the FIFA rules on solidarity mechanism. Danubio claims that the principles established in this first FIFA decision, which were subsequently reversed and are no longer followed by the DRC, prove that the rules can be interpreted in different ways. Danubio is of the opinion that if the Panel followed Danubio's stance, this would not be law making, but merely interpretation of the rules.
- (5) Art. 81 of the EC Treaty should be taken into consideration by the Panel when it interprets the FIFA Regulations. The interpretation of the rules adopted by the DRC leads to a distortion of the EC market, as "national transfers", as defined by the DRC, are not subject to the 5% fee to be paid by the transferring club according to FIFA rules on the solidarity mechanism, which are applicable to international transfers. In Danubio's opinion, the position taken by FIFA (and maintained also in the Decision) in respect of the solidarity mechanism is likely to distort competition within the EC market, contrary to art. 81 of the EC Treaty; its result in fact is to induce the football clubs to recruit players within their domestic market, as the consequence will be saving 5% in solidarity payment. In other words, Danubio submits that there would be an artificially induced increase in domestic transfers, to the detriment of cross-border transfers.
- (6) The rules providing for a solidarity mechanism (and the payment of training compensation) were introduced in the FIFA system on the basis of an undertaking taken by FIFA *vis-à-vis* the EC Commission, that therefore closed an investigation into the FIFA rules on the transfer of players. In this respect, however, according to the Appellant, "*it is noteworthy that, according to the historical background of the discussions between the EU Commission and FIFA and UEFA, the possibility that the solidarity mechanism would be paid in international transfers only ... was never suggested. During the talks, it was assumed that the solidarity mechanism would apply to every transfer of players*".

2. *The position of Inter*

24. Inter's answer can be summarized as follows:

- (1) Based on the 2001 edition of the FIFA Regulations and on the jurisprudence of the DRC, namely a decision of the DRC dated 22 July 2004, Inter stresses that according to the clear wording and systematic of the Regulations, in particular under paragraph 1 of the Preamble, the Regulations do not apply to transfers of players between two clubs affiliated to the same association (national transfers). Moreover, Inter mentions that according to paragraph 2 of the Preamble to the Regulations, the solidarity mechanism is not binding at national level.
- (2) Inter thus concludes that the solidarity mechanism as stipulated in the Regulations does not apply to national transfers including in cases where the club claiming the payment of the relevant contribution is affiliated to another association.
- (3) Inter explains further that the Italian Federation issued its own national regulations on national transfers and that no solidarity mechanism is foreseen. Inter considers that FIFA

rules clearly do not impose on national federations to provide for a solidarity mechanism at national level and that therefore Danubio cannot derive any right against Inter on the basis of the FIFA rules.

- (4) Coming back to Danubio's alleged infringement of EC law, Inter argues that the solidarity mechanism does not apply to trade between Member States as the solidarity mechanism is of a sporting nature and has nothing to do with trade. Moreover, according to Inter, international transfers of players cannot be considered as "interchangeable" or "substitutable" according to the EU Commission's definition of the relevant market and the application of the solidarity mechanism has thus no effect on the competition within the common market. Inter stresses eventually the fact that Danubio failed to meet the burden of proving that the conditions for the application of articles 81 and 82 of the EC Treaty are fulfilled.
- (5) In view of the above, Inter concluded in its answer that the decision passed by the Dispute Resolution Chamber was confirmed and that the appeal was therefore rejected.

3. *The position of FIFA*

25. FIFA's answer can be summarised as follows:

- (1) Following the DRC jurisprudence, in particular the DRC decision dated 22 July 2004, quoted as well by Inter, FIFA considers that the 2001 edition of the FIFA Regulations for the Status and Transfer of Players do not apply to transfers of players between two clubs affiliated to the same association (national transfers). Just like Inter, FIFA stresses that this results from the clear wording and systematic of the Regulations, in particular under paragraph 1 of the Preamble. This leads FIFA to the same conclusion as Inter, meaning that the solidarity mechanism foreseen by the Regulations is not applicable to the transfer of the Player from Juventus to Inter.
- (2) Moreover, FIFA points out that the DRC jurisprudence takes into account that the principle of the solidarity mechanism is not included in the list of the provisions of the Regulations which are binding at national level, as provided under paragraph 2 of the Preamble of the Regulations.

26. FIFA took therefore the same conclusions as Inter and required that CAS confirms the decision passed by the Dispute Resolution Chamber.

4. *The evaluation of the Panel*

27. The Panel carefully reviewed all the arguments raised by the Parties and used all sources of law including the FIFA Statutes and EC law in order to correctly determine the scope of application of the FIFA rules on the solidarity mechanism.

28. In this respect, the Panel maintains that its role is not to revise the content of the applicable rules, but only to interpret and apply them (CAS 2005/A/955 & 956, nr 7.3.10). As to the

interpretation of the rules, Swiss law provides, under art. 1 of the Swiss Civil Code, that a rule must be interpreted according to its wording and its purpose. The historical background of the rule matters only when such rule is not clear or incomplete (Decisions of the Swiss Federal Court, notably, ATF 122 I 253 and ATF 112 II 1).

29. Paragraph 1 of the Preamble to the FIFA Regulations foresees that *“these regulations deal with the status and eligibility of players, as well as with the rules applicable whenever players move between clubs belonging to different national associations”*. Paragraph 2 of the Preamble provides for exceptions to the principles set under paragraph 1. However, the rules on the solidarity mechanism, which belong to chapter IX of the Regulations, are not part to those exceptions. The wording of the paragraph 1 of the Preamble of the Regulations thus clearly excludes that national transfers, meaning transfers between two clubs of the same national association, be subject to chapter IX of the Regulations, regarding the solidarity mechanism.
30. As the transfer at the origin of Danubio’s claim took place between two clubs, Juventus and Inter, belonging to the same association, the Italian association, the Panel does not see any reason why the FIFA Regulations providing for the payment of solidarity contribution should be applied, and the fee paid to Juventus by Inter be subject to the solidarity contribution provided under chapter IX of the Regulations. The clear wording of the FIFA Regulations leaves no room for a different solution.
31. Contrary to Danubio’s opinion, the isolated decision related to the player R. dated 12 November 2003, where the Single Judge of the FIFA Player’s Status Committee was of another opinion and the fact that until 2004 the DRC itself issued apparently similar decisions do not raise any doubts among the Panel as to the scope of application of the rules on the solidarity mechanism and does not change the abovementioned conclusion. That opinion is indeed not supported by the clear wording of the Regulations, which explains why the DRC has subsequently changed its jurisprudence and rejected any claim of payment of a solidarity contribution following the transfer of a player between two clubs belonging to the same association.
32. At the same time, the Panel stresses that art. 2 and art. 3 of the FIFA Statutes, mentioned by Danubio and concerning respectively the objectives of FIFA and the principle of non-discrimination and stance against racism, do not change this conclusion. Indeed, the “objectives” of FIFA (which include the power to draw up regulations, to ensure their enforcement and to control that appropriate steps are taken to prevent their infringement) do not give the FIFA rules a force, a scope of application or meaning other than the one such rules actually have. As a result, a FIFA rule intended to apply, according to its clear wording, only to “international transfers” is not made applicable to “internal transfers” merely because national associations are bound to observe the FIFA rules or because FIFA has a regulatory and supervisory function over national associations. In the same way, the prohibition of discrimination on the basis of race, religion, etc. (as forth in art. 3 of the FIFA Statutes) does not seem to affect rules duly approved by the competent FIFA bodies, such as those regarding the solidarity mechanism, so to impose their application also to national transfers and to give them a meaning they do not have.

33. As to the fact that no solidarity mechanism has been so far implemented by the Italian football association, the Panel notes that, according to paragraph 3 of the Preamble to the 2001 edition of the FIFA Regulations, and to art. 1 paragraph 3 (b) of their 2005 edition, FIFA requires from the national associations that they implement a system for transfers that observes the general principles of the Regulations. At the same time, the Panel remarks that, before being effective, such “national” system must be approved by FIFA, and that, in a circular letter dated 23 September 2005 FIFA gave a deadline to the national federations until 30 June 2007, to submit to FIFA for approval their national regulations on the system of transfers.
34. As a result of the above, the Panel finds that
- (i) the clear wording of the FIFA Regulations,
 - (ii) the fact that national regulations are subject to FIFA approval,
 - (iii) the fact that paragraph 2 of the Preamble of the FIFA Regulations provides only for a limited number of articles to be binding at a national level,
 - (iv) the fact that only the “general principles” of the FIFA Regulations, and not their entire body, have to be implemented by the national associations with regard to the domestic system for the transfer of players,
 - (v) and eventually the fact that FIFA fixed a deadline to the national federations to submit to FIFA their national regulations

prove clearly that the FIFA system on solidarity does not find direct application to domestic transfers if the national federations do not provide for any national regulations on it. Danubio’s argument on this point must thus be rejected.

35. As for the question of the compatibility of the current situation with EC law, notably with art. 81 of the EC Treaty, the Panel notes that it is undisputed that EC competition law is applicable to matters of sport. As mentioned by the European Court of Justice (*Meca-Medina and Majcen v. Commission of the European Communities*, judgment of 18 July 2006, C-519/04P), however, where sporting regulations have to be assessed in the light of the EC Treaty provisions relating to competition, it is necessary to determine, given the specific requirements of art. 81 and 82, whether the rules in question restrict competition or amount to an abuse of a dominant position, and whether that restriction or that abuse affects trade between Member States.
36. In light of such principles, and contrary to the Appellant’s submissions, the Panel comes to the conclusion that the system of the solidarity mechanism currently in place, applicable only to international transfers, does not lead to any violation of EC competition law, as it does not restrict competition. Such conclusion concerns both (i) the existence of a mechanism providing for the payment of a solidarity contribution in the event of international transfers and (ii) the absence in a domestic federative system of a similar mechanism to be applied to internal transfers.
37. The Panel notes in this regard that the principles incorporated in the FIFA Regulations with respect to the transfer of players were approved by the EC authorities after a long process of

negotiation. Among such principles was also that contemplating the “*creation of solidarity mechanisms that would redistribute a significant proportion of income to clubs involved in the training and education of a player, including amateur clubs*”. The (then) EC Competition Commissioner could then declare that “*FIFA has now adopted new rules which are agreed by FIFpro, the main players’ Union and which follow the principles acceptable to the Commission. The new rules find a balance between the players’ fundamental right to free movement and stability of contracts together with the legitimate objective of integrity of the sport and the stability of championships. It is now accepted that EU and national law applies to football, and it is also now understood that EU law is able to take into account the specificity of sport, and in particular to recognise that sport performs a very important social, integrating and cultural function. Football now has the legal stability it needs to go forward*” (see the official press release IP/02/824 – Brussels, 5 June 2002, announcing that the European Commission had closed its investigation into the rules governing international transfers of football players).

38. In other words, far from introducing a distortion in the internal market of the “transfer of players”, the solidarity mechanism was introduced in the FIFA Regulations with the specific approval of the EC authorities, to fulfil the social dimension of sport and to compensate the efforts made by the training clubs, i.e. to achieve a purpose which is crucial also for the application of EC rules.
39. In this respect, the Panel does not agree with the Appellant’s indication, “*that ... the possibility that the solidarity mechanism would be paid in international transfers only ... was never suggested. During the talks, it was assumed that the solidarity mechanism would apply to every transfer of players*”. Indeed, the Panel remarks that the discussions between FIFA and the EC specifically concerned “international transfers”, and that the investigation started by the EC into FIFA rules did not concern purely “domestic transfers”.
40. As a result, the Panel considers that no impact on the competition within the EC market is created by the current system, even to the extent it is applicable to international and not to domestic transfers. In fact, even if the rules on solidarity are regarded as a decision of an association of undertakings limiting the Appellant’s freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of art. 81, or an abuse pursuant to art. 82, since they are justified by a legitimate objective, which is the redistribution of a proportion of income to clubs involved in the training and education of a player, including amateur clubs, related, at the end, to the safeguard of competitive sport and of its promotion. In addition, the restriction (if any) imposed by the FIFA Regulations, appear to be limited to what is necessary to achieve their purpose, considering that the contribution to be paid under the solidarity mechanism is limited in its amount.
41. In addition, the Panel notes that no distortion, relevant for the purposes of art. 81 EC Treaty, is caused by the absence in the Italian domestic federative system of a mechanism, similar to that contemplated in the FIFA Regulations, to be applied to internal transfers. First, because a distortion, if any, would be in any case created by the applicability of the FIFA mechanism at the international level, which imposes a payment – and therefore a restriction – on international transfers, not by the absence of such restriction at the national level. In any event, should the

system of the solidarity mechanism set up by FIFA be deemed to constitute a breach of art. 81 or of art. 82 of the EC Treaty, this would lead to have this system declared void, and not to the creation by this Panel of a new rule to be applied within the national system, which is clearly beyond this Panel's power. The Panel could thus not grant a solidarity contribution to Danubio. Consequently, Danubio cannot draw any advantage from art. 81 or art. 82 of the EC Treaty, as its application, which the Panel rejects in this case, would not lead Danubio to win its case.

5. *Conclusion*

42. Based on all the above, the appeal must be dismissed and the Decision confirmed.

The Court of Arbitration for Sport rules that:

1. Danubio FC's appeal against the decision dated 21 November 2006 of the FIFA Dispute Resolution Chamber is dismissed.

(...)