



**Arbitration CAS 2008/A/1622 FC Schalke 04 v. Fédération Internationale de Football Association (FIFA), CAS 2008/A/1623 SV Werder Bremen v. Fédération Internationale de Football Association (FIFA) & CAS 2008/A/1624 FC Barcelona v. Fédération Internationale de Football Association (FIFA), award of 2 October 2008**

Panel: Mr Efraim Barak (Israel), President; Mr Michele Bernasconi (Switzerland); Mr Ralph Zloczower (Switzerland)

*Football*

*Olympic Games 2008*

*Obligation for the clubs to release their players to the OG*

*Absence of legal basis in connection with such obligation*

- 1. The FIFA Transfer Regulations only provide for the mandatory release of players for (i) matches included in the coordinated international match calendar and (ii) for all matches for which a duty to release players exists on the basis of a special decision taken by the FIFA Executive Committee.**
- 2. The special nature or unique character of an event does not by itself constitute a valid legal basis to recognize the existence of a far-reaching obligation of third parties like the obligation for a club to release its players. Therefore, the specific and unique nature of the Olympic Games itself cannot be considered as valid legal basis for an obligation.**
- 3. Under Swiss association law, customary law can represent a valid set of rules of an association provided that (i) the applicable Regulations contain a loophole which may be supplemented by customary law, (ii) there is a constantly and consistently applied practice of the association (*inveterata consuetudo*) and (iii) the members are convinced that such practice is legally binding (*opinio necessitatis*). A legal obligation cannot be imposed on the members of an association if the requirements based on customary law are not met.**

The FC Schalke 04, Appellant 1, is a German football club with its registered office in Gelsenkirchen, Germany. It is a member of the German Football Federation (Deutscher Fussball-Bund, DFB), which will be further introduced below.

The SV Werder Bremen, Appellant 2, is a German football club with its registered office in Bremen, Germany. It is also a member of the DFB.

The FC Barcelona, Appellant 3, is a football club with its registered office in Barcelona, Spain. It is a member of the Spanish Football Federation (Real Federación Española de Fútbol, RFEF).

The Fédération Internationale de Football Association (FIFA), Respondent, is the governing body of international football on a worldwide level. It exercises regulatory, supervisory, disciplinary and coordinating functions over national associations, clubs, officials and players, worldwide. FIFA is an association under Swiss law and has its headquarters in Zurich, Switzerland.

The German Football Federation, Deutscher Fussball-Bund (DFB), is the governing body of football in Germany. It organises the German football leagues and heads the German national team. It is a member of FIFA.

The Brazilian Football Federation, Confederação Brasileira de Futebol (CBF), is the governing body of football in Brazil. It organises the Brazilian football leagues and heads the Brazilian national team. It is also a member of FIFA.

The Argentinean Football Association, Asociación del Fútbol Argentino (AFA), is the governing body of football in Argentina. It is responsible for the organization of the Argentinean football leagues and heads the Argentinean national team. It is a member of FIFA, too.

Mr. Márcio Rafael Ferreira de Souza alias Rafinha (“Rafinha”) is a Brazilian football player employed by FC Schalke 04. He was born on 7 September 1985.

Mr. Diego Ribas da Cunha alias Diego (“Diego”) is a Brazilian football player employed by SV Werder Bremen. He was born on 28 February 1985.

Mr. Lionel Andrés Messi (“Messi”) is an Argentinean football player employed by FC Barcelona. He was born on 24 June 1987.

With fax letter of 7 July 2008, CBF requested DFB to inform FC Schalke 04 that its player Rafinha was designated to join CBF’s team for the football tournament at the Olympic Games in Beijing taking place from 6 August 2008 to 24 August 2008 (the “Olympic Games 2008”).

With fax letter of 11 July 2008, FC Schalke 04 explained to CBF its view on the legal prerequisites for an obligation of football clubs to release their players for the Olympic Games 2008 and indicated they were not met in the case of Rafinha.

With fax letter of 11 July 2008, CBF asked DFB again to inform FC Schalke 04 that the player Rafinha should be released to the Olympic Games 2008. With fax letter of 17 July 2008, DFB informed CBF that it did not see any legal basis for an obligation of FC Schalke 04 to release

Rafinha, meaning that DFB maintained the same understanding of the legal situation as did its affiliated club FC Schalke 04.

With letter of 22 July 2008, FC Schalke 04 requested from CBF a statement by which CBF undertook to release Rafinha from any duty to participate in the Olympic Games 2008. CBF, however, did not provide the requested statement to FC Schalke 04 within the set deadline.

On 25 July 2008, FC Schalke 04 submitted a complaint at the Single Judge of the Players' Status Committee of FIFA (the "FIFA Single Judge") and requested FIFA to decide that FC Schalke 04 was not obliged to release Rafinha for participating in the Olympic Games 2008.

With fax letter of 7 July 2008, CBF requested DFB to inform SV Werder Bremen that its player Diego was designated to join CBF's team for the football tournament at the Olympic Games 2008.

With fax letter of 14 July 2008, CBF addressed DFB and stated that Diego had reported that SV Werder Bremen did not have the intention to release him to the Olympic Games 2008. As a consequence of this, CBF asked DFB for intervention and support. With fax letter of 17 July 2008, DFB informed CBF that it did not see any legal basis for an obligation of SV Werder Bremen to release the player Diego.

With fax letter of 22 July 2008, SV Werder Bremen requested from CBF a statement by which CBF undertook to release Diego from any duty to participate in the Olympic Games 2008. CBF, however, did not provide the requested statement to SV Werder Bremen within the deadline set by the club.

On 25 July 2008, SV Werder Bremen submitted a complaint to the FIFA Single Judge and requested him to decide that SV Werder Bremen had no obligation to release Diego for participating in the Olympic Games 2008.

With letter of 27 June 2008, AFA informed FC Barcelona that its player Messi was designated to join AFA's team for the football tournament at the Olympic Games 2008.

With letter of 2 July 2008, FC Barcelona responded to AFA that it had no obligation and was not willing to release the player Messi to the tournament at the Olympic Games 2008 since the player would have to play in the two-legged qualification round for the entry to the UEFA Champions League which were fixed by UEFA to take place during the same time period of time as the Olympic Football tournament. With fax letter of 4 July 2008, FC Barcelona confirmed this position.

With letter of 21 July 2008, FC Barcelona proposed that Messi should play the first match of the qualification round for the UEFA Champions League and that Messi should be released for the

Olympic Games 2008 in case the result of the first match would be satisfactory to the interests of FC Barcelona. With letter of the same date, AFA rejected this proposition.

With letter of 28 July 2008, FC Barcelona addressed the FIFA Single Judge and requested him to issue a decision by which it recognised the right of FC Barcelona not to release the player Messi to the Olympic Games 2008.

At the last meeting of the FIFA Executive Committee in Zurich on 14 March 2008, FIFA addressed different questions regarding the Olympic Games 2008. With regard to the men's tournament at the Olympic Games 2008, the minutes of this meeting simply state that the FIFA Executive Committee *"agreed to appeal for good will from clubs in releasing players aged over 23 to take part in the 2008 Men's Olympic Football Tournament although there was no obligation for the clubs to do so"*. According to these minutes, FIFA's Executive committee did not, however, take any decision regarding the question whether clubs have an obligation to release their players aged below 23 for the Olympic Games 2008.

Approaching the Olympic Games 2008, FIFA sent to all its affiliated members a circular letter, no 1153 of 23 July 2008, personally signed by FIFA's President Mr. Joseph Blatter, in which FIFA stated that there was *"a certain amount of confusion as to whether players have to be released for the Men's Olympic Football Tournament Beijing 2008"*. Thus, FIFA wished to clarify that *"the release of players below the age of 23 (...) has always been mandatory for all clubs"* and that this principle shall apply for the Olympic Games 2008. Further, FIFA mentioned in this circular letter that the release of players over the age of 23 (i.e. the three out-of-quota players who are eligible for the final phase of the Olympic football tournament) was not compulsory.

On 29 July 2008, the FIFA Emergency Committee allegedly met in Zurich or was contacted *"to deliberate about the obligation of clubs to release their under 23 aged players for the Olympic Football Tournaments, since this issue apparently led to a certain amount of confusion in connection with the Olympic Men Football Tournament Beijing 2008"*. Pursuant to the minutes of this meeting, the members of the FIFA Emergency Committee stressed that *"the FIFA Congress 1988 had decided that all players up to the age of 23 were eligible to play in the Olympic Football Tournament"* and *"confirmed referring to the **longstanding and undisputed practice existing** since 1988, that the application of customary law is justified"*. Finally the minutes hold that *"the Emergency Committee unanimously **concluded** that an obligation for clubs to release their players for the Olympic football Tournament exists"*.

Upon the requests of the Appellants 1 to 3, the FIFA Single Judge reasoned that in relation with the issues raised regarding the release of players, the coordinated international match calendar was not of relevance at all and that, in view of the longstanding and undisputed practice, recourse to customary law was justified. Therefore, with reference to the FIFA circular letter no 1153 of 23 July 2008 and to the meeting of the FIFA Emergency Committee of 29 July 2008, the FIFA Single Judge issued the following decision dated 30 July 2008 (the "Decision of the FIFA Single Judge"): *"The release of players under the age of 23 for the Olympic Football Tournament Beijing is mandatory for all clubs"*.

The Panel will refer to the FIFA Emergency Committee's and FIFA Single Judge's considerations in more detail within the discussion of this Award, as far as deemed relevant.

Additional facts will be addressed, where material, in connection with the discussion below on the merits of the matter.

The matter to be discussed and decided in the three cases at hand can basically be crystallized to the following clear and simple question:

*Do/Did football clubs have a legal obligation to release their players for the Olympic Games 2008?*

On 31 July 2008 all three Appellants, i.e. FC Schalke 04, SV Werder Bremen and FC Barcelona, filed a statement of appeal against the Decision of the FIFA Single Judge at CAS.

On the same date as the date of the filing of the three appeals, CAS invited the Appellants 1 to 3 and the Respondent to communicate to CAS whether they wished to have a hearing. Further, CAS stated, inter alia, that it proposed to join the three cases CAS 2008/A/1622, CAS 2008/A/1623 and CAS 2008/A/1624 since all three cases had been filed against the same decision of the FIFA Single Judge, and deal with the same legal questions.

With email of 31 July 2008, FIFA informed that it preferred not to hold a hearing, but that it agreed that the three cases were joined.

Due to the emergency of the matter (the appeals were lodged on 31 July 2008, while the Olympic football tournament started on 4 August 2008), all parties have agreed to an expedite procedure and CAS treated the appeals accordingly.

With email of 1 August 2008, FC Barcelona informed CAS that it preferred to have a hearing. FC Barcelona had confirmed already in its statement of appeal to agree that the three cases were joined.

With fax letter of 1 August 2008, SV Werder Bremen and FC Schalke 04 informed that they preferred to have a hearing and that they agreed to joining the three cases.

FC Barcelona's legal reasoning as to the relevant question at stake may be briefly summarised, in essence, as follows:

- the Transfer Regulations provide that the release of players is mandatory only for matches on dates listed in the coordinated international match calendar and for matches for which a duty to release players exists on the basis of a special decision by the FIFA Executive Committee; neither of these two requirements are met with regard to the Olympic Games 2008;

- the findings of FIFA Emergency Committee of 29 July 2008 do not constitute an obligation for the clubs to release their players since (i) these findings do not qualify as a decision but as a legal advice, (ii) the FIFA Emergency Committee is not competent for such a decision, and (iii) the principle of foreseeability of the law and protection of confidence prevents a change of the rules at a time when the addresses have earned trust in the continuity of the legal situation;
- no other legal basis, in particular no customary law, provides an obligation for the clubs to release their players.

FIFA's answer and its legal reasoning as to the relevant question at stake may be briefly summarised, in essence, as follows:

- FIFA starts its answer by clearly stating that according to the Decision of the FIFA Single Judge the obligation for clubs to release their U23-players for the men's Olympic Football Tournament is neither included in the coordinated international match calendar nor based on a special decision of the Executive Committee of FIFA but is based on a long lasting and undisputed practice, thus on customary law;
- the creation of customary law in an association is generally recognised under Swiss law;
- the existence of customary obligation within FIFA for clubs to release U23-players to participate in the Olympic Games is established and cannot be rejected;
- customary law serves in the three cases at hand as an entirely admissible and necessary supplementation in view of the fact that the principle of the obligation to release players for the Olympic Games is not explicitly dealt with by FIFA's regulations;
- the existence of customary law and the obligation of the clubs to release their U23-players have been confirmed by the decision of the FIFA Emergency Committee of 29 July 2008.

On 5 August 2008 the hearing took place in Zurich, with the attendance of all four parties and their representatives. No witnesses were heard.

## LAW

### Jurisdiction and Application of the Procedural Rules of the Code

1. The jurisdiction of CAS has not been disputed by any party and derives from Art. 62 ss of the FIFA Statutes, Art. 23 para. 3 of the Transfer Regulations and Art. R47 of the Code of Sports-related Arbitration (the “Code”). It follows that the CAS has jurisdiction to decide on the present three disputes.
2. Pursuant to Art. R27, the Procedural Rules of the Code apply whenever the parties have agreed to refer a sports-related dispute to the CAS. Art. 62 para. 2 of the FIFA Statutes provides that the provisions of the Code shall apply to the proceedings at CAS. Hence, the Code is applicable to the three present cases.

### Admissibility of the Appeals

3. The appeals of Appellants 1 to 3 were filed within the deadlines set by the FIFA Statutes and stated in the Decision of the FIFA Single Judge.
4. All three appeals comply with all further requirements provided by Art. R48 of the Code. It follows that all three appeals are admissible.

### Law Applicable

5. According to Art. R58 of the Code, a panel shall decide a 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.
6. Art. 62 para. 2 of the FIFA Statutes provides that “*CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law*”. The applicability of the FIFA regulations and, additionally, of Swiss law has not been disputed by any party.
7. Hence, the relevant questions at stake have to be assessed according to the various regulations of FIFA and, additionally, according to substantive Swiss law.

## Merits

8. As already stated, the relevant question in these arbitration cases can basically be reduced to the following:

*Do/Did the Appellants 1 to 3 have a legal obligation to release their players Rafinha, Diego and Messi to participate in the Olympic Games 2008 with their national teams?*

9. The Panel will now examine possible legal grounds for such obligation, in particular the Transfer Regulations, the exceptional nature of the Olympic Games, and customary law.

### A. *The Transfer Regulations*

10. Art. 1 para. 1 of Annexe 1 to the Transfer Regulations reads as follows:

*“Clubs are obliged to release their registered players to the representative teams of the country for which the player is eligible to play on the basis of his nationality if they are called up by the association concerned. Any Agreement between a player and a club to the contrary is prohibited”.*

According to this provision, football clubs have an obligation to release their players for the games of their national team. The extent of this obligation is specified in para. 2 and 3 of the same article.

11. Art. 1 para. 2 of Annexe 1 to the Transfer Regulations states:

*“The release of players under the terms of paragraph 1 of this article is mandatory for matches on dates listed in the coordinated international match calendar and for all matches for which a duty to release players exists on the basis of a special decision by the FIFA Executive Committee”.*

This provision describes in which cases the release of players is mandatory (i.e. positive description of the extent of the obligation): (i) to matches that are listed in the coordinated international match calendar published by FIFA, and (ii) to matches for which the duty to release the players is based on a special decision by the FIFA Executive Committee.

12. Art. 1 para. 3 of Annexe 1 to the Transfer Regulations reads as follows:

*“It is not compulsory to release players for matches scheduled on dates not listed in the coordinated international match calendar”.*

This provision states clearly in which cases no obligation to release players exists (i.e. negative description of the extent of the obligation): to matches which are not listed in the coordinated international match calendar.

13. Thus, the following three questions have to be examined, in a first step, in the three cases at hand:
- 1) Does the relevant coordinated international match calendar list the Olympic Games 2008?
  - 2) Does a special decision of the FIFA Executive Committee provide an obligation for clubs (in particular for the Appellants 1 to 3) to release their players to the Olympic Games 2008?
  - 3) Are Art. 1 para. 1 to 3 of Annexe 1 to the Transfer Regulations exhaustive and exclusive?
- a) Coordinated International Match Calendar
14. It is undisputed that the men's football tournament of the Olympic Games 2008 is not mentioned in the relevant coordinated international match calendar. This fact is, in particular, acknowledged both by the FIFA Single Judge and by the Respondent. The FIFA Single Judge has even emphasized that *"the Men's Olympic Football Tournament was deliberately not officially included in the coordinated international match calendar, since such action would not be congruent with the said calendar"*.
15. Hence, the coordinated international match calendar does not constitute a legal basis for an obligation for clubs, in particular for the Appellants 1 to 3, to release their players in this case the players Rafinha, Diego and Messi, to the Olympic Games 2008.
- b) Special Decision by the FIFA Executive Committee
16. At its last meeting of 14 March 2008, FIFA Executive Committee stated that there was no obligation for clubs to release players over 23 to the men's tournament of the Olympic Games 2008, but appealed for goodwill from clubs to do so. It is undisputed that, at that meeting, the FIFA Executive Committee did not take any decision on the question whether clubs had an obligation to release players under 23 to the Olympic Games 2008. Furthermore, according to the parties, including FIFA, no previous decisions of the FIFA Executive Committee do exist on which such obligation could be based.
17. Hence, there is no such obligation based on a special decision taken by the FIFA Executive Committee in the course of its last meeting of 14 March 2008, or earlier.
18. As mentioned above, FIFA has argued that on 29 July 2008 the FIFA Emergency Committee had deliberated "about the obligation of clubs to release their U-23 players" and that at that

meeting the decision was taken to confirm such an obligation. Further, the FIFA Single Judge also referred in his decision to the decision of the FIFA Emergency Committee and rejected the arguments of the Appellants “bearing in mind also the contents of the said decision of the FIFA Emergency Committee”. On their side, the Appellants objected that the decision of the FIFA Emergency Committee did not qualify as, or materially correspond to, a special decision of the FIFA Executive Committee in the meaning of Art. 1 para. 2 of Annexe 1 to the Transfer Regulations. Thus, the Panel has to examine (i) whether those “findings” qualify as a “special decision” and (ii) whether the FIFA Emergency Committee is competent to take such decision.

19. The corresponding minutes of the FIFA Emergency Committee hold that the Emergency Committee “deliberated” and “concluded” as to the relevant question at stake. Assuming that the “conclusions” of the FIFA Emergency Committee of the meeting of 29 July 2008 were constituting a “decision”, the Panel’s view is that because of their nature, content and background, it is at least questionable whether such a decision of the FIFA Emergency Committee does constitute a special decision in the meaning of the Transfer Regulations.
20. Additionally, the Panel notes that according to the FIFA Statute, the FIFA Emergency Committee is competent to decide only on urgent matters which cannot be delayed until the next meeting of the FIFA Executive Committee.
21. In the present case, no real urgency was proved nor even contested. Indeed, the fact that clubs raised the whole issue of release of players to the Olympic Games 2008 cannot be considered as a non-foreseeable, urgent matter.
22. In particular, the Panel considers that the FIFA Single Judge indicated in his decision that the FIFA Emergency Committee had “confirmed the longstanding and undisputed practice” and “that the application of customary law is justified”. Accordingly, also the FIFA Single Judge considered the finding of the FIFA Emergency Committee as a confirmation of an existing legal status based on certain grounds (the alleged constant and continuous practice that reached the level of customary law) rather than an imposition of a new set of obligations.
23. Accordingly, based on all evidence and arguments submitted, the Panel concludes that an obligation for Appellants 1 to 3 to release their players Rafinha, Diego and Messi to the Olympic Games 2008 cannot base on the findings of the FIFA Emergency Committee of the meeting of 29 July 2008 unless the actual existence of such findings would have been proved (this will be further dealt in para. C. of this Award).

c) Exhaustive Regulation

24. The last question to be considered in this first stage of the examination of the issue, is whether Art. 1 para. 2 and 3 of Annexe 1 to the Transfer Regulations must be considered as an exhaustive regulation or whether an obligation for clubs to release their players to the Olympic Games 2008 could be based on other rules.
25. The wording of Art. 1 para. 2 and 3 of Annexe 1 to the Transfer Regulations does not, at least not explicitly, indicate that the regulation of the extent of this obligation is not exhaustive since these provisions do not contain any words (such as “for instance”, “in particular” or the like) allowing the conclusion that the listed cases or criteria are exemplary only.
26. Moreover, when considering the principle stipulated by the relevant Transfer Regulation provisions, it becomes clear that this principle covers all possible cases: In case a match is listed in the calendar or when a special decision of the Executive Committee exists, there is an obligation for clubs to release their players; in case a match is not listed in the calendar, there is no such obligation unless a special decision has been taken by the FIFA Executive Committee. This principle does not necessarily require any further legal grounds as it is able to cover and govern all possible cases. Therefore, from a material point of view, Art. 1 para. 2 and 3 of Annexe 1 to the Transfer Regulations are exhaustive.
27. In any event, there are no other provisions in the Transfer Regulations or other regulations of FIFA invoked by the Appellants 1 to 3 or Respondent, or otherwise brought to the attention of the Panel, which may constitute additional legal grounds for such kind of obligation for clubs. Therefore, the Panel has to assume that the relevant provisions of the Transfer Regulations are exhaustive and that no other – written – provisions of FIFA regulations oblige clubs, including the Appellants 1 to 3, to release their players to the Olympic Games.

B. *Specific and Unique Nature of the Olympic Games*

28. FIFA’s circular letter no 1153 states, inter alia, that “*the Men’s Olympic Football Tournament Beijing 2008 was deliberately not officially included in the coordinated international match calendar*” and that “[d]ue to its unique character, the Men’s Olympic Football Tournament has always been intentionally treated differently”. It further states that “*given the specific nature of the event (...) the release of players below the age of 23 has therefore always been mandatory*”. The FIFA Single Judge has also referred to the unique character of the Olympic Games. Thus, the question arises whether such special nature of an event may be the legal ground for an obligation for clubs to release their players.
29. The Panel is very well aware of the unique character of such an event like the Olympic Games, being the gathering of the sports families of the entire world. However, the indeed

special nature or unique character of an event does not by itself constitute a valid legal basis to recognize the existence of a far-reaching obligation of third parties like the obligation for a club to release its players. Therefore, the specific and unique nature of the Olympic Games itself cannot be considered as valid legal basis for an obligation of the Appellants 1 to 3 to release their players Rafinha, Diego and Messi to the Olympic Games 2008.

30. Furthermore, in the submissions of the parties, as well as during the hearing, it was proved that for the previous Olympic Games that took place in Athens 2004, FIFA explicitly listed the Olympic football tournament on the official coordinated calendar, meaning that even FIFA did not rely in the previous Olympic Games on the specific and unique nature of the Olympic Games as the legal ground for the release of players.
31. Whether the specific, unique nature of the Olympic Games has had an impact on the development of customary law, which is invoked by FIFA, will be considered below, while the existence of customary law is analyzed.

### C. Customary Law

#### a) General Requirements and Principles

32. FIFA highlights “that the Single Judge stated that the obligation for clubs to release U23-players for the men’s Olympic Football Tournament (...) is based on a long lasting and undisputed practice, thus on customary law”. The Panel has, therefore, to examine whether, and if yes according to what requirements, customary law is recognised under Swiss association law.
33. Swiss doctrine and jurisprudence recognizes the potential importance of customary law within an association (i.e. in German the so-called “*Vereinsübung*” or “*Observanz*” and in French the so-called “*droit coutumier*”; cf. RIEMER H. M., *Berner Kommentar*, 1990, Syst. Teil, before Art. 60-79 Swiss Civil Code, N 321, 351 ff.; HEINI/SCHERRER, *Basler Kommentar*, 2006, Preface to Art. 60-79 Swiss Civil Code, N 23). In addition, CAS has recognized the institution of customary law in an association in many decisions, for instance in CAS 2004/A/589.
34. Panel agrees that, under Swiss association law, customary law can represent a valid set of rules of an association. For this, two requirements have to be met: (i) a constantly and consistently applied practice of the respective association (*inveterata consuetudo*), and (ii) the conviction of the members of that association that such practice is legally binding (*opinio necessitatis*) (cf. RIEMER, *op. cit.*, N 353).
35. It is undisputed under Swiss association law that such customary law may on the one hand complement the statutes of an association, i.e. fill a loophole within the statutes, and may on

the other hand help to interpret the statutes. It is, however, disputed whether such customary law may also derogate the existing statutes, in particular even in a situation in which the wording of the statutes is clear.

36. Hence, the Panel will have to examine (i) whether the Transfer Regulations contain a loophole which may be supplemented by customary law, (ii) whether there is a constantly and consistently applied practice of FIFA (*inveterata consuetudo*) and (iii) whether the members are convinced that such practice is legally binding (*opinio necessitatis*).

b) Loophole

37. Part of the Swiss doctrine (cf. RIEMER, *op. cit.*, N 354; HEINI/SCHERRER, *op. cit.*, N 23) contends that in the interest of legal certainty customary law cannot be admitted *contra legem*; customary law may complement or help to interpret the statutes of an association, but not derogate from their clear wording. By applying such doctrine, customary law may only be developed in case the Transfer Regulations contain a loophole which may be supplemented.

38. A loophole is the lack of an answer to a question which can be expected to be governed within the statutes (cf. RIEMER, *op. cit.*, N 350). As stated above (cf. A., c), the Panel is of the view that the applicable Transfer Regulations provide an exhaustive regulation as to the clubs' obligation to release their players under 23 to the Olympic Games 2008.

39. Accordingly, if one were to follow the above doctrine, no customary law could be applied because of the lack of a loophole in the Transfer Regulations.

40. The settlement of the doctrinal issue of the possibility to admit customary law *contra legem*, or not, is not necessary if the two further requirements for the recognition of customary law, i.e. *inveterata consuetudo* and *opinio necessitatis*, are not met.

c) *Inveterata Consuetudo*

41. Appellant 3 has questioned the existence of a consistent practice within FIFA with regard to the players release issue. In particular, Appellant 3 submitted a number of FIFA technical reports which explicitly state that the release of players to previous Olympic Games has been a well recognized problem. Even if these reports have not been drafted by lawyers, as objected by FIFA in its answer, the Panel considers that they show that the difficulties connected with the release of players have not been a new issue of the Olympic Games 2008 but have been tabled repeatedly during the past decades. Considering these reports, the content of which could not be substantially disputed by the Respondent, the Panel is of the

view that it is questionable whether *inveterata consuetudo* is given as to the customary law alleged by FIFA.

42. Further, Respondent states in its answer that it had never been officially contacted in respect of such kind of problems of release of football players. This has been confirmed by Respondent at the hearing when it also expressed that it had never sanctioned nor took any other measures against any party which did not release players to the Olympic Games. Therefore, and notwithstanding all the arguments raised by FIFA, the Panel has great difficulty to assume that the requirement of *inveterata consuetudo* is satisfied.
43. Additionally, and as already mentioned, the Panel acknowledges that in the past the match dates for the men's Olympic football tournament had been integrated, at least once, in the coordinated international match calendar, e.g. in the December 2003 in relation with the update of the said calendar for the seasons 2004 until 2008. If the clubs' obligation to release their players to the Olympic Games had been customary law, the listing of the Olympic Games would not have been necessary at that time. This fact also seriously questions the Respondent's allegation that there has been a constantly and consistently applied practice.
44. Therefore, the Panel comes to the conclusion that there is not sufficient evidence that the requirement of *inveterata consuetudo* is met.

d) *Opinio Necessitatis*

45. FIFA has stated in the circular letter no 1153 of 23 July 2008 that there was a certain amount of confusion as to whether players have to be released for the men's football tournament at the Olympic Games 2008. At its meeting of 29 July 2008 the FIFA Emergency Committee has confirmed the existence of this confusion. The Panel notes that such confusion is in contrast to a general conviction of clubs and FIFA members that the release of players to the Olympic football tournaments was a general legally binding rule.
46. In FIFA's circular letter no 494 of 21 December 1992, FIFA stated "[n]umerous problems have recently arisen in connection with the detachment of players by their clubs for international matches". It, then, reminded its members that it is binding on clubs to release their players to their national teams for the Olympic football tournament. This circular letter shows that certain clubs did, already at that point of time, not have the understanding that they were bound by such alleged practice.
47. The technical reports already mentioned, as well as the fact that FIFA took no measures against parties that did not release their players, also establish other evidence for the lack of *opinio necessitatis*.

48. Last but not least, also DFB stated in its fax letters to CBF of 17 July 2008 that it did not see any legal basis for an obligation for the Appellants 1 and 2 to release their Brazilian players to the Olympic Games 2008. This is another example that at least one of FIFA's members – notably one of the biggest football federations – was not aware of the alleged customary law and was not convinced in its legal validity, respectively.
49. Lacking such *opinio necessitates*, no existence of customary law can be admitted. For this reason, the Panel is of the view that no customary law providing an obligation for clubs to release their players to the Olympic Games 2008 has been developed, or at least, has been proven to have been developed.

*D. Rule regarding Consequences of Unclear Regulations and Legal Certainty*

55. Under Swiss law, a general principle states that any provision with an unclear wording has to be interpreted against the author of the wording (*contra proferentem*). This principle also applies to association law (cf. RIEMER, *op. cit.*, N 346). This means that in principle, if no other reasons require a different treatment, any ambiguous, or otherwise unclear, provision of the statutes has to be interpreted against the association that has drafted the statutes, and not against the members.
56. This principle, which can be considered as a consequence of the fundamental principle of confidence, may also be applied, *per analogiam*, to the cases at hand. Since FIFA has had several chances to clarify, and codify, the regulations on the clubs' obligation to release their players to the Olympic Games, it must bear the legal disadvantageous consequences in not doing so. In order to provide legal certainty, it would have been reasonable and fair if FIFA had clearly formulated the answer to this crucial question at stake. There is no cogent reason known to the Panel justifying that FIFA has missed the chance to clarify the long lasting and well known confusion of at least some members (including DBF) and clubs, and waited until the very last minute, i.e. basically until the *litis pendens* of the present cases, to address the issues at stake with the decision of the FIFA Emergency Committee. Such attitude does not merit to be supported by law. Also for this reason, the Panel is of the view that there is no obligation for the Appellants 1 to 3 to release their players Rafinha, Diego and Messi.

*E. Conclusion*

57. The Panel is satisfied that the decision of the FIFA Emergency Committee dated 29 July 2008 does not constitute a special decision of the FIFA Executive Committee in the meaning of the

Transfer regulations. This is true, even without further examining the objections raised by Appellants 1 and 2 against the validity of such meeting.

58. Considering the Transfer Regulation, the Panel can hardly assume that they contain a loophole. However, even if they contained a loophole, the Panel has come to the conclusion that no constantly and consistently applied practice of FIFA (*inveterata consuetudo*) has been proven. Additionally, the Panel has found that some clubs and members of FIFA did and do not have the understanding that such practice is legally binding (*opinio necessitatis*). Therefore, the Panel concludes that there is no customary law obliging the Appellants 1 to 3 to release their players Rafinha, Diego and Messi to the Olympic Games 2008.
59. Finally, the Panel does not see any reason to deviate from the principle that the author of the Statutes and Regulations at stake, i.e. FIFA, has to bear the consequences of any lack of clarity of those rules.
60. Therefore, the Appellants 1 to 3 have no legal obligation to release their players Rafinha, Diego and Messi for the Olympic Games 2008.

#### F. *Epilogue*

61. The Olympic Games 2008 are over. The next summer Olympic Games will take place in London on 2012. The Panel noted that after the operative part of this Award was notified to the parties and published by CAS, on August 7, 2008, FIFA called upon the parties, a call that was actually addressed to all the clubs, and recommended to release the players for the Olympic Games. This call was made on the grounds of the Olympic Spirit. In view of the same spirit, CAS had called upon the good will and good sense of the clubs and of FIFA to find a reasonable solution with regard to players who wished to represent their country in the Olympic Games. The Panel therefore would like to express its hope and belief that within the long period of time until the next summer Olympic Games, FIFA and its affiliated members will provide for a clear, fair and widely agreed solution on this question in light of the Olympic Spirit.

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

1. The appeals filed on 31 July 2008 by FC Schalke 04, SV Werder Bremen and FC Barcelona against the decision issued on 30 July 2008 by the FIFA Single Judge of the FIFA Players' Status Committee are upheld.
2. The Decision of the FIFA Single Judge of the FIFA Players' Status Committee issued on 30 July 2008 is set aside in its entirety.
3. On these grounds:
  - a) The Appellant FC Schalke 04 has no legal obligation to release the player Marcio Rafael Ferreira de Souza alias "Rafinha" for the Olympic Football Tournament 2008 in Beijing.
  - b) The Appellant SV Werder Bremen has no legal obligation to release the player Diego Ribas da Cunha alias "Diego" for the Olympic Football Tournament 2008 in Beijing.
  - c) The Appellant FC Barcelona has no legal obligation to release the player Lionel Messi for the Olympic Football Tournament 2008 in Beijing.

(...)