Arbitration CAS 2016/A/4651 Ariel Alberto Alvarado Carrasco v. Confederation of North, Central and Caribbean Association Football (CONCACAF), award of 19 May 2017

Panel: Mr Francisco González de Cossío (Mexico), Sole Arbitrator

Football
Suspension of an Executive Committee member from all football-related activities
CAS jurisdiction
Definition of "receipt" of the decision
Justification for suspension or dismissal
Due process

1. **Pursuant to Article 54.6 of the CONCACAF Statutes, *"CAS shall not take into account facts or evidence which the appellant could have submitted to an internal CONCACAF body by acting with the diligence required under the circumstances, but failed or chose not to do so".* Said provision refers to the admissibility of the facts or evidence that could have been submitted to an internal CONCACAF body. It does not impinge on the authority to decide on the case that is presented before the CAS.**

2. **A juridical definition of "receipt" is *"the communications' entrance within the sphere of control of the addressee".***

3. **Article 36 .2 of the CONCACAF Statute requires that a motion for dismissal be justified. Suspension or dismissal may therefore only occur provided that those making the motion prove that suspension or dismissal is warranted by a reason. Almost all organizations place in the shoulders of the highest decision organs the authority to exclude members when something happens which justifies the step. Although many have lists indicating or illustrating when doing so is warranted, this does not mean that having a general provision conferring discretion on the highest decision organ is unlawful. Taking the opposite view would imply that those tailoring organic regimes would need to elaborate needlessly-extensive lists of reproachable conduct. Such view would not only run afoul of regulatory best practices, but would unnecessarily hinder the margin of manoeuvre that organs of juridical entities are, and should be, naturally vested and entrusted with to perform their functions.**

4. **Due process requires that an opportunity to defend him/herself be conferred to the person which right is to be impinged before deciding accordingly. All that is needed is that an opportunity be conferred on the person; the fact that the person chose not to avail himself of it is not decisive.**

I. PARTIES

1. Mr. Ariel Alberto Alvarado Carrasco ("Mr. Alvarado" or the "Appellant") is a Panamanian citizen. He had a position in the executive Committee of CONCACAF until 2013.

2. The Confederation of North, Central and Caribbean Association Football ("CONCACAF" or the "Respondent") is a confederation which mission is to develop, promote and manage football throughout the regions of North, Central America and Caribbean.

II. BACKGROUND

A. Facts

3. On 4 December 2015, the Acting General Secretary of CONCACAF, Ted Howard, notified the Appellant that, in response to the investigation of the Department of Justice of the United States of America made known on 3 December 2015, the CONCACAF Executive Committee decided to temporally suspend Mr. Alvarado from all activities related to football on a national and international levels within the CONCACAF region.

4. On 29 April 2016, the Acting General Secretary of CONCACAF sent a letter to the Appellant advising that, in response to the investigation of the U.S. Department of Justice, and due to its deep impact and adverse consequences for football, the matter of the Appellant's permanent suspension from all football related activities within the CONCACAF region was to be subject to the XXXI Ordinary CONCACAF Congress for its decision.

5. On 6 May 2016, the Appellant responded to CONCACAF indicating that he did not hold an election office or appointment within the executive committee or as a member of the work or jurisdictional commissions of CONCACAF as well as no office in the UNCAF region or within the FEPAFUT since 2013. Therefore, the suspension had no effects. And the intention of removing Mr. Alvarado from all the football related activities in the CONCACAF region constitutes an arbitrary act since a suspension of that kind corresponds to a sanction which should stem from a disciplinary proceeding, which has not taken place.

6. On 7 May 2016, the Acting General Secretary of CONCACAF answered to the Appellant indicating that, according to article 36 of the Statutes of CONCACAF (2016 edition), the CONCACAF Congress has the power to dismiss any person, and said action is different from the proceedings and actions taking place before the jurisdictional organs of the Confederation. Further to Article 36 of said Statutes, the XXXI Ordinary CONCACAF Congress would address the issue of the Appellant's permanent and definitive suspension from all the football related activities within the CONCACAF region, present and future. Finally, he invited the Appellant to attend said Congress to present his defense before a final decision was taken on this matter.

7. On 12 May 2016, CONCACAF held its XXXI Ordinary Congress in Mexico City, Mexico. The Appellant was invited to present his position on his permanent suspension discussed by the Congress. The Appellant did not attend.

8. On 19 May 2016, the acting General Secretary of CONCACAF notified the Appellant that because of the investigation of the U.S. Department of Justice, and its deep impact and adverse consequences for football, the CONCACAF Congress decided to remove the Appellant permanently and definitively from all activities related to football within the CONCACAF region effective immediately.

B. Proceedings before the Court of Arbitration for Sport

9. On 13 June 2016, Mr. Alvarado submitted his Statement of Appeal before the Court of Arbitration for Sport ("CAS") against CONCACAF with respect to the decision rendered by the CONCACAF on 12 May 2016 (the "Decision"), pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration (2016 edition) (the "CAS Code").

10. On 29 June 2016, the Appellant lodged his Appeal Brief, pursuant to Article R51 of the CAS Code.

11. On 1 July 2016, following the parties' agreement to submit this matter to a Sole Arbitrator, Dr. Francisco González de Cossío was appointed Sole Arbitrator in this case by the President of the CAS Appeals Arbitration Division, further to Article R54 of the CAS Code.

12. On 22 July 2016, the Respondent filed its Answer to the Appeal, pursuant to Article R55 of the CAS Code. With its answer, the Respondent challenged (i) the admissibility of the appeal and (ii) CAS jurisdiction to hear this matter. On 25 July 2016, CAS invited the Appellant to provide an answer to both challenges in a 7-day period.

13. On 2 August 2016, the Appellant submitted his comments on the admissibility of the appeal and jurisdiction of CAS.

14. On 4 August 2016, CAS issued a letter indicating that CONCACAF's objection to the admissibility of the appeal and CAS jurisdiction would be forwarded to the Sole Arbitrator for his consideration.

15. On 4 August 2016, CAS informed the parties that the Sole Arbitrator had decided to solve the jurisdictional and admissibility challenges in the final award. CAS invited the parties to state whether they wished to hold a hearing or whether they preferred to have the Sole Arbitrator to issue an award based solely on the parties' written submissions.

16. On 10 August 2016, the Respondent filed a so-called *"Response to Opposition Reply to Answer"*. Pursuant to Article R56 of the CAS Code, the Sole Arbitrator invited the Appellant to file his comments on the admissibility of such new submission. The Appellant, in turn, did not object its admissibility. The Sole Arbitrator finally decided to admit this submission into the file, pursuant to Article R56 of the CAS Code.

17. On 11 August 2016, the Appellant indicated his preference for an award be rendered on the sole basis of the parties' written submissions. The Respondent, in turn, requested a hearing to be held in this matter.

18. On 18 August 2016, CAS informed the parties that, pursuant to Article R57 of the CAS Code, the Sole Arbitrator decided to hold a hearing in this matter in Mexico City.

19. On 4 October 2016, CAS forwarded the parties the Order of Procedure requesting them to sign it and return a copy by 11 October 2016.

20. On 10 October 2016, the Appellant signed the Order of Procedure.

21. On 11 October 2016, the Respondent signed the Order of Procedure with addendum.

22. On 17 October 2016, pursuant to Article R56 of the CAS Code, the Respondent requested the admission of a new exhibit at the hearing, based on exceptional circumstances. This new exhibit was the redacted transcript of a guilty plea by a co-defendant of the Appellant in the investigation of the U.S. Department of Justice. The Respondent alleged that the evidence was not available until recently.

23. On 18 October 2016, CAS invited the Appellant to provide his comments on the admissibility of the new exhibit by 20 October 2016. Finally, CAS informed the parties that further to Article R56 of the CAS Code, it would be for the Sole Arbitrator to decide on the matter.

24. On 20 October 2016, the Appellant contested the admissibility of the new exhibit filed by the Respondent.

25. The hearing took place on 24 October 2016 in Mexico City. During the hearing the matter of the admissibility of the new evidence was addressed *in limine*. Both parties were heard as to the reasons why the evidence should be admitted or not. Upon consideration of both parties' views, the Sole Arbitrator decided that, inasmuch as the new evidence had become available on August 2016, the "exceptional circumstances" condition established in Article R56 of the CAS Code was met: the impossibility of having access to such information makes its admittance in this case justifiable, as it was not possible to include it in the Answer. Therefore, this new exhibit is admissible as new evidence in this matter. The Sole Arbitrator was emphatic that this ruling only involved the admissibility of the challenged evidence, not its probative weight. Its inferential value would be determined at the appropriate time and having consideration to the entire record. Thereafter, both parties had ample opportunity to present their case. Upon conclusion of the hearing, the Sole Arbitrator enquired into whether the parties felt that they had been treated fairly, with ample opportunity to present their case. Both parties answered positively. Upon doing so, the Sole Arbitrator asked whether anyone harbored any complaint as to the way the hearing and the procedure in general had been conducted. Both parties indicated that neither had a complaint.

III. PARTIES' ARGUMENTS

A. The Appellant / Ariel Alberto Alvarado Carrasco

26. In summary, the Appellant advances the following arguments in support of his position:

a) The Appellant relies on article 52 of the CONCACAF Statutes as conferring jurisdiction on the CAS.

b) The Appealed Decision was notified to the Appellant on 24 May 2016 and the appeal against such decision was filed with the CAS on 13 June 2016. Consequently, the appeal is admissible as it was filed within the 21-day deadline foreseen in the CONCACAF Statutes.

c) The Appealed Decision breaches the principle of *"ne bis in idem"*: By this principle, no legal action can be instituted twice for the same cause of action. The Appellant argues that CONCACAF had knowledge over the indictment in the Federal Court in Brooklyn, New York, United States of America. At the same time, the Chairman of the Investigatory Chamber of the FIFA Ethics Committee formally opened an investigation for the same case. For those reasons, the Appellant argues that we are in presence of several cases in different jurisdictions and entities, but the case in the United States is still in process without a resolution against the Appellant. This bears relevance on the presumption of innocence.

d) The Appealed Decision breaches the principle of legality *"nullum crimen, nulla poena sine praevia lege"*: The Appellant alleges that the conduct to be qualified as a crime must be described in such manner prior to the realization of such conduct. He states that the Decision is based only in Article 36 of the CONCACAF Statutes, and that said provision, this kind of sanction is not specified, because it is only limited to the dismiss of a person, understood in a charge.

e) The Appealed Decision breaches the principle of Due Process: The Appellant argues that CONCACAF never initiated an investigation, but without a disciplinary proceeding determined a sanction without legal or statutory support.

27. The Appellant requested an award in the following terms:

a) Consider the decisions passed by the Congress of CONCACAF on 12 May 2016 involving the dismissal or suspension of Appellate to be null and void.

b) Order the CONCACAF to bear all the costs, if any, of this arbitration and to reimburse to Ariel Alvarado de Court Office fee.

c) Order the CONCACAF to contribute to the legal and other costs incurred by Arial Alvarado in connection with this arbitration.

d) Asking whether a ban on taking part in any Football-related activity a disciplinary measure?;

e) If so, based on Article 36 of the CONCACAF Statues applied by the CONCACAF Congress, may this body remove permanent and definitely a person from all football-related activities (current or future) as it was imposed on the Appellant?;

f) Based on the FIFA Disciplinary Code, or CONCACAF Disciplinary Code if they have,

CONCACAF proceeding complied with granting the guarantees of due process?; and

g) CONCACAF violates the principle of presumption of innocence established in Article 11 of the Universal Declaration of Human Rights?

B. Respondent / CONCACAF

28. CONCACAF argues that:

a) Appeal Filed outside the Time Limit: The Respondent alleges that this proceeding shall be terminated pursuant to Article R49 of the CAS Code because Appellant's statement of appeal was not filed within the deadlines prescribed by the Respondent's statutes as well as the CAS Code. The Respondent argues that pursuant to Article R49 of the CAS Code and Article 54.3 of the CONCACAF Statutes, the Appellant must file his statement of appeal with CAS within 21 calendar days from receipt of the decision being appealed. The Respondent argues that the Decision was formally notified to the Appellant via email on 19 May 2016 and that such notification has full legal effect. Consequently, the Appellant had 21 days from 19 May 2016, or by 9 June 2016, to file his statement of appeal. However, the Appellant filed his statement of appeal with CAS on 13 June 2016.

b) CAS has no jurisdiction to consider any facts or evidence submitted by Appellant: The Respondent argues that Article 54.6 of the CONCACAF Statutes provides that *"CAS shall not take into account facts or evidence which the appellant could have submitted to an internal CONCACAF body by acting with the diligence required under the circumstances, but failed or chose not to do so"*. The Respondent argues that the Appellant chose not to attend to the Congress to speak in his own defense.

c) The CONCACAF Congress was fully empowered to make the decision under the CONCACAF Statutes, which provide the Congress with broad authority to suspend or dismiss any person: The Respondent alleges that according to Article 36.1 of the CONCACAF Statutes, the CONCACAF Congress has the authority to dismiss any person, and that the power is broad and it is not limited by whether the person is currently serving in an official capacity for CONCACAF or not.

d) Response to the Appellant's arguments:

a. First: The CONCACAF Congress has the autonomous authority to decide on the dismissal of a person within the CONCACAF region, independently of any action/process that may be taken by FIFA and its Judicial Bodies.

b. Second: Article 36 of the Statutes of CONCACAF is clear that any person may be dismissed by the Congress from participating in any matter within the jurisdiction of CONCACAF.

c. Third: The Congress of CONCACAF is authorized to act irrespective of certain

disciplinary powers that may have been delegated to other judicial bodies within CONCACAF. All requirements contemplated in article 36 of the CONCACAF Statutes in relation with the dismissal of the Appellant were duly complied by the Respondent and did in fact comport him with due process.

29. CONCACAF requests an award in the following terms:

a) This proceeding be terminated because Appellant's statement of appeal was not timely;

b) Because CAS has no jurisdiction to consider the facts or evidence submitted by Appellant on its appeal such that there is no basis upon which relief may be granted and the appeal must be dismissed.

IV. JURISDICTION

A. CAS Jurisdiction

30. Article 52 of the CONCACAF Statutes states:

"CONCACAF recognizes the jurisdiction of CAS.

Disputes may only be brought before CAS after all other internal procedures and remedies have been exhausted.

All decisions taken by CAS shall be deemed to be final and binding upon all parties.

Proceedings before CAS shall take place in accordance with the CAS Code of Sports-related Arbitration".

31. Article 54 of the CONCACAF Statutes provides the following:

"Article 54. Jurisdiction of CAS as an appeals arbitration body

1. As an appeals arbitration body, CAS shall be entitled to hear appeals against final decisions passed by CONCACAF.

2. Only parties directly affected by a decision may appeal to CAS. However, where doping-related decisions are concerned, the World Anti-Doping Agency (WADA) may appeal to CAS.

3. The time limit for appeal to CAS shall be twenty-one (21) days from the receipt of the decision in question.

4. An appeal before CAS may only be brought after CONCACAF's or FIFA's internal procedures and remedies have been exhausted.

5. An appeal shall not have any suspensory effect as a stay of execution of a disciplinary sanction, subject to the power of CAS to order that any disciplinary sanction be stayed pending the arbitration.

6. CAS shall not take into account facts or evidence which the appellant could have submitted to an internal CONCACAF body by acting with the diligence required under the circumstances, but failed or chose not to do so".

32. Article R47 of the CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".

B. Challenge

33. The Respondent challenges the CAS jurisdiction arguing that, pursuant to Article 54.6 of the CONCACAF Statutes, *"CAS shall not take into account facts or evidence which the appellant could have submitted to an internal CONCACAF body by acting with the diligence required under the circumstances, but failed or chose not to do so".* For such reason, the Respondent considers that, given the fact that the Appellant chose not to attend the Congress to speak in his own defense, CAS has no jurisdiction to consider any facts or evidence submitted by the Appellant in this procedure.

34. The Sole Arbitrator respectfully differs from such interpretation of Article 54.6 of the CONCACAF Statutes. Said provision refers to the admissibility of the facts or evidence that the Appellant could have submitted to an internal CONCACAF body. It does not impinge on the authority to decide on the case that is presented to the Sole Arbitrator. Therefore, the Sole Arbitrator determines that the reason evinced by the Respondent to challenge the CAS jurisdiction is without merit. Therefore, the Sole Arbitrator considers that CAS has jurisdiction to hear this matter.

V. ADMISSIBILITY

A. Arguments of the parties

35. The Respondent takes the view that the appeal is inadmissible. The appeal was lodged on 13 June 2016. Inasmuch as the Decision was notified on 19 May 2016, the 21-day period to do so further to the CONCACAF Statutes is exceeded. Therefore, further to article R49 of the CAS Code, the appeal is untimely. Hence, it is inadmissible.

36. The Appellant retorts that the letter of 19 May 2016 was delivered by courier FedEx on 24 May 2016, so the date of receipt of the Decision was on that day. Mr. Alvarado argues that the Respondent cannot proof that the Appealed Decision was received by the Appellant by email on 19 May 2016. The appeal was therefore timely filed. Hence, it is admissible.

B. Analysis

37. Coming to a conclusion on this issue requires a legal and a factual determination. Legally, what is the *dies a quo* and therefore the *dies ad quem*? Factually, when was the Decision received?

38. The Sole Arbitrator agrees with the Respondent that reliance on Article 31 of the CAS Code is inapposite, as said provision contains the regime applicable to notices during the arbitral procedure. At issue is something different: the *dies a quo* and the *dies ad quem*. What should be the starting date of the beginning of the period to lodge the appeal? Was the appeal lodged before expiry of the time-limit?

1. Dies a quo

39. The determination involving the date of receipt of the Decision should be made further to the regime applicable to the receipt by Appellant of the Decision—and this is contained in the CONCACAF Statutes and Article R49 of the CAS Code.

40. Article 54.3 of the CONCACAF Statutes provides that:

> *"The time limit for appeal to CAS shall be twenty-one (21) days from the* ***receipt*** *of the decision in question"* (emphasis added).

41. Article R49 of the Code provides as follows:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the* ***receipt*** *of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties"* (emphasis added).

42. As may be observed from the underscored language in the above transcription, both provisions establish that the 21-day period to file the appeal shall be counted as of the time of "receipt" of the appealed decision.

43. According to the Webster Dictionary, the common language definition of "receipt" is *"to get or be given something"*. A juridical definition this Sole Arbitrator finds apposite is *"the communications' entrance within the sphere of control of the addressee"*[1].

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[1] A notion advanced by HAAS U., in: Time Limit for Appeal, Arbitration Proceedings before the Court of Arbitration for Sport CAS, Schields VZ, Zeitschrift fur Schiedsverfahren, German Arbitration Journal, vol. 1/2011, p. 8 and echoed by PELLAUX P., in: Délais, notifications et autres prescriptions de forme importantes devant le TAS, CAS Bulletin, 2016/2, p. 16.

44. The Respondent sent to the Appellant the email attaching the Decision on 19 May 2016. The Appellant does not challenge said fact. The Appellant alleges that he received and took cognizance of the Appealed Decision occurred on 24 May 2016 – the date when Mr. Ariel Alvarado replied to the email after having received the FedEx enclosing the Decision. To the extent that the appeal was lodged on 13 June 2016, it occurred within the 21-day period. After all, counted as of the date of 24 May 2016, the 21-day period expires on 14 June 2016.

45. The Sole Arbitrator has given thought to this argument, which it finds dispositive. In ruling on the same, two separate considerations deserve analysis: whether notice requires taking cognizance of the content (§a), and when receipt occurred (§b).

(a) Notice and knowledge of notice

46. The Sole Arbitrator is aware that there is a theory that notice requires that knowledge exists. The theory is not new but its acceptance varies. The question however is whether the applicable regulations require it.

47. Solving this question requires choosing between two competing considerations which merit (or lack thereof) is not self-evident. On the one hand, a textual argument. On the other, a teleological one. According to the former, a (dry) textual reading of Articles 54.3 of the CONCACAF Statutes and R49 of the CAS Code leads to the conclusion that "receipt" is all that is required. Nothing more; nothing less. On the other hand, however, the purpose of giving notice is to make the designee aware of something.

48. Upon careful consideration the Sole Arbitrator finds that there is no reason to depart from the textual reading of Articles 54.3 of the CONCACAF Statutes and R49 of the CAS Code. They are clear and legal certainty requires that legal texts be applied as drafted. Moreover, teleological reasons exist to bootstrap said conclusion: parties are obligated to check the domiciles (electronic or other) they provide for purposes of notices. Not doing so hampers intercourse. Finally, respected doctrine echoes this view. Prof. Ulrich Haas concludes in this regard that:

> *"As a basic rule, it is unanimously recognized by the Swiss legal doctrine and the Swiss Tribunal Federal that under Swiss law a decision or other legally relevant statement are notified, if a person had the opportunity to obtain knowledge of the content irrespective of whether such a person has in fact obtained knowledge. … Thus the relevant point in time is when a person receives the decision and not when it obtains actual knowledge of its content".*

49. Mrs. Pellaux puts the matter as follows:

> *"La prise de connaissance effective n'est donc pas nécessaire".*
>
> […effective knowledge is not necessary…]
>
> (Translation of this Sole Arbitrator)

50. Therefore, I hold that naked receipt – i.e., receipt irrespective of proof of knowledge – is all that is required under the applicable regime.

(b) When did receipt occur?

51. The parties differ as to when receipt occurred. The Appellant claims that receipt occurred on 24 May 2016. CONCACAF alleges that it occurred on 19 May 2016. The Appellant grounds his claim on the fact that the only time when the record shows that receipt occurred is when the email containing the Decision was replied. CONCACAF differs. It believes that the date of delivery is the date it sent the email containing the Decision.

52. Coming to a conclusion on this issue requires treading carefully. Both parties' views contain accuracies but also deserve nuances. Appellant's view that receipt occurred on 24 May 2016 assumes that delivery occurred when it decided to reply to the email. CONCACAF's view that receipt occurred on the same date the email was sent implies conflating 'dispatch' with 'receipt'. Sending with receiving – two separate concepts. The conclusion to this matter should distinguish between both concepts and assessing when 'receipt' took place *in casu*.

53. Albeit in modern life the speed of the occurrence of events makes it difficult to differentiate, the following acts are, and should be, distinguished:

- Sending an email;

- Receiving an email.

54. Usually, the receiving of an email occurs almost simultaneously to the sending of the email – particularly for those involved in office work. But that two events often follow each other does not necessarily mean that they need always follow each other. Stating otherwise would involve the *post hoc ergo propter hoc* fallacy.

55. If a legal text requires receipt, evidence of delivery needs to exist. And it does not ensue from a showing that evidence of the dispatch occurred. Something more must exist. And it must involve the act of getting; not of sending.

56. An examination of the file shows that no evidence of delivery of the email before 24 May 2016 exists. Only two pieces of evidence exist which relate to this disputed fact:

- Email of 19 May 2016 sent by the CONCACAF General Secretariat to Mr. Alvarado attaching the Decision.

- Email of 24 May 2016 sent by Mr. Alvarado to the General Secretariat, the CONCACAF Council, Ted Howard and Marco Leal indicating that correspondence should be directed to Infante & Pérez Almillano.

57. The probative impact of each differs. Whilst the first email *proves* that the General Secretariat sent the email with the Decision attached, it does not however prove that receipt exists. The

second email proves that Mr. Alvarado was aware of the email containing the Decision on 24 May 2016, but not before.

58. Saying that because acknowledgment of receipt exists at a later date necessarily means that delivery occurred at a prior date leaves open the question as to when is delivery proven to have occurred. And the file is vacant in said regards: an evidential dearth exists as to whether the email was delivered before 24 May 2016. Inasmuch as the burden to prove that delivery existed before 24 May 2016 rested on CONCACAF's shoulders, and it has not discharged it, the Sole Arbitrator finds that the only piece of evidence involving the date of receipt of the email is 24 May 2016. As the counting of the 21-day period run as of 24 May 2016, the conclusion therefore is that the appeal was lodged within the 21-day period established by Article 54.3 of the CONCACAF Statutes and Article R49 of the CAS Code.

59. Therefore, this Sole Arbitrator finds that the appeal was timely filed. It is therefore admissible.

VI. LEGALITY OF THE EXCLUSION

60. The Appellant challenges the legality of the exclusion on the following arguments: that no legal action can be instituted twice for the same cause of action (§a), that the sanction is not specifically stated in the CONCACAF Statutes (§b), and that the procedure by which the Appellant was excluded is wanting on due process grounds (§c). Additionally, the Appellant questions whether an exclusion may occur given that no formal office was held (§d). The Sole Arbitrator shall address each in turn.

A. Ne bis in idem

61. *Ne bis in idem* means *"not suffering the same consequences twice"*. The Appellant states that *"no legal action can be instituted twice for the same cause of action"*.

62. The Appellant inveighs that the Decision was initiated without an investigation or open a disciplinary case. Moreover, the Chairman of the Investigatory Chamber of the FIFA Ethics Committee formally opened an investigation for the same case on 4 December 2015, and Article 60 of the FIFA Statutes provides that confederations shall comply with FIFA body decisions. To the extent that several cases exist in several jurisdictions and entities originating from the US-proceedings, he states that *"for the same cause, we are in the presence of several cases in different jurisdictions and entities, but the case of the Court in U.S.A. where originated the others is still process without a resolution against the Appellant with the prerogative of the presumption of innocence"*.

63. The Respondent avers that the jurisdiction is different from that of FIFA. CONCACAF has the autonomous authority to decide on the dismissal of a person within the CONCACAF region, independently of any action/process that may be taken by FIFA and its judicial bodies. Therefore, the argument that the procedures provided for in Article 36 of the CONCACAF Statutes are insufficient is without merit.

64. The Sole Arbitrator agrees with the Respondent. And for two reasons. First, the Decision and the other causes of action extant hail from different jurisdictions. And the principle *ne bis in idem* is always qualified by the notion 'from the same jurisdiction'. Second, the Decision addresses a different subject-matter than that addressed by the other causes of action cited by the Appellant. Whilst the latter relate to the possible existence of bribes, the former is confined to whether Mr. Alvarado should be suspended or dismissed from CONCACAF. Albeit the source of the measure is connected, legally, the issues differ. Therefore, the Appellant reliance in said (criminal law) principle is insufficient to validly challenge the legality of the Decision.

B. Nullum crimen sine lege

65. *Nullum crimen sine lege; nullum poena sine lege* literally means *"no crime exists unless the law so provides; no penalty may be imposed that is not provided by law"*. It commonly refers to the principle of legality: for there to be a crime, the conduct in question shall be characterized as such by a legal statute. It is a check on public power; a legal-certainty guarantee.

66. The Appellant states that this principle requires that for a specific conduct to be qualified as a crime it must be described in such a manner prior to the realization of such conduct and the punishment must be specified by the law. Given that the Decision is based on Article 36 of the CONCACAF Statutes, and said provision does not impose a sanction of suspension, the Decision is arbitrary: it imposes a sanction that is not specified or provided within its powers.

67. CONCACAF retorts that, under Article 36 of the CONCACAF statutes, any person may be dismissed by the CONCACAF Congress from participating in any manner within the jurisdiction of CONCACAF. Doing so is not a criminal consequence as a CONCACAF Congress vote is not a criminal proceeding. CONCACAF has the authority to dismiss a person from CONCACAF–related football activities.

68. Upon consideration the Sole Arbitrator has decided that reliance on said principle is insufficient to validly challenge the legality of the Decision. The reason is threefold. First, citing a criminal law-principle to challenge the legality of a non-criminal law regime is inherently questionable.

69. Second, even put under the criminal-law microscope, the possibility of having open textures is not inherently reproachable. Criminal law doctrine itself speaks of 'blanket criminal norms' (*normas penales en blanco*) or 'open types' (*tipos abiertos*) as situations where the prohibited conduct need be described with a certain level of abstraction, on pain of falling into casuistic analysis which would condemn the provision to theory. Whether the norm in question is so wide that it becomes an 'undetermined legal concept' (*concepto jurídico indeterminado*) need consider whether a check exists on the subject, which leads the Sole Arbitrator to the third reason to reject the argument: the power granted to the CONCACAF Congress does have a counterweight. Article 36 .2 of the CONCACAF Statute requires that:

> *"2. The motion for dismissal must be justified. …"* (emphasis added).

70. According to the Websters Dictionary, justified means *"to show a sufficient lawful reason for an act done"*. The thrust of the provision is therefore that suspension or dismissal may occur provided that those making the motion prove that suspension or dismissal is warranted by a reason. Put in context of Appellant's argument, the question is whether it is unlawful to vest authority on the CONCACAF Congress to dismiss or suspend an athlete from CONCACAF when said high organ finds that a reason exists to do so? The answer is no. Most all organizations place in the shoulders of the highest decision organs the authority to exclude members when something happens which justifies the step. Granted, many have lists indicating or illustrating when doing so is warranted. But does this mean that having a general provision conferring discretion on the highest decision organ is unlawful?

71. In the Sole arbitrator's opinion, the answer is 'no'. Taking the opposite view would not only be contrary to frequently observable practice but take an *in extremis* view of what the principle of legality means. It would imply that those tailoring organic regimes would need to elaborate needlessly-extensive lists of reproachable conduct. Such view would not only run afoul of regulatory best practices, but would unnecessarily hinder the margin of manoeuvre that organs of juridical entities are, and should be, naturally vested and entrusted with to perform their functions.

72. What is proper needs not always be written. Norms of conduct to be applied by organs of all sorts, not only sports but otherwise, need not be exhaustively crystalized in law in order to be lawfully applied.

73. Therefore, this Sole Arbitrator holds that the authority further to which the Decision was adopted does not run afoul of the principle of legality (*nullum crimen sine lege*).

C. Due process

74. The Appellant stresses that due process requires that minimum guarantees exist so as to ensure that a fair and equitable outcome stem from the process. CONCACAF never initiated an investigation. It merely responded to investigations by the Department of Justice by proposing that the Congress dismiss the Athlete. No investigation exists; no charges have been brought. Therefore, to date, no disciplinary proceedings have occurred which result in a sanction that can serve as a premise to the Decision.

75. CONCACAF answers that:

(a) CONCACAF is entitled to act irrespective of the disciplinary powers it has been delegated by other judicial bodies within CONCACAF.

(b) All requirements contemplated in Article 36 of the CONCACAF Statutes in relation to dismissal have been duly complied with. And these comport with due process as (i) the motion for dismissal was justified given the need to expel the Appellant given the damage inflicted on CONCACAF caused by the extraordinary circumstances involved in the criminal activities of the indicted persons; (ii) The Appellant did not avail himself of the opportunity to provide the CONCACAF Congress with evidence of this alleged

innocence as he failed to appear in his own defense when invited; and (iii) CONCACAF continues to suffer from reputational harm as a consequence of the Appellant's conduct.

(c) The CONCACAF Congress unanimously decided to dismiss the Appellant from all football-related activities.

(d) The right to speak in his own defense was afforded to the Appellant.

(e) The requirement that the dismissal must have a two-thirds majority was met, as the motion was unanimously accepted.

76. Upon consideration the Sole Arbitrator finds that the reasons evinced by Appellant are insufficient to conclude that the process was not proper.

77. Due process requires that an opportunity to defend him/herself be conferred to the person which right is to be impinged before deciding accordingly. Albeit nuances exist, they need not be addressed. All that is relevant is that an opportunity be conferred on the Appellant – and he chose not to avail himself of it. But not availing himself of an opportunity does not mean that the opportunity was not granted. Inasmuch as CONCACAF summoned the Appellant to speak on his behalf before the CONCACAF Congress, said fact, in and of itself, suffices to conclude that the process leading to the Decisions was apposite – at least when compares to the reasons advanced to challenge the righteousness of the procedure.

78. The Sole Arbitrator considers that the reason advanced by Appellant to question the procedure leading to the Decision is without merit.

D. Exclusion notwithstanding lack of office

79. The Appellant questions the exclusion on the basis that Mr. Alvarado held no CONCACAF office at the time of the Decision. Not much debate on the subject exists. Other than the naked assertion, the record is sparse as to this concern. The Sole Arbitrator has nonetheless carefully considered it. In doing so, the Sole Arbitrator is mindful of several ramifications that the concern may trigger – none of which have been advanced by CONCACAF. One of the implications is jurisdiction: a sport organization lacks jurisdiction to sanction athletes (persons for that matter) who are not members of the same. Another is whether the mere fact that the evidence is *prima facie* and the resolution of the matter has yet to occur.

80. Upon consideration the Sole Arbitrator finds that:

(a) whatever logic the criticism may have, it does not render the Decision illegal.

(b) the lifetime ban imposed by the CONCACAF Congress was premised on the indictment for criminal charges filed by the United States Department of Justice for a bribery allegedly occurring in 2012, while Appellant was a member of the CONCACAF Executive Committee.

(c) The objectively-based suspicion of bribery and the consequent public investigation appear to be sufficiently good reasons for a sports association to be concerned and act accordingly, given the reputational impact they trigger. Doing so is not a violation of the presumption of innocence inasmuch as no determination exists as to the existence of guilt or the offense.

81. The above reasons are, in this Sole Arbitrator's opinion, independently sufficient grounds to reject the challenge.

VII. CONCLUSION

82. Considering all of the above, the Sole Arbitrator finds that:

(a) CAS has jurisdiction to hear this appeal and the Statement of Appeal was admissible as it was timely submitted.

(b) The reasons advanced by Appellant to question the Decision are without merit. The appeal is therefore dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Court of Arbitration of Sport has jurisdiction to hear the appeal filed by Ariel Alberto Alvarado Carrasco against the decision issued by the Confederation of North, Central America and Caribbean Association Football on 12 May 2016.

2. The appeal filed by Ariel Alberto Alvarado Carrasco against the decision issued by the Confederation of North, Central America and Caribbean Association Football on 12 May 2016 is admissible.

3. The appeal filed by Ariel Alberto Alvarado Carrasco against the decision issued by the Confederation of North, Central America and Caribbean Association Football on 12 May 2016 is rejected.

4. (…).

5. (…).