



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

CAS 2020/A/6617 Manuel Burga Seoane v. FIFA

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr. José Juan Pintó Sala, Attorney-at-Law, Barcelona, Spain
Arbitrators: Mr. Juan Pablo Arriagada Aljaro, Attorney-at-law, Santiago, Chile
Mr. Gustavo Albano Abreu, Professor of law, Buenos Aires, Argentina

in the arbitration between

Mr. Manuel Burga Seoane, Lima, Peru

Represented by Mr. Julio García Torres, Attorney-at-law in Lima, Peru

Appellant

and

Fédération Internationale de Football Association (FIFA), Zurich, Switzerland

Represented by Dr Emilio García Silvero and Mr. Miguel Liétard, FIFA Litigation Department
in Zurich, Switzerland

Respondent

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I. PARTIES

1. Mr. Manuel Burga Seoane (the “Appellant” or Mr. “Burga”) is a Peruvian citizen who formerly held high profile positions in football institutions such as President of the “Federación Peruana de Fútbol” (the “FPF”), member of the Executive Committee of the “Confederación Sudamericana de Fútbol (the “CONMEBOL”), both which in turn are affiliated to the Fédération Internationale de Football Association (“FIFA”), and member of the FIFA Development Committee.
2. The Fédération Internationale de Football Association (the “Respondent” or “FIFA”) is the international governing body of football. FIFA exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials, and players belonging to its affiliates. FIFA is an association under Articles 60 et seq. of the Swiss Civil Code with headquarters in Zurich, Switzerland. Mr. Burga and FIFA are jointly named as the “Parties”.

II. FACTUAL BACKGROUNDS

3. A summary of the most relevant facts and the background giving rise to the present dispute will be developed based on the Parties’ written submissions, the evidence filed with these submissions, and the statements made by the Parties at the hearing held in the present case. Additional facts may be set out, where relevant, in connection with the legal discussion which follows. The Panel refers in the present Award only to the submissions and evidence it considers necessary to explain its reasoning; the Panel, however, has considered all the factual allegations, legal arguments and evidence submitted by the Parties in the present proceedings.
4. Mr. Burga held several profile positions in football institutions, among them:
 - FPF’s director.
 - FPF’s treasurer.
 - FPF’s Vice-President.
 - FPF’s President.
 - Member of FIFA’s Goal Bureau.
 - Member of FIFA’s Development Committee.
 - Member of the Conmebol’s Development Committee.
 - Member Conmebol’s Executive Committee.
5. On 27 May 2015, the United State Department of Justice issued a 47-count indictment in which 9 high-ranking FIFA officials and 5 corporate executives were accused of having committed the criminal offences of, *inter alia*, racketeering, wire fraud and money laundering conspiracies. Said indictment led to the arrest of several high-ranking football officials.
6. On 3 December 2015, the United States District Court, Eastern District of New York issued a superseding indictment in which 16 additional FIFA officials –the Appellant amongst them- were also accused of having committed the criminal offences of, *inter alia*, racketeering, wire fraud and money laundry conspiracies.

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7. On 4 December 2015, Mr. Burga was arrested by the Peru's national police under an extradition request of the United States of America (“USA”).
8. The Appellant remained imprisoned in Peru until 2 December 2016 when he was extradited to the USA, where he was imprisoned in the Brooklyn Detention Centre.
9. Mr. Burga was granted with house arrest on 6 December 2016.
10. The Appellant was prosecuted for racketeering conspiracy before a jury in the United States District Court in the Eastern District of New York. The final verdict was rendered on 26 November 2017 and Mr. Burga was declared not-guilty.

III. PROCEEDINGS BEFORE THE FIFA ETHICS COMMITTEE

11. On 4 December 2015, the Investigatory Chamber of the FIFA Ethics Committee (the “Investigatory Chamber”) sent an email to Mr. Burga (to the electronic address mburga@fpf.org.pe) notifying the opening of investigation proceedings against him for a possible violation of Articles 1, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 25 of FIFA’s Code of Ethics 2012 edition (the “2012 FCE”).
12. On the same day, and before being arrested by the Peruvian national police bodies, Mr. Burga replied to said notification by means of an email sent to FIFA informing of his availability to answer any enquiry the FIFA’s Ethics Committee may had and also requested that any further communication to be sent by FIFA to him be made in Spanish.
13. On 11 December 2015, the Investigatory Chamber sent an email to the Appellant in which he was invited to file his position regarding the superseding indictment of the United States Court, Eastern District of New York and to submit any related document or additional information in order to be sent with the final report to the Adjudicatory Chamber of the FIFA’S Ethics Committee (the “Adjudicatory Chamber”).
14. On 22 January 2016, the Investigatory Chamber sent a new email to Mr. Burga noting that the latter had not filed any submission as invited on 11 December 2015 and requested the Appellant to answer an inquiry list annexed to the email.
15. On 21 June 2019, the Investigatory Chamber sent a new email (from this moment on every email was sent to the electronic address burgamanuel@hotmail.com) informing Mr. Burga of the closure of the investigation proceedings and the referral of the final report and investigation file to the Adjudicatory Chamber.
16. In the abovementioned final report, the Investigatory Chamber’s Chairperson concluded the following:

“Mr. Burga committed various acts of misconduct continuously and repeatedly during his term as an official in different high-ranked and influential positions at CONMEBOL and FIFA. He did so in violation of the specific FCE 2012 sections cited in the report (art. 13, art. 15, art. 19, art. 20 and art. 21 of the FCE 2012).”

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Accordingly, it is respectfully recommended that the adjudicatory chamber of the FIFA Ethics Committee impose appropriate sanctions against Mr. Burga”.

17. On the same day, the Adjudicatory Chamber informed Mr. Burga by email of the decision to proceed with the adjudicatory proceedings against him. Moreover, FIFA provided the Appellant a deadline to inform FIFA regarding his preference or not to hold a hearing as well as to submit his position regarding the matter at stake.
18. On 8 July 2019, the Adjudicatory Chamber sent an email to the Appellant by means of which it was noted that the latter had neither requested a hearing nor submitted his position and consequently, the Adjudicatory Chamber would decide based on the existing documents, and additionally informed Mr. Burga of the composition of the adjudicatory panel.
19. On 12 November 2019, the Adjudicatory Chamber issued its decision in the present matter (the “Appealed Decision”) which was taken on 26 July 2019. Said decision established the following:
 1. *“Mr Burga is found guilty of infringement of art. 27 (Bribery) of the FIFA Code of Ethics.*
 2. *Mr Manuel Burga is hereby banned for life from taking part in any kind of football-related activity at national and international level (administrative, sports or any other) as of notification of the present decision, in accordance with article 7 lit. j) of the FIFA Code of Ethics in conjunction with Article 22 of the FIFA Disciplinary Code.*
 3. *Mr Manuel Burga shall pay a fine in the amount of CHF 1’000’000 within 30 days of notification of the present decision. Payment can be made either in Swiss francs (CHF) to account no. [...] or in US dollars (USD) to account no. [...], with reference to case no. “Adj. ref. no. 17/2019 (Ethics 150960)” in accordance with art. 7 let. e) of the FIFA Code of Ethics.*
 4. *Mr Manuel Burga shall pay costs of these proceedings in the amount of [...] within 30 days of notification of the present decision, which shall be paid according to the modalities stipulated under point 3. above.*
 5. *Mr Manuel Burga shall bear his own legal and other costs incurred in connection with the present proceedings.*
 6. *This decision is sent to Mr Manuel Burga. A copy of the decision is sent to CONMEBOL, the Federación Peruana de Fútbol and to the chief of investigation, Ms Maria Claudia Rojas.”*

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 2 December 2019, pursuant Articles R47 and R48 of the Code of Sports-related Arbitration (the “CAS Code”), Mr. Burga filed its Statement of Appeal directed against FIFA before the Court of Arbitration for Sport (the “CAS”) challenging the Appealed

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Decision. The Appellant requested the present proceedings to be resolved by a sole arbitrator and suggested the CAS to appoint Mr. José María Cruz. Furthermore, Mr. Burga chose Spanish as the language of the procedure.

21. On 9 December 2019, the CAS Court Office acknowledged the Appellant's Statement of Appeal and requested the Respondent to inform if it agreed with the procedure to be conducted in Spanish, and if FIFA objected to conduct the proceedings entirely in Spanish, the Parties were invited to inform if they would agree to hold a bilingual procedure (Spanish/English).
22. On 10 December 2019, Mr. Burga informed the CAS Court Office that he agreed to conduct a bilingual procedure for the present case.
23. On 11 December 2019, FIFA informed CAS that it also agreed to hold a bilingual procedure. In the same letter, FIFA objected that the case could be referred to a sole arbitrator and requested the case to be submitted to a panel of three arbitrators.
24. On the same day, the CAS Court Office confirmed that the present procedure would be bilingual and informed the Parties that the final award would be rendered in English.
25. On 17 December 2019, Mr. Burga submitted his Appeal Brief and, *inter alia*, requested the following:

- i) *“Dejar sin efecto y anular la Decisión Apelada.*
- ii) *Decidir que el caso contra MANUEL BURGA SEOANE por los hechos contenidos en la Decisión Apelada y declarada nula, deben ser definitivamente archivados”*

Freely translated into English by the Panel

- i) *“Annul and leave the Appealed Decision without effects.*
 - ii) *Decide that the case against MANUEL BURGA SEOANE for the facts contained in the Appealed Decision, must be definitively closed”*
26. On 18 December 2019, the CAS Court Office informed the Parties that the Deputy Division President had decided to submit the matter to a three-member panel pursuant to Article R50 of the CAS Code. Additionally, the CAS Court Office noted that the Appellant already had nominated Mr. José María Cruz as arbitrator and invited the Respondent to nominate one.
 27. On 20 December 2019, FIFA nominated Mr. Gustavo Albano Abreu, Professor of law in Buenos Aires, Argentina, as arbitrator in the present proceedings.
 28. On 27 December 2019, Mr. José María Cruz declined to serve as arbitrator given that he is a member of the FIFA's Player's Status Committee and to that extent believed to not be suitable in a matter in which FIFA is a party. Consequently, the CAS Court Office invited the Appellant to nominate a new arbitrator.

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29. On 6 January 2020, Mr. Burga nominated Mr. Juan Pablo Arriagada Aljaro, Attorney-at-law in Santiago, Chile as arbitrator in the present proceedings.
30. On 21 January 2020, the CAS Court Office informed the Parties that pursuant to Article R54 of the CAS Code and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the Panel had been constituted as follows:

President: Mr. José Juan Pintó Sala, Attorney-at-law in Barcelona, Spain.

Arbitrators: Mr. Juan Pablo Arriagada Aljaro, Attorney-at-law in Santiago, Chile.
Mr. Gustavo Albano Abreu, Profesor in Buenos Aires, Argentina.
31. On 24 January 2020, FIFA filed its Answer to the Appeal with the following requests for relief:
 - (a) *“rejecting the reliefs sought by the Appellant;*
 - (b) *confirming the Appealed Decision; and*
 - (c) *ordering the Appellant to bear the full costs of these arbitration proceedings.”*
32. On 27 January 2020, the CAS Court Office invited the Parties to inform whether they preferred a hearing to be held or for the Panel to issue an award based solely on the Parties’ written submissions.
33. On 3 February 2020, FIFA informed CAS that it considered that holding a hearing in the present case was not necessary and a decision could be issued by the Panel based solely on the Parties written submissions.
34. On 2 March 2020, the Appellant informed CAS of his preference to hold an in-person hearing in Lima, Perú.
35. On 17 March 2020, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing in the present case which date and place would be determined once the COVID-19 situation would permit it.
36. On 6 May 2020, the CAS Court Office, on behalf of the Panel, invited the Parties to inform if they preferred to hold an in-person hearing (which date could not be fixed at the moment) or to hold said hearing by videoconference in a closer date.
37. On 7 May 2020, FIFA stated his preference on holding a virtual hearing in light of the existing restrictions due to the COVID-19 pandemic.
38. On 15 May 2020, Mr. Burga stated his preference on holding an in-person hearing and consequently re-evaluate its viability in a further date.

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39. After several communications between the CAS Court Office (on behalf of the Panel) and the Parties, on 5 October 2021, the CAS Court Office informed the Parties that, given that the mobility restrictions persisted and there was no option to hold the hearing in person and with the objective of not delaying any further the procedure, the Panel had decided to hold a hearing by videoconference.
40. On 13 October 2021, the CAS Court Office, after consulting the Parties availability, informed the Parties that the hearing by videoconference was going to be held on 15 November 2021 at 15h00 (CET).
41. On 27 October 2021, the CAS Court Office sent the Parties the Order of Procedure which was duly signed and returned by the parties on 29 October 2021.
42. On 15 November 2021, a hearing was held by video-conference (via Cisco Webex). At the outset of the hearing the Parties confirmed that they had no objection as to the constitution of the Panel.
43. In addition to the Panel and Mr. Antonio de Quesada, CAS Head of Arbitration, the following persons attended the hearing:
 - a) For the Appellant:
 1. Mr. Manuel Burga Seoane, the Appellant
 2. Mr. Julio Manuel García Torres, legal counsel
 3. Mr. José Miguel Delgado Fuentes, legal counsel
 4. Mr. Gabriel Gonzalez Delgado, legal counsel
 - b) For the Respondent
 1. Mr. Miguel Liétard, FIFA's Director of Litigation.
 2. Ms. Marta Ruiz-Ayucar, Head of Judicial Bodies (investigatory) at FIFA.
44. At the hearing, the Parties had the opportunity to present their case, to submit their arguments and to comment on the issues and questions raised by the counterparty and the arbitrators.
45. At the closing of the hearing, the Parties expressly stated that they did not have any objections with regard to the procedure. The Parties further confirmed that they were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel and that their right to be heard had been respected.

V. THE PARTIES' SUBMISSIONS

46. The following summary of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Panel, however, has carefully considered, for the purposes of the legal analysis which follows, all the submissions made by the Parties, even if there is no specific reference to those submissions in the following section.

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A. The Appellant

47. The Appellant's submissions, in essence, may be summarized as follows:
- a. Absence of notification and affectation to the right to be heard and to the right of defense
48. The Appellant was never notified of the proceedings conducted by FIFA against him before the FIFA's Ethics Committee in neither of its stages. Way after and once the proceedings had already been closed by FIFA, Mr. Burga was aware of the existence of a disciplinary proceedings that had been conducted against him.
49. FIFA seems to have sent several notifications to the Appellant by email that were never received by the Appellant as it had not access to the email to which FIFA sent said communications.
50. In this regard, notification shall not be considered an end or objective by itself, as it pursues to give an individual the possibility to exercise (or decide to not exercise) his right of defence.
51. The right of defence is not only a basic guarantee of any lawful procedure but also a fundamental right that may not be violated by an adjudicatory chamber.
52. By the time in which the notification was supposedly made, 2 regulations were applicable: the 2012 FCE and the 2011 Disciplinary Code.
53. The 2012 FCE only made one reference to notifications in its article 44 that establishes the following:
- "44 Notification of decisions*
- 1. Decisions shall be communicated by fax or registered letter.*
 - 2. All of the parties shall be notified of the decisions.*
 - 3. Decisions and other documents intended for persons bound by this Code shall be addressed to the association concerned on condition that it forwards the documents to the parties concerned. In the event that the documents were not also or solely sent to the party concerned, these documents shall be considered to have been communicated properly to the ultimate addressee four days after communication of the documents to the association."*
54. This abovementioned article did not recognize the possibility of notifying by email. FIFA should not neglect its responsibility to comply with the notification requisites stated in its proper regulations and therefore should have duly notified the Appellant in one of the ways that were recognized by the FIFA in force regulations.
55. As to the 2011 Disciplinary Code, its article 103 specifically excludes email as a valid notification method in proceedings. Said Article established the following:

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“103 Form

- 1. Decisions communicated by telefax shall be legally binding. Alternatively, decisions may be communicated by registered letter, which shall also be legally binding.*
- 2. The communication of decisions by electronic mail is not permitted.”*

56. Due to the imprisonment of the Appellant, the latter did not have a chance to exercise his right of defence. When FIFA sent the relevant notifications to the Appellant’s email, he was arrested in Peru and in prison in said country during the entire year and therefore had no access to his email. In fact, Mr. Burga’s PPF corporate email was blocked by the FBI and therefore he was completely unable to access his professional or personal email account while being in prison.
57. Notification is not a mere formality given that, except very few exceptions, administrative acts do not produce effects until they are notified, which requires the certainty that it has been received or at least could be known with a minimum diligence of the addressee of the notification.
58. In disciplinary proceedings, without the act of notification it is not possible to exercise the right of defence, which is a basic principle of a due process as it has already been recognized previously by CAS (CAS 2009/A/1920) taking into account Article 6 of the European Convention on Human Rights and Article 29 of the Swiss Constitution.
59. The recent decision of the Swiss Federal Tribunal 4A_424/2018 referred to the cases CAS 2017/A/5301 and CAS 2017/A/5302 that established that for annulling an award is not enough the affection of the right of defence but said violation must have affected the result of the procedure. In the present case, although it is possible that the Ethics Committee could end by sanctioning the Appellant even if he participated in the proceedings, due to the balance of probabilities principle there is also possibility that in case of participation of the Appellant, the case could have been considered moot given that he had already been declared non-guilty in a USA Federal Court (the only one of more of 40 indicted persons).
60. Taking into account that when the Appellant had the possibility of defending himself of the charges initiated against him by the FBI, he was finally exonerated by the USA tribunal, it is reasonable to consider that the same conclusions could have been reached by the FIFA Adjudicatory Chamber if he had exercised his right of defence to which he was prevented by FIFA.
61. Moreover, and regarding the *de novo* principle applicable at CAS, the notification defect in the FIFA proceedings cannot be remedied at CAS as it implied a serious violation of the Appellant’s right of defence that implied that Mr. Burga was deprived of its right to be heard in a first instance before appearing at CAS.
 - a. Violation of *ne bis in idem*
62. FIFA not only violated the Appellant’s right of defence but also violated the *ne bis in idem* principle by adopting the Appealed Decision as the case shares the factual

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background of an already decided procedure in which FIFA has taken part (the Criminal trial in USA).

63. CAS 2015/A/4319 establishes that the principle of *ne bis in idem* has full applicability in disciplinary proceedings with 3 requisites to consider: identity of the parties, facts and object.
64. Regarding the identity of the Parties, in both proceedings the defendant was Mr. Burga. Even though FIFA was not the Claimant in the USA Criminal proceedings, it shall be noted that FIFA took an active role before the Federal by requesting a fond restitution as it was considered as a victim in said proceedings. FIFA played a key role before the USA tribunal and was evidently a part to the same what therefore implies that there is an evident identity of Parties in both proceedings.
65. The factual background by which the Ethics Committee sanctioned Mr. Burga are the same by which he was declared non-guilty by the USA Federal Court.
66. Although FIFA considers that there is not an identity of object since the criminal case in USA is oriented to the racketeering and money laundry criminal offences and the Ethics Committee proceedings are mainly based on bribery, in the declaration made by Ms. Tanya Haijar, Deputy Prosecutor of the East District of New York it is noted that the facts that could constitute a criminal offense in the USA are the exact same ones that served as basis for the Ethics Committee sanction imposition. Moreover, the same declaration makes explicit mention to the bribery schemes around the Copa Libertadores and Copa America and finally the USA tribunal considered that it has not been proven that Mr. Burga committed any incorrect act and was exonerated of all the charges initiated against him.
67. Furthermore, the Indictment against Mr. Burga while describing the position and characteristics of FIFA, refers to the enforceability of the FIFA's Ethics Code to the Appellant which forbids the same conduct that is typified as a criminal offence in the USA Criminal Law.
68. Taking into account that the criminal proceedings declared Mr. Burga as non-guilty, the proceedings ended definitively and acquired the status of *res judicata*. Said declaration of non-guilty was based on the fact that it was considered as not proven that Mr. Burga had received or agreed any kind of monetary contribution or gift and therefore that he had not committed bribery.
69. Despite the above, FIFA decided to continue with the disciplinary proceedings that had already been initiated and finally reached a completely different conclusion than the USA jury, violating not only the principle of *ne bis in idem* but also *res judicata*. FIFA voluntarily decided to not consider the conclusion reached by the USA tribunal and ended by condemning the Appellant for the same acts that it had been considered as not guilty in the USA. Therefore, it shall be concluded by the Panel that the same facts cannot reach a completely opposite conclusion in two proceedings in which the same exact acts are being analysed and judged, regardless the standard of proof of both proceedings.

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The Respondent

a. The Appellant's awareness of the Ethics Committee proceedings

70. FIFA rejects the Appellant's argument regarding the application to the present case of the 2011 FDC prohibition to make notifications by email. Said code was not applicable to the Appellant's case since the 2012 FCE does not delegate any procedural or other aspects to the Disciplinary Code with the sole exception of appeal proceedings before the FIFA Appeal Committee. In other words, investigations initiated by the FIFA Ethics Committee are in no way covered by the 2011 FDC and the provisions of that code are not applicable to this case.
71. Turning to the notification's mechanism under the 2012 FCE, it shall be noted that Article 44 invoked by the Appellant exclusively refers to the notification mechanism of formal and binding decisions and not to other communications as the ones that were sent by FIFA to the Appellant back in 2015 and 2016 as it is clearly established in said article.
72. The above is further confirmed by paragraph 3 of the same Article 44 of the 2012 FCE when it refers to "other documents" without establishing any requirements as to the form in which they could be sent.
73. Moreover, the Appellant's argument regarding the allegedly mandatory requisite of notifying the disciplinary proceedings to the FPF in addition of having to notify it to the Appellant via fax or registered email should also be rejected.
74. In this regard, Article 44(3) of the 2012 FCE established the possibility of notifying communications solely to the party concerned. Communications made to the relevant association are only made if the party's contact details are unknown or when the association is also copied in addition to the party concerned generally for information purposes.
75. Even if a notification to the relevant association was required, it is recalled that Mr. Burga was the president of the FPF and therefore its highest representative so all communications sent to him would also be considered to have been sent to the FPF especially considering that they were sent to his official email at the FPF (mburga@fpf.org.pe).
76. In light of the above mentioned, the notifications made to Mr. Burga by email since 4 December 2015 with the opening of the ethics investigation until 12 August 2018 fully complied with the 2012 FCE.
77. The Appellant does not specifically address the notification of communications from the Ethics Committee during the adjudicatory proceedings which took place in 21 June 2019, i.e. after the entry of force of the 2018 FCE, which in its Article 41(1) stipulates that "[d]ecisions and other documents shall be communicated and notified by email and may be followed by registered letter". Moreover, Article 41(3) of the same regulations

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- confirms that such communications may be solely and directly sent to their intended recipients without need to copy the national association concerned.
78. It is to be noted that in compliance with the *tempus regit actum* principle, procedural actions should be done in compliance with rules and time limits in force when they are performed (CAS 2004/A/635 and CAS 2000/A/274), which implies that during the adjudicatory proceedings the 2018 FCE was applicable.
 79. In light of the above-mentioned, all email communications sent by the Ethics Committee directly to Mr. Burga in 2019 were fully compliant with the 2018 FCE.
 80. Nevertheless, all of the above is without prejudice to the *de novo* power of review of the Panel that is recognized in Article R57 of the CAS Code, which cures any procedural defect from the previous instance.
 81. Regarding the Appellant's awareness of the proceedings, FIFA cannot accept Mr. Burga's argument that he was totally unaware since upon receipt of the letter of 4 December 2015 which informed him of the initiation of the ethics investigation. The Appellant was fully aware that there was an ongoing investigation conducted by the FIFA Ethics Committee against him. In this regard, the Appellant not only acknowledged receipt of said letter but also informed FIFA of his availability to answer any question from the Ethics Committee and requested that communications would be sent to him in Spanish.
 82. It shall also be noted that all the emails sent to Mr. Burga were correctly received in his email as there was no return message and therefore it shall be concluded that were correctly delivered to the Appellant. Moreover, Mr. Burga did not deny that the electronic addresses in which the notifications were sent was not correct nor even proved that while his imprisonment he did not have access to the correspondent email.
 83. It shall also be taken into account that the majority of the communications sent by FIFA were made once the Appellant was already free or at least in domicile arrest and therefore it shall be concluded that the notifications entered into his sphere of control. Mr. Burga was therefore fully aware of the proceedings that were being conducted by FIFA and therefore voluntarily decided not to appear to said proceedings or even answer any of the communications sent by FIFA.
 84. According to the well-known Swiss jurisprudence that is in turn in line with the relevant Swiss legal doctrine, "*a notification or declaration of intent is deemed to be received when it entered the sphere of control of the receipt and one could reasonably assume that the recipient was able to take note of it*" (free translation from German in BGE 4A_89/2011 E3). Furthermore "*written declarations in the course of electronic commerce/communication (especially by means of email) shall be deemed to have been received as soon as they can be retrieved/received and when the recipient has an 'inquiry-obligation'*" (free translation from German in Gauch/Schluep/Schmid, differenzierend zur Abfrage-Obliegenheit Shwenzer).
 85. The so-called 'inquiry obligation' increases when a party to a proceeding can expect or has to assume that it will receive a communication during the course of those proceedings

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Moreover, the party to such proceedings is responsible for being reachable via the means of communication it opened toward the court/tribunal.

86. In the present case, Mr. Burga, by replying to the proceedings opening email created not only a legitimate expectation that he would receive further communications during the proceedings, but he also made himself reachable via email to the Ethics Committee.

b. No violation of *ne bis in idem*

87. Mr. Burga has not provided any evidence as to how *ne bis in idem* arising from a criminal procedure in the USA would apply to proceedings of a disciplinary nature in a private international federation based in Switzerland and under a different legal framework. In fact, it has been confirmed by CAS on several occasions that “*the principle of ne bis in idem prevents sports disciplinary bodies from trying a person or an entity for an offence in relation to which that person or entity has already been convicted or acquitted pursuant to a final decision of another body within the same regulatory framework*” (CAS 2015/A/4343 and CAS 2013/A/3256).
88. The USA criminal law and the FIFA’s Code of Ethics are two different sets of regulations which bear no connection whatsoever (see CAS 2019/A/6344 and CAS 2001/A/317). It is relevant to highlight that the USA proceedings were carried under the criminal standard of proof beyond reasonable doubt that is completely different to the ethics proceedings comfortable satisfaction standard proof principle (see SFT 4A_448/20131 and CAS 2019/A/6665).
89. The fact that Mr. Burga was considered as not guilty in the USA proceedings that was analysing if Mr. Burga had committed several criminal offences considering the US Criminal Code does not necessarily mean that he did not violate the FCE and vice versa. Additionally, the consequences of the criminal proceedings (including imprisonment) differ from those of the Ethics Committee proceedings.
90. Moreover, the so-called triple-identity test is not met in the present case as the Appellant alleges in its Appeal Brief.
91. As to the identity of the object, the proceedings against the Appellant in the USA Court was based on different legal grounds compared to the Ethics Committee proceedings conducted by FIFA. While in the USA Mr. Burga was accused of having committed the criminal offences of racketeering and conspiracy under Section 18 of the United States Code Section 1962(c), before the Ethics Committee he was accused of having violated Articles 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 25 of the 2012 FCE or their equivalents under the 2018 FCE that have nothing to do with the criminal offences of the USA Criminal Code. Although the Appellant alleges that the breaches are identical, insofar as bribery is concerned, it has not sufficiently proven that the definition of bribery under USA law would be the same as in the FCE.
92. The fact that the Appellant was declared non-guilty in the criminal proceedings in USA does not necessarily mean that he did not violate the FIFA’s Ethics Code (TAS 2020/A/6709 par. 143).

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93. Moreover, the parties involved in the criminal proceedings are not the same to the ones in the present case as FIFA was simply never a party to the Criminal proceedings conducted in the USA. This is clearly evidenced by the heading of the criminal proceeding itself: “*United States of America v. Jeffrey Webb et al*”. No reference whatsoever is made in any District Court document to FIFA being a party of it. The fact that FIFA filed a victim statement and a request for restitution by no means implies that FIFA must be considered as a party as a victim in a criminal trial is not a party thereto.
94. It is worth recalling the case CAS 2010/A/2267 in which CAS sanctioned a Ukrainian club despite the fact that said club had been acquitted by a Ukrainian criminal court. In explaining the different outcomes, the CAS panel assessed that it was not guided by the same standards of proof as the public court and consequently was entitled to reach a different outcome.
95. FIFA does not dispute that the criminal proceedings against the Appellant in the USA and the ethics proceedings against him are based on similar (if not identical) facts but FIFA submits that the failure of the triple-identity test also leads to the rejection of the Appellants argument that his acquittal at the USA trial constitutes *res judicata*.
96. Finally, it shall be noted that the Appellant was only tried for one of the five charges he was indicted (racketeering conspiracy), consequently his acquittal on the first charge could never lead to the automatic closure of the ethics proceedings.

c. The Appellant’s failure to address any of the charges and facts of the case

97. FIFA notes that Mr. Burga’s Appeal exclusively revolves around the two issues discussed in the previous sections, and therefore the Appellant failed to address any of the findings or facts that were analysed in the Appealed Decision. Therefore, it must be concluded that the Appellant has been granted with the possibility of posing arguments and providing evidence about the accusations against him, yet he has chosen to challenge the Appealed Decision merely on two incorrect legal technicalities without contesting the factual or legal findings of the Adjudicatory Chamber.
98. While FIFA is mindful that it bears the burden of proof in ethics proceedings, it is recalled that once the facts have been established as in the Appealed Decision, it becomes the Appellant’s burden of proof to present evidence to counter those facts and legal findings concluded by the Ethics Committee.

VI. JURISDICTION OF THE CAS

99. The jurisdiction of the CAS, which is not disputed by the Parties, derives from Article R47 of the Code in connection with Article 57 para 1 and R58 para 1 of the FIFA Statutes.
100. Article R47 of the Code provides as follows:

“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties

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have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.”

101. Article 57 para 1 of the FIFA Statutes reads as follows:

“FIFA recognizes the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents...”

102. Article 58 para 1 of the FIFA Statutes reads as follows:

“Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of notification of the decision in question.”

103. The jurisdiction of the CAS is not contested by the Parties and was further confirmed by the Order of Procedure duly signed and returned by them.

104. It follows, therefore, that CAS has jurisdiction in this Appeal.

VII. ADMISSIBILITY

105. 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 of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.”

106. Article 58.1 of the FIFA Statutes (2019 edition) states:

“Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of notification of the decision in question.”

107. The Panel notes that the admissibility of the Appeal is not contested by the Parties. The grounds of the Appealed Decision were notified to the Parties on 12 November 2019. The Appellant’s Statement of Appeal was filed on 2 December 2019 i.e., within the 21-day deadline established by Article 58 of the FIFA Statutes and Article R49 of the CAS Code.

108. Consequently, the Appeal filed by the Appellant is admissible.

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VIII. APPLICABLE LAW

109. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.”

110. In addition, Article 57.2 of the FIFA Statutes (2019 edition) stipulates the following:

“The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.”

111. As such, the Panel considers that it shall primarily apply the various regulations of FIFA, in particular the 2012 FIFA Code of Ethics and, subsidiarily, Swiss law shall be applied.

IX. MERITS

112. Before entering into the merits of the present case, the Panel deems it appropriate to firstly point out, for the sake of good order, the following relevant facts:

- i. On 25 November 2015, the United States District Court, Eastern District of New York issued a superseding indictment in which the Appellant was accused of having committed the criminal offences of racketeering, wire fraud and money laundry conspiracies.
- ii. On 4 December 2015, the Investigatory Chamber of the FIFA Ethics Committee sent an email to the Appellant communicating the opening of an investigation proceeding against him for a possible violation of Articles 1, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 25 of the 2012 FCE related to the abovementioned criminal proceedings conducted in the USA.
- iii. On the same day, Mr. Burga was arrested in Peru under an extradition request of the USA Court and remained imprisoned in Peru until 2 December 2016 when he was extradited to the USA where he was firstly imprisoned in the Brooklyn Detention Centre and on 6 December 2016 granted with house arrest.
- iv. On 26 November 2017, the United States District Court, Eastern District of New York concluded that it was not proven that Mr. Burga had committed the alleged criminal offences and therefore declared Mr. Burga not-guilty.
- v. FIFA continued with the parallel ethics proceedings that had initiated and on 26 July 2019 issued the Appealed Decision, which was notified to the Appellant on

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12 November 2019, declaring Mr. Burga guilty of an infringement of art. 27 (bribery) of the 2012 FCE. Due to said infringement, FIFA banned Mr. Burga for life from taking part in any kind of football related activity at national and international level and condemned the Appellant to pay the amount of CHF 1.000.000.

113. The Appellant has challenged the Appealed Decision due to (i) an alleged procedural violation committed by FIFA regarding the notifications submitted to the Appellant within the investigatory and adjudicatory phase of the FIFA Ethics Committee and (ii) the violation of the *ne bis in idem* principle taking into account that Mr. Burga has been declared non-guilty by the United States District Court, Eastern District of New York for the same acts for which FIFA has imposed the Appellant the higher sanction it could impose.
114. In turn, FIFA alleges that beside the fact that the notification of communications by email were allowed in the 2012 FCE, the Appellant cannot allege such unawareness since he answered the first email sent by FIFA by means of which he was informed of the opening of the investigation process and therefore effectively accepted email as a valid communication channel.
115. In this regard, the Panel considers it necessary to firstly analyse what was established in Article 44 of the 2012 FCE applicable to the case at stake, regarding the notification mechanism in all ethics proceedings:
- “44.1. Decisions shall be communicated by fax or registered letter.*
- 44.2. All of the parties shall be notified of the decisions.*
- 44.3. Decisions and other documents intended for persons bound by this Code shall be addressed to the association concerned on condition that it forwards the documents to the parties concerned. In the event that the documents were not also or solely sent to the party concerned, these documents shall be considered to have been communicated properly to the ultimate addressee four days after communication of the documents to the association.”*
116. The Panel considers undisputed that the first decision regarding the initiation of the investigation proceeding against Mr. Burga for a possible violation of Articles 1, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 25 of the 2012 FCE was sent via email by FIFA to the the electronic address mburga@fpf.org.pe and the Appellant acknowledged receipt of the email and its content.
117. It is also worth noting that it has been proven that just the same day in which the Appellant answered to said email he was arrested in Peru and was imprisoned in said country before he was extradited to the USA where he was granted with house arrest. On 11 December 2015, the FIFA Investigatory Chamber sent an email to the Appellant informing him of his right to be heard and invited Mr. Burga to file his position regarding the indictment of the United States Court, Eastern District of New York and to submit any related document

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or additional information in order to be sent with the final report to the Adjudicatory Chamber of the FIFA'S Ethics Committee.

118. On 22 January 2016, the Investigatory Chamber sent a new email to Mr. Burga stating that he had not filed any submission as invited on 11 December 2015 and invited the Appellant to answer an inquiry list annexed to the email.
119. The abovementioned two email were sent to the electronic address that the Appellant used to have when he was president of the FPF, that is to say mburga@fpf.org.pe.
120. The Appellant did not answer to the abovementioned two emails and never filed any submission or document in order to exercise its right of defence before the investigatory chamber of FIFA that finally issued its final report to the Adjudicatory Chamber of FIFA without having heard the Appellant in the case at stake.
121. The Panel wishes to point out that when the above-mentioned two emails were sent to Mr. Burga, he was imprisoned in a federal prison in Peru and therefore seems reasonable to conclude that he was not able to have access to its professional email of the FPF specially taken into account that due to his imprisonment he was devoid of his position as president of the FPF. In this regard, it shall also be concluded that FIFA should, or at least could, have been aware of the personal situation of Mr. Burga and the fact that he could not be answering to the emails sent to his professional electronic address due to the fact that he was imprisoned in Peru.
122. The Panel notes that this was not an isolated case but was part of the well-known FIFA Gate case in which several high-profile FIFA officials were arrested all over the world and were accused of having committed several corruptions related criminal offences in an investigation led by the FBI and the United States Court, Eastern District of New York. Therefore, the Panel considers reliable to conclude that FIFA was aware of the Appellant's situation taking into account that by that time he was the president of the FPF. It does not seem reasonable to sustain that FIFA was totally unaware that the president of one of his federations had been arrested in Peru and remained in prison during more than one year due to an investigation that also affected other FIFA officials and in which FIFA was considered to be a victim.
123. Taking into account that the investigation opened by FIFA against the Appellant was of a severe nature as it was being investigated for committing a potential violation of up to 11 different articles of the 2012 FCE and in parallel was also being investigated by the FBI and a federal court in the USA, FIFA should have had an even higher than normal degree of diligence and should have ensured that the right to be heard and the right of defence of Mr. Burga were fully respected. The Appellant was facing a serious ethics case that could led to the imposition of extremely high sanctions and therefore the adjudicating body should have been cautious and acted in a thorough way especially taking into account that Mr. Burga had not answered to the two letters by means of which FIFA had invited him to expose its position and file any document it considered relevant to defend himself.

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124. In this regard, the Panel notes that FIFA could have at least tried to reach the Appellant in a different way but failed to explore such ways.
125. In light of the above, and taking into account the specific circumstances of the present case and the severity of the accusations and sanctions imposed by FIFA, that it shall be concluded that the Respondent could have acted in a more diligent way in order to ensure that the right to be heard of the Appellant was respected and that he was effectively granted with the possibility of appearing before the investigatory phase and that his defence positions were taken into account by the adjudicatory chamber of FIFA. As it has been previously established by CAS, FIFA would be well-advised to require direct evidence from its affiliate members that the relevant communications are indeed served to the intended recipient, rather than assuming that this had been the case. It is well accepted in any legal system that the service of documents is more than just a notification, it is actually the trigger and legitimate legal starting point, from the point of view of the respondent or the accused, to legally be considered as duly summoned to the proceedings. (CAS 2017/A/5297)
126. The reality is that the Appellant was not heard neither in the investigatory phase nor in the adjudicatory phase in a case that certainly required a special degree of diligence taking into account the severity of the alleged infringements and the potential sanctions to which Mr. Burga was facing.
127. The Panel notes that Article R57 of the CAS Code grants the Panel a *de novo* power of review pursuant to which it has full power to review not only the facts and law of the case but also enables CAS to conclude that even if a violation of the principle of due process had occurred in prior proceedings, it may be cured by a full appeal filed before CAS.
128. Despite the above principle, the Panel also notes that the well-known CAS jurisprudence has also concluded, in line with what is established by Article R57 of the CAS Code, that CAS may annul a decision and refer the case back to the previous instance when there are existing circumstances that may justify such decision.
129. The Panel appreciates, as established by CAS jurisprudence (i.e., CAS 2006/A/1301 or CAS 2015/A/4071), the costs and time advantages that a direct adjudication on the merits of the case would imply. However, the Panel notes that in the present case and taking into account its particular circumstances, the Appellant has not been able to exercise its right of defence in the first previous instance.
130. The importance of the case at stake, especially considering that FIFA has imposed the maximum sanction existing in its Code of Ethics sanctioning Mr. Burga to a life-ban and a pecuniary sanction of CHF 1.000.000, has to be taken into account. In these extraordinary circumstances, the Panel considers that the proper way to proceed is to annul the Appealed Decision and in line with what is established by Article R57 of the CAS Code and the well-known CAS jurisprudence in this regard, refer the case back to FIFA.
131. The Panel acknowledges that the decision of referring the case back to FIFA may not be considered the most suitable decision in accordance to the principles of procedural

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economy and efficiency, implying more time for the parties to obtain a definitive decision regarding the present case. Despite the above, the Panel is convinced that this decision certainly guarantees the better protection of the parties right to be heard, respecting their right of a double instance and, at the same time, gives FIFA the opportunity to amend the procedural irregularities of the first instance.

132. If the Panel was to issue a decision based on the merits of the case at stake it would be depriving the Appellant of one level of adjudication as it undisputed that it did not take part of the investigatory or adjudication phase before FIFA. The Panel stresses that the right to be heard is fundamental in any lawful proceedings and needs to be unequivocally enforced and CAS must veil for its compliance. The particular circumstances of the present case, in which neither of the Parties can individually be considered as fully responsible of the non-appearance of the Appellant before the previous instance, resulted in the non-participation of Mr. Burga in the ethics proceedings, both in the investigatory and adjudicatory phase and therefore the Appellant was deprived of exercising its right to be heard in the previous instance in a so important and severe case.
133. In addition, a new examination of the dispute by the Adjudicatory Chamber of the FIFA Ethics Committee would allow a unitary assessment of all the relevant aspects, including the position of the Appellant regarding the merits of the present case as Mr. Burga has not raised any argument related to the merits of the sanction imposed by FIFA and has relied its defence only on the alleged procedural violations committed by FIFA in the previous instance.
134. The Panel observes that the decision to refer the case back to FIFA is in line with the CAS jurisprudence when referring to Article R57 of the CAS Code, according to which the particular circumstances of a given case can make convenient to refer the case back to the previous instance.
135. Therefore, the Panel considers that the decision has to be annulled, and the case, referred back to FIFA. This conclusion, finally, makes it not necessary for the Panel to consider the other requests submitted by the Appellant to the Panel. Furthermore, all other prayers for relief are rejected.

X. COSTS

136. Articles R65 of the CAS Code provides as follows:

“R65. Appeals against decisions issued by international federations in disciplinary matters.

R65.1 This Article R65 applies to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body (...).

R65.2 Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of CAS are borne by CAS.

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Upon submission of the statement of appeal, the Appellant shall pay a non-refundable Court Office fee of Swiss francs 1,000 without which CAS shall not proceed and the appeal shall be deemed withdrawn.”

137. In accordance with Article R65 of the CAS Code, these proceedings are free of charge, except for the CAS Court Office of CHF 1'000 which was paid by the Appellant and which is retained by the CAS.

138. Moreover, Article R65.3 indicates the following:

“R65.3 Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.”

139. Finally, with regard to the legal fees and other expenses incurred by the parties in connection with this proceeding, taking into account the outcome of the proceedings, the financial resources of the parties, and the complexity and the specific circumstances of this case, the Panel considers it fair and appropriate that each party bear their own legal costs incurred in connection with these proceedings.

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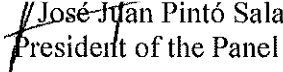
The Court of Arbitration for Sport rules that:

1. The appeal filed on 2 December 2019 by Mr. Manuel Burga against the decision issued on 26 July 2019 by the Adjudicatory Chamber of the FIFA Ethics Committee is partially upheld.
2. The decision issued on 26 July 2019 by the Adjudicatory Chamber of the FIFA Ethics Committee is annulled.
3. The aforementioned case shall be referred back to the FIFA Investigatory Chamber of the FIFA Ethics Committee.
4. The present proceedings are free of charge to the Parties, except for the CAS Court Office fee of CHF 1'000, which was paid by Mr. Manuel Burga and which is retained by the CAS.
5. Each Party shall bear its own legal fees and other expenses incurred in connection with these arbitration proceedings.
6. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Date: 5 April 2022

THE COURT OF ARBITRATION FOR SPORT


President of the Panel

Juan Pablo Arriagada
Arbitrator

Gustavo Abreu
Arbitrator