

Federal Supreme Court endorses extradition of FIFA official to United States

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Introduction

Federal Supreme Court considerations

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On May 2 2016 the Swiss Federal Supreme Court rendered its first decision on the extradition of one of the International Federation of Association Football (FIFA) officials that were spectacularly arrested in Zurich in 2015.⁽¹⁾ The case concerned the extradition of Julio Rocha, former president of the Nicaraguan Football League and citizen of Nicaragua. The United States, and later Nicaragua, requested the extradition of Rocha by way of international legal assistance in criminal matters. The Swiss Federal Criminal Court had approved the extradition to the United States. Rocha consented to be extradited to Nicaragua, but opposed extradition to the United States and appealed to the Federal Supreme Court.

Federal Supreme Court considerations

In international legal assistance regarding criminal matters an appeal to the Federal Supreme Court is, by law, reserved for cases of special importance. The court took the case at hand because of its international and political significance, but dismissed the appeal on examination of the merits.

Passive bribery of non-officials

The court examined in some depth the argument that the crime that Rocha was accused of did not constitute a criminal offence under Swiss law. Rocha allegedly requested and accepted bribes to the amount of \$100,000 in consideration for signing over marketing rights on behalf of the Nicaraguan company FENIFUT. The accepting of bribe payments or other undue advantages by non-officials is not an offence under Swiss criminal law, as currently in effect, but is an offence punishable only on criminal complaint under the Federal Act Against Unfair Competition.⁽²⁾

In its deliberations, the court held that the requirement of a criminal complaint to initiate prosecution was a technical requirement that did not affect the question of whether the act itself was punishable under Swiss law. It specifically recalled that according to Article 35(2)(a) of the Federal Act on International Mutual Assistance in Criminal Matters, special requirements of Swiss law for punishment and guilt are not relevant in assessing whether particular conduct qualifies as a criminal offence for the purposes of mutual assistance in criminal matters.

Lack of US jurisdiction

The appellant further criticised the decision of the lower court as arbitrary with regard to the question of US jurisdiction. The court held that international legal assistance could be denied on such argument only if the alleged lack of jurisdiction was manifest. It found that the case had an obviously strong nexus to the United States. The negotiations about the marketing rights had taken place in the United States and the conspiracy to bribe had involved a US-registered corporation. The bribery payment was transferred via bank accounts in the United States and the criminal conduct adversely affected the US market. For all these reasons, the United States was neither arbitrary nor mistaken to assume jurisdiction in the matter.

AUTHORS

[Bernhard
Lötscher](#)



[Aline Wey
Speirs](#)



Merits of request for extradition

The court went on to consider at some length how to resolve the conflicting extradition requests between the United States and Nicaragua. The appellant argued that the US request had no priority over the request by Nicaragua. The relevant Article 40 of the Federal Act on International Mutual Assistance in Criminal Matters and Article 17 of the extradition treaty between Switzerland and the United States⁽³⁾ allow for a wide discretion by the court. The court weighed a series of different legal and factual arguments. The most convincing arguments in favour of the US extradition request were that:

- the US authorities were simultaneously prosecuting other offences by FIFA officials;
- extradition to the United States allowed for similar and fair treatment with regard to other FIFA officials indicted for similar offences;
- relevant evidence (especially witnesses) were expected to be located in the United States; and
- subsequent to a US trial, extradition from the United States to Nicaragua was possible.

On the other hand, Nicaragua does not extradite its citizens. Hence, extradition to Nicaragua necessarily implied that the suspected offender could no longer be criminally prosecuted in the United States. The Federal Supreme Court also noted that the US request for extradition was made before Nicaragua's request.

For further information on this topic please contact [Bernhard Loetscher](#) or [Aline Wey](#) at CMS von Erlach Poncet Ltd by telephone (+41 44 285 11 11) or email (bernhard.loetscher@cms-vep.com or aline.vey@cms-vep.com). The CMS von Erlach Poncet website can be accessed at www.cms-vep.com.

Endnotes

(1) 1C_143/206, May 2 2016.

(2) The legal situation will change, with effect from July 1 2016, as a result of the introduction of new provisions in the Penal Code on bribery in the private sector.

(3) Extradition Treaty between the Swiss Confederation and the United States, November 14 1990 (SR 0.353.933.6).

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