DOPING AND FUNDAMENTAL RIGHTS OF ATHLETES: COMMENTS IN THE WAKE OF THE ADOPTION OF THE WORLD ANTI-DOPING CODE

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I. Introduction: some basics about fundamental rights and anti-doping regulations restated

In March of this year, all major sports federations and nearly 80 governments participating at the Copenhagen World Conference on Doping in Sport adopted the World Anti-Doping Code ("the Code")[1] "as the basis for the fight against doping in sport throughout the world".[2] The participants noted that the Code was adopted after "broad consultation throughout the world".[3] For the first time in sports history, a broad range of stakeholders was consulted and could provide comments on the draft Code.[4]

During this consultation process, many raised concerns about athletes' fundamental rights. This comes as no surprise as athletes' fundamental rights in doping disputes is presently one of the most debated issues among sports lawyers.[5] In a single book,[6] one can find commentators fearing that the application of human rights standards may jeopardise the fight against doping,[7] while others find that human rights treaties "represent the yardsticks of our civilization" and should therefore be fully applicable even within the sport setting.[8] As a matter of fact, almost everybody agrees that human rights bring "new challenges" for the sporting world.[9]

As a consequence of the concerns about fundamental rights experienced in the course of the drafting process, the World Anti-Doping Agency (WADA), under the aegis of whom the Code was elaborated, requested the authors of this article to opine on the issue whether the Code's main provisions were compatible with an athlete's fundamental rights. This article is based on the opinion provided to WADA ("the Opinion").[10] In this introductory section, it starts by recalling some basic notions about fundamental rights, policies governing anti-doping regulations, and implementation of anti-doping rules. It then goes on reviewing (Section II) the role of fundamental rights in doping issues, the conformity of certain Code provisions with human rights standards, specifically (Section III) those establishing the strict liability doping offences, (Section IV) those providing for disqualification and (Section V) those imposing an ineligibility period. In doing so, this contribution retraces the evolution of the Code. It reaches the conclusion that, unlike the earlier ones that were likely to raise doubts, the final version of the Code does comply with internationally accepted fundamental rights.

Fundamental rights: concept and sources

The analysis will start considering: (1) the concept of fundamental rights; (2) the various sources of

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1. Available at *www.wada-ama.org/docs/web/standards_harmonization/code/code_v3.pdf.*
2. See the "World Conference on Doping in Sport Resolution, adopted by the Copenhagen World Conference on Doping in Sport, Copenhagen, Denmark, 5 March 2003", para.1. (reported in *Play True*, Spring 2003, p.6).
3. *ibid.*, introductory considerations.
4. *i.e.* on Versions 1.0 and 2.0. The earlier drafts were (and still are) freely available on the internet at *www.wada-ama.org/docs/web/standards_harmonization/code.*
5. Charles Flint, Jonathan Taylor and Adam Lewis, "The Regulation of Drug Use in Sport", in Lewis/Taylor (eds), *Sport: Law and Practice* (London, 2003) E4.1, p.908. These authors summarise the issue as follows: "adopting a strict liability approach to doping charges, with a tariff of substantial fixed or minimum sanctions, including suspensions from the sport for lengthy periods, without any ability to take into account of the relative culpability of the individual athlete—risks compromising basic fairness and respect for participants' individual rights. The regulators are challenged with resolving these conflicting imperatives in a manner that both respects the interests of the athletes and vindicates the broader public interest in the sport itself. If the regulators fail to get the balance right, their anti-doing programmes will be subject to forceful challenge".
6. John O'Leary (ed.), *Drugs and Doping in Sport: Socio-Legal Perspectives*, (Cavendish, London-Sydney, 2001).
7. See for instance Edward Grayson, Gregory Ioannidis, *Drugs, Health and Sporting Values*, in John O'Leary (ed.), pp.252–253.
8. JanWillem Soek, *The Fundamental Rights of Athletes in Doping Trials*, in John O'Leary (ed.), (n.6, above), pp.57–73.
9. Andy Gray, *Doping Control: The National Governing Body Perspective*, in John O'Leary (ed.), (n.6, above), pp.27–28.
10. See "Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law", February

fundamental rights; and (3) our approach to analysing and applying these sources in this article.

The concept of fundamental rights

The terms "fundamental rights" and "human rights" are used in a wide variety of different ways and contexts. For example, the Olympic Charter sets out as a "fundamental principle" that "[t]he practice of sport is a human right". The various different and sometimes inconsistent uses of the terms "fundamental rights" and "human rights" can lead to confusion both on the part of athletes[11] and those charged with adjudicating doping disputes.[12] For this reason, it is essential to clarify the concept of "fundamental rights" used in this article.

According to a classic definition, fundamental rights and human rights are "the rights and prerogatives ensuring the liberty and the dignity of human beings, and that can benefit from institutional guarantees".[13] Although terminology is not always univocal, the distinction between "human rights" and "fundamental rights" lies in the source of the rights: the term "fundamental rights" is often used for rights based on national (constitutional) law, while the term "human rights" is used for rights based on international (conventional) law.[14] In this article, the more general concept of "fundamental rights" will be used. It includes human rights protected on both conventional and constitutional level, as well as other fundamental rights, as for instance the EU's basic freedoms. These are not human rights technically speaking, however they may play an important role in doping disputes. With this conceptual and terminological background in mind, let us turn more specifically to the sources of fundamental rights considered in this article.

26, 2003, available at *http://195.139.49.18/3_wada/files/{0F704EEB-070A-4444-8CC5-D6FF2C4F5D20}.pdf.*

11. See CAS-OG 00/01 *Perez I*, para.26, *CAS Digest II*, pp.595, 601.

12. For a quite puzzling approach see AAA No.30-190-00814-02 *USADA v Kyoko Ina*, Award of September 25, 2002, Christopher L. Campbell, dissenting: para.A.1: "The right to compete in national and international competition is a human right. *Olympic Charter, Fundamental Principles, No. 8, p.9.* It is a substantial right protected by [US] federal, state and international law. 22 U.S.C §220509(a); *United States Olympic Committee Constitution*, Art.IX; *California State University v National Collegiate Athletic Association* (1975) Cal. App.3d 533, 121 al Rprtr. (56; Olympic Charter, Rule 2, Section 10 and Bylaw to Rule 45".

13. Frédéric Sudre, *Droit international et européen des droits de l'homme*, Paris 2001, p.12 (free translation of the original French text: *"les droits et facultés assurant la liberté et la dignité de la personne humaine et bénéficiant de garanties institutionelles"*).

14. Andreas Auer, Giorgio Malinverni, Michel Hotellier, *Droit constitutionnel Suisse, Volume II: Les droits fondamentaux* (Bern, 2000), Nos 6-11, pp.4-6 speaking of *"libertés fondamentales"*.

Sources of fundamental rights

"Universal" international instruments for the protection of human rights

There are a large number of international legal texts dealing with human rights, ranging from solemn but non-binding declarations to precise codes accompanied by stringent mechanisms for control and enforcement.[15] In this article, we will often refer to the following texts:

- The "Universal Declaration of Human Rights" ("Universal Declaration"),[16] adopted by the United Nations' General Assembly on December 10, 1948, the Universal Declaration carries significant practical weight. It represented the starting point of the UN regulatory framework, in particular the two UN Covenants of 1966 (which gave binding effect to the Universal Declaration).
- The "International Covenant on Civil and Political Rights of the United Nations"[17] of December 16, 1966 ("UN Covenant on Civil Rights") is the most important human rights text, as it has a worldwide scope of application. In force since 1976, the UN Covenant on Civil Rights has been ratified by 149 countries.
- The "International Covenant on Economic, Social and Cultural Rights of the United Nations"[18] ("UN Covenant on Economic Rights") of December 16, 1966 came into force on January 3, 1976 and has been ratified by 146 countries.

"Regional" international instruments for the protection of human rights

There are numerous different regional international instruments for the protection of human rights. As illustrations, we will focus on the work of both the Council of Europe and the European Union:

- The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, generally referred to as the European Convention on Human Rights ("ECHR") has been in force since

15. For an illustration of the different international human rights instruments, see Paul Sieghart, *The International Law of Human Rights* (Oxford, 1983), pp.24-32.

16. Available at *www.unhchr.ch/udhr/lang/eng.htm.*

17. UN International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of December 16, 1966, available at *www.unhchr.ch/html/menu3/b/a_ccpr.htm.*

18. Available at *www.unhchr.ch/html/menu3/b/a_cescr.htm.*

1953 and is currently binding in 44 European countries, ranging from Portugal to Russia. The ECHR provides for a variety of "civil and political" rights and freedoms that the state parties are required to "secure for everyone within their jurisdiction". As the first binding international instrument for the protection of human rights, the ECHR significantly influenced the other instruments, both on regional and global levels.

- The Council of Europe prepared the European Social Charter as a complementary instrument to the ECHR in the same way that the UN Covenant on Economic Rights is complementary to the UN Covenant on Civil Rights. The European Social Charter was signed in 1961, entered into force in 1965, and is currently binding in 25 countries. The European Social Charter has had a significant impact on the domestic laws of its state parties.

Provisions on fundamental rights in national constitutions (and legislation)

The proliferation of international instruments for the protection of human rights has not lessened the significance of national instruments dealing with human rights, particularly national constitutions. Within the scope of this article, we will refer, as examples, to various provisions of the recently revised Swiss Federal Constitution[19] and the German Federal Constitution. We will also devote attention to the British Human Right Act 1998 that came into force on October 2, 2000. This Act incorporates the provisions of the ECHR into British law making them enforceable by British courts.

General principles of law

Under virtually all definitions of the concept of "general principles of law",[20] certain principles, such as non-discrimination or proportionality, are recognised, regardless of whether or not they are entrenched in instruments for the protection of human rights. It is for this reason that, as early as 1970, the European Court of Justice ("ECJ") relied upon the common constitutional tradition of the Member States when holding that the protection of fundamental rights is a general principle of European law, even though (at that time) the treaty establishing the European Community (the "EC Treaty") did not contain a charter of fundamental rights.[21]

Basic freedoms under the EC Treaties

The EC Treaty contains a number of "freedoms" which it defines as fundamental for achievement of European integration. The ECJ has been very proactive in enforcing these freedoms, including in sports matters.[22] Though the EC basic freedoms are not human rights according to the classic definition set out above they afford the EU citizens important prerogatives that cannot be ignored.

In December 2000, the European Union ("EU") adopted the Charter of Fundamental Rights of the European Union ("EU Charter of Fundamental Rights").[23]

The Council of Europe's Anti-Doping Convention

The Council of Europe's Anti-Doping Convention of 1989 ("European Anti-Doping Convention") is not an instrument for the protection of human rights but it sets out certain important principles that are clearly relevant in the context of this article.[24]

Focus on ECHR and on national laws of Germany, Switzerland and England

In this article, we often refer to fundamental rights by citing a specific provision of the ECHR (for instance Art.6(1) of the ECHR in regard to "the right to a fair hearing"). This approach has been adopted because the ECHR is enforced by an international court—the European Court of Human Rights. The European Court of Human Rights (as well as the European Commission of Human Rights)[25] has created over the years a body of case law, which national courts have found to be persuasive and which, therefore, provides a reliable reference for assessing the validity of specific provisions of the Code.

Moreover, it has become evident in recent years that supra-national tribunals are becoming involved more and more often in sports disputes.

19. An unofficial English translation is available at *www.ukc.ac.uk/international/staff/academic/The%20NewCH Const2.pdf.*
20. For a short description, see Ian Brownlie, *Principles of Public International Law* (Oxford, 1998), p.14.
21. *Internationale Handelsgesellshaft*, [1970] E.C.R. 1135, ECJ.
22. See for instance the well-known *Bosman* case (*Royale Belge de Sociétés de Football v Jean-Marc Bosman* [1995] E.C.R. I–4921, ECJ).
23. JOCE 2000/C 364/01, available at *http://ue.eu.int/df/docs/en/CharteEN.pdf.*
24. Available at *http://conventions.coe.int/Treaty/en/Treaties/Html/135.htm.*
25. The original "two stage" jurisdictional system of the ECHR (*i.e.* Commission of Human Rights (first instance) and Court of Human Rights (second instance)) was abandoned on November 1, 1998 and replaced by a single right of appeal to the European Court of Human Rights.

At present, we are aware of several cases that have come before EU instances (both the ECJ and the European Commission). It is only a matter of time before human rights issues in the context of sports will be brought before the European Court of Human Rights or another international judicial body.[26]

Notwithstanding this trend, national courts are and will continue to be the most important forum in which fundamental rights issues in doping cases are decided. As far as we are aware, the only countries in which courts of law have recently refused to enforce anti-doping sanctions imposed by sports federations are Germany[27] and, to a more limited extent, Switzerland[28] and England.[29] It is also in these countries that the legal debate on the validity of anti-doping sanctions is the most heated. For these reasons, our analysis will often focus on these countries.

The policy rationale for anti-doping regulation

The "spirit of sports"

According to the introduction to the Code, the "fundamental rationale for the World Anti-Doping Code" is meant to be to "preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as the 'spirit of sport'; it is the essence of Olympism; it is how we play true. The spirit of sport is the celebration of the human spirit, body and mind". The Code then lists a series of values characterising the spirit of sport; namely "ethics, fair play and honesty; health; excellence in performance; character and education; fun and joy; teamwork; dedication and commitment; respect for rules and laws; respect for self and other participants; courage; [and] community and solidarity".[30] The drafters of the Code felt it was preferable to set forth only a brief list of values in order to "avoid requests for expansion and clarifications", notably as to whether "sport [should also be considered] entertainment and business".[31] We will take a somewhat broader approach to the policy rationale for anti-doping regulation.

A level playing field

As shown by the list of values in the introduction to the Code, sports governing bodies consider that the principal policy rationale for anti-doping regulation is the need for a level playing field, often referred to by German speaking writers as *Chancengleicheit* (*i.e.* equal chances).[32] As one commentator put it, "at the end of the day, this is what differentiates sports from circus or other entertainment shows".[33] Governmental and judicial bodies have also generally recognised this. For example, the Explanatory Report of the European Anti-Doping Convention[34] states that "doping is contrary to the values of sport and the principles for which it stands: fair play, equal chances, loyal competition [. . .]". Similarly, the courts have observed that the need for a proper comparison of athletic performances is the most important rationale for anti-doping regulation. For example, the German courts have ruled that anti-doping regulation is mainly intended to grant the athletes "the establishment of equal starting and competition conditions".[35]

The protection of the athlete's health

The protection of the athlete's health is the most traditional policy rationale for anti-doping regulation.[36] Although legal commentators increasingly criticise the legitimacy of this rationale,[37] the Code explicitly implements it. Indeed, "actual or potential health risk to the athlete" is one of the three criteria set out in Art.4.3 for including a substance on the list of prohibited substances. The rationale of

26. See also François Rigaux, *Le droit disciplinaire du sport*, Revue trimestrielle des droits de l'homme 1995, *passim*, particularly p.312.
27. *Krabbe v IAAF*, Decision of the OLG Munich of March 28, 1996, SpuRt 1996, p.133. A similar decision, explicitly referring to the *Krabbe* case, has also been rendered in Austria (see *Berger v IAAF*, Decision of LG Vienna of February 23, 1996, SpuRt 2000, p.194.)
28. See *Sandra Gasser v SLV*, Decision of the Richteramt III Bern of December 22, 1987, RSJ 1988 p.85 in which the judge granted the Swiss runner preliminary relief against a two-years imposed by the IAAF and implemented by the Swiss Athletic Federation (SLV). This case is reported in Wise/Meyer, *International Sports Law and Business* (The Hague, 1997), Vol.2, pp.1440–1444.
29. See *Dough Walker v UK Athletics and IAAF* [2000] HC, July 25, unreported, *The Guardian*, July 27, 2000; p.26; 3(5) *Sports Law Bulletin* 3, cited by Grayson/Ioannidis, (n.7, above), p.251.
30. WADC E Version 3.0 annotated, p.8.
31. See Changes to the Draft World Anti-Doping Code (Version 1.0 to 2.0), p.1, available at *www.wada-ama.org/docs/web/standards_harmonization/code/changes_v2.pdf*.
32. Jörg Schmid, *Persönlichkeitsrecht und Sport*, in: Privatrecht im Spannungsfeld zwischen gesellschaftlichem Wandel und ethischer Verantwortung (Bern, 2002), p.138.
33. Clemens Prokop, "Probleme der Aktuellen Dopingbekämpfung aus Sicht nationaler/internationaler Verbände", in J. Fritzweiler (Hrsg.) *Doping—Sanktionen, Beweise, Ansprüche* (Bern, 2000), pp.82.
34. Available at *http://conventions.coe.int/Treaty/en/Reports/Html/135.htm*.
35. *Krabbe v IAAF*, Decision of the OLG Munich of March 28, 1996, SpuRt 1996, pp.133, 134 with respect to the necessity of out-of-competition tests. See also: *Johnson v Athletic Canada and IAAF*, [1997] O.J. 3201, para.29, in which the Ontario court considered that it was "necessary to protect the right of the athlete, including Mr Johnson, to fair competition, to know that the race involves only his own skill, his own strength, his own spirit and not his own pharmacologist".
36. So Prokop (n.33, above), p.82, referring to the "classic" rationale.
37. See, for instance, *Ibid.*, pp.81–82.

protection of athletes' health is also found in the Explanatory Report of the European Anti-Doping Convention: "sport is meant to be a life-enhancing activity not one that imperils life." The importance of protecting the health of athletes has been expressly recognised in several court decisions. For instance, the Ontario Court of Justice stated the following in a decision regarding the life ban imposed on Ben Johnson:

> "It is necessary to protect Mr Johnson for the sake of his own health from the effects of consistently using prohibited substances."[38]

The social and (economic) standing of sport

Some authors argue that the justification for prohibiting doping should not be primarily sought in the notion of fair play (competitive advantages may be obtained by other means such as money) but in the promotion of "the social standing of sport"[39] and its related financial status.[40] After all, it is undeniable that if the athletes are, or are perceived to be cheating, then the spectacle of sport is tarnished.[41] When an athlete is found guilty of a doping offence, other competitors in the same discipline are affected in a more general way. As Grayson and Ioannidis put it, "[w]hen yet another sportsman or woman is tested positive, the public become resigned to the view that certain sports are not 'clean' and, subsequently suspects that innocent participants may be cheating."[42] In the *Krabbe* case, the Regional High Court of Munich expressly found that protecting the "image of a sports discipline in the public" is a legitimate goal of anti-doping regulation.[43] In particular, the court agreed with the disciplinary tribunal with respect to "the damaging effect of offences like those at hand on the image of the sport".[44] This may have important economic consequences. In particular, it is the fear that commercial sponsorship and broadcasting revenue may be lost if a sport appears rigged or suspect.[45]

Sport as a provider of role models

The introduction to the Code refers to "character and education" as values characterising the "spirit of sport". It is a basic premise of anti-doping regulation that sportsmen and women, in particular the most successful ones, are highly visible public persons who enjoy a very special status in society. For the younger generations, these athletes represent examples to be followed. The Ontario Court of Justice specifically recognised this policy rationale in the Ben Johnson case:

> "The elite athlete is viewed as a hero and his influence over the young athlete cannot be underestimated [and, referring to the Dubin Inquiry,[46] that] [w]hen role models in sport, or in any other endeavor, are seen to cheat and prosper, then it is natural than young people will learn to do the same."[47]

The implementation of anti-doping regulation

Except for some very isolated philosophical[48] and legal[49] objections, the pressing need for anti-doping regulation is generally recognised. The increasing consensus on the legitimacy of anti-doping regulation, in particular in Europe, is illustrated by the fact that States are increasingly intervening in sports matters in order to ensure the effectiveness of the fight against doping. Despite this growing public intervention, there is general agreement that the fight against doping is primarily an issue for sports governing bodies and that State intervention is intended to be parallel to and supportive of the action taken by the sports organisations.

Anti-doping regulation consists of two basic elements: (1) a catalogue of doping offences; and (2) a series of sanctions to be imposed when an athlete is found to have committed such offences. The most

38. *Johnson v Athletic Canada and IAAF* [1997] O.J. 3201, para.29.
39. Van Staveren, quoted by JanWillem Soek, *The Legal Nature of Doping Law, The International Sports Law Journal*, 2002/2, p.2.
40. Mary K. FitzGerald, *The Court of Arbitration for Sport: Doping and Due Process During the Olympics, Sports Lawyer Journal* 2000, p.234: "Such illicit behaviour affects future [. . .] sponsorship deals, not to mention public support [. . .]".
41. Gray (n.9, above), p.30 citing the intervention of Sebastian Coe at the 1998 World Conference on Doping in Lausanne.
42. Grayson/Ioannidis, (n.7, above), p.253.
43. *Krabbe v IAAF.*, Decision of the OLG Munich of March 28, 1996, SpuRt 1996, pp.133, 134 (free translation of the original German text: *"de[r] Ansehen der jeweiligen Sportsart in der Öffentlichkeit"*).
44. *Krabbe v IAAF*, Decision of the OLG Munich of March 28, 1996, SpuRt 1996, pp.133, 135 (free translation of the original German text: *"Die Ausführungen des [. . .] zur Notwendigkeit eines 'sauberen' Sports ohne pharmakologische Manipulationen und zu den Auswirkungen von Verstössen der hier vorliegende Art aus das Ansehen des Sports [. . .]. Sind uneingeschränkt nachvollziehbar"*).
45. Ken Foster, *The discourses of doping: Law and regulation in the war against doping*, in John O'Leary (ed.), (n.6, above), p.186.
46. Charles Dubin, *Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance* (Ottawa, 1990). The Report of the Dubin Inquiry was ordered by the Canadian Government in the wake of the (first) Ben Johnson case.
47. *Johnson v Athletic Canada and IAAF* [1997] O.J. 3201.
48. Claudio M. Tamburrini, *The "hand of God'?: essays in the philosophy of sports* (Goteborg, 2000), *passim*.
49. Neville Cox, "Legislation of Drug Use of Sport" [2002] I.S.L.R. 77. Ralf Lenz, *Die Verfassungsmässigkeit von Anti-Doping-Bestimmungen* (Frankfurt, 2000), *passim*.

common doping offence is the presence of a prohibited substance (*i.e.* a substance appearing on the "list of prohibited substances and methods") in the athlete's body. The classic sanction for doping is suspension (or imposition of an ineligibility period), during which the athlete is prohibited from participating in any competition. This may be a very harsh penalty, in particular for professional athletes. Little wonder that doping litigation is an increasing phenomenon. Doping disputes account for more than 60 per cent of the cases before the Swiss-based Court of Arbitration for Sports (CAS) and national courts are also becoming increasingly involved in doping disputes. In some cases, the athlete contests the validity of the analysis of their bodily specimens. However, the vast majority of doping disputes relate to the sanction imposed —athletes often claim that such sanctions are unlawful and/or unduly harsh (*i.e.* disproportionate). As in many other fields of law, human rights are playing a growing role in doping disputes. This trend is evident both in CAS jurisprudence and in recent case law of national courts.

II. The role of athlete's fundamental rights in doping disputes

In Section II, we will consider (1) which fundamental rights may be at issue in doping disputes; (2) whether these fundamental rights are applicable to doping disputes; and (3) the possible justifications for restricting fundamental rights in the specific context of anti-doping regulation.

The athlete's fundamental rights at issue in doping disputes

The adjudication of a doping dispute may have an impact on several fundamental human rights of an athlete, namely the right to personal liberty/privacy, the right to work, the right to equal treatment and the right to a fair hearing. In addition, general principles of law such as proportionality may also become relevant in a doping dispute.

The right to personal liberty/privacy

It is clear that anti-doping control and procedure may involve significant invasions of an athlete's right to personal liberty and privacy (often referred to as the right to respect for one's private life). Although these intrusions primarily relate to the testing procedure itself,[50] the right to privacy has also been raised as a basis for overturning a disciplinary sanction imposed under a sports regulation.[51] The right to privacy is recognised in a number of international instruments: Art.12 of the Universal Declaration of Human Rights and Art.17 of the UN Covenant on Civil Rights.[52] Article 8 of the ECHR does so in the following terms:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The right to equal treatment

The right to equal treatment is also widely recognised in a number of different international instruments and may have important implications for anti-doping regulation. The right to equal treatment is in particular embodied in Art.26 of the UN Covenant on Civil Rights:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Under the heading "Prohibition of Discrimination", Art.14 of the ECHR provides for the same principle. However, in contrast Art.26 of the UN Covenant on

50. Grayson/Ioannidis (n.7, above), pp.252–253, according to whom this Article "could involve a re-examination of the legitimacy of urine and blood testing and fair hearings by sports governing bodies".

51. Swiss Federal Supreme Court, *Abel Xavier v UEFA*, Decision of December 4, 2000, ATF 127 III 429, ASA Bulletin 2001, p.566 in respect of Art.8 ECHR. Swiss Federal Supreme Court, *Lu Na Wang*, Decision of March 31, 1999, *CAS Digest II*, p.767 with regard to the personal liberty (*liberté personelle*) and more particularly the freedom of movement (*libérté de mouvement*) under Swiss constitutional law.

52. This provision reads as follows: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks".

Civil Rights, Art.14 of the ECHR[53] does not grant the right to non-discrimination *per se, i.e.* independently of any breach of another right or freedom granted by the Convention. This loophole in the ECHR will be filled by Protocol 12 to the European Convention that guarantees the principle of equal treatment. Such Protocol, is expected to come into force shortly.

The right to a fair hearing

Many legal commentators have observed that anti-doping rules may restrict the right of an athlete to a fair hearing and the right to be presumed innocent, specifically if and to the extent that such rules provide for a doping offence and/or a sanction irrespective of any fault on the part of the athlete.[54] The right to a fair hearing is widely recognised as a fundamental human right. The European Anti-Doping Convention places particular emphasis on it and provides in Art.7.2(d) that Member States shall encourage their sports organisations to take the following steps:

> "[. . .] clarify and harmonise their respective rights, obligations and duties, in particular by harmonising [. . .] their disciplinary procedures, applying agreed [recognised, *"reconnus"* in the French version] international principles of natural justice and ensuring respect for the fundamental rights of suspected sportsmen and sportswomen; these principles will include:
>
> i. the reporting and disciplinary bodies to be distinct from one another;
> ii. the right of such persons to a fair hearing and to be assisted or represented;
> iii. clear and enforceable provisions for appealing against any judgment made [. . .]."

The Explanatory Report of the European Anti-Doping Convention states that:

> "[t]he principles to be followed are those set down in, for example, the International Covenant on Civil and Political Rights of the United Nations (1966) [defined above as the 'UN Covenant on Civil Rights'] and, for the member states of the Council of Europe, in the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) [defined above as 'ECHR']".

Under the heading "Right to a Fair Hearing", Art.6 of the ECHR provides the following:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
> 3. Everyone charged with a criminal offence has the following minimum rights[55]:
>
> a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> b. to have adequate time and facilities for the preparation of his defence;
> c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

Article 14 of the UN Covenant on Civil Rights provides for a fair hearing in similar terms. In particular, it also contains both a general fair trial clause,

53. Art.14, ECHR reads as follows: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

54. See for instance Thomas Summerer, *'Schutz der Individualrechte des Sportlers*, in *[1st] International Congress on Law and Sport* (Bonn, 2000), p.150.

55. In the system of the ECHR, the Additional Protocol No.7 completes the protection of Art.6 in criminal cases. It guarantees, *inter alia*, two courts levels.

which is generally applicable in the determination of any criminal charge against him, or of his rights and obligations in a suit at law (Art.14(1)), and several additional procedural rights which are only applicable in criminal law proceedings (Art.14(2) to Art.14 (7)).

The right to work

Since athletes exercising their sporting activity earn sometimes significant amounts of money, they may fall within the scope of the provisions protecting the right to work. Article 6 of the UN Covenant on Economic Rights stipulates the right to work, which "includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts". Similarly, Art.1 of the European Social Charter provides the following:

> "With a view to ensuring the effective exercise of the right to work, the Contracting Parties undertake:
> 1. to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment;
> 2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon;
> 3. to establish or maintain free employment services for all workers;
> 4. to provide or promote appropriate vocational guidance, training and rehabilitation."

Further, several national constitutions expressly guarantee the right to work. For instance, the "economic freedom" (*liberté économique*), which is guaranteed by Art.27 of the Swiss Constitution, is deemed to be a fundamental right. It guarantees every individual the right to free economic fulfilment (*"libre épanouissement économique"*), which includes the freedom to choose and exercise one's profession.[56] Similarly, Art.12(1) of the German Constitution also affirms the free choice of one's profession:

> "All German citizens have the right to freely choose their profession, their place of work and their educational institution."[57]

Competition-oriented rights

Given that sport may be a form of economic activity, it is subject to a variety of economic regulatory regimes, such as competition law and the prohibition against restraint of trade. EU competition law is the most notorious example of an economic regulation that may have an impact on sport and has been often invoked to challenge decisions excluding athletes from sports competitions. Article 81 of the EC Treaty provides as follows:

> "1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market [. . .]
> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void."

Turning to the common law, the doctrine of restraint of trade provides that contractual terms that limit the freedom of trade and prevent a party from exercising his or her talents and earning a living from such talents are not enforceable.[58]

Applicability of human rights and fundamental rights in doping disputes

Generally: horizontal effect?

Under the classic theory of fundamental rights, the purpose of fundamental rights is to protect the individual from the State, which is the holder of public power. From this perspective, fundamental rights only apply vertically between the State and the individual. They do not apply horizontally to private relations between individuals. If one were to adopt this classic view of fundamental rights in regard to doping control by sports federations, the logical conclusion would be that fundamental rights only apply to disciplinary proceedings carried out by those sports governing bodies that act

56. Auer/Malinverni/Hotellier, (n.14, above), No. 608–609, p.316. As noted above, Art.27 of the Swiss Constitution was invoked by the athlete in the *Abel Xavier* case. Art.27 of the Swiss Constitution provides as follows: "(1) Economic freedom is guaranteed. (2) This involves above all the freedom to choose one's profession, and to enjoy both free access to, and free exercise of, a gainful private activity."

57. Free translation of the official German text: *"Alle Deutschen haben das Recht, Beruf, Arbeitsplatz und Ausbildungsstätte frei zu wählen."*

58. Michael J. Beloff, Tim Kerr and Marie Demetriou, *Sports Law* (Oxford Oregon, 1999), No.3.38, p.53.

by virtue of a delegation of power from the state.[59] This is the case, for instance, with respect to French national sports federations.[60] However, in the vast majority of countries, sports federations and their disciplinary bodies are private bodies that do not exercise power delegated by the state. This is the case, for example, in the UK, the US, Germany and Switzerland. The Swiss legal position is of paramount importance because the IOC and a significant number of international sports federations that will operate under the Code have their seats in Switzerland.

On the basis of this predominant view of fundamental rights, one can therefore argue that fundamental rights instruments are, as such, inapplicable to doping controls carried out by sports governing bodies that are legally characterised as private entities.[61] To date, the European Court of Human Rights has not ruled on this issue. However, one of its most eminent members, Judge Rudolf Bernhardt, has made a public address in which he expressed his personal view that the ECHR does not apply to the adjudication of doping disputes by private sports governing bodies:

> "In this respect, the objective of the European Convention—and similar fundamental rights catalogues—has to be remembered: Inasmuch it concerns the protections of the individuals from specific invasions by the States, the ECHR and other similar instrument are not directly applicable."[62]

This view is consistent with the current approach of the Swiss Federal Supreme Court. In a recent ruling on a sports governing body's decision suspending an athlete, the court made the following statement:

> "The Appellant [*i.e.* the suspended athlete] invokes Articles 27 of the [Swiss] Constitution and 8 ECHR. However, he was not the subject of a measure taken by the State, with the result that these provisions are, as a matter of principle, inapplicable."[63]

Accordingly, as a matter of principle, the fundamental rights granted by international (and national) instruments of protection of human rights are not applicable in sports matters decided by private bodies. The British Government expressed the same view when it specified that the Human Rights Act "should have no direct horizontal effect".[64]

However, this classic approach of human rights is coming under increasing criticism. Not only do some well-known scholars favour a direct horizontal effect of human rights, but the courts also do generally accept the so-called "indirect horizontal effect" of human rights. With specific reference to Art.6(1) ECHR, leading commentators observe that the court before which the rights granted by the Convention are relied upon:

> "will itself be under an obligation to respect the plaintiff's right under... the Convention, with the consequence that contractual obligations pursuant to which the jurisdiction is exercised, may become infused with the rights which [the Convention] guarantees... ".[65]

This could well permeate private legal relations with ECHR standards. In any event, irrespective of the academic debate over the applicability of fundamental rights guarantees in purely private sports matter, it would be right for sports organisations to take all appropriate action to respect fundamental rights. Thereby, they would obey the (moral) precept of the Universal Declaration of Human Rights urging "every individual and *every organ of society*" to play its part in securing the universal observance of human rights.[66] Any other approach would only

59. Rudolf Bernhardt, *Fairneß–Garantien in den Europäischen Menschenrechten*, in *Sport, Recht und Ethik* (Stuttgart, 1998), p.54.
60. With specific respect to doping issues, see for instance Jean-Christophe Lapouble, *Les droits de l'homme et la lutte contre le dopage: le cas français*, Petites affiches, March 5, 1997, pp.12–13.
61. Soek (n.8, above), p.2. With respect to the situation in England, see Beloff/Kerr/Demetrieu (n.58, above), No.8.31, p.233 according to whom "a sportsman or woman wishing to allege that a disciplinary body has acted in breach of rights under [the ECHR], could be prevented from doing so on the basis that the disciplinary body is performing a private act when exercising its disciplinary function".
62. Bernhardt (n.59, above), p.54 (free translation of the German wording: *"hier darf die [. . .] Zielsetzung der Europäischen Konvention—und ähnlicher Grundrechtskataloge—nicht aus den Augen verloren werden: Es geht um den Schutz des einzelnen vor Übergriffen des Staates. [. . .] und insoweit sind die Europäischen Konvention zum Schutz de der Menschenrechte und ähnliche internationale Vorschriften nicht direkt anwendbar"*).
63. Swiss Federal Supreme Court, *Abel Xavier v UEFA*, Decision of December 4, 2000, ATF 127 III 429, ASA Bulletin 2001, pp.566, 573 (free translation of the original French text: *"Le recourant invoque les art. 27 Cst. et 8 CEDH. Il n'a cependant pas fait l'objet d'une mesure étatique, de sorte que ces dispositions ne sont en principe pas applicables"*). Moreover, it is worth noting that the player also invoked Art.3 of the ECHR prohibiting torture and degradating treatment, and that the Supreme Court found this argument to be manifestly frivolous (*"manifestement téméraire"*).
64. Peter Goldsmith, Timothy Dutton, Thomas Keith, Deepak Nambisan, "Human rights and the business lawyer: The impact of the U.K. Human Rights on commerce", [2001] B.L.I. 55 referring to the ministerial comments made during the passage of the Act through Parliament.
65. Beloff/Kerr/Demetrieu (n.58, above), No.8.33, p.234 and No.7.84, p.205. See also Goldsmith/Dutton/Keith/Nambisan (n.64, above), p.55, according to whom "if the present law does not permit those rights to be safeguarded, the courts will be failing in their own statutory duty if they do not nonetheless uphold the right".
66. See Preamble of the Universal Declaration of Human Rights, emphasis added.

support the view that, in their fight against doping, the sports governing bodies are in fact acting with the same unfairness they pretend to combat.

Specifically: application by analogy of specific criminal law guarantees

Issues of unfairness are most likely to arise in procedural matters. In this respect, the most debated question is whether, because of the functional similarities existing between criminal and so-called doping law, the procedural guarantees which international (and national) fundamental rights instruments afford in criminal matters, are applicable in doping adjudication proceedings. The Swiss Federal Supreme Court has addressed this issue in the landmark decision *Gundel*. It held that doping sanctions imposed by sports federations were private rather than criminal in nature:

> "It is generally accepted that the penalty prescribed by regulations represents one of the forms of penalty fixed by contract, is therefore based on the autonomy [...] [and] has nothing to do with the power to punish reserved by the criminal courts, even if it is punishing behaviour which is also punished by the state."[67]

With respect to the argument that the doping regulations violated public policy, the Supreme Court noted that this was a question of private law that could not be resolved "in the light of notions proper to criminal law, such as the presumption of innocence and the principle *'in dubio pro reo'*, and corresponding guarantees which feature in the European Convention of Human Rights".[68] The New Zealand courts have adopted a similar approach. In *Fox v NZ Sports Drugs Agency*, the District Court of Palmerstone North, referring to the decision in *Hawker v New Zealand Rugby Football Union*,[69] held that the New Zealand Bill of Rights did not apply to a sports disciplinary tribunal:

> "His Honour appears to have accepted the concern expressed in the [disciplinary] Drugs Appeal Tribunal that criminal law principles may not automatically apply in the context of disciplinary rules of a sporting body, where membership was voluntary. His Honour cited from the Appeals Tribunal decision:
>
> 'The criminal law applies to all citizens who have no opportunity to opt out. The liability created by these regulations arises essentially from contractual obligations express or implied by participation in rugby in New Zealand.'
>
> [...] the view expressed is one which, with respect, I would adopt in the present case. The distinction is thus drawn between competitors, with their own set of obligations and rights, and members of the public. This would not appear consistent with the provisions of the New Zealand Bill of Rights [...] as to its applicability."[70]

This clear-cut view adopted by the courts is not unanimously accepted among legal commentators. Describing the above-mentioned approach of the Swiss Supreme Court in *Gundel* as a "rigid, dogmatic—(often) not legally founded—point of departure", a Dutch scholar has strongly advocated the application of criminal law standards in doping proceedings.[71] In his very well documented article, he illustrates the functional similarities between doping regulations and criminal law (*i.e.* "that doping law ... is a kind of criminal law") and concludes that "it is ... in the nature of things that in a sanctioning system use should be made of principles and concepts which have for centuries developed and evolved in the public sanctioning system".[72] This view is increasingly shared among sports law specialists.[73] It suffices to cite the conclusions adopted at the International Sports Law Congress held in Bonn in November 1999, in which the participants emphasised the seriousness of the consequences that a suspension may have for the athlete and recommended the "application of criminal law procedural guarantees to protect the athlete despite the fact that the proceeding is not criminal in nature".[74]

The same trend seems to emerge at the political level, in particular within the context of the Monitoring Group established under the European

67. Swiss Federal Supreme Court, *Gundel c Fédération Equestre Internationale*, Decision of March 15, 1993, reported (and translated) in *CAS Digest I*, pp.561, 571–572.
68. Swiss Federal Supreme Court, *Gundel c Fédération Equestre Internationale*, Decision of March 15, 1993, reported (and translated) in *CAS Digest I*, pp.561, 575 (translation of the French original text).
69. *Hawker v New Zeland Rugby Football Union* [1999] N.Z.A.R. 549.
70. *Fox v NZ Sports Drugs Agency* [1999] D.C.R. 1165.
71. Soek (n.8, above), *passim*.
72. *ibid.*, *passim* and specifically pp.6–7.
73. See for instance Summerer (n.54, above), pp.148–150; Margareta Baddeley, *Dopingsperren als Verbandssanktion aus nationaler und internationaler Sicht*, in J. Fritzweiler (ed.) Doping—Sanktionen, Beweise, Ansprüche (Bern, 2000), pp.17 *et seq.*
74. See Herbert Fenn, *Ergebnisse der 4. Arbeitsgruppe: Doping. Zivilrechtliche und arbeitrechtliche Aspekte*, in [1st] International Sports Law Congress (Bonn 2000), p.219. (free translation of the German text: *"Wegen dieser doch sehr gravierenden Konsequenzen kam die Arbeitsgruppe zu dem Ergebnis, dass in diesen vereinsrechtlichen Verfahren, obwohl es ja Vereinsgerichtsbarkeit -Zivilrecht ist, dass in diesem vereingerichtlichen Verfahren strafrechtliche und strafprozessuale Grundsätze und Garantien zum Schutze der Sportler angewandete werden sollen"*).

Anti-Doping Convention. Under the heading "Procedures Ensuring a Fair Hearing", the Group's 1998/2 Recommendation on Basic Principles for Disciplinary Phases of Doping Control makes the following statement:

> "2.1 Following the provisions of the Convention for Protection of Human Rights and Fundamental Freedoms of the Council of Europe, in particular in Art.6.3 [which guarantees specific procedural rights to "everyone charged with a criminal offence"], the possibility of a fair hearing and the defence of the rights of the individual suspected of an offence must be guaranteed. [. . .]."[75]

Certain CAS Panels have ruled in the same sense with regard to specific criminal law guarantees, for instance the *lex mitior* principle that requires the application of the penalty in force at the time of adjudication, if more benign than that in force at the time of the offence. The CAS Panel in *Cullwick* emphasised that: "[t]his principle applies to anti-doping regulations in view of the penal or at very least disciplinary nature of the penalties that they allow to be imposed."[76]

Conclusion

An analysis of the prevailing contemporary judicial practice leads to the conclusion that fundamental rights, and in particular the specific procedural guarantees in criminal matters, are not applicable to doping disputes before private sports governing bodies.[77] However, mainly because sports governing bodies exercise a monopolistic "quasi-public" position in their relation with the athletes, there is a understanding among lawyers that sports governing bodies can no longer ignore fundamental rights issues in their activities, at least if they want to avoid governmental intervention.[78] Therefore, WADA's effort to ensure the compatibility of the new Code with fundamental rights and to devote special attention to the criminal law procedural guarantees embodied in Art.6(2) and (3) ECHR is a welcome development in the sports arena.

Before reviewing the compatibility of the cornerstone provisions of the Code with fundamental rights, we will first consider the general conditions under which restrictions to fundamental rights are admissible at law.

75. Section B.2; available at *www.coe.int.*
76. CAS 96/149, *A. C[ullwick] v FINA*, Award of March 13, 1997, *CAS Digest I*, p.251. See also CAS 2000/A/289, *UCI v Jérome Chiotti et FFC*, Award of January 12, 2001, *CAS Digest II*, p.424.
77. Soek (n.8, above), p.59.
78. Rigaux (n.26, above), *passim*; Tony Morton-Hooper, *The Right to a Fair Hearing, Sports and the Law Journal*, 2001, p.158.

Admissibility of fundamental rights restrictions

Fundamental rights are not absolute. Summarising the jurisprudence of the European Court of Human Rights, Art.52(1) of the recently adopted EU Charter of Fundamental Rights subjects restrictions to the following conditions:

> "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

These are the three classical conditions upon which a restriction to human rights is deemed admissible, namely (1) legal basis, (2) public interest, and (3) proportionality.[79]

Legal basis: the nature of the code

This first requirement involves an adequate legal basis. Under the case law of the European Court of Human Rights and of the national constitutional courts, this requirement has several elements:

- *The legal basis must be accessible.* It does not necessarily need to be cast in a statutory provision. It can also arise out of case law. However, it must in any event be accessible to the persons concerned;
- *The legal basis must further be predictable.* Hence, the wording of the restriction must be clear, being understood that the standards imposed depend on the severity of the restriction.[80] The restriction must be sufficiently precise to enable the addressee of the rule—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".[81]

In a recent case concerning a life-ban for a first offence (*i.e.* a particularly invasive measure), a CAS Panel adopted a similar approach and investigated very carefully the regulation providing for such restriction:

79. Auer/Malinverni/Hotellier (n.14, above), No.175, p.86.
80. For an illustration, see *Kopp v Switzerland*, ECHR, Decision of March 25, 1998, Reports 1998–II, p.624, paras 62–75.
81. *Margareta and Roger Andersson v Sweden*, ECHR, Decision of February 25, 1992, A226–A, para.75.

"In the present case, the Panel is in no doubt that the sanction imposed was based upon valid provisions of the FISA Rules which were then in force. Those provisions were well-known and predictable to all rowers, and had provided for the possibility of a life ban for a first doping offence for more than 12 years. In addition, Mr R. had signed the "rower commitment", which clearly confirmed that doping violations in the sport of rowing were punishable with a life ban for a first offence. In the circumstances, therefore, the Panel has no hesitation in finding that the sanction contained in FISA's Rules satisfied what might be called the 'predictability test' to which reference was made in CAS Award 94/129: see Digest of CAS Awards 1986–1998, Staempfli Editions, Berne, 1998 (CAS Digest) at Paragraph 34 on pages 197/8."[82]

Public interest: the rationale of the anti-doping policy

In classical human rights theory and practice, a restriction to human rights by the State must aim at protecting a legitimate public interest. The application of such requirement to private anti-doping regulations raises the question of the relevant interest. Is it the interest of the State or the interest of the sports body that issued the regulations that should be considered? To our knowledge, there are no court decisions on this issue. It thus appears reasonable to rely upon the authorised opinion of a judge at the German Constitutional Court, according to whom the relevant interest may be defined by the private body issuing the restriction. In the case of sports governing bodies, the legitimate interest may consist of specific sporting interests (*"spezifischer Sportgüter"*).[83]

Proportionality

In practice, proportionality plays the main role. Often the only decisive factor for the admissibility of a restriction to human rights will be the particular circumstances of the case.[84] In classical human rights theory, the condition of proportionality is divided in three sub-conditions, to which the European Court of Human Rights has added a fourth one. These four conditions are as follows:

- *Capacity*, also referred to with the German term *"Geeignetheit"*, requires that the restriction be suitable to achieve the aim it pursues;
- *Necessity*, implies that no less intrusive restriction is equally suitable to achieve such aim;
- *Stricto sensu proportionality* involves a test balancing the different interests at stake. If the interests of the individual prevail over the interests of the body issuing the restriction, such restriction is disproportionate;
- A *"pressing social need"*[85] is required under Arts 8 to 11 ECHR, which refer to measures "necessary in a democratic society". The European Court of Human Rights considers such phrase does not necessarily require "indispensability", but still implies more than "admissibility", "normality" "utility", "reasonableness" or "advisability".

Admissibility of restrictions to economical fundamental rights

The requirements imposed upon restrictions to competition law and restraint of trade are very similar to those just discussed. Indeed, according to the test set forth in *Nordfeld v Maxim Nordfeld*, a restraining practice will be deemed valid if it satisfies the following three conditions[86]: (1) there must be an interest worthy of protection; (2) the restraint must be reasonable; and (3) the restraint may not be contrary to public interest. These conditions are very similar in substance to those set out in Art.81(3) EC Treaty for exempting an anti-competitive practice.[87]

Conclusion: the paramount role of proportionality

From court decisions in sports and doping matters, it is clear that proportionality plays the predominant role in assessing the validity of restrictive doping regulations. Proportionality is not only the

82. CAS 2001/A/330 *R. v FISA*, unreported, para.42
83. Udo Steiner, *Doping aus verfassungsrechtlicher Sicht*, in Röhricht/Vieweg (eds) Doping-Forum (Stuttgart, 2000), p.131. Referring specifically to the admissibility of fundamental rights restrictions by anti-doping provisions, Judge Steiner expressly mentioned the athletes' health, the reputation of sports and the fairness of the competition.
84. Auer/Malinverni/Hotellier (n.14, above), No.218, p.109.
85. *Handyside v The United Kingdom*, ECHR, A24 Series, para.48.
86. Simon Gardiner, Alexandra Felix, John O'Leary, Mark James, Roger Welch, *Sports Law* (2nd ed., London, Sydney, 2001), p.228.
87. Art.81(3) EC Treaty reads as follows: "The provisions of paragraph 1 [*i.e.* unlawful restrictive practice] may, however, be declared inapplicable in the case of [any restrictive practice] which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

paramount condition for the validity of restrictions or fundamental rights it is also a general principle of law governing the imposition of sanctions of any disciplinary body, whether it be public or private.

III. The principle of "strict liability" and the athletes' fundamental rights

Much has been written on strict liability doping offences. Under a strict liability doping offence, the mere presence of a prohibited substance suffices for the offence to be committed. In other words, a strict liability doping offence "disables the athlete from providing any exculpatory explanation of the circumstances in which the substance was found in the body fluids".[88] This does not mean, as it is often said, that strict liability doping offences make "a sanction the inevitable result".[89] In the ambit of this article, strict liability only refers to the assessment of the offence and not to the imposition of a (mandatory) penalty.[90] In other words, strict liability only applies in the "liability phase of the analysis" and not in the penalty phase.[91] The drafters of the Code have adopted the same approach.[92] Under the heading "anti-doping rule violation", Art.2 of the Code states the following offence:

> *"2.1 The presence of a Prohibited Substance or its Metabolites or Markers in an athlete's bodily specimen.*
> 2.1.1 It is each athlete's Personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance found to be present in their bodily specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish an anti-doping violation under Art.2.1."

The adoption of a strict liability offence in Art.2.1 raises two main issues as to its compliance with fundamental rights: (1) whether the wording of this provision is sufficiently precise as to provide certainty for athletes; and (2) whether this provision unduly affects the presumption of innocence.

Nullum crimen sine lege certa: the need for certainty

An earlier version of Art.2 (then Art.1.2.1.1) stated that it was not necessary to prove "intent, fault or knowing use", but made no reference to negligence.[93] Faced with similar language, a CAS Panel had observed that "[a]ny legal regime should seek to enable its subjects to assess the consequences of their actions".[94] Hence, for the Code to establish a strict liability offence, it was essential that it be stated in clear terms avoiding any doubt about the relevance of negligence. The final wording of Art.2.1 now makes clear that a doping offence occurs whenever a prohibited substance is found in the bodily specimen regardless of intent, fault, negligence or knowing use.

This clear and precise wording represents an important development, it is expected that it will significantly reduce the number of disputes about strict liability doping offences.

The presumption of innocence

In a strict liability regime, any exculpatory evidence tendered by an athlete to show that he or she was not responsible for the presence of a prohibited substance in his or her bodily fluids is irrelevant.[95] Some legal commentators have argued that this may violate the fundamental rights of suspected athletes[96] and, in particular, the presumption of innocence.[97] It is true that the presumption of innocence is an important element of the right to a fair hearing in criminal matters. However, in the well known case of *Salabiaku v France*, the European Court of Human Rights held that presumptions of facts or law that operate against an accused are not, in and of themselves, inconsistent with Art.6(2) of the ECHR:

> "In principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of

88. Michael J. Beloff, *Drugs, Laws and Versapaks*, in John O'Leary (ed.) (n.6, above), p.44.
89. Aaron N. Wise, *Strict liability' drug rules of sports governing bodies*, N.L.J. 1996, p.1161.
90. On this distinction, see Flint/Taylor/Lewis (n.5, above), E.4.103, p.942.
91. Michael S. Straubel, *Doping Due Process: A Critique of the Doping Control Process in International Sport, Dickinson Law Review*, 2002, p.543. See also WADC E Version 2.0 annotated rev.1, p.8:
92. WADC E Version 2.0 annotated rev.1, p.8: "[w]hile the determination of whether an anti-doping rule has been violated is based on strict liability, the imposition of a sanction is not based on strict liability".
93. WADC E Version 2.0 annotated rev.1, Comment on Art.1.2.1, p.8.
94. See also CAS 94/129, *USA Shooting & Quigley c UIT*, Award of May 23, 1995, *CAS Digest I*, pp.187, 196–197.
95. Beloff (n.88, above), p.44.
96. Wise (n.89, above), p.1161.
97. See for instance Jean Lob, *Dopage, responsabilité objective ("strict liability") et de quelques autres questions*, SJZ/RSJ 1999, p.272 who argues that a CAS award enforcing a strict liability rule could be successfully challenged as "arbitrary" within the meaning of Art.36(g) on the *Concordat Intercantonal sur l'Arbitrage*, which is the Swiss uniform law on domestic arbitration: We are not aware of any successful challenge. From the perspective of personality rights under Swiss law, see also Schmid (n.32, above), p.139.

> the rights protected under the Convention (*Engel and Others judgment of 8 June 1976, Series A no. 22, p. 34, para. 81*) and, accordingly, to define the constituent elements of the resulting offence. In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States."

In other words, even if one assumes that the criminal law principles of Art.6(2) of the ECHR are applicable to doping offences, this provision does not prohibit offences of strict liability. Provided that a sport organisation respects the rights protected by the Convention, it is free to establish the elements of the offence in its discretion including any requirement of *mens rea*.[98]

In *Salabiaku*, the European Court of Human Rights refers to "certain conditions" in which strict liability offences are permissible.

Accordingly, the question boils down to the following: do the specific conditions of the fight against doping permit resorting to strict liability offences? Strict liability doping offences are often justified on the basis of the so-called "floodgates argument"[99]—if athletes are permitted to raise any excuse for the presence of a prohibited substance, it would become impossible to fight doping efficiently.[1] The sports bodies are not in a position to establish how that substance was administrated. Only the athlete or his or her entourage may be able to give evidence as to the circumstances of the administration. Or, as a CAS Panel puts it, "neither the federation nor the CAS has the means of conducting its own investigation or of compelling witness to give evidence, means which are available to the public prosecutor in criminal proceeding". Hence, departing from strict liability offences "would put a definitive end to any meaningful fight against doping".[2] In response, critics argue that "the force of pragmatic considerations cannot be allowed to eradicate the search for a principled basis of liability".[3] We believe that the need to resort to strict liability in doping matters is not limited to practical considerations. It is dictated by the general interest in implementing as effective anti-doping policy. Not surprisingly, national courts have had little difficulty accepting the principle of strict liability doping offences, most probably because strict liability offences are well established in other fields of the law.[4]

Conclusion

This led us to the conclusion that strict liability doping offences are, in and of themselves, consistent with internationally recognised fundamental rights standards and general principles of law. Accordingly, Art.2.1 of the Code is valid and enforceable from the perspective of such legal requirements. The real problem with strict liability doping offences lies in the practical impact they may have for the athletes. In other words, the acceptability of a system based on strict liability should be assessed in the light of the consequences that a violation will bring about. The next sections will review the two main consequences that the Code imposes in the event of a violation of anti-doping rules, namely disqualification of result and, most importantly, suspension.

IV. Disqualification of results and fundamental rights

Under the heading "Automatic Disqualification of Individual Results", Art.9 of the Code provides the following rule:

> "An anti-doping rule violation in connection with an In-competition test automatically leads to Disqualification of the individual result obtained in that Competition with all resulting consequences, including forfeiture of any medals, points and prizes. [. . .]".

The drafting process of Art.9 was unproblematic. In fact, despite some issues of concern, there is a widespread consensus among stakeholders in respect to the nature of disqualification.

98. Paraphrasing D.J. Harris, M. O'Boyle, C Warbrick, *Law of the European Convention of Human Rights* (London, 1995), p.244.
99. Klaus Vieweg, *The Definition of Doping and the Proof of a Doping Offence*, Oral presentation of July 25, 2001, 6th Annual Congress of the European College of Sports Science, available at: *www.uni-erlangen.de*, para.III.3.
1. CAS 94/129, *USA Shooting & Quigley v UIT*, Award of May 23, 1995, *CAS Digest I*, pp.187, 196–197.
2. CAS 2001/A/317, *Aanes v FILA*, Award of July 9, 2001, unreported, p.19
3. See also Wise (n.89, above), who emphatically argues that strict liability doping offences aim "to catch the majority of the 'guilty' parties while sacrificing a few "innocent' ones: a concept incompatible with the basic tenets of civilized societies".
4. See for instance *Sandra Gasser v Stinson*, unreported, Blackwell & Partners.

The expression of a general consensus

The Comment on Art.9 states that: "When an athlete wins a gold medal with a Prohibited Substance in his or her system, that is unfair to the other athletes in that competition regardless of whether the gold medallist was at fault in any way."[5] This was the main content of the decision of the CAS Panel in the *Raducan* case rendered during the Sydney Olympics. In the *Baxter* case, which involved a Scottish skier who was stripped of his bronze medal in slalom skiing at the 2002 Salt Lake City Winter Olympics, the CAS Panel made a similar finding:

> "Whether or not Mr Baxter should have been more careful before taking the medication—by reading the label showing the presence of levmetamfetamine in the product or by consulting with the team doctor before taking the medication—is irrelevant to our decision. Consistent CAS case law has held that athletes are strictly responsible for substances they place in their body and that for purposes of disqualification (as opposed to suspension), neither intent nor negligence needs to be proven by the sanctioning body."[6]

The following quotations from CAS cases provide a good summary of the consistent case law referred to in *Baxter*:

- It is the presence of a prohibited substance in a competitor's bodily fluid which constitutes the offence irrespective of whether the competitor intended to ingest the prohibited substance.[7]
- [. . .] the system of strict liability of the athlete must prevail when sporting fairness is at stake, [. . .] It would be indeed shocking to include in a ranking an athlete who had not competed using the same means as his opponents, for whatever reasons.[8]
- It is therefore perfectly proper for the rules of a sporting federation to establish that the results achieved by a "doped athlete" at a competition during which he was under the influence of a prohibited substance must be cancelled irrespective of any guilt on the part of the athlete.[9]

Legal commentators share this view unanimously. In contrast to suspension, the purpose of disqualification is not to punish the athlete[10] and the disqualification does not reflect any moral judgment.[11] Disqualification is "considered as nothing more than the removal of illegally acquired advantages in the competition".[12] The mere fact that an athlete has a prohibited substance in his or her body gives such athlete probably,[13] or at least potentially, a competitive advantage over his or her opponents in that specific competition. For this reason, it is generally agreed that there is no legal or practical basis for objecting to the disqualification of an athlete who has competed with the aid of a prohibited substance, even though he or she may not have been responsible in any manner whatsoever for the presence of such a substance.[14] As one well known CAS arbitrator puts it, "the fact remains that the advantage has been gained—and, in objective terms, unfairly."[15] From the point of view of the other athletes, it makes no difference whether the doped athlete was acting intentionally or innocently—the only decisive thing is that he or she actually (or potentially) had an unfair advantage.

Some issues of concern

One could argue that the interests of the "clean" athletes should only prevail if the doped athlete actually had an advantage. For this reason, it is somewhat precarious to rely upon the probable or

5. WADC E Version 3.0 annotated, p.23.
6. *Raducan v ICO*, Award of September 28, 2000, *CAS Digest II*, p.665, upheld by the Swiss Federal Supreme Court *Andreea Raducan v IOC* (5P.427/2000), Decision of December 4, 2000, Bull. ASA 2001, p.508, Translated in Kaufmann-Kohler, *Olympics*, p.80. CAS 2002/A/376, *Alain Baxter v IOC*, Award of October 15, 2002, available at *www.tas-cas.org* (visited March 2, 2003).
7. CAS 95/141 *Chagnaud v FINA*, Award of April 22, 1996, *CAS Digest I*, pp.205, 220.
8. CAS 98/208 *Wei v FINA*, Award of December 22, 1998, *CAS Digest II*, pp.234, 248.
9. CAS 2001/A/317, *Aanes v FILA*, Award of July 9, 2001, unreported.
10. Soek (n.8, above), p.5; Jens Adolphsen, *Anforderung an Dopingstrafen nationaler Sportverbände* (SpuRt 2000), pp.97–98.
11. Summerer (n.54, above), p.149.
12. Vieweg (n.47, above), para.III.1.
13. See Röhricht reported in Röhricht/Vieweg (ed.) Doping-Forum (Stuttgart, 2000), p.144.
14. Richard McLaren, *Doping sanctions: What Penalty*, International Sports Law Review 2002, pp.23–24; Prokop (n.33, above), p.86; Flint/Taylor/Lewis (n.5, above, 1st ser.), E.4.103, p.942 and E.4.119, p.949; Vieweg (n.47, above), III.1, p.144; Bernhard Pfister, *Die Doping-Rechtsprechung des TAS* (SpuRt 2000), p.134 (available at *www.sportrecht.org/Publikationen/PfiSpuRt2000-133.pdf*); Beloff (n.88, above), p.45; Lob (n.97, above), p.270; Margareta Baddeley, *Athletenrechte und Doping aus der Sicht des schweizerischen Rechts*, in: Doping Realität und Recht (Berlin, 1998), p.326, Flint/Taylor/Lewis (n.5, above, 1st ser.), E.4.103, p.942; Summerer (n.54, above), p.149; Beloff/Kerr/Demetrieu (n.58, above), No.7.39, p.186, according to whom: "if the knowledge and intention of the athlete are truly irrelevant [at the stage of establishing the offence], and if the justification of the strict liability is the gaining of unfair advantage, then it is difficult to see why an 'innocent' athlete in whose body the prohibited substance was present, should not suffer disqualification".
15. Beloff (n.88, above), p.45.

potential advantage provided by prohibited substances as the exclusive or principal rationale for automatic disqualification. In practice, this rationale could lead an athlete to challenge his or her disqualification on the ground that the prohibited substance did not provide a competitive advantage. The CAS recognised the "perilous" character of this justification[16] and held that "one must start from the assumption that a performance realized with the help of a prohibited substance has been artificially improved, even if this has not been scientifically demonstrated".[17] It then seems to require that one "balance the interests of the innocently doped athlete with the ones of his or her opponents that participated at the competition without the prohibited substance in their body".[18] If this were so, one could conclude that the interest of the opponents should prevail only if the doped athlete actually had an advantage. Thus, it seems preferable to avoid any reference to the possibility that the substance "affect the result of the event", and to consider that the athlete is disqualified simply because he or she did not fulfil an objective condition of participation, namely that of a doping-free body ("*Dopingfreiheit*").[19]

The Comment to Art.9 of the Code addresses this concern by noting that "[o]nly a 'clean' athlete should be allowed to benefit from his or her competitive results".[20] It is doubtful whether this comment will represent a sufficient basis to avoid any litigation as to the materiality of the presence of the prohibited substance in respect of the litigious performance. This doubt may, however, appear of little practical importance. Indeed, as the Bern court in the *Gasser* preliminary case, the courts seem to consider that disqualification of the results in a specific competition involves the application of a technical or field-of-play rule, which is not subject to security by the falls court.[21]

16. CAS 97/126, *N v FEI*, Award of December 9, 1998, *CAS Digest II*, p.129, 135 speaking of "*terrain périlleux de l'influence des produits interdits sur la performance du cheval*".
17. CAS Award of April 22, 1996 cited by CAS 97/126, *N v FEI*, Award of December 9, 1998, *CAS Digest II*, pp.129, 134 free translation of the French original wording: "... *il faut partir du principe qu'une performance, réalisée à l'aide d'une substance interdite, a été améliorée artificiellement, même si cela n'est pas démontré scientifiquement*".
18. *ibid.*, free translation of the French original wording: "*on doit, en effet, mettre en balance l'intérêt de l'athlète dope sans faute de sa part et celui de tous les autres concurrents qui ont dispute la compétition dans le produit incriminé dans leur corps*"
19. Adolphsen (n.10, above, 2nd ser.), p.97.
20. WADC E Version 3.0, p.23.
21. *Sandra Gasser v SLV &IAAF*, Decision of the Richteramt III Bern of December 22, 1987, RSJ 1988 p.85. However, if it is true that the application of true technical rules must not be judicially reviewed, it is doubtful that in case of important competition, the courts will adopt the same hands-off approach in case of disqualification following a positive test. This is particularly true with regard to disqualification from a multi-competition event.

Disqualification of all results obtained during a multi-competition event

Article 10.1 of the Code addresses an old issue that has taken on new life in the anti-doping debate[22]: Should all of an athlete's results in (previous) competitions during a multi-competition event (*e.g.* the FINA World Championships) be disqualified if the athlete tests positive during one specific competition (*e.g.* the 100 metre backstroke)? Article 10.1 of the Code provides the following rule in this regard:

> "*Disqualification of Results in Event During which an Anti-Doping Rule Violation Occurs.* [...][23] An anti-doping rule violation occurring during or in connection with an Event may, upon the decision of the ruling body of the Event, lead to disqualification of all of the athlete's individual results obtained in that Event with all consequences, including forfeiture of all medals, points and prizes [...]."

In the following paragraphs we will consider: (1) the legal nature of multi-competition disqualification; and (2) the extent to which multi-competition disqualification is consistent with fundamental human rights and general legal principles.

The legal nature of multi-competition disqualification: special disqualification or sanction?

The Code makes a distinction between "Automatic Disqualification", as described in Art.9, on the one hand, and "Sanctions", as described in Art.10, on the other hand. Article 10.1 provides for an "additional" disqualification that may be imposed in regard to other competitions, potentially even if the athlete was tested and found to be substance-free in

22. As the Comment following Art.1.9.2.1. (Version 2.0) of the Code points out, this issue "arose during the Salt Lake Olympic Winter Games", namely in the highly publicised *Mühlegg* case. Mühlegg, competed for Spain in cross-country skiing and won gold in the Men's 30 km Free Mass Start (February 9, 2002), the Men's 10 Km Free Pursuit (February 14, 2002) and the Men's 50 km Classic (February 23, 2002). On February 21, 2002 he underwent an out of competition test that turned out to be positive (EPO). A CAS award rendered on January 24, 2003 held that all the results obtained after the date of the sample collection had to be invalidated and confirmed the IOC's decision to invalidate the athlete's results in the 50 km race and to withdraw the gold medal obtained. (CAS 2002/A/374, *Muehlegg v CIO*, award of January 24, 2003, available at *www.tas-cas.org* (visited May 25, 2003)). Mühlegg objected to the intervention in the proceedings of the Norwegian Olympic Committee and several Norwegian athletes who claimed the invalidation of all the results obtained during the Olympics. The question is currently pending before another CAS Panel.
23. Version 2.0 expressly excluded the "circumstance described in Articles 1.9.2.3.1 and 1.9.2.3.2 and violations of Article 1.2.1.4".

such other competitions. Given this fact, it is clear that this multi-competition disqualification is not based on the same rationale as automatic disqualification from the competition in which the prohibited substance was found to be present. Based on this analysis, the disqualification of all results obtained during a multi-competition event should be deemed a sanction and be subject to the restrictions applicable to sanctions.

Multi-competition disqualification and human rights: the requirement of fault

As discussed in greater detail below, it is generally accepted that fundamental human rights and, in particular, the principle of *nulla poena sine culpa* prohibit the imposition of a sanction on an athlete who can prove his or her innocence. For this reason, the earlier version of Art.10.1[24] was problematic and the Opinion recommended an addition:

> "If the athlete establishes that he or she bears no Fault or Negligence for the violation, the athlete's individual results in the other Competitions shall not be Disqualified unless the athlete's results in Competitions other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the athlete's anti-doping rule violation."[25]

This provision shows that disqualification from another competition, other than the one in which the doping offence occurred, is intrinsically different from disqualification from the latter competition. The requirement of fault makes disqualification from another competition a real sanction, consistent with the structure of the Code. If the athlete can establish the absence of fault, then an additional disqualification may intervene only where the results were likely to have been affected by the offence. This link between the offence during a competition and the results in another competition must be established by the sports authority. It is submitted that, even though the Code refers to "likelihood", proof that the results in the other competition have been affected must rely on overwhelming scientific data. Only in this case, is the disqualification from the other competition justified by sporting fairness, in the same way as the disqualification from the competition in which the offence occurred.

V. Suspensions and the athlete's fundamental rights

It is generally recognised that one must clearly differentiate between the imposition of a sanction and the mere disqualification of an athlete from the competition in which the doping offence occurred. The classic sanction for doping offences is suspension for a specified period of time, during which the athlete is not eligible to participate in sports competitions. In substance, the Code provides the following rules in respect of suspensions:

> "10.2 *Imposition of Ineligibility for Prohibited Substances and Prohibited Methods.*
> Except for the specified substances identified in Article 10.3,[26] the period of Ineligibility imposed for a violation of Articles 2.1 (presence of Prohibited Substance or its Metabolites or Markers), 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) and 2.6 (Possession of Prohibited Substances and Methods) shall be:
> *First violation:* Two (2) years' Ineligibility.
> *Second violation:* Lifetime Ineligibility.
> However, the athlete or other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in Art.10.5. [. . .]
>
> 10.5 *Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances.*
>
> 10.5.1 *No Fault or Negligence.* If the athlete establishes in an individual case involving an anti-doping rule violation under Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers) or Use of a Prohibited Substance or Prohibited Method under Article 2.2

24. Art.1.9.2.1 of version 2.0 of the Code consisted in a sole paragraph similar to Art.10.1 (WADC E version 2.0 annotated rev.1, p.22). Even more problematic was Art.8.8.1. of Version 1.0 which provided that "[. . .] an anti-doping rule violation occurring during or in connection with an event *automatically leads* to disqualification . . . " (WADC E Version 1.0, p.24.)
25. Art.10.1.1.
26. Art.10.3 provides for the possibility of a special regime for "substances which are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents" (*i.e.* "at a minimum, a warning and reprimand and no period of Ineligibility from future Events, and at a maximum, one year's Ineligibility" for a First violation, two years' ineligibility for a second violation; and "Lifetime Ineligibility" third violation). However, in order to benefit of this special regime, the athlete must "establish that the Use of such a specified substance was not intended to enhance sport performance".

> that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an athlete's Specimen in violation of Article 2.1 (presence of Prohibited Substance), the athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Articles 10.2, 10.3 and 10.6.
>
> 10.5.2 *No Significant Fault or Negligence.* [. . .] If an athlete establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in an athlete's Specimen in violation of Article 2.1 (presence of Prohibited Substance), the athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced."

This Part will examine the following matters: (1) the applicability of the principle of *nulla poena sine culpa* to doping suspension; (2) the applicability of the presumption of innocence to doping suspension; (3) the compatibility of the length of suspensions with the athletes' fundamental rights and general legal principles; and (4) the compatibility of fixed mandatory sanctions and the athletes' fundamental rights and general legal principles.

The principle of *nulla poena sine culpa*

The principle of *nulla poena sine culpa* is one of the foundations of criminal law. Under this principle, a person may only be punished for an offence if he or she has knowingly or negligently committed such offence. In the analysis that follows, we will examine: (1) the applicability of this principle to doping disputes or, in other words, whether sanctions may be imposed for doping in the absence of fault; and (2) the extent to which Arts 10.2 and 10.5 of the Code comply with this principle.

The applicability of the principle of nulla poena sine culpa *to doping disputes*

So far as legal commentators are concerned, there is a clear consensus, even among those who do not accept that doping proceedings are criminal in nature,[27] that the principle of *nulla poena sine culpa* should apply to the imposition of doping sanctions by sports disciplinary tribunals[28]:

> "That aspect should be viewed from a penal viewpoint and fundamental question of fairness should dictate that there is found, or inferred at least some element of moral fault before the athlete is so penalised".[29]

By way of contrast, the positions adopted by arbitral tribunals and by national courts are less univocal.

Probably the strongest call for the application of *nulla poena sine culpa* in doping matters is found in the American Arbitration Association (AAA) arbitral award rendered in the *Foschi* case. The AAA Panel in *Foschi* unanimously held that the suspension of an innocently positive athlete "so offends our deeply rooted and historical concepts of fundamental fairness so as to be arbitrary and capricious".[30]

As a matter of fact, however, this award has not been followed in the subsequent AAA practice. Differences of approach are also notable among CAS Panels. Whilst some CAS awards have basically followed the view of the Swiss Federal Supreme Court refusing to apply criminal law principles to doping disputes,[31] others have applied specific principles of criminal law, like the *lex mitior* principle,[32] and, at least to a certain extent, the *nulla poena sine culpa* principle. Indeed, some CAS awards took the view

27. See for instance Piermarco Zen Ruffinen, *Droit du sport* (Zurich, 2002), No.1313, p.461.
28. See for instance Beloff (n.88, above), p.45; Beloff/Kerr/Demetrieu (n.58, above); Vieweg (n.47, above), para-.III.1; Urs Scherrer, *Strafrechtliche und Strafprozessuale Grundsätze bei Verbandsanktionen*, in: J. Fritzweiler (ed.) Doping—Sanktionen, Beweise, Ansprüche (Bern, 2000), p.124; Adolphsen (n.10, above, 2nd ser.), pp.97–98; Baddeley (n.14, above, 2nd ser.), pp.325–326; Lob (n.97, above), p.271.
29. Flint/Taylor/Lewis (n.5, above, 1st ser.), E.4.103, p.943.
30. AAA 77–190–0036–96 *Jessica K. Foschi v United States Swimming*, Award of April 1, 1996, reported in Yasser/McCurdy/Goplerud, *Sports Law, Cases and Materials* (3rd ed., Cincinnati, 1997), pp.151, 152–153.
31. CAS 2002/A/383 *IAAF v CBAt & S.*, Award of December 18, 2002, para.84, p.26, where the Panel noted, as to the question of the applicable standard of proof, that "as a matter of principle, it is generally recognised that criminal law standards are not applicable to disciplinary proceedings conducted within the framework of private associations such as sporting federations" as to the applicable standard of proof.
32. See above.

that an athlete must always be given the opportunity to prove his or her innocence, even when this is not provided in the applicable regulations,[33] thus implicitly recognising that the principle *nulla poena sine culpa* plays a role in doping matters.[34] These "shy criticisms"[35] of the purely objective approach have become stronger in the latest CAS practice. In a recent unpublished award, the CAS Panel explicitly held that:

> "under Swiss law an athlete cannot validly be banned in the absence of any fault, [and that therefore] an interpretation to the contrary would lead the rules being void which would frustrate the objective of the fight against doping pursued by the entire sporting world".[36]

Surprisingly enough, the position adopted by the courts as to the applicability of *nulla poena sine culpa* to doping offences is not as clear-cut as the latter CAS award seems to suggest. It suffices to recall the position of the Swiss Federal Supreme Court holding that general principles of criminal law do not apply in doping matters.[37] Similarly, the English High Court decision in *Gasser v Stinston* held (indirectly) that the principle *nulla poena sine culpa* does not apply to suspensions imposed by a sports disciplinary body. Scott J., as he then was, rejected the argument that the International Amateur Athletic Federation (IAAF) Regulations constituted an unjustifiable restraint of trade due to the fact that such Regulations did not permit the athlete to establish her moral innocence in an effort to mitigate the suspension imposed. The IAAF's counsel submitted that:

> "if defence of moral innocence were open, the floodgates would be opened and the IAAF's attempts to prevent drug-taking would be rendered futile. He had, in my opinion, reason for that fear.
>
> [The athlete's Counsel submitted] that is not justifiable that the morally innocent may have to suffer in order to ensure that the guilty do not escape. But this is not a submission which is invariably acceptable. The criminal law in this country (and in, I would think, in all others) has various absolute offences and various mandatory sentences."[38]

The German courts have not followed this approach. In the *Krabbe* case, the Munich Regional Court ruled—expressly referring to the principle *nulla poena sine culpa*—that sports disciplinary bodies are not entitled to suspend athletes who violate disciplinary rules, including anti-doping rules, without finding fault.[39] The Frankfurt High Court in the *Baumann* case has recently confirmed this holding:

> "according to the German conception of the law—which insofar expresses a core concept of the legal order as a whole—any ban from a profession, temporary or permanent, is contingent upon personal fault."[40]

Because some national courts and some arbitral tribunals have considered that the principle *nulla poena sine culpa* applies to doping sanctions and because the Code must be applicable worldwide, WADA's efforts to comply with this principle are clearly far-sighted. They will not only avoid legal challenges, but also avoid bringing the entire anti-doping system in disrepute, thereby, jeopardising the fight against doping.[41] Accordingly, this article like the previous Opinion will assume that the principle *nulla poena sine culpa* is applicable in doping disputes. On the basis of this assumption, it will

33. Pfister (n.14, above, 2nd ser.), p.135, referring to CAS 91/53, 92/63, 92/73, 95/141.
34. CAS 95/141, *Chagnaud v FINA, CAS Digest I*, pp.215, 220–221: "one may wonder to what extent sanctions of a penal nature may be imposed without its having been established that the author acted intentionally, or at least displayed culpable negligence, [Principle: *'Nulla poena sine culpa'*] (Louis Dallèves, in Chapitres choisis du droit du sport, GISS, 1993, page 129). The Panel nonetheless points out that too literal an application of the principle could have damaging consequences of the effectiveness of anti-doping measures. [...] [T]he Panel considers that, generally speaking, the principle of presumption of the athlete's guilt may remain, but that, by way of compensation, the athlete must have the possibility of [...] providing exculpatory evidence. The athlete will thus be allowed to demonstrate that he did not commit any fault intentionally or negligently"
35. Frank Oschutz, "International Sports Perspectives: Harmonization of anti-doping Code through Arbitration: the Case Law of the Court of Arbitration for Sport", *Marquette Sports Law Review*, 2002, pp.675, 688 referring to CAS 99/A/234 et 99/A/235 *David Meca-Medina v FINA et Igor Majcen v. FINA*, Award of February 29, 2000.
36. CAS 2001/A/317, *Aanes v FILA*, Award of July 9, 2001, unreported, pp.16–17 (passage reported in Flint/Taylor/Lewis (n.5, above, 1st ser.), E.4.131, p.954)
37. Swiss Federal Supreme Court, *Gundel v Fédération Equestre Internationale*, Decision of March 15, 1993, reported (and translated) in *CAS Digest I*, pp.561, and 571–572; see above.
38. *Sandra Gasser v Stinson*, unreported, Blackwell & Partners. This aspect of the court reasoning was followed in *Wilander v Tobin I* in respect of the anti-doping regulations of the ITF (cited by Flint/Taylor/Lewis (n.5, above), E.4.110, p.945).
39. *Krabbe v IAAF*, Decision of the LG Munich of May 17, 1995, SpuRt 1995, pp.161, 167 (free translation of the original German text: *"Die vom Rechtsausschuss verhängte Sanktion verstöss auch nicht gegen den Grundsatz" nulla poena sine culpa "... Insoweit konnte auch der Trainer Springstein die Klägerin nicht" von jeder Schuld "entlasten ... ").*
40. *Baumann v IAAF*, Decision of the OLG Frankfurt a. M. of April 2, 2002, SpuRt 2002, pp.245, 249 (free translation of the original German text: *"nach deutschen Rechtsverständnis, und insoweit auch den unabdingbaren Kern der öffentlichen Rechtsordnung prägend, darf niemand mit einem auch nur zeitweiligen Berufsverbot belegt werde, wenn ihm nicht auch ein persönlicher Schuldvorwurf gemacht werden kann (OLG Frankfurt/Main, Urteil vom 18.4.2001, 13 U 66/2001).").*
41. For a similar view, see Flint/Taylor/Lewis (n.5, above, 1st ser.), E.4.113, p.947.

address whether the Code complies with that principle.

Does the code comply with the principle nulla poena sine culpa?

The drafters of the Code have always stated their intention to be that "[w]hile the determination of whether an anti-doping rule has been violated is based on strict liability, the imposition of a sanction is not based on strict liability".[42] In spite of this statement, the earlier drafts allowed the suspension of an "innocent" athlete (*i.e.* an athlete who could establish that he or she was not faulty or otherwise negligent). Indeed, the earlier versions of Art.10[43] (Art.1.9.2.3.3 as it then was in Version 2.0) provided that the sanction could be "lessened or eliminated in proportion to the exceptional circumstances of a particular case, but only if the athlete can clearly establish that the anti-doping rule violation was not the result of his or her fault or negligence . . . ".[44] This wording did not appear consistent with the principle of *nulla poena sine culpa* for the following three reasons:

- Art.1.9.2.3.3 provided that a suspension may be either "*lessened* or eliminated". However, if an athlete establishes his or her innocence, the principle of *nulla poena sine culpa* requires that no sanction be imposed at all and, accordingly, it is not be sufficient to simply lessen the sanction.
- Moreover, Art.1.9.2.3.3 used permissive rather than mandatory language. If an athlete establishes his or her innocence, the wording only provided that the period of suspension "*may* be lessened or eliminated" and, accordingly, there remains an element of discretion, which is not consistent with the principle of *nulla poena sine culpa*.
- Finally, Art.1.9.2.3.3 provided that the discretion to eliminate a suspension applied "in proportion to the exceptional circumstances, but only if the athlete can clearly establish" his or her innocence. This wording seems to suggest that the discretion should only be exercised if one is satisfied both that the athlete is innocent and that there exist some additional exceptional circumstances.

42. WADC E Version 2.0 annotated rev.1, p.8. See also the Comment on Art.1.9.2.3.3 of the Code, according to which "[t]his 'exceptional circumstances' Article applies only to the imposition of sanction, it is not applicable to the determination of whether an anti-doping rule violation has occurred." (p.25).
43. See also Art.8.8.3.2 in Version 1.0.
44. WADC E Version 2.0 annotated rev.1, Art.1.9.2.3.3, p.8.

The principle of *nulla poena sine culpa* requires that an innocent athlete is not sanctioned at all. The Opinion so stated and, therefore, the wording was changed to provide that "[i]f the athlete establishes . . . that he or she bears no fault or negligence for the violation, the otherwise applicable period of ineligibility shall be eliminated".[45] This wording fully complies with the requirement of the principle *nulla poena sine culpa*.

With this provision, the Code undoubtedly clarifies the scope of legal protection afforded to athletes. In practice it will, however, not be easy for an innocent athlete to have his or her suspension eliminated. Indeed, under Art.10.5.1, proving absence of fault in cases of ordinary doping offence (*i.e.* "presence of prohibited Substance") requires that the athlete be able to "establish how the prohibited substance entered his or her system". Needless to say that this is a heavy burden placed on the athletes. This aspect is reviewed in the next section.

Presumption of fault versus presumption of innocence

Under Art.10.2 and 10.5, there is a clear presumption of fault on the part of the athlete. This presumption is rebuttable, *i.e.* this presumption can be overcome if an athlete proves no fault or negligence or no significant fault or negligence. As a consequence of this presumption of fault, the burden of proving fault, which the prosecuting party must normally discharge, shifts to the athlete. In the following paragraphs, we will examine (1) the legal validity of such a presumption of fault, and (2) the reasonableness of the presumption of fault in doping matters.

Is the presumption of fault valid in disciplinary matters?

Some commentators argue that a presumption of fault is or may be so difficult to rebut in practice that it violates the presumption of innocence.[46] Others take the contrary view and so has case law. In the opinion of one of the judges of the German Constitutional Court, shifting the burden of proving fault to the athlete is consistent with general rules of civil procedure and does not raise any constitutional concern.[47] In the *Baumann* case, the Frankfurt High Court confirmed this view:

> "[. . .] the finding of the IAAF Panel according to which the athlete was unable to rebut the prima facie evidence [of faulty doping offence]

45. Art.10.5.1. For the full text of this provision, see above, introduction to Ch.V.
46. Baddeley (n.73, above), p.22.
47. Reported in: Röhricht/Vieweg (ed.) *Doping-Forum* (Stuttgart, 2000), p.149.

> does not contradict the principles of the German legal system."[48]

In so far as the requirements of Art.6(2) of the ECHR are concerned,[49] the European Court of Human Rights held the same position, subject to "reasonable limits":

> "Article 6 para.2 (art. 6–2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."[50]

Based upon these decisions, the presumption of fault can be deemed compatible with the principle of *in dubio pro reo* as expressed by Art.6(2) of the ECHR, provided that it operates within reasonable limits.[51]

Does the presumption of fault in the code operate within reasonable limits?

As already suggested, there is little doubt that the presumption of fault can lead to some injustice in cases where an innocent athlete is unable to prove an absence of fault or negligence because he or she truly does not know how the prohibited substance ended up in his or her body.[52] On the other hand, it would be both very difficult and very costly for a sports federation to prove the fault of an athlete. An athlete is undoubtedly in a better position than a sports federation to explain why a specific substance was detected in his or her body. In this regard, it should be emphasised that sports federations are private bodies that lack the powers of coercion necessary to undertake the type of investigation required to discharge such a burden. From this point of view it is clear that the presumption of fault and resulting reversal in the burden of proof is not only appropriate but also essential in order to pursue an efficient anti-doping policy.[53] The Regional High Court of Frankfurt in the *Baumann* case has recently confirmed this:

> "Without such a proof facilitation, a sports federation would have no chance to effectively combat doping [. . .] The criminal law principle of the presumption of innocence cannot be transposed in sports disciplinary matters. [. . .] The presumption of fault is a necessary and reasonable way to conduct evidentiary matters in the context of doping sanctions."[54]

The US Court of Appeals for the 7th Circuit has expressed a similar view in the case of *Mary Decker Slaney*. In considering whether "the burden-shifting approach adopted by the IAAF violates United States public policy", the Court held the following:

> "We disagree. [. . .] The IAAF has adopted the rebuttable presumption of ingestion from a high T/E ratio in an athlete's urine [. . .]. Were the IAAF not to make use of the rebuttable presumption, it would be nearly impossible, absent eyewitness proof, to ever find that an athlete had ingested testosterone. As the IAAF notes, criminal defendants are frequently required to come forward with proof establishing a basis for asserting affirmative defenses."[55]

If one accepts, as did the US Court of Appeals in *Slaney*, that the presumption of fault is justified by the practical difficulty of proving doping offences,

48. *Baumann v DLV*, Decision of the OLG Frankfurt a. M. of April 18, 2001, SpuRt 2001, pp.159, 162 (free translation of the original German text: "[. . .] *die verbandsgerichtliche Feststellung, der Kläger habe nicht nachhaltig zu erschüttern vermocht, nicht der deutschen Rechtsordnung wiederspricht* [. . .]").
49. The *in dubio pro reo* clause of Art.14(2) of UN Covenant on Civil Rights also applies to criminal proceedings but not to civil proceedings. This was confirmed by the Human Rights Committee (see Sarah Joseph, Jenny Schultz, Melissa Castan, *The International Covenant on Civil and Human Rights, Cases, Materials and Commentary* (Oxford, 2000), pp.308–309).
50. ECHR *Salabiaku v France*, Decision of October 7, 1998, para.27, A114–A (1988).
51. See also Beloff (n.58, above), p.49, according to whom, the rule that a party asserting the existence of a particular fact bears the onus of proving that fact "may be modified or displaced by the effect of disciplinary rules creating presumptions or reversing the onus of proof on a particular issue, provided that the effect of the shift of the onus of proof it necessarily implies is not to create a presumption of guilt".
52. Considering the difficulty that an athlete may face when required to prove his or her innocence, several commentators have argued that the presumption of fault should be considered as a mere prima-facie proof (*Anscheinbeweis*) that can be rebutted (*schlüssige Darlegung eines atypischen Kausalverfahrens*) and not necessarily with the proof of the contrary (*Gegenbeweis*). Should the athlete discharge this burden, then it is up to the sports federation to establish that the athlete was at fault (see, for instance, Röhricht reported in *Doping-Forum*, p.148).
53. Adolphsen (n.10 above, 2nd ser.), p.100 (*"man [kann] den Streit um die Beweislast letztlich darauf zuspitzen, was vorgehen soll: der Schutz des Systems oder die Einzelfallgerechtigkeit zugunsten des Athleten"*).
54. *Baumann v IAAF*, Decision of the OLG Frankfurt a. M. of April 2, 2002, SpuRt 2002, pp.245, 249 (free translation of the original German text: *"Ohne diese Beweiserleichterung besäße ein Sportverband keine Chance zur erfolgreichen Dopingbekämpfung. [. . .] Die im Bereich des Strafrechts geltende Unschuldsvermutung ('in dubio pro reo') kann daher auf die Verbandsstrafgewalt nicht übertragen werden. [. . .] Der Anscheinbeweis ist daher der im Bereich von Dopingsanktionen notwendige und auch angemessen Beweisführungsstandard."*).
55. *Slaney v Int'l Amateur Ath. Fedn*, (7th Cir. Ind. March 27, 2001) Certiorari Denied, 244 F.3d 580, 593, citations omitted.

it follows that one must also accept that the athlete should be required to establish his or her innocence. Absent such a requirement, it would be far too easy for a coach or team doctor to testify that he or she was responsible for the presence of the prohibited substance in the athlete's body. Finally, one should not overlook that, according to Art.3.1 of the Code, the athlete must establish his burden by a balance of probability. This provision brings the Code in conformity with the requirement of English law set out by Neill L.J. in *Wilander v Tobin I*.[56] More generally, it also excludes that the athlete must meet a standard of "absolute certainty", which has often been described as being inconsistent with the principle of *in dubio pro reo*.[57]

Conclusion

For all the above reasons, the presumption of the athlete's fault provided in Art.10.2 and 10.5 is compatible with the presumption of innocence, and more generally with human rights and fundamental principles of law.

Compatibility of the length of the suspension with athletes' fundamental rights

For the most common doping offences,[58] Art.10.2 of the Code stipulates that a two-year ineligibility period will be imposed for a first doping violation and a lifetime ineligibility for a second doping violation. Despite some important criticism, in particular by the international governing bodies of football (FIFA) and cycling (UCI), this provision did not evolve during the drafting process. In fact, the two-year rule was a paramount factor of the harmonisation efforts. Therefore, WADA was eager to ascertain compatibility of the duration of the suspension with fundamental rights and the Opinion carefully examined this aspect. This was done by (1) reviewing the fundamental rights at issue and by analysing the relevant conditions justifying an infringement to these rights, and in particular (2) the legitimate aim of the suspension period and (3) its proportionality.

The fundamental rights at issue

There is no doubt that a two-year suspension (not to mention a lifetime ban) has a direct impact on the personal freedom of an athlete. In a recent decision, the Swiss Federal Supreme Court recognised that a ban of two years results in a restriction of an athlete's freedom of movement which may adversely affect his or hers international career as a top-level competitor.[59] Moreover, for professional athletes, a two-year suspension (and, *a fortiori*, a lifetime ban) will likely affect their right to work. In the context of the EU, the imposition of a suspension on an athlete may also encroach on the freedom of movement for workers within the meaning of Art.39 of the EC Treaty and, for self-employed athletes, on the freedom of establishment within the meaning of Art.43 of the EC Treaty. In addition, it could be argued that the imposition of a two-year suspension for a first offence (and a lifetime ban for a second offence) violates the fundamental principle of proportionality, which dictates that the severity of a penalty must be proportionate to the offence committed.[60]

The question is whether these restrictions on fundamental rights and freedoms are valid based upon the general conditions set out above. As to the adequacy of the regulatory basis, Art.10.2 provides a clear and sufficiently predictable regulatory basis. In the following analysis, we will consider whether there is a legitimate aim in requiring a two-year suspension for a first violation (and a lifetime ban for a second violation) and then examine the proportionality of these sanctions.

Legitimate aim

The Comment on Art.10.2 does not set out the reasons for adopting the specified periods of ineligibility, but indicates that these sanctions reflect "the consensus of the World Conference on Doping held in Lausanne in February 1999". At the conclusion of this Conference, the delegates adopted a Declaration that included, among other things, the following principles:

56. *Wilander v Tobin I*, unreported, March 26, 1996. In substance, Neill L.J. found the "presumption of guilt troublesome, but not unreasonable, as long as the regulations were interpreted as meaning that this presumption could be rebutted on the balance of probabilities" (Foster (n.45, 1st ser.), p.194).

57. Scherrer (n.28, above, 2nd ser.), pp.127–128, according to whom *"Im Zusammenhang mit den Grundsätzen der Unschuldsvermutung und in dubio pro reo [. . .] [e]s darf keine absolute Gewissheit fehlenden Verschuldens verlangt werden."*

58. Art.10.3 provides for a specific, more lenient, for specifically identified "substances which are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents" (see n.26, above, 2nd ser.). For the purpose of our Opinion, we focused on the ordinary regime set forth in Art.10.2.

59. Swiss Federal Supreme Court, *Lu Na Wang v FINA* (5P.83/1999), Decision of March 31, 1999, *CAS Digest II*, pp.767, 772.

60. See also Griffit-Johnes Q.C. cited by Flint/Taylor/Lewis (n.5, above), E.4.431, p.1016 suggesting that the Human Rights Act 1998 might provide the basis for a departure from fixed sanction under English law.

> "Considering that doping practices contravene sport and medical ethics, and that they constitute violations of the rules established by the Olympic Movement, and concerned by the threat that doping poses to the health of athletes and youth in general;
>
> Recognizing that the fight against doping in sport is the concern of all: the Olympic Movement and other sports organisations, governments, inter-governmental and non-governmental organisations, sportsmen and sportswomen throughout the world, and their entourage;
>
> The World Conference on Doping in Sport, with the participation of representatives of governments, of inter-governmental and non-governmental organisations, of the International Olympic Committee (IOC), the International sports Federations (IFs), the National Olympic Committees (NOCs), and of the athletes, declares: [. . .]
>
> *3. Sanctions:* [. . .]
>
> In accordance with the wishes of the athletes, the NOCs and a large majority of the IFs, the minimum required sanction for major doping substances or prohibited methods shall be a suspension of the athlete from all competition for a period of two years, for a first offence. However, based on specific, exceptional circumstances to be evaluated in the first instance by the competent IF bodies, there may be a provision for a possible modification of the two-year sanction. Additional sanctions or measures may be applied."

The Declaration specifically records the fact that the athletes in attendance supported the adoption of a two-year suspension for a first offence. Moreover, it should be noted that the possibility of modifying this two-year suspension in case of "specific exceptional circumstances" was inserted at the insistence of FIFA and UCI and contrary to the wishes of the athletes.[61] These facts should be borne in mind when considering the legitimacy of Art.10.2 from the perspective of athletes' fundamental rights. Beyond these facts, the recognition "that the fight against doping in sport is the concern of all" indicates that one of the main purposes of the two-year suspension is to ensure the effectiveness of anti-doping regulation.

But why two years and not four or one? The reason for choosing this period of ineligibility can be traced back to the *Krabbe* case, in which the Munich courts held that a suspension exceeding two years must be considered to be disproportionate.[62] Following this decision, almost every sports governing body reduced the length of its suspension for a first offence to two years. This sanction for a first offence subsequently withstood scrutiny by several national courts and CAS Panels. Undoubtedly, it was this history and the apparent legal certainty associated with a two-year suspension that led the Conference delegates to adopt this period of eligibility in the Declaration.[63] In addition to having the support of athletes and sports governing bodies evidenced by the Declaration, it should be emphasised that the two-year suspension for a first doping offence has also received important governmental backing in the form of the following joint statement by EU Ministers of Sport made in June 1999:

> "[E]ffective doping prevention cannot do without deterring sanctions and that therefore a system of internationally applicable and equivalent sanctions is needed, such as a two-year minimum ban for first-time offenders."[64]

For all of these reasons, it is clear that there is a legitimate aim in imposing a two-year suspension for a first offence and that this sanction has the support of many athletes and sports federations and a significant number of states. As a final matter, it is noteworthy that constitutional courts generally acknowledge that the determination of whether or not any rule or regulation has a legitimate aim is an "eminently political task". Constitutional courts therefore tend to accept the legitimacy of the measure under scrutiny[65] and, instead, focus on the question of proportionality.

Proportionality

Capacity

In order to be capable of achieving the aim of effectively promoting the fight against doping, the imposition of a suspension must have a deterrent effect for athletes. Although "there appears to be no statistical proof of the deterrent effect" of an

61. Zen Ruffinen (n.27, above, 1st ser.), No.1239, p.463.
62. See below.
63. One should add that choosing a penalty that can withstand legal challenge worldwide also have an important harmonising effect "and therefore enable[s] consistency to be maintained" (Barrie Houlihan, *Dying to win* (2nd ed., Strasbourg, 2002), p.184).
64. Conclusions of the German E Council Presidency on the occasion of the Informal Meeting of the Sport Ministers of the European Union in Paderborn, May 31 to June 2, 1999, available at *http://europa.eu.int/comm/sport/doc/infor_meet/paderborn_en.pdf*. According to Vieweg, this suspension was meant to be applicable irrespective of any fault (Klaus Vieweg, *Zur Einführung: Aktuelle Rechtsprobleme des Dopings*, in Röhricht/Vieweg (eds) *Doping-Forum* (Stuttgart, 2000), p.11).
65. Auer/Malinverni/Hotellier (n.14, above, 1st ser.), No.205, p.101.

increased penalty[66] and "that, for some athletes, it is not an effective deterrent",[67] it is obvious that the risk of a long suspension is, in general, a significant deterrent for doping offences for most athletes. Therefore, one can easily agree with the promoters of the Code when they argue that a two-year ban is "still a sufficient disincentive to break doping regulation".[68]

Necessity

The necessity for sufficiently severe sanctions to deter the use of doping has been clearly expressed by the Ontario Court of Justice in the *Ben Johnson* case. In justifying the imposition of a lifetime ban following a second doping offence, the court appears to have accepted the following opinion expressed in the Report of the Dubin Inquiry in respect of "sport organization penalties":

> "Briefly stated, if the rewards for a cheater even when caught are greater than for the obeying the rules, cheating will continue. [. . .] An effective penalty should ensure that there are greater disadvantages than advantages in cheating."[69]

Similarly, in the *Baumann* case, the Frankfurt High Regional Court emphasised that:

> "An effective deterrent can only be implemented by way of imposition of a suspension and related financial effect of the athlete."[70]

In this respect, one can also mention the approach of both European bodies and national courts as to the application of EU anti-trust law. The European Commission in the *Meca-Medina* case and the English courts in the *Edwards* case respectively noted that:

> "[. . .] anti-doping regulations are unanimously considered to be indispensable in order to guarantee the fair conducting of sports competitions [. . .] it is also necessary to provide sanctions in order to guarantee compliance with the anti-doping regulations."[71]

> "The imposition of penalties for cheating is essential if cheats are to be kept out of sport and the rules against cheating are to be effective."[72]

Moreover, one can mention Section B3 of the 1998 Recommendation of Monitoring Group of the European Anti-Doping Convention in which it is clearly stated that sport bodies "should provide in their regulations for imposition of sanctions against doping offence. The sanctions should be sufficient for the offence proved, based on the severity of the infraction, and not encourage disregard for the regulations".

Finally, it should be noted that Italian commentators have generally welcomed the Italian Parliament's recent enactment of legislation providing for the imposition of criminal sanctions in addition to those imposed by sports disciplinary bodies, largely because of the increased deterrent effect of criminal sanctions.[73]

Proportionality stricto sensu

The final version of the Code's Comments does not address proportionality. The Comment on Version 2 of the Code stated that "[t]hese disqualification periods are not unduly harsh when compared to the discipline that is applied to other types of professional misconduct" and that an "athlete who dopes commits a [. . .] breach of trust in his professional or avocation".[74] Hence, the drafters of the Code did recognise the necessity to consider the extent to which the sanction is proportionate with the gravity of the offence committed. Legal commentators have criticised the imposition of a two-year suspension on the ground of proportionality. Some have argued that a two-year suspension for a first doping offence is "unacceptable, in the light of the shortness of a career in several sports disciplines and of the age of several athletes",[75] and that "a minimum suspension of 2 years is [. . .] at odds

66. Emile N. Vrijman, *Harmonisation: A bridge too Far? A Commentary on Current Issues and Problems*, in *Drugs and doping*, O'Leary (ed.) (n.6, above, 1st ser.), p.158.
67. Grayson/Ioannidis (n.7, above, 1st ser.), p.249.
68. Houlihan (n.63, above, 2nd ser.), p.185.
69. *Johnson v Athletic Canada and IAAF* [1997] O.J. 3201, para.31.
70. *Baumann v IAAF*, Decision of the OLG Frankfurt a. M. of April 2, 2002, SpuRt 2002, pp.245, 250 (free translation of the original German text "... eine wirksame Abschreckung [kann] nur durch Wettkampfsperren und damit verbundene finanziellen Einbussen erreicht werden").
71. Decision of the European Commission, COMP/38158 of August 1, 2002, paras 50 and 54 (free translation of the French original text: *"les règles antidopage sont considérées unanimement comme indispensables pour assurer un déroulement loyal des compétitions sportives [. . .] des sanctions sont également nécessaires afin de garantir l'exécution de l'interdiction du dopage"*).
72. *Edwards v BAF and IAAF* [1997] Eu.L.R. 721 (Ch D).
73. Alessandro Traversi, *Diritto penale dello sport* (Milan, 2001), p.113.
74. WADC E Version 2.0 annotated rev.1, p.23.
75. See, for instance: Baddeley (n.73, above, 1st ser.), p.20 (*"In Anbetracht des Kürze der Sportlerkarrieren in vielen Sportarten und des Alters vieler Athleten ist m.E eine 2–järige Sperre kaum akzeptabel"*).

with the principles of due process".[76] These authors often rely upon the work of the Konstanz Working Group on Sports Law, which issued a resolution recommending the imposition of a one-year suspension for a first doping offence.[77]

As previously noted, in the *Krabbe* case both the German sports internal tribunal and the Munich courts held that a suspension exceeding two years was disproportionate:

- The internal tribunal reduced the four-year suspension provided by the IAAF Rules on the ground that "the taking into account of the principle of proportionality would require a more flexible determination of the sanction".[78]
- The Regional Court held that the two-year suspension imposed by the internal tribunal for a first offence "represents the highest threshold admissible under fundamental rights and democratic principles".[79]
- The High Regional Court held that the three-year ban subsequently imposed by the IAAF "was excessive in respect of its objective. Such a rigid disciplinary measure as a sanction for a first sports offence is inappropriate and disproportionate".[80]

Adopting the same approach, the Frankfurt High Regional Court in the *Baumann* case held that "a suspension of two years for a first offence is not disproportionately long".[81] In *Lu Na Wang*, the Swiss Federal Supreme Court made the following statement in regard to proportionality:

> "The issue of the proportionality of the penalty could [. . .] only arise [. . .] if the arbitration award were to constitute an attack on personal rights which was extremely serious and totally disproportionate to the behavior penalized. In the present case, whatever the appellants may say—and they declare with grandiloquent tones that 'only the most extreme custodial sentences that can be pronounced by the state courts are capable of producing such effects'—the two-years suspension imposed on them involves only a moderate restriction on their freedom of movement, since they can continue to practise their sport freely, apart from participating in international competitions; it is admittedly a serious penalty, liable to restrict their international careers as top level athletes, but the fact remains that it is restricted to two years and arises from a proven violation of an anti-doping rule whose application the appellant have accepted [. . .]."[82]

With specific reference to the Swiss Federal Supreme Court's decision in *Lu Na Wang*, a CAS Panel recently upheld a life ban for a first offence in reliance, *inter alia*, on the following reasoning:

> "While it is clear to the Panel that many International Federations have decided that a two-year suspension is appropriate for a first doping offence, it is equally clear that other International Federations [. . .] have chosen to impose higher minimum sanctions as a demonstration of their determination and commitment to the eradication of doping in their sport.
>
> Although the issue has never been directly considered or decided, either by CAS Panels, or by the Swiss Federal Tribunal in rulings on CAS decisions, it seems to the Panel, as a matter of principle, that a life ban can be considered both justifiable and proportionate in doping cases."

Based upon the weight of legal authority, the Opinion reached the conclusion that a two-year suspension for a first doping offence is not

76. Clemens Prokop, Vorschläge zur Reform der Doping-Regelungen der IAAF, in JFritzweiler (Hrsg.) Doping —Sanktionen, Beweise, Ansprüche, Bern [etc.] 2000, p.101, referring to the current IAAF Rules, the German original wording reads as follows: *"Die Mindestsperre von 2 Jahren widerspricht in der vorliegenden Fassung den Grundsätzen eines fairen Verfahrens"*.

77. Reported in SpuRt 1999, p.132.

78. Reported verbatim by the Regional Court in its decision (SpuRt 1995, pp.162, 166).

79. *Krabbe v IAAF*, Decision of the LG Munich of May 17, 1995, SpuRt 1995, pp.161, 167 (free translation of the official German text *"ein Entzug der Starterlaubnis für einen Zeitraum von zwei Jahren zur Ahndung eines erstmaligen Dopingverstoßes des Höchstmass dessen ist, was noch innerhalb der grundrechtlich– rechtsstaatlichen Grenzen liegt"*).

80. *Krabbe v IAAF*, Decision of the OLG Munich of March 28, 1996, SpuRt 1996, pp.133, 138 (free translation of the official German text *"schießt [. . .] deutlich über das Ziel hinaus. Eine derart rigide Disziplinarmassnahme als Sanktion für eine erstmals festgestellte Sportwidrigkeit ist unangemessen und unverhältnismäßig."*).

81. *Baumann v IAAF*, Decision of the OLG Frankfurt a. M. of April 2, 2002, SpuRt 2002, pp.245, 250 (free translation).

82. Swiss Federal Supreme Court, *Lu Na Wang v FINA* (5P.83/1999), Decision of March 31, 1999, *CAS Digest II*, pp.775, 778–781 (Translation by CAS of the original French *"La question de la proportionnalité de la sanction ne pourrait se poser [. . .] que si la sentence arbitrale consacrait une atteinte à la personnalité qui soit extrêmement grave et en dehors de toute proportion avec le comportement qu'elle sanctionne. En l'occurrence, quoi qu'en disent les recourants—qui soutiennent avec grandiloquence que 'seules les plus extrêmes peines privatives de liberté susceptibles d'être prononcées par les tribunaux étatiques sont de nature à générer de tels effets—la suspension de deux ans prononcée à leur encontre ne porte qu'une atteinte modérée à leur liberté de mouvement, puisqu'ils continuent à pouvoir pratiquer librement leur sport en dehors de la participation à des compétitions internationales'; elle est certes sérieuse et susceptible d'entraver leur carrière internationale de sportifs de haut niveau, mais s'en reste pas moins limitée à deux ans et découle d'une infraction prouvée à un règlement antidopage dont [. . .] les recourants ont accepté l'application"*, reported in *CAS Digest II*, pp.767, 772).

disproportionate, considering the gravity of the offence committed. A more lenient sanction for a first offence is likely to seriously jeopardise the effectiveness of the fight against doping. One could add that the overwhelming majority of the athletes (probably not only those who do not dope . . .) are in favour of the imposition of the most stringent sanctions possible to eradicate doping.[83] Significantly enough, the athlete representative to the Copenhagen Convention called for an increase of the minimum penalty for a first offence to four years.[84]

As a final matter, it should be noted that legal commentators have been less inclined to criticise the imposition of a lifetime suspension for a second doping offence. There appears to be a general consensus that recidivism justifies a harsh penalty.[85] The Ontario Court of Appeal was clearly influenced by this rationale in deciding to uphold the lifetime ban imposed on Ben Johnson for his second offence. Indeed, the imposition of a lifetime ban for a second offence is often less severe in practice than the imposition of a two-year suspension for a first offence due to the fact that top level athletic careers are very short in many sports disciplines.

Compatibility of fixed mandatory sanctions with athletes' fundamental rights

The fundamental human right at issue

Article 10.2 and 10.5 provides for some flexibility in the sanctioning mechanism, since the sanction of an athlete who can establish absence of fault or negligence will be eliminated (Art.10.5.1), and the sanction of an athlete who can establish absence of significant fault or negligence may be reduced (Art.10.5.2). Hence, the system established by Arts 10.2 and 10.5 is not a real "fixed sanction" system. However, as far as athletes who are unable to establish that they were not (at least significantly) at fault or negligent are concerned, this system mandates the imposition of specified fixed sanctions. Under such a regime, an athlete is suspended for the same period, irrespective of the gravity of his or her (significant) fault and irrespective of any other particular circumstances that may exist. In other words, there is no requirement for the suspension to be just and equitable, having regard to the specific facts of the case.[86] In practice, this means that an athlete who negligently consumed a mislabelled nutritional supplement containing traces of a prohibited substance may be subject to the same sanction as an athlete who intentionally injected a large quantity of the same substance in order to enhance his or her performance.

There is little doubt that in specific circumstances like these, the regime established by Art.10.2 and 10.5 of the Code may be inconsistent with the fundamental principle of equal treatment expressed, for example, in Art.26 of the UN Covenant on Civil Rights. Again, the question boils down to whether such specific infringements are justifiable under the standards set forth above. The wording of Art.10.2 and 10.5 is clear both as to the rigid character of the sanction, and as to the fact that it will not depend upon the single circumstances of the case. Each sports organisation will have to adopt Art.10.2 and 10.5 verbatim. Since that provision meets the relevant requirements, each organisation will have an adequate regulatory basis to justify a potential restriction on athletes' fundamental human rights. The following paragraphs will examine: (1) whether the fixed sanction regime in Art.1.9.2.3 is based on a legitimate aim, and (2) whether this fixed sanction regime withstands scrutiny under a proportionality test.

Legitimate aim: the need for harmonisation

The harmonisation of doping sanctions is most often advanced as the principal aim for introducing a mandatory fixed sanction regime. The Comment on Art.1.9.2.3 set outs the following rationale for such harmonisation:

> "it is simply not right that two athletes from the same country who tested positive for the same Prohibited Substance under similar circumstances should receive different sanctions only because they participate in different sports.
>
> [. . .] flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sports governing bodies to be more lenient with dopers."[87]

Indeed, a flexible approach to sanctions may also lead to inequalities in the treatment of athletes participating in the same sport but under the flags of different countries. One of the most striking examples of this problem arose in connection with two bob-sleighers who tested positive for the same substance before the Salt Lake City Olympics. One of

83. See for instance Paula Radcliffe's recent declarations in the press reported in Flint/Taylor/Lewis (n.5, above, 1st ser.), p.911. See also Gray (n.9, above, 1 ser.), pp.26–27.
84. Stephan Netzle, *Mehrarbeit für das Internationale Sportschiedsgericht: Der Anti-Doping-Kodex lässt wenig Spielraum bezüglich Sanktionen von Dopingsündern*, in *Neue Zürcher Zeitung* of April 11, 2003, p.41.
85. See for instance McLaren (n.14, above, 2nd ser.), p.32.
86. *ibid.*, p.25.
87. WADC E Version 3.0 annotated, p.24.

these bob-sleighers, Sandis Prusis of Latvia, was able to participate in the Olympic Games following a three-month suspension by the International Federation,[88] while the other bobsleigher, Pavle Jovanovic of the US, was unable to do so as a result of a nine-month suspension imposed by the US Anti-Doping Agency.[89]

The European Commission expressly recognised the legitimacy of the desire for harmonisation in doping matters in the *Meca Medina and Majcen* anti-trust case. In justifying the potentially restrictive effect of the applicable anti-doping regulation, the European Commission emphasised that the need for such harmonisation had become obvious for European political institutions:

> "There is a clear political will to move towards a harmonization of anti-doping legislation and the regulations in order to avoid that single disciplines or single states become 'doping havens' [. . .]."[90]

In the view of the above considerations, there is no doubt that the adoption of a fixed sanction regime is based upon a legitimate aim: the harmonisation of anti-doping sanctions.

Proportionality

It is clear that the simplest means to achieve the harmonisation of anti-doping sanctions is to adopt a mandatory fixed-sanction regime. Such a regime is not only capable of achieving harmonisation but it is also absolutely necessary to do so. The critical question is whether or not such a regime withstands scrutiny under the principle of *stricto sensu* proportionality. The Comment on Art.10.2 expressly acknowledges that there are certain differences between sports that could justify different approaches to the issue of sanctions: "[. . .] in some sports the athletes are professionals making a sizable income from the sport and in others the athletes are true amateurs".[91] However, the Code is based on the premise that the need for harmonisation is paramount and must prevail over any interest in allowing flexibility to consider objective differences that may exist between sports.

This is a sound position, particularly given the importance of protecting the public image of sports. The imposition of different sanctions for similar offences has a very negative impact on perception of the consistency and fairness of the anti-doping policy. Faced with inconsistent sanctions, both the athletes and the public will lose confidence in anti-doping policies and procedures and "fuel the suspicion that anti-doping efforts are at best half-hearted and at worst purely cosmetic".[92] With respect to the interests of athletes' accused of doping, it is necessary to consider whether the need for harmonisation should take precedence over the principle that the specific circumstances of the athlete's case must be taken into account in order to achieve fairness. One commentator recently observed that the "real dilemma for a sporting governing body" in adopting a system of mandatory sanctions is the following:

> "One advantage of the compulsory approach is that it ensures absolute consistency (which may, of course, be equal unfairness) to the entire bodies of the athletes. This may be contrasted with the discretionary approach, where decisions of governing bodies may be viewed cynically as being dependent to no small extent upon the identity of the alleged offender."[93]

In the topical decisions of national court, the emphasis has not been on the inequalities that may exist between athletes participating in different sports and hailing from different countries, but rather on the need to take into account the specific circumstances of each case. In the *Krabbe* case, the Munich Regional Court held that such special circumstances (*sonstige Umstände*) such as a confession

88. This decision was upheld by a CAS Panel at the Olympics (CAS OJ-SLC 02/001, *Prusis and Latvian Olympic Committee v IOC and FIBT*, JDI 2003, p.261, note Loquin).

89. The apparent ambiguity in the applicable regulations as to the circumstances that could be taken into account to determine the length of the suspension was eventually addressed by the CAS following an appeal by *Jovanovic* (CAS 2002/A/360 *Jovanovic v USADA*, Award of February 7, 2002). More generally on the Prusis-Jovanovic saga see Antonio Rigozzi, *Les nouvelles compétences du Tribunal Arbitral du Sport en matière de dopage: premiers commentaires sur le nouveau système de résolution des litiges aux Etats-Unis*, *JusLetter* of April 15, 2002, at: *www.weblaw.ch/jusletter/Artikel.jsp?ArticleNr=1633*.

90. Decision of the European Commission, COMP/38158 of August 1, 2002, para.45 (free translation of the official French text: "*Il existe une volonté politique claire d'aller dans le sens du rapprochement des législations et réglementations antidopage afin d'éviter des états ou disciplines 'paradis' pour les athlètes ayant recours à des substances dopantes*").

91. WADC E Version 3.0 annotated, p.24 adding that " . . . in those sports where an athlete's career is short (e.g. artistic gymnastics) a two year disqualification has a much more significant effect on the athlete than in sports where careers are traditionally much longer (e.g. equestrian and shooting); in individual sports, the athlete is better able to maintain competitive skills through solitary practice during disqualification than in other sports where practice as part of a team is more important".

92. Houlihan (n.63, above, 2nd ser.), pp.190–191, who sees a third danger related to inconsistency: "it creates the risk of costly litigation not only from the innocent but also from the guilty who appear increasingly willing to initiate legal proceedings to defend their income if not their innocence".

93. Gray (n.9, above, 1st ser.), pp.21–22.

by the athlete could justify a reduction in the length of a suspension.[94]

The 1998 Recommendation of Monitoring Group established under the European Anti-Doping Convention also emphasise the importance of flexibility in the determination of the sanction. Section B.3 of the Recommendation sets out the following "guidelines for sanctions":

> "These sanctions should be consistent (*i.e.*, having similar effects) both between different sports in one country and between International Federations. [. . .] Disciplinary Panels should always investigate how the athlete concerned breached the regulations. They may take account of any mitigating factors [. . .]."

Similarly, in a CAS advisory Opinion of 1994, it was observed that Art.7(2)(d) of the European Anti-Doping Convention "implies at least that the personal circumstances of the athlete found guilty of doping be taken into consideration. This obligation to harmonize is thus accompanied with a certain degree of flexibility".[95]

While there are clear advantages in tailoring sanctions to meet the specific facts of each case, it is important to recognise that, from a practical point of view, sports disciplinary bodies may take advantage of such flexibility to adopt more lenient sanctions for high profile athletes.[96] Several well-known examples[97] confirm that this risk is not merely theoretical. As a result, flexibility in the setting of sanctions does not always lead to equal treatment and certainly is no panacea. Moreover, a flexible approach to sanctions enables sports disciplinary bodies to take into account a wide range of factors and circumstances, including those completely at odds with the very purpose of any anti-doping regulation. For example, in an arbitral award recently delivered under the auspices of the *Camera di Conciliazione e di Arbitrato* established by the Italian NOC, the Panel reduced a two-year suspension in reliance, *inter alia*, on the following factors:

> "The fault must always be regarded in close relation with the personality of the subject and with the environment in which he lives and acts. It is undeniable that nowadays, the athletes are under *heavy pressure by the sports clubs, sponsors and media*, 'to go beyond their own limits', if they want to keep their job. [. . .] *doping has unfortunately become an habitual practice in a society encouraging the spirit of competition awarding recognition only to the winners.*"[98]

These practical problems demonstrate that, if some flexibility is required in order to comply with the principle that the sanction must be proportionate with the offence, the scope of this flexibility must be carefully defined and limited. To this end, we recommend that the only possible basis for exercising flexibility in the setting of sanctions should be the existence of fault or negligence, or lack thereof, on the part of the athlete.

Finally, it should also be borne in mind that the Code affords some flexibility in respect of two specific situations. First, regarding specifically "substances which are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents", Art.10.3 provides for a specific

94. *Krabbe v IAAF*, Decision of the LG Munich of May 17, 1995, SpuRt 1995, pp.161, 168.

95. CAS 93/109 *Fédération Française de Triathlon (FFTri) and International Triathlon Union (ITU)*, Advisory Opinion of August 31, 1994, *CAS Digest I*, pp.457 and 467 (English translation), 471.

96. See also Houlihan (n.63, above, 2nd ser.), p.215 according to whom "[I]t is much more likely that some federations, especially those faced by rich and litigious clubs, leagues or individual athletes, are using their discretion to disguise that they have been successfully intimidated".

97. See for instance the well-known case of the Cuban High jumper Javier Sotomayor, in which the IAAF Council decided to reintegrate him (in concomitance with the beginning of the Sydney Olympics) on the basis that *"a great athlete who had a unique record of achievement, and whose behavior for more than 15 years in athletic had been unblemished. The Council felt that Giving Sotomayor the possibility to close his career at a major competition would help him."* (*IAAF News*, No.44, August 2000, p.4, available at *www.iaaf.org/News/newsletter*). Little wonder that this decision was sharply criticized, not only by the other athletes but also by several National Federations, not to speak of the press (see for instance, *Scandinavian Protest Doping Ruling*, in The *New York Times* of August 20, 2000; M. Penner, *Sotomayor Takes Silver After Cocaine Controversy*, in The *Los Angeles Times* of September 24, 2000; *Fragwürdige Flurbereinigung*, in *Neue Zürcher Zeitung* of August 4, 2000, p.41). Similar negative reactions may be found among legal commentators (see for instance Baddeley (n.73, above, 1 ser.), pp.18–19.

98. CCAS *De Angelis et Martinez Tomieto v Federazione Italiana Rugby (FIR)*, Award of February 7, 2002, available at *www.coni.it/coni/docarbitrato/lodo1_7_2.doc*, pp.11–12 (free summary of the original Italian wording *"La responsabilità deve sempre essere considerata in stretto rapporto con la personalità del soggetto e con l'ambiente in cui lo stesso vive e opera. E' innegabile che oggi gli atleti siano pesantemente condizionati dalle società sportive, dagli sponsor e dai "media" che impongono di superare "i propri limiti" pena talvolta, specialmente negli sport minori, la perdita del lavoro. L'uso di sostanze o metodi atti a migliorare la forma è, purtroppo, divenuta pratica corrente in una società che incoraggia lo spirito di competizione e che tributa applausi solo a coloro che vincono. E' questa senza dubbio una società portatrice di valori illusori, come l'imperativo categorico del successo ad ogni costo, che ripropone nell'attività agonistica i distorti miti e riti del successo. Lo sport usato a fini di profitto, il moltiplicarsi eccessivo delle gare che finisce per superare i limiti normali dell'essere umano, sono alcune delle lacune dell'ambiente sociale degli sportivi, indotti ad usare qualsiasi mezzo per raggiungere il successo, senza preoccuparsi di alterare i risultati [. . .] Alla luce di quanto esposto, l'Arbitro Unico ritiene sussistere l'elemento soggettivo con caratteristiche di speciale tenuità e pertanto non ritiene adeguata la sanzione comminata; nel determinarla, infatti, non si è tenuto conto delle innumerevoli pressioni e del contesto socio-culturale in cui gli atleti hanno operato."*).

regime of sanctions. Hence, this provision (re)introduces the nature of the substance and the intent of the athlete as relevant circumstances in order to determine the gravity of the sanction. Moreover, in the event of a first offence under this specific regime, the adjudicatory body enjoys further discretion in assessing the sanction (*i.e.* from "a minimum [of] a warning and reprimand and no period of Ineligibility from future Events.. [to] a maximum [of] one year Ineligibility". Secondly, Art.10.5.3. provides more flexibility to the adjudication in specific cases "where the athlete has provided substantial assistance to the Anti-Doping Organization" in discovering or establishing anti-doping rule violations by athlete support personnel.[99]

Conclusion

For all of the above reasons, the Opinion reached the conclusion that Art.10.2, 10.3 and 10.5 pursues a legitimate aim and satisfies the requirement of proportionality. Accordingly, even if under specific circumstances the regime established by Art.10 may violate the equal treatment principle, the restriction incurred by the single athlete is justifiable. In short, Art.10.2, 10.3 and 10.5 comply with fundamental rights and general legal principles.

General conclusion and outlook

In 1982, François Rigaux wrote that:

> "in order for the fundamental rights of the athletes to be better complied with, it is required that state authorities tighten their control, which today differs from state to state, but is generally insufficient, and that they understand such control as an obligation, the violation of which could justify a condemnation by the European Court of Human Rights".[1]

WADA's effort might be seen by some as the latest attempt of the sports world to immunise sports from state control. The situation is more complex, however. The adoption of a Code, which complies with the fundamental rights of athletes, was only made possible thanks to a broad consultation of all stakeholders. Indeed, as a result of such consultation, the concerns about fundamental rights were duly taken into account in the course of the drafting process. This represents a major step forward as opposed to an approach that ignores fundamental rights requirements and, thus, leaves the enforcement of such rights to the courts. In that situation, the only rights protected are those of the individual athlete who has access to a court willing to interfere in sports matters and who can afford legal proceedings. By contrast, all the athletes will benefit from the fundamental rights protection incorporated into the Code.

The impact of a legal provision normally does not become apparent until the provision is applied. Hence, the bodies adjudicating anti-doping disputes will be pivotal in implementing the human rights concerns that inspired the drafters of the Code. In this respect, the CAS will have to play the most important part, as it will have exclusive jurisdiction to decide doping disputes involving "international level athletes".[2] As a private adjudicatory body, CAS is not under a direct obligation to enforce international and national fundamental rights instruments. As illustrated in this article, CAS Panels have proven to be responsive to fundamental rights issues, but often felt restrained by the applicable sports regulations.[3] It is anticipated that the Code would give CAS Panels a stronger basis for the development of consistent case law enforcing the fight against doping without jeopardising the fundamental rights of the athletes.

99. Under the heading "Athlete's Substantial Assistance in Discovering or Establishing Anti-Doping Rule Violations by Athlete Support Personnel and Others", Art.10.5.3. provides the following: "An Anti-Doping Organization may also reduce the period of Ineligibility in an individual case where the Athlete has provided substantial assistance to the Anti-Doping Organization which results in the Anti-Doping Organization discovering or establishing an anti-doping rule violation by another Person involving Possession under Article 2.6.2 (Possession by Athlete Support Personnel), Article 2.7 (Trafficking), or Article 2.8 (administration to an Athlete). The reduced period of Ineligibility may not, however, be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years"

1. Rigaux (n.26, above, 1st ser.), p.312 (free translation of the French original text: *"Pour que les droits fondamentaux des sportifs soient mieux respectés il faut que les organes de l'Etat intensifient un contrôle, aujourd'hui variable selon les pays mais dans la plupart des cas insuffisant, et qu'ils le conçoivent comme une obligation dont la méconnaissance pourrait justifier une condamnation par la Cour Européenne des droits de l'homme."*).
2. See Art.13.2.1 of the Code.
3. See for instance McLaren (n.14, above, 2nd ser.), pp.32–33.