

CAS 2005/C/841 CONI

ADVISORY OPINION

Pronounced by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

President: Mr François Carrard, Attorney-at-law, Lausanne, Switzerland

Members: Mr Massimo Coccia, Professor and Attorney-at-law, Rome, Italy
Mr Luigi Fumagalli, Professor and Attorney-at-law, Milan, Italy

upon request by

COMITATO OLIMPICO NAZIONALE ITALIANO (CONI), Rome, Italy
Represented by its President, Mr Giovanni Petrucci

* * *

I. INTRODUCTION

1. The *Comitato Olimpico Nazionale Italiano* (“CONI”) is the National Olympic Committee (“NOC”) of Italy, regulated under Italian law by Legislative Decree No. 242 of 1999 (as subsequently amended), acting also as the Italian confederation of national sports federations and overseeing as an independent State agency the whole of Italian sports.
2. The *Federazione Italiana Giuoco Calcio* (“FIGC”) is the Italian football federation and is affiliated to the *Fédération Internationale de Football Association* (“FIFA”). FIFA is the worldwide governing body of football.

II. THE BACKGROUND TO THE REQUEST FOR AN ADVISORY OPINION

3. On 26 November 2004 an Italian criminal court (the “*Tribunale di Torino*”) issued a judgment sentencing the team’s doctor of an Italian professional football club to a term of imprisonment (whose execution was however suspended), for the crime of fraud in sports competition (the “Judgment”).
4. Police investigation, in fact, found that the team’s doctor controlled, at the club’s premises, a large amount of pharmaceutical products, including products containing substances prohibited under anti-doping regulations, and/or subject to restrictions for the purchase and use. As a result, the *Tribunale di Torino*, relying in particular on the evidence given by Court appointed experts, came to the conclusion that in the period 1994-1998 a large quantity of pharmaceutical substances and medical treatments, both included and not included in the list of prohibited substances, had been administered to club’s players not therapeutically but for the specific purpose of enhancing their sport performances.
5. The Judgment is not final and is subject to appeal according to Italian law.

III. PROCEDURE

6. On 7 March 2005, CONI submitted to CAS the request for an advisory opinion pursuant to Article R60 of the Code of Sport-related Arbitration (the “CAS Code”).
7. More specifically, the request for an advisory opinion was made by CONI to know if, based on the sport law in force in the period between 1994 and 1998 or nowadays,
 - (i) “*the use of pharmaceutical substances not expressly prohibited by Sport Law, can be disciplinary sanctioned*”; and
 - (ii) “*under which methods of investigation the use of pharmaceutical substances supplied to athletes and not included in the prohibited list can be assessed by sport authorities*”.

8. CONI specified also that the CAS opinion was requested “*considering also a specific request of FIGC*” and that it was seeking CAS opinion “*in order to know if and under which circumstances pharmaceutical and medical treatments which are not prohibited by national or international sport rules, can influence the regularity of sport competition*”.
9. In accordance with Article R61 of the CAS Code, the CAS President appointed the following Panel: Mr François Carrard (President), Mr Massimo Coccia and Mr Luigi Fumagalli. By letter dated 18 March 2005 he also reformulated and forwarded to the Panel the following questions:
 - “1. *Can the use of pharmaceutical substances which are not expressly prohibited by sports law be sanctioned by disciplinary measures?*
 2. *By which methods of investigation the use of pharmaceutical substances supplied to athletes and which are not included in the prohibited list can be assessed by sports authorities ?”*
10. On 24 March 2005 the President of the Panel, on behalf of the Panel, advised CONI that before rendering its opinion, the Panel was requesting some additional information, and namely:
 - “1. *Copies of the judgement referred to in your request of March 7, 2005.*
 2. *Copies of the “specific request of FIGC” – Italian Football Association – referred to in page 2 of your request of March 7, 2005;*
 3. *Texts of the Italian sports regulations, in particular disciplinary, medical and anti-doping regulations, applicable to football during the entire period 1994-1998 (including the relevant lists of prohibited substances and methods).*
 4. *Texts of the applicable FIFA regulations, in particular disciplinary, medical and anti-doping regulations, applicable during the same entire period 1994-1998 (including the relevant lists of prohibited substances and methods).*
 5. *The report which, according to recent press news, was issued by the “Commissione Scientifica Antidoping” of CONI, or by his President Prof. Luigi Frati, with regard to some the issues raised by the judgment referred to in your request of March 7, 2005”.*
11. In addition, with reference to the second question asked from the Panel, and which relates to the methods of investigation, the President of the Panel stated that

“... the Panel would like to know whether the CONI has any objection to the Panel considering both the substances which are not included and/or included in the prohibited list”.

12. Within the deadline indicated, CONI filed with the Panel the documents requested. Then, as to point 2 of the Panel's letter dated 24 March 2005, CONI specified that FIGC had not submitted a request in writing, and, as to the Panel's request for clarification (para. 11 above), CONI did not raise any objection to the Panel considering all kinds of substances, both included and not included in the prohibited list.

IV. JURISDICTION OF CAS TO ISSUE THE REQUESTED OPINION

13. Article R60 of the CAS Code so provides:

"The IOC, the IFs, the NOCs, WADA, the associations recognized by the IOC and the OCOGs, may request an advisory opinion from the CAS about any legal issue with respect to the practice or development of sport or any activity related to sport. The request for an opinion shall be addressed to the CAS and accompanied by any document likely to assist the Panel entrusted with giving the opinion".

14. It follows that CONI, being a NOC, has the right to request an advisory opinion on any issue of sports law and the CAS has jurisdiction to answer to such request.
15. In the exercise of the advisory jurisdiction conferred to CAS pursuant to Article R60 of the CAS Code, the Panel shall consider the sports law issues raised by the CONI's request as well as any relevant and closely related issue. In any event, as per the express indication of CONI, the Panel may not and shall not give any evaluation on the merits of the case decided by the Judgment and, in particular, on the facts which the Judgment has ascertained.
16. In any case, according to Article R62 of the CAS Code, the advisory opinion does not constitute a binding arbitral award.

V. QUESTION NO. 1 – *Can the use of pharmaceutical substances which are not expressly prohibited by sports law be sanctioned by disciplinary measures ?*

A. Introduction

17. In sport, like in all other areas of society, any disciplinary measure or sanction requires a legal basis. Sport is governed by State law and sports law. Like any other human and social activity, there cannot be any sports activity outside the framework of State law. Depending upon the various political and legal systems in the world, States grant to sports organizations and governing bodies a certain degree of autonomy and allow them to establish, within the framework of State law, their own sports laws and rules. As far as disciplinary measures and sanctions are concerned, they may have their legal basis directly in State law wherever the State intends to directly govern and control sport. However, currently, in most States, disciplinary measures and sanctions are based on sports laws issued by sports organizations, the activities of which are themselves based on or authorized by State laws.

18. The first question submitted to the Panel deals with disciplinary measures and sanctions relating to the use of pharmaceutical substances susceptible of enhancing sports performance. To answer that question the legal basis for the evaluation of the use of pharmaceutical substances susceptible of enhancing sports performance has to be identified and examined. The identification of the relevant set of rules is important for the definition itself of the disciplinary consequences (if any) of the use of pharmaceutical substances susceptible of enhancing sports performance or influencing the regularity of sports competition. And in order to examine the legal basis of disciplinary sanctions relating to such an area, one must first determine in which territory any such sanction may be applicable and in which sport. Disciplinary sanctions may have a local, regional, national or international scope. They may be valid for one specific sport, which is the most frequent situation, or for several or all competition sports (e.g. disqualification from the Olympic Games).
19. For the purposes of this advisory opinion two different levels of sporting regulations can be identified, taking in mind the background of the request of CONI: the international and the Italian domestic level.

B. The International Sporting Regulations

i. In general

20. At the international level, the problem of the disciplinary consequences (if any) of the use of pharmaceutical substances susceptible of enhancing sports performance is dealt with primarily in the perspective of the fight against doping in sport.
21. During many years, the efforts by sports organizations and States in order to deal with problems of doping were characterized by a lack of coordination and determination. It was commonly accepted that for each sport, national and international governing bodies could have their own rules, the standards of which could be very different. Furthermore, the level of interest and intervention of the State was also extremely different. There were States in which doping practices were encouraged and systematically conducted under the control of State sports organizations. On the other hand, there were other States in which no consideration at all was being paid to such problems. More recently, an overall effort of coordination and harmonization has developed, coinciding with a much higher degree of awareness of the seriousness of the problems linked with doping.
22. For a long period of time, the standards and norms applicable to sanctions for doping offences varied substantially from country to country and from sport to sport. A serious effort resulted into the adoption, by the Council of Europe, of the Convention against Doping of 16 November 1989 (the "Anti-Doping Convention"). On 18 June 1995, the IOC Session adopted the IOC Medical Code, which was in force for most of the Olympic Movement until 31 December 1999. During that period, a number of international federations and national governing bodies kept their own anti-doping rules. Unification was not achieved. From 1st January 2000 until July 2003, the Olympic Movement Anti-Doping Code (the "OMAC") was in force. It achieved a further step towards harmonisation and unification. In March 2003, the World Anti-Doping Code was adopted at the Copenhagen Conference.

ii. The Anti-Doping Convention

23. The Anti-Doping Convention is currently in force in the relation between 46 Contracting States, among which Italy and Switzerland. It was ratified by Italy on 12 February 1996, pursuant to Law No. 522 of 29 November 1995, and entered into force for Italy on 1 April 1996, becoming part of the Italian legislation and thus fully binding within the Italian legal system. With the Anti-Doping Convention, the Member States to the Council of Europe, “*concerned by the growing use of doping agents and methods by sportsmen and sportswomen throughout sport and the consequences thereof for the health of participants and the future of sport*”, intended “*to take further and stronger co-operative action aimed at the reduction and eventual elimination of doping in sport*”.
24. More specifically, the Anti-Doping Convention defines the concept of “*doping in sport*” as “*the administration to sportsmen or sportswomen, or the use by them, of pharmacological classes of doping agents or doping methods*”, and indicates the “*pharmacological classes of doping agents or doping methods*” as meaning “*those classes of doping agents or doping methods banned by the relevant international sports organizations and appearing in list*” of prohibited substances attached to the Anti-Doping Convention or approved by the monitoring group referred to under the same Anti-Doping Convention (Article 2).
25. The Anti-Doping Convention also contains the following relevant provisions:

Article 4.1 “*The Parties shall adopt where appropriate legislation, regulations or administrative measures to restrict the availability (including provisions to control movement, possession, importation, distribution and sale) as well as the use in sport of banned doping agents and doping methods and in particular anabolic steroids*”.

Article 7 “1. *The Parties undertake to encourage their sports organisations and through them the international sports organisations to formulate and apply all appropriate measures, falling within their competence, against doping in sport.*

2. *To this end, they shall encourage their sports organisations to clarify and harmonise their respective rights, obligations and duties, in particular by harmonising their:*

- a *anti-doping regulations on the basis of the regulations agreed by the relevant international sports organisations;*
- b *lists of banned pharmacological classes of doping agents and banned doping methods on the basis of the lists agreed by the relevant international sports organisations;*
- c *doping control procedures;*
- d *disciplinary procedures, applying agreed 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;
 - e procedures for the imposition of effective penalties for officials, doctors, veterinary doctors, coaches, physiotherapists and other officials or accessories associated with infringements of the anti-doping regulations by sportsmen and sportswomen;
 - f procedures for the mutual recognition of suspensions and other penalties imposed by other sports organisations in the same or other countries.
3. Moreover, the Parties shall encourage their sports organisations:
- a to introduce, on an effective scale, doping controls not only at, but also without advance warning at any appropriate time outside, competitions, such controls to be conducted in a way which is equitable for all sportsmen and sportswomen and which include testing and retesting of persons selected, where appropriate, on a random basis;
 - b to negotiate agreements with sports organisations of other countries permitting a sportsman or sportswoman training in another country to be tested by a duly authorised doping control team of that country;
 - c to clarify and harmonise regulations on eligibility to take part in sports events which will include anti-doping criteria;
 - d to promote active participation by sportsmen and sportswomen themselves in the anti-doping work of international sports organisations;
 - e to make full and efficient use of the facilities available for doping analysis at the laboratories provided for by Article 5, both during and outside sports competitions;
 - f to study scientific training methods and to devise guidelines to protect sportsmen and sportswomen of all ages appropriate for each sport".

iii. The IOC Medical Code

26. The IOC Medical Code was adopted by the IOC pursuant to Rule 48 of the Olympic Charter then in force, following an agreement signed in Lausanne on 13 January 2004 between the IOC and other constituents of the Olympic Movement concerning the prevention and the fight against doping in sport, “*in furtherance of its mission ... to ... lead ... the fight against doping*”.
27. The IOC Medical Code applied, pursuant to its Article II of Chapter I,
“... to all athletes, coaches, trainers, officials and medical and para-medical personnel working with or treating athletes participating in or preparing for sports competitions of the Olympic Games, those competitions to which the IOC grants its patronage or support and, in a general way, to all competitions contested in the framework of the Olympic Movement, in particular, those organized under the authority, whether direct or delegated, of an international federation or national Olympic committee recognized by the IOC”.

28. Under the IOC Medical Code, “*doping is prohibited*” (Article I of Chapter I). More exactly, as specified in Article III of Chapter I:
“Use of, counselling of the use of, permitting the use of or condoning the use of any substance or method in the IOC Medical Code is prohibited. Sanctions are applicable in the event of any breach of the provisions of the IOC Medical Code”.
29. Pursuant to Chapter II of the IOC Medical Code “*doping consists of: 1. the administration of substances belonging to prohibited classes of pharmacological agents, and/or 2. the use of various prohibited methods*” described in the same Chapter of the IOC Medical Code.

iv. The Olympic Movement Anti-Doping Code (“OMAC”)

30. The OMAC entered into force on 1 January 2000, was applicable to the Olympic Games, the various championships and all competitions under the supervision or the patronage of the IOC and to all sports practised within the context of the Olympic Movement, and stressed, in its Chapter II, Article 1, that
“1. Doping contravenes the fundamental principles of Olympism and sports and medical ethics.
2. Doping is forbidden.
3. Recommending, proposing, authorizing, condoning or facilitating the use of any substance or method covered by the definition of doping or trafficking therein is also forbidden”.
31. Doping was defined as follows (Chapter II, Article 2):
“1. the use of an expedient (substance or method) which is potentially harmful to the athlete’s health and/or capable of enhancing their performance, or

2. *the presence in the athlete's body of a Prohibited Substance or evidence of the use thereof or evidence of the use of a Prohibited Method'.*
32. Pursuant to the OMAC, “*Prohibited Substance*” and “*Prohibited Method*” meant any substance or method so described in the OMAC, on the basis of the list of Prohibited Substances and Prohibited Methods contained in the OMAC itself; and “*use*” meant “*the application, ingestion, injection, consumption by any means whatsoever of any Prohibited Substance or Prohibited Method. Use includes counselling the use of, permitting the use of or condoning the use of any Prohibited Substance or Prohibited Method*”.
33. It is to be noted that the OMAC sanctioned, in addition to doping (as strictly defined), *inter alia*, also the “*refusal to undergo any test contemplated*” in the OMAC, “*doping for which responsibility is imputable to an official or to the athlete's entourage*”, and “*complicity or other forms of involvement in an act of doping by members of a medical, pharmaceutical or related profession*” (Chapter II, Article 3.2), as well as “*trafficking in Prohibited Substances*” (Chapter II, Article 3.6), where “*trafficking*” was to be understood “*to occur when a person, without having expressly received prior authorization from the competent body, manufactures, extracts, transforms, prepares, stores, expedites, transports, imports, exports, transits, offers subject to payment or free of charge, distributes, sells, exchanges, undertakes the brokerage of, obtains in any form, prescribes, commercializes, makes over, accepts, possesses, holds, buys or acquires in any manner prohibited doping substances; takes any measures to this end, finances such substances or serves as an intermediary for their financing, provokes in any way the consumption or use of such substances, or establishes means of procuring or consuming such substances; is party to Prohibited Methods*”.
- v. The World Anti-Doping Code
34. Currently, and since March 2003, the most universal and updated norms and standards relating to measures and sanctions concerning doping offences are to be found in the World Anti-Doping Code (hereafter the “WADC”) which was elaborated within the framework of the World Anti-Doping Agency (“WADA”), adopted at the Copenhagen Conference in March 2003 and approved by the IOC Session in July 2003. The importance of the WADC results in particular from the fact that the WADA is an original international organization, which is characterized by an equal sharing and participation of governments and inter-governmental organizations on one hand, the Olympic and sports Movement on the other hand. WADA is unique in that it gathers on equal footing States and private organizations. The WADC is also an original and unique piece of international legislation in that it reflects the intents of both public and private sectors in sport.
35. Regardless of its actual binding force and enforceability, the WADC has to be considered as the most accurate recent source of guidance in order to assess the conditions under which measures and sanctions can be passed regarding doping offences.

36. According to the introduction of the WADC (see the WADC as published by WADA, March 2003), the purposes of the World Anti-Doping Program and of the WADC, are in particular “*to protect the athletes’ fundamental right to participate in doping-free sport and thus promoting health, fairness and equality for athletes worldwide ...*” (see WADC, page 1). The WADC is characterized as “*the fundamental and universal document upon which the World Anti-Doping Program in sport is based. The purpose of the Code is to advance the Anti-Doping effort through universal harmonization of core anti-doping elements. It is intended to be specific enough to achieve complete harmonization on issues where uniformity is required, yet general enough in other areas to permit flexibility on how agreed upon anti-doping principles are implemented*” (see WADC, page 1).
37. The fundamental rationale for the WADC is described as follows (see WADC, page 3, introduction):

“Anti-Doping Programs seek 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 too. The spirit of sport is the celebration of the human spirit, body and mind, and is characterized by the following values :

- *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.*
- *Community and solidarity.*

Doping is fundamentally contrary to the spirit of sport”.

This rationale clearly defines the overall principle which is the basis for sanctioning offences relating to doping.

38. Part 1 of the WADC sets forth specific anti-doping rules and principles that are to be followed by organizations responsible for adopting, implementing or enforcing anti-doping rules within their authority, such as, in particular, international federations and national anti-doping organizations. The WADC does not replace or eliminate the need for comprehensive anti-doping rules adopted by any international or national anti-doping organization. However, the WADC does include some provisions which must be incorporated essentially *verbatim* by each anti-doping organization in its own rules; other provisions of the WADC establish mandatory guiding principles that allow flexibility in the formulation of rules (see WADC, introduction, page 6).

39. According to the WADC, its following articles, as applicable to the scope of anti-doping activity which any anti-doping organization performs, must be incorporated into the rules of such organization without any substantive changes (see WADC, introduction, pages 6 and 7) :
- Article 1 (definition of doping).
 - Article 2 (anti-doping rule violations).
 - Article 3 (proof of doping).
 - Article 10 (sanctions on individuals)
 - Article 11 (consequences to teams)
 - Article 13 (appeals, with the exception of Article 13.2.2)
 - Article 17 (statute of limitations).
40. According to the introduction to the WADC (see WADC, page 7), anti-doping rules, like competition rules, are sport rules governing conditions under which sport is played. Athletes accept these rules as a condition of participation. Anti-doping rules are not intended to be subject to or limited by requirements and legal standards applicable to criminal proceedings or employment matters. The policies and minimum standards set forth in the WADC represent the consensus of a broad spectrum of stakeholders with an interest in fair sport and should be respected by all courts and adjudicating bodies.
41. According to Article 1 of the WADC, doping is defined as "*the occurrence of one or more of the anti-doping rule violations set forth in article 2.1 through article 2.8 of the Code*". Article 2 of the WADC defines anti-doping rule violations. In short, these are the following :
- Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Specimen.
 - Use or Attempted Use of a Prohibited Substance or a Prohibited Method.
 - Refusing, or failing without compelling justification, to submit to Sample collection after notification or otherwise evading Sample collection.
 - Violation of applicable requirements regarding Athlete availability for out-of-competition testing.
 - Tampering or Attempting to Tamper with any part of Doping Control.
 - Possession of Prohibited Substances and Methods (by an Athlete or by Athlete Support Personnel, if not pursuant to acceptable justification).
 - Trafficking in any Prohibited Substance or Prohibited Method.
 - Administration or Attempted administration of a Prohibited Substance or Prohibited Method to any Athlete, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any Attempted violation.
42. The WADC gives the following definition of possession (see WADC, page 76) :
- "The actual, physical possession, or the constructive possession (which shall be found only if the Person has exclusive control over the Prohibited Substance/Method or the premises in which a Prohibited Substance/Method exists); provided, however, that if the Person does not have exclusive control over the Prohibited Substance/Method or the premises in which a Prohibited Substance/Method exists, constructive possession shall only be found if the Person knew about the presence of the Prohibited*

Substance/Method and intended to exercise control over it. Provided, however, there shall be no anti-doping rule violation based solely on possession if, prior to receiving notification of any kind that the Person has committed an anti-doping rule violation, the Person has taken concrete action demonstrating that the Person no longer intends to have Possession and has renounced the Person's previous Possession.” [...]

As for Trafficking, the definition given by the WADC is as follows (see WADC, page 78) :

[...]“To sell, give, administer, transport, send, deliver or distribute a Prohibited Substance or Prohibited Method to an Athlete either directly or through one or more third parties, but excluding the sale or distribution (by medical personnel or by Persons other than an Athlete’s Support Personnel) of a Prohibited Substance for genuine and legal therapeutic purposes.”

43. Pursuant to the WADC, Prohibited Methods and Prohibited Substances are methods or substances described as such in the Prohibited List published and revised by WADA. Pursuant to Article 4.2 of the WADC, in fact, “*the Prohibited List shall identify those Prohibited Substances and Prohibited Methods which are prohibited as doping at all times (both In-Competition and Out-of-Competition) because of their potential to enhance performance in future Competitions or their masking potential and those substances and methods which are prohibited In-Competition only*”.
44. The system of sanctions instituted by the WADC is clearly based on the existence of anti-doping rule violations, as defined and set forth in Article 2 of the WADC. The WADC does not provide for any sanctions for other possible forms of alleged offences. In other words, based on the WADC, which constitutes more and more a fundamental “lex sportiva”, a sanction is possible if there is an anti-doping rule violation; absent any such anti-doping rule violation, the WADC does not provide for any possible sanction.
45. As to the actual enforceability in Italy of the WADC, the Panel notes that as of 7 February 2005, one hundred and sixty-three governments have signed the declaration of WADC Acceptance, including Italy. As to the sports organizations which have expressly accepted the WADC, all international federations recognized by the International Olympic Committee, including FIFA, have accepted the WADC. Thus, even if the WADC does not yet constitute directly applicable national legislation, the principles and rules set forth by the WADC are to be considered as essential for any sports organization and anti-doping organization in the world facing a matter dealing with possible anti-doping rule violations.

C. The Domestic Sporting Regulations

46. In the same way as doping regulations enacted at the international level, Italian domestic anti-doping rules, enacted by CONI and FIGC, also evolved over the years:
 - i. with respect to CONI, rules were approved on 4 February 1994 (setting forth the principles to be incorporated in the statutes of the national federations, among which FIGC, with respect to anti-doping enforcement), on 4 May 1995, on 30

April 1997 and thereafter, up to the regulations approved on 21 October 2003 and on 12 October 2004, which incorporated in Italian sports law the provisions of the WADC. From time to time CONI adopted and transmitted to the national federations lists of Prohibited Substances, on the basis of the indications coming from the IOC (within the framework of the IOC Medical Code and the OMAC) and from the WADA (within the framework of the WADC);

- ii. with respect to FIGC, anti-doping rules were adopted, on the basis of the CONI directives, and incorporated in the internal disciplinary codes (“*Codice di giustizia sportiva*”) in force from time to time and published in the Federal Rules Book (“*Carte Federali*”) published in 1992, 1995 and thereafter. In the same way, the lists of Prohibited Substances transmitted by CONI were approved from year to year.
47. Notwithstanding the evolution of Italian sports regulations, of CONI and FIGC, there was a substantial consistency in the definition of “doping”, even before the incorporation in Italian sporting rules of the provisions of the WADC. According to the CONI and FIGC rules in force over the years (in particular, Article 1.2 of the principles to be incorporated in the statutes of the national federations with respect to anti-doping enforcement, adopted by CONI on 4 February 1994), doping was defined as

“... l’uso di sostanze e metodi vietati dai regolamenti sportivi nazionali ed internazionali che producono l’effetto di modificare la condizione fisica o psichica dell’atleta allo scopo di migliorarne la prestazione con rischio della salute” (“... the use of substances and methods prohibited by national and international sports regulations producing the effect of modifying the physical or psychical condition of the athlete with a view to improving performances with health risk”, Panel’s translation).

48. The rules currently in force literally reproduce the text of the WADC, also for the definition of doping and the identification of anti-doping rules infringements (see para. 41 above).
49. FIGC rules, in addition to doping regulations, indeed contain (and have always contained, at least for the period relevant to this advisory opinion)
- i. provisions concerning the medical treatment of athletes (Articles 43 and 44 of the “*Norme Organizzative Interne Federali*”, as amended from time to time); and
 - ii. provisions obliging athletes (and the other subjects of the sporting system governed by FIGC) to adopt a

“condotta conforme ai principi sportivi della lealtà, della probità e della rettitudine nonché della correttezza morale e materiale in ogni rapporto di natura agonistica, economica e sociale” (“behaviour in accordance with the sports principles of loyalty, probity and rectitude as well as of moral and material correctness in any relation of competitive, economic and social nature”, Panel’s translation),

which could also be relevant to evaluate, in a perspective other than doping, the use of pharmaceutical substances which are not expressly prohibited under anti-doping rules.

D. Evaluation of the Panel

50. As mentioned, in Question No. 1 it is asked to the Panel whether the use of pharmaceutical substances which are not expressly prohibited by sports law can be sanctioned by disciplinary measures. In this connection, the Panel notes that the answer to such Question does not change if the international regulations or the Italian domestic regulations are considered.
51. The succession in time of anti-doping regulations poses the problem of the identification of the substantive rule which is relevant for the answer to such question. In this respect the Panel confirms the principle that "*tempus regit actum*": in order to determine whether an act constitutes an anti-doping rule infringement, it has to be evaluated on the basis of the law in force at the time it was committed. In other words, new regulations do not apply retroactively to facts that occurred prior to their entry into force, but only for the future. As stated in a CAS precedent (CAS 2000/A/274, *S. v/ FINA*, award dated 19 October 2000, *Digest of CAS Awards II (1998-2000)*, p. 389 at 405), in fact,

"under Swiss law the prohibition against the retroactive application of Swiss law is well established. In general, it is necessary to apply those laws, regulations or rules that were in force at the time that the facts at issue occurred ...".

The same principle is recognized in Italy pursuant to Article 11 of the Introductory Provisions to the Civil Code ("*La legge non dispone che per l'avvenire: essa non ha effetto retroattivo*").

52. The principle of non-retroactivity is however mitigated by the application of the "*lex mitior*" principle. In this respect the Panel fully agrees with the statements contained in the advisory opinion CAS 94/128 rendered on 5 January 1995, *UCI and CONI (Digest of CAS Awards (1986-1998))*, p. 477 at 491), which read (in the English translation of the pertinent portions) as follows:

"The principle whereby a criminal law applies as soon as it comes into force if it is more favourable to the accused (lex mitior) is a fundamental principle of any democratic regime. It is established, for example, by Swiss law (art. 2 para. 2 of the Penal Code) and by Italian law (art. 2 of the Penal Code). This principle applies to anti-doping regulations in view of the penal or at the very least disciplinary nature of the penalties that they allow to be imposed. By virtue of this principle, the body responsible for setting the punishment must enable the athlete convicted of doping to benefit from the new provisions, assumed to be less severe, even when the events in question occurred before they came into force. This must be true, in the Panel's opinion, not only when the penalty has not yet been pronounced or appealed, but also when a penalty has become res judicata, provided that it has not yet been fully executed. The Panel considers that [...] the new provisions must also apply to events which have occurred before they came into force if they lead to a more favourable result for the athlete. Except in cases where the penalty pronounced is entirely executed, the penalty imposed is, depending on the case, either expunged or replaced by the penalty provided by the new provisions".

53. As a result, the Panel confirms that the possibility to sanction the use of pharmaceutical substances depends on the law in force at the time the pharmaceutical substances at issue were used, subject to the *lex mitior* principle, which could lead to the application of the law subsequently enacted, if more favourable to the accused.
54. Applying the above mentioned principles as set forth by the WADC to the subject matter of this Panel's advisory opinion, the answer to Question No. 1 will be different depending upon whether the pharmaceutical substances envisaged are prohibited in the sense of the applicable anti-doping regulation or not. In that context, the Panel notes that the existence or not of a judgement – in particular of a criminal nature – rendered by a State court is essentially irrelevant for the decision to be taken by the competent anti-doping bodies. State law is applicable as defined by the State in its sovereignty and any judgments rendered by State courts have to be enforced in all circumstances. The right for an anti-doping organization or other sports organization to pass or not a sanction is independent from the attitude of the State court.
55. The Panel notes in fact that the key issue is whether a substance can be considered as prohibited. Every set of rules examined, at the international and the domestic level (with the possible exception of the OMAC: but see below para. 57), considers doping as the presence in the body or the use or attempted use *only of a Prohibited Substance or Method* – and the same applies to other violations, such as possession, trafficking or administration – and defines the Prohibited Substance through the reference to a list. In principle a substance is prohibited if listed; if it is not listed it is not prohibited.
56. In this connection, it is however to be noted that not only substances which are “expressly” mentioned in the list are prohibited. In addition to those expressly named, all lists of Prohibited Substances define as prohibited the substances not expressly named, but which are “*related substances*” (IOC Medical Code, OMAC) or “*substances with a similar chemical structure of biological effect(s)*” (Anti-Doping Convention, WADC) to those expressly prohibited. In other word a substance is prohibited, even if not expressly mentioned, if chemically or biologically related to a Prohibited Substance. This principle has been applied in several CAS precedents. For instance, the CAS *Ad hoc* Division at the Atlanta Olympic Games (CAS OG 96/003-4, *K. and G. v/ IOC*, unreported) had to verify whether “Bromantan”, a substance not specifically named as a Prohibited Substance in the IOC Medical Code, could be considered as a stimulant, in the light of its actual chemical composition and qualities, and therefore whether it could be treated as a Prohibited Substance. More recently in CAS 2002/A/370 (*L. v/ IOC*, award of 29 November 2002, *Digest of CAS Awards III (2001-2003)*, 273), CAS 2002/A/371 (*D. v/ IOC*, award of 29 November 2002, unreported) and CAS 2002/A/400 (*M. v/ FIS*, award of 24 January 2003, *Digest of CAS Awards III (2001-2003)*, 396) it was held that “Darbepoetin”, although not specifically listed as a prohibited substance in the OMAC, was an analogue or mimetic to EPO, which was a Prohibited Substance, and that therefore it was a Prohibited Substance as well.
57. One notable exception to the above mentioned principle that a substance is prohibited if listed and not prohibited if not listed could be possibly found in the OMAC, where Chapter II, Article 2.1 defined doping as “*the use of an expedient (substance or method) which is potentially harmful to the athlete's health and/or capable of enhancing their performance*” in alternative (“or”) to “*the presence in the athlete's body of a Prohibited Substance or evidence of the use thereof or evidence of the use of a Prohibited*

Method". One could in fact argue that a doping offence could be committed through the use of a substance potentially harmful to the athlete's health and/or capable of enhancing his performance irrespective of the presence of such substance in the Prohibited List. It is to be noted however that the WADC, currently in force, does not allow such broad interpretation. As a result, the application of the "*lex mitior*" principle would in any such case imply that the use of a substance not listed (and not similar or related to a listed substance) cannot be considered as doping.

58. In the light of the foregoing, the Panel is of the opinion that the use of pharmaceutical substances which are not expressly prohibited by sports law, and which are not similar or related substances to those expressly prohibited, cannot be considered as an anti-doping rule infringement and in that respect cannot, therefore, be the object of disciplinary sanctions.
59. The Panel has noted that in its original request for opinion, the CONI sought an opinion in order to know "*if and under which circumstances pharmaceutical and medical treatment which are not prohibited by national or international sport rules can influence the regularity of sport competition*". Determining whether the use of certain substances influences or not the regularity of sport competition falls outside the scope of legal expertise. While the Panel cannot express any valid opinion on this particular point, it nevertheless wishes to point out that the system instituted by the WADC is quite consistent and does not ignore the concerns expressed by organizations such as CONI. Indeed, according to the comments to Article 4.3.2 of the WADC (see WADC, page 16), a substance shall be considered for inclusion on the prohibited list if the substance is a masking agent or meets at least two of the following three criteria:
 - It has the potential to enhance or enhances sport performance.
 - It represents a potential or actual health risk.
 - It is contrary to the spirit of sport.
60. None of the above three criteria alone is a sufficient basis for including a substance into the prohibited list. The reference to the spirit of sport in the third criterion to be applied by WADA clearly shows how the Prohibited List may be amended. The Panel recalls that a characterization and definition of the spirit of sport is given in the introduction to the WADC itself (see above, para. 37 and page 3 of the WADC). One may thus consider that the concern expressed by CONI as to the possible influence of the use of a substance on the regularity of sport competition is being addressed within the systems established by the WADC. There is flexibility as to changes and amendments to the Prohibited List (indeed, in accordance with Article 23.6 of the WADC, any sports organization should cooperate and inform immediately WADA, so that appropriate scientific evaluations be made, when it has reason to believe that a given substance or method should be added to the Prohibited List). However, the WADC only provides for sanctions for Prohibited Substances mentioned in the Prohibited List. There is no room for sanctions outside of the Prohibited List.
61. The Panel wishes to emphasize that, as far as prohibited substances and methods are concerned, the sports organizations are not only *entitled* but even *obliged* to take disciplinary action, subject to the qualifications set forth hereinafter (see below

para. 64), in order to prosecute possible anti-doping rule infringements. This is confirmed both at the international and national levels of regulation of sporting activities, which clearly show that prosecution against doping is a condition to belong and to participate in the internationally recognized sporting system and that failure to abide by and enforce anti-doping rules puts an entity outside of the Olympic Movement. The fight against doping, i.e. a practice which is “*fundamentally contrary to the spirit of sport*”, is not an option : it is a necessity and a duty.

62. On the international level, the obligation of sports organizations to take disciplinary actions to prosecute anti-doping rule infringements, as a condition for the participation in the organized sporting system, is confirmed:

- i. by provisions set forth in the Olympic Charter and notably in

Rule 23 [“*Measures and Sanction*”], under which

“In the case of any violation of ... the World Anti-Doping Code ... the measures or sanctions which may be taken by the Session, the IOC Executive Board or the disciplinary commission referred to under 2.4 below are:

1. *in the context of the Olympic Movement:*

[...]

- 1.2 *with regard to IFs:*

- a) *withdrawal from the programme of the Olympic Games of:*

- *a sport ...*
- *a discipline ...*
- *an event ...*

- b) *withdrawal of provisional recognition ...*

- c) *withdrawal of full recognition*

[...]

- 1.4 *with regard to NOCs:*

- a) *suspension ...; in such event, the IOC Executive Board determines in each case the consequences for the NOC concerned and its athletes;*

- b) *withdrawal of provisional recognition ...;*

- c) *withdrawal of full recognition ...; in such a case, the NOC forfeits all rights conferred upon it in accordance with the Olympic Charter”.*

Rule 47 [“*Sports Programme, Admission of Sports, Disciplines and Events*”], pursuant to which

“1. *To be included in the programme of the Olympic Games, an Olympic Sport must conform to the following criteria:*

[...]

1.3 *only sports that adopt and implement the World Anti-Doping Code can be included and remain in the programme of the Olympic Games”.*

ii. by provisions set forth in the WADC and notably in:

Article 20, dealing with roles and responsibilities of the entities which signed the WADC and undertook to comply with it, as follows:

“20.1 *Role and Responsibilities of the International Olympic Committee*

20.1.1 *To adopt and implement anti-doping policies and rules for the Olympic Games which conform with the Code.*

20.1.2 *To require as a condition of recognition by the International Olympic Committee, that International Federations within the Olympic Movement are compliance with the Code.*

20.1.3 *To withhold some or all Olympic funding of sport organizations that are not compliance with the Code.*

20.1.4 *To take appropriate action to discourage non-compliance with the Code as provided in Article 23.5.*

20.1.5...

[...]

20.3 *Roles and Responsibilities of International Federations:*

20.3.1 *To adopt and implement anti-doping policies and rules which conform with the Code.*

20.3.2 *To require as a condition of membership that the policies, rules and programs of National Federation are compliance with the Code.*

20.3.3 *To require all Athletes and Athlete Support Personal within their jurisdiction to recognize and be bound by anti-doping rules in conformance with the Code.*

20.3.4 *To require Athletes who are not regularly members of the International Federation or one of its member National Federations to be available for Sample collection and provide*

accurate and up-to-date whereabouts information if required by the conditions for eligibility established by the International Federation or, as applicable, the Major Event Organization.

20.3.5 *To monitor the anti-doping programs of National Federations.*

20.3.6 *To take appropriate action to discourage non-compliance with the Code as provided in Article 23.5.*

20.3.7...

20.3.8 *To withhold some or all funding to its member National Federation that are not in compliance with the Code.*

20.4 *Roles and Responsibilities of National Olympic Committees ...:*

20.4.1 *To ensure that their anti-doping policies and rules conform with the Code.*

20.4.2 *To require as a condition of membership or recognition that National Federation anti-doping polices and rules are in compliance with the applicable provisions of the Code.*

20.4.3 *The require Athletes who are not regular member of a National Federation to be available for Sample collection and provide accurate and up-to-date whereabouts information on a regular basis if required during the year before the Olympic Games as a condition of participation in the Olympic Games.*

20.4.4 *To cooperate with their National Anti-Doping Organization.*

20.4.5 *To withhold some or all funding, during any period of his or her Ineligibility to any Athlete or Athlete Support Personnel who has violated anti-doping rules.*

20.4.6 *To withhold some or all funding to its member or recognized National Federations that are not in compliance with the Code.*

20.5 *Roles and Responsibilities of National Anti-Doping Organizations.*

20.5.1 *To adopt and implement anti-doping rules and polices which conform with the Code.*

20.5.2 *To cooperate with other relevant national organizations and other Anti-Doping Organizations.*

20.5.3 *to encourage reciprocal testing between National Anti-Doping Organizations.*

20.5.4 *To promote anti-doping research".*

Article 23.5, setting forth the consequences of non-compliance with the WADC:

“Non-compliance with the Code by either the government or National Olympic Committee of a country may result in consequences with respect to Olympic Games, Paralympic Games, World Championships or the Events of Major Event Organizations as determined by the ruling body for each Event ...”.

63. With respect to Italian rules, the obligation of sports organizations to take disciplinary actions to prosecute anti-doping rule infringements is confirmed:

- i. by the rationale and spirit as well as several provisions of L. 14 December 2000 No. 376 (*“Disciplina della tutela sanitaria delle attività sportive e della lotta contro il doping”*), and chiefly by its Article 6, according to which
 - “1. *Il CONI, le federazioni sportive, le società affiliate, le associazioni sportive, gli enti di promozione sportiva pubblici e privati sono tenuti ad adeguare i loro regolamenti alle disposizioni della presente legge, prevedendo in particolare le sanzioni e le procedure disciplinari nei confronti dei tesserati in caso di doping o di rifiuto di sottoporsi ai controlli.*
 - 2. *Le federazioni sportive nazionali, nell’ambito dell’autonomia riconosciuta loro dalla legge, possono stabilire sanzioni disciplinari per la somministrazione o l’assunzione di farmaci o di sostanze biologicamente o farmacologicamente attive e per l’adozione o sottoposizione a pratiche mediche non giustificate da condizioni patologiche ed idonee a modificare le condizioni psicofisiche o biologiche dell’organismo al fine di alterare le prestazioni agonistiche degli atleti, anche nel caso in cui questi non siano ripartiti nelle classi di cui all’articolo 2, comma 1, a condizione che tali farmaci, sostanze o pratiche siano considerati dopanti nell’ambito dell’ordinamento internazionale vigente.*
 - 3. *Gli enti di cui al comma 1 sono altresì tenuti a predisporre tutti gli atti necessari per il rispetto delle norme di tutela della salute di cui alla presente legge.*

(“1. CONI, sports federations, affiliated clubs, sporting associations and public and private organizations for sports promotion shall amend their regulations to render them consistent with the provisions of this law, in particular by providing sanctions and disciplinary proceedings against any licensed person in case of doping or refusal to submit to testing.

2. National sports federations, within the autonomy recognized by the law, may provide disciplinary sanctions for the administering or use of drugs or of biologically or pharmacologically active substances and for the adoption of, or participation in, medical practices which are not justified by pathological conditions and apt to modify the psycho-physical or biological conditions of the organism with a view to altering the competitive performances of the athletes, even if not included in the classes mentioned under Article 2, Paragraph 1, on condition that such drugs, substances or practices are regarded as doping by the international regulations in force.

3. The entities mentioned under Paragraph 1 shall also take all necessary action in order to comply with the rules governing the protection of health set forth in this law”, (Panel’s translation).)

- ii. by Article 2.1 of Legislative Decree 23 July 1999 No. 242 (governing CONI), as subsequently amended, under which

“Il CONI [...] cura inoltre, nell’ambito dell’ordinamento sportivo, anche d’intesa con la Commissione per la vigilanza ed il controllo sul doping e per la tutela della salute nelle attività sportive, istituita ai sensi dell’articolo 3, della legge 14 dicembre 2000, n. 376, l’adozione di misure di prevenzione e repressione dell’uso di sostanze che alterano le naturali prestazioni fisiche degli atleti nelle attività sportive ...” (“CONI [...] is moreover responsible, within the framework of the sports legal system, also in agreement with the Commission for the monitoring and control of doping and for the safeguard of health in sports activities, established by art. 3 of Law no. 376 of 14 December 376, for the adoption of measures of prevention and punishment of the use of substances altering the natural physical performances of athletes in sporting activities”, Panel’s translation).

- iii. by the CONI Statute adopted on 23 March 2004, and chiefly by

Article 2.2: *“Il CONI detta i principi fondamentali per la disciplina delle attività sportive e per la tutela della salute degli atleti, anche al fine di garantire il regolare e corretto svolgimento delle gare, delle competizioni e dei campionati”* (“CONI shall set forth the basic principles for the discipline of sporting activities, and for the safeguarding of the health of athletes, also with the aim of guaranteeing the regular and correct conduct of sporting contests, competitions, and championships”, Panel’s translation);

Article 2.7: *“Il CONI detta principi per prevenire e reprimere l’uso di sostanze o di metodi che alterano le naturali prestazioni fisiche degli atleti nelle attività agonistico-sportive”* (“CONI shall set forth the principles to prevent and repress the use of substances or methods altering the natural physical performances of athletes in competitive sporting activities”, Panel’s translation);

Article 3.3: *“Il CONI previene e reprime l’uso di sostanze o metodi che alterano le naturali prestazioni fisiche degli atleti nelle attività agonistico-sportive, anche in collaborazione con le autorità preposte alla vigilanza e al controllo sul doping e per la tutela della salute nelle attività sportive”* (“CONI shall prevent and punish the use of substances or methods altering the natural physical performances of athletes in their competitive sporting activities, also in cooperation with the authorities empowered to monitor and control doping and for the safeguard of health in sports activities”, Panel’s translation).

Article 23, confirming that the activity of national federations concerning, *inter alia*, the prevention and the prosecution of doping involves a public interest element, and, as such, is subject to the directions and supervision of CONI.

64. The authority of sports organizations is however limited in terms of merits, territory and time. Regarding the merits of an alleged anti-doping rule violation, the concerned sports authority will have to verify that the alleged facts did constitute an anti-doping rule violation at the time they took place, subject to the application of the *lex mitior*

principle. This implies the application of the substantive norms and regulations then in force, unless subsequently modified in favour of the accused. In addition, the sports authority will have to verify its own jurisdiction from a territorial standpoint, in particular regarding the geographical extension of the possible sanction. This will depend upon the applicable rules to the particular sport relating to the jurisdiction of the respective national and/or international federation. In addition the Panel notes that pursuant to Article 17 of the WADC (and Article 17.5 of the CONI anti-doping regulation currently in force), no action may be commenced against an athlete or other person for a violation of an anti-doping rule unless such action is commenced within eight years from the date the violation occurred (the so-called "statute of limitations").

65. There remains one issue to be addressed within the framework of Question No. 1. The issue is whether the use of pharmaceutical substances which are not expressly prohibited by sports law could be sanctioned by disciplinary measures outside of the scope of anti-doping regulations. In other words, whether it is conceivable that such use of substances could be sanctioned on other grounds than anti-doping regulations. Such other grounds would be, for instance, an overall and broad concept of misconduct from a sports ethics standpoint. In principle, such a concept could be imagined. In this respect, the Panel has also noted the contents of the WADC provision to be found immediately before the WADC Prohibited List and which clearly states the following :

"The use of any drug should be limited to medically justified indications". The reference to "*any drug*" is quite meaningful. The principle contained in such provision could be part of a definition of ethical standards; however, the Panel recalls that any disciplinary sanction should rely on a clear and firm legal basis.

E. Conclusion

66. In summary, the Panel is of the opinion that the use of pharmaceutical substances which are not expressly prohibited by sports law, and which cannot be considered as "*similar*" or "*related substances*" to those expressly prohibited, cannot be sanctioned by disciplinary measures. On the other hand, the use (or possession or trafficking or administration) of pharmaceutical substances which are expressly prohibited by sports law must be sanctioned by disciplinary measures regardless of the existence or not of any judgement rendered by any State court; in such event, however, any disciplinary action shall take into account the substantive norms and rules applicable at the time of the alleged violation, the "*lex mitior principle*", the jurisdiction as to the merits of the organisation or body taking such disciplinary action as well as the statute of limitations as prescribed by the WADC.

VI. QUESTION NO. 2 – *By which methods of investigation the use of pharmaceutical substances supplied to athletes and which are not included in the prohibited list can be assessed by sports authorities ?*

67. The second question submitted to the Panel focuses on the "methods of investigation" to be employed by sports authorities with regard to "the use of pharmaceutical substances supplied to athletes", either included in the list of prohibited substances and methods or not.

68. As already stated with respect to the first question posed by CONI, the Panel points out that determining which scientific methods are more appropriate to assess the use of pharmaceutical substances supplied to athletes falls outside the scope of legal expertise.
69. However, in light of the background of CONI's request (see *supra* paras. 3-9), it seems to the Panel that the question is directed at seeking advice in connection with situations when sports authorities happen to know of the possible use or possession by athletes or other licensed persons of pharmaceutical substances from sources other than positive doping testing.
70. The question appears to be not particularly meaningful in relation to substances or methods not included, not even implicitly through the "similarity" concept, in the list of prohibited substances and methods. In fact, as explained above, under the WADC all substances and methods not included in the Prohibited List (as long as not similar to those included) are allowed and, thus, do not require any disciplinary action by sports authorities, unless rules other than anti-doping rules are violated.
71. However, the Panel is of the view that any massive and/or frequent resort by athletes to (or supply to athletes of) a pharmaceutical substance not included in the Prohibited List, without any plausible therapeutic explanation, appears to be quite suspicious and should be investigated by sports authorities with a view to ascertaining, through scientific research, whether some other form of doping may be revealed. In situations of this kind, as already pointed out, the WADC allows and even invites any sports authority to inform immediately WADA, so that appropriate scientific evaluations be made in order to add or not a given substance to the Prohibited List in accordance with (at least two out of) the three criteria listed under Article 4.3.2 of the WADC. Indeed, Article 4.5 of the WADC provides that "*WADA, in consultation with other Signatories and governments, shall establish a monitoring program regarding substances which are not on the Prohibited List, but which WADA wishes to monitor in order to detect patterns of misuse in sport*". Such "*monitoring program*", currently being carried out by WADA, is obviously open to scientific inputs or contributions coming from national or international sports organizations.
72. In any event, the Panel wishes to stress that the research of possible new forms of doping, as well as the fight against prohibited substances and methods, must be conducted by all means with the utmost earnestness and eagerness, using any possible technique of investigation available to sports authorities.
73. In the Panel's view, the second question posed by CONI appears to be quite meaningful in relation to methods of investigation concerning the use of prohibited substances and methods. In general terms, the Panel remarks that in no anti-doping regulation brought to its attention can a rule be found stating that an adverse analytical finding (i.e. positive testing) is the only way of proving the use of doping substances or methods. As a matter of fact, all anti-doping regulations sanction as doping violations behaviours – such as trafficking of forbidden substances, or refusal to submit to doping controls (see *supra* paras. 33, 41, 63) – which, by definition, do not require any positive testing.
74. Accordingly, the Panel is of the opinion that the fight against doping requires that sports authorities do not content themselves with waiting for adverse analytical findings and, instead, open immediately a disciplinary proceeding whenever they receive any *notitia*

criminis, i.e. whenever they happen to know of possible violations of anti-doping rules from whatever source, be it a court decision, a police report, the confession of an implicated person or the testimony of a direct witness. Delays in opening disciplinary proceedings cannot be justified. Once the disciplinary proceedings start, it will be a matter of evidence (sufficient or insufficient) to be evaluated case by case by the adjudicating disciplinary bodies or courts in accordance with the applicable standards of proof.

75. For example, in the joined cases TAS 2002/A/403 and TAS 2002/A/408, *UCI/FCI/P.*, the CAS Panel found that the police reports describing the search and seizure in an athlete's hotel room of a syringe containing traces of a prohibited substance was sufficient evidence, to the Panel's "comfortable satisfaction", to convict that athlete for "possession" of a prohibited substance in accordance with the applicable anti-doping rules. Another example is the case TAS 2002/A/378, *S./UCI/FCI*, where the CAS Panel found that the Athlete's declaration, as recorded by crime investigating authorities, that he had made use of forbidden products, although subsequently not confirmed to the sports authorities, was sufficient evidence of a doping offence.
76. Therefore, the Panel is of the view that when a State court's judgment indicates that substances forbidden or restricted by sports anti-doping rules were stored and perhaps used by licensed individuals and/or a licensed club belonging to a national federation, the national sports authorities having jurisdiction over the matter must immediately open a disciplinary proceeding and investigate. Then, it will be up to the adjudicating disciplinary bodies at national and/or international level (including as a possible last instance the CAS itself) to assess the evidence gathered by the sports authorities and convict or acquit any implicated licensed individual or entity.
77. The only exception to the said duty to immediately open a disciplinary proceeding upon reception of any news of a possible doping offence is when, due to the time elapsed, the statute of limitations, to be found in the applicable sporting regulations, prevents any possible punishment. Indeed, Article 17 of the WADC so provides: "*No action may be commenced against an Athlete or other Person for a violation of an anti-doping rule contained in the Code unless such action is commenced within eight years from the date the violation occurred*".
78. The question may arise as to how to measure the eight-year period in terms, for example, of *dies a quo*, interruption, suspension, expiry or extension of such time-bar. In this respect, it must be noted that doping rules enacted by sports authorities are private law rules (and not penal law rules). Consequently, in the Panel's view, any legal issue concerning the application of such eight-year rule should be dealt with in the context of the principles of private law of the country where the interested sports authority is domiciled. For instance, with respect to the doping rules issued by international federations domiciled in Switzerland, the rules of Swiss civil law concerning the statute of limitations – in French "*prescription*" – should be applied complementarily to the sports rules themselves. By the same token, Italian sports authorities, when applying their own rules setting forth a statute of limitations – in particular, the eight-year rule implemented by CONI and by Italian federations after Article 17 of the WADC –, should interpret such rules in the context of the Italian civil

code and the related civil law jurisprudence on “*prescrizione*” in order to evaluate whether they are actually time-barred from opening a disciplinary proceeding for facts occurred years before.

79. The Panel is of the opinion that, if in a given case there are legal doubts as to the interpretation of the statute of limitations and as to whether an anti-doping action is already time-barred, the concerned sports authority must start the prosecution of the presumed doping violation, leaving it up to the adjudicating body to eventually determine whether the matter can be adjudicated upon its merits or not.
80. With regard to the procedural rules (including those concerning the “methods of investigation”) to be applied by sports authorities in anti-doping proceedings, the Panel points out that, according to CAS jurisprudence, the prohibition against the retrospective application of law and the principle of *lex mitior* are not relevant, as they apply only to substantive rules. Indeed, in the award CAS 2000/A/274, *S./FINA*, the CAS stated clearly that “*laws and rules relating to procedural matters apply immediately upon entering into force and regardless of when the facts at issue occurred*” (in *Digest of CAS Awards*, II, 405). In another award, the CAS affirmed that “*as a general rule, transitional or inter-temporal issues are governed by the principle ‘tempus regit actum’, holding that any deed should be regulated in accordance with the law in force at the time it occurred. As a consequence, procedural actions [...] should be done in compliance with rules and time limits in force when they are performed*” (CAS 2004/A/635, *Espanyol/Velez*, unpublished).
81. In particular, as evidentiary rules pertain to procedure, in any anti-doping proceeding the evidentiary rules to be applied are those in force at the time of the proceeding and not those in force at the time of the possible doping offence. The CAS expressly stated that an anti-doping provision setting forth “*an evidentiary or procedural rule [should] be applied in this case notwithstanding the fact that the doping control at issue occurred before this provision came into force*” (CAS 2000/A/274, *S./FINA*, in *Digest of CAS Awards*, II, 406).
82. As a consequence, any current anti-doping disciplinary proceeding opened by a sports authority which approved and adopted the WADC, and thus all anti-doping proceedings opened in Italy nowadays, should apply the procedural and evidentiary rules currently in force as provided by the WADC.
83. In the Panel’s opinion, therefore, for cases when there is no “adverse analytical finding” proving the “presence of a prohibited substance or its metabolites or markers in an athlete’s bodily specimen” (i.e., when there is no positive testing), the use or attempted use of a prohibited substance or a prohibited method can be proved by any means of proof (“*for example, through admissions, third party testimony or other evidence*”, according to the comment to Article 2.2 of the WADC). The same obviously applies to “possession” and “trafficking” doping offences.
84. The Panel observes that, in anti-doping proceedings other than those deriving from positive testing, sports authorities do not have an easy task in discharging the burden of proving that an anti-doping rule violation has occurred, as no presumption applies. In fact, according to the WADC and all sports regulations implementing it, the standard of proof shall be whether the concerned sports authority “*has established an anti-doping*

rule violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt” (Article 3.1 of the WADC).

85. In any event, the undeniable circumstance that the conviction for doping offences is more difficult when the evidence is other than positive testing must not prevent the sports authorities from prosecuting such offences, as already remarked, with the utmost earnestness and eagerness, using any available method of investigation. In the end, it will be up to the adjudicating body having jurisdiction over the matter – which, according to Article 8 of the WADC, must always be a “*fair and impartial hearing body*” – to determine case by case whether the standard of proof of Article 3.1 of the WADC has been met and the burden of proof has been discharged, or not, by the prosecuting sports authority.

ON THESE GROUNDS

The Court of Arbitration for Sport gives the following advisory opinion:

Question 1.- : The use of pharmaceutical substances which are not expressly prohibited by sports law, and which cannot be considered as substances similar or related to those expressly prohibited, is not to be sanctioned by disciplinary measures. However, regardless of the existence or not of any judgement rendered by a State court, sports authorities are under the obligation to prosecute the use of pharmaceutical substances which are prohibited by sports law or any other anti-doping rule violation in order to adopt disciplinary measures. In such event, any disciplinary action shall take into account: the substantive norms and rules applicable at the time of the alleged violation, the "*lex mitior*" principle, the jurisdiction of the organisation or body taking such disciplinary action, as well as the statute of limitations as prescribed by the applicable rules.

Question 2.- : The use by athletes of pharmaceutical substances which are not included in the prohibited list, and which cannot be considered as substances similar or related to those expressly prohibited, is to be investigated by sports authorities only in order to inform WADA of possible new forms of doping. With regard to the use of pharmaceutical substances included in the prohibited list or any other anti-doping rule violation, sports authorities must resort to all available methods of investigation and must open without delay a disciplinary proceeding whenever they happen to know of possible violations from whatever source of information, leaving it up to the adjudicating bodies to determine whether there is sufficient evidence, in accordance with the applicable standards of proof, to inflict disciplinary sanctions.

Lausanne, 26 April 2005

THE COURT OF ARBITRATION FOR SPORT

François Carrard
President of the Panel

Massimo Coccia
Member

Luigi Fumagalli
Member