combat doping in sport. Until better detection methods are found, this approach, in addition to the current doping control system, may be an adequate and legally acceptable way to fight against doping.

#### **IV. Conclusions**

As previously explained, there is no common legal definition of the term doping. Doping can either be defined in an abstract manner or in a pragmatic way, the latter predominant. According to this pragmatic definition, the mere presence of a forbidden substance in an athlete's body constitutes a doping offence and can lead to the disqualification of the athlete. On the other hand, in relation to sanctions, in particular bans, proof of culpability is necessary. The burden of proof of the offence lies with the accusing party, i.e. the sports organisation, which is made easier due to the principle of "primafacie" proof. Nevertheless the athlete can defend himself by providing evidence that the finding of the substance was due to a reason other than the application of the substance. This is relevant with regard to substances which are produced naturally by the human body. For these substances, cut-off limits have to be established to separate the permitted natural state of the body from the forbidden manipulation. In relation to sanctions, the athlete has to rebut the presumption that the finding of the substance in the body was due to intention or negligence on the part of the athlete. However it is very difficult to present credible facts to negate negligence and for this reason the rebuttal of the presumption has seldom succeeded.

> <u>le international Sports</u> Law Journal

38 Cf. also G. Wagner, Eine einfache Möglichkeit zur anreizgesteuerten Dopingbekämpfung im Hochleistungssport, in: K. Vieweg (Ed.): Doping B Realität und Recht, Berlin 1998, p. 391 (395 et seq.).

### The Olympic Movement Anti-Doping Code

## The Shepherd's Courage

by Janwillem Soek<sup>1</sup> and Emile Vrijman<sup>2</sup>

#### 1. Introduction

#### Lausanne, 2nd August 1999

As you know, following the agreement which the Olympic family reached at the meeting on 27th November 1998, the draft Olympic Movement Medical Code was adopted under the title "Olympic Movement Anti-doping Code" at the World Conference on Doping in Sport in Lausanne on 2nd, 3rd and 4th February 1999. This was a major event, as it means that all the constituents of the Olympic Movement now have a common instrument with which to combat doping in sport. This Code will come into force on 1st January 2000. In the meantime, I remain,

Yours faithfully,

Juan Antonio SAMARANCH Marqués de Samaranch <sup>3</sup>

Whith the appearance in 1995 of the Medical Code the International Olympic Committee (IOC) for the first time united its hitherto fragmented doping regulations in one comprehensive document. In addition to banning the use of prohibited (classes of) substances and providing directions and guidelines for carrying out doping controls, the IOC Medical Code further strictly banned the trafficking of prohibited (classes of) substances, provided further instructions with respect to the accreditation and practices of the so-called "*IOC accredited doping control laboratories*"

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the working group. The working group should, among others, put forward proposals concerning: 10. the definition of doping and 20. a system of sanctions providing for a range of 'penalties' flexible enough to allow each IF to find what they need therein, these penalties being better adapted to the different infractions'. The chairman's name is usually preceded in IOC documents - including those he writes himself - by the epithet 'Judge'. Wherever Mbaye's name is mentioned below, please note that Judge Mbave is intended. and, in case of violation of its provisions, established sanctions for both athletes and their entourage.

Because of its' comprehensive character, the IOC Medical Code has been the focal point over the past years in the debate within the international sports community concerning the harmonisation of anti-doping rules and regulations. Not surprisingly and not widely publicized, one of the first tangible results of the "*World Conference on Doping in Sport*" which took place in early 1999, turned out to be a revised Medical Code, the so-called "*Olympic Movement Anti-Doping Code*".

#### 2. A comparison

When compared to the Medical Code (MC), the structure of the Olympic Movement Anti-Doping Code (ADC) has essentially remained the same. Some elements of the MC however, have been assigned a new place in the scheme of things within the ADC, while other elements, such as "gender verification", have not returned at all. In several provisions within the ADC, reference is being made to the competence, objectives and tasks of the so-called "World Anti-Doping Agency (WADA)". These references are of a transitory character as WADA's competence, objectives and tasks had not yet been established clearly at the time of adoption of the ADC. Apparently, the IOC did not find it necessary to await the outcome of the deliberations concerning WADA before proceeding to adopt the ADC.

Apart from the aforementioned differences in structure and layout, the ADC also provides definitions, as well as descriptions, of several concepts and procedures markedly different from those applied in the past. This review intends to examine and comment on the most salient differences between both the MC and the ADC against the background of the harmonization and asses their consequences. First and foremost, the definition of doping, including its approach of the liability issue, as well as the sanctions <sup>4</sup> attached to it, will be discussed, after which attention will be paid to certain selected new elements of the doping control procedure, as well as the position of the doping control laboratories therein.

#### 2.1. The description of the doping offence

#### 2.1.1. The definition of doping

According to the MC, "*doping*" is understood to mean the use of prohibited (classes of) substances and methods capable of enhancing an

<sup>4</sup> On the internet site that was especially created for the international doping conference of February 1999 there also appeared - among the various documents that were contributed to the conference some documents authored by Mr Mbaye, chairman of the working group on the legal and political aspects of doping. In his introduction of 30 September 1998 he formulated the specific tasks of

athlete's performance in sports, or of prohibited (classes of) substances and methods which could have such an effect. Such practices are deemed a violation of medical ethics and are *generally* regarded as doping <sup>5</sup>. Accordingly, the MC defines doping specifically as "*the use* of any substance and/or method featuring on the list of prohibited classes of substances and prohibited methods contained in Chapter II of the MC". The MC thus essentially provides the same kind of circular definition of doping as provided for in the anti-doping regulations of other international sports governing bodies. What *exactly* constitutes "*doping*" we still do not know <sup>6</sup>. In practice, doping should be regarded as the use of banned (classes of) substances and/or identified as such by the IOC.

As the definition of doping contained within the MC was felt to be incomplete, the working group established by the IOC for the purpose of redrafting its MC, was required to re-orientate itself regarding this issue. In the words of Mbaye, the working group had to achieve:

"a definition of doping which would not sacrifice the effectiveness of prevention and punishment nor change current practice, but include an additional weapon with which to pre-empt offenders, is what seems to be needed in the fight against this scourge."

The results of this reorientation process, can be found in a document drafted by Mbaye on December 24,1998, in Dakar, entitled "*The offence of doping and its punishment*". Unfortunately, the working group did not consider it part of its assignment to formulate a definition of what constitutes "*doping*" that does justice to the essence of the phenomenon itself, while, at the same time, retaining a level of abstraction allowing it to be used as a legal concept in its own right. According to Mbaye, doping is to be defined as:

- 1. the use of an expedient (substance or method) which is potentially harmful to athletes' health and capable of enhancing their performance.
- 2. the presence in the athlete's body of a substance or evidence of the use of a method where such substance or method appears on the list annexed to the present Code.

This provision (included unaltered in the ADC as Article 2 of Chapter II) contains however, not one, but four definitions of doping <sup>7</sup>. Doping is:

- 1. the use of an expedient (substance or method) which is potentially harmful to athletes' health;
- 2. the use <sup>8</sup> of an expedient which is capable of enhancing performance;
- 3. the presence in the athlete's body of a substance that appears on the IOC list of prohibited classes of substances and prohibited methods; and
- 4. evidence of the use of a method that appears on the IOC list of prohibited classes of substances and prohibited methods.

It could be argued that, by formulating four definitions, the working group's task to provide one definition of what constitutes "*doping*" has sufficiently been accomplished. This point of view however, certainly wasn't shared Mbaye. According to Mbaye, one lacuna still existed: "We have never clearly differentiated between doping, the mere detection of which is sufficient to result in certain measures and sanctions (doping as a kind of petty offence), and intentional doping, which should be punished more severely" A description of the concept of "intentional dop-

6 The biggest problem, Verbruggen said ... are the untraceable substances. 'At the moment, it's EPO, which use cannot or only barely be proven. In a while, it will be even newer substances. Cell implants, genetic engineering, the end is nowhere near in sight.' Investigating these offences is getting harder and so is punishing them. There are always borderline cases. 'And what exactly is doping?', Verbruggen wonders. NRC 3-2-1999.

7 'Une définition claire et suffisammant large du dopage parait nécessaire. D'une part pour couvrir tous les cas de figure et d'autre part pour une bonne conduite de la procédure menée par une autorité sportive ou judiciaire à l'encontre d'une personne, athlète ou non, poursuivi pour dopage. Une définition imprécise ou ing" was however, not included in the December 1998 document. What constitutes "*intentional doping*" may be read in Article 1 of Chapter I of the ADC:

"Intentional doping means doping in circumstances where it is established, or may reasonably be presumed, that any Participant acted knowingly or in circumstances amounting to gross negligence".

While arguing the necessity to differentiate between doping and intentional doping, Mbaye mixes up two - distinguishable - legal phenomena: the definition of doping and the description of the doping offence. The human actions described in abstracto provide but one of the constituent elements of the doping offence. An athlete cannot be sanctioned on the basis that his actions match those described in the definition. To be sanctioned, it is also necessary that his actions are being regarded as reprehensible and thus punishable. Article 1, of Chapter II of the December 1998 document, as well as the ADC, stipulates that "doping is forbidden". Only after linking Article 2 with Article 1, one arrives at a complete description of the doping offence. In other words, the additional element required for the description to become an unlawful act is derived from the interconnection of the two provisions cited. In order to derive at a better understanding of the four separate definitions of what constitutes "doping" as contained within the ADC - and because Mbaye has already pointed us in that direction -one should keep in mind that these definitions are only a part of the description of the offence. In addition, the ADC also features the concept of "intentional doping". This review intends to examine first the offence of doping as a "petty offence" 9.

#### 2.1.2. Doping as a petty offence

The MC used to distinguish between a so-called "*prima facie case of doping*" and a so-called "*definitive case of doping*" <sup>10</sup>. A prima facie case of doping would occur in those cases where an athlete would test positive for such banned substances as ephedrine, pseudo-ephedrine, phenylpropanolamine and cathine, as well as testosterone and, more recently, nandrolone. While the mere detection of other banned substances in an athlete's urine sample would automatically constitute a "*definitive case of doping*" independent from either the athlete's intentions or the actual concentration of the banned substance found present, a "*prima facie case of doping*" would not, as the amount of the banned substance found present needs to be considered. Consequently a "*definitive case of doping*" simply does not allow an athlete the opportunity to present evidence as to his intentions or the amount of the banned substance found present to establish that a doping offence had not been intended, a prima facie case still does.

#### 2.1.3. Intentional doping

With the introduction of the ADC the concept of "*intentional doping*" was introduced as well. It remains however unclear in what manner "*intentional doping*" is different from the concept of "*doping*" itself as we know it. Because of the evidentiary problems encountered in the past by sports governing bodies all around the globe when trying to proof that the athlete having tested positive intended to use doping to enhance his performance, the anti doping rules and regulations establishing what constitutes a doping offence have gradually shifted away from specified actions to a mere factual finding - i.e., whether a banned substance was found present in the athlete's urine sample resulting in the introduction of the so-called "strict liability approach". In other words, once the presence of a banned substance in the ath-

incomplète permaittrait à des personnes responsables d'une manquement à la réglementation sur le dopage d'échapper aux sanctions', says La Rochefoucauld in a memo to the working group. Rap Conf Mond fev 99.lwp, p. 10/33.

8 'Use' is understood to mean by the ADC pursuant to Art. 1, Ch. I: '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.'

 9 As an aside, it could be mentioned that most athletes will not consider an offence punishable by exclusion for a minimum of two years a 'petty offence'.
 10 MC, Arts. IV and V, Ch. II.

<sup>5</sup> Second 'whereas' of the preamble.

# Legal eagles cross borders



HV&PARTNERS IS A LEADING EXECUTIVE SEARCH FIRM FOR THE LEGAL PROFESSION WWW.HV-PARTNERS.NL TEL 00 - 31 - (0)10 - 240 06 05 lete's urine sample had been established, the athlete would be fully liable for this. A discussion of the alleged absence of intent and consequently of culpability thus became unnecessary. With the introduction of the concept of "*intentional doping*" however, such a discussion appears to have become relevant once again.

The confusion regarding both doping offences, is further aided by the manner in which the ADC has been structured. The definition of what constitutes a doping offence has been included - extensively - in Chapter II, titled "The offence of doping and its punishment". Consequently, it would have made sense to include the definition of intentional doping in this Chapter as well. Chapter II was written however by Mbaye some time in December of 1998 and did not include a definition of "intentional doping". As this draft version was included within the ADC's final draft almost unaltered, it should be assumed that the definition of "intentional doping" came along at a later date and subsequently was introduced in Article 1 of Chapter I of the ADC. Consequently, the definition of what constitutes "intentional doping" thus precedes the general definition of doping, of which it actually is an aggravated form. This inconsistency might have been noticed at an earlier stage, as Article 3 of Chapter II specifies the applicable sanctions in case on intentional doping, while Article 4 of Chapter II contains further provisions concerning evidence of intentional doping. The Article 4 rule may be found in statu nascendi in Mbaye's draft of December 1998: "Evidence of fraudulent intent in cases of doping can be adduced by any means whatsoever, including presumption". Couched in ADC terms this rule reads: "Intentional doping can be proved by any means whatsoever, including presumption" <sup>11</sup>.

#### 3. Liability

#### 3.1. Strict liability

Article 2 of Chapter II of the ADC contains a provision detailing what constitutes doping similar to Article IV of the MC, as well as likewise Articles in the anti-doping rules and regulations of a great many international sports governing bodies <sup>12</sup>. This provision has derived from CAS case law establishing a two-stage system in doping cases, based upon the strict liability approach. At the first stage, the sports governing body needs to establish that a doping offence has indeed been committed by showing a banned substance to be present within the athlete's body tissue or fluids <sup>13</sup>. Accordingly, many sports administrators held the view that the strict liability approach did not require them to show a relationship between the intent to commit a doping offence and the actual offence itself, in order to sanction the athlete: "[...] the principal offence of doping consists merely of the finding of the presence of a prohibited substance in an athlete's body tissue or fluids. The rule does not provide that an athlete must have taken the substance deliberately. It creates an offence of strict liability in that the athlete's intent is completely irrelevant" 14.

This rather laid back approach by sports governing bodies of the requirements for proving a doping offence (focusing only on the consequences of the unlawful act, i.e., doping thus establishing the strict

11A salient editorial difference between the two categories of doping definitions may still be spotted. The doping definitions of Art. 2, Ch. II address 'athletes', while the definition of intentional doping in Art. 1 of Ch. I uses the term 'participant'. It is possible that it was simply forgotten to 'readdress' the provision of Art. 2. 'Participant' in Art. 1 is understood to mean: 'any athlete, coach, trainer, official, medical or 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 all competitions organized under the authority, whether direct or delegated, of an IF or NOC'. If intentional doping is an aggravated form of doping, it is highly relevant that the

group of persons, which the provisions address, is the same.

- 12 IAAF Rules and Regulations, Rule 55, para. 2; FISA Rules of racing and related bye-laws, Rule 80, para. 2; IWF Antidoping Policy, Art. 5.1; FINA Doping Control, DC 1.2; IBU Anti-doping, Blood Test and Gender Verification Rules; ITF Anti-doping Programme (c)2; ITU Doping Control Rules and Procedural Guidelines, 2.2; FIS Doping Rules - Rules 1 - 3; ATP en WTA Official Rulebook - Players - Tennis' Anti-doping Program - C.1.
- 13 See the CAS decision of 14-2-1996, in re L./FINA, CAS 95/142.
- 14M. Gay in a speech during the International Symposium on Sport & Law at the beginning of 1991.
- 15 CAS decision of 8-1999, in re Bernhard

liability of the athlete) has been rudely interrupted by a recent CAS decision <sup>15</sup>. In this decision the Panel presiding over the matter argues that, if a sports governing body organisation opts to sanction the consequences of the unlawful act rather than the unlawful act itself, the causal relationship between the unlawful act and its consequences should be entirely clear and incontestable. Generally speaking, in tort law the causal between the unlawful act itself and its consequences is not automatically assumed present but requires proof. Even in cases of strict liability - requiring no proof of guilt - the causal relationship between the unlawful act itself and its consequences nevertheless remains an element requiring proof by the party invoking liability. Bearing in mind the quasi criminal law character of such disciplinary proceedings as doping cases, the Panel in this matter deemed it unacceptable to apply the strict liability concept more stringently against an athlete accused of having committed a doping offence, as would have been the case under civil in which the strict liability concept is firmly rooted. Consequently a causal link between the unlawful act itself and its consequences still remains an element requiring proof by the party basing its arguments for sanctioning on the consequences of the unlawful act. In other words, whereas the strict liability rule precludes a sports governing body from having to proof that a doping offence has been committed by showing the athlete to be guilty of the presence of a prohibited substance in his body, the same rule, according to the Panel, does, however, not preclude a sports governing body from having to proof that such presence is the result of use by the athlete 16.

Once the existence of a doping offence has been established, the second stage is reached, resulting in a shift of the burden of proof from the sports governing body to the athlete accused of having committed a doping offence .<sup>17</sup> At this stage, the accused athlete is given the opportunity to show why he is not guilty (and thus not culpable) of having committed the offence. At this stage of the proceedings, the focus has shifted to the (severity) of the applicable sanction in accordance with the principle of proportionality, provided the sports governing body in question applies a flexible sanctioning system.

#### 3.2. Culpable liability

Apart from the strict liability definition of doping - ignoring the issued of guilt and intent - the ADC features three other definitions of doping which focus on the unlawfulness of the act of doping and require proof of culpability (either negligence or intent). One of these definitions aims at the use of a banned method. The remaining two concern the use of banned substances in general.

According to the first sentence of Article 2 of Chapter I of the ADC, the use of an expedient (either a substance or method) potentially harmful to an athlete's health, is prohibited. This provision must be directed at substances and/or methods currently not listed on the IOC list of prohibited classes of substances and prohibited methods. If not, this situation would already be fully covered by the provision contained in Article 2 of Chapter II of the ADC. Having to proof

16 The criticism does not entirely ignore the strict liability rule. Lob, for example, writes in his article 'Dopage, responsabilité objective ('strict liability') et de quelques autres question' (SJZ 95(1999) no. 12, p. 272) 'Il nous paraît qu'une sentence du TAS fondée sur le principe de la responsabilité objective pourrait étre attaquée devant les tribunaux ordinaires. L'art. 36 g du Concordat du 27 août 1969 sur arbitrage permet en effet l'annulation d'une sentence arbitrale lorsque la sentence est arbitraire, parce qu'elle constitue une violation évidente du droit ou de l'équité. Le principe de la responsabilité objective apparaît aussi critiquable s'il est appliqué á la durée de la suspension. Les règles statutaires peuvent certes prévoir des normes, mais il appartient

aux fédérations de tenir compte de toutes les circonstances et de prendre en considération en particulier la gravité de la faute de l'athlète concerné'.

17 See CAS 98/208 N. 5.10: 'If the presence of a prohibited substance is established to the high degree of satisfaction required by the seriousness of the allegation, then the burden shifts to the competitor to show why, in the case of a diuretic, the maximum sanction should not be imposed. The Panel repeats that under the new FINA rules it is only at the level of sanction not of finding of innocence or guilt, that the concept of shifting burden becomes relevant at all. And it is only at this juncture too that questions of intent become relevant.'

v. ITU, TAS 98/222.

however, that an athlete has used a substance or a method which has not been listed on the IOC list of prohibited classes of substances and prohibited methods, but which is harmful to the athlete's health, thus constituting doping, forces sports governing bodies, once again, to face insurmountable obstacles concerning the required scientific evidence related to such an offence. This definition therefore merely appears to be a reflection of the first "whereas" in the ADC preamble, then a serious attempt to provide a new and additional definition of doping, i.e., "[...] the Olympic Movement, [...] takes measures, the goal of which is to prevent endangering the health of athletes" <sup>18</sup>.

The second part of Article 2 of Chapter I of the ADC, prohibits, in conjunction with Article 1 of Chapter II, the use of an expedient either a substance or a method - which potentially could enhance an athlete's performance. According to Bette and Schimanck: "With this provision 'hängt für eine - insbesondere auch rechtliche - Handhabbarkeit dieser Art der Dopingdefinition alles davon ab, inwieweit sich in sachlicher Hinsicht hinreichend präzise und umfassend, in zeitlicher Hinsicht hinreichend dauerhaft und in sozialer Hinsicht hinreichend intersubjektiv einheitlich bestimmen läßt, welche Art von Handeln sich als 'unnatürliche' sportliche Leistungssteigerung begreifen läßt. In dem Maße hingegen, wie genau diese Spezifizierungen nicht gelingen, erweist sich eine Wesensdefinition des Dopings als unbrauchbar" 19. The 1996 so-called "Bbromantan case" provides a perfect example of the caveat of Bette and Schimanck, as it shows that the rules and regulations on which the fight against doping is based suffer from a systematic defect because they allow an athlete using a performance enhancing substance not listed of the IOC's list of prohibited classes of substances and prohibited methods to go free. With the introduction of the provision contained in Article 2 of Chapter II - the second part of the first sentence - the Working Group has attempted to repair this defect. Neither the Working Group, nor Mbaye have been blind to the limitations of this approach from an evidentiary point of view:

"[this provision] will [...] enable the Olympic Movement to guard against such a case [the Bromantan case, the authors], it should nevertheless be noted that doping will be counteracted essentially on the basis of detection of the presence or use of prohibited substances and methods".

The last remaining definition of doping concerns the use - if established - of a method listed on the IOC list of prohibited classes of substances and prohibited methods. As the use or application of a banned methods remains difficult to proof directly, but instead, - to a larger or lesser extent -depends on indirect proof, such as the of occurrence of subsequent side effects, this offence does not lend itself for application of the strict liability principle.

In conclusion, the ADC has little news to offer concerning the definition of what constitutes a doping offence. Both the MC, as well as the anti-doping rules and regulations of a large number of international sports governing bodies, have long since contained provisions similar to those in the ADC.

#### 3.3. Liability in case of intentional doping

The introduction of the concept of "*intentional doping*" raises the question whether or not the IOC is raking up old and awkward matters? Old, because the evidentiary problems concerning proof of intent had already led to the development of the strict liability

18 To most sporting participants the side effects of these drugs outweigh the advantages of taking them. At the highest level the competitive instincts of many participants may blind them to the dangers. So how justified are NGBs in taking a paternalist approach and protecting the welfare of sporting participants?' Traditional paternalist jurisprudence would argue that this approach is only valid if the effect of the prohibition is to protect those unable to make an informed and rational judgment for themselves or to prevent harm to others. The obvious example of the former would be a ban on the taking of performance enhancing drugs by children and junior athletes but extending the ban beyond this point is difficult to justify on this basis.' Gardiner, et al., Sports Law, p. 164.

und Recht (1998), p. 359. 20 Mbaye in his introduction of 30

September 1998.

21 Nor does it follow from what Mbaye

approach of the doping offence. Awkward, because "establishing proof of such intention will clearly be difficult, and for that reason it is necessary to establish regulations governing it" 20. This however, would be absurd. Although not mentioned in so many words in the ADC <sup>21</sup>, it would make sense not to consider the offence of "intentional doping" as being equal to the offence of doping as defined in Article 2 of Chapter II. Apparently, "intentional doping" is an aggravated form of doping. If sports governing body is successful in proving that a doping offence has indeed been committed for which the athlete is strictly liable, it would then be allowed to present further evidence that the athlete, when committing the offence, had also intended to do so. This would allow a sports governing body to suspend an athlete from competition for life, as opposed to a suspension of a limited duration in cases in which it has failed to proof the existence of such an intention. A similar difference exists with regard to the fine to be imposed. In case of prove intent, such a fine could amount to a maximum of US\$ 1,000,000.---, as opposed to US\$ 100,000,--- if intent is not proven 22.

#### 4. Sanctions

The sanctions to be imposed in case of a doping offence has been committed, can be divided into two categories. Article 3 of Chapter 1 of the ADC contains a range of sanctions in case of a regular doping offence, while the paragraphs 2 and 3 provide a range of sanctions, among others, in case of an aggravated doping offence. Both ranges of sanctions allow amendments to be made with regard to (the nature of) the actual banned substance used. One sub category within these ranges concerns the use of such substances as ephedrine, phenylpropanolamine, pseudo-efedrine, caffeine, strychnine or related substances, while the other sub-category addresses the use of all remaining banned substances.

## 4.1. Sanctions in case of a regular or "*non-aggravated*" doping offence

Regardless of (the nature of) the banned substance used, two sanctions can be applied both in case of regular and aggravated doping, i.e., a ban on participation in one or several sports competitions and a fine of up to US\$ 100,000.—. In case an athlete has been found guilty of having used a banned substance as ephedrine, he could be let off with only a warning, or be suspended from any competition for a duration of one to six months. Would the same athlete test positive for using any of the other remaining banned substances, he could very well face a suspension from the competition for a minimum period of two years.

The IOC's proposal to include in the ADC a two year suspension as a minimum sanction for a first time offence of doping, actually turned out to be the only serious disputed issue at the IOC's 1999 World Conference on Doping in Sport in Lausanne, Switzerland. Politicians (22 Ministers and State Secretaries), sports governing bodies (35 International Federations) and athletes (The IOC's athletes' commission represented by the former Norwegian speed skater Koss), all declared to be in favour of such a minimum sanction for a first time doping offence. Only two International Federations, the FIFA and the UCI, opposed this proposal <sup>23</sup>. The Lausanne Declaration of February 4, 1999, carefully states the compromise reached:

wrote in his introduction. ' ... we have never clearly differentiated between doping ... and intentional doping'.

 $22\,ADC$  Ch. II, Art. 3 (1) and (2).

23 Hein Verbruggen ... 'People here (at the World Doping Conference) are always talking about penalties. ... Penalties are unimportant ... 'That's also what I told Koss. I'm sitting next to the chairman of the swimming federation. He deals out a four-year penalty to a swimmer, she goes to the American Courts and gets two years there. Then that penalty is reduced by the Court of Arbitration to six months. And the chairman actually owes her 15,000 dollars in damages.' Volkskrant 3-2-1999. It seems that only the penalty of two years is an issue here. I'm not crazy about that time limit. Every court will refine such a suspension after which the sports federations will be saddled with enormous claims for damages. When pressed, I will agree to this, but when the time comes that we have to pay damages I'm counting on the same kind of solidarity.' Telegraaf 3-2-1999.

<sup>19</sup> Karl-Heinrich Bette und Uwe Schimank, "Doping und Recht - soziologisch betrachtet", in K. Vieweg, Doping, Realität

"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 [authors' emphasis]".

Thus the underlined part of the Declaration was incorporated into the ADC.

#### 4.2. Sanctions in case of an aggravated doping offence

As has already been indicated before, the sanctions contained in both paragraph 2 and 3 of Article 3 of Chapter II do not only address the offence of "intentional doping", but also include to the use of a masking agent intended to prevent or distort the results of a doping test, the refusal to participate in a doping test and the apparent involvement of an official, member of an athlete's entourage or the medical or pharmaceutical profession. Again, a distinction is being made between the use of ephedrine and ephedrine-related substances and other banned substances. Apart from those sanctions such as the suspension from competition and the US\$ 100,000.-fine contained within the first range of sanctions discussed before, the athlete having used ephedrine or a related substance may, in case of an aggravated doping offence, be suspended from any competition for a period of two to eight years. The sanctions to be applied in case of use of any of the remaining banned substances, also apply in case of a repeat offence involving the use of ephedrine and ephedrine related substances.

An athlete having committed a repeat doping offence may be sanctioned in three different manners. He may be:

- banned from participating in any sport in any capacity whatsoever;
  fined up to \$ 1,000,000.—; and
- 3. suspended between four years and life from all sports competitions.

When reviewing this extended range of sanctioning options contained in Article 3 of Chapter I of the ADC, one cannot fail to notice the recurring difference in applicable sanctions between ephedrine and ephedrine related substances and all other remaining banned substances. This distinction in applicable sanctions based upon (the nature of) the banned substance actually having been used, already featured within the MC. The major difference between the sanctions catalogued within the MC and those in the ADC is found in the introduction of the principle of proportionality in sanctioning decisions. Although the distinction between sanctions applied in case of first offence and repeat offences already contained in the MC has been continued in the ADC, it is now also possible to translate the gravity of the offence in the actual sanction to be applied. Furthermore, pursuant to the italicised phrase at the end of Article 3 of Chapter II of the ADC, sanctions may be imposed concurrently insofar as they are compatible. In addition, regular or unannounced doping tests may also be conducted over a specified period of time.

While representatives of governments and sports governing bodies appeared to outdo each other at the 1999 IOC World Conference on Doping in Sport in Lausanne, Switzerland with respect to proposing the most severe sanction to be applied in case of a doping offence being committed - such as two-year minimum sanction <sup>24</sup> -, a change now appears to have occurred. At the so-called "Asser Round Table Session" of the T.M.C. Asser Institute in The Hague, the Netherlands,

24 Shortly after the conclusion of the conference, the FINA in its Doping Control Rules of 1-6-1999 established a penalty of a minimum of four years.

25 See also CAS decision of 22-4-1996, in re C. v. FINA, CAS 95/141.

26 CAS decision of 8-1999, in re Bernhard v. ITU, TAS 98/222. 29 ADC Ch. VI, Art. 3. 29 ADC Ch. VI, Art. 3, sub (b) holds an

exception to this rule: '... if, without otherwise affecting the competition, it is still possible for the Participant to be reinserted, the Participant may continue to take part in the competition. (For example, if addressing the harmonisation of anti-doping rules and regulations, Jaime Andreu, Head of the Sports Unit of the Education and Culture Directorate of the European Commission, informed the participants that the opinions within the European Union's Commission concerning the severity of sanctions to be impose in case of a first time offence of doping were variegated. The European Union Commission's approach has been influences by:

- the finding that a ban of more then two years for a first time doping offence is not supported by national legislation in most member states; and
- 2. the opinion that a two year suspension could put an end to the careers of athletes in some sports, as opposed to other where this would not be the case at all.

#### 4.3. Competitors and athletes

As has already been mentioned in paragraph 4.2, the sanctioned contained in paragraph 2 and 3 of Article 3 of Chapter II of the ADC, also apply to officials, members of the athlete's entourage, or the medical and pharmaceutical profession. It remains unclear whether the sanctions specified in paragraph 1 of Article 3 of Chapter II of the ADC also applies to members of the athlete's entourage or members of the medical profession involved in a doping offence. As opposed to paragraph 2 of Article 3 of Chapter II of the ADC, these individuals are not mentioned in paragraph 1 of Article 3, while paragraph 2 of Article 1 only refers to athletes.

#### 4.4. Sports sanctions

According to paragraph 3 of Article 3 of Chapter II of the ADC, every doping offence committed during competitions will result in a disqualification and subsequent annulment of the result obtained at that competition, including the forfeiture of any medals and prizes thus gained <sup>25</sup>. Consequently, in the dictum of its decision of August 8, 1999, <sup>26</sup> in which a decision of a sports governing body in a doping case was reversed, the CAS Panel ordered the disqualification of the athlete lifted and his results and titles thus gained to be confirmed.

Under the provisions of the MC, an athlete was only considered to have tested positive and thus to have committed a doping offence, if the results of the analysis of the so-called B-sample confirmed those of the A-sample, or, if the athlete having tested positive, renounced his right to have his B-sample analysed <sup>27</sup>. On the basis of the ADC however, an athlete is already deemed to have tested positive and thus to have committed a doping offence on the basis of a positive result of the analysis of the athlete's A-sample <sup>28</sup>. The athlete does retain however, the right to have his B-sample analysed. If the result of the analysis of sample B is negative, the athlete is not automatically fully rehabilitated. Although no additional sanctions will be applied, the initial sanction of the disqualification remains in force <sup>29</sup>.

#### 4.5. No possibility of reinstatement

As the ADC allows sports governing bodies to exclude an athlete from competition for an extremely long period of time, one should keep in mind that such an extended period of suspension may conflict with national case law regarding the issue of "*restraint of trade*"<sup>30</sup>, as developed within various countries. Consequently, it would have been reasonable to expect the ADC to contain a provision allowing a suspended athlete to be reinstated after a certain period of time has elapsed <sup>31</sup>. Various international sports governing bodies did in fact include such a provision within their anti-doping rules and regulations, allowing a suspended athlete, under certain conditions, the right to request to be re-admitted before the actual suspension will have expired. Usually, "*extraordinary circumstances*" are required to allow such a request <sup>32</sup>.

an athlete is entered in more than one event and the second has not commenced, it may be possible to enter the second event.)'

30 See Gardiner, et al., Sports Law, pp. 248-249.

31 See Darren Bailey, "Doping Control in the United Kingdom", in K. Vieweg, Doping, Recht und Realität, (1998) pp. 352-354.

Not surprisingly, the ADC is also devoid of any provision concerning the revision of doping cases, as the issue of reinstatement is closely connected with the absence of a provision allowing the review of sanctions initially applied. In this regard, the International Weightlifting Federation's anti-doping rules and regulations provide an elegant solution by allowing a decision to be reviewed at a later date, after new, relevant, information has become available .<sup>33</sup> A similar provision would should have been included in the ADC.

#### 5. Conducting doping trials

#### 5.1. The rights of the accused

The MC did contain a provision concerning the right of the athlete, accused of having committed a doping offence, to be heard (*audi et alteram partem*), which included:

- 1. the right to be informed of the charges brought;
- 2. the right to appear in person or to be represented during the proceedings; and
- 3. the right to submit evidence, call witnesses or to submit a defence in writing <sup>34</sup>.

Remarkably, such a provision has not been included in the ADC, despite the statement concerning athletes' rights to the contrary contained in the last paragraph of the ADC's preamble, advocating the protection of these rights <sup>35</sup>. The failure to include a similar provision as the one above within the ADC constitutes, given its exemplary function, not only a serious omission, but furthermore illustrates the ever advancing erosion of athletes' rights in doping cases <sup>36</sup>. If the international sports community intends to make recourse to the civil courts more difficult through harmonisation of its' anti-doping rules and regulations, it will sooner achieve the opposite if it neglects fundamental (human) rights. The question if and to what extent a doping trial actually still represents a "*fair trail*", thus becomes increasingly important and relevant.

**5.2.** The position of IOC accredited laboratories in doping trials Chapter III of the ADC, mainly dealing with appeals, also contains a provision concerning the status and position of the IOC accredited doping control laboratories in a doping trial. Even more so than its positioning within the ADC, the content of this Article is cause for wonder <sup>37</sup>. Even though the exclusive position awarded to IOC accredited doping control laboratories in the ADC already provides these institutions with a certain measure of self-evident exclusivity also with regard to the assessment of the quality and proficiency of the analytical procedures carried out by these laboratories - this appears not to be enough. According to Article 2 of Chapter III of the ADC:

"Accredited laboratories are presumed to have conducted testing and

- 32 IPC Appendix 3, 8.2, Art. 3.2; IAAF Procedural Guidelines for Doping Control, 4. Exceptional circumstances rule 4.1;ICF Procedural Guidelines for Doping Controls, 3 Exceptional circumstances, sub 1; ITF 8. Tennis Anti-Doping Programme, (Q) Application for **Reinstatement Following Permanent** Disqualification, para. 1; FIS Procedural Guidelines for doping and haemoglobin control, D Exceptional circumstances, para. 1;ATP Procedural Guidelines for Doping Controls, 3 Exceptional circumstances, sub 1.1; WTA Procedural Guidelines for doping and hemoglobin control, D Exceptional circumstances, para. 1, sub 1.1 through 1.4.
- 33 IWF Anti-Doping Policy, 15. Appeal, review of sanction, 15.18: 'If at any time new and relevant information becomes available, the sanction may be reviewed. The review will be conducted by the Appeal Committee in light of the new information.'
- 34 MC Ch. VII, Art. VII read: Any individ-

ual ... has the right to be heard by the IOC organ competent for applying or recommending a measure or sanction to such individual, team or entity. The right to be heard includes the right to be acquainted with the charges and the right to appear personally, to be represented, to bring forward evidence, including witnesses, or to submit a defence in writing.

- 35 'WHEREAS in keeping with the desire of the Olympic Movement to act in the best interests of athletes ... whose rights to justice must be safeguarded, the Olympic Movement Anti-Doping Code shall include provisions to enable appeals to be lodged with the Court of Arbitration for Sport (CAS) against certain decisions rendered in application of such Code.'
- 36 In this context the omission concerned, given its character, could be called Freudian.
- 37 ADC Ch. III, Appeals
- 38 ADC Ch. III, Art. 2.
- 39 It is not clear what is intended by "convincing evidence". This qualification does

custodial procedures in accordance with prevailing and acceptable standards of scientific practice" <sup>38</sup>.

In other words, in addition to the exclusive status awarded to IOC accredited laboratories, this position furthermore gives rise - for no apparent reason -to the presumption that, in case of a doping trial, the laboratory concerned functioned in accordance with its applicable guidelines and Good Laboratory Practice (GLP). It is however, possible for the athlete accused of having committed a doping offence to adduce evidence to the contrary:

"This presumption can be rebutted by convincing evidence to the contrary, but the accredited laboratory shall have no onus in the first instance to show that it conducted the procedures other than in accordance with its customary practices".

One should note however, that the evidence to be adduced by the accused athlete not only needs to be "*convincing*" <sup>39</sup>, the laboratory in question is in no need in the first instance to show anything more than that it conducted the procedures and analyses concerned in its own customary manner <sup>40</sup>. Again the laboratory concerned is under no obligation to prove beforehand that it followed its procedures correctly. In other words: only after evidence to the contrary has been introduced by the athlete accused of having committed a doping offence, is the laboratory required to show it conducted its analyses <sup>41</sup>.

Judging from the above, it is clear that the position of the of the IOC accredited doping control laboratories in doping cases is special and cannot be simply equated with the position of an expert witness in regular legal proceedings, as the latter has to explain and document on which scientific evidence he has relied in providing his expert testimony is based on, especially with regard to the methods of research or analysis used. The privileged position of the IOC accredited doping control laboratories not only contributes to a further increase of the procedural inequality between parties in a doping trial <sup>42</sup>, it also seriously impedes objective fact-finding. After all, why would IOC accredited doping control laboratories in case of doubt co-operate in further research or scientific investigations potentially exculpating the accused athlete when their own findings are presumed to be (scientifically) correctness ? This is especially relevant in those cases in which there exists a scientific difference of opinion about the possible origin of the banned substance found present in the athlete's body tissues or fluids and/or the applicable sanctioning norm <sup>43</sup>.

#### 5.3. The relationship between the IOC and the CAS

The ADC provides an athlete accused of having committed a doping offence not only with the right to appeal any decision of the IOC with CAS, but also against decisions of International Federations in

not follow from the ADC itself, or from the CAS case law regarding doping. 40 Accordingly, it is thus without question assumed that this 'its customary practices' are in accordance with "prevailing and acceptable standards of scientific practice".

- 41 In the MC, Ch. X, Art. II a provision was included on the basis of which it had to be presumed that the accredited laboratory had conducted the tests and analyses of the samples in accordance with the highest scientific standards and that the results of those analyses had to be presumed scientifically correct. That rule has not returned in the ADC.
- 42 Not only does the athlete need to verify if and to what extent the IOC accredited doping control doping control laboratory concerned acted in conformity with its usual practice, i.e., in conformity with IOC guidelines, but also if and to what extent these guidelines are in accordance with "prevailing and acceptable standards of scientific practice". A salient detail in

this context, is the fact that the athlete, in order to prove the above, completely depends on the information adduced by the laboratory concerned at the trial via the (inter)national sports governing body concerned.

43 In this context the current discussion regarding positive results in case of endogenous substances, especially where the origin of the so-called "nandrolon positives" is concerned, provides a perfect example for this attitude. Until recently, it was assumed that nandrolon was an exogenous substance, alien to the human body. At this time however, it is generally accepted that nandrolone is endogenous. Even though scientifically speaking doubts exist as to the correctness of the cut-off limit (2 ng/ml) currently applied for sanctioning, this has, at least until now, not induced the IOC accredited laboratories concerned to conduct further scientific research with regard to this issue, other than an epidemiological study of their own test results.

doping cases <sup>44</sup>. However, the IOC is not entitled to award such a right with regard to decisions by International Federations, as this lies outside scope of the IOC's authority 45. International Federations are completely autonomous from the IOC, which means that the sole authority to include such a provision within their anti-doping rules and regulations solely rests with the International Federations themselves. At this time only half of all Olympic International Federations recognise the jurisdiction of CAS as their final appellate body in doping matters.

Not only does the ADC -incorrectly - pretend to create a relationship between the International Fderations and CAS, as the International Federations' final appellate body, it also interferes in matters only CAS itself can - and should- regulate. For example, the ADC contains a provision stipulating that parties who bring their case before CAS must "proceed with all due despatch" 46. In addition, the ADC also pretends to endows CAS with the power to draw inferences from the dilatory behaviour of one of the parties and to award costs against a party whose behaviour is vexatious, frivolous or dilatory <sup>47</sup>.

#### 6. Conclusion

The IOC motto "Citius, altius, fortius" does not readily apply to the ADC. On the contrary, compared to the MC and from a legal point of view, it is fair to say that matters have deteriorated rather than improved, especially where the definition of doping is concerned. It seems as if the IOC wishes to depart from the well established and clear principle of strict liability in doping cases in exchange for a more variable system of incurring liability. It is clear that this does not aid the transparency of the subject matter and will probably cause unnecessary confusion.

Finally, one may wonder if and to what extent the IOC and the international sports governing bodies, in their continuing efforts to protect the positive social values of sports by continuing "strengthening" of their anti-doping rules and regulations, are not in effect violating more general fundamental human rights and principles themselves. This, of course, can never be the goal of creating effective antidoping rules and regulations. Nevertheless, it now appears as if every sense of direction and proportion is being lost.

Die armen Schafe sagen zu ihrem Zugführer: 'Gehe nur immer voran, so wird es uns nie an Mut fehlen, dir zu folgen.' Der arme Zugführer aber denkt bei sich: Folg mir nur immer nach, so wird es mir nicht an Mut fehlen, euch zu führen. Nietzsche

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44 ADC Ch. III, Art. 1. 45 In Art. R27 of the CAS Procedural Rules it is indicated which cases under which

CAS. One of the conditions is that "the

statutes or regulations of ... (the sports)

bodies ... provide for an appeal to the CAS ...

46ADC Ch. III, Art. 4.

circumstances may be brought before the 47 ADC Ch. III, Art. 5. Part F of the CAS Procedural Rules (Arts. R64-R6) provides for the "costs of the proceedings".

Lecture at the 'On the Road to the Olympics 2004' Conference, Athens, November 2000

# The Bosman Ruling and **Nationality Clauses**

A critique of the treatment of nationality clauses in the jurisprudence of the European Court of Justice

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In the Bosman ruling<sup>1</sup>, the Court of Justice of the European Communities ruled that two distinct regulations were in contravention of Article 39 (which, at that time, was Article 48) of the EEC Treaty, since they impeded the exchange of players/European citizens between two clubs in different member states.

The first regulation was known in sporting parlance as the transfer system. This system consisted of collective regulations governing the transfer of a player from a club in one member state to a club in another member state. It meant that the new club was required to pay a remuneration to the old club. Many clubs were concerned about the Court of Justice ruling that such regulations were invalid since they were incompatible with Article 39 of the EEC Treaty. They feared that it would give players unlimited freedom to join the club of their choice in another member state. The Court's ruling related to the obligation for a transfer fee to be paid for a player who was in fact free. In other words, the player was no longer under contract to his old club. The Court's ruling did not apply to players who were still under contract to their old club. In the latter case, players can gain their freedom by first terminating their current contract with their old club. This can be achieved by legal means, by buying out their contract. The clubs have availed themselves of this option by offering players long-term agreements that include provisions for premature termination by buying out the contract. Accordingly, the judgement of the Court of Justice of the European Communities concerning the old transfer system has only meant that another legal channel has been found by which the objectives of the old transfer system can largely be realized. Nevertheless, the practice of buying out contracts gives the impression that the world of sport does not make normal use of regulations pertaining to labour law. According to reports, the European Commission wants to combat this practice by invoking its powers under competition law, as contained in Article 81 of the EEC Treaty. A matter of legal interest is whether it is indeed possible for legal regulations pertaining to labour law to be in contravention of competition law. Furthermore, would it be acceptable to place competition law above labour law? The real question, however, is whether sport clubs will be prepared to passively await the result of

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1. 15 December 1995, case C-415/93, Jur. 1995, p. I-4921, NJ 1996, 637