

The WADA World Anti-Doping Code: The Road to Harmonisation

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1. Introduction

The World Conference on Doping in Sport, which took place in Lausanne from 2 to 4 February 1999, led to the adoption of the Lausanne Declaration by representatives of governments, intergovernmental organizations and the international sports organizations, the IOC among them. The establishment of the World Anti-Doping Agency (WADA) was a direct result of this Conference. The WADA was established on 10 November 1999. The reason for establishing a World Anti-Doping Agency was the assumption that the fight against doping could be fought more effectively when the Olympic Movement (including the athletes) and public authorities would cooperate. It may therefore be considered the first 'joint venture' between sports and public authorities. Initially the WADA had its headquarters in Lausanne, but on 21 August 2001 the Foundation Board put the permanent seat to the vote, the result of which was that the WADA seat would be transferred to Montreal.¹ The IOC committed itself to financing the WADA until the end of 2001 and as of January 2002 the sport movement and the public authorities would jointly take over the funding. 'The mission of the Agency shall be to promote and coordinate at international level the fight against doping in sport in all its forms; to this end, the Agency will cooperate with intergovernmental organisations, governments, public authorities and other public and private bodies fighting against doping in sport, inter alia, the International Olympic Committee (IOC), International Sports Federations (IF), National Olympic Committees (NOC) and the athletes', according to the Draft Mission Statement.² The Wada is also assigned '[...] to promote harmonised rules, disciplinary procedures, sanctions and other means of combating doping in sport, and contribute to the unification thereof taking into account the rights of athletes'.³ After the establishment of the WADA, the International Intergovernmental Consultative Group on Anti-Doping in Sport (IICGADS) was created '[...] to coordinate the efforts of the public authorities in the WADA'.⁴ The role which national and regional authorities were supposed to play in the WADA was subsequently clarified during various meetings of the IICGADS. One of the most important tasks of the WADA was to come up with universally applicable anti-doping regulations, whose drafting was entrusted to a Code Project Team. '[...] there had been several stages within an eighteen-month period; the consultation process had involved all categories of stakeholders in addition to independent experts for certain key areas; the comments and suggestions received had been addressed and incorporated into each new version of the document'.⁵ An outline of the framework of the World Anti-Doping Code (WADC) was started immediately after the meetings of the Executive Committee and the Foundation Board between September and November 2001. This process involved athletes, the IICGADS, the Council of Europe, various governments, var-

ious national anti-doping organizations (NADOs), several IFs, the GAISF, the CAS and all the members of the various WADA working committees. The foundations for the Code were laid between December 2001 and April 2002 and were the product of consultations. Approximately 130 individuals and organizations submitted comments. During this stage, about 30 experts in the field of doping were involved as content producers. Meetings were held with athletes, IFs, the European Commission, the Council of Europe, governments, NOCs and NADOs. The WADA participated in the Harmonisation Conference in the Netherlands and in the IICGADS meeting in Kuala Lumpur in 2002. After the first version of the Code had been completed, it was circulated between May and September 2002. Meetings followed involving athletes, the IOC Athletes' Commission, the European Olympic Committees Athletes' Commission, the IOC, the majority of IFs, the GAISF, the ASOIF, the ARISE, the AIOWF, several governments, the Council of Europe, the IICGADS, the European Union Presidency, a number of NOCs and various NADOs. The expertise of several key drafting experts could be drawn on. Over 120 comments were the result of this exploration. The second draft of the Code was published on 10 October 2002. Again, meetings were held with practically all the parties mentioned above who had been involved previously. This round of consultations yielded another 90 comments. The third draft dates from 20 February 2003 and was circulated in the final quarter of that month.

The second World Conference on Doping in Sport took place in Copenhagen from 3 to 5 May. The purpose of this conference '[...] was to review, discuss and agree upon the Code content and its use as the basis for the fight against doping in sport. The approach had been to highlight the importance of the athletes, and its basis was the integrity of sport'.⁶ Taking part in the Conference were representatives of the IOC and of 80 governments, 60 NOCs, 70 IFs, 30 NADOs and 20 athletes, all in all around 1000 persons. The first day was set aside for the discussion of the content of the third draft of the Code. The WADA Foundation Board would adopt the Code on the third day of the Conference. A Conference Resolution would also be drawn up on that day, based on the interventions and their content. With the Resolution 'the World Conference accept[ed] the World Anti-Doping Code [...] as the basis for the fight against doping in sport throughout the world'.⁷ The governments present at the Conference declared among other things that they would 'support a timely process leading to a convention or other obligation concerning, among other things, the Code, to be implemented through instruments appropriate to the constitutional and administrative contexts of each government on or before the XX Olympic Winter Games in Turin in 2006'.⁸ The governments agreed to a joint meeting in Copenhagen in order to discuss intergovernmental aspects and to arrive at a Government Declaration which was to supplement the Conference Resolution.

'There should be no place at the Olympic Games for IFs or NOCs that refused to implement the Code. Likewise, no organisation of the Olympic Games should be awarded to a country whose government had neglected or refused to implement the Code,' IOC chairman Rogge warned in his opening address, and he further urged all IFs and NOCs 'to apply the same philosophy'.⁹

Core elements of the WADC are:

1. The broadened scope of the concept of doping. According to the new concept doping is not only understood to be the act of doping itself, but also attempted doping and the possession of or trafficking in doping products and methods.

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1 http://www.wada-ama.org/asiakas/003/wada_english.nsf/.

2 Available on the WADA website.

3 Draft Mission Statement, 4.6.

4 Balfour, *ibidem*.

5 World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 12.

6 World Conference on Doping in Sport,

plenary sessions, Summary Notes, p. 13.

7 World Conference on Doping in Sport Resolution, adopted by the World Conference on Doping in Sport, Copenhagen, Denmark, 5 March 2003, sub 1.

8 World Conference on Doping in Sport Resolution, adopted by the World Conference on Doping in Sport, Copenhagen, Denmark, 5 March 2003, sub 2.

9 World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 1.

2. Strict liability as the starting point. The athlete is strictly liable for the presence of any prohibited substance in his or her body. Although the WADC includes some exceptions to this rule, every participant in the Olympic Games and world championships is tested for doping and, if found positive, automatically disqualified.
3. A penalty of two years' exclusion following a first doping offence. In exceptional circumstances, however, this penalty can be reduced or lifted. Repeat offences result in life-long exclusion.
4. At least once a year, the WADA publishes a list of banned substances and methods.¹⁰ The current list, which has been in force as of 1 January 2003, also features the prohibition of gene doping.
5. The WADA may appeal doping judgments from sports organizations to the CAS.

Below, several aspects of the WADC will be discussed and where necessary compared to the rules in previous Codes.

2. Description of the doping offence (violation of the anti-doping rule)

2.1. The definition of doping

Article 1 Definition of Doping

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.

The descriptions of the doping offence used in the codes preceding the WADC were similar in structure to the description of an offence under criminal law. A certain act or situation was considered undesirable and a penalty was attached to it. The drafters of the WADC decided to abandon this approach. Doping is no longer considered a specified condemnable human act or the result of such an act, but rather a violation of the rules describing that act or result. The concept of doping has been completely detached, abstracted and instrumentalized. Doping is no longer viewed as an act knowingly performed by an athlete, but rather as an act performed by an athlete in a legal dimension: doping is the violation of an anti-doping rule. As such violations of the anti-doping rule also comprise situations which are not directly considered doping offences in the classical sense of the word¹¹ it is understandable that the term doping has to be defined in two stages, although this is not very elegant, nor very clear. The substantive norm, i.e. the norm that should be complied with and on the basis of which an act or a situation can be tested and punished, has been pushed into the background. Subsequent to the framework rule it is indicated when there can be said to have been a violation of the anti-doping regulations. The substantive norm which was taken as the starting point in the WADC says that no underlying substantive norms may be violated. These rules essentially indicate what the drafters of the Code considered doping to be.

2.2. Description of the doping offence

Article 2 Anti-doping Rule Violations¹²

The following constitute anti-doping rule violations:

- 2.1 The presence of a prohibited substance or its metabolites or markers in an athlete's bodily Specimen
 - 2.1.1 It is each athlete's personal duty to ensure that no prohib-

ited substance enters his or her body. Athletes are responsible for any prohibited substance or its metabolites or markers found to be present in their bodily specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.

- 2.1.2 Excepting those substances for which a quantitative reporting threshold is specifically identified in the prohibited list, the detected presence of any quantity of a prohibited substance or its metabolites or markers in an athlete's sample shall constitute an anti-doping rule violation.
- 2.1.3 As an exception to the general rule of Article 2.1, the prohibited list may establish special criteria for the evaluation of prohibited substances that can also be produced endogenously.
- 2.2 Use or attempted use of a prohibited substance or a prohibited Method.
 - 2.2.1 The success or failure of the use of a prohibited substance or prohibited method is not material. It is sufficient that the prohibited substance or prohibited method was used or attempted to be used for an anti-doping rule violation to be committed.
- 2.3 Refusing, or failing without compelling justification, to submit to sample collection after notification as authorized in applicable anti-doping rules or otherwise evading sample collection.
- 2.4 Violation of applicable requirements regarding athlete availability for out-of-competition testing including failure to provide required whereabouts information and missed tests which are declared based on reasonable rules.
- 2.5 Tampering, or attempting to tamper, with any part of Doping Control.
- 2.6 Possession of prohibited substances and methods:
 - 2.6.1 Possession by an athlete at any time or place of a substance that is prohibited in out-of-competition testing or a prohibited method unless the athlete establishes that the possession is pursuant to a therapeutic use exemption granted in accordance with Article 4.4 (Therapeutic Use) or other acceptable justification.
 - 2.6.2 Possession of a substance that is prohibited in out-of-competition testing or a prohibited method by athlete support personnel in connection with an athlete, competition or training, unless the athlete support personnel establishes that the possession is pursuant to a therapeutic use exemption granted to an athlete in accordance with Article 4.4 (Therapeutic Use) or other acceptable justification.
- 2.7 Trafficking in any prohibited substance or prohibited method.
- 2.8 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.

The Code Project Team '[...] had tried to come up with a list of anti-doping rule violations that was both comprehensive and loophole-free.'¹³ In Articles 2(1) - (3), 2(5) and 2(7) - (8) some rules have been laid down which may also be found in the IOC codes and in the anti-doping regulations of the majority of IFs. A new feature of the list, which describes acts and circumstances which are indicative of a violation of an anti-doping rule, is that in principle, doping is also understood to include the failure to provide the required information concerning an athlete's whereabouts. The drafters of the WADC considered unannounced out-of-competition doping checks to be at the heart of effective doping control. It is their opinion that without accurate information concerning the athlete's location doping control would become inefficient and in many cases even impossible. The drafters felt that this was such an important part of the entire out-of-

¹⁰ Art. 4 WADC.

¹¹ The possession of doping substances by persons in the athlete's entourage is very far removed from an actual act of doping by the athlete.

¹² The comment to Art. 1.2 - Anti-doping rule violations, of the second draft of the WADC in part reads as follows: 'The purpose of this Article is to specify the circumstances and conduct which constitute violations of anti-doping rules. Hearings in doping cases will proceed

based on the assertion that one or more of these specific rules have been violated. Most of the circumstances and conduct on this list of violations can be found in some form in the OMADC or other existing anti-doping rules'. It is entirely right that this comment should not have returned in the final version of the WADC.

¹³ World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 14.

competition testing programme that it had to be brought inside the scope of the term doping.¹⁴ Also new as compared to the previous anti-doping regulations is that the possession of doping substances and methods has been made a violation of the anti-doping rules. It is important to note that Articles 2(6)(1) and 2(6)(2) only penalize possession when the doping substances were found during 'out-of-competition testing'.

The line set out in the Olympic Movement Anti-Doping Code, i.e. the starting point that the athlete is absolutely responsible for the presence of prohibited substances in the sample that was taken from him/her, is continued in the WADC. 'For purposes of anti-doping violations involving the presence of a prohibited substance (or its metabolites or markers), the Code adopts the rule of strict liability which is found in the OMADC [Olympic Movement Anti-Doping Code, JS] and the vast majority of existing anti-doping rules. Under the strict liability principle, an anti-doping rule violation occurs whenever a prohibited substance is found in an athlete's bodily specimen. The violation occurs whether or not the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault.' The Code Project Team did not hesitate to follow the approach of the OMADC and did not bow to the criticism which was the result of this rather harsh position. It would have been possible to opt for a reversal of the burden of proof whereby the athlete who tested positive would have been found guilty *prima facie*, but would also be given the opportunity to defend him/herself against the charges (*Anscheinsbeweis*). But the WADC system does not allow for any debate concerning the question of guilt either. It can only be debated in the doping procedure where the proportionality of the severity of the penalty is concerned as related to the severity of the offence. However, even then such debate is pointless, because the Code has a system of fixed penalties.

Athletes are bound by the rules of play applying in their sport. In the comment to Article 2 the drafters are of the opinion that 'in the same manner, athletes and athlete support personnel should be bound by anti-doping rules based on Article 2 of the Code by virtue of their agreements for membership, accreditation, or participation in sports organizations or sports events subject to the Code.' Here a connection is made which cannot be entirely justified. The anti-doping rule is not a rule of play. During a game a participant may be sent off for a violation of the rules of play without the need to discuss whether blame can be attributed. We will not find any diatribes concerning human rights on the pitch, but we will find them before the disciplinary court which has to try a doping offence. The sporting world prefers to consider the offence of doping a sporting offence and tackle it accordingly. However, there are not many sporting offences for which first-time offenders may be banned for two years and repeat offenders for life. Where an offence can result in penalties such as these it is necessary to protect the athlete with more rights than would be warranted by violations of the rules of play which are not punished as severely. An appropriate passage in the *Frankfurter Allgemeine Zeitung* reads: 'Wenn man mehr Flexibilität schaffen würde, wäre das kein Angriff auf den Antidoping-Kampf', sagte der schweizerische Jurist Denis Oswald, der Präsident des Internationalen Ruder-Verbandes und Vorsitzende der Gemeinschaft aller olympischen Sommersport-

verbände. Auch sein Schweizer Landsmann Jiri Dvorak, Mitglied der Sportmedizinischen Kommission der FIFA, beruft sich auf 'gute Erfahrungen in der Einzelfall-Beurteilung'. Sie ist schließlich kein sportliches Entgegenkommen, sondern sogar ein elementares Grundrecht'.¹⁵ The harsh position taken in the WADC is somewhat mitigated by an escape clause: if the athlete can demonstrate exceptional circumstances, he/she may thereby force the authorities to consider the culpability of his/her act. The exceptional circumstances clause will be discussed below.

3. Out-of-competition testing¹⁶

Richard Young's team had asked several athletes their opinion concerning out-of-competition testing. 'With regard to out-of-competition testing, most of the athletes to whom he had talked thought that out-of-competition testing was a pain, but were strongly in favour of it as they believed that it was absolutely necessary to have a level playing field. The athletes were not, however, supportive of uncoordinated and disorganised out-of-competition testing. The Code tried to coordinate the process. Disagreements and power struggles between IFs and national bodies arose at times, due to a lack of transparency or a lack of confidence in the other party. The Code required transparency and stipulated that all parties work together, cooperate, collaborate and coordinate, because the fight against doping was big enough to provide enough work for everybody.'¹⁷ The WADC proposes that out-of-competition doping tests are held by international and national organizations. Such tests can be initiated and supervised by the WADA, the IOC or the IPC in the context of the games organized by them, by the athlete's IF, by the athlete's NADO or by the NADO of the country where the athlete resides. The tests are to be coordinated by the WADA so as to attain maximum efficiency as regards the joint efforts and so as to avoid the unnecessary repetition of tests. Although most governments are unable to be parties to or to be bound by non-governmental instruments like the WADC, the drafters of the Code nevertheless believe that the fight against doping is a battle which the sporting world and national governments have to fight side by side. For the sake of this joint battle governments should at least make it possible for the WADA to organize out-of-competition tests.¹⁸

What are athletes tested for out-of-competition? The WADC has a single list of prohibited substances for use both in and out of competition. However, there are also substances on this list for which athletes are not tested out of competition. Among the substances which are prohibited at all times are masking agents and substances which have a long-term boosting effect after use during training, like anabolics.¹⁹ 'An Athlete's out-of-competition use of a prohibited substance that is not prohibited out of competition would not constitute an anti-doping rule violation', says the comment to Article 2(2)(1) of the WADC.²⁰

Athletes have to keep themselves available for out-of-competition testing. If an athlete fails to do this and does not inform the competent authorities of his/her location, he/she will be guilty of a doping offence under Article 2.4 of the WADC. Over the years, doping hunters have come to the conclusion that unannounced out-of-com-

¹⁴ The comment to Art. 2.4 reads in part: 'This Article, which is not typically found in most existing anti-doping rules, requires athletes that have been identified for out-of-competition testing to be responsible for providing and updating information on their whereabouts so that they can be located for no advance notice out-of-competition testing. The 'applicable requirements' are set by the athlete's International Federation and National Anti-Doping Organization in order to allow some flexibility based upon varying circumstances encountered in different sports and countries. A violation of this Article may be based on either intention-

al or negligent conduct by the Athlete.'

¹⁵ *Frankfurter Allgemeine Zeitung*, 5 March 2003.

¹⁶ In Appendix 1 - Definitions - 'out-of-competition' is understood as referring to 'Any doping control which is not in-competition'.

¹⁷ World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 17. See also the comment to Art. 15 WADC: 'Rather than limiting the responsibilities of one group in favour of the exclusive competency of the other, the Code manages potential problems associated with overlapping responsibilities, first by creating a much higher level of overall har-

monisation and second, by establishing rules of precedence and cooperation in specific areas.'

¹⁸ Art. 22.1 WADC.

¹⁹ Art. 4.2 WADC. In the comment to this Article it is also mentioned that the distinction '[...] between what is tested for in-competition and what is tested for out-of-competition is carried over from the OMADC'. Under Art. 2.6.2 WADC 'possession of a substance that is prohibited in out-of-competition testing or a prohibited method by athlete support personnel in connection with an athlete [...]' is prohibited. It is not entirely clear from this provision whether 'possession

of a substance' refers to persons from the athlete's entourage or to the athlete him/herself.

²⁰ 'Prohibited stimulants, for example, are not tested for out-of-competition because they have no performance enhancing benefit unless they are in the athlete's system while the athlete is actually competing. So long as the prohibited stimulant has cleared the athlete's system at the time the athlete competes, it makes no difference whether that stimulant could have been found in the athlete's urine the day before or the day after the competition', as Appendix 1 - Definitions - explains.

petition testing is an effective tool for detecting doping. 'Without accurate athlete location information such testing is inefficient and sometimes impossible', says the comment to this Article. The athlete's IF and NADO have to formulate 'applicable requirements [...] in order to allow some flexibility based upon varying circumstances encountered in different sports and countries.' Athletes who have been included in an out-of-competition testing pool by their IF or NADO have to provide detailed information concerning their location. The IFs and NADOs must pass this information on to the WADA. The WADA then makes the information accessible to other NADOs who are competent with respect to the athlete pursuant to Article 15 of the WADC. The information must be kept confidential and may only be used in the planning, coordination and application of the test and has to be destroyed after it has ceased to be relevant for these purposes.²¹ The NADOs who administer the tests must first consult with their fellow organizations. Every NADO has to establish a 'Registered Testing Pool' for the country for which it is competent,²² including both international-level athletes and national-level athletes. Every IF, in consultation with every NADO, has to plan and apply out-of-competition tests based on its Registered Testing Pool.²³ The WADA is merely a coordinating body where out-of-competition testing is concerned. The actual testing is left to national and international anti-doping organizations. WADA was in the position to include principles in the WADC for the protection of the rights of the individual athlete which the organizations would have had to guarantee in unannounced tests.

4. Procedure after testing positive

Every anti-doping organization which organizes doping controls has to adopt rules for the pre-hearing administration with respect to suspected violations of the anti-doping rules.²⁴ To this end, several rules have been established in the WADC. The organization must in the first place examine whether the use of the prohibited substance found in the A sample was not in fact approved (therapeutic use exemption) and whether the International Standards for Testing have been applied strictly so as not to undermine the validity of the positive doping result. When these matters have been found to be in order the organization will promptly notify the athlete of its findings. He will be informed, among other things, of the fact that he can request an analysis of the B sample and that he or his representative can apply to be present at the analysis. The athlete may request that he/she be sent copies of the A and B sample laboratory documentation package. The package must include the information required by the International Standard for laboratory analysis. The anti-doping organization is in charge of organizing the follow-up investigation. The results of this investigation must be passed on promptly to the athlete. The organization must also inform the athlete whether it persists in its opinion that a doping rule has been violated. If so, it must indicate which rule has been violated and in what way.

5. Provisional suspension

A Signatory²⁵ may adopt rules, applicable to any event for which it is responsible, permitting provisional suspensions to be imposed after the investigation referred to above but prior to a final hearing. Pursuant to Article 10.7 the athlete will then be disqualified with all the resulting consequences, including the loss of medals, rankings and

prizes, 'unless fairness requires otherwise'. The WADC has made this type of suspension conditional upon certain factors. The athlete must be heard in a provisional hearing. This hearing is to take place either before the provisional suspension is imposed or very shortly thereafter. It does not follow clearly from the WADC whether the rights of the defence (Article 8) which apply to the final hearing also apply to the provisional hearing. If a provisional suspension has been imposed and it has meanwhile become apparent that the result of the analysis of the B sample does not confirm that of the A sample, the athlete shall not be subject to any further action. The drafters of the WADC assumed that the analysis of the B sample would only rarely result in a different finding than the analysis of the A sample. Still, at the end of Article 7.5 they have inserted a provision 'just in case'. 'In circumstances where the athlete [...] has been removed from a competition and the subsequent B sample analysis does not confirm the A sample finding, if, without otherwise affecting the competition, it is still possible for the athlete or team to be reinserted, the athlete or team may continue to take part in the competition.' It is hard to imagine a situation in individual sports where the competition would not be affected. In the likely event that the rehabilitated athlete can no longer take part in the competition, no financial compensation or satisfaction of any kind is offered.

6. Sanctions

6.1. Sport sanctions

The WADC provides for sport sanctions and disciplinary sanctions. The sport sanctions consist of '[...] disqualification of all of the athlete's individual results obtained in that event with all consequences, including forfeiture of all medals, points and prizes'.²⁶ Two particular sets of circumstances can trigger automatic disqualification. Under Article 9 this may happen when the violation of the doping rule takes place '[...] in connection with an in-competition test', and under Article 10.1 when the violation takes place '[...] during or in connection with an event [...], upon the decision of the ruling body of the event.' Article 9 is a separate article, while Article 10.1 is part of an Article concerning 'Sanctions on individuals'. The reason remains unclear why Article 10.1 has not been accorded the status of a separate article or has not been joined to Article 9. The only difference between the situations described is whether the game in question is an individual game or part of a series. Article 10.1.1 provides that if the athlete '[...] bears no fault or negligence for the violation, the athlete's individual results in the other competitions shall not be disqualified unless the athlete's results in competitions other than the competition in which the anti-doping rule violation occurred were likely to have been affected by the athlete's anti-doping rule violation.' Strangely enough, it seems that an exception is made here to the strict liability rule.

6.2. Disciplinary sanctions for individuals

The WADC includes sanctions directed against individual athletes (Article 10), against teams (Article 11) and against sports organisations (Article 12). The WADC sanctions for a violation of the rules in Articles 2.1 - 2.3 and 2.5 - 2.6 - except when the specified substances referred to in Article 10.3 are found in a sample - are two years' exclusion for a first offence²⁷ and life-long exclusion for a second offence.²⁸

21 Art. 14.3 WADC. Art. 14.5 WADC once more reiterates that: 'Private information regarding an athlete shall be maintained by WADA in strict confidence'.

22 I.e. 'The pool of top level athletes established separately by each International Federation and National Anti-Doping Organization who are subject to both in-competition and out-of-competition testing as part of that International Federation's or Organization's test distribution plan.'

Appendix 1 - Definitions - of the WADC.

23 Art. 5.1.1 WADC.

24 Art. 7 WADC.

25 Signatories: Those entities signing the Code and agreeing to comply with the Code, including the International Olympic Committee, International Federations, International Paralympic Committee, National Olympic Committees, National Paralympic Committees, Major Event

Organizations, National Anti-Doping Organizations, and WADA. Appendix 1 - Definitions - WADC.

26 Art. 9 WADC - Automatic disqualification of individual results and Art. 10.1 WADC - Disqualification of results in event during which an Anti-Doping rule violation occurs.

27 *Die Welt* of 3 March 2003 ('Die Radprofis stehen isoliert da' (2)) contained an interview with WADA president Richard

Pound. To *Die Welt's* question: 'Können Sie den Verbänden zusichern, dass Zweijahres-Sperren juristisch so abgesichert sind, dass ihnen anschließend keine riesigen Schadensersatzforderungen von gesperrten Athleten drohen?' Pound replied: 'Renommiertere Sport- und Menschenrechtsexperten haben uns die Unbedenklichkeit der Vorschriften in Gutachten bescheinigt.'

28 Art. 10.2 WADC.

29 During the 1999 World Conference on Doping it was agreed to introduce flexible sanctions with a minimum of two years following a first offence. The idea of imposing a certain minimum at least has been abandoned in the WADC. The reason could be that various disciplinary tribunals have the discretionary power to respond differently to equal cases, which causes a lack of uniformity. The comment to article 10.2 expresses the fear that: 'flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sporting bodies to be more lenient with dopers'. The same comment persistently maintains that the two-year ban is upheld with a view to harmonisation. It would be truer to speak of uniformity, which may actually impede harmonisation. Imposing a two-year ban has different results depending on whether you are a short distance runner or an archer. Harmonisation can only be achieved when the sanction is related to the period of the athlete's life in which he/she is able to practise his/her sport professionally. 'A primary argument in favour of harmonisation is that it is simply not right that two athletes from the same country who test positive for the same prohibited substance under similar circumstances should receive different sanctions only because they participate in different sports'. Besides the fact that it makes no difference whether the athletes are from the same country, this argument could easily serve to defend differentiated sanctioning, related to each particular sport. The comment to Article 2.9.1.3. in the second version of the WADC, which is now Article 10.2, rightly did not make it to the third version. This comment defended the instrument of the two-year or life-long ban. It claimed that 'these disqualification periods are not unduly harsh when compared to the discipline that is applied to other types of professional misconduct. A lawyer who misuses his client's funds, a psychiatrist who has sex with a patient, and an airline pilot who arrives drunk for a flight will, in most countries, be permanently banned from their professions. An athlete who dopes commits a comparable breach of trust in his profession or vocation'.

During the Conference another heated discussion took place concerning the question whether the periods of exclusion (two years and life) were in conformity with human rights, principles of national justice, general principles of law and fundamental fairness. Richard Young, Team Leader of the WADA Code Project Team,³⁰ remarked that independent experts had been consulted concerning this question. 'Two Geneva law professors, experts in international law and human rights, had been hired, and they had agreed that two years and a lifetime were acceptable and consistent with human rights and natural justice, as long as there were clauses in the rules which said that, if the athlete had absolutely no fault, he or she could not be punished with a suspension or period of ineligibility. They had added that something would need to be built into the rules to deal with the concept of proportionality, so that if the athlete was just slightly at fault, the ineligibility period would have to be less than two years. With regard to the concept of exceptional circumstances, this was a crack in the two-year door.'

Article 10.4.2 provides that violations of the anti-doping rules referred to in Articles 2.7 and 2.8, i.e. including a possible failed attempt to administer doping to an athlete, will be punished by a minimum of four years to a maximum of life-long exclusion. The same article further provides that violations of an anti-doping rule involving a minor will be considered to be exceptionally severe

offences. If a member of the athlete support personnel is involved in the offence, he/she will be banned for life.

6.3. Disciplinary sanctions for teams

What did 'team sport' have to be defined as? In Appendix 1 - Definition - WADC team sport is defined as 'a sport in which the substitution of players is permitted during a competition'. If several members of a team are suspected of a possible doping offence in the framework of a series of games (or event),³¹ the entire team will be subject to target testing³² throughout the event. If multiple players on a team are found to test positive during an event, the entire team may be disqualified and be made subject to disciplinary proceedings. This means that when only one team member is suspected or tests positive, this has no ramifications for the team as a whole. This indicates a departure from the idea of fairness with respect to the team's opponents.³³ In his presentation at the last World Conference on Doping Richard Young put the following question to his audience: '[...] what would happen to a team in the event of one of its athletes testing positive, there was some clarification as to what was considered a team sport' whereupon he cited the definition given above. 'In tennis doubles or team gymnastics, therefore, how disqualification worked was left to the rules of the individual IFs'. In such cases, it cannot be concluded from the text of the WADC what the fate will be of one team member who is suspected or has tested positive, nor what the fate of his/her team as a whole will be.

6.4. Remission of sentence

6.4.1. Exceptional circumstances

The OMADC already provided a rule for exceptional circumstances. After Article 3(1)(b) penalised the doping offence by a sanction of two years at least, it was further provided that '[...] 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'. During the World Conference on Doping the FIFA and UCI chairmen did not attend because their federations could not reconcile themselves with the fixed two-year sanction for the first doping offence.³⁴ The situation was all the more curious as the first version of the WADC already contained an exceptional circumstances clause which allowed for the flexible application of the prescribed fixed sanction of two years. This clause read as follows:

8.8.3.2 Exceptional circumstances.

The minimum periods of disqualification provided above may be lessened in proportion to the exceptional circumstances of a particular case, but only if the athlete can clearly establish that the anti-doping rule violation was not the result of his or her fault or negligence.

This clause was couched in broader terms than its counterpart in the OMADC, as it did not merely apply in connection with the sanction for a first offence. According to this provision it would in theory be possible to commute the sentence of exclusion for life to a much milder penalty.

29 Pursuant to Art. 10.3 the sanctions for testing positive for certain 'specified substances' are: First violation: at a minimum, a warning and reprimand and no period of ineligibility from future events, and at a maximum, one (1) year's ineligibility. Second violation: two (2) years ineligibility. Third violation: lifetime ineligibility. A violation of the whereabouts rule is at a minimum 3 months and at a maximum 2 years (Art. 10.4.3) and a trafficking or administration violation is at a minimum four years up to lifetime ineligibility (Art. 10.4.2).

30 World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 13.

31 Event: A series of individual competitions conducted together under one ruling body (e.g., the Olympic Games, FINA World Championships, or Pan American Games). WADC, Appendix 1, Definitions.

32 Target testing is defined as: 'Selection of athletes for testing where specific athletes or groups of athletes are selected on a non-random basis for testing at a specified time', under Appendix 1 - Definitions - WADC.

33 '[...] it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently', according to the CAS in Quigley v. UIT. Cited by the drafters of the WADC in the comment to Art. 2.1.1.

34 'Unter den rund 1000 Delegierten und Beobachtern aus 100 Ländern fehlten ausgerechnet die beiden

Weltverbandspräsidenten Sepp Blatter (Fußball) und Hein Verbruggen (Radsport), die zu den schärfsten Kritikern des Codes zählen. Ihre Abwesenheit wurde von vielen Teilnehmern als Bräskierung angesehen. Sowohl die Fußballspieler als auch die Radsportler wenden sich gegen die vorgesehene Mindeststrafe von zwei Jahren auch für Doping-Ersttäter'. Frankfurter Allgemeine Zeitung, 4 March 2003, no. 53, p. 31.

The second version saw the clause return in a much-edited version. It had been supplemented to cover cases where an athlete's low age and lack of experience would be relevant in deciding the culpability of his actions.

1.9.2.3.3 Exceptional circumstances.

The periods of ineligibility provided above may be lessened or eliminated in proportion to the exceptional circumstances of a particular case, but only if the athlete can clearly establish that the anti-doping rule violation was not the result of his or her fault or negligence. The athlete's age and competitive experience may be considered in determining whether the anti-doping rule violation was the result of the athlete's fault or negligence.

Why include an exceptional circumstances clause in the WADC? 'This approach is consistent with basic principles of human rights and provides a balance between those Anti-Doping Organizations that argue for a much narrower exception, or none at all, and those that would reduce a two year suspension based on a range of other factors even when the athlete was admittedly at fault.'³⁵ Perhaps partly as a result of pressure from the FIFA and the UCI, the exceptional circumstances clause was expanded considerably.

Where the first version still spoke of a proportional reduction of the period of exclusion, the second mentioned reduction and elimination, and the third now exclusively mentions elimination in cases where there has been no fault or negligence. It must be noted however that the clause may currently only be invoked in case of the violation of the anti-doping rules referred to in Articles 2.1. and 2.2.

10.5 Elimination or reduction of period of ineligibility based on exceptional circumstances.

10.5.1 No fault or negligence

Athlete establishes in an individual case involving an anti-doping rule violation under Article 2.1 [...] or use of a prohibited substance or prohibited method under Article 2.2 that he or she bears no fault or negligence for the violation, the otherwise applicable period of ineligibility shall be eliminated.³⁶

A rule which has been laid down in the final version of the WADC and which was not found in earlier versions is Article 10.5.2. The Code Project Team considered it appropriate to include another exceptional circumstances clause for cases where there is no significant fault or negligence. This clause may also be invoked by athletes who are suspected of having violated the anti-doping rules laid down in Articles 2.3 and 2.8.

10.5.2 No significant fault or negligence

This Article 10.5.2 applies only to anti-doping rule violations involving Article 2.1 [...], Article 2.2, [...] Article 2.3, or [...] Article 2.8. If an athlete establishes in an individual case involving such violations that he or she bears no significant fault or negligence, then the period of ineligibility may be reduced, but the reduced period of ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise

applicable period of ineligibility is a lifetime, the reduced period under this section may be no less than 8 years.

An additional requirement which had already been part of all the earlier versions of the WADC is that '[...] the athlete must also be able to demonstrate how the prohibited substance entered his or her system'.³⁷

One could argue that it is hardly proportional that the penalty for a second violation is eliminated when no fault or negligence is at stake, but is upheld for a minimum of eight years if there is no significant fault or negligence.

The Dutch delegation to the World Conference on Doping in Copenhagen criticized the limited role in the doping procedure of the question of the culpability of the athlete in doping violations. Van Kleij remarked that: 'Where exceptional circumstances were concerned, the proposed system for taking into account exceptional circumstances seemed to be limited, therefore limiting the fairness of the anti-doping policy. An athlete should not be restricted in proving exceptional circumstances when accused of an anti-doping rule violation. The Code should address explicitly that exceptional circumstances would be taken into consideration for each and every anti-doping rule violation. This would promote the credibility of the anti-doping policy by providing greater fairness'.³⁸ This is a laudable point of view, but the drafters of the WADC had already opted for a system in which culpability could no longer be discussed for the purpose of determining whether a doping violation had taken place. This system, which had already been laid down in the OMADC, was adopted by the world when it was adopted in the WADC.

As the OMADC clause did not provide for exceptional circumstances, the IFs were free to each apply clauses of their own.³⁹ The WADC '[...] stated that an athlete needed to exercise the utmost caution. What if an athlete could not meet the test of absolutely no fault? How could proportionality be dealt with? If the athlete could not prove absolutely no fault, then the athlete would have the burden to prove no significant fault or negligence, following which the two years could be reduced to a floor of one year. The opinion of the independent experts was that there had to be a rule that addressed proportionality, and this rule (Article 10.5) satisfied the requirement', said Richard Young.⁴⁰

Questions still remain however concerning the particular circumstances which according to the drafters of the WADC had to be considered exceptional. These had to be adequately described, as 'there is plenty of devil in the detail'.⁴¹ The comment to the WADC mentions the following concerning the definition of the clause's scope:

'Article 10.5 is meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.

To illustrate the operation of Article 10.5, an example where no fault or negligence would result in the total elimination of a sanction is where an athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of no fault or negligence in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and

35 Comment to Art. 10.5.2 WADC (final version).

36 The comment to Art. 10.5.1 states that this provision '[...] applies only to violations under Articles 2.1 and 2.2 [...] because fault or negligence is already required to establish an anti-doping rule violation under other anti-doping rules'. This is some cause for confusion as under the strict-liability-doctrine in the WADC any discussion of culpability is ruled out where the violation of an anti-doping rule is concerned. Such discussion can only take place in the framework of determining punishment. Given the comment to Art. 10.5.2 the Code Project

Team was quite aware of this: 'These Articles [10.5.1 en 10.5.2] apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred'.

37 In the WADC's final version the condition under Art. 10.5.1 is supplemented as follows: 'In the event this Article is applied and the period of ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Articles 10.2, 10.3 and 10.6.'

38 World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 32.

39 '[...] as a result, different sporting bodies had set their own, different, criteria. Two examples from two federations could be cited. The FINA rule was based on lack of fault. Since adoption of the rule, there had been fourteen nandrolone cases, ten of which had imposed a four-year sanction, and four of which had applied the exceptional circumstances rule to some extent, but only one of those had applied the penalty of less than two years (in this case, one year). FINA had a tight exceptional circumstances rule. The UCI had a very different exceptional circumstances

rule, which was much broader, and allowed for consideration of the impact on the athlete, and the impact on his or her standing in the community. The UCI had had four cases since January 2001, when the two-year rule had been adopted. In one of these cases, the athlete had been sanctioned for two years, and the other three cases had received six months', commented Richard Young, World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 13.
40 Richard Young, World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 14.

have been warned against the possibility of supplement contamination); (b) the administration of a prohibited substance by the athlete's personal physician or trainer without disclosure to the athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any prohibited substance); and (c) sabotage of the athlete's food or drink by a spouse, coach or other person within the athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on no significant fault or negligence. (For example, reduction may well be appropriate in illustration (a) if the athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to prohibited substances and the athlete exercised care in not taking other nutritional supplements.)

Article 10.5.2 applies only to the identified anti-doping rule violations because these violations may be based on conduct that is not intentional or purposeful. Violations under Article 2.4 (whereabouts information and missed tests) are not included, even though intentional conduct is not required to establish these violations, because the sanction for violations of Article 2.4 (from three months to two years) already builds in sufficient discretion to allow consideration of the athlete's degree of fault.³⁵

Despite this explanation, a very real chance remains that the disciplinary bodies of the different IFs will each use their own interpretation of exceptional circumstances. If this interpretation conflicts with the WADA's point of view, the WADA does not need to stand idly by. Under Article 13.2.1 the final decision of an IF disciplinary tribunal may be appealed exclusively (without recourse to the courts) to the Court of Arbitration for Sport (CAS) when a case is involved arising from competition in an international event or in cases involving international-level athletes. Article 13.2.3 lists the 'Persons entitled to appeal'. Under (e) the WADA is included in this circle. In the future, CAS case law will further define the term 'exceptional circumstances'. Given Articles 21.1 and 21.1.3, it will not be easy to demonstrate exceptional circumstances. These Articles provide among other things that the 'roles and responsibilities of athletes [are] to be knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant to the Code [and] to take responsibility, in the context of anti-doping, for what they ingest and use'.

6.4.2. Cooperating in the investigation

If an athlete has substantially assisted an anti-doping organization in the detection or establishment of violations of the anti-doping rules by

athlete support personnel this organization may decide to reduce the ineligibility period of the athlete concerned. When the penalty was imposed for a first violation the reduction may be by as much as half the minimum period of exclusion. If the athlete was banned for life, his/her penalty may only be reduced by a maximum of eight years.

6.5. Reinstatement

Various IFs have by now introduced a review procedure which offers athletes who have been banned as a result of doping the opportunity to reduce the period of their ineligibility and return to competition early. The WADC does not provide for this type of review procedure. Where the Code mentions reinstatement (Article 10.10) it refers to the athlete's return to competition after the entire period of his/her exclusion.

7. Rights of the defence

Every anti-doping organization⁴² which is responsible for results management has to ensure that a hearing takes place concerning every person who is suspected of having violated an anti-doping provision. Such hearings serve to establish whether a doping violation has in fact been committed and if so, what the appropriate penalty is. Hearings in connection with an event may be expedited. Article 8 WADC, which provides these matters, is not intended to take the place of the rules of the signatories, but rather to inform them of certain minimum requirements which a hearing must fulfil. These minimum requirements are:

- a timely hearing;
- fair and impartial hearing body;
- the right to be represented by counsel at the person's own expense;
- the right to be fairly and timely informed of the asserted anti-doping rule violation;
- the right to respond to the asserted anti-doping rule violation and resulting consequences;
- the right of each party to present evidence, including the right to call and question witnesses (subject to the hearing body's discretion to accept testimony by telephone or written submission);
- the person's right to an interpreter at the hearing, with the hearing body to determine the identity, and responsibility for the cost, of the interpreter; and
- a timely, written, reasoned decision.

As in the realm of the law of association the influence of the ECHR and the ICCPR is non-existent, it was recommended at the end of chapter 15 above, that a sports federation (at least in the EU), in order

35 Comment to Art. 10.5.2 WADC (final version).

36 The comment to Art. 10.5.1 states that this provision '[...] applies only to violations under Articles 2.1 and 2.2 [...] because fault or negligence is already required to establish an anti-doping rule violation under other anti-doping rules'. This is some cause for confusion as under the strict-liability-doctrine in the WADC any discussion of culpability is ruled out where the violation of an anti-doping rule is concerned. Such discussion can only take place in the framework of determining punishment. Given the comment to Art. 10.5.2 the Code Project Team was quite aware of this: 'These Articles [10.5.1 en 10.5.2] apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred'.

37 In the WADC's final version the condition under Art. 10.5.1 is supplemented as

follows: 'In the event this Article is applied and the period of ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Articles 10.2, 10.3 and 10.6.'

38 World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 32.

39 '[...] as a result, different sporting bodies had set their own, different, criteria. Two examples from two federations could be cited. The FINA rule was based on lack of fault. Since adoption of the rule, there had been fourteen nandrolone cases, ten of which had imposed a four-year sanction, and four of which had applied the exceptional circumstances rule to some extent, but only one of those had applied the penalty of less than two years (in this case, one year). FINA had a tight exceptional circumstances rule. The UCI had a very different exceptional circumstances

rule, which was much broader, and allowed for consideration of the impact on the athlete, and the impact on his or her standing in the community. The UCI had had four cases since January 2001, when the two-year rule had been adopted. In one of these cases, the athlete had been sanctioned for two years, and the other three cases had received six months', commented Richard Young, World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 13.

40 Richard Young, World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 14.

41 'This has been modified to allow individual sports bodies to reduce the ban in 'exceptional circumstances'. Professor Jiri Dvorak, the head of FIFA's medical committee, said football had no major disagreements with the code. He said: 'We can live with the general estimation of a two-year ban for a first offence but we want the right to increase the bans as

well as reduce them - maybe to three or maybe four years.' BBC Sport, Tough new sanctions for drug cheats, 5 March 2003.

42 A Signatory that is responsible for adopting rules for initiating, implementing or enforcing any part of the Doping Control process. This includes, for example, the International Olympic Committee, the International Paralympic Committee, other Major Event Organizations that conduct testing at their events, WADA, International Federations, and National Anti-Doping Organizations. Signatories: Those entities signing the Code and agreeing to comply with the Code, including the International Olympic Committee, International Federations, International Paralympic Committee, National Olympic Committees, National Paralympic Committees, Major Event Organizations, National Anti-Doping Organizations, and WADA. Appendix 1, Definitions, WADC.

to be and remain recognised as such, should have statutes and household rules in which (at least) the ECHR are subscribed to. This recommendation has been amply followed in Article 8 WADC.

8. Proof of doping

Article 3 WADC contains both substantive and procedural rules of evidence. Especially the procedural law rules call the positioning of this Article amongst the articles regulating substantive law matters into question. Article 3.1 regulates the burdens and standards of proof. As was the case in the previous anti-doping codes, the WADC puts the onus of proving the doping offence on the prosecuting organization. It is subsequently indicated how the offence has to be proven. The standard of proof is that the prosecuting organization will have proven the offence if the evidence is 'to the comfortable satisfaction of the hearing body'. The severity of the offence is a co-deciding factor. 'This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt'. In cases where according to the WADC the burden of proof is on the accused, 'the standard of proof shall be by a balance of probability'. Unfortunately the Code Project Team did not incorporate the principle of *in dubio pro reo* in the Code following the decision of the CAS in *Bernhard v ITU*⁴³. Against the standard of proof as now also provided under the WADC the CAS argued that 'the situation in 'quasi-penal' procedures, such as doping in sport, should, on the other hand, be looked at differently, among other reasons also due to the principle 'in dubio pro reo', i.e. the benefit of doubt, which itself is an emanation of one of the most important legal presumptions, the presumption of innocence, deeply enshrined in the general principles of law and justice. This principle has the effect that in criminal and similar proceedings, the two parties do not bear equal burden of proof, while the accusing party must prove the alleged facts with certainty, it is sufficient for the accused to establish reasons for doubt.'⁴⁴ In their comment the drafters of the Code defended their standard of proof by stating that it '[...] is comparable to the standard which is applied in most countries to cases involving professional misconduct. It has also been widely applied by courts and tribunals in doping cases.'

The position which laboratories were granted under the OMADC could rightly be criticized from a law of evidence perspective.⁴⁵ Has the almost unassailable position of the laboratories been weakened under the WADC? According to Article 2 of Chapter III of the OMADC:

'Accredited laboratories are presumed to have conducted testing and custodial procedures in accordance with prevailing and acceptable standards of scientific practice'.

Article 3.2.1 WADC provides that:

'WADA-accredited laboratories are presumed to have conducted sample analysis and custodial procedures in accordance with the International Standard for laboratory analysis.

⁴³ CAS 98/222, 9-8-1999.

⁴⁴ CAS 98/222, 9-8-1999, grounds 62 and 63.

⁴⁵ Cf. *supra* (17.2.5.2).

⁴⁶ Appendix 1 - Definitions - of the WADC defines international-level athletes as: 'Athletes designated by one or more International Federations as being within the Registered Testing Pool for an International Federation'.

⁴⁷ Contrary to international-level athletes, Appendix 1 of the WADC does not define the term 'national-level athletes'. Art. 13.2.2 leaves the definition of this term to each particular NADO.

⁴⁸ Does this mean that such cases may not be brought before other international arbitral tribunals besides the CAS or does it mean that such cases may not be brought before a court? The OMADC

did not permit recourse to the courts as appeared from Art. 6 of Chapter III.

'Participants shall accept the individual or joint obligation to submit disputes concerning the application of this Code to the Court of Arbitration for Sport. Such acceptance is presumed by the very fact of participation by the Participants in the Olympic Movement. Any de facto refusal of such acceptance shall result in the Participants being considered as having excluded themselves from the Olympic Movement.'

⁴⁹ The comment to Art. 13.2.2 states that: 'An Anti-Doping Organization may elect to comply with this Article by giving its national-level athletes the right to appeal directly to CAS.' This possibility is not found in the legally relevant text of the WADC.

It would still be true to say that, in other words, in addition to the exclusive status awarded to (now) WADA-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).

Under the OMADC, however, it was 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'.

The WADC in Articles 3.2.1 and 3.2.2 improves the position of the athlete, who is suspected of having used doping, as against the laboratory. The provisions read as follows:

'The athlete may rebut this presumption by establishing that a departure from the International Standard occurred.

If the athlete rebuts the preceding presumption by showing that a departure from the International Standard occurred, then the Anti-Doping Organization shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.

[...] If the athlete establishes that departures from the International Standard occurred during testing then the Anti-Doping Organization shall have the burden to establish that such departures did not cause the adverse analytical finding or the factual basis for the anti-doping rule violation.'

9. Appeals

Pursuant to Chapter III of the OMADC every participant could appeal a decision from an IF, NOC or other organization to the CAS provided that the decision had been made on the basis of the OMADC. Article 13 of the WADC has restricted the possibilities for appeal. According to Article 13.2 appeal lies against a decision

- that an anti-doping rule violation was committed;
- imposing consequences for an anti-doping rule violation;
- that no anti-doping rule violation was committed;
- that an anti-doping organization lacks jurisdiction to rule on an alleged anti-doping rule violation or its consequences; and
- to impose a provisional suspension as a result of a provisional hearing or in violation of Article 7.5

Articles 13.2.1 and 13.2.2 distinguish between appeals involving international-level athletes⁴⁶ and those involving national-level athletes.⁴⁷ Cases involving international-level athletes arising from competition in an international event or cases involving international-level athletes in general may be appealed exclusively⁴⁸ to the CAS. National-level athletes can only appeal to an independent and impartial disciplinary body established under the rules of the NADO. Only the WADA, the relevant IF and, in cases where the national anti-doping organization has so entitled them, the athletes can appeal a decision from a national disciplinary body to the CAS.⁴⁹ Article 13.2.2, which provides this, also lists the principles of a fair hearing which the deciding body has to apply. Suddenly here rules concerning the rights of the defence once more emerge. The principles referred to are:

- a timely hearing;
- fair, impartial and independent hearing body;
- the right to be represented by counsel at the person's own expense; and
- a timely, written, reasoned decision.

Why do not all the rights of the defence laid down in Article 8 apply to national doping procedures? Why do the right to be fairly and

timely informed of the asserted anti-doping rule violation, the right to respond to the asserted anti-doping rule violation and resulting consequences, the right of each party to present evidence, including the right to call and question witnesses and the person's right to an interpreter at the hearing not apply? The comment to this Article is silent on this point. It does however mention that 'an Anti-Doping Organization may elect to comply with this Article by giving its national-level athletes the right to appeal directly to CAS'. Here too one may wonder why this has not been laid down in the 'WADC proper'.

Article 13.2.3 further elaborates which individuals and organizations may appeal. For both possibilities of appeal these are: the athlete or other person involved in the case, the other party, the relevant IF and the WADA. Decisions involving international-level athletes may also be appealed by an anti-doping organization other than the relevant IF, when the penalty has been imposed on the basis of a rule of that other organization. The IOC or the IPC may further also appeal such decisions where they 'may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games'.

Pursuant to Article 13.1, the decisions appealed from remain in effect, unless the appellate body orders otherwise. The final part of this Article reads as follows: 'before an appeal is commenced, any post-decision review provided in the Anti-Doping Organization's rules must be exhausted [...]'. What is the meaning of this rule? Article 13.2.1 does not say that all possibilities of appeal as provided by the IF must be exhausted before a decision can be appealed to the CAS. Does the provision of Article 13.1 mean to prescribe that these possibilities of appeal actually have to be exhausted first? In a national context it would make sense that one can only appeal to the national disciplinary tribunal in the second instance from a final decision delivered in the first instance.

10. Athlete support personnel

One of the problems faced by the IOC Medical Code (MC) and the OMADC was the elusiveness of the members of the athlete's supporting staff. These persons were not contractually bound to the sports organization and therefore remained out of its reach. In this respect the WADC has made a radical change now that it defines the term 'participant' as: 'Any athlete or athlete support personnel'⁵⁰ and 'athlete support personnel' as: 'Any coach, trainer, manager, agent, team staff, official, medical or para-medical personnel working with or treating Athletes participating in or preparing for sports competition.' 'By their participation in sport, [...] athlete support personnel should be bound by anti-doping rules based on Article 2 of the Code by virtue of their agreements for membership, accreditation, or participation in sports organizations or sports events subject to the Code. Each signatory, however, shall take the necessary steps to ensure that all [...] athlete support personnel within its authority are bound by the relevant Anti-Doping Organization's anti-doping rules'. Article 21.2 WADC describes their function and responsibilities:⁵¹

- 21.2.1 To be knowledgeable of and comply with all anti-doping policies and rules adopted pursuant to the Code and which are applicable to them or the athletes whom they support.
- 21.2.2 To cooperate with the Athlete Testing program.

⁵⁰ Appendix 1 - Definitions - WADC.

⁵¹ Article 18.2 WADC further extends the scope of the functions of athlete support personnel: 'Athlete support personnel should educate and counsel athletes regarding anti-doping policies and rules adopted pursuant to the code'.

⁵² The comment to the first part of Art. 7, in which the ADOs are given various tasks, only mentions the 'Signatory'. Art. 15.4 concerning the mutual recognition of inter alia therapeutic use exemp-

tions, hearing results or other final adjudications of signatories, considers as signatories the IOC, the IPC, IFs, NOCs, National Paralympic Committees, major event organizations, NADOs and the WADA.

⁵³ Pursuant to Art. 13.3 WADA decisions concerning the therapeutic use exemption can only be appealed to the CAS. The athlete in question or the ADO may lodge the appeal.

- 21.2.3 To use their influence on athlete values and behaviour to foster anti-doping attitudes.'

Athlete support personnel may also commit doping offences under the WADC. Article 2.6.2 WADC provides that:

- 'Possession of a substance that is prohibited in out-of-competition testing or a prohibited method by athlete support personnel in connection with an athlete, competition or training [...].'

The penalties awaiting members of the athlete's entourage when they commit doping offences are not to be taken lightly. Article 10.4.2 WADC to this end provides that:

For violations of Articles 2.7 (Trafficking) or 2.8 (administration of Prohibited Substance or Prohibited Method), the period of Ineligibility imposed shall be a minimum of four (4) years up to lifetime ineligibility. An anti-doping rule violation involving a minor shall be considered a particularly serious violation, and, if committed by Athlete Support Personnel for violations [...] shall result in lifetime ineligibility for such Athlete Support Personnel.

11. The role of the ADOs and NADOs

Pursuant to Appendix 1, Definitions, of the WADC the term 'Anti-Doping Organization' (ADO) is defined as: 'a Signatory that is responsible for

- adopting rules for initiating,
- implementing or enforcing any part of the doping control process.

As examples of such organizations are mentioned the IOC, the IPC, other major event organizers that conduct testing at their events, WADA, IFs and National Anti-Doping Organizations (NADOs). NADOs are the national bodies that

- adopt and implement anti-doping rules,
- direct the collection of samples,
- the management of test results, and
- the conduct of hearings, all at the national level.

Failing the designation of such a body the NOC will carry out the tasks mentioned in the country in question. The text of the WADC may be the source of some confusion because the same body is sometimes referred to by different names or one name is used to refer to different bodies. At the beginning of this section, for example, it was noted that an ADO is a signatory and Article 7.5 provides that '[...] a Signatory may adopt rules [...] permitting provisional suspensions to be imposed [...]'.⁵² The 'national anti-doping organization' comes under the term 'anti-doping organization', yet neither body is given the exact same tasks. Does the term 'anti-doping organization' in the text of the WADC always imply the 'national anti-doping organization', besides the IF and the WADA itself? Another cause of possible confusion is the fact that under one provision of the WADC the NADO is given certain tasks in connection with athletes under its jurisdiction who are not 'international-level athletes' and under another provision is given tasks concerning both 'international-level athletes' and 'national-level athletes' included in its registered testing pool. ADOs that conduct testing have to consult with other ADOs conducting tests in the same athlete pool. The NADO has to establish a procedure for athletes under its jurisdiction who are not international-level athletes concerning the therapeutic use exemption with respect to substances and methods which would ordinarily speaking be prohibited. The NADO must promptly inform the WADA when it has granted a therapeutic use exemption to a foreign international-level athlete or a national-level athlete included in the registered testing pool of his/her own NADO. The WADA may verify whether the decision was justified.⁵³ The WADC defines 'registered testing pool' as 'the pool of top level athletes established separately by each

International Federation and National Anti-Doping Organization who are subject to both in-competition and out-of-competition testing as part of that International Federation's or Organization's test distribution plan.' Every IF has to establish a registered testing pool for international-level athletes in its own branch of sports. Every NADO has to establish a national registered testing pool for its national athletes. Every IF and every NADO have to prepare and carry out in and out-of-competition testing in their individual registered testing pools.

Every ADO charged with results management has to establish a procedure for the pre-hearing administration of possible violations of the anti-doping rules, with due regard for certain principles laid down in the WADC. It needs to be examined whether a therapeutic use exemption was granted and whether a clear deviation from the International Standards for Testing or Laboratory Analysis exists, which could render the results of the analysis invalid. When a possible violation has been found the athlete must be informed promptly. It must be pointed out to him/her that among other things he/she may request the analysis of the B sample. The ADO has to carry out a follow-up investigation, the result of which has to be reported promptly to the athlete. The ADO is able to exclude the athlete provisionally until a final decision has been made. Under Article 13.2 the athlete has the right to appeal this decision. The ADO may also decide to dispense with earlier elements of the procedure and start with the final hearing under the expedited procedure based on Article 8. Every ADO responsible for result management has to make arrangements for a hearing. The hearing should take place upon certain conditions (see section 11.4.7.).

The ADO plays an important role in the proof of anti-doping rule violations. Article 3.2.1 lays down the presumption that the WADA-accredited laboratories carry out sample analyses and custodial practices in accordance with the International Standard for Laboratory Analysis. The athlete concerned can attempt to rebut this presumption by showing that the laboratory did not act in accordance with the International Standard. If the athlete successfully challenges the presumption, the burden of proof is on the ADO to demonstrate that the proven deviation from the Standard was not the cause of the Adverse Analytical Finding nor the factual basis of a violation of an anti-doping rule. Article 3.2.2 provides that deviations from the International Standard for Testing which do not result in an adverse analytical finding or otherwise show a violation of an anti-doping rule do not invalidate the outcome of the analysis.

12. Summary

The description of the doping offence has been laid down somewhat oddly in the WADC. No longer is the starting point the undesirable human act which is punished; instead it is the violation of anti-doping rules. These rules describe the outcome of a human act. The way in which these matters are regulated by the WADC is neither elegant, nor transparent. The WADC provisions not only concern the athletes, but also persons from their entourage. The system providing for strict liability after a sample has tested positive in a laboratory may lead to the punishment of innocent people. I argue in favour of the simple reversal of the burden of proof whereby the athlete is presumed guilty but is at least given the opportunity to prove his/her innocence. The possibility included in the WADC for an athlete who has been found guilty to claim exceptional circumstances may offer an escape for athletes who are free of blame. The basis for relying on such circumstances is very narrow and the plea does not alter the fact that the athlete is guilty of the offence; its effect is felt only in the determina-

tion of the penalty. In out-of-competition testing the WADA has a coordinating function. The division of tasks between the respective anti-doping organizations has been regulated in the WADC in such a manner (in contrast to previous regulations) that a battle of competences between the organizations involved is all but impossible. This benefits the athletes. It is to be deplored that the Code does not include guidelines for the protection of the athletes' privacy in out-of-competition testing. It is not entirely clear whether the athlete is entitled to inspect the complete report of the laboratory's analysis. After the positive analysis of an A sample the athlete may face a provisional suspension. The situation where the analysis of the B sample does not confirm the analysis (with a negative result) of the A sample has not been adequately regulated from an athlete's point of view. The WADC imposes fixed penalties. Such penalties have the disadvantage of not taking account of the severity of the offence. One more possibility to become eligible for a reduced penalty other than due to exceptional circumstances is when the penalized athlete cooperates in exposing other doping offenders. This practice is viewed less positively on the Continent than in the US. The rights of the defence, which were treated rather shabbily in previous doping regulations, and which were criticized because of this, have been done full justice in the WADC, for which the drafters of the Code are to be commended. The possibilities for submitting evidence under the Code have been based on private law. In a penalty system, which is after all what disciplinary law in the field of doping is, it would have been preferable to seek a closer connection with the principles of criminal law. The inclusion in the WADC of, for example, the principle of *in dubio pro reo* would have been a valuable addition. When considered in the light of the MC and the OMADC, the position of the laboratories has become less sacrosanct in the WADC. This development is certainly one to celebrate. The possibilities of appeal have also changed as compared to the OMADC. The possibility to appeal to the CAS has been slightly limited. Nevertheless, it is not expected that there will be less doping cases brought before the CAS. The WADA has reserved the right to appeal to the CAS from any decision of the disciplinary bodies of the sports organizations and the NADOs with which it disagrees. Especially as regards the doctrine of 'exceptional circumstances' it is expected that the CAS will be delivering a great many decisions.

The WADC reserves an important coordinating task for the Anti-Doping Organizations (ADOs) and the National Anti-Doping Organizations (NADOs). It is not easy to understand the wording of the WADC. One may easily get confused when reading that the NADO comes under the term ADO, yet has a different function. NADOs and ADOs are both signatories, but a signatory is not always a NADO or ADO. Does the term 'anti-doping organization' as used in the WADC always include the NADO, in addition to the IF and the WADA itself? Every IF and every NADO has to prepare and carry out both in and out-of-competition testing within its registered testing pool. Every ADO charged with results management has to establish a procedure for the pre-hearing administration of possible violations of the anti-doping rules. Another cause of possible confusion is the fact that under one provision of the WADC the NADO is given certain tasks in connection with athletes under its jurisdiction who are not 'international-level athletes' and under another provision is given tasks concerning both 'international-level athletes' and 'national-level athletes' included in its registered testing pool. IFs have to establish registered testing pools for the international-level athletes in their branches of sports, while NADOs have to establish national registered testing pools for their national athletes.

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