

could have been regarded as likely to impugn the probity of an athlete, given the high profile of the sports personalities in question.

The Ethics Commission, like all the Olympic family members, can only approve of and support the unceasing fight against the scourge of doping conducted by Mr Richard Pound, WADA Chairman and IOC member.

Nonetheless, it recalls that, in accordance with the principle set out under point 4 of the Fundamental Principles of Olympism in the Olympic Charter, “the Olympic spirit, which inspires the whole Olympic Movement, requires mutual understanding, a spirit of friendship, solidarity and fair play” within the Olympic Family. In this regard, a degree of prudence is indispensable out of respect for the Olympic spirit.

As a result, the Ethics Commission recommends that the IOC Executive Board remind Mr Richard Pound of the obligation to exercise greater prudence consistent with the Olympic spirit when making public pronouncements that may affect the reputation of others.

Decision:

After deliberating in accordance with its Statutes, the Ethics Commission decides:

1. to declare itself to have no jurisdiction regarding the complaint made against the World Anti-Doping Agency;
2. to recommend that the IOC Executive Board remind Mr Richard Pound, IOC member, of the obligation to exercise greater prudence consistent with the Olympic spirit when making public pronouncements that may affect the reputation of others.

Done in Lausanne, 2nd February 2007

For the Chairman,
Pâquerette Girard Zappelli
Special Representative

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Proportionality in the World Anti-Doping Code: Is There Enough Room for Flexibility?

by Jannica Houben*

The biggest advantage of the introduction of the World Anti-Doping Code in 2004 is the harmonization, but a disadvantage is that there are still some unclear matters left. The drafters of the WADC opted for a system of strict liability with mandatory (tough) penalties and a possibility of sanction reduction in the case of exceptional circumstances. The question of fault or negligence only plays a role in the determination of the sanction. In this article, I will evaluate this system and the rulings by the CAS. Are the sanctions imposed proportionate to the offenses? Does the Code leave room for the use of the principle of proportionality? If yes, does the CAS use the flexibility in the Code?

In this contribution it is argued that the CAS does not interpret the Code in a correct way. Although the Code can be seen as well drafted, the CAS does not use the flexibility that is incorporated therein. But there is hope: recently a CAS Panel held in the *Puerta* case¹ that “in those very rare cases in which Articles 10.5.1 and 10.5.2 of the WADC do not provide a just and proportionate sanction, i.e., when there is a gap or lacuna in the WADC, that gap or lacuna must be filled by the Panel.”²

In this article I will, in the first section, look at the system of strict liability, as this is the most important part of the system of sanctioning.

Then I will evaluate the burden of proof and the different types of

sanctions and sanction reduction under the Code, in section 2, since these are important features in the Code.

In section 3 I will come to the main point of this article: proportionality. I will look at the way CAS used the principle of proportionality before and after the introduction of the Code. In this section I will also look at the recent developments in the *Puerta* case.

I will end with a conclusion.

1. Strict liability

The Code lies down a principle of strict liability. Under this system the question of fault or negligence only comes into play in the determination of the sanction. The drafters opted for this system because they believed it to be the best way to fight doping in an effective manner.

The rule states that the mere presence of a prohibited substance will be sufficient to cause the loss of any results arising out of the competition during which the positive sample was taken. Article 9 of the Code stipulates that an anti-doping rule violation in connection with an in-competition test automatically leads to disqualification of the individual result. This is because the athlete had a potential advantage over the other athletes, regardless of whether he or she was at fault in any way.

The system of strict liability was known before, both in CAS case law and in the vast majority of existing anti-doping rules (The IOC Anti-Doping Code for example). The WADC can be seen as a codification of this principle. In fact, CAS has always used the strict liability principle: in one of the first doping cases ever to be examined by CAS a provision was qualified as a strict liability rule³. In the pre WADC *Quigley* case⁴ the CAS panel stated that the practical necessities of the fight against doping justify the application of the strict liability rule.

Two purposes of WADA are the protection of the athlete’s right to participate in a doping-free sport and securing a harmonized, coordinated and effective fight against doping⁵. To reach this second goal the concept of strict liability is laid down in the WADC. In a line of awards⁶ the panels stated that, notwithstanding a certain degree of hardship, this strict rule was necessary. In literature too, the concept

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1 CAS 2006/A/1025 *Puerta v. ITF*.

2 CAS 2006/A/1025 *Puerta v. ITF*, 11.7.23.

3 CAS 91/A/53, *G. v. International Equestrian Federation*.

4 CAS 94/129, *USA Shooting & Quigley v. UIT*.

5 *The Court of Arbitration for Sport 1984-2004*, Ian S. Blakshaw, Robert C.S. Siekmann & Janwillem Soek, p. 260

T.M.C. Asser Press, The Hague, The Netherlands.

6 See e.g. CAS 95/141, *V. v. FINA*, CAS 99/A/239, *UCI v. Moller*.

7 See for example: *The definition of doping and the proof of an anti-doping offense (an anti-doping rule violation) under special consideration of the German legal position*, K. Vieweg, *Marquette Sports Law Review*, vol. 37, 2004-2005 and *Harmonization of Anti-Doping Code through arbitration: the case law of the Court of Arbitration for Sport*, F. Oschütz, *Marquette Sports Law Review*, 675 2001-2002.

is generally considered a necessary instrument in the fight against doping⁷, although there is criticism as well⁸; as the outcome in some cases might be quite harsh and can be seen as unfair. The criticism is especially pointed at the imposing of additional sanctions without addressing the issue of guilt⁹. As long as only disqualification was at stake, the CAS panels have always felt prepared to apply the strict liability regime without any alteration¹⁰. The traditional means in the fight against doping did not work very well. It is an almost impossible task for an International Federation (IF) to prove that the athlete doped him- or herself intentionally or negligently, especially since these organizations do not enjoy any rights of investigation. The system of strict liability makes it easier for IFs to fight doping in an effective way, since they do not have to prove fault or negligence. Strict liability might not be an ideal system, but currently this is seen as the best option available. It provides a reasonable balance between effective anti-doping enforcement and fairness in the exceptional circumstance where a prohibited substance entered an athlete's body through no fault or negligence on his or her part¹¹.

Notwithstanding the fact that the Code works with a system of strict liability, there is an article that takes fault and negligence into account. Article 10.5 WADC provides for a system of sanction reduction, and the question of (no) fault or negligence comes into play here. This approach reflects a compromise between the IFs applying the strict liability doctrine without any exemptions and those IFs attaching great importance to the principles of fault and proportionality. Article 10.5 was incorporated to satisfy the (in many countries) constitutional principles of fault and proportionality, since the possibility existed that national courts would not have accepted the regulation¹².

2. Proof and Sanctions

2.1. Proof of an anti-doping rule violation

The consequence of the system of strict liability is that the burden of proof shifts to the athlete. He or she has to prove that there were exceptional circumstances, and that he or she bears no (significant) fault or negligence.

Under the Code the burden of proving that a violation of an anti-doping rule occurred lies with the IF¹³. The IF must thus prove two points: a substance has to be detected in the bodily fluids of the athlete (1) and that substance has to be on the Prohibited List (2). Strict liability in doping cases means that the sanction is an inevitable consequence if an anti-doping rule violation has been established¹⁴. The athlete has the burden to prove the facts on the basis of which the sanction could be reduced. This is laid down in Article 10.5 WADC. According to Article 3 WADC the IF must prove an allegation 'to the comfortable satisfaction of the hearing body', which is a relatively high standard. It is not quite as high as the criminal standard of 'beyond all reasonable doubt', but certainly higher than the ordinary civil standard of 'a balance of probabilities'. The criminal standard cannot be applied, since this would confuse the public law of the state with the private law of an association¹⁵. The athlete on the other hand must prove the facts on a balance of probabilities. The last sentence of Article 3 states:

Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

This wording leaves enough room for the principle of proportionality to be applied.

This shifting of the burden of proof to an athlete after a positive finding is called 'prima facie' proof. Prima facie proof allows culpable behavior or a cause of a finding to be proved in an indirect manner by using presumptions based on experience¹⁶. An athlete in whose bodily fluids a prohibited substance is found has, according to experience, used the prohibited substance, in a culpable way (thus with intent or due to negligence)¹⁷. By proving the existence of the fact, the behavior that may have caused it is therefore also proven. The prima facie proof therefore consists of a double presumption: first, of the use of the substance, and second, of a culpable element¹⁸. However, this proof is only a presumption, which can be rebutted by the athlete.

It could be argued that the presumption of fault in the strict liability system might not be consistent with Article 6 ECHR. The principle of the presumption of innocence is laid down in 6(2). The European Court of Human Rights however held in the *Salabiaku v. France* case¹⁹ that presumption of fact or law that operates against an accused is not inconsistent with Article 6(2). So, if one assumes that the criminal law principles of Article 6(2) are applicable to doping offenses, this provision does not prohibit offenses of strict liability, provided that an IF respects the rights protected by the ECHR²⁰. Professor Steiner, a judge of the German Constitutional Court, is of the opinion that the shifting of the burden of proving fault is consistent with general rules of civil procedure and does not raise constitutional concern²¹. This view was reconfirmed in the *Baumann* case²². In the United States, a similar view has been expressed in the *Mary Decker Slaney* case²³.

2.2. Sanctions

With the introduction of the Code, the intention was to have every sanction imposed reflect the seriousness of the offence. A distinction was made between sport sanctions (disqualification) and disciplinary sanctions (suspension).

In case the athlete is unable to prove that he or she bears no significant fault or negligence for the violation, Article 10.1 provides that an anti-doping rule violation in connection with a competition may also lead to disqualification from the entire event. In considering whether to disqualify other results in the event grounds may include the severity of the athlete's anti-doping rule violation and whether or not the athlete tested negative in the other competitions.

The part on suspension can be found in the Articles 10.2 to 10.4. The sanctions range from a warning to a lifetime ban depending on various matters, including²⁴:

8 See for example CAS 95/142, *L. v. FINA* at 231, "Strict Liability" *Drug Rules of Sports Governing Bodies: Are they legal?*, A.N. Wise, Defensor Legis 119 (1997).

9 *Harmonization of Anti-Doping Code through arbitration: the case law of the Court of Arbitration for Sport*, F. Oschütz, Marquette Sports Law Review, 675 2001-2002, p. 689.

10 *Harmonization of Anti-Doping Code through arbitration: the case law of the Court of Arbitration for Sport*, F. Oschütz, Marquette Sports Law Review, 675 2001-2002, p.686.

11 *The definition of doping and the proof of an anti-doping offense (an anti-doping rule violation) under special consideration*

of the German legal position, K. Vieweg, Marquette Sports Law Review, vol. 37, 2004-2005, p. 42.

12 *The definition of doping and the proof of an anti-doping offense (an anti-doping rule violation) under special consideration of the German legal position*, K. Vieweg, Marquette Sports Law Review, vol. 37, 2004-2005, p.43.

13 Article 3.1 of the WADC.

14 *The definition of doping and the proof of an anti-doping offense (an anti-doping rule violation) under special consideration of the German legal position*, K. Vieweg, Marquette Sports Law Review, 37 2004-2005.

15 *The Court of Arbitration for Sport 1984-*

2004, Ian S. Blakshaw, Robert C.S. Siekmann & Janwillem Soek, p. 237, T.M.C. Asser Press, The Hague, The Netherlands.

16 *The definition of doping and the proof of an anti-doping offense (an anti-doping rule violation) under special consideration of the German legal position*, K. Vieweg, Marquette Sports Law Review, 37 2004-2005, p.45.

17 *The definition of doping and the proof of an anti-doping offense (an anti-doping rule violation) under special consideration of the German legal position*, K. Vieweg, Marquette Sports Law Review, 37 2004-2005, p.45.

18 CAS 1998/222 *Bernhard v. International*

Triathlon Union.

19 ECHR, *Salabiaku v. France*, Decision of October 7th 1998.

20 *Legal opinion on the conformity of certain provisions of the draft WADC with commonly accepted principles of international law*, G. Kaufmann-Kohler & G. Malinverni p. 29, to be found on the WADA website <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=377>.

21 Steiner, reported in *Doping-Forum*, p.149.

22 *Baumann v. DLV*, Decision of the OLG Frankfurt of April 18th 2001.

23 *Slaney v. IAAF*, 7th Cir. Ind. March 27th 2001, 244 F.3d.

1. The type of the anti-doping violation;
2. The circumstances of the individual case (level or absence of fault or negligence);
3. The substance (or quantity found for certain substances) in case of the detection of a prohibited substance; and
4. Repetition of an anti-doping violation (recidivism).

If an athlete committed multiple anti-doping violations at the same time, he or she will be considered to have committed one doping offense, but the sanction to be imposed will be based on the violation that carries the most severe penalty²⁵.

As a general rule there is a fixed sanction, e.g. two years for a first time violation and a lifetime ban for a second violation. These sanctions apply regardless of the specific characteristics of the sport concerned, without regard to length of the career or the age of the athlete.

If these sanctions (fines and bans) are to be imposed, the principle of strict liability is no longer applicable from a legal point of view²⁶. So, for disqualification the principle of strict liability is applied in its original meaning, but for fines and bans the consequences of the system are softened. This is in compliance with the Counsel of Europe's Anti-Doping Convention. A German judge already ruled that liability without fault is incompatible with the rights of the athlete and even unconstitutional under German law²⁷. An athlete can thus only be sanctioned with a fine or a ban in the case of fault^{28,29}.

In the WADC this is implemented as follows. According to WADA "The trend in doping cases has been to recognize that there must be some opportunity in the hearing process to consider the unique facts and circumstances of each particular case in imposing sanctions^{30,31}".

This is laid down in Article 10.5.1 (no fault or negligence) and Article 10.5.2 (no significant fault or negligence). The question of guilt comes into play in these Articles.

If a sanction is eliminated due to a finding of no fault or negligence this will also prevent the incident from later being regarded as a first offense for purposes of calculating later sanctions. Therefore, the athlete is treated as a first time violator if he or she subsequently tests positive. This is a highly important provision: were this incident to count as a first offense, a subsequent positive test would result in a lifetime ban³¹.

These are mandatory provisions of the Code that must be adopted in the rules of International Federations. It is clear that these Articles only apply to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred³², since culpability can no longer be discussed for the purpose of determining whether an anti-doping violation has occurred. According to the comment to Article 10.5.2 this Article "applies only to the identified anti-doping violations because these violations may be based on conduct that is not intentional or purposeful" (thus to the violation of anti-doping rules referred to in Article 2.1 and 2.2). It does not apply to Article 2.4 because the sanctions in this Article already build in sufficient discretion in allowing the Athlete's degree of fault.

These Articles are vital to the CAS, as they provide a playing field to pursue its flexible approach under the Code. The CAS will have to clear the way to explain the meaning of the terms 'no fault or negligence' and 'no significant fault or negligence'. The definition in the

Code itself does not provide a lot of comfort. One may hope that the CAS will be prepared to reduce or even lift the suspension if the particular circumstances of the case should so warrant³³.

2.3. The limited impact of the question of guilt

In the comment to the Code it is stated "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"³⁴.

The importance of this phrase lies in the limiting effect it has on the impact of Article 10.5. Questions remain as to which circumstances should be seen as truly exceptional. It seems likely that different IFs will each use their own interpretation of exceptional circumstances, since this is a very open terminology that allows for flexible jurisdiction. If this interpretation conflicts with WADA's point of view, WADA is entitled to appeal the final decision of an IF disciplinary tribunal to CAS upon the condition that the relevant case has arisen from competition in an international event or in cases involving international-level athletes³⁵.

In Article 21.1 the roles and responsibilities of the athletes are laid down. Given these provisions it will be difficult to demonstrate exceptional circumstances, especially since Article 21.1.3 states that athletes are responsible for what they ingest and use.

Inadvertent stimulant cases like *Baxter* and over-the-counter medicine cases like *Raducan* and *Edwards v. IAAF*³⁶ cried out for relief from the rigid application of the strict liability principle. The supplement cases involving manufacturers' contamination or mislabeling of the contents of supplements highlighted the need to mitigate the effects of strict liability in many cases³⁷. The CAS panel in the case of the American swimmer *Kicker Vencill*³⁸ revolved around the definition of no fault or negligence which entails that the athlete establish

"That he or she did not know or suspect and could not reasonably have known or suspected even with the exercise of the utmost caution, that he or she had used or been administered the Prohibited Substance or Prohibited Method".

According to the panel, exceptional circumstances could not be found in this case. Until now, there has been no case where a suspected athlete has been able to establish no fault or negligence. As it is very difficult to prove for an athlete that there is no culpability and no degree of fault on his or her side, it is unlikely this category will ever be of much use. All the case law on exceptional circumstances has arisen out of Article 10.5.2. The test for this provision involves measuring the degree of culpability of the athlete with respect to the analytical positive result.

The system that provides for strict liability for athletes testing positive can result in the punishment of more or less innocent people. This can now be mitigated by the reversal of the burden of proof: the athlete is presumed guilty but is at least given the opportunity to prove his or her innocence in order to reduce the sanction. The possibility in the Code to claim exceptional circumstances may offer an escape to the athlete who is free of blame or whose degree of guilt is not serious enough to make him pay the full. The basis however for relying on such circumstances is very narrow, forced upon us by the rulings of CAS. Moreover, this argument does not change the fact that the athlete remains guilty of the offense; its effect is only reflected in the determination of the penalty³⁹.

24 *Sanctions under the World Anti-Doping Code*, David Howman, p. 2, to be found on the WADA-website <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=539>.

25 *Sanctions under the World Anti-Doping Code*, David Howman, p. 2, to be found on the WADA-website <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=539>.

26 CAS 2001/A/317, *Aanes v. FILA*.

27 See the article by K. Vieweg, footnote 16, p. 44.

28 See the article by F. Oschütz, this opinion shows at different points in the article.

29 *Doping en de sportbeoefenaar: gedopeerd of gedupeerd?*, F. Hendrickx, *Doping en medisch verantwoord sporten. Sportrecht en praktijk*. Instituut voor Arbeidsrecht, Leuven, 31 mei 2005.

30 see the Comment to Article 10.5.2 of the Code.

31 *CAS Doping Jurisprudence: What Can We Learn?*, Richard H. McLaren, I.S.L.R., issue 1 2006 p. 19.

32 see the Comment to Article 10.5.2 in the Code.

33 *The Court of Arbitration for Sport 1984-2004*, Ian S. Blakshaw, Robert C.S. Siekmann & Janwillem Soek, p. 263-264, T.M.C. Asser Press, The Hague, The Netherlands.

34 see the Comment to Article 10.5 WADC.

35 Article 13.2.1 and 13.2.3.

36 CAS 2002/A/376 *Baxter v. IOC*, CAS OG00/011 *Raducan v. IOC*, CAS OG 04/003 *Edwards v. IAAF* (for a descrip-

tion of these cases see 3.1.1. of this article).

37 *CAS Doping Jurisprudence: What Can We Learn?*, Richard H. McLaren, I.S.L.R., issue 1 2006 p. 18.

38 TAS 2003/A/484, *Kicker Vencill v. USADA*.

39 Dissertation of JW Soek, *The Strict Liability Principle and the Human Rights of the Athlete in Doping Cases*, March 3, 2006, p.173.

The *Baxter* case⁴⁰ is a pre WADC case. Baxter is a British alpine skier. He tested positive for methamphetamine during the Olympic Winter Games in Salt Lake City in 2002, where he won a bronze medal. He has a well-documented long-standing medical condition of nasal congestion. He uses a non-prescription Vicks Vapor Inhaler for relief. In the UK the inhaler is included in the list of permitted substances issued by the Sports Council. In the US however, the Vicks inhaler that is sold over the counter has a different formulation, the US version contains 'levmetamfetamine'. The term methamphetamine, which is on the doping list, includes both isomers of methamphetamine, including levmetamfetamine'.

Mr. Baxter did not consult with the team doctor because it appeared to be the same product as the one he had used regularly in the UK, neither did he read the back of the package, which clearly stated that the product contained levmetamfetamine. He was disqualified and his bronze medal was withdrawn. The level of substance found in his body is consistent with his taking the medication for therapeutic use. Baxter appealed to the CAS. The panel held that athletes are strictly responsible for substances they place in their body and that for purposes of disqualification (as opposed to suspension!) neither intent nor negligence needs to be proven. In summary, the panel was of the opinion that: (i) a prohibited substance was present in his body, (ii) that this presence alone constitutes a case of doping (since the IOC did not establish a threshold level for methamphetamine) and (iii) that pursuant to OMAC this case of doping automatically leads to invalidation of the result obtained, whether or not his performance was enhanced⁴¹. But the panel did express its sympathy for Mr. Baxter, since he did not intend to enhance his performance or to gain a competitive advantage.

From the *Raducan* case⁴² it follows that the young age of an athlete does not fall in the scope of exceptional circumstances under the Code. However, I do think that this should be viewed as a possible exceptional circumstance. Minors should be treated differently; their young age should be taken into consideration. They should not be given the same degree of responsibility in taking 'the utmost caution'.

In this case the panel upheld the disqualification of a 16-year old gymnast who took a medication provided by the team doctor that contained the prohibited substance of pseudoephedrine.

In the *Edwards* case⁴³ the doping offense took place almost four months before the beginning of the Olympic Summer Games in Athens. Edwards, a 27-year old American athlete with a distinguished career in track and field, tested positive for nikethamide in April 2004. She stated that the prohibited substance was contained in two glucose tablets ingested by her after having been given by her physical therapist. USADA suspended her for two years. She admitted before a First Instance North American CAS Panel that she, by mistake, committed a doping offense, but she claimed that exceptional circumstances existed. The panel decided that such circumstances might exist, and referred the case to an IAAF Doping Review Board, since that is mandatory under IAAF Rules. This board concluded that no such circumstances existed, and ordered the CAS panel to impose a two-year ban. Edwards appealed this decision at the CAS in Lausanne, as she was entitled to do. This was a final effort for her to be eligible to compete at the Athens Games. Her case was heard by an Ad Hoc tribunal in Athens, in order to hear her case on an expedited basis. Edwards contented that she was unaware that the tablets she had taken contained a prohibited substance. The panel confirmed the findings of the Review Board. It rules that it would have been clear to any person reviewing the tablets that there was more than one ingredient in the tablets, and that there was negligence in not making sure that the tablet did not contain a prohibited substance, before she ingested them. It is each athlete's personal duty to ensure that no prohibited substance enters his or her body. In the circumstance of buying a product in a foreign country more steps could and should have been taken, especially since the packaging contained the name 'nikethamide' on it, and there was a leaflet inside warning that the product contained an active stimulant that could result in a positive doping test. The panel also stated:

"It would put an end to any meaningful fight against doping if an athlete was able to shift his or her responsibility with respect to substances which enter the body to someone else and avoid being sanctioned because the athlete himself or herself did not know that substance."

One recent case dealing with the presence of exceptional circumstances is *Hipperdinger*⁴⁴.

In this case the ATP rules were applicable, but since there was no guidance in these rules as to whether something constituted exceptional circumstances, the panel referred to the WADC.

Because he did not enquire about what he was consuming the panel ruled that he could not satisfy the no significant fault or negligent element.

The exceptions to the system of strict liability are limited. Another example of how limited they are, is the invoking of a physician's error.

In order to invoke a physician's error an athlete needs to prove, by showing medical files, that he or she did receive medical treatment. The validity of the prescription and the diagnosis may be reviewed. If a prohibited substance was prescribed without a therapeutic justification, no exceptional circumstances can be invoked⁴⁵.

In the *Koubek* case⁴⁶ the narrow application of Article 10.5 and, more importantly of the trying to hide behind the physician's fault is justified. A different approach would open the door to abuse. If athletes were allowed to hide behind their physician's fault to escape sanctions, the fight against doping would be seriously undermined. So, the fault of an adviser, such as a physician must be attributed to the athlete, even if the athlete is not personally at fault. A personal responsibility is placed on athletes to ensure that any medical treatment received in no way violates the anti-doping rules. The athlete must convince the hearing body that they did everything in their power to avoid a positive test result. The reasonableness of the athlete's conduct is no longer the applicable criterion.

The criterion is now use of the 'utmost caution', a very high standard that will only be met in the most exceptional cases⁴⁷. This 'utmost caution' must be shown at each of the stages of the treatment process, e.g. the choice of the physician, the information provided.

That it is of course negligent to use a drug without consulting a physician at all was confirmed in the *Squizzato* case⁴⁸. The athlete must always inform the physician that he is in fact an athlete, and thus subject to anti-doping rules, and the athlete must always check the information appearing on the product for himself, and compare this with the list of prohibited substances⁴⁹.

3. Proportionality

3.1. The principle of proportionality

The proportionality of sanctions imposed for a violation of the anti-doping rules is probably the subject that has received the most attention since the introduction of the Code. This is a very important principle since this is the main possibility for a flexible interpretation of the Code by CAS. The principle is laid down in Article 6 ECHR, and this is applicable to disciplinary law as well.

The principle of proportionality was laid down in the rules and regulations of some IF's in the pre WADC era. CAS used the concept in a series of cases⁵⁰. It recognized proportionality as a general principle of law applicable to everyone and particularly to disciplinary sanc-

40 CAS 2002/A/376 *Baxter v. IOC*.

41 CAS 2002/A/376 *Baxter v. IOC*, c.3,30.

42 CAS OG00/011 *Raducan v. IOC*.

43 CAS OG 04/003 *Edwards v. IAAF*.

44 CAS 2004/A/690 *Hipperdinger*.

45 *Selected Case Law Rendered under the World Anti-Doping Code*, Olivier Niggli & Julien Sieveking, p. 3, to be found on the WADA website: <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=539>.

46 ITF Independent Anti-Doping Tribunal (18.01.2005), *ITF v. Koubek*.

47 ITF Independent Anti-Doping Tribunal (18.01.2005), *ITF v. Koubek*.

48 CAS 2005/A/830 *Squizzato v. FINA* ("(...) the Panel is of the view that it is indeed negligent for an athlete willing to compete in continental or world events to use a medical product without the advice of a doctor (...)").

49 *Selected Case Law Rendered under the World Anti-Doping Code*, Olivier Niggli & Julien Sieveking, p. 2-6, to be found on the WADA website: <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=539>.



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tions. It may not have been applied consistently in similar circumstances, but a sense of disproportion between the stipulated sanction and an athlete's violation guides the doctrine⁵¹. Proportionality focuses on perceived fairness to the athlete based on the pretence that the sanction imposed is deemed excessive or unfair on its face. The adoption of the Code raises the question of whether and how the principle of proportionality will continue to evolve⁵². Article 10.5 suggests that this mechanism is the only means by which a sanction can be reduced; the principle of proportionality is incorporated herein. The CAS panel in the *Lichtenegger* case⁵³ confirmed that the principle of proportionality is incorporated into the Code. Later cases suggested that the introduction of the Code would eliminate the application of the doctrine of proportionality in future cases, except as provided for in the Code. This might lead to situations in which a CAS panel is tempted to reduce a sanction on the basis of proportionality, even though the strict requirements of sanction reduction under the Code might not be met⁵⁴, as happened in the *Puerta* case⁵⁵.

The former president of the Swiss Federal Tribunal, Justice Claude Rouiller said that associations have the power to adopt rules of disciplinary law and that an athlete who is a member to a federation that is a signatory to the Code agrees, in a deliberate manner, that he or she may be a subject of an abrupt sanction⁵⁶. The Swiss Federal Supreme Court held in the *N. et al. v. FINA* case⁵⁷ that the appropriate question is not whether a sentence is proportionate to an offense, but whether the athlete can prove mitigating circumstances. The issue of proportionality would only be legitimate if a CAS award constituted an extremely serious infringement of individual rights and would be completely disproportionate to the penalized behavior. Therefore sentences handed down without an examination of proportionality did not constitute a violation of the general principles of Swiss law⁵⁸.

It can be argued that the need for harmonization is the most important objective and should prevail over any interest in allowing flexibility to consider objective differences that may exist between sports. The imposition of different sanctions could have a negative impact on the perception of the public of the fairness of anti-doping actions. Furthermore, greater flexibility may lead to more lenient sanctions for high-profile athletes, and IFs could start taking all kinds of irrelevant factors into account, or even at odds with the very purpose of the anti-doping rules⁵⁹. I, however, do not agree. The proportionality principle means that a balance must be achieved between the seriousness of the offense and the severity of the sanction. In imposing a sanction, it must be taken into account that suspension is not the only penalty, but that on top of that there can be other consequences, such as loss of income, cancelled sponsoring contracts, loss of fame and loss of profession due to the fact that at the end of the period of ineligibility the athlete is often too old to achieve top performances once again. This differs per sport; in some sports a two-year ban will not be a problem, but in other sports it will mean the end of a career⁶⁰. If there should be no flexibility allowed, one cannot speak of harmonization, but of unification. As Dr. Soek states in his

dissertation, the effects of the sentences should be the same in all sports, not the sentences themselves⁶¹.

As mentioned above, if additional sanctions (fines and bans) are to be imposed, the principle of strict liability is no longer applicable from a legal point of view⁶². This is in compliance with the Counsel of Europe's Anti-Doping Convention. A German judge already ruled that liability without fault is incompatible with the rights of the athlete and German law⁶³. An athlete can thus only be sanctioned with a fine or a ban in the case of fault^{64,65}. This means that the principle of proportionality should be applied, and I believe the wording of the Code leaves enough room for this.

3.2. Proportionality cases

3.2.1. Pre WADC cases

An example of the use of the doctrine of proportionality is the pre WADA Code *Meca-Medina & Majcen v. FINA* case⁶⁶. Meca-Medina and Majcen, two long-distance swimmers tested positive for nandrolone after finishing first and second in an event. The amount of nandrolone in their systems only slightly exceeded the limit, and both swimmers claimed that they had unknowingly ingested nandrolone by consuming uncastrated boar meat. FINA suspended them for four years and CAS upheld the suspension. After the publication of a scientific study suggesting that uncastrated boar meat could lead to positive nandrolone tests, FINA and both athletes agreed to a re-hearing. Although they were unable to prove that their positive tests were due to the consumption of boar meat, the panel applied the proportionality doctrine and reduced their suspension to two years. This was based on the otherwise good behavior of the athletes, the fact that a four-year suspension often equals a lifetime ban and that many other IFs used a two-year ban for a first offense.

Another pre WADC case is the *Lichtenegger* case⁶⁷. This case was reviewed just prior to the implementation of the Code. Lichtenegger tested positive for nandrolone in 2003, due to a contaminated supplement (which was said to be free of a prohibited substance by an IOC/WADA accredited laboratory!). The existence of exceptional circumstances was found, and he was suspended for six months by the Austrian federation of athletics. IAAF appealed the case to the CAS, since it was of the opinion that a higher sentence would be correct. Lichtenegger asked the CAS to apply the *lex mitior* principle, so that he could benefit from the more lenient sanctions under the WADC regime, as he perceived those rules. Article 24.5 of the Code however states that the Code is not to be applied retroactively, so the panel ruled that the IAAF Anti-Doping rules were to be applied. These rules provided for a mandatory minimum of a two-year suspension, except in case exceptional circumstances existed. These exceptional circumstances did not include contamination of nutritional supplements. The panel held that a strict compliance of the rules in this case would lead to unfairness and injustice, which is in fact contrary to the proportionality principle. His previous good conduct and the fact that the supplement was described as 'free of the prohibited substance' were found to be mitigating factors, and his suspension was reduced to 15 months⁶⁸.

50 The principle of proportionality was first developed in two CAS awards of 1996: CAS 1995/A/122 *NWBA v. IPC*, CAS 1995/A/141 *C. v. FINA*. Both cases found that the penalty imposed must be in proportion with the circumstances of the present case. Other case that dealt with the principle of proportionality are: CAS 97/180 *P. et al. v. FINA*, CAS 98/214 *Bouras v. IJF*, CAS 99/A/246 *W. v. FEI*, CAS 2000/A/270 *Meca-Medina & Majcen v. FINA*, CAS 2001/317 *Aanes v. FILA*, CAS 2000/A/312 *Leipold v. FILA*.

51 *CAS Doping Jurisprudence: What Can We Learn?*, Richard H. McLaren, I.S.L.R., issue 1 2006 p. 16-17.

52 *CAS Doping Jurisprudence: What Can We Learn?*, Richard H. McLaren, I.S.L.R., issue 1 2006 p. 16-17.

53 CAS 2004/A/624, *IAAF v. OLV & Elmar Lichtenegger*.

54 *CAS Doping Jurisprudence: What Can We Learn?*, Richard H. McLaren, I.S.L.R., issue 1 2006 p. 18.

55 CAS 2006/A/1025 *Puerta v. ITF*.

56 Opinion of Justice Rouiller on the compatibility of the sanctions provided for in the Code with Swiss law and with the proportionality principle, see Olivier Niggli & Julien Sieveking: *Selected Case Law Rendered under the World Anti-Doping Code*, p.9, to be found on the WADA website: <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=539>.

57 CAS 1998/A/208) *N., J., Y., W. v. FINA*.

58 *CAS Doping Jurisprudence: What Can We Learn?*, Richard H. McLaren, I.S.L.R., issue 1 2006 p. 18.

59 *Legal opinion on the conformity of certain provisions of the draft WADC with commonly accepted principles of international law*, G. Kaufmann-Kohler & G. Malinverni p. 49-52 to be found on the WADA website <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=377>.

60 Dissertation of JW Soek, *The Strict Liability Principle and the Human Rights of the Athlete in Doping Cases*, March 3, 2006, p. 252.

61 Dissertation of JW Soek, *The Strict Liability Principle and the Human Rights of the Athlete in Doping Cases*, March 3,

2006, p. 252.

62 CAS 2001/A/317, *Aanes v. FILA*.

63 See the article by K. Vieweg, footnote 16, p. 44.

64 See the article by F. Oschütz, this opinion shows at different points in the article.

65 *Doping en de sportbeoefenaar: gedopeerd of gedupeerd?*, F. Hendrickx, *Doping en medisch verantwoord sporten. Sportrecht en praktijk*. Instituut voor Arbeidsrecht, Leuven, 31 mei 2005.

66 CAS 2000/A/270, *Meca-Medina & Majcen v. FINA*.

67 CAS 2004/A/624, *IAAF v. OLV & Elmar Lichtenegger*.

68 *CAS Doping Jurisprudence: What Can We Learn?*, Richard H. McLaren, I.S.L.R., issue 1 2006 p. 17.

3.2.2. Post WADC cases

The *Hipperdinger* case⁶⁹ is an example of a post WADC introduction case. Hipperdinger is a Spanish tennis player who tested positive for cocaine. He claimed that this was a result of the consumption of tea made of coca leaves, and that he did not know that these leaves were in fact coca leaves and that he did not even know that the consumption of coca leaves could lead to positive tests for cocaine. The ATP Tennis Anti-Doping Program 2004 rules had to be applied; these rules were based on the WADC. Under the Code (and so idem under the ATP rules) the only possibility of reducing a fixed sanction is by proving no (significant) fault or negligence by means of the existence of exceptional circumstances. The panel held that if no such exceptional circumstances existed, it had no other choice than to apply the appropriate fixed sanction. It held that the doctrine of proportionality that had developed in previous CAS case law had been based on the anti-doping rules of many different IFs, and that the situation had changed such that the doctrine of proportionality could not be applied in the same way as it had previously. The Anti-Doping Program rules did not allow the panel to apply the doctrine except in accordance with the rules. In this case, no exceptional circumstances were proved, so the panel upheld the two-year suspension⁷⁰.

In the *Knauss* case⁷¹ the CAS panel held that:

"(...) The purpose of introducing the WADC was to harmonize at the time a plethora of doping sanctions to the greatest extent possible and to uncouple them from both the athlete's personal circumstances (amateur or professional, old or young athlete etc.) as well as from circumstances relating to the specific type of sport (individual sport or team sport, etc.)."

It thus recognized that the proportionality principle has been applied more restrictively since the introduction of the Code, and that this restriction is justified by the goal of the Code, namely the harmonization of anti-doping rules⁷². The element of fault or negligence is 'doubly relevant' now. Firstly it is relevant in deciding whether the sanction reduction article applies at all, and if yes, secondly whether the term of the appropriate sanction should be set somewhere between one and two years. The panel also states that the threshold for proving no significant fault or negligence cannot be set too low; otherwise the two-year ban for a first offence would form the exception, rather than the general rule. But neither can it be set too high, for otherwise no opportunity remains for differentiating meaningfully and fairly within the range of sanctions⁷³.

In the *Hondo* case the panel said that:

"A more flexible interpretation of the said system that would allow for the mitigation of the sanction even in the absence of the specific circumstances could jeopardize the uniform application and effectiveness thereof⁷⁴."

I think that the CAS interprets the Code in an unjust way in this point. The Code can be seen as well drafted and, in itself, leaves room for the use of the proportionality principle. In the last sentence of Article 3.1 it is stated that the standard of proof for the athlete shall be by a balance of probability. This sentence is broad enough to allow for the use of the doctrine of proportionality to be taken into account. I agree with Dr. Janwillem Soek's opinion in his dissertation: I believe penalties should be harmonized, not unified. In some sports a two-year ban is not a problem, while in other sports a two-year ban means the end of a career⁷⁵. The principle of proportionality that is incorporated in the Code in my point of view can help to impose a proportionate sentence.

As mentioned in the introduction, the *Puerta* case⁷⁶ is one of the most recent cases in this area. Puerta is an Argentinean tennis player who tested positive for etilefrine after his lost final at Roland Garros in May 2005. His wife uses the drug effortil to treat hypotensive episodes, which can be bought over the counter in certain countries like Argentina. The written information supplied with the drug states that its active ingredient is etilefrine, a stimulant which is a prohibit-

ed substance under the ITF Tennis Anti-Doping Programme. Mrs. Puerta usually takes the drug by dripping drops of the drug in water. The drug has no taste when mixed with water. Puerta was aware of the fact that his wife takes the drug in case of stress, such as when he plays an important match.

The ITF Panel found on the balance of probabilities that the player was contaminated by effortil and that this occurred during the period of about one to two days before the final at a time and place unknown, that the source was Mrs. Puerta's medication, and that the player was unknown of the contamination. The amount found in his body was too small to be performance enhancing. Puerta contented that there were exceptional circumstances in his case. The Panel found that he could not prove no fault or negligence, since he did not exercise the utmost caution, but he succeeded in establishing the defense of no significant fault or negligence. Puerta was suspended before (for nine months), in 2003, when he tested positive for clenbuterol, so this incident would count as a second offense. Puerta stated that it would be disproportionate to count this offence as a second offense, since there was no significant fault or negligence. The Panel did not agree, since the Code is intended to be severe. The proportionality principle is more difficult to sustain under the Code. The Panel is not persuaded that it is open to IFs to say that eight years for two mistakes is disproportionate. It concluded that it should not disapply the written provisions of the Programme applicable to this case. He was suspended for eight years.

The Panel had an

"Uncomfortable feeling about the severity of the sanction, even a very uncomfortable one. But that is not enough."⁷⁷

Puerta appealed his case to CAS. The Panel came to a quite surprising decision: it considered the eight year ban as disproportionate, and was willing to reduce the sanction to two years! The Panel said that in all but the very rare case the Code imposes a regime that provides a just and proportionate sanction, and one in which the particular circumstances of an individual case can be properly taken into account, but that there are inevitably going to be instances in which the "one size fits all" solution does not work. The *Puerta* case is the paradigm of such a case. Mr. Puerta's ingestion of the prohibited substance was inadvertent, and that the degree of fault or negligence that he exhibited was so small as almost to amount to No Fault or Negligence. The Panel held that "in those very rare cases in which Articles 10.5.1 and 10.5.2 of the WADC do not provide a just and proportionate sanction, i.e., when there is a gap or lacuna in the WADC, that gap or lacuna must be filled by the Panel."⁷⁸

This definitely is a good start, now we will have to see if CAS is willing to apply this principle more often in cases where the outcome is disproportionate. However, the Panel makes it clear that the circumstances in which a tribunal might find a gap or lacuna in the Code will arise only very rarely.

According to case law of the European Court for Human Rights the principle of proportionality is incorporated in Article 6 of the European Convention of Human Rights (ECHR)⁷⁹. In Article 6 TEU it is laid down that the European Union respects the ECHR, and that

69 CAS 2004/A/690 *Hipperdinger*.

70 CAS Doping Jurisprudence: *What Can We Learn?*, Richard H. McLaren, I.S.L.R., issue 1 2006 p. 18.

71 CAS 2005/A/847 *Knauss v. FIS*.

72 *Selected Case Law Rendered under the World Anti-Doping Code*, Olivier Niggli & Julien Sieveking, p. 9, to be found on the WADA website: <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=539>.

73 CAS 2005/A/847 *Knauss v. FIS*, c.7.3.5.

74 CAS 2005/A/922, 923, 926, *Hondo v. UCI, Swiss Olympic and WADA*.

75 Dissertation of JW Soek, *The Strict Liability Principle and the Human Rights*

of the Athlete in Doping Cases, March 3, 2006, p. 252.

76 ITF Independent Anti-Doping Tribunal (21.12.2005), *ITF v. Puerta*.

77 ITF Independent Anti-Doping Tribunal (21.12.2005), *ITF v. Puerta*, c.9.8.

78 CAS 2006/A/1025 *Puerta v. ITF*, 11.7.23.

79 See for example the cases of *Malige v. France* (23.09.1998) and *Waite & Kennedy v. Germany* (18.2.1999) before the European Court for Human Rights. This is confirmed to me by Dr O. Janssen of the department of Constitutional and Administrative law of Utrecht University, who can be considered an expert in this area.

this Convention is applicable to all the inhabitants of the European Union. The EU is a party to WADA. Article 6 ECHR deals with the right to a fair trial. It is a fundamental right of an athlete to have a fair trial; this is laid down in Article 13.2.2. of the Code.

Also, the decisions of IFs can affect athletes in their deepest professional interests, and can even go as far as preventing them from exercising their profession. Procedural guarantees should thus apply⁸⁰.

Article 6 ECHR is applicable to compulsory arbitration. In the *Bramelid & Malmstrom v. Sweden* case (Appl nr 8588/79 en 8589/79) the European Commission for Human Rights stated that:

“A distinction must be drawn between voluntary arbitration and compulsory arbitration (...) If (...) arbitration is compulsory (...) the parties have no option but to refer their dispute to an arbitration board, and the board must offer the guarantees set forth in Article 6(1)81.”

Since Article 6 is applicable to compulsory arbitration it is applicable to disciplinary law as well, as there is more discretion. One can say that the WADC deals with compulsory arbitration since it is laid down in the Code that decisions by IFs can exclusively be appealed to CAS⁸². Arbitration in sports matters is characterized by the fact that the arbitration clause is never freely accepted by the athlete, it is imposed by the IF. Therefore arbitration by the CAS can be seen as compulsory⁸³. The above-mentioned means that CAS thus has to use the principle of proportionality in its cases.

It can be argued that the way in which CAS interprets the Code now is contrary to the right to a fair trial, since the principle of proportionality is incorporated in Article 6 ECHR. National courts that will have to review a CAS award can invalidate the award if it violates the guarantees of Article 6 ECHR on the basis of incompatibility with public policy of the forum⁸⁴.

4. Conclusion

Recently there have been a great number of doping cases before CAS. This is probably a temporary result of the coming into force of the WADC. Once all the principles in the Code are better understood and refined, the number of cases is likely to decrease⁸⁵.

From all the cases it has become clear that according to CAS the proportionality doctrine has lost its importance. It cannot be applied in the same way anymore, and it seems that the only way proportionality can be taken into account is via the proving of exceptional circumstances under Article 10.5. It can only play a role in the fixing of the penalty.

I think this view is flawed as it risks the Code being misinterpreted in case law. The Code can be seen as well drafted, and in itself creates space for the use of proportionality; it just does not codify it. The Code offers more room for flexibility than one might think at first sight. I think the Code is written in a good way, but that CAS does not interpret it correctly. I believe that the last sentence of Article 3.1 (*Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability*) is broad enough to allow for

the use of the doctrine of proportionality to be taken into account. CAS does not use the flexibility that is incorporated in the Code.

The outcome in the *Puerta* case was therefore quite surprising. It is a good start, but now we will have to see if more Panels are willing to reduce fixed sentences if the proportionality principle should so warrant.

The WADC is currently under review and it might be amended in 2007. Perhaps it could be an option to explicitly codify the principle of proportionality.

Can a panel go below the limits set by the Code? In the *Squizzato* case⁸⁶ the Panel seems to answer in the affirmative, but according to Justice Rouiller this is not allowed⁸⁷. It is not entirely clear what the point of view of the CAS is in this respect.

Currently, many IFs such as FIFA are continuing to impose sanctions far below the minimum. Rio Ferdinand for example was suspended for eight months for missing a doping test⁸⁸. Will the CAS continue to allow this?

I agree with Dr. Janwillem Soek's opinion in his dissertation: I believe penalties should be harmonized, not unified. In some sports a two-year ban is not a problem, while in other sports a two-year ban means the end of a career. There are already IFs that impose higher sentences for a first violation, like IAAF in the *Collins* case⁸⁹. The question therefore is whether a panel should have the power to increase or reduce a sanction should the circumstances of the case so warrant. I think this question should be answered in the affirmative. Fixed sanctions make it almost impossible to translate the gravity of the anti-doping rule violation into a proportional sanction. I believe it is highly important to have the impact of a penalty in one sport be equal to the penalty in another sport. Again: proportionality is the keyword!

Questions still remain as to what constitute exceptional circumstances, but I expect that this will become clear in the near future, when CAS will have refined all the principles in the Code. Contrary to the current view in case law, I think that the young age of an athlete should be seen as a possible exceptional circumstance. Minors should not be given the same degree of responsibility as adults in taking 'the utmost caution'.

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⁸¹ *Bramelid & Malmstrom v. Sweden* ECHR (12.12.1983, Appl nr. 8588/79 and 8589/79), published in Decisions and Reports (D & R) vol. 38, p. 38.

⁸² Article 13.2.1. WADC.

⁸³ *The Trials and Tribulations of the Court of Arbitration for Sports. Contribution to the Study of the Arbitration of Disputes concerning Disciplinary Sanctions.* Andrea Pinna, I.S.L.J. 2005/1-2, p. 13.

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Andrea Pinna, I.S.L.J. 2005/1-2, p. 16.

⁸⁵ *CAS Doping Jurisprudence: What Can We Learn?*, Richard H. McLaren, I.S.L.R. issue 1 2006 p. 22.

⁸⁶ CAS 2005/A/830, *Squizzato v. FINA*

⁸⁷ Legal opinion of October 25th, 2005, given by Claude Rouiller, p.36-37 (a summary can be found in the article: *Selected Case Law Under the World Anti-Doping Code*)

⁸⁸ *CAS Doping Jurisprudence: What Can We Learn?*, Richard H. McLaren, I.S.L.R. issue 1 2006 p. 19

⁸⁹ AAA No.30 190 00658 04 (2004),

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List of abbreviations

ATP	Association of Tennis Professionals
CAS	Court of Arbitration for Sport
ECHR	European Convention on Human Rights
EU	European Union
FIFA	Fédération Internationale de Football Association
FILA	Fédération Internationale des Luttes Associées
FINA	Fédération Internationale de Natation Amateur
FIS	Fédération Internationale de Ski
IAAF	International Association of Athletics Federations
IF	International Federation
IOC	International Olympic Committee
ITF	International Tennis Federation
NeCeDo	Nederlands Centrum voor Dopingvraagstukken
OMAC	Olympic Movement Anti-Doping Charter
TEU	Treaty on European Union
UCI	Union Cycliste Internationale
UNESCO	United Nations Educational, Scientific and Cultural Organization
USADA	United States Anti-Doping Agency
WADA	World Anti-Doping Agency
WADC	World Anti-Doping Code

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