Anti-Doping Law in Sport

The Hybrid Character of WADA and the Human Rights of Athletes in Doping Cases (Proportionality Principle)

by **Robert C.R. Siekmann***

1. Introduction

Generally speaking, what may be termed "sports law" consists of two parts, a public and a private one. The private part is formed by the rules and regulations of organized sport. Organised sport is built up of national and international organisations for each sport. The national associations are members of regional (continental) and universal, global and worldwide federations (IFs). From an institutional point of view, his part is hierarchically structured with - in association football - universal federations such as FIFA at the top and with UEFA as the regional organization for Europe. Besides, the Olympic Games which have an "omnisport" character, are organized under the umbrella of the IOC in cooperation IFs regarding the technical sporting aspects. The private part of sports law is the core part of this field of law, whereas the public one is of a non-systematic, fragmented nature. This part mainly consists of national legislation and a number of agreements under public international law (treaties) which relate specifically to sport.

"Anti-Doping law" belongs to "sports law". In the past, its private part was represented by national and international anti-doping regulations. With the introduction of the WADA Code in 2003 (WADA = World Anti-Doping Agency; officially, the correct naming is WAD Code (WADC), however, the Code is popularly known as and called WADA Code) this part was uniformised in one single international legal instrument. The public part consists of a number of national Anti-Doping Acts as well as two treaties which deal with the subject under consideration, that is the Council of Europe's Anti-Doping Convention of 1989 (and its Additional Protocol) and the UNESCO International Convention against Doping in Sport of 2005. As far as disciplinary law is concerned, the (private) jurisprudence of the Court of Arbitration for Sport (CAS) plays a very significant role. The special characteristic of "anti-doping law" from an institutional, organizational perspective is the fact that national governments and intergovernmental organisations (IGOs) directly participate in WADA and the close linkage between the UNESCO Convention and the WADA Code. This issue will be discussed in detail in the first part of this article. The hot issue of the legal aspects of the fight against doping in sport is the relationship between "anti-doping law" and the human rights of athletes in doping cases, that is the applicability of general public human rights law to doping in sport . In the second part of the article a case of this type in which in 2009 this author was personally involved as a member of the appeals committee of the *Instituut Sportrechtspraak* [Netherlands Institute for Sport Adjudication] will be presented. The Appeals Board's decision was finally submitted to the CAS which was and still is the first time in history with regard to a Dutch case.

2. WADA: a public-private body

According to Richard Pound, Member of the IOC and the first Chairman of WADA, in 2002, the seminal event that led to the creation of the World Anti-Doping Agency (WADA) was the Tour de France in 1998. During the event, the French police found doping substances in the possession of certain of the teams and proceeded to arrest not only officials, but also athletes. The sight of athletes being led away by the police, to face possible criminal charges, was most dramatic. It also delivered a "wake-up" message to all other sports; if this could happen to one of the major European sports, in its showcase event, then it could also happen to them. The prospect of sport being governed by criminal law, with the concomitant intervention of the state, was thoroughly unattractive.

The situation was compounded by remarks made by IOC President Juan Antonio Samaranch to a Spanish journalist during the same Tour de France, in which he speculated that the list of substances prohibited was too long and that, so far as he was concerned, anti-doping scrutiny should be limited solely to substances that were harmful to the athletes, regardless of their performance-enhancing capacities. This statement drew considerable media attention, much of which was to the effect that the IOC was going "soft" on drug use and that much of its previous rhetoric concerning anti-doping was nothing more than pious claptrap. This led Samaranch to call a special meeting of the IOC Executive Board in August 1998. During the course of discussions on the issue, a suggestion emerged that what was required, inter alia, was an independent anti-doping agency, that would be completely neutral in its activities and that would have a governance structure designed to ensure that no organisation or groups of organisations could control it. The model suggested at the meeting of the IOC Executive Board was that used in the resolution of sports-related disputes, pursuant to which the Court of Arbitration for Sport (CAS) is governed by the International Council for Arbitration in Sport (ICAS), an organisation made up of representatives of the IOC, the International Federations (IFs), the national Olympic committees (NOCs) and athletes. The effect of such a governance structure has been such that CAS has been recognised as an independent body by the Swiss courts.

The IOC Executive Board also decided to organise a World Conference on Doping in Sport in February 1999 in Lausanne, to which not only members of the Olympic family would be invited, but also representatives of governments and of international organisations. In preparation for the meeting, the working group charged with developing the concept of an international anti-doping agency contemplated a series of the equal blocks of members, consisting of the IOC, the IFs, NOCs, athletes, governments and a sixth group containing representatives of sponsors, sporting good manufacturers, event organisers and, possibly, the pharmaceutical industry. In the interim, the IOC Medical Code was made more generic and turned into the Olympic Movement Anti-Doping Code to become effective on January 1, 2000, so that there would be a uniform set of rules to be applied in doping matters. At a meeting in Lausanne in November 1998, the IFs agreed they would adopt such a code and the stage was set for the World Conference the following February.

Unfortunately, not only on general principles pertaining to the IOC, but also with respect to smooth functioning of the World Conference on Doping in Sport, the Salt Lake City bidding scandal erupted in December 1998 and consumed more virtually all public attention on the failings of the IOC as an organisation to ensure proper governance of its own members. The level of media attention to this issue amounted to a virtual firestorm that drew all attention away from the important substantive content of the proposed World Conference. Despite the risks involved in proceeding with the Conference, and the risk that the anti-doping agenda might be hijacked, the IOC decided, in view of the importance of anti-doping efforts, that the Conference should nevertheless proceed, which it did in early February. A good deal of the Conference was taken up by criticism of the IOC, not only in relation to anti-doping activities, but also in relation to virtually everything it did or had ever done. When the proposed model of the independent anti-doping agency was put forward in this context, the governments present declared themselves completely opposed to the suggested governance structure. They insisted that governments must have at least an equal share of the governing body of any such agency.

Then Pound continues: "Samaranch, who was chairing the Conference, considered this rejection of the governance structure a disaster

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and thought that the Conference was doomed to complete failure. [Readers will, I hope, forgive the use of the first person singular at this juncture, but since the next portion of the saga involved me, it seems unnecessarily convoluted to resort to a third-person narrative.] I persuaded him that this could be turned to the IOC's advantage in several respects: the governments, who had been resolutely critical of the IOC and its anti-doping efforts, would now have to make themselves part of the solution and their participation at this level could mean that the IOC would not have to assume the full costs of such an agency. Although he was pessimistic, Samaranch delegated me to meet with the government representatives, headed by the United Kingdom and Spain, and to see what might be possible. The meeting was shorter than anyone expected. I asked if the governments were insistent on a 50-50 governance mechanism for the independent agency. They were. I said that was fine with the Olympic Movement and that we welcomed such an equal partnership. The government representatives, obviously expecting bitter resistance to their position, were astonished. I said there was one condition. What was that, they inquired? That if they had 50 per cent control of the governance body, they must assume 50 per cent of the costs. The Olympic Movement did not need governments to tell it how to spend its money. Not unpredictably, the prospect of spending money raised certain problems with governments and they said they would need some time to see whether this might be possible. That was agreeable to the IOC, I said, provided that the timetable for reaching a decision was accelerated beyond the normal pace for reaching government decisions. The matter would have to be fast-tracked or the Olympic Movement would proceed on its own, without government involvement, because the matter of doping in sport was too important not to proceed with all possible haste. The governments were now trapped. If they refused to participate, their own rhetoric would be exposed as devoid of both content and commitment to eradicating drugs from sport."[1]

The governments agreed to a fast-track operation and during the summer of 1999, the terms of government participation and the structure of the organisation were negotiated. The resulting organisation was named the World Anti-Doping Agency, or WADA, and was established as a private foundation under Swiss law (Articles 80 *et seq.* of the Swiss Civil Code) in November 1999, with an equal number of representatives from the Olympic Movement and of the governments from all five continents. The initial concept was to have a Foundation Board of 32 members. The 16 from the Olympic Movement were to be four members each named by the IOC, the Ifs, the NOCs and the IOC Athletes Commission and the governments were to name 16 from the various continents. This was later increased to add additional representatives on both sides (government and sport) up to 18 each, maintaining the 50-50 balance.[2] According to the Constitutive Instrument of Foundation (September 2009), the seat of WADA is in Lausanne (Switzerland) and its headquarters are in Montreal (Canada). The Foundation Board takes its decisions by an absolute majority of the votes of the members present; in the event of a tie, the chairman has the casting vote. The first members of the Foundation Board, including the first chairman, was appointed by the founder (IOC). The Foundation Board is self-organized. It elects from its members, or from personalities chosen outside of its members, a chairman and a vice-chairman. The Foundation is an equal partnership between the Olympic Movement and public authorities. To promote and preserve parity among the stakeholders, the Foundation Board will ensure that the position of chairman alternates between the Olympic Movement and public authorities, To further maintain equal partnership between the Olympic Movement and the public authorities, the vice chairman must be a personality nominated by the public authorities if the chairman is a person nominated by the Olympic Movement, and vice versa. [3] The Foundation Board delegates to an Executive Committee of twelve members, the majority chosen from amongst the Foundation Board members, the actual management and running of the Foundation, the performance of all its activities and the actual administration of its assets. The chairman and vice-chairman of the Foundation Board automatically hold the position of chairman and vice-chairman. The Executive Committee takes its decisions by an absolute majority of the votes of the members present; in the event of a tie, the chairman has the casting vote. The Executive Committee is competent to take all decisions which are not reserved by the Law or by the present statutes for the Foundation Board. The Foundation Board may propose amendments to the statutes to the supervisory authority (that is the Swiss Federal Department of the Interior). Any proposed amendment, in particular any change to the object of the Foundation, is reserved and must be approved by a two-third majority of the Foundation Board members present.

One of the most interesting legal aspects of WADA is its legal status. Created by notarial deed, pursuant to Swiss law and subject to oversight by Swiss authorities, it does not conform with the legal format that most governmental organisations prefer and with which they are comfortable. Governments are clearly more comfortable with public entities and intergovernmental organisations; they are not comfortable with private organisations and are not entirely certain how to deal with such entities. Initial expressions of preference by governments were to turn WADA into a public entity, in which governments could be members. This, of course, completely disregarded the other half of the governance structure, namely the Olympic Movement, none of the organs of which are public entities and some of which (such as athlete members) are entirely personal. At least for the time being, governments agreed to see whether it is possible to operate through a hybrid organisation.[4] The Constitutive Instrument of Foundation of WADA provides that the Agency will be entitled to prepare plans and proposals in light of its conversion, if necessary, into a different structure, possibly based on public international law.

In spite of its formally private nature, WADA carries out functions that aim to further public goals such as promoting and coordinating at the international level the fight against doping in sport in all its forms, including through in- and (unannounced) out-of-competition testing. However, WADA's most important activity (in terms of its "public" function) is its role as a global standard setter. WADA carries out significant normative functions such as updating the prohibited list of substances and the establishment of international technical standards with regard to analyses, and also produces "soft-law" in the form of recommendations and good practices. Beside these tasks, WADA carries out other relevant administrative activities, such as monitoring anti-doping tests during major sports events. The most significant outcome of WADA's activities is the World Anti-Doping Code (WADC), which was adopted in 2003 and entered into force on 1 January 2004.[5] WADA's Signatories (i.e. those entities signing the Code and agreeing to comply with it) include the IOC, NOCs, NADOs, WADA, and others. Governments instead were not asked to be signatories to the Code, but rather to accept the UNESCO Convention against Doping in Sport, which was unanimously approved by 191 governments at the UNESCO's General Conference. The Convention is currently ratified by 110 States. Article 4 concerns the relationship of the Convention to the Code provides *inter alia* that States Parties commit themselves to the principles of the Code as the basis for the measures to achieve the objectives of the Convention, which may include legislation, regulation, policies and administrative practices. However, the Code itself, reproduced for information purposes as Appendix to the Convention, is not an integral part of the Convention and does not create any binding obligations under international law for States Parties. Casini states that, although the WADA Code formally rests on an instrument of private law (as it itself clarifies: most governments cannot be parties to, or bound by, private non-governmental instruments such as the Code), it displays rather a hybrid nature, due to the role played by public authorities both in

1 Richard W. Pound, Q.C., "The World Anti-Doping Agency: An Experiment in International Law", [2002] International Sports Law Review, July 2002 - Issue 3/02, pp. 53-55.
2 The five European members of the WADA Foundation Board are designated half by the Council of Europe and half by the EU.
3 Currently, the WADA President is John Fahey (Australia) and the Vice President is Prof. Arne Ljungqvist (Sweden), IOC Member and President of the IOC Medical Commission.
4 See again: Richard W. Pound, Q.C., *op.cit supra*, p. 57.
5 A second version of the Code was unanimously adopted by WADA's Foundation Board and endorsed at the Third World Conference on Doping in Sport, in Madrid, on 17 November 2007; the new Code entered into force on 1 January 2009.

WADA's decision-making process and in the procedure for the drafting of the Code. Putting aside any concerns regarding the classification of WADA, this body offers a prime example of an *equal* institutional public-private partnership (PPP) that is unusual both at the global level and in domestic contexts. A second set of issues refers to the binding force of the WADA Code. The Code offers, in fact, a prime instance of a formally private source of norms that show to a high degree a public character, cf., in particular governments taking part both in the decision-making and Code-drafting process as well as the UNESCO Convention expressly referring to WADA and its Code. Casini concludes that the WADA Code provides a very relevant example of norms that cannot be labelled as fully private or fully public, but rather as "*sources de caractère mixte*".[6] It is remarkable that the WADA Code itself provides that it be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the Signatories [cf., Olympic Movement] or governments. This would mean that the WADA Code does not belong to the public or private part of sports law; it is international sports law of a *sui generis* character. The same would apply to WADA as an institution because of its public/private nature.

3. The Dutch billiard social drugs case and the principle of proportionality

3.1. First instance: Instituut Sportrechtspraak: Royal Dutch Billiards Federation (KNBB) (complainant) v N. Zuijkerbuijk (defendant)

On 5 April 2009, during a match in the Dutch Three-Cushion Billiards Premier League, held in Apeldoorn, the defendant was selected for an anti-doping control. The analytical report received by the Doping Authority from the anti-doping laboratory stated that analysis of the A urine sample revealed the presence of benzoylecgonine (a metabolite of cocaine). The analysis of the B urine sample confirmed the presence of this substance. On grounds of the confirmation by the analysis of the B sample of the analysis of the A sample of the defendant, the party concerned was declared to have tested positive. The presence of said substance was thus established. Cocaine appeared on the 2009 Prohibited List accompanying the Doping Regulations of the Institute for Sports Law followed by the Royal Dutch Billiards Association (KNBB) in the category "substances and methods prohibited in competition". The presence alone of a connected substance, in this case a metabolite of a substance that appeared on said list, in a urine sample of an athlete selected for an anti-doping control was deemed sufficient proof that the Doping Regulations had been violated. The party concerned did not have any valid dispensation for the use of said substance. In its decision dated 25 August 2009 the Disciplinary Committee of the Institute for Doping Law also ruled that article 3 paragraph 1 of the Doping Regulations had been violated. Under article 38.1 of the Doping Regulations the Disciplinary Committee excluded the person concerned from competition for a period of two years. Such a sanction could be imposed in the case of a first violation under the provisions laid down in this article unless the conditions set out under a) and b) of this article were met. Cocaine is not a specified substance. The athlete had not discharged the burden of proving that he bears no (significant) level of fault or negligence and neither did he admit violating the anti-doping rule prior to this doping case. The KNBB Board had not established any aggravating circumstances. The Disciplinary Committee found that none of the conditions to reduce/extend the standard sanction period was met.

In the appeal, the defendant did not dispute the violation but he was appealing against the duration of the imposed penalty. In its decision of 26 November 2009, the appeals committee confirmed the verdict of the disciplinary committee dated 25 August 2009 that the violation was proven but reduced the ineligibility period imposed in the decision of the disciplinary committee. In the appeal, the defendant admitted using cocaine. The violation of article 3 (1) of the Doping Regulations had therefore been established. The substantive grounds for the appeal by the defendant related exclusively to the penalty, which he considered to be excessively long.

Article 38 of the Doping Regulations stipulated a period of ineligibility of two years for a first violation of article 3 unless the conditions in articles 39 (Specific substances), 40 (No fault or negligence) and/or 41 (No plausible level of fault or negligence) for the reduction of the penalty have been met. The appeals committee noted, on the basis of the 2009 Prohibited List, that cocaine was not a specific substance. The reduction of the ineligibility period on the grounds of article 39 of the Doping Regulations was therefore inappropriate. Article 40(1) of the Doping Regulations stipulated as a condition for the non-imposition of the ineligibility period that the defendant did not know or suspect, and could not reasonably have known or suspected, even after exercising the greatest possible care, that he had used the prohibited substance. The defendant stated in his appeal form and at the hearing that he deliberately used the prohibited substance, in this case cocaine. The fact that he did not realise at that time the consequences to which this use could lead did not detract from the fact that the condition stated in article 40(1) had not been fulfilled. There were therefore no factual grounds based on article 40 of the Doping Regulations for the non-imposition of the eligibility period. Article 41(1) of the Doping Regulations stipulated as a condition that there should be no question of a plausible level of fault or negligence. This was the case if the athlete can demonstrate that his fault or negligence was not significant in relation to the violation of the regulations given the circumstances of the case. It had been established that the defendant deliberately used the cocaine. This excluded the possibility of the absence of any significant fault or negligence in the sense of article 41 of the Doping Regulations.

During the hearing, the defendant argued that the penalty imposed upon him was excessive and therefore disproportional. The appeals committee considered this to be an explicit appeal to the principle of proportionality. In this case: the disproportionality of the penalty in relation to the prohibited behaviour being punished. It must therefore examine the penalty in the light of this principle.

The principle of proportionality is a fundamental principle of proper justice (or *due process*). Although it was not, in principle, an explicit statutory component of Dutch criminal or procedural law, it was generally recognised and accepted. Disciplinary law was less formal than criminal law; the principle of proportionality should therefore be applied more widely in disciplinary law than in criminal law.

Disciplinary law was a component of the provisions regulating the membership relationship. This was a relationship in private law that was subject to statutory provisions relating to associations, as set out in book 2 of the Netherlands Civil Code. The statutory standard for the argument of proportionality was found in section 8(2) of the Netherlands Civil Code.

In the opinion of the appeals committee, doping regulations to which athletes who engaged in their sports as members of an association were necessarily subject must, firstly, meet the standards that government regulations in general and their application with respect to criminal law in particular are required to meet. In addition, there were also the standards of a fair trial - in part against the background of European law - and of section 2.8(2) of the Netherlands Civil Code (see *infra*).

The WADA Code and therefore the Doping Regulations had a very strict and rigid and - by comparison with normal criminal law, a very severe - system of penalties. Certainly in cases like the present one, in which the performance-enhancing effects of the prohibited substance found were at best disputed, the implications of the application of this rigid system of penalties must therefore be examined at all times in the light of the standards that prevail in normal criminal law, including the principle of proportionality. As it will emerge below, the appeals committee knew that it was supported in this respect by the CAS and the EC Court of Justice, without it being necessary to make clear whether the CAS or the Court were guided by this principle of criminal law.

The principle of proportionality implied that the application of anti-doping regulations must not go further than is strictly necessary to effectively combat doping. See, for example, Soek, The Strict Liability

6 See: Lorenzo Casini, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)*, International Organization Law Review 6 (2009) pp. 439, 440, 441. The French expression has been applied to sports law, that is to the WADA Code by Franck Latty, La *lex sportiva*. Recherche sur le droit transnational, Leiden-Boston, 2007, p. 391.

Principle and the Human Rights of Athletes in Doping Cases, T.M.C. Asser Press, The Hague 2006, p. 381 ff.). In his thesis, Soek summed up the principle as follows (p. 389):

> *"The proportionality principle is widely recognized and accepted. It prohibits the taking of any measure which in view of its objective must be considered to go beyond what is appropriate and necessary. The application of the principle involves the balancing of the interests of the person or persons affected by the measure and the possibly wider social aim which it is intended to achieve. The CAS has regularly considered whether the doctrine of proportionality could be applied in reduction of a penalty. The application of fixed penalties for doping offences made it difficult to weigh the severity of the offence against the severity of the penalty. Nevertheless, as the CAS at one occasion concluded, when the circumstances of the case so allowed the appellant's sentence could properly be reduced by reference to proportionality considerations."*

The CAS had applied the proportionality principle - with the reduction of fixed penalties - in a number of cases, including in particular CAS 2000/A/270, Meca-Medina and Majcen v. FINA, to which Soek referred, and later in: CAS 2006/A/1025, Puerta/v. ITF and CAS 2007/A/1252, FINA v. Mellouli and TSF (cf. David, A Guide to the World Anti-Doping Code - A Fight for the Spirit of Sport, Cambridge University Press, 2008, p. 168 ff.).

In an Advisory Opinion about the implementation of the WADA Code in the FIFA Disciplinary Code (CAS 2005/C/976 and 986, FIFA and WADA; paragraph 139, pp. 52-53) the CAS had the following to say with particular reference to the proportionality principle (section 1.4.3):

> *"A long series of CAS decisions have developed the principle of proportionality in sport cases. This principle provides that the severity of a sanction must be proportionate to the offense committed. To be proportionate, the sanction must not exceed that which is reasonable required in the search of the justifiable aim. Both the Swiss Federal Supreme Court and a significant part of Swiss legal doctrine have upheld the principle of proportionality. […] The panel is of the view that the principle of proportionality is guaranteed under the WADC; moreover, proportional sanctions facilitate compliance with the principle of fault. Consequently, each body must consider the proportionality of imposed sanctions for doping cases".*

It added, in section 1.5 (Conclusion; paragraph 143, pp. 54-55):

> *"The right to impose a sanction is limited by the mandatory prohibition of excessive penalties, which is embodied in several provisions of Swiss law. To find out whether a sanction is excessive, a judge must review the type and scope of the proved rule violation, the individual circumstances of the case, and the overall effect of the sanction on the offender. However, only if the sanction is evidently and grossly disproportionate in comparison to the proved rule violation and if it is considered as a violation of fundamental justice and fairness, would the panel regard such a sanction as abusive and, thus, contrary to mandatory Swiss law."*

With respect to the significance of Advisory Opinions McLaren stated (CAS Advisory Opinions, in: Blackshaw/Siekmann/Soek (Eds.), The Court of Arbitration for Sport 1984-2004, T.M.C. Asser Press, The Hague, pp. 180-181):

> *"Through the Advisory procedure, the CAS is able to give opinions on legal questions concerning any activity related to sport in general. Under Rule 60 of the Code (of Sports-related Arbitration) any questions of law or general interpretation related to sport may be submitted to the CAS for resolution. […] For the Advisory procedure, the questions do not have to be fact specific; and thus, can raise and deal with general principles of law and how they may apply to sport. For instance, there have been Advisory Opinions on the application of lex mitior, jurisdiction to establish rules, and proportionality in determining sporting sanctions."*

Turning to European law, the application of the proportionality principle was also recognised by the Court of Justice. See, forexample, the Meca-Medina case and Majcen v. European Commission, C-519/04. Ground 48 was as follows:

> *"Rules of that kind [in this case, anti-doping rules] could indeed prove excessive by virtue of, first, the conditions laid down for establishing the dividing line between circumstances which amount to doping in respect of which penalties say be imposed and those which do not, and second, the severity of those penalties."*

Dutch Association Law

As stated above, the issue of proportionality should also be considered on the basis of the standard of reasonableness and fairness relating to the membership relationship stated in section 2:8 of the Netherlands Civil Code. The text of the section was as follows:

> *"A rule governing the relationship between them by law, custom, statutes, regulations or decision shall not be applicable in so far as it is unacceptable according to standards of reasonableness and fairness in the given circumstances."*

The provision is an imperative rule of law and, furthermore, the relevant statutory provision is not excluded in the KNBB regulations. The Committee must therefore apply this rule of law.

The KNBB was an association residing in the Netherlands and it was therefore subject to Dutch association law. The defendant was a Dutch citizen residing in the Netherlands and, when the sample was taken, he was participating in a competition in the Netherlands. The membership relationship and the relevant conduct were entirely within the domain of Dutch law. Dutch law therefore applied exclusively.

The doping regulations were a component of the regulations of the KNBB. These regulations were a component of the membership relationship between the defendant and the KNBB. The application of those regulations implied that the appeals committee must base its considerations on the principle of reasonableness of section 2:8 of the Netherlands Civil Code, which also governed that membership relationship, and all the more because an explicit appeal had been made to that principle (by reference to proportionality).

The provision that required a minimum penalty of an ineligibility period of two years must guide the considerations of the appeals committee unless that rule "is unacceptable according to standards of reasonableness and fairness in the given circumstances". In that case, the rule in question must, by law, not be applied. The appeals committee, in a limited examination, was of the opinion that this unacceptability was a factor in this case, taking all the circumstances of the case into consideration. The reader is referred to the section on "Grounds for Consideration" *infra.*

Grounds for Consideration

After the application of the proportionality principle, the appeals committee came to the conclusion that the ineligibility period of two years imposed by the disciplinary committee was excessive. In so doing, the appeals committee took the following facts and circumstances into consideration:

a The defendant had not been found positive previously.

b Cocaine was not a performance-enhancing substance in billiards. The sports doctor and doping expert Harm Kuipers had stated (Dagblad de Stentor, 6 September 2006) that the use of cocaine had no performance-enhancing effect for an athlete whatsoever. *"Certainly not for a billiards player. This is a sport requiring coordination and cocaine is of no use in that respect. Alertness is enhanced, but only for a very short time. Indeed, coordination is rapidly adversely affected, as is the capacity to take decisions quickly. Athletes who use cocaine may have a problem, but it's not a doping problem."*

c The presence of cocaine in the urine of an athlete in an *out-of-competition control* did not constitute a violation of the Doping Regulations. The appeals committee concluded from this that the WADA also accepted that the use of cocaine did not provide athletes with any advantage other than immediately after use. In this case, there were three days between the use of the cocaine and the competition in which the defendant participated.

d On the basis of the account of the defendant, which the committee considered to be credible, the appeals committee found in this procedure that it was a fact that the cocaine was taken unthinkingly in

the context of the defendant's nightlife and that there was no question of any link to sports performance.

e There was no intention to enhance performance and so there was also no intention to acquire an unfair and irregular advantage with respect to competitors.

f Although it was the case that the defendant did not admit the violation in good time, or at least not in accordance with the Doping Regulations in the correct way prior to the results of the analysis and the charge, the defendant did not make any secret of the recreational use. He has frankly admitted using the substance and did so again during the hearing, seated alongside his father with a contrite expression. The KNBB was also visibly uncomfortable with its own draconic and implacable regulations. Its representative at the hearing was clearly embarrassed about the situation, but he had no choice.

There had been a case recently in another sport of a "spontaneous" admission of cocaine use which was evidently inspired by a sample being taken shortly after cocaine had been used. That strategic honesty - in the light of the prospect of discovery - was found to be grounds for halving the penalty. The defendant had not had routine experience with doping controls targeting cocaine use, by contrast with the reluctant repentant who was clearly motivated by strategic considerations. In all reasonableness, the defendant should not suffer a worse fate than that fellow-user.[7]

g The defendant had also admitted his cocaine use in public. This could be seen from publications in the press and on various billiards websites. In this respect, the defendant contrasted favourably with numerous other athletes who, when confronted with a positive result, denied using prohibited substances regardless of the facts. With his public admission, and his expressions of regret about what had happened, the defendant had made a contribution to the discussion about this problem for, in particular, younger billiards players. The publicity relating to this case had inflicted considerable damage on the defendant's good name, fame and reputation, and what was even worse in a matter that should have remained private (also from the point of view of the WADA ideology) if use had been established out of competition.

h The defendant had stated that he did not know that the traces of cocaine would still be apparent in his urine after three days. Particularly when elite sports were involved, it was of course the responsibility of the athlete to be informed about the effect of the substances on the prohibited list. However, this did not absolve the sports associations from their responsibility in this respect. Article 22 of the Doping Regulations was very clear in this respect. Without wishing to suggest that there had been any significant shortcoming in the information provided by the KNBB, the appeals committee did believe it was justifiable to conclude that this information might have left something to be desired, at least in terms of the punishability and traceability of this forbidden substance. In the view of the appeals committee, the defendant was a serious athlete who, if he had been able to oversee the consequences of his cocaine use, would have been in a better position to resist the temptation.

i The general goal of doping regulations in the field of sports was to combat doping in order to ensure fair competition and it included the need to ensure that all athletes had the same chances and to safeguard their health. The KNBB's aim - following in the footsteps of WADA - of setting punishments for the presence in the body of a series of substances was based on this general objective. Banning cocaine, a substance which did not enhance sporting, or at least billiards, performance was therefore, in the opinion of the appeals committee, difficult to describe as conducive to that aim. At the same time, the detection and prosecution of the presence of this substance led in this case to a serious infringement of the privacy of the defendant which was therefore not justified by the core aim of the fight against doping in sports. The infringement of privacy was all the more disproportional in consequence and the ineligibility period coming on top of that should be all the shorter in order to attain a reasonable proportionality.

In summary, the appeals committee, in a limited examination, considered the outcome of a rule that required a penalty of an ineligibility period of two years to be imposed for this violation to be disproportional and the result to be unacceptable in the sense of section 2:8 of the Netherlands Civil Code. This was supported by the grounds stated with respect to CAS decisions and European law. In this case, therefore, the rule and its result must not be applied. Instead, the appeals committee, after having taken all the circumstances into consideration and given the fact that the defendant had already received a substantial punishment, considered an ineligibility period of one year after the date of the initial decision to be reasonable.

3.1.1 Comment

1. According to the website of the Netherlands Doping Authority, cocaine belongs tot he doping category S6. Stimulantia. Cocaine may be used to improve the athelete's performance, because tiredness is dissipated and alertness temporarily stimulated. However, the use of cocaine may considerably damage a person's health. So, cocaine fulfils two out of three criteria which are applied when the decision is taken to put a substance on the doping list, that is (possibly) improving performance and (possibly) being harmful to health. The third criterion is: "contrary to the spirit of sport"; many people are of the opinion that this is true also for cocaine, a social or party drug. In competition a sportsperson is controlled with regard to all doping categories, but out of competition he or she is not tested with regard tot he doping categories S6. Stimulantia, S7. Narcotica, S8. Cannabinoïds and S9. Glucocorticosteroïds. The main reason to test with regard to these substances only in competition is their short-term effectiveness. If these subtances are used well in advance of competition, the sportsperson will not benefit from them in competition.
2. As to the substantial aspects of the case, in my opinion, this is a clear case in which formalities had to be set aside. Generally speaking, it must be possible to impose a less severe penalty in appeal, reconsidering a case and taking all relevant circumstances into account, not only the formal legal ones but also possible aspects of (natural) justice which are not of a formal nature. It is the task of a judge and tribunals to do justice to the facts and circumstances of a case. A judge in a free, democratic society can never be expected to administer justice in a way he cannot reconcile with his conscience as a human being and citizen. Offenders must be treated fair and human. The closed, rigid sanctions system of the WADA Code is forced and even absurd. It is a purely defensive system which in not in conformity with the character of disciplinary law. One of the main purposes of the administration of disciplinary law is to take pedagogically, educationally useful measures which are effective from a societal perspective (society at large argument, on the micro - sporting - and macro levels). In *Meca-Medina*, the European Court of Justice makes the *ratio* of doping law explicit, which is not the case in the WADA Code or in the Doping Regulations of het *Instituut Sportrechtspraak* which follow the WADA Code, since in both a preamble is missing (this underlines the rigid- and closedness of the WADA Code which gives reasonable "society at large" arguments or other prayers for relief no chance).[8] Re-education of is not feasible, if not all circumstances of his or her case are being considered. A defendant must get the feeling that his arguments and explanation of the facts are really taken into account; otherwise, he or she will not have a cooperative, understanding attitude, once having been sentenced. The re-educational nature of disciplinary law is particularly relevant, when it in fact is about amateur sport like in the present case. The defendant was sponsored, but not dependent on playing billiards for his income. A suspension of two years is not reasonable. It was questionable whether the defendant, a young very talented player ("the new Jaspers", as he was called[9]), would return to competition after this period of time. On the opposite, having been banned from competitive sport he might even become a regular drug user. So, the consequences of a dis-

7 The *Instituut Sportrechtspraak* is here referring to the *Yuri van Gelder* case decided by the Disciplinary Commission of the Royal Dutch Gymnastics Union on 22 October 2009. Yuri van Gelder won the European and world champion's titles (rings) in 2005, 2008 and 2009 and 2005, 2006 and 2007 respectively.

proportionate time penalty would be detrimental to the athlete and his sport. The aim of the sanction - to make clear that the recreational use of drugs may have consequences in doping law, in particular also because it is not "sportsmanlike" - could be achieved as effectively by imposing a penalty for a much shorter period (three or six months) combined with an official, conditional warning that recidivism would automatically lead to a two years suspension. The imposition of sanctions must be tailor-made. A two-year suspension would not communicate an appropriate message of condemnation to the receiver under the mitigating circumstances and really contribute to the prevention of recidivism. Apart from that, the question could be asked whether the use of social drugs (and excessive drinking and smoking/nicotine) would not better be combated under sporting disciplinary law independently from doping.

3. However, in the opinion of the Netherlands NADO, the decision of the *Instituut Sportrechtspraak* was fundamentally incorrect. Having sympathy for the *Instituut*'s approach and the human considerations they bring forward, acceptance of these considerations would imply that the harmonisation of doping policy as it is laid down in the WADA Code would become almost an illusion, the Netherlands NADO observed. This became even more relevant now that the verdict was made by the Appeals Committee of the most important tribunal of The Netherlands in disciplinary matters. Therefore, the NADO had decided to submit the case to CAS.
4. It is true that the CAS has applied the proportionality principle in exceptional cases, reducing fixed penalties The CAS did this before as well as after the adoption of the WADA Code in 2003 (in particular in Meca-Medina, Puerta). An Advisory Opinion of the CAS (FIFA and WADA) is of a general purport (R60 CAS; see also MacLaren, *op. cit. supra*) and in Puerta reference is made to the fundamental reasoning on proportionality in FIFA and CAS. One of course might argue that it would be foreseeable that in an appeal in the Zuijkerbuijk case the CAS would come to a different conclusion than the *Instituut Sportrechtspraak*'s Appeals Committee, but this would not be absolutely certain beforehand because - as far as I know - the CAS was never confronted with a similar case before (and apart from the fact that the CAS is not obliged to apply the *stare decisis* principle in its decision-making). The "proportionality cases" of the CAS did concern the absence of (a plausible level of) fault or negligence, but the facts in those cases were indeed quite different. Why should it be expected that in *Zuijkerbuijk* the CAS would automatically use an *a contrario* reasoning, because the previous "proportionality cases" and *Zuijkerbuijk* were not similar (absence of analogy)?

3.2. Appeal: Court of Arbitration for Sport (CAS)

CAS 2009/A/2012 Doping Authority Netherlands (hereafter: "NADO") (appellant) v. Mr Nick Zuijkerbuijk (respondent) (Sole Arbitrator: Mr. Manfred Peter Nan, The Netherlands), Lausanne, 11 June 2010.

On the principle of proportionality the CAS award in *Zuijkerbuijk* reads in full as follows (paragraphs 65-79):

" [T]he determination of the period of ineligibility necessarily requires the Sole Arbitrator to consider the issue of proportionality.

The sanction must be proportionate. The issue is whether the Sole Arbitrator can impose a lesser period of ineligibility then is prescribed by Article 38.1 ISR Doping Regulations, knowing that the requirements for reduction as mentioned in Articles 39-42 ISR Doping Regulations are not met.

NADO argues that DAC *"has not applied the doctrine of proportionality as developed by CAS, or at least has not applied this doctrine correctly in accordance with CAS case law. It has not established circumstances that make this case truly exceptional, and it has not (correctly) applied the criteria established in CAS case law on applying proportionality in doping cases".*

The Athlete argues that a two years period of ineligibility is *"out of proportion"* and *"would apply to structural use of doping, especially when meant to enhance performance"*. The Athlete argues that DAC *"acknowledged the draconic and uncompromising nature of the applicable doping regulations, justifiably calling upon the principle of proportionality"*. DAC has reduced the ineligibility period imposed to one year, stating that after application of the proportionality principle an ineligibility period of two years is excessive, disproportional and also unacceptable in the sense of section 2:8 of the Netherlands Civil Code. In this regard, DAC refers in its Decision to facts regarding the Athlete, namely (a) *that he has not been found positive previously, (d) the cocaine was taken unthinkingly (…), (e) there is no intention to enhance performance (…), (j) he has frankly admitted using the substance (…),* (g) *the defendant has also admitted his cocaine use in public (...), (h) he did not know that the traces of cocaine would still be apparent in his urine (…).* In its Decision DAC also states that *(b) cocaine is not a performance-enhancing substance in billiards (…), (e) the presence of cocaine in the urine of an athlete in an out-of-competition control does not constitute a violation of the Doping Regulations (...), (j) there has been a case recently in another sport of a "spontaneous" admission of cocaine use (...). That (...) was found to be grounds for halving the penalty (…). In all reasonableness, the defendant should not suffer a worse fate than that fellow-user (…).* Furthermore, DAC finds in its decision that *(h)* the information provided by the sports association KNBB with reference to the *punishability and traceability* of cocaine has left something to be desired. Finally, DAC holds that *(i) banning cocaine*, (...) *is difficult to describe as conducive to the aim of combat doping.*

The WADC and the ISR Doping Regulations, considerably restrict the application of the principle of proportionality. Whether an Athlete has never tested positive before in his sporting career is relevant only for determining the applicable range of sanctions as mentioned in Articles 38 and 45 ISR Doping Regulations. The Athlete's age, that he took the prohibited substance unthinkingly and not with the intention to enhance performance, the question of whether taking the cocaine metabolite had a performance..enhancing effect, the (not timely) admission, the admission in public, his unawareness of the traceability of cocaine, the fact that the presence of cocaine in the sample of an Athlete in an out-of-competition control does not constitute a violation of the Doping Regulations or the peculiarities of the particular type of Sport, are not - according to the WADC - matters to be weighed when determining the period of ineligibility. The purpose and intention of the WADC is, inter alia, to make the fight against doping more effective by harmonising the legal framework and to provide uniform sanctions to be applied in all sports, These rules, for instance, do not distinguish between amateur or professional athletes, old or young athletes or individual sport or team sport.

DAC's reference to an anonymous case in another sport and their opinion that banning cocaine is difficult to describe as conducive to the aim of combat doping do not justify a departure of the mandatory rule. DAC also mentioned in its Decision that the information provided by the sports association KNBB with reference to the punishability and traceability of cocaine has left something to be desired. Although Article 22 ISR Doping Regulations provides *that the association board is required to inform members about the content and operation of these regulations (…),* it is not the duty of the Sports association to warn athletes against the use of cocaine (or its metabolite). While it is certainly desirable that a sports association should make

8 Paragraph 43 of *Meca-Medina* reads in full: "As regards the overall context in which the rules at issue were adopted, the Commission could rightly take the view that the general objective of the rules was, as none of the parties disputes, to combat doping in order for competitive sport to be conducted fairly and that it included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport." In the preamble of the UNESCO Anti-Doping Convention (and previously in similar terms, in the preamble of the Council of Europe Anti-Doping Convention) it reads: "Conscious that sport should play an important role in the protection of health, in moral, cultural and physical education and in promoting international understanding and peace", "Concerned by the use of doping by athletes in sport and the consequences thereof for their health, the principles of fair play, the elimination of cheating and the future of sport", "Mindful that doping puts at risk the ethical principles and educational values embodied in the International Charter of Physical Education and Sport of UNESCO and in the Olympic Charter" and "Mindful also of the influence that elite athletes have on youth".

9 Dick Jaspers is a Dutch professional billiards player, who was world champion (three-cushions) in 2004 and 2004.

every effort to educate athletes about doping, it is principally the sole duty of the individual athlete to ensure that no prohibited substances enter his body.

Article 10.2 WADC and Article 38.1 ISR Doping Regulations provides for a uniform sanction of an ineligibility of two years for first offences. The only possibility for the athlete to reduce this fixed sanction is by evidence of exceptional circumstances (Article 10.5 WADC and Article 40 and 41 ISR Doping Regulations). If the Sole Arbitrator denies the existence of exceptional circumstances, it has, under the WADC and ISR Doping Regulations, no other choice than to apply the sanction of a two year suspension.

The consequences of this abstract and rigid approach of the WADC when fixing the length of the period of ineligibility in an individual case may be detrimental or (in rare cases) advantageous to the athlete (see for instance CAS 2002/A/376 Baxter v/ FIS). Insofar as the WADC prevents specific circumstances to be taken into account for the benefit of the athlete, the admissibility of such provisions is often questioned.

However, CAS case law and various legal opinions confirm that the WADC mechanisms are not contrary to human rights legislation. In the case CAS 2004/A/690 (Hipperdinger v/ ATP), the Panel found that the athlete had not established either "No Fault or Negligence" or "No Significant Fault or Negligence". In this case, in which the Panel upheld the two years suspension, the Panel cited with approval the decision of the Swiss Federal Court in N, et al. v/ FINA (W. v/ FINA 5P.83/1999). This latter case involved positive doping tests by four Chinese swimmers. The appeal concerned the CAS award upholding the swimmers' suspension. The award was rendered prior to the adoption of the WADC. One of several claims raised by the swimmers on appeal was that the CAS award failed to comply with the principle of proportionality. The amount of banned substance was very low, yet the suspension handed down could possibly end the swimmers' careers. The Swiss Federal Court held that under the applicable FINA Anti-Doping Rules, the appropriate question is not whether a penalty is proportionate to an offence, but rather whether the athlete is able to produce evidence of mitigating circumstances. Furthermore, the issue of proportionality would only be a legitimate issue if a CAS award constituted an infringement of individual rights that was extremely serious and completely disproportionate to the behaviour penalised. The Court found that the two year suspensions in question were only a moderate restriction on the athletes, because the suspensions resulted from a proven doping violation under rules that had been accepted by the athletes. In the result, the Court held that the two year suspensions handed down without examination of proportionality did not constitute a violation of the general principles of Swiss law.

The Sole Arbitrator refers also to CAS 2005/A/847 H. Knaus v/ FIS and CAS 200S/A/830 G. Squizzato v/ FINA. In this latter case the Panel considered: *"The Panel recognizes that a mere uncomfortable feeling "alone that a one year penalty is not the appropriate sanction cannot itself justify a reduction. The individual circumstances of each case must always hold sway in determining any possible reduction. Nevertheless, the implementation of the principle of proportionality as given in the World Anti-Doping Code closes more than ever before the door to reducing fixed sanctions. Therefore, the principle of proportionality would apply if the award were to constitute an attack on personal rights which was serious and totally disproportionate to the behaviour penalised (...)".*

In continuation, the Sole Arbitrator takes also in account the Advisory Opinion delivered by CAS in relation to the implementation of the WADC into the FIFA Disciplinary Code (CAS 2005/C/976 & 986 FIFA & WADA), in which the Panel held that the principle of proportionality is guaranteed under the WADC.

Furthermore, in the opinion by Prof. G. Kaufmann-Kohler-Antonio Rigozzi and Giorgio Malinvenu *(Legal Opinion on the Conformity of certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law, dated 26 February 2003)*, the rigid system of fixed sanctions in the WADC considerably restricts the doctrine of proportionality, but is nevertheless compatible with human rights and general legal principles. These experts justify this characteristic by citing the legitimate aim of harmonising doping penalties.

Whether the conclusions to be drawn from these experts are correct in such finality can be left unanswered here (see also CAS 2004/A/690 Hipperdinger v/ ATP and CAS 200S/A/847 Knaus v/ FIS); for the case at hand does not require an in-depth discussion of the issue. The mechanism of fixed sanctions according to the WADC is incorporated into the ISR Doping Regulations. At least in the opinion of the Swiss Federal Tribunal, sports bodies can limit in their rules the circumstances to be taken into account when fixing sanctions and thereby also restrict the application of the doctrine of proportionality. However, in the opinion of the Swiss Federal Tribunal, the sport associations exceed their autonomy if these rules constitute an attack on personal rights, the nature and scope of which is extremely serious and totally disproportionate to the behaviour penalised. In the Sole Arbitrator's opinion, this threshold has not been exceeded in the present case. The Sole Arbitrator holds that a two years period of ineligibility is not out of proportion, excessive or disproportional.

This opinion is not contrary to the standard as set out in section 2.8 of the Netherlands Civil Code. This provision implies that a judging body is not allowed to apply a rule when the result of the application of that rule will be unacceptable. As said above, the application of the mandatory rule of a two years suspension is not unacceptable according to standards of reasonableness and fairness in the given circumstances.

For these reasons, the Sole Arbitrator decides that the Athlete is sanctioned with a period of ineligibility of two years."

3.2.1. Comment

No comment. This is a case of zero tolerance. Or, possibly: what is the usefulness of appeal, if in cases like *Zuijkerbuijk* there is not any room for *Einzelfallgerechtigkeit* ("casuistry" in the sense of a case-by-case approach and philosophy)? At first instances, at the national level one gets the feeling as an judge or arbitrator that one fulfils the role and function not of a human being and citizen, but of a stamping machine, acting as a counter clerk. An oral hearing giving a real. non-virtual opportunity to be informed about who is the defendant and why he or she did what he or she did etc. etc., becomes useless and superfluous under the circumstances.

4. Summary and conclusion

1. The WADA - institutionally - and the WADA Code - instrumentally/materially - have a sui generis character. In a pure formal sense, they are private legal instruments, but in fact they are a mixture of public and private (or private and public) elements. Their nature might be called semi-public (from the international governmental perspective) or semi-private (from the perspective of international organized sport). As such, they are separate phenomena in sports law, in a doctrinarian sense. The international community of states directly participates in WADA and its decision-making. Regional intergovernmental organisations such as the Council of Europe and the European Unioin participate indirectly in WADA (the European members of the Foundation Board are designated half by the Council of Europe and half by the EU). WADA is funded equally by the Olympic Movement on one hand and public governments on the other. Governments have on an equal basis taken part in the unanimous adoption of the initial WADA Code and its amended successor version of 2007. Through the introduction of the UNESCO Anti-Doping Convention states have endorsed the WADA Code in fact twice.

   The WADA and WADA Code may be considered a global norm-setting model for other major problem areas in international sport like the fight against fraud and corruption. The introduction of public international agreements (treaties) is a first step to "juridify" such problems on an interstate level (see, for example, in particular the Anti-Football Hooliganism and Anti-Doping Conventions of the Council of Europe). Without the direct, explicit support of the international (or regional) community of states it is impossible to tackle major problems like football hooliganism, doping or fraud and cor-

ruption properly. States have the funding and the means (police enforcement and judicial measures). States in these circumstances must be the "double partners" of sport. The UNESCO Convention does not only have the same function as the Council of Europe Anti-Doping Convention, but then on a global level, it supports WADA and its Code directly. Hybrid organizations of the WADA type might be established - on a permanent, institutionalized basis - for the purpose of combating wrongs and abuses in the sporting world (and also beyond).

2. What is the practical consequence of the close linkage between the international community of states and the WADA Code? The practical consequence is that what might be considered generally recognized principles of disciplinary law and procedure[10] are as such neglected as norms of a hierarchically superior order in relation to what initially were mere sporting rules which in fact are the laws of a subculture. In his PhD of 2006 at Erasmus University Rotterdam, Soek has come to the conclusion that the disciplinary law concerning doping violations must be considered as pseudo-criminal law.[11] This would bring the general principles of criminal and criminal procedural law into the realm of disciplinary law in sport. The Dutch billiard social drugs case (*Zuijkerbuijk*) is a concrete example of the practical consequence of the close linkage between the international community of states and the WADA Code, in particular with regard to the application of the proportionality principle.

   In this matter, states obviously have passed the Rubicon. It would be interesting to undertake an international comparative "state practice" research into the question whether and how states (governments) have weighed the general interest of the fight against doping in sport and the fundamental/human rights of the athlete against each other. What governments have stated within the framework of intergovernmental bodies like UNESCO and the Council of Europe? What positions national parliaments have taken? What were the legal and policy considerations to accept, for another example the whereabouts reporting and unannounced out-of-competition control system which seriously affects the privacy of the athlete? What are the arguments for delegating the investigating powers of national police and prosecution to the private sports organizations like WADA and others?[12] There still are a lot of questions to be asked and responded to. Finally, It seems fair to cite here what for example the Netherlands Minister of Sport replied to written parliamentary questions on this issue in 2010:

Question:
What is the legal position of the National Doping Code with regard to current legislation and international conventions, such as the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Convention on the Rights of the Child (UNCRC)? In the event that parts of the code deviate from these conventions, which have been ratified by the Dutch government, is it not true that the text of the convention would have to take precedence? What implications would this have for the rules on doping controls and how do you perceive your own role in this?

Answer:
The National Doping Code is based almost entirely on the World Anti Doping Code and, first and foremost, must be regarded as a code for and by the sporting world. In this respect, therefore, by taking part in sport an athlete accepts obligations arising from the doping code. Within this context of the law of associations - in this case, sports associations - the international conventions mentioned above have no direct horizontal effect in principle. After all, an athlete can always refrain from taking part in sport. When the Code was established in 2003 and revised in 2007, this basic principle was universally accepted.

Furthermore, a number of professors (Kaufman-Kohler et al) with expertise in the fields of international law and human rights have reviewed the key provisions of the Code in light of the general principles of relevant international law and concluded that there are no inconsistencies.

The international context of anti-doping policy is a crucial factor when planning this policy in the Netherlands. Governments and the sporting world have deliberately agreed, at global level, that the anti-doping rules are the same for all sports and in all countries. As well as being necessary for the success of anti-doping policy, this harmonisation has also been achieved through international agreements. Our country cannot unilaterally withdraw from this, partly because, if it did, it would run the very real risk of sporting isolation.

This does not detract from the fact that the Netherlands is dedicated to achieving a lasting and proper balance between the anti-doping rules and the rights of athletes. Among other achievements, this commitment has led to the current consultation within the Council of Europe regarding specific rules within anti-doping policy for athletes under the age of 18. Lastly, the principle of protecting health - alongside that of fair play - is also particularly relevant to young athletes (a principle that is also established in the Convention on the Rights of the Child)."[13]

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10 Cf., on the international plane, „the general principles of law recognized by civilised nations" as a source of public international law in Article 38(1)(c) of the Statute of the International Court of Justice.

11 Janwillem Soek, *op. cit. supra,* in particular at p.401 (Final statement no. 1). See previously also, Janwillem Soek, *The Legal Nature of Doping Law*, The International Sports Law Journal (ISLJ) 2002/2 pp. 2-3, 5-7. See in general on principles of Dutch criminal law: H. de Doelder, *Toepassing en beginselen van tuchtrecht* [Scope and Principles of Disciplinary Law], Alphen aan den Rijn 1981.

12 See, in particular Janwillem Soek, *The Athlete's Right to Respect for his Private Life and his Home*, ISLJ 2008/3-4 pp. 3-13.

13 *Aanhangsel Handelingen Tweede Kamer* [Annex to Parliamentary Proceedings] 2009-2010 No. 1999.

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