Striking down the "Osaka Rule" - An unnecessary departure

By **Dr. Jan F. Orth, LL.M. (UT)***

The reasoning of the CAS in its decision, which strikes down the "Osaka Rule", consists of 23 single-spaced pages and seems therefore to be well-substantiated. However, a critical review of the reasoning reveals remarkable shortcomings in the argumentation scheme of the competent CAS panel. The author reaches the result that the invalidation of this important anti-doping provision was not compelling at all.

I. Introduction

1. The sport politics background

The *International Olympic Committee (IOC)* itself was faced with more than a few doping incidents during *Olympic Games* in the past few decades. The public perception of this rising difficulty, even in Olympic sports, likely began with the 1988 Olympic scandal regarding the Canadian sprinter, *Ben Johnson,* who beat the American sprinter *Carl Lewis* in 100m final at the Olympics in *Seoul.* Johnson was subsequently convicted of the use of steroids, which lead to his disqualification only three days later. Further incidents were to follow in the subsequent years regarding both the *Olympic Summer* and the *Olympic Winter Games.*

To confront former offenders-and in so doing preventing potential future offenders from participating in the *Olympic Games,* the *IOC Executive Board* enacted - at long last - at its meeting in *Osaka (Japan)* the following rule which came to be known as the "Osaka Rule" on June 27 2008[1]:

"The IOC Executive Board, in accordance with Rule 19.3.10 OC and pursuant to Rule 45 OC, hereby issues the following rules regarding participation in the Olympic Games:

1. Any Person who has been sanctioned with a suspension of more than six months by any anti-doping organization for any violation of any anti-doping regulations may not participate, in any capacity, in the next edition of the Games of the Olympiad and of the Olympic Winter Games following the date of expiry of such suspension.
2. These Regulations apply to violations of any anti-doping regulations that are committed as of 1 July 2008. They are notified to all International Federations, to all National Olympic Committee and to all Organizing Committees for the Olympic Games."

This article refers to this regulation as the "Osaka Rule", "IOC Regulation" or "IOC Rule".

2. Factual background of the case

The claimant in the case decided by the *CAS* is the *United States Olympic Committee ("USCO"),* which is the *National Olympic Committee (NOC)* of the *United States.* It is responsible for the US Olympic teams. It is seated in *Colorado Springs.*[2] The *IOC* is the respondent in this case.[3]

After the *IOC* approving the Osaka Rule as stated above, it came into force in July 2008. However, no case is known where the Regulation had an impact on any athlete who applied to attend the *Winter Olympic Games* in *Vancouver* in February 2010. It seemed clear, however, that the IOC Regulation would have actually impacted a number of athletes around the globe for the *Olympic Games 2012* in *London*.[4] Moreover, it came to the attention of the *World Anti-Doping Agency (WADA)* that the enactment of the regulation influenced doping adjudications since it came into effect: At least one case was shown, involving a US swimmer that tested positive for doping, in which the arbitration panel appeared to have fixed the suspension at exactly six months in order to avoid the application of the IOC Regulation.[5]

Subsequently, the applicability of the IOC Regulation was subject to arbitration in the *United States.* In the case of *Mr. LaShawn Merritt* - an American track and field athlete and 2008 *Beijing* double gold medalist - the AAA Panel found besides material mitigating circumstances, which allowed reducing the usual suspension, that "the IOC Regulation could not be used to prevent Mr. Merritt from competing in the 2012 Olympic Trials or from having his name submitted from entry to the Olympic Games."[6] In the case of *Ms. Jessica Hardy* - an American swimmer -, after a national arbitration panel sentenced her to a one-year suspension in shorting an usual minimum suspension of two years and declaring "that it would be manifestly unfair and a grossly disproportionate penalty for *Ms. Hardy* to be subject to the application of the IOC Regulation, which had come into effect only three (3) days prior to her positive drug sample", the *CAS* upheld the suspension on appeal of *WADA* and subsequently of Ms. Hardy. Afterwards, however, the *IOC* declared that it would not apply the IOC Regulation to *Jessica Hardy*.[7]

The legal situation in the *Merritt* case particularly put the *USOC* into a dissoluble situation: On the one hand, the competent AAA panel had declared "that Mr. Merritt must be allowed to compete at the 2012 Olympic Trials and, if he qualified, the USOC must assign him to its Olympic Team." On the other hand, it was clear that the *IOC* would not acknowledge a nomination of *Mr. Merritt* by the *USOC* due to the Osaka rule.[8]

Basically both parties made a commendable decision: They "recognized that there was considerable uncertainty facing the world's aspiring Olympic athletes and their national Olympic committees because of the IOC Regulation. In recognition of these concerns and to their credit, in April 2011 the parties voluntarily entered into an Arbitration Agreement […]."[9] The main objective of this arbitration agreement was to gain a binding decision of the *CAS* regarding the enforceability of the IOC Regulation.[10]

II. The decision of The Court of Arbitration for Sport

On October 4 2011, the competent *CAS Panel* rendered its decision in the arbitration case. It declared "[t]he IOC Executive Board's June 27, 2008 decision prohibiting athletes who have been suspended for more than six months for an anti-doping rule violation from participating in

* The author is a Judge at Cologne Regional Court (Landgericht Köln) and an Adjunct Professor at the Faculty of Law of the University of Cologne for Sports Law. He wishes to thank Mr. Michael Wolfe, Austin/Texas, for the proofreading. This article is a for the publication revised version of a Directed Research Paper completed in April 2012 as a prerequisite to gain the degree Master of Laws from The University of Texas at Austin. The Directed Research was supervised by Prof. Lucas A. Powe Jr., UT Law School. A shortened version, presenting the material propositions only, has been published in German language in SpuRt ("Sport und Recht" = Journal for Sports and Law) 2012, p. 93.

1 USOC v. IOC, CAS Arbitration Award of 10/4/2011, No. CAS 2011/O/2422, section 2.2, available at http://www.tas-cas.org/. A closer look on the "Osaka Rule" and its background takes DANIEL GANDERT, THE BATTLE OVER THE OSAKA RULE, INTERNATIONAL SPORTS LAW JOURNAL, 2012:1-2, 109.
2 USOC v. IOC, supra, section 1.1.
3 USOC v. IOC, supra, section 1.2.
4 USOC v. IOC, supra, section 2.3.
5 USOC v. IOC, supra, footnote 3.
6 USOC v. IOC, supra, section 2.4.
7 USOC v. IOC, supra, section 2.5. For more background on these cases, especially the fact that the athletes may have exercised due diligence and may therefore seem "unduly punished", see GANDERT, supra, p. 109, 113, 115.
8 USOC v. IOC, supra, section 2.6.
9 USOC v. IOC, supra, section 2.7.
10 USOC v. IOC, supra, section 2.9 - 2.10.

the next Olympic Games following the expiration of their suspension […] invalid and unenforceable." The *Panel* presented its reasoning in 23 single-spaced pages, which superficially looked like a well-substantiated opinion. After introducing the Parties (1.), the *Court* retells the Factual Background (2.), gives an overview on the Proceedings before itself (3.), states the Constitution of the *Panel* and the Hearing (4.) and the Jurisdiction of the CAS (5.), identifies the Applicable Law (6.), comes finally to the Substantive Arguments (7.) and ultimately to the Panel's Findings on the Merits (8.). The last topic deals with the Costs (9.). The *Court* structured its "Findings on the Merits" - as a matter of course the most important section of the decision - like this: (i) Scope and Application of the IOC Regulation, (ii) Proper Characterization of the IOC Regulation as an eligibility rule or a sanction, (iii) Is the IOC Regulation consistent with the WADA Code and the OC?, (iv) Other Arguments raised by the USOC, (v) Conclusion.

As the factual background is presented in this article to the extent required for understanding the reasoning of the court, this analysis will particularly focus on the actual legal reasoning of the *Court* as presented under "8. The Panel's Findings on the Merits". As far as the "Substantive Arguments" are addressed, their objective will be presented directly in accordance with the legal analysis.

Essentially, the *Court* holds that the Osaka Rule imposes a sanction on the athlete and is not an eligibility rule[11]. It further holds that the imposition of another sanction for the same doping offense is inconsistent with and contrary to the WADA code[12]. As the inconsistency of a separate anti-doping sanction of the *IOC* as allegedly imposed by the Osaka Rule with the WADA code cannot be disputed (as the list of actual sanctions for doping offenses is clearly conclusive and the imposition of an actual additional sanction would violate the *ne bis in idem*-principle), this analysis shall focus on the findings of the *Court* that the Osaka Rule actually imposes an (additional) sanction on the athletes and does not enacts an "eligibility rule" for participants of *Olympic Games.*

To justify this finding, the Court first defines the "Scope and Application of the IOC Regulation"[13]. After describing the impact of the regulation on certain athletes, it holds an interim result important for its argumentation scheme: "The effects of a suspension under the WADA Code that overlaps with an Olympic Games or the qualification for that Games and the application of the IOC Regulation are identical."[14] The Panel then stresses the necessity to "determine whether IOC Regulation is a sanction, as the USOC argues, or is an eligibility rule, as the IOC submits[,]" "[i]n order to asses some of [the USOC's] arguments."

This leads to the core of the decision: The paragraphs on the "Proper Characterization of the IOC Regulation as an eligibility rule or a sanction"[15]. Here the Court gives a surprising start: It states that a *CAS* Advisory Opinion[16], requested by the *IOC,* concluded that the now disputed IOC Regulation was an eligibility rule. However, it is true that the proceedings leading to such an Advisory Opinion are not adversarial and the now deciding *Panel* "was benefitted by extensive arguments made by both parties and numerous Amicus Curiae Briefs."[17]

After briefly mentioning another confidential *CAS* Advisory Opinion, which reasons are said to be inapplicable in the current case[18], the Panel points to other *CAS* jurisprudence[19]: "A CAS Panel noted in *RFEC & Alejandro Valverde* v. *UCI* (CAS 2007/O/1381 at paragraph 76)[20] […] that a common point in qualifying (eligibility) rules is that they do not sanction undesirable behavior by athletes. Qualifying rules define certain attributes required of athletes desiring to be eligible to compete and certain formalities that must be met in order to compete."[21]

From this prior *CAS* jurisprudence the *Panel* derives an important conclusion for its argumentation: "In contrast to qualifying rules are the rules that bar an athlete from participating and taking part in a competition due to prior undesirable behavior on the part of the athlete. Such a rule, whose objective is to sanction the athlete's prior behavior by barring participation in the event because of that behavior, imposes a sanction." The *Panel* then refers to another opinion that addressed the issue of whether the *IOC* can refuse entry into the *Olympic Games*[22]. The *Court* in this case sums this decision up: "The Panel in Prusis said that the effect of refusing the athlete entry to the Games was to impose a further sanction on him for the same offense."[23]

After this introduction the Panel turns to the appropriate characterization of the IOC Regulation. It compares the language of the WADA Code on ineligibility ("the Athlete […] is barred for a specified period of time **from participating** in any Competition")[24] and of the IOC Regulation, which says that athlete "**may not participate**, in any capacity, in the next edition of the Olympic Games"[25] (emphasis by the *Panel*). From this the panel derives: "The essence of both rules is clearly disbarment from participation in an event or a number of events."

In the next paragraph the Panel determines "that the Olympic Games come within the definition of Competition under the WADA Code"[26] - an unsurprising determination. It then draws its final interim holding: "Ineligibility is a sanction according to the provision of Article 10 of the WADA Code"[27], which reads:

> "The period of Ineligibility imposed for a violation of Article 2.1 [Presence of Prohibited Substance or its Metabolites or Markers], Article 2.2 [Use or Attempted Use of Prohibited Substance or Prohibited Method] or Article 2.6 [Possession of Prohibited Substances and Prohibited Methods] shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Article 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:
> First violation: Two [2] years Ineligibility"[28]

The Panel goes further: "The OC in Rule 44"[29] (which reads: "The World Anti-Doping Code is mandatory for the whole Olympic Movement") "makes the WADA Code mandatory. Therefore, the Panel finds that a reading of the two documents together makes the IOC Regulation, insofar as it makes an athlete ineligible to participate in a Competition - i.e., the Olympic Games -[,] a sanction."[30]

The Court then grapples with the counterargument of the IOC that "the Regulation cannot be disciplinary in nature, because the IOC only has disciplinary jurisdiction and powers over Olympic athletes during the Olympic Games."[31] The *Panel* holds that: "As the discussion above demonstrates, the ineligibility caused by the IOC Regulation falls squarely within the nature of sanctions provided in the WADA Code. Once the IOC Regulation is used to bar the participation of an athlete, the effect of the regulation is disqualification from the Olympics and would be undeniably disciplinary in nature. Furthermore, the athlete would certainly perceive such a disqualification as a sanction, much like a suspension under the WADA Code. Therefore, the Panel is satisfied that the IOC Regulation has the nature and the inherent characteristics of a sanction."[32]

11 USOC v. IOC, supra, section 8.19.
12 USOC v. IOC, supra, section 8.26.
13 USOC v. IOC, supra, section 8.1 - 8.4.
14 USOC v. IOC, supra, section 8.4. However, the Court admits in the following sentence, „[a] WADA Code suspension, of course, also has a broader effect as it bans participations in other competitions as well."
15 USOC v. IOC, supra, section 8.7 - 8.19.
16 CAS Advisory Opinion of 6/11/2009, No. TAS 2009/C/1824, available at http://www.tas-cas.org/.
17 USOC v. IOC, supra, section 8.7.
18 USOC v. IOC, supra, section 8.8.
19 USOC v. IOC, supra, section 8.9.
20 This opinion was rendered in French only and is not available in English on the CAS website. It was, however, not issued by a Panel but by a single arbitrator.
21 USOC v. IOC, supra, section 8.9.
22 PRUSIS & LATVIAN OLYMPIC COMMITTEE (LOC) V. IOC, CAS ad hoc Division (O.G. Salt Lake City) Arbitration Award of 2/5/2002, No. 02/001, available at http://www.tas-cas.org/.
23 USOC v. IOC, supra, section 8.10.
24 USOC v. IOC, supra, section 8.12.
25 Id.
26 USOC v. IOC, supra, section 8.13.
27 USOC v. IOC, supra, section 8.14.
28 USOC v. IOC, supra, section 6.9.
29 USOC v. IOC, supra, section 8.14.
30 USOC v. IOC, supra, section 8.14.
31 USOC v. IOC, supra, section 8.15.
32 USOC v. IOC, supra, section 8.15.

The *Panel* then determines that this finding holds, although athletes are not barred from other Competitions than the *Olympic Games* by the Osaka Rule[33]. It then notes "that the Olympic Games are, for many athletes, the pinnacle of success and the ultimate goal of athletic competition. Being prevented from participating in the Olympic Games, having already served a period of suspension, certainly has the effect of further penalizing the athlete and extending that suspension."[34]

The *Court* then comes to its final conclusion: "For all of the foregoing reasons, having regard to the objective and purpose of the IOC Regulation and to its scope and application, the Panel is of the view that the IOC Regulation is more properly characterized as a sanction of ineligibility for a major Competition, i.e. as a disciplinary measure taken because of a prior behavior, than as a pure condition of eligibility to compete in the Olympic Games. Even if one accepts that the Regulation has elements of both an eligibility rule and a sanction, it nevertheless operates as, and has the effect of, a disciplinary sanction."[35]

III. Critical Review

The reasoning of the *Panel* is poor and consists of certain and material weaknesses. The whole argumentation scheme is truly formalistic, has some inconsistencies and shows a remarkable lack of consideration of substantive distinctions between sanctions and eligibility rules.

Initially, to reach this conclusion, it is necessary to break down the argumentation chain of the *Panel* down to single argumentation steps, as the argumentation itself is not very stringent. Principally, the *Panel* argues in this order:

1. The Osaka Rule actually can bar athletes from participating in the *Olympic Games,* by declaring them ineligible (see section 8.4).
2. In the WADA Code ineligibility means that an athlete is barred from participating (see section 8.12).
3. The Osaka Rule uses a very similar language and therefore WADA Code eligibility and Osaka Rule have the same essence (id.).
4. According to Art. 10 of the WADA Code and its definitions "ineligibility" is a sanction (see section 8.13).
5. The WADA Code is mandatory under Olympic Charta Rule 10 and therefore the "reading of the two documents together" makes the Osaka Rule a sanction (see section 8.14).
6. Athletes perceive a disqualification under the Osaka Rule like a suspension under the WADA Code (see section 8.15).
7. The Osaka Rule has the nature and the inherent characteristics of a sanction (id.).

Preface.
Prior to the discussion of any of these argumentation steps in detail, it is further necessary to comment on some general and possibly *obiter dicta* remarks of the *Panel* regarding the distinction between sanctions and eligibility rules, which the Panel lays out in the very beginning of its reasoning but never truly applies to its argumentation scheme. These paragraphs (see sections 8.7 to 8.10) seem just to have the purpose to preface the actual findings and possibly to bias the reader in a certain direction.

There, the *Court's* assertion, that another panel in *Prusis*[36] said that the effect of refusing the athlete entry to the Games was to impose a further sanction on him for the same offense, is plainly wrong. The panel in *Prusis* held in section 15 of its opinion of an ad hoc-panel decision regarding access to the *Olympic Games* in *Salt Lake City:*

> "In the absence of a clear provision in the Olympic Charter and in the Rules of the relevant International Federation entitling the IOC to intervene in the disciplinary proceedings taken by that International Federation, it is the Panel's opinion that an athlete has a legitimate expectation that, once he has completed the punishment imposed on him, he will be permitted to enter and participate in all competitions absent some new reason for refusing his entry. If it were otherwise, there would be a real risk of double jeopardy, as this case has illustrated. As became clear from statements made by the IOC's representatives during the hearing, the effect of refusing Mr. Prusis entry was to impose a further sanction on him for the same offence. The Panel was told that it was the role of the IOC to 'come to a certain common treatment between the different sports' and that 'three months compared to the normal two years or even life ban in some sports was not acceptable'."[37]

That, of course, reads rather differently than the rendition of the *Panel*. The *Panel* in *Prusis* describes obviously only a risk of double jeopardy. Moreover, the whole paragraph is presented under the prerequisite of the absence of an empowerment to the *IOC* to intervene in the disciplinary action of an International Federation. Such a provision may now be seen in the later enacted Osaka Rule. In addition: The court accepts this argumentation for its reasoning, although in *Prusis,* the will of the IOC to penalize the athletes comes openly to light here. This circumstance is in section 8.8 - among others - a reason to declare the confidential Advisory Opinion to be distinct from the current case. *Prusis* was clearly a completely different case: That double jeopardy is at risk, if the *IOC* tries to prolong an existing and elapsed suspension (which it deems insufficient) by denying an athlete to participate in the Olympic Games (and even argues that way!), is beyond any doubt.

The argumentative impact, which the *Panel* derives from that, for denying the Osaka Rule being an eligibility rule, is not convincing despite the fact that it is not clear where this argument is tied to in the Panel's argumentation scheme. It says that rules that bar athletes from participating due to prior undesirable behavior are in conflict with eligibility rules. This is inconsistent and a circular argument. Every sanction and eligibility can only tie on any "human behavior" - be it "desirable" or "undesirable", be it conduct or forbearance. So an indisputable eligibility rule for a pole vaulter to have reached a minimum height of 7 m in an acknowledged competition clearly links to his desirable conduct (gaining the requested performance), and an equally undisputable eligibility rule for any Olympic competitor to sign an acknowledgement of the *Olympic Charta* and the subordinate competition regulations to his undesirable forbearance (failure to sign), or the eligibility rules for freshmen athletes in US colleges link to academic progress[38], which clearly only can result from the student's "behavior". In stressing the terms of "undesirable behavior" the Panel misreads the ruling of the *Panel* in *Valverde.* As shown above, everything is linked to human behavior, meaning that the distinction that the Panel in *Valverde* actually makes is whether the prior "undesirable behavior" is sanctioned by the eligibility rule. That raises the question what the purpose and objective of the eligibility rule is and not the question whether the prior behavior was undesirable or not.

In addition, the Court's definition of an eligibility rule ("Qualifying rules define certain attributes required of athletes desiring to be eligible to compete and certain formalities that must be met in order to compete."), which it takes from the *Valverde* decision,[39] is too narrow. Eligibility rules can, in my opinion, be better described (in a manner that also extends beyond the realm of sports) as follows: "The sole purpose of eligibility rules and other contest regulations is to keep competition equitable, to maintain activities in proper perspective and to achieve a minimum standard of performance." It must not be determined which definition is better or more correct, as the challenged IOC Regulation is an eligibility rule under either definition, as shown above.

Now, it is useful to consider the single argumentation steps in particular (the subsequent steps refer to the order of the arguments as listed above):

33 USOC v. IOC, supra, section 8.16.
34 USOC v. IOC, supra, section 8.17.
35 USOC v. IOC, supra, section 15.
36 For more factual background on the *Prusis* decision, see GANDERT, supra, p. 109.
37 PRUSIS & LATVIAN OLYMPIC COMMITTEE (LOC) V. IOC, supra, section 15.
38 WEILER ET AL., supra, p. 794.
39 See p. 6.

Step 1.
The finding that the Osaka Rule actually can bar athletes from participating in the *Olympic Games* is truly trivial. That is its purpose.

Steps 2 und 3.
Also the finding that "ineligibility" in the WADA Code means that an athlete is barred from participating is very basic. The same is true for the finding that the Osaka Rule uses a very similar language.

Out of this reasoning, the Panel forms one of its main arguments that "the essence of both rules is clearly disbarment from participation in event or a number of events." This argument seems alarmingly hollow. The *Panel* derives its conclusion that a suspension under the WADA Code and ineligibility under the IOC Regulation have the same effect, from a comparison of the language. The *Panel* finds it remarkable that the wording is alike and emphasizes here the word "participate". First, it must be noted that *Panel* puts a stress on the common verb, which is used by virtually everybody - either in legal or vernacular registers - to describe an athlete's attendance in a competition. It is quite natural to use this language when a restraint of an athlete's attendance is to be described. Then, with this emphasizing, the *Panel* completely neglects the rest of the language in both sentences, which demonstrate substantive differences. As a result, the conclusion of the *Panel* that "The essence of both rules is clearly disbarment from participation in an event or a number of events." is clearly wrong. Only the "ineligibility" under the WADA Code, a suspension, means disbarment from a number of events. The IOC Rule disbars the athlete simply from a single event, namely the *Olympic Games*. And this is a material difference between the two disbarment regulations: A suspension bars the athletes from any competition during the suspension period, which makes it rather a sanction: The athlete is sanctioned for his/her misconduct - s/he may not participate in any sports event at all, because s/he did not respect the basic rules of fair conduct in Sports. The IOC Regulation bars the athlete from participation in the *Olympic Games* (once for a single specific event) only: This is rather an eligibility rule. The ineligibility for participation in the *Olympic Games* is tied to the potential risk stemming from a pre-convicted doping offender spoiling the *Olympic Games* and their Olympic ideals of fair play with their continued or recidivistic usage of performance enhancing drugs. The only mutual essence is disbarment.

However, it is highly remarkable the extent to which the language focused upon by *Panel* ignores the clear language of the WADA Code in this context. In Appendix One of the WADA Code (as quoted by the Panel in section 6.10) "ineligibility" is exactly defined as barring the athlete "for a specified period of time from participating **in any Competition** or other activity" (emphasize added). That means that the Panel makes its finding contrary to the explicit language of the WADA Code, which it itself invokes, and from comparing apples and oranges. It is surprising that the *Panel* does this in full self-awareness: As noted in footnote 14, the Court has well realized the material differences between the effects of the Osaka Rule and a WADA suspension in section 8.4 of its opinion. However, it is merely ignored in further argumentation.

Step 4.
It is indisputable that "ineligibility" is a sanction according to Art. 10 of the WADA Code and its definitions. It is notable, however, that "ineligibility" due to these definitions is a disbarment of an athlete from any event.

Step 5.
It cannot be doubted that the WADA Code is mandatory for the IOC after Rule 44 of the Olympic Charta adopted it. However, it remains completely unclear why "a reading of the two documents together" makes the Osaka Rule a sanction. This is a mere assertion of the *Panel* that is not founded upon any evidence whatsoever. As demonstrated, the Osaka Rule does just not fall into the WADA Code meaning of "eligibility", because it disbars the athletes only from the Olympic Games and not "from any event for a specific period of time". And even if the WADA Code would, after its adoption, control the whole language of the IOC, its Olympic Charta and its by-laws to an extent that a so called "ineligibility" could then considered to be a sanction, it is still a widely recognized principle that the mere label of a matter does not determine its substantive contents or effect *(falsa demonstratio non nocet).* Decisive is the substantive background.

To find the Osaka Rule to be a sanction, it would have been the *Panel's* duty to determine the substantive effect of and the intention standing behind the Osaka Rule. Regrettably there are no substantial findings in the *Court's* opinion apart from truly apodictic assertions that do not find any support in the academic literature.

The discussed assertion of the *Court* does not receive any further justification by simply repeating it in section 8.15 of the opinion. As the above analysis has shown, however, the IOC Regulation does not fall "squarely" within the nature of sanctions provided by the WADA Code. At this point the *Panel* has not delivered any substantial analyses of the *nature* of the sanctions by the WADA Code at all. And as shown above, the IOC Regulation does not even fall within the language of the WADA Code sanctions due to its explicit definitions.

Step 6.
The next two steps are, according to the Panel, just confirmation of the finding that the Osaka Rule is truly a sanction. Again, the Panel is apodictic and its argumentation unsubstantiated.

In this paragraph the *Panel* focuses mainly on the perception of the effect of the application of the Osaka Rule by the athlete. But the perception of a measure cannot be decisive for its nature. The fact, that the athlete percepts the measure as a sanction, does not render the measure a sanction at all. If that were true for sanctions in general, we could, for example, decide that a prison sentence is not punishment, because the prisoner considers it unjust, or imagines that it is for his own protection.[40] Moreover, the fact that a few people enjoy being flogged, or are in the fortunate position of being able to easily afford a fine, does not mean that these measures are not punishment.[41] In addition, following this idea, it would be virtually impossible for a state to enact other rules of behavior that are not punishing at all. Requirements like public permits (like building permissions or driver's licenses) or any measure for the protection against threats to public safety are certainly perceived by the addressee as the infliction unwelcome (at least an unpleasant duty) and could thus be perceived as a "punishment", although it is clearly not by definition.

Step 7.
In section 8.16, the *Panel* concludes: "Therefore, the Panel is satisfied that the IOC Regulation has the nature and the inherent characteristics of a sanction." This is surprising because the Panel has not identified a single "inherent characteristic" of sanction in its opinion at all, besides those mentioned in this section, namely their effects on and their perception by the addressee, plus the fact that this sanction is to be "undeniably disciplinary" [sic!]. The opinion therewith falls incredibly short on a discussion of the scholarly concepts developed towards this subject. Referring to the "undeniably disciplinary" character of the matter is - despite the alarming usage of the word "undeniably" - a circular argument: that is exactly what is to be shown. Moreover, referring to these "characteristics" of sanctions in the latter part of the opinion raise doubts on its consistency: The *Panel's* main grounds for finding the Osaka Rule a sanction were language arguments and the "reading together" of the two "documents".

The question remaining is: Has the Osaka Rule the nature and the inherent characteristics of a sanction? The answer to this question gives the ultimate determinant if the Osaka Rule is a sanction or something different.

40 NIGEL WALKER, WHY PUNISH? 3 (1991).

41 WALKER, supra, p.1.

In this context the academic literature has identified certain universal features of punishment.[42] Although its numbers vary among the different authors, a consistent scheme of general requirements remains with all sources. These are underlaid by a shared conception of punishment, regardless where or by whom they are imposed: Society (state), Christian church, schools, colleges, professional organizations, clubs, trade unions or armed forces. They may have different names, though, in the different areas of their application.[43] These features apply even and explicitly to sport sanctions.[44] According to *Walker,* these - his seven - features of punishment are as follows:

> "[a]. [Punishment] involves the infliction of something which is assumed to be unwelcome to the recipient: the inconvenience of a disqualification, the hardship of incarceration, the suffering of a flogging, exclusion from the country or community, or in extreme cases death. […]
> "[b]. The infliction is intentional and done for a reason. […]
> "[c]. Those who order it are regarded - by members of the society, organization, or family - as having the right to do so. […]
> "[d]. The occasion for the infliction is an action or omission which infringes a law, rule, or custom. […]
> "[e]. The person punished has played a voluntary part in the infringement, or at least his punishers believe or pretend to believe that he has done so. […]
> "[f]. The punisher's reason for punishing is such as to offer a justification for doing so. It must not be mere sadism, for example. […] A justification is called for because what is involved is the imposition of something unpleasant regardless of the whishes of the person on whom it is imposed (unlike dentistry, surgery, or penance, from which the suffer would hope benefit).
> "[g]. It is the belief or intention of the person who orders something to be done, and not the belief or intention of the person to whom it is done, that settles the question whether it is a punishment. […]"[45]

For the determination whether the IOC Regulation imposes a sanction or is an eligibility rule, it is necessary to analyze whether these features of punishment apply to the IOC Regulation, when it is applied.

a. As already mentioned by the *Penal*, the Osaka Rule imposes **something unwelcome** to the athlete: He receives disbarment from one of the most prestigious competitions in global sports.
b. This inflection is done **intentionally**, namely by the legal order of the IOC Rule, and for a **reason**. It is notable, however, at this point that this reason is not the initial doping offense, but to an established and incontestable suspension of certain severity due to a doping offense. This is a clearly distinct connecting factor.
c. The third feature is questionable. Although it is beyond reasonable doubt that the ultimate prompting authority of the disbarment, the *IOC,* is deemed to **have the right** to regulate the participation of its own Games, the question is whether this consequence is "ordered" in the sense of the defined feature. "Ordering a punishment" necessarily implies an individualized decision of sanction rendered by a Judge, Court or Panel after some kind of investigative and recognitional proceedings. In contrast to this requirement, the IOC Rule orders its disbarring effect as an abstract-general legal proposition for anybody who complies with its prerequisites. Therefore, in the case of IOC Rule, there is no specific and individualized "punishment ordered", its effect seems to be merely a general consequence.
d. The requirement that the **occasion** for the infliction is to be a behavior which **infringes a law, rule** or alike, also shows that the IOC Regulation does not really fall within the punishment concepts. The IOC Rule simply does not tie to some infringing behavior (the actual doping offense), but links to a later constituted suspension due to the prior rule-infringing behavior. Thus, the IOC Regulation fulfills this perquisite indirectly at best. Therewith this factor seems rather to be in line with a eligibility rule determination.
e. The same arguments apply to the feature that the person to be punished has to play a **voluntary part** in the infringement. As just mentioned above, the IOC does not tie its rule to the specific infringing behavior that ultimately led to his suspension punishment. This underlines the tendency that the IOC Rule does not really fit into the common punishing scheme. However, professional athletes must be and will always be aware of the fact that a behavior contrary to common ethical standards in sport - doping - can lead to serious sanctions and further consequences likewise.
f. This feature is not self-explanatory. *Feinberg* and *Bedau* found that one prime **justification** for punishment is that "proper punishments […] express (often through their conventional symbolism) resentment, disapproval, condemnation or reprobation."[46] According to this, the justification for a punishment is the community's disapproval of the infringement of the community's rule. This requirement is highly problematic for the Osaka Rule. Rather than condemning the athlete's undesired behavior (this has already been done by the suspension rendered by the competent doping tribunal), the *IOC* invokes preventive reasons for disbarring a prior suspended athlete from the *Olympic Games* and thus confers no further, extra, or new condemnation of his prior unlawful behavior on the athlete. Beside this undoubted preventive intention of the *IOC,* the rule's link not to a doping offense but to a subsequent sentencing decision is a forceful formal argument. Invoking the clearly preventive intention of the *IOC* there is this feature substantively missing as well in order to consider the effect of the Osaka Rule a sanction. One cannot find any further disapproval or condemnation in the act of disbarring the athlete from the *Olympic Games* by the *IOC,* when this disbarment does not render a (further) verdict against the athlete but rather expresses concerns of prevention.
g. With this feature, one can make the most forceful argument against a consideration of the IOC Rule as a punishment. Decisive for the determination whether the action conferred to the athlete **is a punishment is the intention** of the "punisher". It is my conviction that the *IOC* persuasively can show that its intention underlying the IOC rule is not to promote a further punishment on a doping offence, but to constitute an eligibility rule with an important and reasonable preventive effect for anti-doping policy reasons. The *Panel* itself holds the *Olympic Games* are "paramount" for every single athlete engaged into Olympic sports. And so are - at least - the intentions which (hopefully) still underlie the *Olympic Games.* According to the Olympic Charta one of the "Fundamental Principles of Olympism" is this - the first principle:

> "Olympism is a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind. Blending sport with culture and education, Olympism seeks to create a way of life based on the joy of effort, the educational value of good example, social responsibility and respect for universal fundamental ethical principles."[47]

It is quite clear in this outlined environment that there is no space for doping or doping offenders. It is not only a right of the *IOC* to prevent its games from profanation with doping; it is obviously its finest duty. Doping in sports makes the underlying principle of a competition of sport capabilities a mockery because it takes away the basis for such a comparison: the artificially unenhanced and purely training-based physical capabilities of human beings. And, as a matter of course, doping is considered "cheating" and therefore clearly inconsistent with "universal fundamental ethical principles".
Therefore, the protection of these basic values of sports and the Olympic Ideal is a legitimate interest of the IOC. Thus, the intention to prevent threats to these values by regulating admission to the Olympic Games by pre-convicted doping offenders, who are more likely to backslide

42 WALKER, supra, p. 1-4; ANTHONY FLEW, THE JUSTIFICATION OF PUNISHMENT, Philosophy, 3 (1954), 291 ff. (reprinted in H.B. ACTON (ed.), THE PHILOSOPHY OF PUNISHMENT: A COLLECTION OF PAPERS (1969));. JOEL FEINBERG, THE EXPRESSIVE FUNCTION OF PUNISHMENT, The Monist, 49: 397-423; HUGO ADAM BEDAU, FEINBERG'S THEORY OF PUNISHMENT, BUFFALO CRIMINAL LAW REVIEW, Vol. 5:103, 2001, p. 103; STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/punishment/ (viewed 4/30/2012) - under section "2. Theory of Punishment", Headline "Justification of Punishment".
43 WALKER, surpra, p. 1.
44 WALKER, id.; FLEW, supra.
45 WALKER, supra, p. 1-3.
46 Bedau, p. 115.
47 Olympic Charta, http://www.olympic.org/Documents/olympic_charter_en.pdf (last viewed 4/30/2012), p. 10.

than non-offenders, clearly reflects a preventive and thus not a repressive - punishing - intent of the lawmakers.

Other Aspects.
The remarks of the Panel in section 8.17 are, in part, revealing. The Panel makes no effort to mask the "true intentions" for the outcome of its decision. In my opinion, the real, at least economic, reasons for declaring the Osaka Rule invalid and unenforceable can be found in this paragraph. While stating that participation in the *Olympic Games* is paramount for any athlete, "that the Olympic Games are, for many athletes, the pinnacle of success and the ultimate goal of athletic competition", and that disbarring the athlete from these Games after his/her "basic" suspension has elapsed, would mean to "extend his punishment", the *Panel* again considers merely the perspective of the athlete. It has already been shown that this perspective is not decisive. It is of course true that disbarment from the *Olympic Games* means a considerable disadvantage to an athlete. Naturally, this disadvantage lies not only in the deprivation of the Olympic "athletic competition" but certainly in the "success" part of it: A successful participation in the Olympic Games is for most athletes, especially from fringe sports, the only way to gain the necessary public attention that might ultimately lead to monetary valuable endorsement deals and promotional activities. The athletes' interests herewith protected by the *Panel* are manifest economic expectations.

In its final conclusion the *Panel* invokes "the objective and purpose" of the Osaka Rule and "its scope and application". With - as shown - falling vastly short on the "objective and purpose" side of the argumentation the *Panel's* result continues, as before, being apodictic. Finally, the assertion that the rule "operates as, and has the effect of, a disciplinary sanction" is once again not underlaid by sufficient arguments or merely based on the impermissible view of the athlete and his/her perception of the measure.

Conclusion (on sanction versus eligibility rule).
Thus, the conclusion is that the exclusion of an athlete from the *Olympic Games* based on the Osaka Rule does not impose a sanction on the athlete. It is not a repressive punishment that was determined by a tribunal in an individual case assessment. It is an abstract-general eligibility rule that bars athletes from participating in the *Olympic Games* for preventive reasons: It tries to minimize the risk of participation of doped athletes by baring those who have already been convicted on these offense, which raises the risk of reoffending in the specific athlete. Therefore, the Osaka Rule does not link to a certain doping offense record, but to an established and incontestable suspension of certain severity due to a doping offense.

Alleged violation of the *ne bis in idem*-principle.
The Osaka Rule, as an eligibility rule, does not infringe the basic principles of "ne bis in idem" or "double jeopardy".

These principles basically guarantee the same range of rights against sentencing state action and differ in their labels only. "Ne bis in idem" - under European and German doctrine - prevents a criminal Court or tribunal to convict a person twice for the same offense[48], meaning for a specific set of circumstantial facts. This specific set of circumstantial facts is usually defined as the "whole historical event, which is usually considered a single historical course of actions the separation of which would seem unnatural"[49]. It is so protected by Art. 103 subsection 3 of the German Constitution (Grundgesetz):

> "Nobody shall be punished multiple times for the same crime on the base of general criminal law."[50]

The same principle is in force by Art. 54 Schengen Agreement within the whole European Union at the supranational level, meaning that valid convictions and acquittals by other European States bar national courts from punishing an alleged offender for the same crime.

In the United States the principle of "double jeopardy" is provided in the Fifth Amendment to the *United States Constitution:*

> "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[…]."

According to the jurisdiction of the *United States Supreme Court,* the Double Jeopardy Clause of the Constitution encompasses four distinct prohibitions: subsequent prosecution after acquittal, subsequent prosecution after conviction, subsequent prosecution after certain mistrials, and multiple punishments in the same indictment.[51]

Before one turn to the question whether disbarment from the *Olympic Games* by the Osaka Rule due to a foregoing suspension may violate this principle, there remains the question why this principle is applicable to the relationship between the athlete and the different associations, which basically is nothing else than a contract subject to private law. Fundamentally, in either legislation, the constitutionally guaranteed rights are safeguards against undue state action, in this case criminal jurisdiction in particular. It is a bedrock principle of US constitutional law that was held ever since "The Civil Rights Cases" that "[c]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority […]. The wrongful act of an individual […] is simply a private wrong […]."[52] Also in the German constitutional theory the constituently grounded so-called "basic" (or: "fundamental") "rights" are historically and basically rights, which are mainly designed to protect individuals against state actions. However, this principal has been extremely expanded by the jurisdiction of the *German Federal Constitutional Court (Bundesverfassungsgericht)*. In cases where similar protection is needed for individuals from mostly superior entities (regularly vastly exceeding the individual's bargaining power) the "basic rights" of the German Constitution can be applied to private law relations and contracts under the doctrine of the "Third Party Effect"[53]. German courts will regularly find under this doctrine the "ne bis in idem"-principle "indirectly applicable" in cases like this and give the principle effect in doing so.

The US American solution for this problem is not too far away from this approach. "It is asserted that [the] wide grant of jurisdiction of the [sport governing bodies] is an attempt to deprive the court[s] of [their] jurisdiction and that such a provision is contained in these agreements, rules, and uniform contract is contrary to public policy. No doubt the decision of any arbiter, umpire, engineer, or similar person endowed with the power to decide may not be use in an illegal manner, that is fraudulently, arbitrarily, without legal basis for the for the same or without any evidence to justify action."[54] That essentially means that the Courts under the Common Law will engage in judicial review of arbiter decisions when a basic standard of legal protection is not met by the provided procedures and rules by the sport governing bodies. They would then either declare the challenged arbitration award void or just "read in" the missing basic principle as being agreed into "in good faith" (as a basic and immanent contractual duty) in the contractual relationship between the parties. That makes the principle of "double jeopardy" indirectly applicable under the Common Law as well, at least insofar as Common Law courts would declare void those sport sanctions, that obviously are disregarding the "double jeopardy" principle and would hereby virtually sentence an athlete twice for the same offense.

48 Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] March 31, 1987, 75 BVERFGE 1 (5).
49 Bundesverfassungsgericht [BVerfG][Federal Constitutional Court], February 2, 1968, 23 BVERFGE 91 (102).
50 Beyond its mere language, the clause is constructed to also protect against double jeopardy in the case of an acquittal.
51 NORTH CAROLINA V. PEARCE, 395 U.S. 711 (1969).
52 "THE CIVIL RIGHTS CASES", U.S. V. STANLEY ET. AL., 109 U.S. 3. The Station Action Dichotomy for protection under the 14th Am. was also explicitly upheld by the US Supreme Court for the area of Sports Law, NCAA V. TARKANIAN, 488 U.S. 179.
53 Eric Engle, Third Party Effect of Fundamental Rights (Drittwirkung), HANSE LAW REVIEW 5, 165 (2009). For applying fundamental rights in Sports Law to sanctioning decision of associations and clubs, see JAN F. ORTH, VEREINS- UND VERBANDSSTRAFEN AM BEISPIEL DES FUßBALLSPORTS 94 ff. (2008).
54 MILWAUKEE AM. ASS'N. V. LANDIS, 49 F.2d 298.

This principle, however, - in either legislation - does not encompass an absolute right not to subject a historic factual situation to different laws or consequences or to the assessment of different (government) bodies. Similarly, eligibility rules that are tied to a prior conviction (like disenfranchisement or disciplinary action for state officials) have never been successfully challenged[55] under either "double jeopardy" or "ne bis in idem" reasons. "Disenfranchisement" due to a prior criminal conviction is basically nothing else than imposing an eligibility rule for state elections.

From this outset, a lawful application of the Osaka Rule on an athlete with the effect that s/he is barred from the participation in the Olympic Games, does not violate the principle "ne bis in idem". This subsequent effect is firstly not a punishment, and secondly constitutes an abstract-general ordered by another and independent body.

However, regarding the undeniable need of protection for individual athletes against superior sport associations, it is worth noting, that - as a matter of course - the athlete who is threatened with the additional effect of the Osaka Rule while the appropriate time of suspension is determined by the competent panel is not unprotected by the law. The Panel that determines the just punishment for the athlete's doping offense has to take a likely disbarring effect of the Osaka Rule into account for its sentencing decision, namely considering it as a mitigation circumstances and use it in its usual proportionality weighing[56], where for instance the fact that an athlete exercised due diligence regarding his nutrition is clearly a mitigating factor that may lead to a length of a suspension which does not trigger the "Osaka Rule".

IV. Conclusion

As shown above, the law did not compel a verdict rendering the Osaka Rule invalid and void. On the contrary, the analysis has shown material deficiencies of the reasoning of the *Panel* that reached this result. That is to some extent surprising, as the *Panel* itself claims that it "was benefitted by extensive arguments made by both parties and numerous Amicus Curiae Briefs." Some of these "extensive arguments" seem to be missing and their disclosure of them in the opinion might have helped to make the reasoning more convincing and straightforward. However, after the foregoing analyses it can be doubted that these arguments could justify the same outcome for the main reasons shown above: The Osaka Rule does not impose an (additional) sanction on the athlete, because it is not a punishment. Neither meets it the WADA Code definition of a sanction nor has it the typical features of a punishment. It does not violate the principle "ne bis in idem". Instead, the Osaka Rule represents a permissible and powerful preventive measure to forestall the disturbing appearance of doping incidents during the *Olympic Games.*

However, the holding the Panel entered into was not surprising. From the policy background the decision of the *CAS* came down in a temporal connection and in a triad with the equally important decisions regarding the invalidity of territory exclusive broadcasting rights in the *European Union*[57] and player movements of the *FC Sion* disregarding *UEFA's* corresponding restraints of player movements.[58]

Beyond the complicated problems of the law that arose in all of these cases, these decision have a common theme: They prove a remarkable inclination of the *Court of Justice of the European Union,* of the *CAS* and of the Swiss Civil Courts not only to stress individual legal rights versus collective legal interests of the organized sports, but even to regularly give them priority. That leads to the more general question, if this "eternal balancing in sports law" (individual versus collective rights, that runs like a golden thread through all important contemporary sports law cases) is now and will be in the future at an angle that is in favor for the individual rights of the professional athletes, whose income and living - and that is one of the most important points - would be at stake when the collective rules are always applied as sought by the associations.

If this trend should prevail, that would be a material challenge for all sports associations around the world. Their regulations usually seek the objective of maintaining fairness and equality within their specific sport, and to diminish the influence of money on performance, winning and losing. An overemphasis of individual - and even individual monetary interests - will jeopardize this objective, regardless of how serious one is in individual cases. And this would be a threat to the basic principles of sports, a consequence that few others beyond the most highly paid athletes would desire.

55 RICHARDSON V. RAMIREZ, 418 U.S. 24 (1974).

56 See for proportionality weighing in doping cases GANDERT, supra, p. 112.

57 *E.C.J.*, Cases No. C-403/08 und C-492/08, 2011 SpuRt 245 („Murphy").

58 After in temporal connection with the CAS decision the Osaka Rule Swiss state courts had found those restraints of player movements to be invalid, the CAS has now ultimately upheld their validity. See UEFA V. OLYMPIQUE DES ALPES SA/FC SION, CAS Arbitration Award of 1/31/2012, No. CAS 2011/O/2574, available at http://www.tas-cas.org/.

Announcement for website(s)

T.M.C. Asser Instituut intensifies collaboration with the University of Stirling

The T.M.C. Asser Instituut is proud to announce that staff at its International Sports Law Center will intensify collaboration with staff at the School of Law of the University of Stirling. Both organisations are internationally recognised for their pioneering initiatives and research activities in the area of International and European Sports Law. By actively seeking synergy in activities and acknowledging complementarity in the respective areas of intervention both organisations intend to further strengthen their individual and collective expertise and impact on the European and International ' sports law' world.

As per September 1, 2012 Dr. David McArdle, Senior Lecturer at the University of Stirling, will also become a senior member of the Asser International Sports Law Center. Interest is welcomed from other organisations keen to join and expand this inter-university network particularly in the area of tendering for relevant research projects, with the primary purpose of furthering the knowledge of International and European Sports Law.

T.M.C. Asser Instituut
R.J. Schimmelpenninclaan 20-22
P.O. Box 30461
2500 GL The Hague
Tel. +31 (0)70 3420300
www.asser.nl
www.sportslaw.nl

School of Arts and Humanities
University of Stirling
Stirling
FK9 4LA

Tel. +44(0) 1786 477561
www.stir.ac.uk