

LEGAL OPINION ON THE CONFORMITY OF CERTAIN PROVISIONS OF THE DRAFT
WORLD ANTI-DOPING CODE
WITH COMMONLY ACCEPTED PRINCIPLES OF INTERNATIONAL LAW

Professor Gabrielle KAUFMANN-KOHLER
Antonio RIGOZZI
Schellenberg Wittmer
10, cours de Rive
PO Box 3054
1211 Geneva
SWITZERLAND

Professor Giorgio MALINVERNI
Department of Constitutional Law
Geneva Law School
University of Geneva
40, boulevard du Pont-d'Arve
1211 Geneva 4
SWITZERLAND

26 February 2003

Table of Content

SUMMARY OPINION	5
I. PRELIMINARY COMMENTS.....	6
1. Professional Qualifications of the Authors of this Opinion.....	6
2. The Questions Addressed in this Opinion and Documents Reviewed	8
3. Human Rights: Concept and Sources.....	8
a. The concept of human rights	8
b. Sources	9
c. Approach to human rights in this opinion	12
II. THE POLICY AND IMPLEMENTATION OF ANTI-DOPING REGULATION	13
1. The Policy Rationale for Anti-Doping Regulation.....	13
a. Under the Code	13
b. A broader approach.....	13
c. Recognized legitimacy.....	16
2. The Implementation of Anti-Doping Regulation	16
III. THE ROLE OF HUMAN RIGHTS AND GENERAL PRINCIPLES OF LAW IN DOPING DISPUTES	17
1. The Human Rights and General Principles of Law at Issue in Doping Disputes	17
a. The right to personal liberty / privacy	17
b. The right to equal treatment.....	18
c. The right to a fair hearing.....	18
d. The right to work.....	20
e. Competition-oriented rights.....	21
2. Applicability of Human Rights and General Principles of Law in Doping Disputes	22
3. Admissibility of human rights restrictions	25
a. Legal basis: the nature of the Code	25
b. Public interest: the rationale of the anti doping policy.....	26
c. Proportionality.....	27

d.	Admissibility of restrictions to economical fundamental rights	27
4.	Conclusion: the paramount role of proportionality	28
IV.	ARTICLE 2.1: CONFORMITY OF STRICT LIABILITY DOPING OFFENCES WITH HUMAN RIGHTS AND GENERAL LEGAL PRINCIPLES	28
1.	Nullum crimen sine lege certa: The Need for Certainty	28
2.	The Presumption of Innocence	28
a.	Legitimate rationale or convoluted distortion of justice?	29
b.	Practical consequences for athletes	31
3.	Conclusion	31
V.	ARTICLES 9 AND 10.1: CONFORMITY OF DISQUALIFICATION WITH HUMAN RIGHTS AND GENERAL LEGAL PRINCIPLES	31
1.	The Expression of a General Consensus	32
2.	Some Issues of Concern	33
3.	Disqualification of All Results obtained during a Multi-Competition Event	34
a.	The legal nature of multi-competition disqualification: special disqualification or sanction?	34
b.	Multi-competition disqualification and human rights: The requirement of fault	35
c.	Conclusion	35
VI.	ARTICLE 10.2: CONFORMITY OF DOPING SUSPENSIONS WITH HUMAN RIGHTS AND GENERAL LEGAL PRINCIPLES	35
1.	The Principle of <i>nulla poena sine culpa</i>	37
a.	The applicability of the principle of <i>nulla poena sine culpa</i> to doping disputes	37
b.	Does the Code comply with the principle <i>nulla poena sine culpa</i> ?	39
2.	Presumption of Fault versus Presumption of Innocence	40
a.	Is the presumption of fault legally valid in disciplinary matters?	40
b.	Does the presumption of fault in the Code operate within reasonable limits?	41
c.	Conclusion	42
3.	Compatibility of the Length of the Suspension with Athletes' Fundamental Rights	43
a.	The fundamental rights at issue	43
b.	Legitimate aim	43

c.	Proportionality.....	45
4.	Compatibility of Fixed Mandatory Sanctions with Athletes' Fundamental Rights	49
a.	The fundamental human right at issue	49
b.	Legitimate aim: the need for harmonization	50
c.	Proportionality.....	51
5.	Conclusion	53
VII.	OTHER PROVISIONS	53
1.	Article 8: The Right to an Interpreter	53
2.	Athlete's Consent to Binding Effect.....	55
Annex A	Curriculum Vitae of Prof. Gabrielle Kaufmann-Kohler	
Annex B	Curriculum Vitae of Prof. Giorgio Malinverni	
Annex C	Curriculum Vitae of Antonio Rigozzi, Esq.	
Annex D	Bibliography	

SUMMARY OPINION

1. There is considerable debate as to whether human rights apply to doping disputes. This being so, there are arguments in favour of their application and it may be that in the future, courts will enforce human right guarantees in sport matters. Hence, the Code should be in conformity with human rights and general principles of law.
2. Assuming they apply at all, a whole range of human right guarantees may come into play in doping matters. Commonly accepted principles of international law and human rights are embodied in different international and regional instruments as well as in national constitutions. Whatever the source, the general principles and human rights which may play a role in sports matters are by and large uniform. Among these, the principle of *nulla poena sine culpa* and the presumption of innocence play a decisive role for the matters addressed in the Code.
3. General principles of law and human rights are not absolute. They may be subject to restrictions provided certain requirements are met. The most important of these requirements mandates that the restriction to the fundamental right be proportionate.
4. On the basis of a through analysis of human rights and of the validity of possible restrictions, we come to the following conclusions in this opinion with respect to the draft provisions of the Code:
 - 4.1 The provision of the Code about strict liability, pursuant to which the presence of a prohibited substance in an athlete's specimen constitutes an anti-doping rule violation without regard to fault or negligence, is in conformity with human rights standards.
 - 4.2 The article of the Code, which provides for automatic disqualification of an athlete's result in the competition in which the athlete tested positive, complies with the requirements of the human rights and international law principles.
 - 4.3 The article of the Code providing a possibility of disqualification of all of the athlete's results at the entire event where the athlete tested positive, is compatible with international law and human right standards, because the athlete is given the opportunity to establish that the doping offence was not a result of his or her fault or negligence (unless the sports governing body establishes that the athlete's results in competitions other than the one in which the anti-doping violation occurred were affected by such violation).
 - 4.4 The Code provisions imposing periods of ineligibility as a consequence of a doping offence comply with international law and human rights standards, because the athlete is given the opportunity to eliminate the period of ineligibility

by demonstrating no fault or negligence and to reduce the period of ineligibility by demonstrating no significant fault or negligence.

4.5 The provision stipulating a fixed sanction of two years for a first doping offence is not incompatible with international law and human rights requirements, because the athlete is given the opportunity to eliminate the period of ineligibility by demonstrating no fault or negligence and to reduce the period of ineligibility by demonstrating no significant fault or negligence.

4.6 The article of the Code providing for a life ban in the event of a second doping offence is not incompatible with human rights and international law standards because the sanction will not be imposed if the Athlete demonstrates no fault or negligence for the first or second offense and there is some flexibility to reduce the sanction if the Athlete can demonstrate lack of significant fault or negligence.

5. The provisions of the Code which are the subject of this opinion in the Version 3.0 20 February 2003 comply with the requirements of human rights and international law set forth in the preceding paragraphs.

I. PRELIMINARY COMMENTS

1. Professional Qualifications of the Authors of this Opinion

6. Gabrielle Kaufmann-Kohler is a professor of law at the University of Geneva, Switzerland. She teaches private international law, including international dispute resolution. She also teaches the comparative law of international arbitration in a post-graduate programme at the University of Lausanne, Switzerland. She regularly lectures at various universities and international conferences on the resolution of international sports disputes and international aspects of sports law.

Professor Kaufmann-Kohler also is a practicing attorney-at-law admitted to the bars of Geneva, Switzerland and New York State. She is a partner in the law firm Schellenberg Wittmer, Geneva, where she heads the international arbitration team. Her practice is focused almost entirely on international arbitration, both as counsel and as arbitrator. In addition, she represents litigants before the Swiss Federal Supreme Court in arbitration-related matters. She is on the arbitration panels of major arbitration institutions, including the International Centre for Settlement of Investment Dispute ("ICSID") of the World Bank. She has advised the Court of Arbitration for Sport ("CAS") and several international federations on their dispute resolution system. Professor Kaufmann-Kohler participated in drafting the amended Rules of the CAS and in preparing the related structure reform of this institution in 1994. She also drafted the

Rules for the ad hoc Arbitral Tribunal at the Olympic Games and chaired this tribunal from its inception in Atlanta in 1996 to the Olympic Games in Sydney in 2000.

Professor Kaufmann-Kohler is the President of the Swiss Arbitration Association, sits on the board of the Swiss Society of International Law and is a member of the International Counsel for Commercial Arbitration, a worldwide body with forty members.

Finally, Professor Kaufmann-Kohler is the author of numerous publications in the area of private international law, international dispute resolution and the arbitration of sports disputes, including a book published in 2001 entitled "Arbitration at the Olympics". A *curriculum vitae* is attached as Annex A.

7. Giorgio Malinverni is a professor of law at the University of Geneva, Switzerland. He teaches constitutional law and human rights. He heads a program of continuing education in human rights. He has been a visiting professor at a number of universities over the last two decades, including Paris II and Strasbourg. He advises international organizations and governments, including the Council of Europe, on human rights and constitutional issues. He is a member of the European Commission for Democracy through Law of the Council Europe and of the Committee for Economic, Social and Cultural Rights of the United Nations.

Professor Malinverni has published numerous books and articles in the area of human rights, constitutional and fundamental rights. A *curriculum vitae* and a list of publications is attached as Annex B.

8. Antonio Rigozzi is a practicing attorney-at-law at the bar of Geneva, Switzerland, and an associate lawyer with the law firm Schellenberg Wittmer. His practice focuses on international arbitration, in both commercial and sports-related matters. He is currently acting as ad hoc secretary to CAS Panels in some high profile doping cases. Prior to professional practice, Mr Rigozzi was a research assistant in international arbitration and private international law at University of Geneva. In 2001-2002, he spent a year as a research fellow at Harvard University Law School to carry out research on sports-related and arbitration matters.

In parallel to his professional practice, Mr Rigozzi is presently completing a doctoral thesis devoted to the resolution of sports disputes. He is also the author of a number of publications of the area of international law. A complete *curriculum vitae* is attached as Annex C.

2. The Questions Addressed in this Opinion and Documents Reviewed

9. We have been asked to opine on whether the following provisions of the Draft World Anti-Doping Code (Version 3.0) conform with commonly accepted principles of international law and human rights:

- Article 2.1 (providing that the presence of a prohibited substance in an athlete's specimen constitutes an anti-doping rule violation without regard to fault).
- Article 9 (providing for automatic disqualification of an athlete's competitive results in the competition where the athlete tested positive).
- Article 10.1 (providing for the potential disqualification of all of the athlete's competitive results at the entire event, e.g., the Olympic Games, where the athlete tested positive).
- Article 10 (sanction of ineligibility including the "exceptional circumstances" clauses found in Article 10.5).

10. We have also been asked to briefly opine on the following provisions:

- Article 8 (with regard to the athlete's right to an interpreter at a hearing).
- A new provision designed to ensure that all participants are informed of and agree to be bound by the anti-doping rules.

11. In the course of preparing this opinion, we have been provided with various Working Drafts and the final Version 3.0 of the Code.

3. Human Rights: Concept and Sources

12. We will begin our analysis by considering: (a) the concept of human rights; (b) the various sources of human rights and other general principle of law relevant for this opinion; and (c) our approach to analyzing and applying these sources of international law in this opinion.

a. *The concept of human rights*

13. The term "human rights" is used in a wide variety of different ways and different contexts. For example, the Olympic Charter sets out as a "fundamental principle" that "[t]he practice of sport is a human right". The various different and sometimes inconsistent uses of the term "human rights" can lead to confusion both on the part of athletes¹ and those charged with adjudicating doping disputes. For this reason, it is

¹ See CAS-OG 00/01 *Perez I* para. 26, CAS Digest II p. 595, 601.

essential to be clear from the outset about what is meant by the concept of "human rights" in the context of this opinion.

14. According to a classic definition, human rights are "the rights and prerogatives ensuring the liberty and the dignity of human beings, and that can benefit from institutional guarantees"². Human rights are, from a classical perspective, characterized by the following main features³:
- they are guaranteed by the state through national constitutions or international treaties;
 - they accrue to the individual and are directed against action by the state;
 - they are enforced by the judiciary; and
 - they are fundamental with regard to the rights that they protect.

b. Sources

aa) "Universal" international instruments for protection of human rights

15. There are a large number of legal texts dealing with human rights, ranging from solemn but non-binding declarations to precise codes accompanied by stringent mechanisms for control and enforcement⁴. One can also distinguish between national constitutions and international treaties, and, within the latter, between regional and global treaties. In this opinion, we will often refer to the following texts:
- The **Universal Declaration of Human Rights**⁵ ("Universal Declaration") was adopted by the United Nations' General Assembly on 10 December 1948. The Universal Declaration had an enormous practical significance in that it represented the starting point of the UN regulatory framework, in particular the two UN Covenants of 1966 (which gave binding effect to the Universal Declaration).

² SUDRE, p. 12 (free translation of the original French text: "les droits et facultés assurant la liberté et la dignité de la personne humaine et bénéficiant de garanties institutionnelles"). The full citations to all authors referred to in the foot notes are found in annex D hereto.

³ AUER/MALINVERNI/HOTELLIER, NN° 6-11, pp. 4-6. These authors speak of "libertés fondamentales", which is the classical terminology used when analysing human rights on a national (constitutional) basis.

⁴ For an illustration of the different international human rights instruments, see SIEGHART, pp. 24-32.

⁵ Available at <<http://www.unhchr.ch/udhr/lang/eng.htm>>.

- The **International Covenant on Civil and Political Rights of the United Nations**⁶ (“UN Covenant on Civil Rights”) of 16 December 1966 is the most important human rights text having a worldwide scope of application. In force since 1976, the UN Covenant on Civil Rights has been ratified by 149 countries.
- The **International Covenant on Economic, Social and Cultural Rights of the United Nations**⁷ (“UN Covenant on Economic Rights”) of 16 December 1966 came into force on 3 January 1976 and has been ratified by 146 countries.

bb) “Regional” international instruments for the protection of human rights

16. There are numerous different regional international instruments for the protection of human rights. As illustrative, we will focus on the work of both the Council of Europe and the European Union.

- The Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms, generally referred to as the **European Convention on Human Rights** (“ECHR”), has been in force since 1953 and is currently binding in 44 European countries, ranging from Portugal to Russia. The ECHR provides for a variety of ‘civil and political’ rights and freedoms that the State Parties are required to “secure for everyone within their jurisdiction”. As the first binding international instrument for the protection of the human rights, the ECHR has had an enormous influence on the other instruments, both on regional and global levels.
- The Council of Europe prepared the **European Social Charter** as a complementary instrument to the ECHR in the same way that the UN Covenant on Economic Rights is complementary to the UN Covenant on Civil Rights. The European Social Charter was signed in 1961, entered into force in 1965, and is currently binding in 25 countries. The European Social Charter has had a significant impact on the domestic laws of its State Parties.

cc) Provisions on human rights in national constitutions (and legislation)

17. It is important to appreciate that the proliferation of international instruments for the protection of human rights has not lessened the significance of national instruments dealing with human rights, particularly national constitutions. It would not be possible to consider all potentially relevant national constitutions within the scope of this opinion.

⁶ UN International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, available at <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>.

⁷ <http://www.unhchr.ch/html/menu3/b/a_cescr.htm>.

Instead, consistent with the general approach of this opinion, we will refer, as illustrative examples, to various provisions of the recently revised Swiss Federal Constitution⁸ and the German Federal Constitution.

dd) General principles of law

18. Under virtually all definitions of the concept of “general principles of law”⁹, certain principles, such as non-discrimination or proportionality, are recognized, regardless of whether or not they are entrenched in instruments for the protection of human rights. It is for this reason that, as early as 1970, the European Court of Justice (“ECJ”) relied upon the common constitutional tradition of the Member States in holding that the protection of the fundamental rights is a general principle of European law, even though (at that time) the treaty establishing the European Community (the “EC Treaty”) did not contain a charter of fundamental rights¹⁰.

ee) Basic freedoms under the EC Treaty

19. The EC Treaty contains a number of “freedoms” which it defines to be fundamental for the achievement of the European integration. The ECJ has been very proactive in enforcing these freedoms, including in sports matters. Though the EU basic freedoms are not human rights according to the classic definition set out above (see *supra* I.3(a)) they afford the EU citizens with important prerogatives that cannot be ignored in this opinion.
20. In December 2000, the European Union (“EU”) adopted the Charter of Fundamental Rights of the European Union (“EU Charter of Fundamental Rights”).¹¹

ff) The Council of Europe’s Anti-Doping Convention

21. The Council of Europe’s Anti-Doping Convention of 1989 (“European Anti-Doping Convention”) is not an instrument for the protection of human rights but it sets out certain important principles that are clearly relevant in the context of this opinion¹².

⁸ See: <<http://www.ukc.ac.uk/international/staff/academic/The%20NewCHConst2.pdf>> for an unofficial English translation.

⁹ For a short description, see BROWNIE, p. 14.

¹⁰ ECJ, *Internationale Handelsgesellschaft*, Judgment of 17 January 1970, [1970] 1135.

¹¹ JOCE 2000/C 364/01, available at <<http://ue.eu.int/df/docs/en/CharteEN.pdf>>.

¹² Available at <<http://conventions.coe.int/Treaty/en/Treaties/Html/135.htm>>.

c. Approach to human rights in this opinion

22. In this opinion, we often refer to human rights or general principles of law by citing a specific provision of the ECHR (for instance Article 6(1) of the ECHR in regard to “the right to a fair hearing”). This approach to human rights has been adopted because the ECHR is enforced by an international court – the European Court of Human Rights. The European Court of Human Rights (as well as the European Commission¹³) has, over the years, created a body of case law on human rights, which national courts have found to be persuasive and which therefore provides a reliable reference point for assessing the validity of specific provisions of the Code.
23. Moreover, it has become evident in recent years that supra-national tribunals are becoming involved more and more often in sports disputes. At present, we are aware of several cases that have come before EU instances (both the ECJ and the European Commission). It is only a matter of time before human rights issues in the context of sports will be brought before the European Court of Human Rights or another international judicial body.
24. Notwithstanding this trend, national courts are and will continue to be the most important forum in which human rights issues in doping cases are decided. As far as we are aware, the only countries in which courts of law have recently refused to enforce anti-doping sanctions imposed by sports federations are Germany. It is also in these countries that the debate among legal commentators on the validity of anti-doping sanctions is the most heated. For these reasons, our analysis will often focus on these countries.
25. With respect to the structure of this opinion, we will begin in Part II by reviewing the policy rationale for anti-doping regulation and the underlying public and private interests that can potentially justify restrictions on the fundamental rights of athletes. In Part III, our analysis will focus on the fundamental rights and general principles of law that may be relevant to anti-doping regulation generally and within the specific scope of the Code. Finally, in Parts IV to VII, we will examine the application of these fundamental rights and general principles of laws to the specific provisions of the Code at issue in this opinion.

¹³ The original “two stage” jurisdictional system of the ECHR (i.e., Commission of Human Rights (first instance) and Court of Human Rights (second instance)) was abandoned on 1st November 1998 and replaced by a single right of appeal to the European Court of Human Rights.

II. THE POLICY AND IMPLEMENTATION OF ANTI-DOPING REGULATION

1. The Policy Rationale for Anti-Doping Regulation

a. *Under the Code*

26. In the Introduction to the Code, the “fundamental rationale for the World Anti-Doping Code” is stated to be the following:

preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as “the spirit of sport”; it is the essence of Olympism; it is how we play true. The spirit of sport is the celebration of the human spirit, body and mind, and is characterized by the following values:

- Ethics, fair play and honesty
- Health
- Excellence in performance
- Character and education
- Fun and joy
- Teamwork
- Dedication and commitment
- Respect for rules and laws
- Respect for self and other participants
- Courage
- Community and solidarity

Doping is fundamentally contrary to the spirit of sport.¹⁴

27. The drafters of the Code felt it was preferable to set forth only a brief list of values in order to “avoid requests for expansion and clarifications”, notably as to whether “sport [should also be considered] entertainment and business”¹⁵. We will take a somewhat broader approach to the policy rationale for anti-doping regulation.

b. *A broader approach*

aa) *A level playing field*

28. As shown by the list of values in the Introduction to the Code, sports governing bodies consider that the principal policy rationale for anti-doping regulation is the need for a level playing field, often referred to by German speaking writers as *Chancengleichheit* (i.e., equal chances). As one commentator puts it, “at the end of the day, this is what differentiates sports from circus or other entertainment shows”¹⁶. This has also been

¹⁴ WADC E VERSION 3.0 ANNOTATED

¹⁵ See Changes to the Draft World Anti-Doping Code (Version 1.0 to 2.0), p. 1.

¹⁶ PROKOP, Probleme, p. 82.

generally recognized by governmental and judicial bodies. For example, the Explanatory Report of the European Anti-Doping Convention¹⁷ states that “doping is contrary to the values of sport and the principles for which it stands: fair play, equal chances, loyal competition [...]”. Similarly, the German courts have observed that the need for a proper comparison of athletic performances is the most important rationale for anti-doping regulation. Specifically, the German courts have ruled that anti-doping regulation is mainly intended to grant the athletes “the establishment of equal starting and competition conditions”¹⁸.

bb) The protection of the athletes’ health

29. The Code also refers to the second traditional policy rationale for anti-doping regulation¹⁹, namely the protection of the athlete’s health. Moreover, “actual or potential health risk to the athlete” is one of the three criteria set out in Art. 4.3 for including a substance on the prohibited list. This policy rationale can also be found in the Explanatory Report of the European Anti-Doping Convention:

Doping endangers the health of athletes, as they are using substances in ways that they were not designed for; sport is meant to be a life-enhancing activity not one that imperils life.²⁰

30. Although the legitimacy of this rationale is increasingly criticized by legal commentators²¹. The importance of protecting the health of athletes has been expressly recognized in several court decisions. For instance, the Ontario Court of Justice stated the following in a decision regarding the life ban imposed on Ben Johnson:

It is necessary to protect Mr. Johnson for the sake of his own health from the effects of consistently using prohibited substances.²²

¹⁷ Available at <<http://conventions.coe.int/Treaty/en/Reports/Html/135.htm>>.

¹⁸ *Krabbe v. IAAF et. al.*, Decision of the OLG Munich of 28 March 1996, SpuRt 1996, p. 133, 134 with respect to the necessity of out-of-competition tests. See also: *Johnson v. Athletic Canada and IAAF*, [1997] O.J. No. 3201, para. 29, in which the Ontario court considered that it was “necessary to protect the right of the athlete, including Mr. Johnson, to fair competition, to know that the race involves only his own skill, his own strength, his own spirit and not his own pharmacologist”.

¹⁹ So PROKOP, *Probleme*, p. 82, referring to the “classical” rationale.

²⁰ *Johnson v. Athletic Canada and IAAF*, [1997] O.J. No. 3201, para. 29.

²¹ See for instance PROKOP, *Probleme*, pp. 81-82.

²² *Johnson v. Athletic Canada and IAAF*, [1997] O.J. No. 3201, para 29.

cc) The social and (economic) standing of sport

31. When an athlete is found guilty of a doping offence, other competitors in the same discipline are affected in a more general way. As Grayson and Ioannidis put it, “[w]hen yet another sportsman or woman is tested positive, the public become resigned to the view that certain sports are not ‘clean’ and, subsequently suspects that innocent participants may be cheating.”²³
32. In the *Krabbe* case, the Regional High Court of Munich expressly found that protecting the “image of a sports discipline in the public” is a legitimate goal of anti-doping regulation²⁴. In particular, the Court agreed with the disciplinary tribunal with respect to:
- the need of a clean sport without pharmacological manipulations, and the damaging effect of offences like those at hand on the image of the sport.²⁵
33. Some authors argue that the justification for prohibiting doping should not be primarily sought in the notion of fair play (competitive advantages may be obtained by other means such as money) but in the promotion of “the social standing of sport”²⁶ and its related financial status²⁷.

dd) Sport as a provider of role models

34. The Introduction to the Code refers to “character and education” as values characterizing the “spirit of sport.” It is a basic premise of anti-doping regulation that sportsmen and women, in particular the most successful ones, are highly visible public persons who enjoy a very special status in society. For the younger generations, these athletes represent examples to be followed. The Ontario Court of Justice specifically recognized this policy rationale in the *Ben Johnson* case:

The elite athlete is viewed as a hero and his influence over the young athlete cannot be underestimated [and, referring to the *Dubin Inquiry*, that] [w]hen role models in sport, or

²³ GRAYSON/IOANNIDIS, p. 253.

²⁴ *Krabbe v. IAAF et. al.*, Decision of the OLG Munich of 28 March 1996, *SpuRt* 1996, p. 133, 134 (free translation of the original German text: “de[r] Ansehen der jeweiligen Sportsart in der Öffentlichkeit”)

²⁵ *Krabbe v. IAAF et. al.*, Decision of the OLG Munich of 28 March 1996, *SpuRt* 1996, p. 133, 135 (free translation of the original German text: “Die Ausführungen des [...] zur Notwendigkeit eines ‘sauberen’ Sports ohne pharmakologische Manipulationen und zu den Auswirkungen von Verstößen der hier vorliegende Art aus das Ansehen des Sports [...]. Sind uneingeschränkt nachvollziehbar”).

²⁶ Van Staveren, quoted by SOECK, p. 2.

²⁷ FITZGERALD, p. 234: “Such illicit behaviour affects future [...] sponsorship deals, not to mention public support [...]”

in any other endeavor, are seen to cheat and prosper, then it is natural than young people will learn to do the same.²⁸

c. *Recognized legitimacy*

35. Except for some very isolated philosophical²⁹ and legal³⁰ objections, the pressing need for anti-doping regulation is generally recognized. The increasing consensus on the legitimacy of anti-doping regulation, in particular in Europe, is illustrated by the fact that States are increasingly intervening in sports matters in order to ensure the effectiveness of the fight against doping.

2. The Implementation of Anti-Doping Regulation

36. There is general agreement that the fight against doping is primarily an issue for sports governing bodies. The recent increased intervention by States is not inconsistent with this view, insofar such intervention is intended to be parallel to and supportive of the action taken by the sports organizations.
37. Anti-doping regulation consists of two basic elements: (a) a catalogue of doping offences; and (b) a series of sanctions to be imposed when an athlete is found to have committed such offences. The most common doping offence is the presence in the athlete's body of a prohibited substance (i.e., a substance set out on the "List of Prohibited Substances and Methods"). The classic sanction for doping is suspension (or imposition of an ineligibility period), during which the athlete is prohibited from participating in any competition.
38. Doping disputes account for more than 60% of the cases before CAS and national courts are also becoming increasingly involved in doping disputes. In some cases, the athlete contests the validity of the analysis of their bodily specimens. However, the vast majority of doping disputes relate to the sanction imposed — athletes often claim that such sanctions are unlawful and/or unduly harsh (i.e., disproportionate).
39. As in many other fields of law, human rights are playing a growing role in doping disputes. This trend is evident both in CAS jurisprudence and the recent case law of national courts.

²⁸ *Johnson v. Athletic Canada and IAAF*, [1997] O.J. No. 3201.

²⁹ *TAMBURRINI, passim*.

³⁰ *LENZ, passim*.

III. THE ROLE OF HUMAN RIGHTS AND GENERAL PRINCIPLES OF LAW IN DOPING DISPUTES

40. In Part III, we will consider the following: (1) the human rights and general principles of law that may be at issue in doping disputes; (2) the applicability of such human rights and general principles of law to doping disputes; and (3) the possible justifications for restricting human rights in the specific context of anti-doping regulation.

1. The Human Rights and General Principles of Law at Issue in Doping Disputes

41. The adjudication of a doping dispute may have an impact on several fundamental human rights of an athlete, namely the right to personal liberty / privacy, the right to work, the right to equal treatment and the right to a fair hearing. In addition, general principles of law such as proportionality may also become relevant in a doping dispute.

a. *The right to personal liberty / privacy*

42. It is clear that anti-doping control and procedure may involve significant invasions of an athlete's right to personal liberty and privacy (often referred to as the right to respect for one's private life). Although these intrusions primarily relate to the testing procedure itself³¹, the right to privacy has also been raised as a basis for overturning a disciplinary sanction imposed under a sports regulation³². The right to privacy is recognized in a number of international instruments.

43. Similarly to Article 12 of the Universal Declaration of Human Rights, Article 17 of the UN Covenant on Civil Rights further provides the following:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

44. Similarly, Article 8 of the ECHR states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-

³¹ GRAYSON/IOANNIDIS, pp. 252-253, according to whom this Article "could involve a re-examination of the legitimacy of urine and blood testing and fair hearings by sports governing bodies".

³² Swiss Federal Supreme Court, *Abel Xavier v. UEFA*, Decision of 4 December 2000, ATF 127 III 429, ASA Bulletin 2001, p. 566 in respect of Article 8 ECHR. Swiss Federal Supreme Court, *Lu Na Wang*, Decision of 31 March 1999, CAS Digest II, p. 767 with regard to the personal liberty (*liberté personnelle*) and more particularly the freedom of movement (*liberté de mouvement*) under Swiss constitutional law.

being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

45. In addition, one should mention a draft protocol 12 to the European Convention which guarantees the principle of equal treatment. Such Protocol is expected to come into force shortly.

b. *The right to equal treatment*

46. The right to equal treatment is also widely recognized in a number of different international instruments and may have important implications for anti-doping regulation.

47. The right to equal treatment is in particular embodied in Article 26 of the UN Covenant on Civil Rights:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

48. Under the heading "Prohibition of Discrimination", Article 14 of the ECHR provides for the same principle:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

c. *The right to a fair hearing*

49. Many legal commentators have observed that anti-doping rules may restrict the right of an athlete to a fair hearing and the right to be presumed innocent if and to the extent that such rules provide for a doping offence and/or a sanction irrespective of fault on the part of the athlete³³.

50. The right to a fair hearing is widely recognized as a fundamental human right. The European Anti-Doping Convention places particular emphasis on this right in the context of doping matters. Pursuant to Article 7.2(d) of the European Anti-Doping Convention, Member States shall encourage their sports organizations to take the following steps:

"[...] clarify and harmonise their respective rights, obligations and duties, in particular by harmonising [...] their disciplinary procedures, applying agreed [recognized, "*reconnus*"]

³³ See for instance SUMMERER, p. 150.

in the French version] international principles of natural justice and ensuring respect for the fundamental rights of suspected sportsmen and sportswomen; these principles will include:

- i. the reporting and disciplinary bodies to be distinct from one another;
- ii. the right of such persons to a fair hearing and to be assisted or represented;
- iii. clear and enforceable provisions for appealing against any judgment made [...].

51. The Explanatory Report of the European Anti-Doping Convention states that “[t]he principles to be followed are those set down in, for example, the International Covenant on Civil and Political Rights of the United Nations (1966) [defined above as the “UN Covenant on Civil Rights”] and, for the member states of the Council of Europe, in the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) [defined above as “ECHR”].”

52. Article 14 of the UN Covenant on Civil Rights provides for fair hearing in the following terms:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...].
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
4. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - a. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - b. To be tried without undue delay;
 - c. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - d. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

- e. To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - f. Not to be compelled to testify against himself or to confess guilt.
5. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
6. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
53. Under the heading "Right to a Fair Hearing", Article 6 of the ECHR provides the following:

- 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
- 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- 3. Everyone charged with a criminal offence has the following minimum rights³⁴:
 - b. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - c. to have adequate time and facilities for the preparation of his defence;
 - d. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - e. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - f. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

d. The right to work

54. Since athletes exercise their sporting activity in order to earn significant amounts of money, they may argue that they fall within the scope of various provisions that protect the right to work.

³⁴ In the system of the ECHR, the Additional Protocol N° 7 completes the protection of Art. 6 in criminal cases. It guarantees, *inter alia*, two courts levels.

55. For instance, Article 6 of the UN Covenant on Economic Rights provides the following:

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

56. Article 1 of the European Social Charter provides the following in respect to the “right to work”:

With a view to ensuring the effective exercise of the right to work, the Contracting Parties undertake:

1. to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment;
2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon;
3. to establish or maintain free employment services for all workers;
4. to provide or promote appropriate vocational guidance, training and rehabilitation.

57. Under Swiss law, the “economic freedom” (*liberté économique*) guaranteed by Article 27 of the Swiss Constitution is deemed to be a human right. It guarantees every individual the right to free economic fulfillment (“*libre épanouissement économique*”), which includes, among other things, freedom to choose one’s profession and freedom in the exercise of such profession.³⁵ Article 27 of the Swiss Constitution provides as follows:

1. Economic freedom is guaranteed.
2. This involves above all the freedom to choose one's profession, and to enjoy both free access to, and free exercise of, a gainful private activity.

58. Article 12(1) of the German Constitution provides inter alia the following:

All German citizens have the right to freely choose the [their?] profession, the [their?] place of work and the [their?] educational institution.³⁶

e. Competition-oriented rights

59. Given that sport may be a form of economic activity, it is subject to variety of economic regulatory regimes, such as competition law and the prohibition against restraint of trade.

³⁵ AUER/MALINVERNI/HOTELLIER, NN° 608-609, p. 316. As noted above, Article 27 of the Swiss Constitution was invoked by the athlete in the *Abel Xavier* case.

³⁶ Free translation of the official German text: “Alle Deutschen haben das Recht, Beruf, Arbeitsplatz und Ausbildungsstätte frei zu wählen.”

60. EU competition law is the most notorious example of economic regulation that may have an impact on sport and has been often invoked to challenge decisions excluding athletes from sports competitions. Article 81 of the EC Treaty provides as follows:
1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market [...]
 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
61. Turning to the common law, the doctrine of restraint of trade provides that contractual terms which limit the freedom of trade and prevent a party from exercising his or her talents and earning a living from such talents are not enforceable³⁷.

2. Applicability of Human Rights and General Principles of Law in Doping Disputes

62. In considering the applicability of human rights and general principles of law in doping disputes, our analysis will focus primarily on the ECHR. It should, however, be noted that the issues and analysis are by and large the same under the UN Covenant on Civil Rights.
63. Under the classic concept of human rights, the purpose of human rights is to protect the individual from the State, as the holder of public power. Human rights are not, from a classical perspective, intended to apply directly to private relations between individuals.
64. If one were to adopt this restrictive view of human rights in regard to doping control by sports federations, the logical conclusion would be that human rights only apply to disciplinary proceedings carried out by those sports governing bodies that act by virtue of a delegation of power from the State³⁸. This is the case, for instance, with respect to French national sports federations.
65. However, in the vast majority of countries, sports federations and their disciplinary bodies are private bodies that do not exercise power delegated by the State. This is the case, for example, in the UK, the US, Germany and Switzerland. The Swiss legal position is of paramount importance because the IOC and a significant number of international sports federations which will operate under the Code have their seats in Switzerland. On the basis of this predominant view of human rights, one can therefore

³⁷ BELOFF/KERR/DEMETRIEU, N° 3.38, p. 53.

³⁸ BERNHARDT, p. 54.

- argue that human rights instruments are, as such, inapplicable to doping controls carried out by sports governing bodies that are legally characterized as purely private entities³⁹.
66. To date, the European Court of Human Rights has not yet rendered any decision on this issue. However, one of its most eminent members, Judge Rudolf Bernhardt, has made a public address in which he expressed his personal view that the ECHR does not apply to the adjudication of doping disputes by private sports governing bodies:
- In this respect, the objective of the European Convention – and similar fundamental right catalogue – has to be remembered: Inasmuch it concerns the protections of the individuals from specific invasions by the States, the ECHR and other similar instrument are not directly applicable.⁴⁰
67. This view is consistent with the current approach of the Swiss Federal Supreme Court. In a recent decision concerning a sports governing body's decision to suspend an athlete, the Court held the following:
- The Appellant [i.e. the suspended athlete] invokes Articles 27 of the [Swiss] Constitution and 8 ECHR. However, he was not the subject of a measure taken by the State, with the result that these provisions are, as a matter of principle, inapplicable⁴¹.
68. Accordingly, as a matter of principle, the fundamental rights granted by international (and national) instruments of protection of human rights are not applicable in sports matters decided by private bodies.
69. This is particularly true with respect to the specific procedural guarantees that international (and national) human rights' instruments afford in criminal matters. The Swiss Federal Supreme Court has addressed the issue of whether or not doping regulations are comparable to criminal law provisions. In the landmark decision *Gundel*, the Supreme Court specifically held that a sports federation's sanctions for doping were private rather than criminal in nature:

³⁹ SOECK, p. 2. With respect to the situation in England, see BELOFF/KERR/DEMETRIEU, N° 8.31, p. 233 according to whom "a sportsman or woman wishing to allege that a disciplinary body has acted in breach of rights under [the ECHR], could be prevented from doing so on the basis that the disciplinary body is performing a private act when exercising its disciplinary function".

⁴⁰ BERNHARDT, p. 54 (free translation of the German wording: "*hier darf die [...] Zielsetzung der Europäischen Konvention – und ähnlicher Grundrechtskataloge – nicht aus den Augen verloren werden: Es geht um den Schutz des einzelnen vor Übergriffen des Staates. [...] und insoweit sind die Europäischen Konvention zum Schutz der Menschenrechte und ähnliche internationale Vorschriften nicht direkt anwendbar*").

⁴¹ Swiss Federal Supreme Court, *Abel Xavier v. UEFA*, Decision of 4 December 2000, ATF 127 III 429, ASA Bulletin 2001, p. 566, 573 (free translation of the original French text: "*Le recourant invoque les art. 27 Cst. et 8 CEDH. Il n'a cependant pas fait l'objet d'une mesure étatique, de sorte que ces dispositions ne sont en principe pas applicables*".) Moreover, it is worth noting that the player also invoked Article 3 of the ECHR prohibiting torture and degrading treatment, and that the Supreme Court found this argument to be manifestly frivolous ("*manifestement téméraire*").

It is generally accepted that the penalty prescribed by regulations represents one of the forms of penalty fixed by contract, is therefore based on the autonomy [...] [and] has nothing to do with the power to punish reserved by the criminal courts, even if it is punishing behavior which is also punished by the state.⁴²

70. With respect to the argument that the doping regulations violated public policy, the Supreme Court noted the following:

As for the opinion of the CAS, whereby it is sufficient that the analysis performed reveal the presence of a banned product for there to be presumption of doping and, consequently, a reversal of the burden of proof and the assessment of evidence, problems which cannot be resolved, in private law matters, in the light of notions proper to criminal law, such as the presumption of innocence and the principle 'in dubio pro reo', and corresponding guarantees which feature in the European Convention of Human Rights⁴³

71. The New Zealand courts have adopted a similar approach. In *Fox v. NZ Sports Drugs Agency*, the District Court of Palmerstone North referred to the decision in *Hawker v. New Zealand Rugby Football Union*⁴⁴ in holding that the New Zealand Bill of Rights did not apply to a sports disciplinary tribunal:

His Honour appears to have accepted the concern expressed in the [disciplinary] Drugs Appeal Tribunal that criminal law principles may not automatically apply in the context of disciplinary rules of a sporting body, where membership was voluntary. His Honour cited from the Appeals Tribunal decision:

The criminal law applies to all citizens who have no opportunity to opt out. The liability created by these regulations arises essentially from contractual obligations express or implied by participation in rugby in New Zealand.

[...] the view expressed is one which, with respect, I would adopt in the present case. The distinction is thus drawn between competitors, with their own set of obligations and rights, and members of the public. This would not appear consistent with the provisions of s 3 of the New Zealand Bill of Rights [...] as to its applicability.⁴⁵

72. One can conclude that, according to the prevailing contemporary judicial practice, human rights, and in particular the specific procedural guarantees in criminal matters, are not applicable to doping disputes before private sports governing bodies⁴⁶.

⁴² Swiss Federal Supreme Court, *Gundel c. Fédération Equestre Internationale*, Decision of 15 March 1993, reported (and translated) in *CAS Digest I*, p. 561, 571-572.

⁴³ Swiss Federal Supreme Court, *Gundel c. Fédération Equestre Internationale*, Decision of 15 March 1993, reported (and translated) in *CAS Digest I*, p. 561, 575 (translation of the French original text).

⁴⁴ *Hawker v New Zealand Rugby Football Union*, [1999] NZAR 549.

⁴⁵ *Fox v NZ Sports Drugs Agency* [1999] DCR 1165

⁴⁶ SOEK, Fundamental Rights, p. 59.

73. It is true, however, that a growing number of scholarly opinions⁴⁷ and policy statements⁴⁸ advocate the application of human rights principles in sports matters. Assuming, hence, that the current approach of the courts is likely to evolve in the future towards enforcement of human rights in sports matters, we will next turn to the conditions subject to which human rights' restrictions are admissible.

3. Admissibility of human rights restrictions

74. Human rights are not absolute. Summarizing the jurisprudence of the European Court of Human Rights, Article 52(1) of the recently adopted EU Charter provides the following:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

75. These are the three classical conditions upon which the restriction of human rights are generally considered to be admissible, namely (a) of a statutory basis, (b) a public interest, and (c) proportionality⁴⁹.

a. *Legal basis: the nature of the Code*

76. This first requirement involves an adequate legal basis. Under the case law of the European Court of Human Rights and of the national constitutional courts, this requirement has several elements:

- The legal basis must be accessible. It does not necessarily need to be cast in a statutory provision. It can also arise out of case law. However, it must in any event be accessible to the persons concerned;

⁴⁷ See for instance SUMMERER, p. 148-150; BADDELEY, *Athletenrechte*, p. 17 ss.; SOEK, *Legal Nature*, *passim*; and RIGAUX, p. 312, according to whom "a better compliance with the fundamental rights of the athlete requires a more intense control by the States (which, nowadays, is very variable among states but insufficient in the majority of them) and that they conceive it as an obligation, the violation of which could justify a condemnation by the European Court of Human Rights" (free translation).

⁴⁸ See in particular the Recommendation recently adopted by the Monitoring Group established under the European Anti-Doping Convention. Section B.2 of the Monitoring Group's Recommendation on Basic Principles for Disciplinary Phases of Doping Control provides the following under the heading "Procedures Ensuring a Fair Hearing": "2.1 Following the provisions of the Convention for Protection of Human Rights and Fundamental Freedoms of the Council of Europe, in particular in Article 6.3, the possibility of a fair hearing and the defence of the rights of the individuals suspected of an offence must be guaranteed. [...]". See also, for instance, the conclusions of the 1st International Sports Law Congress, reported in FENN, *Ergebnisse*, p. 219.

⁴⁹ AUER/MALINVERNI/HOTELLIER, N° 175, p. 86.

- The legal basis must further be predictable. Hence, the wording of the restriction must be clear, being understood that the standards imposed depend on the severity of the restriction.⁵⁰ The restriction must be sufficiently precise to enable the addressee of the rule - if need be, with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".⁵¹

77. In a recent case concerning a life-ban for a first offence (i.e., a particularly invasive measure), a CAS Panel adopted a similar approach and investigated very carefully the regulation providing for such restriction:

In the present case, the Panel is in no doubt that the sanction imposed was based upon valid provisions of the FISA Rules which were then in force. Those provisions were well-known and predictable to all rowers, and had provided for the possibility of a life ban for a first doping offence for more than 12 years. In addition, Mr Reinholds had signed the "rower commitment", which clearly confirmed that doping violations in the sport of rowing were punishable with a life ban for a first offence. In the circumstances, therefore, the Panel has no hesitation in finding that the sanction contained in FISA's Rules satisfied what might be called the "predictability test" to which reference was made in CAS Award 94/129: see Digest of CAS Awards 1986-1998, Staempfli Editions, Berne, 1998 (CAS Digest) at Paragraph 34 on pages 197/8.⁵²

b. Public interest: the rationale of the anti doping policy

78. In classical human right theory and practice, a restriction of human rights by the State must aim at protecting a legitimate public interest.
79. The application of such requirement to private anti-doping regulations raises the question of the relevant interest is it the State or the interest of the sports body which issued the regulations? To our knowledge, there are no court decisions on this issue. It thus appears reasonable to rely upon the authorized opinion of a judge at the German Constitutional Court, according to whom the relevant interest may be defined by the private body issuing the restriction. In case of sports governing bodies, the legitimate interest may consist in specific sporting interests ("*spezifischer Sportgüter*")⁵³.

⁵⁰ For an illustration, see ECHR *Kopp v. Switzerland*, Decision of 25 march 1998, Reports 1998-II, p. 624, paras. 62-75.

⁵¹ ECHR *Margareta and Roger Andersson v. Sweden*, Decision of 25 February 1992, A226-A, para. 75.

⁵² CAS 2001/A/330 *Reinholds v. FISA*, unreported, para. 42

⁵³ STEINER, p. 131. Referring specifically to the admissibility of fundamental rights restrictions by anti-doping provisions, Judge Steiner expressly mentioned the athletes' health, the reputation of sports and the fairness of the competition.

c. Proportionality

80. In practice, proportionality plays the main role. Often the only decisive factor for the admissibility of a restriction to human rights will be the particular circumstances of the case⁵⁴. In classical human rights theory, the condition of proportionality is divided in three sub-conditions, to which the European Court of Human Rights has added a fourth one. These four conditions are as follows:

- **Capacity.** Generally also referred to with the German term "*Geeignetheit*", requires that the restriction be suitable to achieve the aim it pursues;
- **Necessity.** Implies that no less intrusive restriction is equally suitable to achieve the aim;
- **Stricto sensu proportionality.** Involves a balancing test of the different interests involved. When the interests of the individual prevail over the interests of the body issuing the restriction, the latter is disproportionate;
- Article 8 to 11 ECHR refer to what is "necessary in a democratic society". The European Court of Human Rights held that, such phrase does not necessarily mean "indispensability", but still requires more than these "admissibility", "normality" "utility", "reasonableness" or "advisability". It implies the existence of what the court calls a "**pressing social need**"⁵⁵

d. Admissibility of restrictions to economical fundamental rights

81. The requirements imposed upon restrictions to competition law and restraint of trade, are very similar to those just discussed.

82. Indeed, according to the test set forth in *Nordfeld v. Maxim Nordfeld*, a restraining practice will be deemed valid if it satisfies the following three conditions⁵⁶:

- There must be an interest worthy of protection;
- The restraint must be reasonable; and

⁵⁴ AUER/MALINVERNI/HOTELLIER, N° 2

⁵⁵ ECHR *Handyside v. The United Kingdom*, A24 Series, para. 48.

⁵⁶ GARDINER *et al.*, p. 228; for similar requirements, see also Art. 81(3) EC Treaty, which reads as follows: "The provisions of paragraph 1 [i.e, unlawful restrictive practice] may, however, be declared inapplicable in the case of [any restrictive practice] which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

- The restraint may not be contrary to public interest.

4. Conclusion: the paramount role of proportionality

83. From court decisions in sports and doping matters, it is clear that proportionality plays the predominant role in assessing the validity of restrictive doping regulations. Proportionality is not only the paramount condition for the validity of restrictions or fundamental rights it is also a general principle of law governing the imposition of sanctions of any disciplinary body, whether it be public or private.

IV. ARTICLE 2.1: CONFORMITY OF STRICT LIABILITY DOPING OFFENCES WITH HUMAN RIGHTS AND GENERAL LEGAL PRINCIPLES

84. Article 2 of the Code provides that the following constitutes anti-doping rule violation":

2.1 The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily specimen.

2.1.1 It is each Athlete's Personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance found to be present in their bodily specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.

85. The adoption of a strict liability offence in Article 2.1 raises two main issues: (1) whether the wording of this provision is sufficiently precise to provide certainty for athletes; and (2) whether this provision unduly affects the presumption of innocence.

1. Nullum crimen sine lege certa: The Need for Certainty

86. Article 2.1 of the Code is indeed precise and makes absolutely clear to athletes that a doping offence occurs when a Prohibited Substance is found in their specimen regardless of their intent, fault, negligence⁵⁷ or knowing use.

2. The Presumption of Innocence

87. Under a doping offence based on strict liability, any exculpatory evidence that an athlete may offer to explain why he or she was not responsible for the presence of a prohibited substance in his or her bodily fluids is irrelevant⁵⁸. Some legal commentators have argued that this may violate the fundamental rights of suspected athletes and, in

⁵⁷ In order to achieve certainty as to the strict liability character of the offence, we recommended "negligence" to be expressly added to "intent or fault" as a non-relevant factor for a doping offence to occur.

⁵⁸ BELOFF, p. 44.

particular, the principle of the presumption of innocence.⁵⁹ For instance, one commentator has stated:

It is apparent that among other internationally recognised principles of natural justice and fundamental rights of suspected athletes is the right not to be subjected to undemocratic "strict liability" drug rules. A fair hearing and the right to appeal are totally incompatible with such draconian doping rules.⁶⁰

88. However, in the well known case of *Salabiaku v. France*, the European Court of Human Rights held that presumptions of fact or law that operate against an accused are not, in and of themselves, inconsistent with Article 6(2) of the ECHR:

In principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention (*Engel and Others judgment of 8 June 1976, Series A no. 22, p. 34, para. 81*) and, accordingly, to define the constituent elements of the resulting offence. In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States⁶¹.

89. In other words, even if one assumes that the criminal law principles of Article 6(2) of the ECHR are applicable to doping offences, this provision "does not prohibit offences of strict liability [...]. Provided that [a sport organization] respects the rights protected by the convention, it is free to [...] establish the elements of the offence in its discretion including any requirement of *mens rea*".⁶²
90. In *Salabiaku*, the European Court of Human Rights refers to "certain conditions" in which strict liability offences are permissible. In the following sections, we will examine: (a) the rationale for strict liability offences in doping offences; (b) the consequences of strict liability offences for athletes; and (c) the overall conclusions to be reached in regard to Article 1.2.1.1 of the Code.

a. Legitimate rationale or convoluted distortion of justice?

91. Strict liability doping offences are often justified on the basis of the so-called "floodgates argument"⁶³ – if athletes are permitted to raise any excuse for the presence

⁵⁹ See for instance LOB, p. 272 who argues a CAS award enforcing a strict liability rule could be successfully challenged as "arbitrary" within the meaning of Article 36(g) on the *Concordat Intercantonal sur l'Arbitrage*, which is the Swiss uniform law on domestic arbitration: We are not aware of any successful challenge.

⁶⁰ WISE, p. 4/5.

⁶¹ ECHR, *Salabiaku v France*, Decision of 7 October 1998, para. 27, A114-A (1988).

⁶² HARRIS/O'BOYLE/WARBRICK, p. 244.

⁶³ VIEWEG, Oral Presentation, para. III.3.

of a prohibited substance, it would become impossible to fight doping efficiently. In response, critics argue that strict liability doping offences aim “to catch the majority of the ‘guilty’ parties while sacrificing a few ‘innocent’ ones: a concept incompatible with the basic tenets of civilized societies”⁶⁴.

92. As noted in the Comment on Article 2.1, the best rationale for strict liability doping offences is likely the one articulated in the CAS award in *Quigley*:

It is true that a strict liability test is likely in some sense to be unfair in an individual case, such as that of [Quigley], where the Athlete may have taken medication as the result of mislabeling or faulty advice for which he or she is not responsible - particularly in the circumstances of sudden illness in a foreign country. But it is also in some sense “unfair” for an Athlete to get food poisoning on the eve of an important competition. Yet in neither case will the rules of the competition be altered to undo the unfairness. Just as the competition will not be postponed to await the Athlete’s recovery, so the prohibition of banned substances will not be lifted in recognition of its accidental absorption. The vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or the negligence of unaccountable Persons, which the law cannot repair.

Furthermore, it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently. Moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations - particularly those run on modest budgets - in their fight against doping.⁶⁵

93. National courts have had little difficulty accepting the principle of strict liability doping offences, most probably because strict liability offences are well established in other fields of law. For instance, in *Gasser v. Stinson*, the English High Court emphasized the following:

The criminal law in this country (and in, I would think, in all others) has various absolute offences and various mandatory sentences.⁶⁶

⁶⁴ Wise, p. 5/5.

⁶⁵ CAS 94/129, *USA Shooting & Quigley. c. UIT*, Award of 23 May 1995, *CAS Digest I*, p. 187, 196-197.

⁶⁶ *Sandra Gasser v Stinson and another*, Unreported, Blackwell & Partners, Transcript available on LEXIS.

b. Practical consequences for athletes

94. Beyond the debate about applicable legal principles, strict liability doping offences are often criticized because of the practical consequences they have for athletes, in particular, the fact that such offences often make “a sanction the inevitable result”⁶⁷.
95. The Comment on Article 2.1, points out that the only automatic consequence of the strict liability offence rule is that the athlete is disqualified from the competition which produced the positive test⁶⁸.
96. This is was not entirely true in earlier drafts of Version 3.0. As previously written, even if no further sanction (i.e., a suspension) was imposed due to a lack of fault, the violation of a strict liability anti-doping rule would have constituted a “first offence” in the event of a further violation. Such a “first offence” would have enormous practical consequences on the length of the period of ineligibility to be imposed for the second violation (e.g., under Article 1.9.2.3 of the Code, the sanction for a second violation is a life ban as opposed to a two-year suspension for a first violation). This is not compatible with the principle of *nulla poena sine culpa*.
97. In order to avoid any doubt as to the compatibility of strict liability doping offences with this fundamental principle of law, we recommended the addition of the last sentence of Article 10.5.1.

3. Conclusion

98. Strict liability doping offences are, in and of themselves, consistent with internationally recognized human rights and general principles of law. Accordingly, we have come to the conclusion that Article 2.1 is valid and enforceable from the perspective of such legal requirements.

V. ARTICLES 9 AND 10.1: CONFORMITY OF DISQUALIFICATION WITH HUMAN RIGHTS AND GENERAL LEGAL PRINCIPLES

99. Article 9 of the Code provides:

Automatic Disqualification of Individual Results. An anti-doping rule violation in connection with an *In-competition* test automatically leads to *Disqualification* of the individual result obtained in that Competition with all resulting consequences, including forfeiture of any medals, points and prizes. [...]

⁶⁷ WISE, p. 3/5.

⁶⁸ WADC E VERSION 3.0 ANNOTATED

1. The Expression of a General Consensus

100. The Comment on Article 9 states that: "When an Athlete wins a gold medal with a Prohibited Substance in his or her system, that is unfair to the other Athletes in that competition regardless of whether the gold medalist was at fault in any way."⁶⁹ This was the decision of the CAS Panel in the Raducan case rendered during the Sydney Olympics. In the *Baxter* case, which involved a British skier who was stripped of his bronze medal in slalom skiing at the 2002 Salt Lake City Winter Olympics, the CAS Panel made a similar finding:

Whether or not Mr. Baxter should have been more careful before taking the medication -- by reading the label showing the presence of levmetamfetamine in the product or by consulting with the team doctor before taking the medication -- is irrelevant to our decision. Consistent CAS case law has held that athletes are strictly responsible for substances they place in their body and that for purposes of disqualification (as opposed to suspension), neither intent nor negligence needs to be proven by the sanctioning body.⁷⁰

101. The following passages provide a good summary of the consistent CAS case law referred to in *Baxter*:

- It is the presence of a prohibited substance in a competitor's bodily fluid which constitutes the offence irrespective of whether the competitor intended to ingest the prohibited substance.⁷¹
- [...] the system of strict liability of the athlete must prevail when sporting fairness is at stake, [...] It would be indeed shocking to include in a ranking an athlete who had not competed using the same means as his opponents, for whatever reasons.⁷²
- It is therefore perfectly proper for the rules of a sporting federation to establish that the results achieved by a 'doped athlete' at a competition during which he was under the influence of a prohibited substance must be cancelled irrespective of any guilt on the part of the athlete.⁷³

102. Legal commentators share this view unanimously. In contrast to suspension, the purpose of disqualification is not to punish the athlete⁷⁴ and it does not reflect any

⁶⁹ WADC E VERSION 3.0 ANNOTATED

⁷⁰ *Raducan v. ICO*, Award of 28 September 2000, CAS Digest II p. 665, upheld by the Swiss Federal Supreme Court *Andreea Raducan v IOC* (5P.427/2000), Decision of 4 December 2000, Bull. ASA 2001, p. 508, Translated in KAUFMANN-KOHLER, Olympics, p. 80. CAS 2002/A/376, *Alain Baxter v. IOC*, Award of 15 October 2002, unreported, available online at <<http://www.tas-cas.org>>.

⁷¹ CAS 95/141 *Chagnaud. c. FINA*, Award of 22 April 1996, CAS Digest I, p. 205, 220.

⁷² CAS 98/208 *Wei v FINA*, Award of 22 December 1998, CAS Digest II, p. 234, 248.

⁷³ CAS 2001/A/317, *Aanes v. FILA*, Award of 9 July 2001, unreported.

⁷⁴ SOECK, p. 5; ADOLPHSEN, pp. 97-98.

moral judgment⁷⁵. Disqualification is “considered as nothing more than the removal of illegally acquired advantages in the competition”⁷⁶. The mere fact that an athlete has a prohibited substance in his or her body probably⁷⁷, or at least potentially, gives such an athlete a competitive advantage over his or her opponents in that specific competition. For this reason, it is generally agreed that there is no legal or practical basis for objecting to the disqualification of an athlete who has competed with the aid of a prohibited substance, even though he or she may not have been responsible in any way whatsoever for the presence of such a substance⁷⁸.

103. As one well known CAS arbitrator puts it, “the fact remains that the advantage has been gained – and, in objective terms, unfairly.”⁷⁹ From the point of view of the other athletes, it makes no difference whether the doped athlete was acting intentionally or innocently - the only decisive thing is that he or she actually (or potentially) had an unfair advantage.

2. Some Issues of Concern

104. If automatic disqualification is justified on the basis that the interests of an innocently doped athlete are outweighed by those of the other athletes who competed without the prohibited substance in their body⁸⁰, one could argue that the interests of the “clean” athletes should only prevail if the doped athlete actually had an advantage.
105. For this reason, we consider that it is somewhat precarious to rely upon the probable or potential advantage provided by prohibited substances as the exclusive or principal rationale for automatic disqualification. In practice, this rationale could lead an athlete to challenge his or her disqualification on the ground that the substance found did not provide an advantage in the specific competition at issue, particularly when this competition is very important.

⁷⁵ SUMMERER, *Individualrechte*, p. 149.

⁷⁶ VIEWEG, *Oral Presentation*, para. III.1.

⁷⁷ See RÖHRICHT reported in *Doping-Forum*, p. 144.

⁷⁸ PROKOP, *Probleme*, p. 86; McLAREN, pp. 23-24; VIEWEG, *Oral Presentation*, para. III.1, RÖHRICHT reported in *Doping-Forum*, p. 144; PFISTER, *Doping-Rechtsprechung*, p. 134, BELOFF, p. 45; LOB, p. 270; BADDELEY, *Athletensrechte*, p. 326, SUMMERER, *Individualrechte*, p. 149; BELOFF/KERR/DEMETRIEU, N° 7.39, p. 186, according to whom, “if the knowledge and intention of the athlete are truly irrelevant [at the stage of establishing the offence], and if the justification of the strict liability is the gaining of unfair advantage, then it is difficult to see why an ‘innocent’ athlete in whose body the prohibited substance was present, should not suffer disqualification”.

⁷⁹ BELOFF, p. 45.

⁸⁰ CAS 94/126, *N v. FEI*, Award of 9 December 1998, CAS Digest II, p. 129, 141.

106. The Comment to Article addresses this concern by noting that: "Only a "clean" *Athlete* should be allowed to benefit from his or her competitive results"⁸¹

3. Disqualification of All Results obtained during a Multi-Competition Event

107. Article 10.1 of the Code addresses an old issue that has taken on new life in the anti-doping debate: Should all of an athlete's results in (previous) competitions during a multi-competition event (e.g., the FINA World Championships) be disqualified if the athlete tests positive during one specific competition (e.g., the 100 meter backstroke)? Article 10.1 of Code provides the following in this regard:

Disqualification of Results in Event During which an Anti-Doping Rule Violation Occurs. [...] ⁸² An anti-doping rule violation occurring during or in connection with an Event may, upon the decision of the ruling body of the Event, lead to Disqualification of all of the Athlete's individual results obtained in that Event with all consequences, including forfeiture of all medals, points and prizes [...].

108. In this section, we will consider: (a) the legal nature of multi-competition disqualification; and (b) the extent to which multi-competition disqualification is consistent with fundamental human rights and general legal principles.

a. *The legal nature of multi-competition disqualification: special disqualification or sanction?*

109. The drafters of the Code have made a distinction between "Automatic Disqualification", as described in Article 9 on one hand, and "Sanctions", as described in Article 10.1 on the other hand.

110. As we understand it, Article 10.1 provides for an "additional" disqualification that may be imposed in regard to other competitions, potentially even if the athlete was tested and found to be substance free in such other competitions. Given this fact, it is clear that this multi-competition disqualification is not based on the same rationale as automatic disqualification from the competition in which the prohibited substance was found to be present.

111. Based on this analysis, we believe that the disqualification of all results obtained during a multi-competition event should be considered to be a sanction and treated as being subject to the same legal restrictions that apply to all other sanctions.

⁸¹ WADC E Version 3.0

⁸² Version 2.0 expressly excluded the "circumstance described in Articles 1.9.2.3.1 and 1.9.2.3.2 and violations of Article 1.2.1.4".

b. Multi-competition disqualification and human rights: The requirement of fault

112. As discussed in greater detail below in Part VI, it is generally accepted that fundamental human rights and general legal principles (and, in particular, the principle of *nulla poena sine culpa*) prohibit the imposition of a sanction on an athlete who can prove his or her innocence.

113. For this reason, we recommended the addition of Article 10.1.1 which provides the following

If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's individual results in the other Competitions shall not be Disqualified unless the Athlete's results in Competitions other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the Athlete's anti-doping rule violation.

c. Conclusion

114. Based upon the above analysis, we conclude that the principle of disqualification of all results obtained in a multi-competition event as reflected in Articles 10.1 and 10.1.1 is consistent with fundamental human rights and general legal principles.

VI. ARTICLE 10.2: CONFORMITY OF DOPING SUSPENSIONS WITH HUMAN RIGHTS AND GENERAL LEGAL PRINCIPLES

115. In Part VI, we will examine the following matters: (1) the applicability of the principle of *nulla poena sine culpa* to Article 10.2; (2) the applicability of the presumption of innocence to Article 10.2; (3) the compatibility of the length of the suspensions with athletes' fundamental human rights and general legal principles; and (4) the compatibility of fixed mandatory sanctions and athletes' fundamental human rights and general legal principles.

116. As previously stated, it is generally recognized that one must clearly differentiate between a sport governing body's imposition of a sanction and the mere disqualification of an athlete from the competition in which the doping offence occurred.

117. The classic sanction for doping offences is the imposition of a suspension for a specified period of time, during which the athlete is not eligible to participate in sports competitions. The Code provides the following in respect of suspensions:

10.2 Imposition of Ineligibility for Prohibited Substances and Prohibited Methods.

Except for the specified substances identified in Article 10.3, the period of *Ineligibility* imposed for a violation of Articles 2.1 (presence of *Prohibited Substance* or its *Metabolites* or *Markers*), 2.2 (*Use or Attempted Use of Prohibited Substance* or

Prohibited Method) and 2.6 (*Possession of Prohibited Substances and Methods*) shall be:

First violation: Two (2) years' *Ineligibility*.

Second violation: Lifetime *Ineligibility*.

However, the Athlete or other Person shall have the opportunity in each case, before a period of *Ineligibility* is imposed, to establish the basis for eliminating or reducing this sanction as provided in Article 10.5.

10.3 Specified Substances.

The Prohibited List may identify specified substances which are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents. Where an Athlete can establish that the Use of such a specified substance was not intended to enhance sport performance, the period of *Ineligibility* found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a warning and reprimand and no period of *Ineligibility* from future Events, and at a maximum, one (1) year's *Ineligibility*.

Second violation: Two (2) years' *Ineligibility*.

Third violation: Lifetime *Ineligibility*.

However, the Athlete or other Person shall have the opportunity in each case, before a period of *Ineligibility* is imposed, to establish the basis for eliminating or reducing (in the case of a second or third violation) this sanction as provided in Article 10.5.

10.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances.

10.5.1 No Fault or Negligence.

If the Athlete establishes in an individual case involving an anti-doping rule violation under Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers) or Use of a Prohibited Substance or Prohibited Method under Article 2.2 that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of *Ineligibility* shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of *Ineligibility* eliminated. In the event this Article is applied and the period of *Ineligibility* otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of *Ineligibility* for multiple violations under Articles 10.2, 10.3 and 10.6.

10.5.2 No Significant Fault or Negligence.

This Article 10.5.2 applies only to anti-doping rule violations involving Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers), Use of a Prohibited Substance or Prohibited Method under Article 2.2, failing to submit to Sample collection under Article 2.3. or administration of a Prohibited Substance or Prohibited

Method under Article 2.8. If an Athlete establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

10.5.3 Athlete's Substantial Assistance in Discovering or Establishing Anti-Doping Rule Violations by Athlete Support Personnel and Others.

An Anti-Doping Organization may also reduce the period of Ineligibility in an individual case where the Athlete has provided substantial assistance to the Anti-Doping Organization which results in the Anti-Doping Organization discovering or establishing an anti-doping rule violation by another Person involving Possession under Article 2.6.2 (Possession by Athlete Support Personnel), Article 2.7 (Trafficking), or Article 2.8 (administration to an Athlete). The reduced period of Ineligibility may not, however, be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years.

1. The Principle of *nulla poena sine culpa*

118. The principle of *nulla poena sine culpa* is one of the foundations of criminal law. Under this principle, a person may only be punished for an offence if he or she has knowingly or negligently committed such offence. In the analysis that follows, we will examine: (a) the applicability of this principle to doping disputes or, in other words, whether sanctions may be imposed for doping in the absence of fault; and (b) the extent to which Articles 10.2 and 10.5 of the Code comply with this principle.

a. The applicability of the principle of *nulla poena sine culpa* to doping disputes

119. There is conflict in the positions adopted by national courts, on whether the principle of *nulla poena sine culpa* applies to the imposition of sanctions for doping offences.

120. The Swiss Federal Supreme Court has held that general principles of criminal law do not apply in doping matters⁸³. Similarly, the English High Court decision in *Gasser v. Stinson* held (indirectly) that the principle *nulla poena sine culpa* does not apply to suspensions imposed by a sports disciplinary body. In *Gasser v. Stinson*, the English High Court rejected the argument that the IAAF Regulations constituted an unjustifiable restraint of trade due to the fact that such regulations did not permit the athlete to

⁸³ Swiss Federal Supreme Court, *Gundel v. Fédération Equestre Internationale*, Decision of 15 March, 1993, reported (and translated) in CAS Digest I, pp. 561, and 571-572.

establish her moral innocence in an effort to mitigate the suspension imposed. Scott J., as he then was, held that the restraint was reasonable considering, among other things, the following:

[The Athlete's Counsel] submits that it is not justifiable that the morally innocent may have to suffer in order to ensure that the guilty do not escape. But this is not a submission which is invariably acceptable. The criminal law in this country (and in, I would think, in all others) has various absolute offences and various mandatory sentences.⁸⁴

121. In contrast, German courts have come to the opposite conclusion and ruled – expressly referring to the principle *nulla poena sine culpa* – that sports disciplinary bodies are not entitled to suspend athletes who violate disciplinary rules, including anti-doping rules, without finding fault⁸⁵. In the *Baumann* case, the Frankfurt High Court held that no one can be suspended from working (even temporarily) unless at fault⁸⁶.

122. CAS awards have basically adopted the approach of the Swiss federal supreme court as to the applicability of criminal law principles in doping disputes. For instance, a CAS panel has recently held that

As a matter of principle, it is generally recognized that criminal law standards are not applicable to disciplinary proceedings conducted within the framework of private associations such as sporting federations⁸⁷

123. However, several CAS panels have applied specific principles of criminal law in doping cases, like for instance the *lex mitior* principle⁸⁸, and, at least to a certain extent, the *nulla poena sine culpa* principle. Some CAS awards took the view that an athlete must always be given the opportunity to prove his or her innocence, even when this is not

⁸⁴ *Sandra Gasser v Stinson and another*, Unreported, Blackwell & Partners, Transcript available on LEXIS.

⁸⁵ *Krabbe v. IAAF et. al.*, Decision of the LG Munich of 17 May 1995, SpuRt 1995 p. 161, 167 (free translation of the original German text: “Die vom Rechtsausschuss verhängte Sanktion verstößt auch nicht gegen den Grundsatz „nulla poena sine culpa“... Insoweit konnte auch der Trainer Springstein die Klägerin nicht „von jeder Schuld“ entlasten...”).

⁸⁶ *Baumann v. IAAF*, Decision of the OLG Frankfurt a. M. of 2 April 2002, SpuRt 2002 p. 245, 249 (free translation of the original German text: “nach deutschem Rechtsverständnis, und insoweit auch den unabdingbaren Kern der öffentlichen Rechtsordnung prägend, darf niemand mit einem auch nur zeitweiligen Berufsverbot belegt werden, wenn ihm nicht auch ein persönlicher Schuldvorwurf gemacht werden kann (OLG Frankfurt/Main, Urteil vom 18.4.2001, 13 U 66/2001).”).

⁸⁷ CAS 2002/A/383 *IAAF v/ CBAI & F. dos Santos*, Award of 18 December 2002, para. 84, p. 26 as to the question of the applicable standard of proof.

⁸⁸ CAS 2000/A/289, *UCI c. Jérôme Chiotti et FFC*, Award of 12 January 2001, CAS Digest II, p. 424, 427.

provided for in the applicable regulations⁸⁹, thus implicitly recognizing that the principle *nulla poena sine culpa* plays a role in doping matters⁹⁰.

In the same way as part of doctrine, "one may wonder to what extent sanctions of a penal nature may be imposed without its having been established that the author acted intentionally, or at least displayed culpable negligence, [Principle: 'Nulla poena sine culpa']" (Louis Dallèves, in *Chapitres choisis du droit du sport*, GISS, 1993, page 129). The panel nonetheless points out that too literal an application of the principle could have damaging consequences of the effectiveness of anti-doping measures. [...] [T]he Panel considers that, generally speaking, the principle of presumption of the athlete's guilt may remain, but that, by way of compensation, the athlete must have the possibility of [...] providing exculpatory evidence. The athlete will thus be allowed to demonstrate that he did not commit any fault intentionally or negligently.⁹¹

124. Turning to legal commentators, there is a clear consensus, even among those who do not accept that doping proceedings are criminal in nature⁹², that the principle of *nulla poena sine culpa* should apply to the imposition of doping sanctions by sports disciplinary tribunals⁹³. Most commentators have come to this conclusion due to the severe consequences of sanctions for athletes.

125. Because some national courts and some arbitral panels have considered that the principle *nulla poena sine culpa* applies to doping sanctions, and because the Code must be applicable worldwide, the assumption for purposes of the analysis in this opinion is that it is applicable.

b. Does the Code comply with the principle *nulla poena sine culpa*?

126. Consistent with this assumption, we recommended adding a provision specifying that an athlete could not be suspended, unless at fault. Following this recommendation, Article 10.5 was added to the Code.

⁸⁹ PFISTER, *Doping-Rechtsprechung*, p. 135, referring to CAS 91/53, 92/63, 92/73, 95/141.

⁹⁰ CAS 95/141, *Chagnaud v. FINA*, CAS Digest I, p. 215, 220-221: "one may wonder to what extent sanctions of a penal nature may be imposed without its having been established that the author acted intentionally, or at least displayed culpable negligence, [Principle: 'Nulla poena sine culpa']" (Louis Dallèves, in *Chapitres choisis du droit du sport*, GISS, 1993, page 129). The panel nonetheless points out that too literal an application of the principle could have damaging consequences of the effectiveness of anti-doping measures. [...] [T]he Panel considers that, generally speaking, the principle of presumption of the athlete's guilt may remain, but that, by way of compensation, the athlete must have the possibility of [...] providing exculpatory evidence. The athlete will thus be allowed to demonstrate that he did not commit any fault intentionally or negligently"

⁹¹ CAS 95/141, *Chagnaud v. FINA*, CAS Digest I, p. 215, 220-221.

⁹² See for instance ZEN RUFFINEN, N° 1313 p. 461.

⁹³ See for instance WIEWEG, Oral presentation, para. III.1; ADOLPHSEN, pp. 97-98; BADDELEY, *Athletensrechte*, pp. 325-326; BELOFF, p. 45, LOB, p. 271.

127. According to Article 10.5 of the Code, the sanction normally imposed under Article 10.2 is eliminated

If the Athlete establishes in an individual case involving an anti-doping rule violation under Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers) or Use of a Prohibited Substance or Prohibited Method under Article 2.2 that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated.

128. Clearly, this wording fully complies with the requirement of the principle *nulla poena sine culpa*.

2. Presumption of Fault versus Presumption of Innocence

129. Under Articles 10.2 and 10.5, there is a clear presumption of fault on the part of the athlete. This presumption is rebuttable, i.e., this presumption can be overcome if an athlete proves No Fault or Negligence or No Significant Fault or Negligence.

130. As a consequence of this presumption of fault, the burden of proving fault, which the prosecuting party must normally discharge, shifts to the athlete. In this section, we will examine: (a) the legal validity of such a presumption of fault; (b) the reasonableness of the presumption of fault in doping matters.

a. *Is the presumption of fault legally valid in disciplinary matters?*

131. Many commentators have argued that a presumption of fault is (or, at least, may be)⁹⁴ so difficult to rebut in practice that it violates the presumption of innocence.

132. In the opinion of Professor Steiner, a Judge of the German Constitutional Court, a shift in the burden of proving fault to the athlete is consistent with general rules of civil procedure and does not raise any constitutional concern⁹⁵. In the *Baumann* case, the Frankfurt High Court confirmed this view:

"[...] the finding of the IAAF Panel according to which the athlete was unable to rebut the prima facie evidence [of faulty doping offence] does not contradict the principles of the German legal system."⁹⁶

133. Insofar as the requirements of Article 6(2) of the ECHR are concerned,⁹⁷ it should be noted that the European Court of Human Rights has made the following finding:

⁹⁴ BADDELEY, *Athletenrechte*, p. 22.

⁹⁵ STEINER, reported in *Doping-Forum*, p. 149

⁹⁶ *Baumann v. DLV*, Decision of the OLG Frankfurt a. M. of 18 April 2001, SpuRt 2001 p. 159, 162 (free translation of the original German text: "[...] die verbandsgerichtliche Feststellung, der Kläger habe nicht nachhaltig zu erschüttern vermocht, nicht der deutschen Rechtsordnung widerspricht [...]").

Article 6 para. 2 (art. 6-2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.⁹⁸

134. Based upon this decision, we consider that the presumption of fault is compatible with the principle of *in dubio pro reo* as expressed by Article 6(2) of the ECHR, provided that it operates within reasonable limits⁹⁹.

b. Does the presumption of fault in the Code operate within reasonable limits?

135. There is little doubt that the presumption of fault can lead to some injustice in cases where an innocent athlete is unable to prove an absence of fault or negligence because he or she truly does not know how the prohibited substance ended up in his or her body¹⁰⁰.
136. On the other hand, it would be both very difficult and very costly for a sports federation to prove the fault of an athlete. An athlete is undoubtedly in a better position than a sports federation to explain why a specific substance was detected in his or her body. In this regard, it should be emphasized that sports federations are private bodies that lack the powers of coercion necessary to undertake the type of investigation required to discharge such a burden. From this point of view, it is clear that the presumption of fault and resulting reversal in the burden of proof is not only appropriate but also essential in order to pursue an efficient anti-doping policy¹⁰¹. This has been recently confirmed by the Regional High Court of Frankfurt in the Baumann case:

Without such a proof facilitation, a sports federation would have no chance to effectively combat doping [...] The criminal law principle of the presumption of innocence cannot be

⁹⁷ The *in dubio pro reo* clause of Article 14(2) of UN Covenant on Civil Rights also applies to criminal proceedings but not to civil proceedings. This was confirmed by the Human Rights Committee (See JOSEPH/SCHULTZ/CASTAN, pp. 308-309).

⁹⁸ ECHR *Salabiaku v France*, Decision of 7 October 1998, para. 27, A114-A (1988).

⁹⁹ See also BELOFF, p. 49, according to whom, the rule that a party asserting the existence of a particular fact bears the onus of proving that fact "may be modified or displaced by the effect of disciplinary rules creating presumptions or reversing the onus of proof on a particular issue, provided that the effect of the shift of the onus of proof it necessarily implies is not to create a presumption of guilt".

¹⁰⁰ Considering the difficulty that an athlete may face when required to prove his or her innocence, several commentators have argued that the presumption of fault should be considered as a mere prima-facie proof (*Anscheinbeweis*) that can be rebutted (*schlüssige Darlegung eines atypischen Kausalverfahrens*) and not necessarily with the proof of the contrary (*Gegenbeweis*). Should the athlete discharge this burden, then it is up to the sports federation to establish that the athlete was at fault (see, for instance, RÖHRICHT reported in *Doping-Forum*, p. 148).

¹⁰¹ ADOLPHSEN, p. 100. ("man [kann] den Streit um die Beweislast letztlich darauf zuspitzen, was vorgehen soll: der Schutz des Systems oder die Einzelfallgerechtigkeit zugunsten des Athleten.")

transposed in sports disciplinary matters. [...] The presumption of fault is a necessary and reasonable way to conduct evidentiary matters in the context of doping sanctions.¹⁰²

137. The U.S. Court of Appeals for the 7th Circuit has recently expressed a similar view in the case of *Mary Decker Slaney*. In considering whether “the burden-shifting approach adopted by the IAAF [International Amateur Athletic Federation] violates United States public policy”, the Court held the following:

“We disagree. [...] The IAAF has adopted the rebuttable presumption of ingestion from a high T/E ratio in an athlete’s urine [...]. Were the IAAF not to make use of the rebuttable presumption, it would be nearly impossible, absent eyewitness proof, to ever find that an athlete had ingested testosterone. As the IAAF notes, criminal defendants are frequently required to come forward with proof establishing a basis for asserting affirmative defenses”.¹⁰³

138. If one accepts, as did the U.S. Court of Appeals in *Slaney*, that the presumption of fault is justified by the practical difficulty of proving doping offences, it follows that one must also accept that the athlete should be required to establish his or her innocence. Absent such a requirement, it would be far too easy for a coach or team doctor to testify that he or she was responsible for the presence of the prohibited substance in the athlete’s body.

139. Moreover, according to Article 3.1, the Athlete must establish his burden by a balance of probability. This provision excludes that the athlete must meet a standard of “absolute certainty”, which has often been described as being inconsistent with the principle of *in dubio pro reo*¹⁰⁴.

c. Conclusion

140. For all the above reasons, we conclude that the presumption of the athlete’s fault provided for in Articles 10.2 and 10.5 is compatible with the principle of the presumption of innocence, and more generally with human rights and fundamental principles of law.

¹⁰² *Baumann v. IAAF*, Decision of the OLG Frankfurt a. M. of 2 April 2002, SpuRt 2002 p. 245, 249 (free translation of the original German text: “Ohne diese Beweiserleichterung besäße ein Sportverband keine Chance zur erfolgreichen Dopingbekämpfung. [...] Die im Bereich des Strafrechts geltende Unschuldsvermutung („in dubio pro reo“) kann daher auf die Verbandsstrafgewalt nicht übertragen werden. [...] Der Anscheinbeweis ist daher der im Bereich von Dopingsanktionen notwendige und auch angemessen Beweisführungsstandard“).

¹⁰³ *Slaney v. Int’l Amateur Ath. Fedn.*, (7th Cir. Ind. Mar. 27, 2001) Certiorari Denied, 244 F.3d 580, 593, citations omitted.

¹⁰⁴ SCHERRER, Pp. 127-128, according to whom “Im Zusammenhang mit den Grundsätzen der Unschuldsvermutung und in dubio pro reo [...] [e]s darf keine absolute Gewissheit fehlenden Verschuldens verlangt werden.”

3. Compatibility of the Length of the Suspension with Athletes' Fundamental Rights

a. *The fundamental rights at issue*

141. Article 10.2 of the Code stipulates that two-years' ineligibility shall be imposed for a first doping violation and lifetime ineligibility shall be imposed for a second doping violation.

142. There is no doubt that a two-year suspension (not to mention a lifetime ban) has a direct impact on the personal freedom of an athlete. In a recent decision, the Swiss Federal Supreme Court recognized that a ban of two years results in a restriction of athletes' freedom of movement which may adversely affect their international careers as top-level competitors.¹⁰⁵

143. Moreover, for professional athletes, a two-year suspension (and, a fortiori, a lifetime ban) will likely affect their right to work. In the context of the EU, the imposition of a suspension on an athlete may also encroach on the freedom of movement for workers within the meaning of Article 39 of EC Treaty and, for self-employed athletes, on the freedom of establishment within the meaning of Article 43 of the EC Treaty.

144. In addition, it could be argued that the imposition of a two-year suspension for a first offence (and a lifetime ban for a second offence) violates the fundamental principle of proportionality, which dictates that the severity of a penalty must be proportionate to the offence committed.

145. The question is whether these restrictions on fundamental rights and freedoms are valid based upon the general conditions set out above in Section III.3. As to the adequacy of the regulatory basis, Article 10.2 provides a clear and sufficiently predictable regulatory basis. In the following analysis, we will consider whether there is a legitimate aim in requiring a two-year suspension for a first violation (and a lifetime ban for a second violation) (b) and then examine the proportionality of these sanctions (c).

b. *Legitimate aim*

146. The Comment on Article 10.2 does not set out the reasons for adopting the specified periods of ineligibility, but indicates that these sanctions reflect "the consensus of the World Conference on Doping held in Lausanne in February 1999". At the conclusion of this Conference, the delegates adopted a Declaration which included, among other things, the following principles:

¹⁰⁵ Swiss Federal Supreme Court, *Lu Na Wang et al. v. FINA* (5P.83/1999), Decision of 31 March 1999. CAS Digest II p. 767. 772.

Considering that doping practices contravene sport and medical ethics, and that they constitute violations of the rules established by the Olympic Movement, and concerned by the threat that doping poses to the health of athletes and youth in general;

Recognizing that the fight against doping in sport is the concern of all: the Olympic Movement and other sports organizations, governments, inter-governmental and non-governmental organizations, sportsmen and sportswomen throughout the world, and their entourage;

The World Conference on Doping in Sport, with the participation of representatives of governments, of inter-governmental and non-governmental organizations, of the International Olympic Committee (IOC), the International sports Federations (IFs), the National Olympic Committees (NOCs), and of the athletes, declares: [...]

3. Sanctions: [...]

In accordance with the wishes of the athletes, the NOCs and a large majority of the IFs, the minimum required sanction for major doping substances or prohibited methods shall be a suspension of the athlete from all competition for a period of two years, for a first offence. However, based on specific, exceptional circumstances to be evaluated in the first instance by the competent IF bodies, there may be a provision for a possible modification of the two-year sanction. Additional sanctions or measures may be applied.

147. The Declaration specifically records the fact that the athletes in attendance supported the adoption of a two-year suspension for a first offence. Moreover, it should be noted that the possibility of modifying this two-year suspension in case of "specific exceptional circumstances" was inserted at the insistence of the international governing bodies of football and cycling and contrary to the wishes of the athletes¹⁰⁶. These facts should be borne in mind when considering the legitimacy of Article 10.2 from the perspective of athletes' fundamental rights.
148. Beyond these facts, the recognition "that the fight against doping in sport is the concern of all" indicates that one of the main purposes of the two-year suspension is to ensure the effectiveness of anti-doping regulation.
149. But why a two year suspension, and not four years or one year? The reason for choosing this period of ineligibility can be traced back to the *Krabbe* case, in which the Munich courts held that a suspension exceeding two years must be considered to be disproportionate¹⁰⁷. Following this decision, almost every sports governing body reduced the length of its suspension for a first offence to two years. This sanction for a first offence subsequently withstood scrutiny by several national courts and CAS Panels. Undoubtedly, it was this history and the apparent legal certainty associated

¹⁰⁶ ZEN RUFFINEN N° 1239, p. 463.

¹⁰⁷ See *infra* IV.3.

with a two-year suspension that led the Conference delegates to adopt this period of eligibility in the Declaration.

150. In addition to support of athletes and sports governing bodies evidenced by the Declaration, it should be emphasized that the two-year minimum suspension for a first doping offence has also received important governmental backing in the form of the following joint statement by EU Ministers of Sport made in June 1999:

[E]ffective doping prevention cannot do without deterring sanctions and that therefore a system of internationally applicable and equivalent sanctions is needed, such as a two-year minimum ban for first-time offenders¹⁰⁸;

151. For all of these reasons, it is clear that there is a legitimate aim in imposing a two-year suspension for a first offence and that this sanction has the support of many athletes and sports federations and a significant number of States.
152. As a final matter, it is noteworthy that constitutional courts generally acknowledge that the determination of whether or not any rule or regulation has a legitimate aim is an “eminently political task”. Constitutional courts therefore tend to accept the legitimacy of the measure under scrutiny¹⁰⁹ and, instead, focus on the question of proportionality.

c. Proportionality

aa) Capacity

153. In order to be capable of achieving the aim of effectively promoting the fight against doping, the imposition of a suspension must have a deterrent effect for athletes.
154. Although “there appears to be no statistical proof of the deterrent effect” of an increased penalty¹¹⁰ and “that, for some athletes, it is not an effective deterrent”¹¹¹, it is obvious that the risk of a long suspension is, in general, a significant deterrent for doping offences for most athletes.

bb) Necessity

155. The necessity for sufficiently severe sanctions to deter the use of doping has been clearly expressed by the Ontario Court of Justice in the *Ben Johnson* case. In justifying the imposition of a lifetime ban following a second doping offence, the Court appears to

¹⁰⁸ Conclusions of the German E Council Presidency on the occasion of the Informal Meeting of the Sport Ministers of the European Union Paderborn, 31 May to 2 June 1999, available at <http://europa.eu.int/comm/sport/doc/infor_meet/paderborn_en.pdf>. According to Vieweg, this suspension was meant to be applicable irrespective of any fault (VIEWEG, Einführung, p. 11).

¹⁰⁹ AUER/MALINVERNI/HOTELLIER, N° 205, p. 101.

¹¹⁰ VRIJMAN, Harmonisation, p. 158.

¹¹¹ GRAYSON/IOANNIDIS, p. 249.

have accepted the following opinion expressed in the Report of the Dubin Inquiry¹¹² in respect of "sport organization penalties":

Briefly stated, if the rewards for a cheater even when caught are greater than for the obeying the rules, cheating will continue. [...] An effective penalty should ensure that there are greater disadvantages than advantages in cheating.¹¹³

156. Similarly, in the Baumann case, the Frankfurt High Regional Court emphasized that:

An effective deterrent can only be implemented by way of imposition of a suspension and related financial effect of the athlete.¹¹⁴

157. In this respect, one can also mention the *Meca-Medina* anti-trust case, in which the European Commission noted that:

[...] anti-doping regulations are unanimously considered to be indispensable in order to guarantee the fair conducting of sports competitions [...]

it is also necessary to provide sanctions in order to guarantee compliance with the anti-doping regulations.¹¹⁵

158. Moreover, it should be noted that Italian commentators have generally welcomed the Italian parliament's recent enactment of legislation providing for the imposition of criminal sanctions in addition to those imposed by sports disciplinary bodies, largely because of the increased deterrent effect of criminal sanctions.¹¹⁶

cc) Proportionality stricto sensu

159. Both lawyers and legal commentators have criticized the imposition of a two-year suspension on the ground of proportionality. Some legal commentators have argued that a two-year suspension for a first doping offence is "unacceptable, in the light of the shortness of a career in several sports disciplines and of the age of several athletes"¹¹⁷, and that "a minimum suspension of 2 years is [...] at odds with the principles of due

¹¹² The Report of the Dubin Inquiry is a report on doping in sport ordered by the Canadian government in the wake of the (first) Ben Johnson case.

¹¹³ *Johnson v. Athletic Canada and IAAF*, [1997] O.J. No. 3201, para. 31.

¹¹⁴ *Baumann v. IAAF*, Decision of the OLG Frankfurt a. M. of 2 April 2002, SpuRt 2002 p. 245, 250 (free translation of the original German text: "Eine Sperre von zwei Jahren Dauer, [...] halt die Kammer bei einem Erstverstoss nicht für unangemessen lang.").

¹¹⁵ Decision of the European Commission, COMP/38158 of 1 August 2002, paras. 50 and 54 (les règles antidopage sont considérées unanimement comme indispensables pour assurer un déroulement loyal des compétitions sportives [...] des sanctions sont également nécessaires afin de garantir l'exécution de l'interdiction du dopage").

¹¹⁶ TRAVERSI, p. 113.

¹¹⁷ See, for instance: BADDELEY, *Dopingsperren*, p. 20 ("In Anbetracht des Kürze der Sportlerkarrieren in vielen Sportarten und des Alters vieler Athleten ist m.E eine 2-jährige Sperre kaum akzeptabel").

- process”¹¹⁸. These authors often rely upon the work of the Konstanz Working Group on Sports Law, which issued a resolution recommending the imposition of a one-year suspension for a first doping offence¹¹⁹.
160. As previously noted, the German sports internal tribunal and the Munich courts both held that a suspension exceeding two years was disproportionate in the *Krabbe* case:
- The internal tribunal reduced the 4-years suspension provided by the IAAF Rules on the ground that “the taking into account of the principle of Proportionality would require a more flexible determination of the sanction”¹²⁰.
 - The Regional Court held that the two years suspension imposed by the internal tribunal for a first offence “represents the highest threshold admissible under the fundamental rights and democratic principles”¹²¹.
 - The High Regional Court held that three-year ban subsequently imposed by the IAAF “was excessive in respect of its objective. Such a rigid disciplinary measure as a sanction for a first sports offence is inappropriate and disproportionate”¹²².
161. Adopting the same approach, the Frankfurt High Regional Court in the *Baumann* case held that “a suspension of two years for a first offence is not disproportionately long”¹²³
162. In the *Lu Na Wang* case, the Swiss Federal Supreme Court made the following statement in regard to proportionality:
- The issue of the proportionality of the penalty could [...] only arise [...] if the arbitration award were to constitute an attack on personal rights which was extremely serious and totally disproportionate to the behavior penalized. In the present case, whatever the appellants may say – and they declare with grandiloquent tones that “only the most

¹¹⁸ PROKOP, *Vorschläge*, p. 101. Referring to the current IAAF Rules, the German original wording reads as follows: “Die Mindestsperre von 2 Jahren widerspricht in der vorliegenden Fassung den Grundsätzen eines fairen Verfahrens”.

¹¹⁹ Reported in *SpuRt* 1999, p. 132.

¹²⁰ Reported verbatim by the Regional Court in its decision (*SpuRt* 1995, p. 162, p. 166).

¹²¹ *Krabbe v. IAAF et. al.*, Decision of the LG Munich of 17 May 1995, *SpuRt* 1995 p. 161, p. 167 (free translation of the official German text “ein Entzug der Starterlaubnis für einen Zeitraum von zwei Jahren zur Ahndung eines erstmaligen Dopingverstosses des Höchstmass dessen ist, was noch innerhalb der grundrechtlich- rechtsstaatlichen Grenzen liegt”).

¹²² *Krabbe v. IAAF et. al.*, Decision of the OLG Munich of 28 March 1996, *SpuRt* 1996 p. 133, 138 (free translation of the official German text “schießt [...] deutlich über das Ziel hinaus. Eine derart rigide Disziplinar-massnahme als Sanktion für eine erstmals festgestellte Sportwidrigkeit ist unangemessen und unverhältnismässig.”).

¹²³ *Baumann v. IAAF*, Decision of the OLG Frankfurt a. M. of 2 April 2002, *SpuRt* 2002 p. 245, 250 (free translation of the original German text: “Ohne diese Beweiserleichterung besässe ein Sportverband keine Chance zur erfolgreichen Dopingbekämpfung. [...] Die im Bereich des Strafrechts geltende Unschuldsvermutung („in dubio pro reo“) kann daher auf die Verbandsstraf-gewalt nicht übertragen werden. [...] Der Anscheinbeweis ist daher der im Bereich von Doping-sanktionen notwendige und auch angemessen Beweisführungsstandard“).

extreme custodial sentences that can be pronounced by the state courts are capable of producing such effects” – the two years’ suspension imposed on them involves only a moderate restriction on their freedom of movement, since they can continue to practise their sport freely, apart from participating in international competitions; it is admittedly a serious penalty, liable to restrict their international careers as top-level athletes, but the fact remains that it is restricted to two years and arises from a proven violation of an anti-doping rule whose application the appellant have accepted [...]”¹²⁴

163. With specific reference to the Swiss Federal Supreme Court’s decision in *Lu Na Wang*, a CAS Panel recently upheld a *life ban* for a *first offence* in reliance *inter alia* on the following reasoning:

While it is clear to the Panel that many International Federations have decided that a two year suspension is appropriate for a first doping offence, it is equally clear that other International Federations [...] have chosen to impose higher minimum sanctions as a demonstration of their determination and commitment to the eradication of doping in their sport.

Although the issue has never been directly considered or decided, either by CAS Panels, or by the Swiss Federal Tribunal in rulings on CAS decisions, it seems to the Panel, as a matter of principle, that a life ban can be considered both justifiable and proportionate in doping cases.

164. Based upon the weight of legal authority, we conclude that a two-year suspension for a first doping offence is not disproportionate, considering the gravity of the offence committed. In our view, a more lenient sanction for a first offence is likely to seriously jeopardize the effectiveness of the fight against doping.
165. As a final matter, it should be noted that legal commentators have been less inclined to criticize the imposition of a lifetime suspension for a second doping offence. There appears to be a general consensus that recidivism justifies a harsh penalty¹²⁵. The Ontario Court of Appeal was clearly influenced by this rationale in deciding to uphold the lifetime ban imposed on Ben Johnson for his second offence. Indeed, the imposition of a lifetime ban for a second offence is often less severe in practice than

¹²⁴ Swiss Federal Supreme Court, *Lu Na Wang et al. v. FINA* (5P.83/1999), Decision of 31 March 1999, CAS Digest II p. 775, 778-781 (Translation by CAS of the original French “La question de la proportionnalité de la sanction ne pourrait se poser [...] que si la sentence arbitrale consacrait une atteinte à la personnalité qui soit extrêmement grave et en dehors de toute proportion avec le comportement qu’elle sanctionne. En l’occurrence, quoi qu’en disent les recourants – qui soutiennent avec grandiloquence que « seules les plus extrêmes peines privatives de liberté susceptibles d’être prononcées par les tribunaux étatiques sont de nature à générer de tels effets » -, la suspension de deux ans prononcée à leur encontre ne porte qu’une atteinte modérée à leur liberté de mouvement, puisqu’ils continuent à pouvoir pratiquer librement leur sport en dehors de la participation à des compétitions internationales ; elle est certes sérieuse et susceptible d’entraver leur carrière internationale de sportifs de haut niveau, mais s’en reste pas moins limitée à deux ans et découle d’une infraction prouvée à un règlement antidopage dont [...] les recourants ont accepté l’application”, reported in CAS digest II, p. 767, 772).

¹²⁵ See for instance MCI ARFN, D. 32.

the imposition of a two-year suspension for a first offence due to the fact that top-level athletic careers are very short in many sports disciplines.

4. Compatibility of Fixed Mandatory Sanctions with Athletes' Fundamental Rights

a. *The fundamental human right at issue*

166. Articles 10.2 and 10.5 provide for some flexibility in the sanctioning mechanism, since the sanction of an athlete who can establish absence of fault or negligence will be eliminated (Article 10.5.1), and the sanction of an athlete who can establish absence of significant fault or negligence may be reduced (Article 10.5.2).
167. Hence, the system established by Articles 10.2 and 10.5 is not a real "fixed sanction" system. However, as far as athletes who are unable to establish that they were not (at least significantly) at faulty or negligent are concerned, this system mandates the imposition of specified fixed sanctions. Under such a regime, an athlete is suspended for the same period, irrespective of the gravity of his or her (significant) fault and irrespective of any other particular circumstances that may exist. In other words, there is no requirement for the suspension to be just and equitable, having regard to the specific facts of the case¹²⁶.
168. In practice, this means that an athlete who negligently consumed a mislabelled nutritional supplement containing traces of a prohibited substance may be subject to the same sanction as an athlete who intentionally injected a large quantity of the same substance in order to enhance his or her performance.
169. There is little doubt that in specific circumstances like these, the regime established by Articles 10.2 and 10.5 of the Code may be inconsistent with the fundamental principle of equal treatment as expressed, for example, in Article 26 of the UN Covenant on Civil Rights.
170. The question becomes whether such specific infringements are legally justifiable under the standards set forth in Section III.3.a above. The wording of Articles 10.2 and 10.5 is clear both as to the rigid character of the sanction, and as to the fact that it will not depend upon the single circumstances of the case. Since each anti-doping organization must adopt this provision verbatim, we believe that Articles 10.2 and 10.5 provide an adequate regulatory basis to justify a potential restriction on athletes' fundamental human rights. In the following sections, we will examine: (b) whether the fixed sanction regime in Article 1.9.2.3 is based on a legitimate aim, and (c) whether this fixed sanction regime withstands scrutiny under a proportionality test.

b. Legitimate aim: the need for harmonization

171. The harmonization of doping sanctions is most often advanced as the principal aim in introducing a mandatory fixed sanction regime. The Comment on Article 1.9.2.3 sets out the following rationale for such harmonization:

it is simply not right that two Athletes from the same country who tested positive for the same Prohibited Substance under similar circumstances should receive different sanctions only because they participate in different sports.

[...] flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sports governing bodies to be more lenient with dopers.¹²⁷

172. Indeed, a flexible approach to sanctions may also lead to inequalities in the treatment of athletes participating in the same sport but under the flags of different countries. One of the most striking examples of this problem arose in connection with two bobsledders who tested positive for the same substance before the Salt Lake City Olympics. One of these bobsledders, Sandis Prusis of Latvia, was able to participate in the Olympic Games following a three-month suspension by the International Federation, while the other bobsledder, Pavle Jovanovic of the US, was unable to do so as a result of a nine-month suspension imposed by the US Anti-Doping Agency¹²⁸.

173. The European Commission expressly recognized the legitimacy of the desire for harmonization in doping matters in the *Meca Medina and Majcen* anti-trust case. In justifying the potentially restrictive effect of the applicable anti-doping regulation, the European Commission emphasized that the need for such harmonization had become obvious for European political institutions:

There is a clear political will to go towards a harmonization of anti-doping legislation and the regulations in order to avoid that single disciplines or single states become 'doping havens' [...]¹²⁹

174. In the view of the above considerations, we have little doubt that the adoption of a fixed sanction regime is based upon a legitimate aim: the harmonization of anti-doping sanctions.

¹²⁷ WADC E VERSION 3.0 ANNOTATED

¹²⁸ The apparent ambiguity in the applicable regulations as to the circumstances that could be taken into account to determine the length of the suspension was eventually addressed by the CAS following an appeal by *Jovanovic* (CAS 2002/A/360 *Jovanovic c. USADA*, Award of 7 February 2002).

¹²⁹ Decision of the European Commission, COMP/38158 of 1 August 2002, para. 45 (free translation of the official French text: "Il existe une volonté politique claire d'aller dans le sens du rapprochement des législations et réglementations antidopage afin d'éviter des états ou disciplines « paradis » pour les athlètes avant recours à des substances dopantes").

c. Proportionality

175. It is clear that the simplest means to achieve the harmonization of anti-doping sanctions is to adopt a mandatory fixed sanction regime. Such a regime is not only capable of achieving harmonization but it is also absolutely necessary to do so. The critical question is whether or not such a regime withstands scrutiny under the principle of *stricto sensu* proportionality.

176. The Comment on Article 10.2 expressly acknowledges that there are certain differences between sports that could justify different approaches to the issue of sanctions:

[...] in some sports the Athlete are professionals making a sizable income from the sport and in others the Athlete are true amateurs, in those sports where....¹³⁰

177. However, the Code is based on the premise that the need for harmonization is paramount and must prevail over any interest in allowing flexibility to consider objective differences that may exist between sports. In our opinion, this is a sound position, particularly given the importance of protecting the public image of sports. The imposition of different sanctions for similar offences has a very negative impact on the public's perception of the consistency and fairness of the anti-doping action by sports governing bodies.

178. With respect to the interests of athletes accused of doping, it necessary to consider whether the need for harmonization should take precedence over the principle that the specific circumstances of the athlete's case must be taken into account in order to achieve fairness. One commentator recently observed that the "real dilemma for a sporting governing body" in adopting a system of mandatory sanctions is the following:

One advantage of the compulsory approach is that it ensures absolute consistency (which may, of course, be equal unfairness) to the entire bodies of the athletes. This may be contrasted with the discretionary approach, where decisions of governing bodies may be viewed cynically as being dependent to no small extent upon the identity of the alleged offender¹³¹

179. In the national court decisions on point, the emphasis has not been on the inequalities that may exist between athletes participating in different sports and hailing from different countries, but rather on the need to take into account the specific circumstances of each case. In the *Krabbe* case, the Munich Regional Court held that

¹³⁰ WADC E VERSION 3.0 ANNOTATED

¹³¹ GRAY pp 21-22

such special circumstances (*sonstige Umstände*) could justify a reduction in the length of a suspension, such as a confession by the athlete¹³².

180. The 1998 Recommendation of Monitoring Group established under European Anti-Doping Convention also emphasizes the importance of flexibility in the determination of the sanction to be imposed in doping cases. Section B.3 of the Recommendation sets out the following “guidelines for sanctions”:

- 3.1 Countries or sport bodies concerned should provide in their regulations for imposition of sanctions against doping offence. The sanctions should be sufficient for the offence proved, based on the severity of the infraction, and not encourage disregard for the regulations.
- 3.2 These sanctions should be consistent (i.e., having similar effects) both between different sports in one country and between International Federations.
- 3.3 [...]
- 3.4 Disciplinary panels should always investigate how the athlete concerned breached the regulations. They may take account of any mitigating factors. [...]

181. Similarly, in a CAS advisory opinion of 1994, it was observed that Article 7(2)(d) of the European Anti-Doping Convention “implies at least that the personal circumstances of the athlete found guilty of doping be taken into consideration. This obligation to harmonize is thus accompanied with a certain degree of flexibility”¹³³.

182. While there are clear advantages in tailoring sanctions to meet the specific facts of each case, it is important to recognize that, from a practical point of view, sports disciplinary bodies may take advantage of such flexibility to adopt more lenient sanctions for high profile-athletes. Several well-known examples confirm that this risk is not merely theoretical. As a result, flexibility in the setting of sanctions does not always lead to the equal treatment of the athletes and certainly is no panacea.

183. Moreover, a flexible approach to sanctions enables sports disciplinary bodies to take into account a wide range of factors and circumstances, including those completely at odds with the very purpose of any anti-doping regulation. For example, in an arbitral award recently delivered under the auspices of the *Camera di Conciliazione e di Arbitrato* established by the Italian NOC, the Panel reduced a two-year suspension in reliance *inter alia* on the following factors:

The fault must always be regarded in close relation with the personality of the subject and with the environment in which he lives and acts. It is undeniable that nowadays, the athletes are under **heavy pressure by the sports clubs, sponsors and media**, ‘to go

¹³² *Krabbe v. IAAF et. al.*, Decision of the LG Munich of 17 May 1995, SpuRt 1995 p. 161, 168.

¹³³ CAS 93/109 *Fédération Française de Triathlon (FFTri) and International Triathlon Union (ITU)*, Advisory Opinion of 31 August 1994. CAS Digest I, p. 457 and p. 467 (English translation), 471.

beyond their own limits', if they want to keep their job. [...] doping has unfortunately become an habitual practice in a society encouraging the spirit of competition awarding recognition only to the winners.¹³⁴

184. These practical problems demonstrate that, if some flexibility is required in order to comply with the principle that the sanction must be proportionate with the offence, the scope of this flexibility must be carefully defined and limited. To this end, we recommend that the only possible basis for exercising flexibility in the setting of sanctions should be the existence of fault or negligence, or lack thereof, on the part of the athlete.

5. Conclusion

185. For all of the above reasons, we conclude that Articles 10.2, 10.3 and 10.5 pursue a legitimate aim and satisfy the requirement of proportionality. Accordingly, even if, under specific circumstances, the regime established by these Articles may violate the equal treatment principle, the restrictions incurred by the single athlete is justifiable. In short, Articles 10.2, 10.3 and 10.5 comply with human rights and general legal principles.

VII. OTHER PROVISIONS

1. Article 8: The Right to an Interpreter

186. It is a generally accepted principle of due process that a person charged with a criminal offence has the right to an interpreter at no cost, if he or she cannot understand or speak the language used in court. This right is expressly recognized in Article 14(3)(f) of the UN Covenant on Civil Rights and Article 6(3)(e) of the ECHR.

¹³⁴

CCAS *De Angelis et Martinez Tomieto c. Federazione Italiana Rugby (FIR)*, Award of 7 February 2002, available at <http://www.coni.it/coni/docarbitrato/lodo1_7_2.doc>, pp. (free summary of the original Italian wording "La responsabilità deve sempre essere considerata in stretto rapporto con la personalità del soggetto e con l'ambiente in cui lo stesso vive e opera. E' innegabile che oggi gli atleti siano pesantemente condizionati dalle società sportive, dagli sponsor e dai "media" che impongono di superare "i propri limiti" pena talvolta, specialmente negli sport minori, la perdita del lavoro. L'uso di sostanze o metodi atti a migliorare la forma è, purtroppo, divenuta pratica corrente in una società che incoraggia lo spirito di competizione e che tributa applausi solo a coloro che vincono. E' questa senza dubbio una società portatrice di valori illusori, come l'imperativo categorico del successo ad ogni costo, che ripropone nell'attività agonistica i distorti miti e riti del successo. Lo sport usato a fini di profitto, il moltiplicarsi eccessivo delle gare che finisce per superare i limiti normali dell'essere umano, sono alcune delle lacune dell'ambiente sociale degli sportivi, indotti ad usare qualsiasi mezzo per raggiungere il successo, senza preoccuparsi di alterare i risultati [...] Alla luce di quanto esposto, l'Arbitro Unico ritiene sussistere l'elemento soggettivo con caratteristiche di speciale tenuità e pertanto non ritiene adeguata la sanzione comminata; nel determinarla, infatti, non si è tenuto conto delle innumerevoli pressioni e del contesto socio-culturale in cui gli atleti hanno operato.")

187. The European Court for Human Rights has made the following finding in regard to the right to an interpreter:

[...] [F]or the purpose of ensuring a fair trial, paragraph 3 of Article 6 (art. 6-3) enumerates certain rights ("minimum rights"/"notamment") accorded to the accused (a person "charged with a criminal offence"). Nonetheless, it does not thereby follow, as far as sub-paragraph (e) is concerned, that the accused person may be required to pay the interpretation costs once he has been convicted. To read Article 6 para. 3 (e) (art. 6-3-e) as allowing the domestic courts to make a convicted person bear these costs would amount to limiting in time the benefit of the Article and in practice, as was rightly emphasised by the Delegates of the Commission, to denying that benefit to any accused person who is eventually convicted. Such an interpretation would deprive Article 6 para. 3 (e) (art. 6-3-e) of much of its effect, for it would leave in existence the disadvantages that an accused who does not understand or speak the language used in court suffers as compared with an accused who is familiar with that language - these being the disadvantages that Article 6 para. 3 (e) (art. 6-3-e) is specifically designed to attenuate¹³⁵.

188. If one were to apply this jurisprudence directly to doping disputes, it would mean that sports governing bodies would be systematically required to pay the costs of interpreters, regardless of the outcome of each case. This would obviously impose a significant financial burden on sports governing bodies, which some less well-funded organizations may not be in a position to bear.

189. However, as discussed above in Section III.2, it should be emphasized that provisions such as 6(3)(e) of the ECHR are primarily directed to criminal law proceedings. The applicability of such provisions to doping disputes is based on the functional analogy between sports disciplinary proceedings and criminal proceedings. While this analogy may justify the application of specific principles such as *nulla poena sine culpa* to doping disputes, it does not provide a basis for requiring strict adherence with all of the procedural protections applicable to criminal proceedings.

190. For this reason, we find that a rule recognizing the right to an interpreter but leaving the decision as to the costs of such interpreter to the adjudicating body would comply with the right to a fair hearing. We therefore consider that the wording used in Article 8 of the Code¹³⁶ conforms with fundamental human rights [general legal principles?]:

The hearing process shall respect the following principles: [...] the *Person's* right to an interpreter at the hearing, with the hearing body to determine the identity, and responsibility for the cost, of the interpreter.

¹³⁵ ECHR *Luedicke, Belkacem And Koç v. Germany*, Decision of 28 November 1978, A29, para. 42.

¹³⁶ Article 8

2. Athlete's Consent to Binding Effect

191. The Code contains the following introductory provision:

Participants shall be bound to comply with the anti-doping rules adopted in conformance with the Code by the relevant Anti-Doping Organizations. Each *Signatory* shall establish rules and procedures to ensure that all *Participants* under the authority of the *Signatory* and its member organizations are informed of and agree to be bound by anti-doping rules in force of the relevant *Anti-Doping Organizations*.

192. This provision is important because several national courts have carefully considered whether or not an athlete is bound by rules and regulations promulgated by an organization of which he or she is not a member. The issue is particularly critical due to the submission to CAS arbitration set out in the Code.

193. Given these concerns, we believe that it would be useful to prepare a standard declaration to be signed by all athletes subject to the Code. In this standard declaration, the athlete must specifically confirm his or her acceptance of both the anti-doping regulations and the CAS arbitration agreement.

Made in Geneva on February 26, 2003

Prof. Gabrielle Kaufmann-Kohler

Prof. Giorgio Malinverni

Antonio Rigozzi