# Attachment 1



## AUSTRALIAN OLYMPIC COMMITTEE

(ARBN 052 258 241)
(Registered Number A0004778J)

## ANTI-DOPING BY-LAW

### 1. WORLD ANTI-DOPING CODE

1.1. On 5 March 2003 the Australian Olympic Committee (AOC) became a *Signatory* to the *Code* and, as such, is responsible for assisting *ASADA* in initiating, implementing and enforcing the *Doping Control* process and fulfilling all its obligations under the *Code* and the *International Standards*.

1.2. This By-Law is adopted and implemented as a result of the AOC's commitment to the purposes of the World Anti-Doping Programme of *WADA* and the *Code*. It is in conformance with the AOC's responsibilities under the *Code* and in furtherance of the AOC's continuing efforts to eradicate doping in Australia.

**Fundamental Rationale for the Code and the AOC's Anti-Doping By-Law**

Anti-Doping programs seek to 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, the pursuit of human excellence through the dedicated perfection of each person's natural talents. It is how we play true. The spirit of sport is the celebration of the human spirit, body and mind, and is reflected in values we find in and through sport, including:

- 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.

1.3. Under the *Code*, the AOC as the National Olympic Committee for Australia, has roles and responsibilities including the following:

(1) To ensure that its anti-doping policies and rules conform with the *Code*.

(2) To respect the autonomy of the *National Anti-Doping Organisation* in its country namely, *ASADA* and not to interfere in its operational decisions and activities.

(3) To require as a condition of membership or recognition that *National Federations*' anti- doping policies and rules are in compliance with the applicable provisions of the Code.

(4) To require *National Federations* to report any information suggesting or relating to an *anti-doping rule violation* to *ASADA* and their *International Federation* and to cooperate with investigations conducted by any *Anti-Doping Organisation* with authority to conduct the investigation.

(5) To require as a condition of participation in the Olympic Games as a member of an Australian Olympic Team that, at a minimum, *Athletes* who are not regular members of a *National Federation* be available for *Sample* collection and to provide whereabouts information as required by the *International Standard for Testing* and Investigations as soon as the *Athlete* is identified on the list or subsequent entry document submitted in connection with the Olympic Games.

(6) To fully cooperate with and assist *ASADA* to vigorously pursue all potential *anti-doping rule violations* within its jurisdiction, including fully cooperating with any investigation *ASADA* is conducting into whether *Athlete Support Personnel* or other *Persons* may have been involved in each case of doping.

(7) To require each of its *National Federations* to establish rules requiring each *Athlete Support Personnel* who participates as coach, trainer, manager, team staff, official, medical or paramedical personnel in a *Competition* or activity authorised or organised by the *National Federation* or one of its member organisations to agree to be bound by anti-doping rules and *Anti-Doping Organisation* results management authority in conformity with the *Code* as a condition of such participation.

(8) To withhold some or all funding, during any period of his or her *Ineligibility*, to any *Athlete* or *Athlete Support Personnel* who has violated anti-doping rules.

(9) To withhold some or all funding to its *National Federations* that are not in compliance with the *Code*.

(10) To promote anti-doping education, including requiring *National Federations* to conduct anti-doping education in cooperation with *ASADA*.

(11) To co-operate with relevant national organisations and agencies and other *Anti-Doping Organisations*.

(12) To have disciplinary rules in place to prevent *Athlete Support Personnel* who are *Using Prohibited Substances* or *Prohibited Methods* without valid justification from providing support to *Athletes* within the AOC's authority.

## 2. APPLICATION OF ANTI-DOPING BY-LAW

2.1. This By-Law applies to:

(1) The members of the AOC Executive; members of any commission or committee established pursuant to the Constitution of the AOC; members of the IOC (if any) who are citizens of Australia; officers, employees, interns and volunteers of the AOC;

(2) *Athletes;*

(3) *Team Members*;

(4) *Youth Olympic Team Members*;

(5) *Athlete Support Personnel*;

(6) Any other *Person* under the AOC's authority; and

(7) *National Federations.*

2.2. Sanctions are applicable in the event of any *anti-doping rule violation* or other breach of this By- Law.

3. **OBLIGATIONS**

3.1. All *Athletes* must:

(1) be knowledgeable of and comply with all applicable anti-doping policies and rules, namely the *Code,* the *International Standards*, this By-Law and the policies and rules of *ASADA* and their *National Federation* and *International Federation*;

(2) co-operate with and assist *ASADA*, including by:

(a) attending an interview to fully and truthfully answer questions; (b)

giving information; and

(c) producing documents,

in an investigation being conducted by ASADA, even if to do so might tend to incriminate them or expose them to a penalty, sanction or other disciplinary measure;

(3) be available for *Sample* collection conducted according to the *Code* at all times;

(4) take responsibility, in the context of anti-doping, for what they ingest and *Use*;

(5) inform medical personnel of their obligation not to *Use Prohibited Substances* and *Prohibited Methods* and to take responsibility to make sure that any medical treatment received does not violate the anti-doping policies and rules applicable to them;

(6) disclose to *ASADA* and their *National Federation* any decision by a non-*Signatory* finding that they committed an anti-doping rule violation within the previous ten years; and

(7) co-operate with *Anti-Doping Organisations* investigating *anti-doping rule violations.*

3.2. All *Athletes* who are not regular members of a *National Federation* must be available for *Sample* collection conducted according to the *Code* and provide accurate and up-to-date whereabouts information on a regular basis if required during the year before the Olympic Games as a condition of participation in the Olympic Games as a member of an Australian Olympic Team.

3.3 Any *Athlete* who is not a member of a *National Federation* and who fulfills the requirements to be part of the *ASADA Registered Testing Pool*, must become a member of his or her *National Federation,* and must make himself or herself available for *Testing*, at least twelve months before participating in *International Events* or at least six months before participating in *National Events* of his or her *National Federation.*

3.4. All *Athlete Support Personnel* must:

(1) be knowledgeable of and comply with all anti-doping policies and rules, namely the *Code*, the *International Standards*, this By-Law and the policies and rules of their *National Anti-Doping Organisation*, National Federation and International Federation, applicable to them or to the *Athletes* whom they support;

(2) co-operate with the *Athlete Testing* programme;

(3) use his or her influence on *Athlete* values and behaviour to foster anti-doping attitudes;

(4) disclose to *ASADA* and his or her National and International Federation any decision by a non-*Signatory* finding that he or she committed an *anti-doping rule violation* within the previous ten years;

(5) cooperate with *Anti-Doping Organisations* investigating *anti-doping rule violations*;

(6) not *Use* or *Possess* any *Prohibited Substance* or *Prohibited Method* without valid justification; and

(7) co-operate with and assist *ASADA*, including by:

(a) attending an interview to fully and truthfully answer questions; (b)

giving information; and

(c) producing documents,

in an investigation being conducted by ASADA, even if to do so might tend to incriminate them or expose them to a penalty, sanction or other disciplinary measure.

3.5. Each *National Federation* must:

(1) comply with the *Code*, the *International Standards* and this By-Law;

(2) co-operate with and assist *ASADA*;

(3) adopt and implement an anti-doping policy that conforms with the *Code*;

(4) report any information suggesting or relating to an *anti-doping rule violation* to *ASADA* and cooperate with investigations conducted by any *Anti-Doping Organisation* with authority to conduct the investigation;

(5) cooperate with and assist its *International Federation* in its day-to-day anti-doping operations;

(6) require all *Athletes* and each *Athlete Support Personnel* who participates as coach, trainer, manager, team staff, official, medical or paramedical personnel in a *Competition* or activity authorised or organised by the National Federation or one of its member organisations or a club recognised by it or one of its member organisations to agree to be bound by anti-doping rules and *Anti-Doping Organisation* results management authority in conformity with the *Code* as a condition of such participation;

(7) prevent *Athlete Support Personnel* who are *Using Prohibited Substances* or *Prohibited Methods* without valid justification from providing support to *Athletes* within the *National Federation's* authority;

(8) require as a condition of membership that the policies, rules and programmes of its members or clubs recognised by it or one of its member organisations are in compliance with the *Code*;

(9) take appropriate action to discourage non-compliance with the *Code* and its anti-doping policy;

(10) notwithstanding the previous paragraph:

(a) recognise and respect a finding of an *anti-doping rule violation* by the IOC, its *International Federation, ASADA* or any other *Signatory* or another *National Federation* without the need for a hearing, provided the finding is consistent with the *Code* and within the authority of the body concerned; and

(b) require *Athletes* who are not regular members of it to be available for *Sample* collection and provide accurate and up-to-date whereabouts information on a regular basis, if required during the year before the Olympic Games as a condition of participation in the Olympic Games as a member of an Australian Olympic Team;

(11) require any *Person* who is not a regular member and who fulfills the requirements to be part of the *ASADA Registered Testing Pool*, to become a member and to make himself or herself available for *Testing*, at least twelve months before participation in *International Events* or at least six months before participating in *National Events;*

(12) promptly notify the AOC of the finding of any *anti-doping rule violation* and the imposition of any sanction for an *anti-doping rule violation* on:

(a) any *Athlete, Athlete Support Personnel* or other *Person* under its authority; or

(b) any *Athlete, Athlete Support Personnel* or other *Person* under its authority under the anti-doping policy and rules of its International Federation;

(13) promote anti-doping education in coordination with *ASADA*; and

(14) provide assistance and information to the AOC as requested by the Secretary-General to enable the AOC to properly implement this By-Law.

4. ***TESTING***

4.1. The AOC will recognise the results of accredited laboratory analysis of *Testing* conducted by *Anti-Doping Organisations* (including *ASADA)* conducted in accordance with the *Code*.

4.2. The AOC may request any *Anti-Doping Organisation* to conduct *Testing* and analysis of *Samples* of *Team Members* in accordance with the *Code*.

4.3. Where the AOC requests the conduct of *Testing* and analysis of *Samples* of *Team Members* by *ASADA*, whether by itself or, in the case of *Team Members* not within *ASADA's* jurisdiction, by another *National Anti-Doping Organisation* under Articles 20.5.3 and 20.5.4 of the *Code,* then *ASADA* will either by itself or the other *National Anti-Doping Organisation* which conducts the *Testing* ensure that there is timely initial review pursuant to Article 7.1 of the *Code* and a follow-up review and investigation of any Adverse Analytical or Atypical Finding required pursuant to Articles 7.3 and 7.4 of the *Code* and advise the AOC, and the *Team Member's National Federation* and *International Federation* of the results thereof.

5. **BREACHES OF THIS BY-LAW**

5.1. Without limiting any other term of this By-Law, the commission of an *anti-doping rule violation* is a breach of this By-Law.

5.2. Articles 1, 2, 3, 4, 5, 6, 7 and 17 of the *Code* apply to determine whether any *anti-doping rule violation* has been committed.

5.3. It is an infraction of this By-Law for an *Athlete, Athlete Support Personnel, other Person* or a *National Federation* to breach any of their obligations to the AOC derived from this By-Law.

6. **MUTUAL RECOGNITION OF ANTI-DOPING RULE VIOLATIONS**

6.1. The AOC will recognise *Testing,* hearing results or other final adjudications or determinations (a determination) by any *Signatory* and *National Federation* that a *Person* has committed an *anti-doping rule violation* provided the finding is consistent with the *Code* and within that *Signatory's* or *National Federation's* authority.

6.2. The AOC will recognise the same actions of other bodies which have not accepted the *Code* if the rules of those bodies are otherwise consistent with the *Code*.

6.3. Upon being advised of a determination under clause 6.1 or 6.2, the Secretary-General will give the *Person* concerned notice in writing of:

(1) the recognition by the AOC of such determination; and

(2) the automatic imposition of the applicable sanction under clause 8 for the period determined by the *Anti-Doping Organisation* or *CAS* to apply to the *anti-doping rule violation* in question.

6.4. Except as provided in the *Code*, no *Person* may appeal against or challenge any recognition by the AOC under this clause 6 of an *anti-doping rule violation* by that *Person* unless that *Person* has first exhausted all his or her rights of appeal and other legal rights (if any) in respect of the hearing and finding of the *Signatory* or *National Federation* concerned (before any tribunal as provided for in the anti-doping policy of the *Signatory* or *National Federation* concerned). In the event that a *Person* challenges or appeals the hearing, finding or determination of the *Signatory* or *National Federation* concerned, the AOC will defer recognition of the *anti-doping rule violation* pending the conclusion of the challenge or appeal and will abide by the decision of the tribunal concerned.

7. **NON-RECOGNISED *ANTI-DOPING RULE VIOLATIONS***

7.1. Where:

(1) there is evidence of an *anti-doping rule violation* by a *Team Member* or a *Youth Olympic Team Member* including *Athlete Support Personnel* and the Secretary- General believes that it is inappropriate in the circumstances of the particular case to refer the matter to a *National Federation* for prosecution as a breach of its anti-doping policy; or

(2) the Secretary-General believes that a person holding a position on the AOC a *Team* or a *Youth Olympic Team Member* including *Athlete Support Personnel* may have committed an *anti-doping rule violation* and is not subject to the anti-doping policy of any *National Federation* in respect of that alleged *anti-doping rule violation*; or

(3) in the period commencing one month before the Opening Ceremony of a *Games* or *Youth Olympic Games* until midnight of the day of the Closing Ceremony of those *Games* or *Youth Olympic Games*, a *National Federation* or the Secretary-General receives notification or believes on other grounds that a *Team Member* or *Youth Olympic Team Member* including *Athlete Support Personnel* in respect of those *Games* or *Youth Olympic Games* may have committed an *anti-doping rule violation* and, unless the alleged *anti-doping rule violation* arises out of circumstances within the authority of the IOC or the Organising Committee for those *Games* under the Olympic Charter or the *Code* in respect of those *Games*,

the Secretary-General will issue an infraction notice under clause 7.2.

7.2. The infraction notice referred to in the preceding clause will: (1)

be in writing and be given to the *Person* by:

(a) personal service; or

(b) delivered to the person's last known address as advised by the *National Federation* concerned to the AOC;

(2) set out the nature and particulars of the alleged *anti-doping rule violation*;

(3) set out the sanction that may be imposed under this By-Law in respect of the *anti-doping rule violation*; and

(4) state that the matter has been referred to the Oceania Registry of *CAS* for hearing as soon as possible to determine:

(a) whether or not the *anti-doping rule violation* has been committed; and

(b) the sanction to be imposed in respect of the *anti-doping rule violation* should it be found to have been committed.

7.3. The hearing of the matter referred to in Clause 7.2(4) by *CAS* will be conducted pursuant to clause 10 and as expeditiously as possible in order, in the case of a *Team Member* or *Youth Olympic Team Member* including *Athlete Support Personnel*, to be concluded prior to the *Team Member* or *Youth Olympic Team Member* including *Athlete Support Personnel* participating in the *Games* or *Youth Olympic Games* in question. To this end the *CAS* will implement an expedited procedure and R44.4 of the Code of Sports-Related Arbitration requiring the consent of the parties will not apply.

## 8. AOC IMPOSED SANCTIONS FOR ANTI-DOPING RULE VIOLATIONS

8.1. Subject to clause 8.5, any *Person* who is found to have committed an *anti-doping rule violation* will be ineligible for membership of or selection in any *Team* or *Youth Olympic Team*, or to receive funding from or to hold any position on the AOC or any *Team* or *Youth Olympic Team* for the period or periods specified in the *Code* as applicable to the *anti- doping rule violation* in question.

8.2. For the purposes of clause 8.1, the period or periods of any sanction will be determined according to Articles 10 and 11 of the *Code*.

8.3. The above sanctions may be applied to a *Person* independently of any sanction or penalty, its duration or timing or whether current or past, imposed by any *Signatory* or *National Federation* provided that the AOC will recognise previous sanctions imposed by any *Signatory* or *National Federation* to determine whether the breach is a first, second or third offence.

8.4. Any period of sanction in respect of an *anti-doping rule violation* may be reduced or otherwise varied by CAS solely in accordance with the provisions of the Code.

## 9. OTHER BREACHES OF THIS BY-LAW

9.1. The sanctions set out in this clause 9 do not apply in respect of the commitment of an *anti-doping rule violation* by the relevant *Person*.

9.2. Subject to clause 9.1, if a breach of this By-Law occurs at any time other than during a *Games Period*, then the breach and any sanction to be applied will be determined by the AOC in its sole and absolute discretion.

9.3. Subject to clause 9.1, if a breach of this By-Law occurs at any time during a *Games Period*, then the breach and any sanctions to be applied will be determined by the Chef de Mission of the relevant Team or his or her authorised delegate(s) in their respective sole and absolute discretion.

9.4. Without limiting clauses 9.2 and 9.3, any *Person* who, in the sole and absolute discretion of the AOC or the Chef de Mission (as the case may be), fails to comply with the obligations set out in clauses 3.1(2), 3.4(7) or in the case of any *National* Federation, 3.5(2) may be ineligible for membership or continued membership of or selection to any *Team*, or to receive funding from or to hold any position within or continued membership of the AOC for such period as determined by the AOC or the Chef de Mission.

9.5. Any sanctions imposed under this clause 9 are non-exclusive and the *Person* may be subject to additional sanctions in accordance with any other terms applicable to that *Person's* relationship with the AOC, including any terms of employment.

10. **CAS HEARING**

10.1. A hearing by *CAS* under this By-Law will be conducted:

(1) by a single arbitrator appointed by the Permanent Secretary of the Oceania Registry of *CAS*;

(2) as an ordinary arbitration proceeding; and

(3) pursuant to the Code of Sports Related Arbitration, provided that the Award and the arbitrator's reasons therefore will be made public and to this extent Rule 43 of the Code of Sports-Related Arbitration will not apply.

10.2. All instances of alleged *anti-doping rule violations* will be determined in conformity with the *Code* and must be established according to the provisions of the *Code.*

10.3. If *CAS* determines that a person has committed an *anti-doping rule violation*, it will impose on the person the relevant sanction pursuant to clause 8.

11. **APPEALS FROM DETERMINATIONS OF *CAS.***

11.1. A *Person* (including the AOC and those entitled to appeal under Article 13.2.3 of the *Code*) aggrieved of a determination of *CAS* under clause 10 may appeal that decision to *CAS.*

11.2. Any appeal hearing by *CAS* under this clause 11 will be conducted:

(1) by a panel of three arbitrators appointed by the Permanent Secretary of the Oceania Registry of *CAS*;

(2) as an appeal arbitration proceeding; and

(3) pursuant to the Code of Sports Related Arbitration, provided that the Award and the arbitrator's reasons therefore will be made public and to this extent Rule 43 of the Code of Sports-Related Arbitration regarding confidentiality will not apply.

11.3. Any appeal from a determination of *CAS* under clause 10 must be solely and exclusively resolved by *CAS.* The determination of *CAS* will be final and binding on the parties to the appeal and no person may institute or maintain proceedings in any court or tribunal other than *CAS.* In particular, and without restricting the generality of the foregoing and for further and better assurance notwithstanding that such provisions have no applicability, neither party will have the right of appeal under Sections 34 and 34A of the Commercial Arbitration Act of any of the Australian States or to apply for the determination of a question of law under Section 271 of such Act.

11.4. An appeal will be a rehearing of the matters appealed against by way of a hearing de novo and the provisions of clause 10 will apply, mutatis mutandis, to any appeal to *CAS.*

12. **NOTIFICATION.**

12.1. Upon the imposition of a sanction under this By-Law, the AOC will send details of the sanction imposed to:

(1) the *IOC*;

(2) those *Persons* entitled to notification under Article 14.1 of the *Code*

(3) the *National Federation* of the *Person* concerned;

(4) the *International Federation* of the *Person* concerned;

(5) the Australian Sports Commission;

(6) *ASADA*;

(7) *WADA*; and

(8) any other person or organisation the AOC believes should be informed in this respect.

12.2. If on appeal *CAS* overturns the finding that an *anti-doping rule violation* has occurred or alters the sanction imposed, the AOC will advise the decision to all those persons notified of the initial imposition of the sanction pursuant to clause 12.1.

## 13. DISPUTES

Any dispute regarding the construction and/or application of this By-Law must be solely and exclusively resolved by *CAS* according to the Code of Sports-Related Arbitration. The decision of *CAS* will be final and binding on the parties concerned and no *Athlete* or *Person* may institute or maintain proceedings in any court or tribunal other than *CAS*. In particular, and without restricting the generality of the foregoing and for further and better assurance notwithstanding that such provisions have no applicability, neither party will have the right of appeal under Sections 34 and 34A of the Commercial Arbitration Act of any of the Australian States or to apply for the determination of a question of law under Section 27I of such Act.

## 14. COSTS AND EXPENSES OF HEARINGS & APPEALS TO CAS

14.1. In any hearing before *CAS* pursuant to clause 10 or clause 11, the AOC will bear the costs of *CAS* in respect of the arbitration save that the fee payable to *CAS* pursuant to Rule 64.1 of the Code on lodgment of any appeal under clause 11 will be paid by the party instituting that appeal.

14.2. Recognising the AOC's commitment contained in clause 14.1 and the fact that any hearing by *CAS* under this By Law is disciplinary in nature and resulted from the requirement of the AOC to apply and enforce anti-doping provisions common to all *Athletes* and *Athlete Support Personnel* under the *Code*,

(1) the person alleged to have committed an *anti-doping rule violation* will indemnify and keep indemnified the AOC from and against any award by *CAS* of a contribution towards that person's legal costs and expenses; and

(2) the AOC will indemnify and keep indemnified the person alleged to have committed an *anti-doping rule violation* from and against any award by *CAS* of a contribution towards the AOC's legal costs and expenses solely in respect of any hearing before *CAS* pursuant to clause 10.

## 15. REVIEW OF *ANTI-DOPING RULE VIOLATION*

If a *Person* recorded as having committed an *anti-doping rule violation* is subsequently found not to have committed that *anti-doping rule violation* or is otherwise cleared or pardoned of any relevant wrongdoing by *CAS* or any other *Anti-Doping Organisation's* Appellate Body acting in conformity with the *Code*, the AOC will overturn the *anti-doping rule violation* and any sanction which had been imposed as a result of that *anti-doping rule violation* and will report the decision to all those *Persons* notified of the initial imposition of the sanction pursuant to clause 12.

## 16. REVIEW OF AOC IMPOSED SANCTION

16.1. Where a *Person* to whom a sanction has been applied under this By-Law or any preceding AOC anti-doping policy in respect of an *anti-doping rule violation* has new and relevant information concerning the subject *anti-doping rule violation*, he or she or it may make written application to the Secretary-General setting out the grounds for a possible review of that AOC imposed sanction.

16.2. The Secretary-General will consider the application and determine in his or her sole and absolute discretion whether to review any sanction imposed under this By-Law or any preceding AOC anti-doping policy and may alter a sanction imposed previously including a reduction or withdrawal of that AOC imposed sanction.

16.3. The Secretary-General will not alter any sanction under clause 16.2 without first consulting with any other sports organisation which he or she knows has a current sanction over the person.

16.4. In the event of any alteration to a sanction by the AOC pursuant to this clause 16, the Secretary- General will promptly notify the *Person* concerned as well as those *Persons* who received notification from the AOC of that sanction. In such instance, those *Persons* entitled to appeal under Article 13.2.3 of the *Code* (other than the *Person* to whom the sanction has been applied) will have the right to appeal the decision of the Secretary-General to *CAS* in accordance with the Code. Clauses 11.2 – 11.4 will apply to any such appeal.

## 17. INTERPRETATION

17.1. In this By-Law, the following words have the following respective meanings:

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| ***"Adverse Analytical Finding"*** | means a report from a *WADA*-accredited laboratory or other *WADA*-approved laboratory that, consistent with the International Standard for Laboratories and related Technical Documents, identifies in a *Sample* the presence of a *Prohibited Substance* or its *Metabolites* or *Markers* (including elevated quantities of endogenous substances) or evidence of the *Use* of a *Prohibited Method.* |
| ***"Anti Doping Organisation"*** | means a *Signatory* that is responsible for adopting rules for initiating, implementing or enforcing any part of the Doping Control process. This includes, but is not limited to, the *IOC*, the *International Paralympic Committee*, other *Major Event Organisations* that conduct *Testing* at their *Events*, *WADA*, *International Federations*, and *National Anti-Doping Organisations* (which for Australia is *ASADA).* |
| ***"Anti-doping rule violation"*** | means the anti-doping rule violations described in Article 2 of the *Code*. |
| ***"ASADA"*** | means the Australian Sports Anti-Doping Authority and includes any successor thereto established by the Australian Government as the *National Anti-Doping Organisation* for Australia. |
| ***"Athlete"*** | means: |

(a) any *Person* who competes or participates in sport at the international level (as defined by each International Federation) or the national level (as defined by *ASADA*);

(b) any Person who is neither an *International-Level Athlete* nor a *National-Level Athlete* to whom *ASADA* applies its anti-doping rules;

(c) for purposes of Articles 2.8 and 2.9 of the *Code* and for purposes of anti-doping information and education, any *Person* who competes or participates in sport under the authority of any *Signatory,* government or other sports organisation accepting the *Code*;

(d) any *Person* who competes or participates in sport under the authority of a *National Federation* or under the authority of a member of a *National Federation; or*

(e) any Person who is registered as an athlete or competitor or participant (however described) with a *National Federation* or with a member of a *National Federation* or a club recognised by a *National Federation*.

***"Athlete Support Personnel"*** means any coach, trainer, manager, agent, team staff, official, medical, paramedical personnel, parent or any other *Person* working with, treating or assisting an *Athlete* participating in or preparing for sports *Competition*.

***"Atypical Finding"*** means a report from a *WADA*-accredited laboratory or other *WADA*-approved laboratory which requires further investigation as provided by the *International Standard* for Laboratories or related Technical Documents prior to the determination of an *Adverse Analytical Finding*.

***"CAS"*** means the Court of Arbitration for Sport.

***"Code"*** means the World Anti-Doping Code as in force from time to time.

***"Competition"*** means a single race, match, game or singular sport contest.

***"Doping"*** means the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through to Article 2.10 of the *Code*.

***"Doping Control"*** means all steps and processes from test distribution planning through to ultimate disposition of any appeal including all steps and processes in between such as provision of whereabouts information, *Sample* collection and handling, laboratory analysis, *TUEs*, results management and hearings.

***"Games"*** means the Olympic Games, or any other sporting competition or event in which a *Team* is to compete or participate.

***"Games Period"*** means the period commencing on the earlier of:

(1) the assembly of the *Team* or *Youth Olympic Team* for the *Games* or *Youth Olympic Games* under the control of the Chef de Mission; or

(2) the opening of the official *Games* or *Youth Olympic Games* accommodation,

and ends at midnight the day after the closing ceremony of the *Games* or on such later date as the *Person* is formally discharged from the relevant *Team* or *Youth Olympic Team*.

***"IOC"*** means the International Olympic Committee.

***"International Event"*** means *Event* or *Competition* where the International Olympic Committee, the International Paralympic Committee, an International Federation, a *Major Event Organisation*, or another international sport organisation is the ruling body for the *Event* or appoints the technical officials for the *Event*.

***"International Federation"*** means an International Federation being an organisation controlling a branch of sport and recognised as such by the IOC.

***"International-Level Athlete"*** means *Athletes* who compete in sport at the international level, as defined by

each International Federation, consistent with the *International Standard* for *Testing* and Investigations;

| | |
|---|---|
| ***"International Standard"*** | means a standard adopted by *WADA* in support of the *Code*. Compliance with an *International Standard* (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude that the procedures addressed by the *International Standard* were performed properly. *International Standards* shall include any Technical Documents issued pursuant to the *International Standard*. |
| ***"Major Event Organisations"*** | means the continental associations of *National Olympic Committees* and other international multi-sport organisations that function as the ruling body for any continental, regional or other *International Event*. |
| ***"National Anti-Doping Organisation"*** | means the entity(ies) designated by each country as possessing the primary authority and responsibility to adopt and implement anti-doping rules, direct the collection of *Samples*, the management of test results, and the conduct of hearings at the national level. If this designation has not been made by the competent public authority(ies), the entity shall be the country's *National Olympic Committee* or its designee. |
| ***"National Event"*** | means a sport *Event* or *Competition* involving *International-* or *National-Level Athletes* that is not an *International Event*. |
| ***"National Federation"*** | means any organisation that is a member of the AOC. |
| ***"National-Level Athlete"*** | means *Athletes* who compete in sport at the national level, as defined by each *National Anti-Doping Organization*, consistent with the *International Standard* for *Testing* and Investigations. |
| ***"Olympic Games"*** | means the Games of an Olympiad and the Olympic Winter Games conducted under the authority of the IOC. |
| ***"Person"*** | means a natural person or an organisation or other entity. |
| ***"Prohibited List"*** | means the List identifying the *Prohibited Substances* and *Prohibited Methods*. |
| ***"Prohibited Method"*** | means any method so described on the *Prohibited List*. |
| ***"Prohibited Substance"*** | means any substance, or class of substances, so described on the *Prohibited List*. |
| ***"Sample or Specimen"*** | means any biological material collected for the purposes of *Doping Control*. |
| ***"Signatory"*** | An entity signing the *Code* and agreeing to comply with the *Code*, including the IOC, International Federations, International Paralympic Committee, National Olympic Committees, Major Event Organisations, ASADA, other National Anti-Doping Organisations, and WADA. |
| ***"Team"*** | means any Australian Olympic Team, Australian Olympic Winter Team or other team selected by the AOC. |

| | |
|---|---|
| ***"Team Member"*** | means: |
| | (a) a member of a *Team*; or |
| | (b) a person advised by a *National Federation* to the AOC as a person considered suitable as a member of a Team and recognised as such by the AOC. |
| ***"Testing"*** | means the parts of the Doping Control process involving test distribution planning, Sample collection, Sample handling, and Sample transport to the laboratory. |
| ***"TUE"*** | means Therapeutic Use Exemption as described in Article 4.4 of the *Code*. |
| ***"Use"*** | means the utilisation, application, ingestion, injection or consumption by any means whatsoever of any *Prohibited Substance* or *Prohibited Method*. |
| ***"WADA"*** | means the World Anti-Doping Agency being a Foundation constituted under the Swiss Civil Code in Lausanne on 10 November 1999 and any Agency contracted by WADA. |
| ***"Youth Olympic Games"*** | means the Youth Olympic Games and the Youth Olympic Winter Games conducted under the authority of the IOC. |
| **"Youth Olympic Team"** | means any Australian Youth Olympic Team or Australian Youth Olympic Winter Team selected by the AOC. |
| **"Youth Olympic Team Member"** | means: |
| | (a) a member of a Youth Olympic Team; or |
| | (b) a person advised by a National Federation to the AOC as a person considered suitable as a member of a Youth Olympic Team and recognised as such by the AOC. |

17.2.

(1) All the words utilised in this By-Law shall have the same meaning as that ascribed to them in the *Code* and the *International Standards*.

(2) The *Code* and the *International Standards* shall be considered as part of this By-Law, apply automatically and prevail in case of conflict.

(3) Words not defined in this By-Law have the meaning ascribed to them in the *Code* and the *International Standards* unless a contrary meaning appears from the context.

(4) In the interpretation of this By-Law, should there be any inconsistency or conflict between this By- Law and the *Code* and the *International Standards*, then the provisions of the *Code* and the *International Standards* will prevail.

(5) Reference to:

(a) the singular includes the plural and the plural includes the singular; and

(b) a person includes a body corporate.

(6) If a *Person* or *National Federation* to whom this By-Law applies consists of more than one person, then this By-Law binds them jointly and severally.

(7) Headings are for convenience only and do not form part of this By-Law or affect its interpretation.

(8) "Including" and similar words are not words of limitation.

17.3. Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.

**ADOPTED** as a By-Law of the AOC by its Executive on 20 November 1997

**AMENDED** on 21 July 2000 by the Doping Offences Special Purpose By-Law both the adoption and amendment effective from 21 July 2000.

**AMENDED** on 21 March 2003 both the adoption and amendment effective from 21 March 2003.

**AMENDED** on 18 November 2005 with the amendment effective from 1 January 2006.

**AMENDED** on 8 May 2009 both the adoption and amendment effective from 8 May 2009.

**AMENDED** on 20 March 1998 both the adoption and amendment effective from 1 December 1997.

**AMENDED** on 9 March 2001 both the adoption and amendment effective from 9 March 2001.

**AMENDED** on 31 May 2004 both the adoption and amendment effective from 31 May 2004

**AMENDED** on 16 March 2007 both the adoption and amendment effective from 16 March 2007.

**AMENDED** on 14 August 2009 both the adoption and amendment effective from 14 August 2009.

**AMENDED** on 3 May 2013 both the adoption and amendment effective from 3 May 2013.

**AMENDED** in principle on 7 August 2014. For final amendment and adoption on 21 November 2014. Effective from 1 January 2015.

**Attachment 2**

AUSTRALIAN
OLYMPIC
COMMITTEE

# PRESIDENT'S ADDRESS
# AUSTRALIAN OLYMPIC COMMITTEE
# ANNUAL GENERAL MEETING
# SATURDAY, 10 MAY 2014

*EXCERPT:*

## WORLD ANTI-DOPING CODE, 2015

In the Annual Report I drew attention to the changes to the World Anti-Doping Code, effective 1 January 2015.

Shortly after its adoption on 15 November 2014, Craig Phillips provided member National Federations with WADA's summary of the Significant Changes between the 2009 Code and the 2015 Code, principal among which is increasing bans from 2 to 4 years for real cheats.

The 2015 Code amendments support the increasing importance of investigations and use of intelligence in the fight against doping which has received quite some prominence here in Australia over the last eighteen months.

Most pleasingly, amendments to the Code have been included to better reach Athlete Support Personnel who are involved in doping. We know that doping frequently involves coaches, trainers, or other Athlete Support Personnel and in many cases those Athlete Support Personnel were outside the jurisdiction of anti-doping authorities.

Be aware that the new Article 20.3.5 establishes that one of the roles and responsibilities of International Federations is to adopt rules which obligate their National Federations to require Athlete Support Personnel who participate in their activities to agree to be bound by anti-doping rules and the results management authority of applicable Anti-Doping Organizations. Article 20.4.7 imposes this same responsibility on National Olympic Committees in respect of their National Federations.

Also note Article 2.10 which adds a new anti-doping rule violation entitled "Prohibited Association". This makes it an anti-doping rule violation for an Athlete or other Person (meaning a natural Person or an organisation or other entity) to associate in a professional or sports-related capacity with Athlete Support Personnel who are currently Ineligible (meaning the Athlete or other Person is barred on account of an anti-doping rule violation for a specified period of time from participating in any Competition or other activity or funding as provided in Article 10.12.1), who have been convicted in a criminal, disciplinary, or professional proceeding for conduct that would constitute doping, for the longer of six years from the conviction/decision

or the duration of the criminal, disciplinary, or professional sanction imposed; or someone who is serving as a front for such a Person.

Before an Athlete is found to have violated this article, he or she must have received notice of the Athlete Support Personnel's disqualified status and the Consequence of continued association. The Athlete Support Personnel also has the opportunity to explain that the disqualified status is not applicable to him or her. Finally, this article does not apply in circumstances where the association is unavoidable, such as a child/parent or wife/husband relationship.

The AOC Executive will be updating the AOC Anti-Doping By-Law at its November meeting to conform with the 2015 Code from 1 January 2015.

The AOC will also be drawing specific attention to the operation of the new anti-doping rule violation of Prohibited Association in its Team Membership Agreements for Athletes and Officials and requiring assurances of no such association as a condition for election to, and continuing membership of, the AOC Executive and Athletes' Commission, or appointment to any commissions of, or employment with, the AOC.

Member National Federations should similarly ensure that their Athlete Support Personnel are bound by the anti-doping rules and the new anti-doping rule violation of Prohibited Association is understood by their Athletes, Athlete Support Personnel and administrators.

**JOHN COATES AC**
President

**Attachment 3**

AUSTRALIAN OLYMPIC COMMITTEE

**Media Release** **August 25 2014**

## COATES TARGETS ATHLETE'S ENTOURAGE – A SCOURGE ON SPORT

The President of the Australian Olympic Committee, John Coates, has embraced the new WADA Code and commenced moves preventing Rio-bound athletes from dealing with coaches, trainers, sports scientists and other support personnel who have violated anti-doping rules.

The new WADA Code does not take effect until January 1st 2015 but Coates has included the "Prohibited Association" clause in documents which all members of the Shadow Team for Rio are obliged to sign.

Coates is working with ASADA and letters have been sent to all National Sporting Federations (NFs) who will identify up to twelve hundred athletes comprising the Shadow Team.

"We totally support the new code and athletes who want to compete in the Australian Olympic Team in Rio need to understand the changes and comply now" Coates said.

Last week Coates advised NFs of the need to be WADA Code compliant by the start of next year, otherwise they risk losing their membership status.

"For a long time now the Olympic Movement has expressed grave concerns about the athlete's entourage, those people who surround the athletes and actively promote and assist in doping. They are a scourge on sport" he said. Previously they have been outside the jurisdiction of anti-doping authorities, not any more".

The AOC consent to Shadow Team Membership form says:

***"I have not at any time engaged in Prohibited Association as prescribed under Article 2.10 of the World Anti-Doping Authority (WADA) Code (in effect from 1 January 2015), meaning association in a professional or sport-related capacity with any Athlete Support Personnel who:***

- ***(a) is serving a period of Ineligibility; or***
- ***(b) has been convicted or found in a criminal, disciplinary or professional proceeding to have engaged in conduct which would have constituted a violation of anti-doping rules; or***
- ***(c) is serving as a front or intermediary for an individual described in (a) or (b) above.***

" Article 2.10 is simple. It says athletes are forbidden from associating with these people in any professional or sports-related way. They are now off limits, out of the picture totally" Coates said.

Other changes to the WADA Code from January 1 2015 include punishment for athletes caught cheating increasing from a two year ban to four years which would automatically rule them out of the next Olympic Games.

**Attachment 4**

# Legal opinion regarding the draft 3.0 revision of the World Anti-doping Code

authored by Jean-Paul Costa

## 1. Purpose of the consultation:

At the request of the World Anti-Doping Agency (WADA), represented by Maître Olivier NIGGLI, attorney-at-law in Lausanne, I have examined the issue of the compatibility of several provisions of the draft revision of the World Anti-Doping Code ("the Code") with the accepted principles of international law and human rights. I received this request in January 2013. Working sessions took place with Maître Niggli and Professor Ulrich Haas on January 8 and 31, March 7, May 6 and June 13, 2013, in Strasbourg, Paris and Lausanne.

## 2. Qualifications of the consultant:

I am a legal expert with known and recognized competence and I have held high-level judicial positions. After a career as a member of the French State Council, the highest French administrative court (I am now an honorary State Councillor), I served as a judge at the European Court of Human Rights ("ECHR") in Strasbourg for thirteen years and for nearly five of which I served as the Court's President. I left the Court on November 3, 2011 due to the age limit (I am currently the President of the International Institute of Human Rights).

I wish to clarify that I have given this legal opinion in a strictly personal capacity and under my own responsibility. The opinions expressed are solely my own and thus are only binding on me.

## 3. Questions asked:

The legal opinion addresses eight questions[1], set out in summary below:

a) Compatibility of the new provisions pertaining to sanctions, in particular the provisions in draft Article 10.2 of the Code, with the aforementioned principles[2];

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[1] Six at the time of the original request for the opinion. The seventh, suggested by several States, was added following a meeting on March 7, 2013 between the author of this opinion, Maître Olivier Niggli and Professor Ulrich Haas. The eighth, suggested by one State in particular, was added following a meeting between the same three persons on May 6, 2013.

[2] These are the recognized principles of international law and human rights. As we shall see, the European Convention for the Protection of Human Rights ("the Convention") will serve as the main reference. The European Union and the Treaties of the Union, however, are also relevant inasmuch as according to the Court of Justice of the European Union (CJEU) – formerly the Court of Justice of the European Communities (CJEC) - anti-doping rules may potentially conflict with certain provisions of European Union law, namely Articles 81 and 82 of the EC Treaty, which have become Articles 101 and 102 of the Treaty on the Functioning of the EU since the coming into force of the Lisbon Treaty on December 1, 2009. These articles prohibit obstacles to free competition and abusive practices regarding competition. The freedom to provide services might also be affected, perhaps even obstructed. Furthermore, since the coming into force of the Lisbon Treaty on December 1, 2009, the Charter of Fundamental Rights of the European Union ("the Charter"), which was declared at the Nice

b) applicability of Article 6 § 1 of the European Convention for the Protection of Human Rights to draft Article 8.1 of the Code on disciplinary anti-doping procedures;
c) compatibility of the principle of prohibited association in draft Article 2.10 of the Code with the aforementioned principles;
d) compatibility of draft Article 10.12 of the Code with the aforementioned principles, in the light of the decision of the Swiss Federal Court in the Matuzalem case;
e) compatibility of the publication of sanctions, in particular of draft Article 14.3.4 of the Code with the aforementioned principles;
f) compatibility of the statute of limitations under draft Article 17 of the Code with the aforementioned principles.
g) is it compatible or incompatible with human rights and the aforementioned principles to render an athlete or any other person ineligible for life for a second or third violation?
h) in view of the international standards regarding human rights, may anti-doping controls be performed on athletes anywhere, including at the athlete's "residence", for example in a hotel room, and at any time including at night between 9 p.m. and 9 a.m.?

## 4. Some very important general considerations:

Inasmuch as several Code provisions, and in particular the provisions for which this legal opinion has been sought, refer to *sanctions*, it is of crucial importance to define the legal system that governs these sanctions: are they civil, criminal, or *sui generis* in nature?

Indeed, the applicable legal system will differ from case to case. By virtue of the most relevant[3] international instruments, criminal sanctions afford the accused the greatest level of safeguards; civil sanctions provide fewer safeguards, whereas *sui generis* sanctions in principle offer few safeguards.

One can conclude without too much difficulty that the nature of sports sanctions applied to anti-doping rule violations is civil, which brings them under the scope of application of Article 6 § 1 of the Convention. The Convention is considered as being, if not the most universal international instrument, at least

Summit in December 2000, has become legally binding. It is true that the provisions of the Charter, with regard to the issues examined in this legal opinion, are close to those of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Moreover, the Charter is only intended to apply to the Member States of the European Union (27 at present, 28 as of July 1, 2013, date of the accession of Croatia). Lastly, there are international conventions, such as the Council of Europe's Anti-Doping Convention, adopted in 1989, and the International Convention against Doping in Sport adopted by UNESCO in 2005. Whilst not underestimating their importance, they are not very helpful when it comes to sanctions or safeguards for individuals liable to sanctions.

[3] Universal Human Rights Declaration (Article 10), European Convention for the Protection of Human Rights (Article 6), International Covenant on Civil and Political Rights (Article 14). Article 13 of the European Convention for the Protection of Human Rights (right to an effective remedy) must also be considered, as necessary.

the most relevant[4] one in material terms and will therefore be used in this legal opinion as the chief reference point.

The relevance of the reference to the ECHR and its case law is also justified *ratione loci*: the Court of Arbitration for Sport (CAS), which has its seat in Switzerland (Lausanne) comes under the appeal jurisdiction of the Swiss Federal Court by virtue of Articles 176 and 190 of the Swiss Law on Private International Law. In addition, the decisions of the latter fall under the jurisdiction of the ECHR for two reasons. In terms of jurisdiction and substance, the Swiss Federal Court's decisions are binding on Switzerland as it is a State Party to the European Convention on Human Rights (Article 1 of the Convention[5]) despite not being a member of the European Union. In procedural terms, they stand as the final domestic decision within the meaning of Article 35 of the Convention. Indeed, Article 35 stipulates as a condition of admissibility of applications made to the Court that all domestic legal remedies must have been exhausted and that a period of six months from the date on which the final decision was taken must have elapsed.

The sanctions provided for by the Anti-Doping Code currently in force as well as those envisaged in the draft revision have sufficiently significant, if not to say grave, professional and/or financial consequences affecting the athletes, and other related persons, for the subject matter to be deemed "civil" within the meaning of Article 6 § 1 of the Convention concerning the right to a fair trial within the context of challenges regarding rights and obligations of a civil nature[6].

Sports anti-doping sanctions might, however, by way of exception, escape the "civil" characterization because of their *sui generis* nature. However, the tendency in international law and human rights law is clearly toward extending the civil nature of rights and obligations and toward reducing disputes lacking this character. According to the case law of the ECHR, only a few measures are still of a non-civil and *sui generis* nature: fiscal sanctions that are not criminal in nature[7]; measures, such as expulsion, taken against foreigners[8]; certain sanctions of a political nature, in particular ineligibility[9]; or sanctions imposed on certain civil servants, which are an exception when compared with the general public service regime[10]. It would be artificial to assert that sports sanctions, in particular anti-doping sanctions, are by analogy capable of forming part of this category, which is in the process of being gradually reduced. In fact, whichever way one looks at it, they do not materially come under any of the sub-categories I have just enumerated.

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[4] The United Nations Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights, has a universal mandate but is a quasi-jurisdiction without the authority to enforce its decisions.

[5] The State Parties to the Convention (the "High Contracting Parties") recognize vis-à-vis everyone within their jurisdiction the rights and freedoms defined in the Convention (and in its Protocols).

[6] For disciplinary sanctions, refer to the significant body of case law of the Court in Strasbourg, Le Compte et al. *v.* Belgium, judgement of the ECHR dated June 23, 1981.

[7] Ferrazzini *v.* Italy, judgement dated July 12, 2001.

[8] Maaouia *v.* France, judgement dated October 5, 2000.

[9] Pierre-Bloch *v.* France, judgement dated October 21, 1997.

[10] Vilho Eskelinen *v.* Finland, judgement dated April 19, 2007.

We are left with the most difficult issue: Are anti-doping sanctions of a criminal nature?

In my opinion, a certain hesitation is certainly justified, but I do not believe that this is the case. The case law of the ECHR has long since developed an "autonomous interpretation" of the notions of criminal sanctions and violations[11]. Nonetheless, not every disciplinary or administrative sanction is by any means a criminal sanction[12]. The number and variety of the ECHR's decisions of inadmissibility, as referred to in footnote 12, show that the range of sanctions, which have a civil, but not a criminal nature remains vast. Contrary to sanctions *sui generis,* this is not a category facing extinction.

More generally, several arguments, when taken together, speak for denying a criminal character to the anti-doping sanctions that can be imposed in the framework of the World Anti-Doping Code:

i) they are free from any criminal prosecution, even though within a given country, such as France or Italy for example, sanctions of this type [such as those that the French Anti-Doping Agency (AFLD – Agence Française de Lutte contre le Dopage) has the authority to impose] may serve as a basis for criminal prosecution and, if necessary, give rise to actual – but subsequent and distinct - criminal sanctions;

ii) their gravity, like the gravity of anti-doping rule violations by athletes and other persons, is irrefutable, although in principle not sufficiently so in order to assimilate them with criminal sanctions (which more often than not may extend to the deprivation of liberty, which does not apply here);

iii) they do not apply to the public at large as criminal sanctions do, but to groups (albeit sizeable ones) with a specific status, such as athletes[13], physicians, coaches, etc.[14]. The provisions in fact do not apply *eo ipso* but only on condition that the person is subject to the disciplinary authority of the sports organization, whether by contract or by granting his/her consent;

iv) with regard to the competent jurisdiction, the CAS considers, based in particular on qualifications in domestic law – a criterion which is only indicative in a general way according to the ECHR – that cases coming under its jurisdiction are not criminal but civil cases;

v) so far, the Swiss Federal Court has never decided in the opposite way; in fact, it is the only national court that, provided certain conditions are met, has the jurisdiction to rule on the awards made by the CAS;

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[11] Since the judgement in Engel *v.* the Netherlands dated June 8, 1976, upheld by a significant body of case law, although not without certain nuances: see for example the judgement in Escoubet *v.* Belgium dated October 28, 1999.

[12] Thus, the following are not criminal sanctions: disciplinary sanctions imposed on teachers (Costa *v.* Portugal, judgement in 1999); those imposed on soldiers (Linde Falero *v.* Spain, judgement in 2000), or on policemen (Banfield *v.* UK, judgement in 2005), or on civil servants (judgement in Moullet *v.* France in 2007); professional sanctions imposed on lawyers (judgement in Tabet *v.* France in 2005); a disciplinary fine imposed on a solicitor (judgement in Brown *v.* United Kingdom dated 24 November 1998); or further, the professional disqualification order against a bankrupt person (judgement in Storbraten *v.* Norway in 2007).

[13] See the restrictive definition of "Athlete" in the draft Code.

[14] See Prof. Ulrich Haas' article "Role and application of Article 6 of the European Convention on human rights in CAS procedures", Sweet and Maxwell's International Sports Law Review, 2012, p.47.

vi) Lastly, regarding the ECHR and its rulings on appeals (normally involving Switzerland, in view of the jurisdiction the CAS and the Swiss Federal Court have) in cases involving anti-doping sanctions, it has to date made only two decisions. In one of them, the Court refused the application made by two female Russian cross-country skiing champions who had been sanctioned for doping at the Winter Olympic Games in Salt Lake City; the sanctions were upheld by the CAS and subsequently by the Swiss Federal Court[15]. Certainly, the applicability of Article 6 § 1 was only admitted implicitly by the Court (and even then not in a clear fashion), but it is noteworthy that the applicants had not invoked Article 6 from a criminal angle, which does have at least some indicative significance.

The same situation arose in a horse doping case[16]: the coach making the application also did so exclusively from a civil and not from a criminal perspective.

Furthermore, in a recent case communicated to the parties, the Pechstein v. Switzerland case (application N° 67474/10), in which the applicant, a female speed-skating champion, put forward several complaints, the one alleging a violation of the presumption of innocence, within the meaning of Article 6 § 2 of the Convention (which only applies to criminal matters), was not communicated to the parties by the Court. This is a strong indication that, at the time the application was lodged, the Court did not feel that the complaint would be admissible *ratione materiae*.

One objection could, however, be based on the fact that the financial sanctions that *Sports Federations* are empowered to inflict can be onerous, indeed very onerous. Even if they do not derive directly from the provisions of the World Anti-Doping Code, might that not be a sign that the severity of these sanctions "contaminates" the subject matter, thereby shifting it into the criminal domain?

I do not believe so. In a large number of countries, Federations have the authority to impose not only disciplinary sanctions, but also financial ones, by virtue of their jurisdiction over the organization of sport in general and over competitions in particular; this confers upon them – in marked contrast to sports clubs – certain public authority prerogatives, such as the authority to sanction. These sanctions can naturally be imposed in instances of doping, one of the most serious violations of sports ethics. However, these sanctions do not derive from the World Anti-Doping Code. Even if the Code did not exist, the Sports Federations would or could hold such powers by virtue of national legislation. This consideration seems to me to suffice to set aside the argument according to which the severe nature of the sanctions imposed by the Federations could, by implication, cause anti-doping sanctions to come down on the criminal side.

Another objection might be based on the possible link between the effects of the sanctions and the interference with fundamental freedoms. As we shall see

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15 Decision to strike out the application from the list of cases dated July 3, 2008 in Lazutina and Danilova *v.* Switzerland.

16 Decision of inadmissibility for non-exhaustion of all domestic remedies dated October 18, 2001, in Antikainen *v.* Finland.

later (see footnote 22 below), the ECHR holds that sports sanctions can, for example, distort competition and therefore, as the case may arise, infringe free competition and the freedom of trade and industry (or economic freedom). I do not, however, consider this objection as being a decisive one either. Many sanctions can interfere with fundamental rights and freedoms, but this has no influence on their criminal civil or even *sui generis* nature. In other words, the severity of a measure (or its proportionality) may influence its juridical qualification, but the fact that a fundamental freedom might be interfered with has no bearing on whether the sanction is of a civil, criminal or even *sui generis* nature.

Overall, the nature of the sanctions under the World Anti-doping Code is not criminal, in my opinion.

This opinion must however be qualified (although moderately) on two counts: on the one hand, the ECHR has never *explicitly* voiced its opinion on this issue (at least one case is still pending currently and has been communicated to the parties[17]); however, this does not give me reason to think *prima facie* that we are faced with a criminal matter. On the other hand, as we shall see later, increasing the severity of sanctions could, if the increase is significant, be such as to push them over the edge into the criminal realm, in view of the ECHR's case law in general.

Having expressed these general considerations, we can examine the eight questions set out above.

5. Regarding the first question:

The new provisions applicable to sanctions according to the Revised Draft Code Version 3.0 are as follows :

***10.2.1 The period of Ineligibility shall be four years where:***

***10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.***

***10.2.1.2 The anti-doping rule violation involves a Specified Substance and the Anti-Doping Organization can establish that the anti-doping rule violation was intentional.***

***10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.***

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17 Bakker *v.* Switzerland, application communicated on September 7, 2012 (n°7198/07). This is an appeal on the grounds that the Swiss Federal Court dismissed the applicant's public law appeal of a CAS arbitral award. On the one hand, this award dismissed his request to lift the suspension imposed on him by the Anti-Doping Committee of the Royal Dutch Cycling Union; on the other hand, it banned the rider for life from participating in any sports competition.

***10.2.3 As used in Articles 10.2 and 10.3, the term "intentional" means that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute an anti-doping rule violation and manifestly disregarded that risk.***

There follows the draft comment:

***[Comment to Article 10.2: Harmonization of sanctions has been one of the most discussed and debated areas of anti-doping. Harmonization means that the same rules and criteria are applied to assess the unique facts of each case. Arguments against requiring harmonization of sanctions are based on differences between sports including, for example, the following: in some sports the Athletes are professionals making a sizable income from the sport and in others the Athletes are true amateurs; in those sports where an Athlete's career is short a two-year period of Ineligibility has a much more significant effect on the Athlete than in sports where careers are traditionally much longer. A primary argument in favor of harmonization is that it is simply not right that two Athletes from the same country who test positive for the same Prohibited Substance under similar circumstances should receive different sanctions only because they participate in different sports. In addition, flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sporting organizations to be more lenient with dopers. The lack of harmonization of sanctions has also frequently been the source of jurisdictional conflicts between International Federations and National Anti-Doping Organizations.]***

Draft Article 10.2 (Version 3.0) thus concerns *ineligibility ("suspension"* in French) for presence, for use, or for attempted presence or use of a prohibited substance or method.

According to the current Code, the period of ineligibility is two years for a first anti-doping rule violation, unless the conditions for reducing or increasing the period, as provided in Articles 10.4 and 10.5 on the one hand, and in Article 10.6 on the other hand, are met.

According to draft Article 10.2, the period of ineligibility for a first violation would be increased from two to four years (subject to the application of reduction clauses) for certain classes of substances, such as anabolic agents and others, unless the athlete or other person is able to prove the absence of his/her fault or negligence (10.4). Otherwise, if there is intention, it would be four years (10.2.1.1 and 10.2.1.2). It would remain two years in the other cases (10.2) and the mechanisms allowing for reduction provided for by the current Code remain applicable (10.5).

The revised Code proposes an increase in the period of ineligibility for classes of substances or agents hypothetically assumed to be more serious/dangerous. There is no doubt that this increase is significant, but it remains *moderate,* even when considering the consequences thereof for the

athletes; one must refer here to Article 10.12 of the Code, which speaks about the status of the athlete.

Now, one must recall that the principle of the *necessity* of sanctions, or the *proportionality* of the sanctions to the violations, has a wider scope of application than just to criminal subject matter; this is reasonable bearing in mind the risk of curtailing personal freedom, and in particular, professional freedom arbitrarily or disproportionately, and hence unfairly. In the same way, sanctions (or sentences) must not be *automatic* and they must be adjustable depending on the circumstances: this is a consequence of the principle of the individualization or personalization of sanctions and sentences. This is precisely what we are dealing with here: not only are sanctions not automatic, they are *adjustable/scalable*. The modularity of sanctions stems from the consideration of several circumstances: the nature of the prohibited substance, the gravity of the individual fault, behaviour during the procedure ("prompt admission"), or even age (minors). Moreover, it is not possible to increase too significantly the consideration given to individual circumstances, since athletes have to be treated equally at the international level, and it would be unjust to treat athletes who have used the same prohibited substance differently, merely because they practice different sports.

Furthermore, the modularity of sanctions works in many ways in favour of *reduction*. Everything works as if the new length of sanctions envisaged in the revised draft were capped, which clearly shows the moderate nature of their increase compared with the current system. Lastly, the equality of treatment of all athletes is guaranteed by the system envisaged in the revised draft, since the criteria applicable to the duration of the period of ineligibility are objective, and do not result in discriminatory distinctions being made between athletes.

Regarding the *proportionality* of the sanctions to the violations, the CAS itself has for a long time accepted that anti-doping sports sanctions must respect this principle[18].

One does have to verify, however, whether this position is also in conformity with the international human rights principles.

Indeed, the case law of the Strasbourg Court does not offer absolute clarity on this point. It is true that neither Article 6 §§ 2 and 3 of the Convention regarding a fair trial in criminal cases, nor even Article 7, which sets forth the principles of legality and non-retroactivity of sentences, explicitly mention the severity of sanctions or their necessity, or even their proportionality to the fault[19]. Seen, however, from the angle of Article 5 of the Convention, which guarantees the right to liberty, the Court has had the opportunity to rule that detaining a prisoner, when he had been granted conditional release was an infringement of Article 5, due to the disproportionality of the length of the new

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18 See in *Jusletter* as early as February 20, 2006, the article by Olivier Niggli and Julien Sieveking "Eléments choisis de jurisprudence rendue en application du Code mondial antidopage".

19 One might even derive from the judgement in Göktan *v.* France dated July 2, 2002, the principle - although it is an isolated one, it has not been invalidated to date, according to which the Convention does not prohibit automatic or non-adjustable sanctions.

period of detention to the breaches of the conditions fixed at the time of his release[20].

Conversely, several national constitutional courts and international courts have clearly ruled that a disproportionate sentence, in particular regarding the length of the sentence (or regarding its *quantum),* is unlawful. This is the position of the French Constitutional Council[21]. The Court of Justice of the European Union has also ruled in this way [22]. The Supreme Court of the United States has also given its opinion regarding this question and it essentially goes in the same direction[23]. The individualization of sentences, and hence the prohibition of sanctions of an automatic and non-adjustable nature is also a traditional principle in German law; this applies for example to fines imposed for infringement of competition law. Lastly Article 49 § 3 of the Charter of Fundamental Rights of the European Union, which has had binding legal force since December 1, 2009 (date on which the Lisbon Treaty came into force) goes further than the Convention inasmuch as it explicitly asserts the principle of the proportionality of penalties[24]. The application of this article, which has apparently not yet given rise to any judgements of the CJEU, should be a further reason for the CJEU to uphold the principle of proportionality, which is no longer merely a general principle of law, but now enjoys the backing of a legal text in Article 49 § 3. Of course, it only pertains to criminal subject matter *stricto sensu*, but it would be unsafe to contend that it should not be applied to sanctions in general, including sports sanctions in the case of anti-doping rule violations.

One can therefore conclude that the internationally recognized principles of law encompass the notions of proportionality of sanctions and prohibition of excessively severe sanctions.

In the present case, however, the increase in the level of sanctions envisaged by the revised draft of the Code remains, I repeat, *moderate* in relative terms and the outcome itself is, in my opinion, not excessive. The increase does not seem to me to be sufficient to shift the sanctions into the area of criminal subject matter.

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20 Judgement in Gatt *v.* Malta dated July 27, 2010.

21 Decision 248-DC dated January 17, 1989 on the freedom of audio-visual communication. According to this decision, an *administrative* authority (and not just a judicial authority) has the right to inflict sanctions. These administrative sanctions, however, in the same way as criminal sentences, must be necessary and proportionate, in particular with regard to their length. This position is founded in Article 8 of the Declaration of Human and Civic Rights 1789, which has constitutional force and contains numerous provisions similar to those of the Convention. See also a more recent decision of the Constitutional Council No 20107-6/7 QPC dated June 11, 2010.

22 Judgement of the CJEU in Meca Medina et al. *v.* Commission (C-519/04) (ruling on an appeal from the Court of First Instance of the EU), dated July 18, 2006: the Court of Justice recalled that anti-doping rules (in this instance applied to long-distance swimmers) did not infringe the rules of free competition as long as they pursued a legitimate objective and were *proportionate.*

23 US Supreme Court, Decision N° O1-1289 dated April 7, 2003 in State farm mutual insurance Co *v.* Campbell. The Supreme Court of the USA held that a financial sanction, such as "punitive damages" inflicted by the jurors in a trial must not be disproportionate with the harm suffered by the victims and should normally not exceed 9 times the amount of the damage caused. More recently, but in a criminal case, the Supreme Court decided that an automatic sanction violated the Constitution: Decision Miller *v.* Alabama and Jackson *v.* Hobbs dated June 25, 2012.

24 "The severity of penalties must not be disproportionate to the criminal offence"

In addition, in my opinion, there does not seem to be any breach of the equality of treatment of athletes. Indeed, the difference in the proposed durations, besides not being particularly significant, is based on objective criteria and not on subjective differences liable to be characterised as arbitrary (see my comment above under section 5).

In conclusion, it is my opinion that the revised draft Article 10.2 (Version 3.0) is compatible with the principles of international law and human rights.

6. Regarding the second question:

The new provisions envisaged with regard to fair hearings are as follows (Version 3.0):

***8.1 Fair Hearings.***

***For any Person who is asserted to have committed an anti-doping rule violation, each Anti-Doping Organization with responsibility for results management shall provide, at a minimum, a fair hearing within a reasonable time by a fair and impartial hearing panel. A timely reasoned decision specifically including an explanation of the reason(s) for any period of Ineligibility shall be publicly reported.***

***[Comment to Article 8.1: This Article requires that at some point in the results management process, the Athlete or other Person shall be provided the opportunity for a timely, fair and impartial hearing. These principles are also found in Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms and are principles generally accepted in international law. This Article is not intended to supplant each Anti-Doping Organization's own rules for hearings but rather to ensure that each Anti-Doping Organization provides a hearing process consistent with these principles.]***

The revised draft of Article 8.1 does indeed pertain to the issue of fair hearings. According to the current Code, which is far more detailed than the proposed revised version, the Anti-Doping Organizations with responsibility for the management of test results must guarantee that any person suspected of having committed an anti-doping rule violation be granted the due process of a fair hearing and, in particular, abide by a certain number of principles, which are those generally enshrined in the relevant international human rights instruments[25].

The elements that make up a fair trial vary. I recall that the most important ones are as follows:

- The right to an effective appeal, and in particular the right to appeal to a tribunal, and the right of access to such a tribunal which is not impeded by excessive limitations;

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[25] See footnote 2 above.

- The independence and impartiality of the tribunal and of the member or members composing it;
- The guarantee of equal means for all parties;
- Public nature and transparency of the proceedings ;
- Reasonable length of the proceedings;
- The possibility to appeal the tribunal's decision, subject to certain exceptions;
- Prompt and complete enforcement of the tribunal's decision.

Other safeguards are, for their part, particular to criminal subject matter, such as the presumption of innocence, the right to defence or legal assistance; but they do not come into consideration if the subject matter, as is the case here, is truly civil and not criminal.

Draft Article 8.1 (Version 3.0) retains in substance the same safeguards, though much more briefly and concisely, which is no problem in itself.

My opinion :

Bearing in mind the above (under section 4, "Some very important general considerations"), the answer to this question is a simple one. Whenever disciplinary anti-doping procedures concern rights and obligations of a civil nature, they fall under the scope of application of Article 6 § 1 of the Convention regarding the right to a fair trial. In contrast to §§ 2 and 3 of the same Article, which applies only to persons "charged with a violation", which has always been understood in case law as meaning "charged with a criminal offence", § 1 of Article 6 is of general scope, which encompasses these persons (i.e. those charged with a violation) as well as any person who raises a challenge with regard to their civil rights and obligations. The new wording suggested in Article 8.1, although less detailed than the version currently in force, contains all the safeguards required by Article 6 § 1, and it grants them to the persons subject to the Code.

This wording did however fall short on one point: not only does the hearing have to take place within a reasonable time limit, the reasoned decision handed down thereafter must also be made within a reasonable time limit. If an excessive period of time were to pass between the hearing and the decision, the well-known requirement set forth in Article 6 § 1 of the Convention – to be heard within a reasonable time – would be disregarded. Indeed, according to the Strasbourg Court, this provision must be applied to the entire procedure, including to the period of time following the decision on the merits[26].

The following minor editorial clarification has however been inserted in the most recent version, dated June 10, 2013: the new wording now reads: "**a timely reasoned decision specifically including an explanation of the reason(s) for any period of ineligibility shall be publicly reported**".

[26] The case law is time-honoured and constant: see for example Robins *v.* United Kingdom, judgement dated September 23, 1997.

This wording allays the concern I expressed above regarding the previous version [27]. Therefore, I espouse the version dated June 10, 2013.

My opinion therefore is that draft Article 8.1 (Version 3.0) is compatible with the principles of international law and in particular with Article 6 § 1 of the European Convention for the Protection of Human Rights regarding the right to a fair trial (provision which is applicable in the instance)[28].

7. Regarding the third question:

The principle of *prohibited association*, which has to be examined as to its compatibility with the recognized principles of international law and human rights, is set forth in draft Article 2.10 and was worded as follows as of May 6, 2013:

***2.10 Prohibited Association.***

***Association by an Athlete in a professional or sport-related capacity with any Athlete Support Personnel who:***
***(i) is serving a period of Ineligibility; or***
***(ii) has been found in a criminal, disciplinary or professional proceeding within the previous eight years to have been involved in conduct which would have constituted a violation of anti-doping rules if Code-compliant rules had been applicable to such Person.***

***In order for this provision to apply, it is necessary that the Athlete has previously been advised in writing by an Anti-Doping Organization with jurisdiction over the Athlete, or by WADA, of the Athlete Support Personnel's disqualifying status.***

Followed by the draft comment:

***[Comment to Article 2.10: For example, Athletes should not be working with coaches or trainers who are Ineligible on account of an anti-doping rule violation. Similarly, they should not be associated with physicians or other Persons who have been criminally convicted or professionally disciplined in relation to doping.]***

This draft Article 2.10 is new. It introduces a new anti-doping rule and a new anti-doping rule violation, i.e. that of prohibited association.

All athletes are to be prohibited from associating with any person among their support personnel (coach, trainer, physician, agent or other), who is suspended or who in the eight preceding years acted in a way that would have violated anti-doping rules if the relevant Code rules applied to such a person. For this provision to be applicable to an athlete, however, the Anti-Doping Organization with jurisdiction over such an athlete, or WADA, would have had to

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[27] May 6, 2013.

[28] See Section 4 above, "Some very important general considerations"

inform the athlete previously in writing about the disqualifying status of the member of his support personnel.

For this draft rule to be compatible with the applicable international principles, it is necessary, in my opinion, for:

- the rule to be sufficiently *predictable,* which implies that it must be clear;
- the burden of proof on the athlete not to be too heavy and such that it makes it impossible for him/her to disprove the allegation.

Indeed, the predictability of a law and the prohibition of having to bring an impossible proof (which is one of the elements of equal means) are part of the safeguards of a fair trial within the meaning of Article 6 § 1 of the Convention. Advising the athlete in writing and in advance proffers sufficient safeguards to the athlete. Conversely, it does not appear that the draft revised Code foresees a provision – either in Article 2.10, or anywhere else - for analogous information to be communicated to the other persons, i.e. to the athletes' support personnel. It does seem unfair for such personnel, who run the risk of suffering similarly serious consequences from the new violation of prohibited association – even though this is in principle right –, not to be entitled to receive previous written information, if only for the purpose of refuting the allegations made against him/her if necessary.

In fact, the rule itself seems to be sufficiently clear, provided that the notion of *association* itself be specified, namely by defining it as resorting to the services of a person or persons referred to in the Article in question, regardless of the nature of the transaction (and whether for a fee or free of charge). The absence of any clarification could well give rise to the criticism of an absence of predictability.

However in the most recent version – dated June 10, 2013 – draft Article 2.10 and its three sub-clauses 2.10.1, 2.10.2 and 2.10.3, allay these fears, as on the one hand the notion of association is specified, and on the other hand the support personnel now is given the same safeguards as the athletes themselves with respect to information being furnished in advance [29].

On these terms, I am able to support this most recent version, which incorporates the recommendations I expressed on these two issues.

Lastly, I feel that the period of eight years is somewhat long. In many legal systems, in terms of criminal sanctions, such a length is close to that of the statute of limitation in the area of criminal subject matter. Particularly in Europe, however, there is a tendency to lengthen the criminal limitation period, and thus by analogy or a fortiori also the limitation period for non-criminal sanctions. But overall, the length of eight years could in these circumstances appear too strict.

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[29] With respect to support personnel, the Anti-Doping Organization must at the very least use all reasonable efforts to inform them and they have a period of 15 days to appear before the Anti-Doping Organization to assert that the criteria disqualifying them from associating with an athlete do not apply to them.

Lastly, in the most recent version of draft Article 2.10.2 (Version 3.0), the length has been reduced to six years, so my comments above have been duly considered.

My opinion on the whole, regarding draft Article 2.10 (and 2.10.1, 2.10. 2 and 2.10.3) is favourable.

The wording in its entirety is as follows:

**Article 2.10, version 3.0**

***2.10 Prohibited Association.***

***Association by an Athlete or other Person subject to the authority of an Anti-Doping Organization in a professional or sport-related capacity with any Athlete Support Personnel who:***

***2.10.1 is serving a period of Ineligibility; or***

***2.10.2 where Ineligibility has not been addressed in a results management process pursuant to the Code has been convicted or found in a criminal, disciplinary or professional proceeding to have engaged in conduct which would have constituted a violation of anti-doping rules if Code-compliant rules had been applicable to such Person (the prohibited status of such Person shall be in force for the longer of six years from the criminal, professional or disciplinary decision or the duration of the criminal, disciplinary or professional sanction imposed); or***

***2.10.3 is serving as a front or intermediary for an individual described in Article 2.10.1 or 2.10.2.***

***In order for this provision to apply, it is necessary that the Athlete or other Person has previously been advised in writing by an Anti-Doping Organization with jurisdiction over the Athlete or other Person, or by WADA, of the Athlete Support Personnel's disqualifying status and the potential Consequence of prohibited association and that the Athlete or other Person cannot reasonably avoid the association. The Anti-Doping Organization shall also use reasonable efforts to advise the Athlete Support Personnel who is the subject of the notice to the Athlete or other Person that the Athlete Support Personnel may, within 15 days, come forward to the Anti-Doping Organization to explain that the criteria described in Articles 2.10.1 and 2.10.2 do not apply to him or her.***

***The burden shall be on the Athlete or other Person to establish that any association with Athlete Support Personnel described in Articles 2.10.1 or 2.10.2 is not in a professional or sport-related capacity.***

***Anti-Doping Organizations that are aware of Athlete Support Personnel who meet the criteria described in Articles 2.10.1, 2.10.2, or 2.10.3 shall submit that information to WADA.***

And the comment:

***[Comment to Article 2.10: Athletes and other Persons must not work with coaches, trainers, physicians or other Athlete Support Personnel who are Ineligible on account of an anti-doping rule violation or who have been criminally convicted or professionally disciplined in relation to doping. Some examples of the types of association which are prohibited include: obtaining training, strategy, technique, nutrition or medical advice; obtaining therapy, treatment or prescriptions; providing any bodily products for analysis; or allowing the Athlete Support Personnel to serve as an agent or representative. Prohibited association need not involve any form of compensation.]***

8. Regarding the fourth question:

The wording of the draft was as follows:

***10.12 Payment of CAS Cost Awards.***

***Athletes and other Persons shall not be allowed to participate in Competition until any CAS cost awards against them have been paid, unless fairness requires otherwise.***

And the wording of the related comment:

***[Comment to Article 10.12: The determination of whether fairness requires that a period of Ineligibility be extended for non-payment of a CAS cost award shall be initially made by the Anti-Doping Organization which has jurisdiction over the Athlete or other Person's return to eligibility. Such decision may be appealed pursuant to Article 13.]***

Draft Article 10.12 prohibits athletes and other persons from taking part in competitions for as long as they have not paid the costs arising from a CAS award relating to them.

The decision of the Swiss Federal Court dated March 27, 2012 in the Matuzalem case (1st Civil Law Division)[30] may serve as a reference, although it does not relate to doping. In this case, the appellant, a professional football player, had unilaterally and illegally terminated his contract with an Ukrainian club and had been hired by a Spanish club, which had accepted to bear the consequences of the breach of contract. The Disciplinary Committee of the International Football Federation (FIFA) ruled that both the football player and the Spanish club were obliged to settle their debt owed to the Ukrainian club within 90 days, as ordered by the CAS failing which the football player, Mr Matuzalem, would be banned from all football activity. The Swiss Federal Court

[30] Swiss Federal Court - 4A_558/2011.

overturned this decision on grounds that it interfered excessively with the football player's economic freedom, and his private and professional life. The Federal Court held furthermore that to deprive a professional athlete of all sporting activity, hence of all income, made it impossible for him to settle his debts.

Does such a draft Article not run the risk of bringing about similar situations against which the Swiss Federal Court reacted?

This is indeed possible, even likely.

As far as the Convention is concerned, certainly in the case where a contractual obligation is not fulfilled – such as a debt – it only prohibits the act of depriving the debtor of his liberty[31] (Article 1 of Protocol N° 4 to the Convention). However, the prohibition to practice a sporting activity, even professionally, regardless of its severity for the person concerned, cannot be placed on the same footing as a deprivation of liberty *stricto sensu*. Nonetheless, the ECHR is very sensitive when it comes to inflicting excessive pecuniary sanctions, not in this instance with regard to the asserted violation, but in absolute terms, in view of the consequences for the rights and freedoms of the sanctioned person. It has thus held that excessively restricting the right of access to a procedure of enforcement by ordering the applicant to pay the legal costs, which were disproportionate to the latter's means, infringed Article 6 § 1[32]. It has also held in the case of an applicant, a football club engaged in a dispute with the International Football Federation (FIFA) following the transfer of a professional player, that requiring the player to pay excessive legal costs, by obstructing his right to appeal to the country's Supreme Court, violated the right of access to a tribunal, guaranteed by Article 6 § 1[33].

In the absence of a more pertinent case law emanating from the ECHR, it would in any event seem prudent to seek guidance in the recent Matuzalem decision of the Swiss Federal Court - the "natural judge" with respect to anti-doping sanctions under the Code - and to abstain from introducing in the Code an article such as the proposed Article 10.12. Indeed, the Swiss Federal Court, and possibly the ECHR, might view this as introducing an additional *disproportionate* sanction.

Conversely, the sanction included in the draft could not fall under the rule *non bis in idem* laid down in Article 4 of Protocol N° 7 to the Convention, which applies only in criminal cases (see the aforementioned decision in Göktan, and more specifically the decision in Zolotoukhine v. Russian Federation dated February 10, 2009[34]). In the same way, placing such a prohibition to exercise an activity on the same footing as forced labour within the meaning of Article 4 of the Convention does not seem possible either.[35]

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31 Commonly known as debtor's prison.

32 Judgement in Apostol *v.* Georgia dated November 28, 2006.

33 Judgement in Football club of Mretebi *v.* Georgia dated July 31, 2007.

34 See also the decision of the CJEU in Norma Kraaijenbrink (C-367/05) dated July 18, 2007.

35 In a recent case at the ECHR, which has reached the stage of communication to the parties, Mutu c. Switzerland (application N°40575/10), the complaint lodged by the applicant football player based on Article 4

Nevertheless, the non-conformity of the proposed sanction with the Convention, and in particular with its Article 8 regarding the right to respect for private and family life, in my opinion seems to suffice to make it suspect from a legal perspective.

My opinion, therefore, was to drop this element of the revised draft of the Code. To my mind, it seemed of dubious legality and, if one accepts the rationale of the Matuzalem decision as being reasonable, the proposed revision was, in addition, not particularly advisable : the sporting career of professional athletes is not very long in most cases. To prevent them from earning their living by participating in competitions for a period which, conversely, can be long, is to render them incapable of settling the amounts they are required to pay (albeit legitimately) and hence it is a counter-productive measure.

However, Version 3.0 of draft Article 10.12, re-numbered 10.9, seems to set aside most of my previous objections, which were inspired in particular by the Matuzalem decision. This new version *specifies in detail* the amounts the athlete must pay back before being allowed to continue his/her sporting activity. Now there are more safeguards. The athlete, who can prove that the payment of such sums would create a manifestly excessive financial burden, will be able to seek authorisation to pay back a *reasonable* portion of the debt owed and to submit a payment plan to the CAS for approval. The related comment also considers the possibility of reaching an out-of-court settlement with the relevant Anti-Doping Organization without having to resort to the CAS.

Nevertheless, I persist in the belief that this is still not sufficiently in line with the reasoning of the Matuzalem decision to which I subscribe, whilst acknowledging that the principle of enforcing judgements is also one of the components of a fair trial[36]. In this respect, I note – merely by analogy – that the Strasbourg Court has held that it was in breach of Article 6 of the Convention for a party to have been deprived of his right of appeal against the decision of a court of appeal as a result of not having paid the amount of the debt he was ordered to pay by such decision in circumstances where payment would have caused him manifestly excessive consequences.[37]

Furthermore, even if these are pragmatic considerations rather than being based juridical arguments strictly speaking, I believe that the "procedural" efforts made in the new draft Article (10.9) are needlessly complex considering the intended objective. In other words, I revert to my original reticence regarding provisions making the right to participate in sports competitions conditional on payment in full of a financial sanction.

My opinion, therefore, is that draft Article 10.9 (formerly Article 10.12), as reproduced below including the related comment, is not compatible, or not sufficiently compatible, with the principles of international law and human rights.

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was not communicated, which is, as I have pointed out, a strong indication from the Court as to the remote probability of the applicability of Article 4.

36 See decision in Hornsby *v.* Greece dated March 19, 1997.

37 Annoni di Gussola et al. *v.* France, decision dated November 14, 2000.

**Article 10.12, replaced by 10.9 in Version 3.0**

***10.9 Repayment of CAS Cost Awards and Forfeited Prize Money.***

***As a general principle, Athletes and other Persons shall not regain eligibility until CAS cost awards and forfeited prize money imposed upon them on account of anti-doping rule violations have been paid. However, where an Athlete or other Person can demonstrate that this general rule would create a financial burden that is manifestly excessive, then the Athlete or other Person may submit a payment plan to CAS for approval. Failure to comply with an approved payment plan will automatically result in Ineligibility.***

***The priority for repayment of CAS cost awards and forfeited prize money shall be: first, payment of costs awarded by CAS; second, reallocation of forfeited prize money to other Athletes if provided for in the rules of the applicable International Federation; and third, reimbursement of the expenses of the Anti-Doping Organization that conducted results management in the case.***

***[Comment to Article 10.9: Without going to CAS, the Athlete or other Person can always reach agreement on a payment plan with the relevant Anti-Doping Organizations.]***

9. Regarding the fifth question:

Draft Article 14.3.4 reads as follows:

***14.3.4 For purposes of Article 14.2, publication shall be accomplished at a minimum by placing the required information on the Anti-Doping Organization's website and leaving the information up for the longer of one month or the duration of any period of Ineligibility imposed.***

This draft Article 14.3.4 of the Code is also new. Public dissemination, or publication, of sanctions is already provided for by the current Code and is a long-standing, seemingly effective, practice. It serves as a strong deterrent, so *a priori* it is appropriate from the point of view of the Code and of the ongoing review process.

The modification added to the draft is technical more than anything else, i.e. to post the information (at a minimum) on the website of the Anti-Doping Organization and to keep it there during the longer of the two periods: either for one month or during the length of the ineligibility period (if the latter exceeds one month). At present, the duration is for at least one year. Moreover, certain safeguards have already been built into Article 14.2 of the Code and the proposed modification does not seem to affect them. Furthermore, draft Article 14.3.2 also offers the athletes safeguards, as does CAS case law.

It is, therefore, rather a question of compatibility of the *current* rules of publication of sanctions with international standards. It must be recalled that

these sanctions are not criminal; this means that, as such, they are not subject to the rules and safeguards prevailing everywhere with regard to a person's criminal record.

For their part, the institutions of the European Union, the Commission and the Court of Justice, have taken the opportunity to recall that anti-doping rules must respect the principles of personal data protection – which also exist, according to the case law of the ECHR[38], under the aforementioned Article 8 of the Convention. Other international instruments have similar provisions, such as Article 8 of the Charter of Fundamental Rights of the European Union[39].

On the whole, however, the publication provision set forth in the current Code and proposed in the revised draft does not appear to interfere excessively with the respect for athletes' private (and family) life. It has a legitimate objective and does not seem to be disproportionate. There is however a dual *reservation*:

On the one hand, if the athlete's ineligibility period is long, the duration of publication can also last for a long period. At present, publication can be maintained for at least one year, without fixing a maximum. The revised draft renders the ineligible person's situation more serious. One may not, however, mistake the length of ineligibility for that of the publication of such ineligibility, which may be perceived as an additional, or subsidiary, "sentence" (but in any case as a sanction). Publication may indeed have negative repercussions on the private, professional and even family life of the ineligible athlete, for example in terms of the athlete's ability to find employment (again). It would be preferable, if the wish is to preserve the equivalence between the length of ineligibility and of publication, to give the person concerned the possibility to request that the publication of his/her ineligibility be terminated before the ineligibility has expired. The question is, of course, as of when. It is difficult to answer this question categorically, since it depends on the length of ineligibility. In my opinion, the longer the ineligibility, the more the request to terminate the publication would be helpful, even desirable. At any rate, it would be up to the body with the sanctioning authority to accept or refuse such a request depending on all the circumstances. The request for termination of the publication would not be automatic; it is not enough to simply ask in order to obtain the termination.

On the other hand, the case law of the ECHR vigorously protects the confidentiality of private data relating to the *health* of the person in question[40]. A provision must, therefore, be added to the revised Code stipulating that the publication of information about the health of a person (which is of a particularly sensitive nature in the area of doping) without the latter's consent is prohibited.

My opinion, therefore, is that draft Article 14.3.4 (and the related rules) are compatible with the principles of international law and human rights, subject to giving the ineligible person the possibility to request that the publication of

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[38] Decision in Leander *v.* Sweden dated April 26, 1987 and abundant subsequent case law.

[39] See the judgement of the ECJ in Schecke (C-92/09) dated November 9, 2010 regarding the application of the principles set out in Article 8 of the Charter – though in a very different subject area (that of subsidies paid by the European Agricultural Fund).

[40] See for example Z. *v.* Finland, judgement dated February 25, 1997 and several subsequent judgements.

his/her ineligibility be terminated prior to its expiry, in cases of long periods of ineligibility.

10. Regarding the sixth question:

The previous version of draft Article 17 reads as follows:

***No anti-doping rule violation proceeding may be commenced against an Athlete based on Article 2.1 (Presence) or Article 2.2 (Use) unless such action is commenced within ten (10) years from the date the violation is asserted to have occurred. Actions based on any other anti-doping rule violation must be commenced within fourteen (14) years from the date when the violation is asserted to have occurred.***

Essentially, the objective of draft Article 17 was to increase the length of the statute of limitation – which in the current Code is eight years from the date on which it has been asserted that an anti-doping rule violation was committed – to ten years from this date, when an athlete has violated the rule regarding the presence or use (of prohibited substances or methods) and to fourteen years in all other cases (trafficking, tampering, administration etc.).

As mentioned already in part under Section 6 above (regarding the third question) the main difficulty lies in the significant increase in the length of the limitation period.

The ECHR expressed its position on the principle in the Stubbings case[41], and has reasserted it several times subsequently[42]. Limitation periods are not necessarily an insurmountable obstacle to the right of access to a tribunal (guaranteed by Article 6 § 1), which according to the Court's case law is not an unlimited right and contains implicit limitations. These limitation periods promote legal certainty, but they also protect potential defendants against tardy complaints and avoid legal actions being brought a very long time after the alleged facts have taken place in which the provision of evidence would be arbitrary or even impossible. In the first cited case (Stubbings), a case of physical harm, the Court deemed the six years' limitation period to be reasonable, as it did with the twelve years in the second case (J.A. Pye Oxford), which concerned conflicts of ownership and property.

In general, applicants complain about periods being too short, but based on the same jurisprudential criteria, one can also imagine that litigants could well complain about the opposite, i.e. too much time, in the name of a kind of "right to finality" (similar to an entry in a person's criminal record and the deletion thereof). This is paradoxical only in appearance, since legal certainty and the reliability of evidence must also benefit persons who have violated or are accused of having violated anti-doping rules. Recently, the Strasbourg Court censured the retention of records of individuals (true, it concerned persons who had been acquitted at the criminal level or against whom prosecution had been discontinued) indefinitely or for too long a period in public fingerprint and genetic

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41 Judgement in Stubbings *v.* United Kingdom dated October 22, 1996.

42 See recent judgement in J.A. Pye Oxford (Ltd) *v.* United Kingdom dated June 30, 2007.

databases[43]. In short, in so doing, it laid down the principle of *deletion* and, having done so with regard to criminal subject matter, it should apply it a fortiori to the area of administrative sanctions.

A long limitation period in itself is not particularly shocking in this instance, especially since it is a matter of taking legal action against, and sanctioning, serious cheating. Nevertheless, whilst being able to accept a change from eight to ten years – a moderate increase in relative terms bringing the duration to a not unreasonable level in absolute terms – one may and should well wonder whether shifting from eight to fourteen years – nearly doubling the period to one which is very long - would not be judged excessive in the event of litigation. Moreover, the difference between the two categories of violations (ten years and fourteen years) is itself very significant and the rational justification thereof is not obvious.

Nonetheless, the wording of draft Article 17 (Version 3.0) below takes account of my comments and lowers the statute of limitation to ten years for all cases. Thus, I no longer have cause to make any reservations regarding this article.

**Article 17, version 3.0**

***No anti-doping rule violation proceeding may be commenced against an Athlete or other Person unless such action is commenced within ten years from the date the violation is asserted to have occurred.***

My opinion:

Draft Article 17 (Version 3.0) of the revised Code is compatible with the principles of international law and human rights.

11. Regarding the seventh question:

The compatibility of a *life* ban or *ineligibility for life* of an athlete in the event of recurrent violation (second or third violation) with the principles of international law and human rights is a sensitive issue calling for an answer, which it is not easy to give. One certainly cannot make a comparison with a sentence of irreducible life imprisonment, which, ever since the abolition of the death penalty (which – by the way – is not yet universal, though nearly so in Europe[44]), is increasingly deemed as being incompatible with human rights. The analogy is ill-advised, for imprisonment and deprivation of liberty are, quite obviously, more serious than ineligibility.

Ineligibility or exclusion for life in disciplinary or professional areas exists in many national legal systems, for example as applied to medical doctors or lawyers. The ECHR has often admitted the legitimacy of such sanctions,

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[43] Judgement in S. and Marper *v.* United Kingdom dated December 4, 2008.

[44] Ever since Protocol N° 6 to the Convention came into force, all the Member States of the Council of Europe have ratified it except for the Russian Federation, but the latter has been applying a moratorium since 1996.

acknowledging implicitly their non-disproportionate nature. It accepted the legitimacy for example in the case of the life disbarment of a lawyer[45], of a medical doctor[46] and of a chartered accountant[47].

Life ineligibility or life bans are even more frequent[48] in the area of anti-doping sanctions. These are grave decisions, but are they necessarily disproportionate to the rule violation or are their consequences excessive in absolute terms?

Absent, to my knowledge, any case law on this subject emanating from the human rights courts, namely from the ECHR, I would be inclined to answer both questions in the negative. Even though this is not a decisive argument, it is a fact that the majority of athletes, at least in certain disciplines, have to end their sports career at a relatively young age so that the "for life" aspect of their ineligibility is frequently theoretical rather than real.

In addition, two further arguments come down on the side of the legitimacy, or legality, of life ineligibility: the fact that it cannot be applied to sanction an isolated act or conduct and the fact that suspension or exclusion for life also exists in many other professions, without it being considered unlawful.

There is of course no doubt, given the serious and (in some ways) shameful nature of an athlete's life ban, that especially rigorous disciplinary safeguards and a subsequent judicial appeal should be in place in such cases and that this measure should be applied with moderation.

My opinion therefore is that ineligibility for life of an athlete is not incompatible with the principles of international law and human rights.

12. Regarding the eighth question:

***5.2 Scope of Testing.***

***Any Athlete may be required to provide a Sample at any time and at any place by any Anti-Doping Organization with Testing authority over him or her. Subject to the jurisdictional limitations for Event Testing set out in Article 5.3:***

The problem relating to the place and the time testing can be performed on athletes by the organization with testing authority raises the issue of establishing whether this place and time are in conformity with the relevant international standards, namely Article 8 of the European Convention for the

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45 Judgement in Tropkins *v.* Latvia dated May 3, 2001.

46 Judgement in Gubler *v.* France dated July 27, 2006.

47 Judgement in Djaoui *v.* France dated October 4, 2007.

48 For recent cases we can cite the life suspension pronounced by the United States Anti-Doping Agency (USADA) dated August 24, 2012 against the famous rider Lance Armstrong or the one imposed by the Athletics Federation of Russia dated December 18, 2012 against the Russian race walker Sergei Morozov. There is also the even more recent case of a life ban of the Jamaican sprinter Steve Mullings, which was upheld by the CAS on March 13, 2013.

Protection of Human Rights and Fundamental Freedoms (which reflects Article 12 of the Universal Declaration). Article 8 of the Convention guarantees the right to respect for private and family life, which includes the *place of residence (domicile).*

Indeed, the draft of Article 5.2 of the revised Code proposes that any athlete may be obliged to provide a sample at any time or any place by any organization with testing authority over him or her. This obligation is explained in, and further strengthened by, Article 4.5.5 of the International Standard for Testing. Indeed, these standards are just as binding as the Code itself on the organizations and States who accept to implement the World Anti-Doping Program.

The provisions of this article have raised queries, in particular by the French National Anti-Doping Agency (AFLD). In certain national legislation[49], testing may not be carried out at the athlete's *domicile* during the night between 9 p.m. and 6 a.m.

The case law of the European Court of Human Rights first of all holds that the notion of place of residence (*domicile*) is an autonomous notion[50] and it gives it a wide interpretation[51]. It could even encompass the hotel room in which an athlete resides, in particular during a competition in which he/she participates[52], although the issue around *domicile* goes beyond the remit of a hotel room.

The issue of the time of testing is a delicate one. In several countries (see footnote 49), in accordance with the tradition of respecting a person's private sphere and sleep, nocturnal house searches are prohibited, except in the case of emergency or *in flagrante delicto* – and this may be relevant to the present legal opinion, as we will see later – or in the case of grave offences such as those involving drugs in particular. National tribunals are inclined to find quite readily that the rules makers may extend the range of cases in which a private home may be searched at night, despite criticism from academic commentary[53].

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[49] For example in France (Sports Code amended by decree dated April 14, 2010 – see in particular Article L. 232-14 of this Code), in Germany (section 758a (4) of the Code of Civil Procedure) and in Austria (§ 30(2) of the Law on the Enforcement of Judgements).

[50] See Buckley *v.* United Kingdom, judgement dated October 25, 1996.

[51] The Court of Justice of the EU has modified its case law in this area regarding certain points in order to take into account the Strasbourg Court's case law: see for example the ruling of the CJEU in Roquette frères SA dated October 22, 2002 (with regard to the notion of private premises extended to commercial premises).

[52] The Court did not explicitly rule on the question of hotel rooms. In its decision dated June 26, 2001 in O'Rourke *v.* UK, it did not address the question because the complaint based on interference with the inviolability of the home was inadmissible for a different reason. Nonetheless, the effort already undertaken by the Strasbourg Court to interpret "domicile" extensively, in particular by assimilating the home with company head offices and commercial premises, leads one to believe that a temporary residence, such as a hotel on the occasion of competitions, (or the "Olympic Village"), could be brought under the scope of the protection granted by Article 8 of the Convention.

[53] See for example the decision of the French Constitutional Council dated March 4, 2004 N° 2004-492 DC regarding the law adapting justice to the evolution of crime or the ruling of the French State Council dated February 24, 2011 in Union nationale des footballeurs professionnels, in which the appeal lodged by this union dated April 14, 2010 against the aforementioned decree was rejected (see footnote 49 above).

The Strasbourg Court's case law on these questions is not very abundant. Certainly, the Court has ruled in many cases that searches or house searches were in contravention of the Convention, for lack of sufficient procedural safeguards[54]. Cases specifically involving the infringement of the inviolability of the home during night-time are more rare. In all, there are only two in which the Court ruled that Article 8 had been violated by a house search during the night, in both cases on the ground that there was no case of *in flagrante delicto*[55]. In another case, the argument put forward by the applicant based on the fact that the house search had taken place during the night at 6 a.m. was deemed "pertinent" by the Court, even though the applicant was absent at the time (which demonstrates the objective nature of respect for the home)[56].

As to the procedural safeguards, the Court holds that they need to be such as to prevent abuse and the risk of arbitrariness and to ensure that searches and visits of a person's residence (*domicile*) remain *proportionate*[57]. The notion of "*adequate safeguards*" figures prominently in its case law. The Court holds in particular that under the national legislation of a country, visits and searches are authorized *without a prior warrant* issued by a judge, but subject to effective ex post judicial review[58]. Moreover, the serious (or conversely, minor) nature of the violation supposedly committed by the person being controlled (i.e. searched or visited) is a component which is also part of the analysis when assessing the proportionality of the challenged intervention[59]. Lastly, emergency (or *in flagrante delicto*) may legitimize the performance of a doping control, for example at the person's *domicile*.

This eighth question is thus a delicate one. On the one hand, it is important to guarantee the right to respect for private life, and in particular for the place of residence (*domicile*). On the other hand, the possibility of testing at night is crucial for the fight against doping: indeed, in many sports, it is very often at night-time that the acts of cheating are perpetrated. It may well be – and the testimony of "repented cheats" has borne this out – that anti-doping rule violations are committed shortly after 9 p.m. and become undetectable in practice if testing is conducted after 6 a.m., i.e. nearly nine hours later.

How can one reconcile this provision, which is essential for the fight against doping, with the principles of proportionality and respect for human rights, which the World Anti-Doping Code recalls in its introduction?

As I explained above, the Court's case law does not completely discard the possibility of testing during the night even when it involves an interference with the respect for the *domicile*.

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[54] See for example the judgements in Van Rossem *v.* Belgium dated December 9, 2004 and in André *v.* France dated July 24, 2008 and in Rossiot *v.* France dated June 28, 2012 (relating to the Cofidis case, hence the fight against doping in cycling races)

[55] This is the Damian-Buruena and Damian *v.* Romania case dated May 26, 2009 and the Bisir and Tulus *v.* Moldova case, judgement dated May 17, 2011.

[56] Zubal *v.* Slovakia, judgement dated November 9, 2010.

[57] Camenzind *v.* Switzerland judgement dated December 16, 1997.

[58] Smirnov *v.* Russia, judgement dated June 7, 2007 ; *a contrario,* Harju *c.* Finland, judgement dated February 15, 2011.

[59] See for minor infringements and violations of Article 8, judgement in Buck *v.* Germany dated April 28, 2005.

Indeed, the Court has accepted it in the case of "*in flagrante delicto*" (within the non-strictly criminal meaning of the term, since anti-doping procedures are not criminal as we saw above). In this respect, where *grave and matching suspicions* give reason to believe that a night-time doping control is indispensable to uncover the truth, such a control could be admitted, in my opinion. The test is more stringent than mere "plausible reasons to suspect" that a person has committed a violation within the meaning of Article 5 § 3c) of the Convention on the right to liberty and security. Nevertheless, this is justified. Whilst "plausible reasons to suspect" under this Article 5 permits the lawful arrest and detention of a person, an arrest warrant must nevertheless be issued beforehand or an equivalent procedure must be put in place; this is not necessary in the case of searches or visits of a person's residence, precisely because they curtail liberty less than arrests.

Furthermore, when defining the *duration* of "night-time", one could accept such duration from 11 p.m. (and no longer from 9 p.m.) to 6 a.m. (for all seasons). Thus, a seven hour period of inviolability (relatively speaking) of the home – and no longer 9 hours - would constitute an acceptable compromise between respect for sleep and private life on the one hand and the concern of making cheating less easy, on the other.

Indeed, other criteria by way of additional safeguards would still have to be added:

- the *gravity* of the suspected infringements, since interfering with the inviolability of the *domicile* and/or of private life in the case of minor infringements becomes disproportionate (see the aforementioned case *Buck)*;
- the existence of adequate procedural safeguards, in particular the possibility of conducting effective reviews of sanctions, which may result from the testing of athletes. In this respect Article 13 of the Code on appeals (whether to the CAS, as the case may be, or to a national organization) is satisfactory, in my opinion.
- the absence of excessive, hence disproportionate, consequences, but this might well be covered by the preceding criterion.

In my opinion, it is not absolutely necessary to supplement Article 5.2 along these lines, but this should be mentioned in a comment, since the Code states (Article 24.2) that the comments should be used to interpret the Code.

My opinion:

In view of the real importance of testing, including during the night-time, for the fight against doping, the possibility of testing athletes at their *domicile* (and regardless of the type of such *domicile*) must be accepted. It is, however, necessary to recapitulate in a comment to the future Article 5.2 the criteria emanating from the case law of the Strasbourg Court (as recalled above), in order to ensure that the testing authorities do not abuse the controls; avoid arbitrariness; limit doping controls to cases of "*in flagrante delicto*"; perform controls only if there is suspicion of grave anti-doping rule violation; and that effective subsequent reviews guarantee the possibility of reviewing possible sanctions on appeal. The meaning of "night-time" could also be specified in such

a comment: I would suggest defining night (in all seasons) as the time between 11 p.m. and 6 a.m.

Version 3.0 of Article 5.2 and its comment:

***5.2 Scope of Testing.***

***Any Athlete may be required to provide a Sample at any time and at any place by any Anti-Doping Organization with Testing authority over him or her. Subject to the jurisdictional limitations for Event Testing set out in Article 5.3:***

And the related comment:

***[Comment to Article 5.2: Additional authority to conduct Testing may be conferred by means of bilateral or multilateral agreements among Signatories. Before Testing an Athlete between the hours of 11:00 p.m. and 6:00 a.m., an Anti-Doping Organization should have serious and specific suspicion that the Athlete may be engaged in doping.]***

13. Summary:

In summary, my opinion regarding the various issues is thus as follows:

1) The entirety of the subject matter of sports sanctions is civil and not criminal;

2) My opinion on draft Article 10.2 is favourable;

3) My opinion on draft Article 8.1 is favourable;

4) My opinion on draft Article 2.10 (and 2.10.1, 2.10.2 and 2.10.3) is favourable;

5) After due consideration, my opinion on draft Article 10.9 (former Article 10.12) is unfavourable;

6) My opinion on draft Article 14.3.4 is favourable, subject to ensuring that the ineligible person has the possibility to request the termination of the publication of ineligibility before such ineligibility has expired;

7) My opinion on draft Article 17 is favourable;

8) My opinion on life ineligibility of athletes is in principle favourable, but I insist on the need for additional and reinforced safeguards – both procedural and in substance – in support of this measure (proportionality of the sanction with the asserted anti-doping rule violation);

9) My opinion is favourable, with similar reservations, regarding the possibility of conducting visits in certain cases to the *domicile* of athletes for the purpose of

testing, including during the night, subject to a comment specifying in detail the definition of "night-time" as well as the testing conditions and the procedural safeguards thereof.

Done at Strasbourg, June 25, 2013.

Jean-Paul Costa

*Please note that the original version of this opinion is in French; this English translation is provided only for the purposes of comprehension.*

**Attachment 5**



# 2013 World Conference on Doping in Sport

Johannesburg, 12-15 November 2013

## Intervention by the Australian Government

I rise today to speak on behalf of the Australian Minister for Sport and to provide the Australian Government's support for the proposed revisions to the World Anti-Doping Code and International Standards.

Since its establishment, the Code has facilitated a co-ordinated and co-operative approach between Governments and the international sporting movement to implement a viable and effective international anti-doping framework. This is a significant achievement and reflects the relevance and effectiveness of the Code.

It is important however, that the Code keeps pace with the latest doping trends and has the tools to meet future challenges. The overall anti-doping effort needs to remain rigorous and credible among stakeholders. Our athletes and the general public must have confidence in the integrity of sport and know that athletes who cheat will be identified and sanctioned.

I would highlight the Australian Government's support for the proposed increase in sanctions for the more serious doping violations. The penalties for anti-doping rule violations need to be strong enough to act as an effective deterrent against doping. A four-year penalty means that an athlete in an Olympic sport is likely to miss the next Olympics and an athlete in a non-Olympic sport loses a significant amount of time participating in their chosen sport.

The Australian Government also supports the amendments that give greater prominence to the role of intelligence gathering and investigations in detecting breaches of the anti-doping rules.

With doping practices becoming more sophisticated, it is less likely that anti-doping rule violations will be detected through analytical testing means alone. Although testing athletes to detect the use of prohibited substances is a valuable and fundamental means of policing doping in sport, increasingly anti-doping organisations will need to have the capacity to undertake effective investigations and intelligence gathering activities.

Also, the structure of the revised Article 5 highlights that the detection of doping breaches is best served through the operation of an integrated strategy that incorporates testing, intelligence gathering and investigations.

It has been Australia's experience that the evidence collected through an investigation can be used to better target a NADO's Testing Distribution Plan; and that testing results can be used to shape the scope of an investigation.

WADA will also be looking to improve testing itself through the adoption of measures promoting smarter test distribution planning, smarter menus for sample analysis and improved sample storage.

I also acknowledge WADA's push for greater proportionality. For example, the revision to the threshold for not providing athletes' whereabouts information before committing an anti-doping rule violation is welcomed. The relaxation from 3 times per 18 months to 3 times per twelve months is consistent with efforts to make athletes' whereabouts arrangements less onerous.

While the Australian Government does not agree with some revisions such as allowing a banned athlete in a team sport to return to team training prior to the end of their sanction, it is acknowledged that the overall benefits of the proposed revisions to the Code far outweigh any issues we may have with some of the specific changes.

We should remind ourselves that the operation of the Code has established an effective international anti-doping framework; and that Governments and the international sporting movement have been able to work together through the independent operation of the World Anti-Doping Agency.

Recent experiences in Australia have highlighted that doping is one of many varied and multi-faceted threats to the integrity of sport. The potential for doping to be linked with other threats such as match-fixing and illegal betting; and organised crime, raises a number of complex challenges for both sports and governments.

I don't think these threats are unique to Australia. Stronger lines of communication between anti-doping organisations, law enforcement bodies, betting agencies and sporting organisations are essential to ensure that the full range of threats are understood and to develop effective strategies that will protect the overall integrity of sport.

I would like to acknowledge those who have contributed to this comprehensive review of the Code and Standards. This includes the management and staff of WADA, the members of the Code Drafting team and our anti-doping colleagues who made submissions during the consultation phases.

Finally it is appropriate to acknowledge the significant contributions of the Hon John Fahey AC as the President of WADA and that of Vice-President, Prof. Arne Ljungqvist over the period of the last six years. Their influence and leadership has been outstanding over a period during which much of the tremendous progress of WADA has occurred.

**Attachment 6**

## WADA – Sport Movement Intervention:

## IOC Vice President and AOC President John Coates: 58.00 – 1.01.00

Thank you Mr Chairman, and I guess I will speak as President of the Australian Olympic Committee here in congratulating the draftsmen on the amendments that are before us, and expressing our full support for all of them, particularly the increases to the sanctions.

I'd like to note though my pleasure that there is reference to investigations in Article 5, so we've now got testing and investigations so that we can investigate non-analytical information or intelligence that may lead to a violation being proven. We have been concerned about that for a long time in Australia, we have been lobbying our Government to amend its legislation, it's Anti-Doping legislation, to give it the power to compel a person to respond to a request for information or to give evidence by our Anti-Doping Organisation, and we finally managed to get those amendments earlier this year to the extent that now the Anti-Doping Organisation can issue a notice requiring an athlete or a support personnel member to attend an interview to answer questions, to give information of a specified kind or to produce documents of a specified kind where they think this information may be relevant to the administration of the Anti-Doping Scheme.

I think this is very important and very strong legislation, and what I wanted to do was really highlight to the other governments of the world, that just having reference to testing and investigation in the WADA Code isn't enough. These governments have to go out there now and give themselves the power to do what happened in the Armstrong Investigations, USADA was able to get sworn testimony. We aren't all able to do that under our different legislative structures, so I commend amendments such as those of our Government to you. The Australian Olympic Committee has gone one step further, we also have repeated those requirements in our Team Membership Agreements for both Athlete and Athlete Support Personnel and we've added the provision that they must attend an interview, answer questions, give information, produce documents even if to do so might tend to incriminate them or expose them to a penalty. And on the point of penalties, I should mention that the Australian Government has a penalty of $5,100 a day for every day that an athlete or Athlete Support Personnel member refuses to comply, so it's pretty serious, and I would commend that to other governments.

Thank you.

**Attachment 7**



My name is Felipe Contepomi. It is a privilege to be with you here in Johannesburg and to offer my intervention and my passion toward the anti-doping issue.

I am from Argentina and I've played Internatonal rugby for the past 15 years. I grew up in Buenos Aires in a very sporty family … I have played 4 Rugby World Cups and have served as an ambassador for the IRB "keep rugby clean" antidoping campaign since 2009.

For the past two years I have been a part of WADA's Athlete Committee. The Committee has offered me a unique opportunity to work with fellow athletes from different sports and disciplines, to discuss the Anti-Doping issues and also to be involved with the Code Review Process.

From my perspective, you can only control the controllable, and that's your own preparation and all the hard work you're ready to put in it. As a clean athlete, you want to believe that you are competing against other athletes in your same state – clean. To think of competition in any other way, really removes the magic of what sport is meant to be.

We must provide for more education and focus on prevention. Young players need to understand the risks and consequences of cheating. Athletes need to know the health risks of what they put into their body. Sometimes ignorance or ambition leads young players to take substances that can cause health problems – both immediate and long term, that's why educational programs need to help players make wise decisions.

Today I am at the end of my sporting career. As a medical doctor, I will always have a passion for sport and I plan to stay involved at a different level. I hope to continue to contribute as much as I can to keeping this 'magical' thing called sport as clean as possible. Because that is what sport is … magic. Together we need to work as one to ensure that those magical moments of sporting glory are owned by hard working, gifted athletes and not cheaters.

Thank you.

**Attachment 8**



**WADA Intervention**

**International Paralympic Committee (IPC) Athletes' Council Chairperson Todd Nicholson**

Hello, I'm Todd Nicholson, Chairperson of the International Paralympic Committee's Athletes' Council, an elected group of athletes who aim to be the collective voice of Para-athletes within the Paralympic Movement.

I would like to thank WADA for this opportunity and, on behalf of all athletes within the Paralympic Movement, would like to commend WADA and the IPC on their efforts to improve education, communication, system access and processes to ensure sport remains clean and safe for everyone.

However, from my own personal perspective and the perspective of all para-athletes around the world, so much more can be done, not just by WADA or the IPC, but by all stakeholders involved in sport.

As the Code has evolved over the years to reflect the advancements in doping, so has the need for athletes and nations to be successful.

The incentive to win gold has never been greater and so have the risks.

When I first joined the Canadian ice sledge hockey team, I was told that I was responsible for the products that I put into my system. It was hammered into me that I should be cautious about taking anything that might make me feel or perform better, or give me the results I thought I should be able to achieve.

Although the advice was very basic, I was one of the lucky ones. There are thousands of athletes around the world who have never been given any anti-doping advice whatsoever. As the chair of a body that represents athletes, that greatly concerns me.

There may be more communication and education materials available than ever before, however, hand on heart, can we all confidently say that we all are doing absolutely everything to ensure athletes all over the world are getting the information they require on anti-doping?

What if we were to ask some retiring athletes whether they felt they were provided with sufficient guidance during their careers? Did their coach, trainer, doctor, NSO, NOC, NPC or IF provide them with all the information they required?

For new athletes coming onto the scene - are we 100 per cent confident that they are being advised on when and where to get information about the WADA Code? Do they know how to read and where to find the required information?

Unfortunately, I suspect the answers to all these questions is "no!"

That is why education and communication is something that should never stop. It should be an ongoing process, accessible to all around the world, and not just something you are told on the first day of joining the national team like I was.

As stated earlier the responsibility to educate and communicate does not lie solely with WADA or IPC, it applies to us all.

We all must be willing to put in the time, effort and, most importantly, money into insuring that important anti-doping information is circulated and networked to those who need it most.

The information needs to be accessible. It needs to be available in multiple languages, be able to be read by a person with or without an impairment and be able to be accessed freely by someone without a computer or internet access.

Take the ADAMS system. It's a great tool but is not accessible to everyone around the world. If we as athletes are required to be accountable for everything we do, then please help us by ensuring we have the tools and proper equipment to do so.

Most importantly, athletes want to be regularly reminded and provided with the relevant information. We want to be able to make an informed, educated and safe choice for our bodies and for our sport.

That is why the increase in the number of athletes travelling around the world to compete internationally in recent years should be seized upon as opportunities to educate and inform.

As the IPC found at August's IPC Swimming World Championships in Montreal, outreach activities and workshops at sporting events, training camps and grassroots programmes do so much to provide athletes and their support network with the right information at the right time.

Anti-doping is a huge issue affecting all levels of all sports. We can all help provide the right safe choice for all our athletes. To all stakeholders involved in sport, speaking on behalf of athletes around the world, I ask you to do all you can to provide outreach activities, communication, education and accessible information to all your athletes.

Shortly a colleague of mine Dr. Toni Pascual, Chair of the IPC Anti-Doping Committee, will speak about TUE management. The IPC Athletes' Council is aware of the IPC's issue and is fully supportive of its recommendation.

Thank you for your time and attention. Please remember we all have a responsibility to ensure that sport remains a clean and safe place for all our athletes from grassroots to the podium.

**Attachment 9**

WC Plenary Session 3: Matt Dunn

My name is Matthew Dunn, I'm from Sydney Australia and my sport is Swimming.

I was a swimmer on the Australian National Team for 10 years, during which time I broke 4 World Records and competed in 3 Olympic Games culminating in an amazing "home town" Olympic Games in Sydney 2000. My involvement in Swimming did not end there, as I am now a Bureau Member of FINA, the governing body of Aquatics.

As a competing athlete, your perspective is often quite insular and self centre around very specific targets. It is often due to this that athletes seldom realise the time and passion that is applied behind the scenes so they can maintain this focus. As such and with the benefit of hindsight, I am now very appreciative of those that protected my pathway through sport and thank those that are now protecting the athletes of today. Providing a safe and level playing field is instrumental in ensuring this "protected pathway" with the WADA Code a key element.

As a member of the WADA Athletes Committee for the past 2 years, I have been fortunate to have participated in the World Anti-Doping Code review. This involvement successfully allowed the athletes perspective to be heard and considered in the context of all other key stakeholder input.

Most notable discussion items from the athletes' viewpoint throughout the World Anti-Doping Code review have been:

- to ensure appropriate sanctions are applied relative to the offence and that sanctions for major doping offences should not only be tougher than they are today, but should also prohibit the athlete from partaking in "career high" events such as the Olympic Games.

- to ensure the Entourage and extended Entourage is better and more thoroughly addressed by the revised World Anti-Doping Code. It is an unfortunate reality, that in many cases, the athlete Entourage plays a role in athlete doping, and the Entourage should therefore be subject to serious sanctions as well.

- that the athlete whereabouts system provides a strong deterrent for dopers whilst still being practical for the clean athletes of the world.

- to promote anti-doping education and prevention at all levels of the athletes' pathway to ensure they fully understand all the negatives surrounding doping, how to protect themselves and most importantly the benefits of a clean playing field.

Although we will never be able to cover every scenario we can make every endeavor to do so now and in future revisions.

As an ex-athlete, I hope all stakeholders will be able to use the new WADA Code with maximum effect to protect all clean athletes and ensure a level playing field.

Thank you

**Attachment 10**

WC Plenary Session 3: Claudia Bokel

My name is Claudia Bokel. I am an Olympic fencer and I won a silver medal at the 2004 Olympic Games and gold medals at World and European Championships. I studied chemistry and did research at the Cologne anti-doping laboratory. I am currently the Chair of the IOC Athletes Commission. All athletes who compete at the Olympic Games have a right to vote for their athlete representatives and I was one of those elected in Beijing. My three main election platforms were athlete representation, dual careers and the fight against doping.

I hear there are several interest groups stating that athletes should be able to take certain illegal substances such as cocaine, that athletes don't want four-year bans, and that athletes don't want a whereabouts system. Let me tell you from experience that athletes want strong sanctions. No, athletes obviously are not too happy about filling out whereabouts forms. But maybe my own example will allow you to understand our position, the position of clean athletes, the position of athletes that are elected by their peers.

When I started competing, my coach told me after I won my first competition that I would need to go to a doping control. I knew then that every time I would finish in the top 3 of a major competition, I needed to go to a doping control. This also meant that if I wouldn't be in the top 3, I would not be tested.

Sometimes someone came to the fencing center to conduct a doping test. They tested a bunch of athletes who just happened to be there. The ones who weren't there would be tested the next day. This meant that if I wouldn't have shown up, it would have given me enough time to prepare to be clean for the upcoming doping test.

Then things changed a little bit. At competitions they would also randomly test someone from the top 64. This meant that athletes who didn't want to be caught just didn't compete at certain competitions and we saw that.

Doping control officers started to call athletes before a doping test, again giving dirty athletes a chance to prepare to be clean at the doping test.

It was good that NADO's were created, but we now had to fill out every quarter where we would be. I didn't like it. I was clean and now had to tell where I would be in the upcoming 3 months? As if I knew! I thought it was such a hassle. I then talked with many other athletes from many federations and I realized that if I didn't do it, things would continue to go on as I described before. We would not be able to catch any dopers and more importantly we wouldn't keep any athletes from doping! It is not only about the amount of athletes that are caught, it is also about the deterrent effect for athletes to get caught through the whereabouts system.

At first I had to send my whereabouts both to my International Federation as well as to my National Anti-Doping Agency. Things became easier when my International Federation and the NADO aligned to use one computer system. It was not only good for me to have to fill out only one form instead of two, but it also meant that doping controls from different organizations could finally be aligned through it.

Later we had to identify one hour every day when we would be available instead of the whole 24 hours. To make sure that I would be there, I always provided an hour that I would probably

be in my bed sleeping. That meant that I could be tested early in the morning, but it also meant that I wouldn't make silly mistakes of not being at the right time at the right place.

If athletes are expected to announce in advance every three months where they will be – and of course need to make last-minute changes as anyone does – why is it only possible to make such announcements on a computer and not on smartphones that many athletes and probably everybody here so frequently use?

Even though athletes can make two mistakes, two filing failures without consequences, we don't want athletes to make those silly mistakes, so we have to make it as easy as possible for them. But we also want to catch the cheats and we have discussed this at length during our IOC International Athletes' Forum and I am proud to say that all athletes' representatives unanimously supported strong bans for athletes convicted of a deliberate and aggravated doping offence. We actually wanted lifetime bans. Clean athletes don't want to compete against dirty athletes!

Dear delegates, ladies and gentlemen, we have been involved in the Code review process. But with this Code review, the fight against doping is not finished. All of us, including governments and the sports movement, need to continue to think of the clean athletes. We cannot just provide this legal document to athletes. We need to educate and inform them in an athlete-friendly way about the changes in the WADA Code and we need to explain to them what the implications are.

We need to help the clean athletes to ensure they are as little burdened as possible. To do so we must share information between anti-doping organizations, prioritize the right technology for all those athletes that are providing their whereabouts, and strongly sanction those who are cheating, be it athletes or any member of their entourage.

Thank you.

**Attachment 11**

WC Plenary Session 4: Beckie Scott

Good afternoon!
I'm Beckie – from the video – and I'm an Olympian in the sport of xc-skiing. I started skiing and racing as a very young kid in my hometown of Vermilion, followed my dreams of becoming an Olympian and won a gold medal at the Salt Lake City Olympic games in 2002 and a silver medal at the Torino Olympics in 2006.

I once heard a comedian in Canada describe cross-country skiing as "something like Alpine, with the fun taken out of it" and I'm not entirely sure I disagree – it is truly one of the toughest, most physically demanding sports there is. Eurosport television used to run an advert for xc-ski racing – showing snaps of xc-skiers falling across the finish line in various states of complete exhaustion – calling it the most "lung-busting, gut-wrenching sport on the planet" They're right - it's a hard sport....and it is also a sport with a very high risk for doping. When I finished third in the Salt Lake City Olympic games behind two athletes that subsequently tested positive for performance enhancing drugs, it was one of the most heart-breaking, discouraging and frustrating experiences of my life. I had trained my entire life for that moment, and it was given to a doper. But it was also a defining moment for me because the injustice behind it all moved me to take action and get involved. I realized that by staying silent, I was part of the problem, and so I began to speak out, petition for greater policing and monitoring in our sport, and fight for clean fair sport for all.

I strongly believe that athletes need to get involved. They need to speak up, ask questions, and show that they care about the matters which so profoundly affect them. When I joined WADA's Athlete Committee in 2006 and then WADA's Foundation Board and Executive Committee, it was a great opportunity to represent the voice and rights of the athlete. Over the past two years the Athlete Committee has been deeply involved in the Code Review process ... providing feedback and giving advice on matters that impact athletes the most.

As one example, intelligent testing and providing whereabouts

information are two pillars of the anti-doping movement the athletes strongly and unequivocally support. Is providing whereabouts an inconvenience for athletes? Perhaps. But it's a small one ... I lost out on a gold medal experience at the Olympic Games because two doped athletes finished in front of me. The modest inconvenience of providing whereabouts is something that any clean athlete would support and embrace, knowing that it is helping to level the playing field.

Members of WADA's Athlete Committee and the IOC's Athlete Commission have long been outspoken and vocal supporters of strengthening the sanction period for real cheats and intentionally doped athletes. This is what clean athletes want and have been calling for – for a very long time now. Longer sanctions protect clean athletes, they act as a deterrent for potential dopers, and most importantly, they show that doping and using drugs to get ahead in sport is a serious crime – worthy of a serious punishment.

I am so pleased to be here in Johannesburg amongst the anti-doping community. It has been just over ten years since the Salt Lake Olympics and the progress that the anti-doping movement has made should be applauded.

My story is just one that shows justice can prevail, and I hope that is the message that clean athletes take away from this Conference. The 2015 World Anti-Doping Code and Standards is another positive step towards sport that is more clean, sport that is more fair, and sport that continues to have integrity and respect as it's very essence...at it's heart. And this, above all, is what the athletes want.

I hope that my voice and my story will continue to resonate in keeping the fight as strong as possible.

Thank you.

**Attachment 12**

# WC Plenary Session 6: Athlete Intervention - Cydonie Mothersill

**Cydonie Mothersill – WADA Athlete Committee Member**

My name is Cydonie Mothersill and I am from the Cayman Islands. It is a great honour to be here at the World Conference on Doping in Sport and most importantly to voice my perspective as a clean athlete.

My sport is athletics of which I am a sprinter. My dedication to my craft cannot be summed up in a few words but I will try..... track and field has provided me with a life that I could have only dreamt about. That life however cannot be without certain responsibilities such as being true to yourself, your sport, your country and your fans. My journey as a professional athlete has not been easy, and it has had its share of struggles but I am a firm believer that it is those struggles in life that brings out our best qualities.

Like many track and field athletes, I started my career running in regional events, and then went on to secure an athletic scholarship to attend university in the United States after which I pursued a professional career which set me on the path of many Olympic Games and World Championships.

This path has led me to participate in 5 Olympic Games which is not an easy feat in any sport. Going to the Olympic Games is probably the most unique experience I have had not just in my sporting career but in my life that is with the exception of the recent birth of my baby daughter. Being an Olympian brings many fond memories to mind, the sense of community we developed from living in the athlete village together, and the sense of accomplishment knowing you are one of the selected few. By the time I was at my fifth Olympics, I was well seasoned; I was now in a position to share my knowledge not just to my team mates but from other countries in the region.

As a role model, a role I take quite seriously I am bound to show the youths through my actions that hard work, dedication, self-discipline and plain honesty are still important qualities to attain. They build character and must not be pushed aside in the journey to achieve greatness.

The athletes that know me know that I am very opinionated and have a definite opinion about keeping track clean! I was fortunate throughout my career to have great support around me...strong ethics from my family were instilled in me from an early age and continue to play a vital role in my career. I was never tempted by doping as the consequences in my mind were too dire.

With that being said, I was personally affected by the doping issue when I was denied the rightful chance to stand on the podium to receive my bronze medal at the 2001 World Championships in athletics.

It's a bitter sweet memory, because even though I did receive the medal years later at home surrounded by family and friends, the benefits of receiving that medal on that day will never be known. I missed a true podium experience and it is something I can never get back.

I joined WADA's Athlete Committee three years ago. It has been such a great opportunity not only to share my insight about my sport, which has been known to have a doping problem, but to also to share the perspective of coming from a country of less than 60,000 people. I believe that education and information is an essential element in cleaning up sport. It is not only important for athletes to know their rights and responsibilities, but it is equally important that coaches, managers and agents

are aware. The fact that with the implementation of the 2015 Code they can also be held accountable, I believe it is an important step in keeping sport clean.

In closing, I love my sport and want it to have a better image, and for it to have longevity. There is a fine line that exists in speaking out against doping but If I can play a part in changing people's concept, then I am pleased. My hope is that one day the playing field will be level.

Thank you.

**Attachment 13**

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# AUSTRALIA AND THE EUROPEAN COURT OF HUMAN RIGHTS

The Australian National University,
Centre for European Studies,
College of Arts and Social Sciences
Canberra

Conference on Re-Appraising the Judicial Role – European and Australian Comparative Perspectives

14 February 2011

The Hon. Michael Kirby AC CMG

## AN ERA OF HUMAN RIGHTS

The use of international materials in the development of Australian law is still a matter of debate and controversy in some circles[158]. In particular, the idea that the Australian Constitution should be read consistently with the rules of international law has been described as "heretical"[159]. I do not accept that view. But it is one held in some legal circles in Australia, including by judges of the highest standing. There were resonances of these differing views in the High Court's decision in *Roach*[160]. Thus, in that case, Justice Heydon took his colleagues in the majority to task in an important passage in his reasons:

> "...these instruments can have nothing whatever to do with the construction of the Australian Constitution. These instruments did not influence the framers of the Constitution, for they all postdate it by many years...The language they employ is radically different. One of the instruments is a treaty to which Australia is not and could not be a party. Another of the instruments relied on by the plaintiff is a treaty to which Australia is a party, but the plaintiff relied for its construction on comments by the United Nations Human Rights Committee...[T]he fact is that our law does not permit recourse to these materials. The proposition that the legislative power of the Commonwealth is affected or limited by developments in international law since 1900 is denied by most, though not all, of the relevant authorities - that is, denied by 21 of the Justices

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158 The opposing viewpoints in this debate were considered at some length in *Al-Kateb v Godwin* (2004) 219 CLR 562, per McHugh J at 589-595; and in my own reasons *ibid* at 622-630.

159 *Al-Kateb v Godwin* (2004) 219 CLR 562, per McHugh J at 589 [13].

160 See above.

> of this Court who have considered the matter, and affirmed by only one."[161]

Certainly, there are considerations that limit the application of unincorporated international law by domestic judges. A judge in a municipal court must be obedient to the national Constitution from which, ultimately, he or she derives jurisdiction, powers and legitimacy. Consistent with this obligation, such a judge cannot give priority to international law that has not been made part of the domestic legal system over and above the clear requirements of their national law[162]. It is possible, however, to respect this limitation whilst acknowledging the useful and persuasive role that can be played by international materials. The decisions of tribunals such as the European Court of Human Rights can enhance judicial thinking by exposing judges to the way that other experienced lawyers have approached similar issues. At the very least, their reasoning may disclose relevant considerations of legal policy and legal principle that need to be considered and evaluated for their local relevance. Shutting ourselves off from the experiences and knowledge of others only serves to restrict us in the continued pursuit of justice. Efforts to isolate individual countries, such as Australia and the United States of America from the persuasive force of international law are "doomed to fail"[163].

The jurisprudence of the European Court of Human Rights has had a very important impact within Australia. This is reflected most clearly in

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161 (2007) 81 ALJR 1830 at 1805 [181] (Footnotes omitted).

162 *Minister for Immigration & Multicultural & Indigenous Affairs v B* (2004) 219 CLR 365, in my own reasons at 425 [170]-[173].

163 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 629 [190], in my own reasons. See MD Kirby, "International Law - the Impact on National Constitutions" (The Seventh Annual Grotius Lecture) 21 American University International Law Review 327 (2006).

the references made by Australian courts to decisions of the Court. References to such decisions have been increasing in recent years. This is a trend that seems likely to continue and to expand as Australia moves towards enacting statutory charters of fundamental rights.

The influence of the European Court of Human Rights is not defined exclusively by the number of references found in Australian case law. It has also had a more intangible, and possibly more enduring, effect through the way that that court has guided and influenced our thinking about human rights. As Sir Anthony Mason pointed out in relation to international law and legal institutions:

> "The influence of international legal developments travels far beyond the incorporation of rules of international law and convention provisions into Australian domestic law. The emphasis given by international law and legal scholars to the protection of fundamental rights, the elimination of racial discrimination, the protection of the environment and the rights of the child, have changed the way in which judges, lawyers and legal scholars think about these subjects."[164]

This influence will be maintained, and indeed will grow, in the future. This is because Australia, like other modern nations and economies, has become increasingly international in its outlook and culture, including its legal culture. As well, the Australian people are becoming more aware of the importance of human rights issues and jurisprudence. The effective protection of human rights has become a subject of interest and debate in Australia[165]. It may, possibly, be conceivable that the people of Oklahoma, abetted by the views of

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[164] A F Mason, "Cross Currents: Internationalism, National Identity & Law", Paper presented to the 50th Anniversary Conference of the Australasian Law Teachers' Association (1995), at 5.

[165] G Williams, *The Case for an Australian Bill of Rights* (UNSW, 2004).

Justice Scalia, will be capable of being hidden from international legal thinking by a legal *fiat*. Against the background of our history and Constitution, this cannot and will not happen in Australia.

In this environment, the role of the European Court of Human Rights will become even more significant. Reasoned, serious, balanced decisions are a powerful weapon against injustice and arbitrary or ill-conceived depravation of fundamental rights. The Strasbourg Court will continue to influence and guide the development of human rights law in Australia, as it has done in many non-signatory countries. In my view, the European Court of Human Rights is a court for the modern age. It takes a leading part in, and stimulates, the trans-national conversation about human rights. It gives intellectual leadership in a controversial field of the law's operation where wisdom and proportionality matter most[166]. Australia's judges and lawyers should acknowledge their indebtedness. This is my attempt to do so.

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[166] M D Kirby, "Terrorism and the Democratic Response: A Tribute to the European Court of Human Rights" Robert Schuman Lecture, 11 November 2004. See (2005) 28 UNSWLJ 221.

**Attachment 14**

**My name is Kimberley Crow.** I am an Olympic Rower (Beijing 2008, London 2012) and the Chairperson of the Australian Olympic Committee Athletes' Commission. I appeared before the Senate Rural and Regional Affairs and Transport References Committee last year to support the amendments to the ASADA Authority Amendment Bill 2013. I had hoped to appear again this year in support of the proposed amendments to the ASADA Authority Amendment Bill 2014 however I am overseas competing.

I believe I can justifiably say my view is representative of athletes in Olympic Sports. The AOC Athletes' Commission is elected by the athletes at the Summer Olympics (8 athletes) and Winter Olympics (2 athletes). The AOC Athletes' Commission then elected me their Chair. In my role, I liaise with the athlete leaders across all the Olympic sports, and also fill the role as the Deputy Chair of the Rowing Australia Athletes' Commission.

There is no doubt that the prevailing view of the athletes is that there is no place in sport for doping, and tough sanctions for those who dope and those who abet the doping process is fundamental to clean sport.

While 4 year sanctions for serious offenders may seem a strong penalty, the sporting context suggests otherwise. For every doper out there, clean athletes suffer. We dedicate our hearts and souls to pursuing our sporting dreams. To have these dreams stolen by cheats is an irreplaceable theft. Imagine training every day with the knowledge that you were competing against "dirty" athletes. How do you motivate yourself? Imagine finishing in fourth spot, only to later find out that you were beaten by cheats? This is a moment in time you can never get back.

Even more upsetting is the permanent question mark over brilliant performances. No longer can someone produce a commanding performance without having their integrity questioned. Dopers have stolen the innocence of sport. Dopers have cast a shadow over our entire sporting population.

In no way are dopers or their accomplices the victims. The education we receive in Australia in regard to anti-doping is world class. Check the ASADA website if you're in doubt. Athletes are so well educated in anti-doping from a very early age. We know the difference between right and wrong, we know all the details of the anti-doping system. We know how to check for banned substances. This education is omniscient and compulsory.

Allowing soft sanctions is punishing every clean athlete. The message must be clear and the deterrent must be definitive. It is unacceptable for athletes to gamble upon cheating because the length of the ban is worth the gamble. The Olympics are our pinnacle. An athlete who has doped will likely still have the physical benefit of the drugs within four years. It is completely unfair to be competing against these athletes at our pinnacle competition.

It must also be recognised that in many sports, the sporting landscape has changed. Sport is merging with entertainment, and money is flowing to those who succeed. Teams are becoming more professionalised, with highly qualified support personnel. Anti-doping must adapt to changing circumstances.

It is my personal opinion that in the current anti-doping landscape it would be impossible to dope and not get caught without expert support. We are subject to a "whereabouts" regime

where we must record our overnight residence every night of the year. We must record our regular training routine. We must record the competitions we enter. We must record a one hour time period each day where we can be located for testing. We must even record our flight number if we are travelling overseas. Drug testers can come and test you anytime, anywhere. And they do. They take blood and urine. They test us for the presence of drugs in our system, but also monitor our blood for changes to our blood and our steroid profile. They can tell if we have doped, even without tests for the drugs themselves. They also store our samples for eight years, in case they develop tests for more drugs in the future. This is a huge deterrent- there can no longer be such a thing as an "undetectable" drug.

These testing developments are new and are having a huge impact on keeping sport clean. Unlike the days where athletes were only tested for urine at competition, I believe the only way this current system could be "gamed" would be if it was coordinated by an expert doctor or sports scientist. These people are destroying the foundations of sport - the joy of competition, the challenge to improve oneself, the ultimate goal of being one's best.

By bringing support personnel within the ambit of the ASADA Act, and by ensuring athletes are not abetted by known offenders, we are taking a highly important step in protecting clean athletes.

The purpose of the WADA Code and the ASADA Act is to protect the essence of sport. When we talk about the "rights" of the athletes, the ultimate way to protect athlete "rights" is to protect the clean athlete. We train up to 8 hours a day for decades on end to reach our true potential and to do our country proud. I would feel let down by my own country if it failed to do its bit to protect us, the clean athletes.

While this hearing is on, I will be competing in a coxed eight with the eight best scullers from throughout the world. The rest of the world is making steps to implement the WADA code. I want to be able to look my international competitors (and, in this case, team mates) in the eye and know that Australia is doing its bit to fight for drug free sport. For so long, Australia has led the way in anti-doping. I hope it stays this way.

**1 October 2014**

**Kimberly Crow**
**Chair, AOC Athletes' Commission**