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Sanctions for Anti-Doping Rule Violations in the Revised Version of the World Anti-Doping Code*

by Alessandro L. Celli, Lucien W. Valloni, Dmitry A. Pentsov**

I. Introduction

The fight against the use of doping in sport which was started by international sport federations in the late 20-s of the last century sometimes resembles a boxing match where its participants are constantly exchanging powerful punches.¹ Indeed, over the last several decades, the introduction of doping tests and the lists of prohibited substances have been constantly countered by the development of new substances, notably anabolic steroids, and more sophisticated methods of doping which, in turn, has led to the development of new testing methods, and, more recently, the creation of the World Anti-Doping Agency (WADA), and the adoption of the World Anti-Doping Code (the "WADC").²

Viewed from this perspective, recently the use of doping in sport received another punch. On November 17, 2007, the World Anti-Doping Foundation Board has approved a revised World Anti-Doping Code, which will enter into force on January 1, 2009 (the "WADC-2009").³ The revised version of the Code contains a number of major innovations, notably as concerns sanctions for anti-doping rule violations. These innovations reflect two general themes which emerged during the Code's review - firmness and fairness - both targeted at strengthening the fight against doping in sport.⁴ Correspondingly, the purpose of this Article is to analyze the most important innovations concerning sanctions focusing on their practical consequences for athletes and teams.⁵

The practical consequences of the innovations concerning sanctions for anti-doping rule violations are illustrated on the example of actual cases decided by the Court of Arbitration for Sport (CAS) on the basis of provisions the World Anti-Doping Code prior to its revision.⁶ After a brief description of the facts of a case, legal issues presented and decision reached by the CAS, the hypothesis is made as to how the same court would have ruled on the same set of facts after January 1, 2009, on the basis of provisions of WADC-2009. Making an interesting combination of a statutory interpretation and a case law analysis, such approach goes to the heart of the legal profession - to predict as accurately as possible how the court would rule on a specific set of facts in a particular case,⁷ and transforms a theoretical analysis of innovations concerning sanctions for anti-doping rule violations into a fascinating reading. Furthermore, such "re-hearing" of previously decided CAS cases could make this Article appealing not only to sports law scholars and legal practitioners, but also to wide variety of athletes and sporting bodies officials, who might be interested in knowing whether and, if so, how these new provisions could specifically affect their own rights and interests in the future. Prior to making this analysis, however, it would be desirable to briefly recall the meaning of "doping" in the WADC-2009 as well as the founda-

tions of the liability for anti-doping rule violations.

II. The definition of "Doping" and the principle of strict liability for anti-doping rule violations

The term "doping" is defined in WADC-2009 as the occurrence of one or more anti-doping rule violations set forth in Article 2.1 through Article 2.8 of the Code.⁸ These violations which closely resemble the violations listed in Articles 2.1-2.8 of WADC are:

- The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample.⁹
- Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method.¹⁰
- Refusing or failing without compelling justification to submit to Sample collection after notification as authorized in applicable anti-doping rules, or otherwise evading Sample collection.¹¹
- Violation of applicable requirements regarding Athlete availability for Out-of-Competition Testing including failure to file required whereabouts information and missed tests which are declared based on rules which comply with the International Standard for Testing. Any combination of three missed tests and/or filing failures within an eighteen-month period as determined by Anti-Doping Organizations with jurisdiction over the Athlete shall constitute an anti-doping rule violation.¹²
- Tampering or Attempted Tampering with any part of Doping Control.¹³
- Possession of Prohibited Substances and Methods: (i) Possession by an Athlete In-Competition of any Prohibited Method or any Prohibited Substance, or Possession by an Athlete Out-of-Competition of any Prohibited Method or any Prohibited Substance which is prohibited in Out-of-Competition testing, unless the Athlete establishes that the Possession is pursuant to a therapeutic use exemption granted in accordance with Article 4.4 (Therapeutic Use) or other acceptable justification.¹⁴ (ii) Possession by an Athlete Support Personnel In-Competition of any Prohibited Method or any Prohibited Substance, or Possession by an Athlete Support Personnel Out-of-Competition of any Prohibited Method or any Prohibited Substance which is prohibited in Out-of-Competition Testing, in connection with an Athlete, Competition or training, unless the Athlete Support Personnel establishes that the Possession is pursuant to a therapeutic use exemption granted to an Athlete in accordance with Article 4.4 (Therapeutic Use) or other acceptable justification.¹⁵
- Trafficking or Attempted Trafficking in any Prohibited Substance or Prohibited Method.¹⁶
- Administration or Attempted administration to any Athlete In-

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1 The first international sport federation to ban the use of doping was the International Amateur Athletic Federation (IAAF) in 1928. See, World Anti-Doping Agency: A Brief History of Anti-Doping, available at: <http://www.wada-ama.org/en/dynamic.ch2?pageCategory=15>: 312 (last visited May 10, 2008).

2 The English version of the WADC is available at: http://www.wada-ama.org/rtecontent/document/code_v3.pdf; the Russian version is available at: [\[ama.org/rtecontent/document/code_ru.pdf\]\(http://www.wada-ama.org/rtecontent/document/code_ru.pdf\) \(last visited May 10, 2008\).](http://www.wada-</p></div><div data-bbox=)

3 The English version of the WADC-2009 is available at: http://www.wada-ama.org/rtecontent/document/code_v2009_En.pdf (last visited May 10, 2008).

4 World Anti-Doping Agency: Q&A: World Anti-Doping Code Review: Consultation Process & Major Envisaged Changes, available at: http://www.wada-ama.org/rtecontent/document/QA_Code_Consultation_En.pdf (last visited May 10, 2008).

5 It should be noted that the provisions of WADC, in principle, do not have direct application (see, e.g., TAS 2006/1A/1038, *Joseph N'Sima v. FIBA & AMA*, award dated December 4, 2006, section 83, avail-

able at: <http://www.wada-ama.org/rtecontent/document/CAS-NSima.pdf> (last visited May 10, 2008). Correspondingly, Article 23.2 of WADC-2009 lists the Articles of the Code (and corresponding Comments) which must be implemented by the signatories to the Code, including International Federations and National Anti-Doping Organizations, without substantive change, namely, Article 1 (Definition of Doping), Article 2 (Anti-Doping Rule Violations), Article 3 (Proof of Doping), Article 4.2.2 (Specified Substances), Article 4.3.3 (WADA's Determination of the Prohibited List), Article 7.6 (Retirement from Sport), Article 9 (Automatic Disqualification of Individual Results), Article 10 (Sanctions

Competition of any Prohibited Method or Prohibited Substance, or administration or Attempted administration to any Athlete Out-of-Competition of any Prohibited Method or any Prohibited Substance that is prohibited in Out-of-Competition Testing, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any Attempted anti-doping rule violation.¹⁷

The liability for the presence of a prohibited substance or its metabolites or markers in an athlete's bodily specimen is based upon the strict liability principle. Under this principle, an anti-doping rule violation occurs whenever a prohibited substance is found in an athlete's bodily specimen. This violation occurs regardless of whether or not the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault. If the Positive Sample came from an In-Competition test, then the results of that Competition are automatically invalidated.¹⁸ However, the Athlete then has the possibility to avoid or reduce the period of ineligibility which could be also imposed upon him or her if this Athlete can demonstrate the absence of fault or significant fault¹⁹ or in certain circumstances the absence of intent to enhance his or her sport performance.²⁰

Perhaps, the clearest explanation of the rationale for the strict liability principle has been presented by the CAS in 1995 in the case of *USA Shooting & Quigley v. International Shooting Union (UIT)*.²¹ As was pointed out by the Court, it was true that a strict liability test was likely in some cases to be unfair in an individual case, where the athlete may have taken medication as the result of mislabelling or faulty advice for which he or she was not responsible - particularly in the circumstances of sudden illness in a foreign country. But it was also in some sense "unfair" for an athlete to get food poisoning on the eve of an important competition. Yet in neither case would the rules of the competition be altered to undo the unfairness. Just as the competition would not be postponed to await the athlete's recovery, so the prohibition of banned substances would not be lifted in recognition of its accidental absorption. The vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or the negligence of unaccountable persons, which the law cannot repair.²² Furthermore, in the CAS's view, it appeared to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently. Moreover, according to the CAS, it was likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it was certain that a requirement of intent would

invite costly litigation that may well cripple federations - particularly those run on modest budgets - in their fight against doping.²³

III. Innovations concerning sanctions on individuals

1. New definition of "specified substances" and its impact on the existing system of sanctions

The sanctions for the use of prohibited substances provided for in the current version of WADC may be subdivided into: (i) basic periods of ineligibility²⁴ and (ii) reduced periods of ineligibility for the use of those prohibited substances which are qualified as "specified substances".²⁵ The specified substances are those substances identified in the Prohibited List which are particularly susceptible to unintentional anti-doping rule violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents.²⁶ Where an athlete can establish that the use of such a specified substance was not intended to enhance sport performance, this violation may result in a reduced sanction.²⁷ On the other hand, when an athlete fails to do so, or when the prohibited substance used by an athlete is not "specified substance", such athlete would be subject to the basic sanctions.

While WADC-2009 also provides for the same two categories of sanctions, namely basic periods of ineligibility²⁸ and reduced periods of ineligibility for the use of "specified substances",²⁹ as compared to its predecessor, the scope of the definition of "specified substances" in WADC-2009, has been significantly broadened. The new version of the Code defines "specified substances" as all prohibited substances, except substances in the classes of anabolic agents and hormones and those stimulants so identified on the prohibited list.³⁰ As a result, under WADC-2009, the reduced sanctions could be applied in a substantially larger number of cases than that under WADC. On the other hand, unlike WADC, to become eligible for a reduced sanction under WADC-2009, the athletes would have to prove not only the lack of intent to enhance the athlete's sport performance or mask the use of a performance-enhancing substance, but also to establish how this substance entered his or her body or came into his or her possession.³¹ This combination of the expansion of the definition of specified substances with the hardening of the burden of proof placed upon athletes, may be seen as a reflection of the trend for a greater flexibility as concerns sanctions in cases where the athlete can clearly demonstrate that he or she did not intend to enhance sport performance, which emerged during the Code's review.³²

The practical implications of the new definition of "specified substances" for the athletes could be illustrated on the example of the case of *WADA v. Darko Stanic & Swiss Olympic*, decided by CAS in 2007³³ and the case of *WADA v. National Shooting Association*

on Individuals), Article 11 (Consequences to Teams), Article 13 (Appeals) with the exception of 13.2.2 and 13.5, Article 15.4 (Mutual Recognition), Article 17 (Statute of Limitations), Article 24 (Interpretation of the Code), and Appendix 1 - Definitions. No additional provision may be added to a Signatory's rules which changes the effect of the Articles enumerated in this Article.

6 The Court of Arbitration for Sport in Lausanne, Switzerland, created in 1984, is a permanent independent arbitration body specialized in resolving disputes directly or indirectly related to sport. Its organization as well as its arbitration proceedings is governed by the 1994 Code of Sport-related Arbitration, divided into two parts: the Statutes of bodies working for the settlement of sport-related disputes and the Procedural Rules. In 1999, mediation rules have been added to the Code. See, <http://www.tas-cas.org/en/infogenerales.asp/4-3-238-1011-4-1-1/5-0-1011-3-0-0/> (last visited May 10, 2008).

7 As Judge Oliver Wendell Holmes, a pre-

eminent American lawyer, once said, the prophecies of what the courts will do in fact, and nothing more pretentious, are what he meant by the law. See, Oliver W. Holmes, *The Path of the Law* // Harvard Law Review, 1897, Vol. 10, pp. 457-461.

8 Article 1 of WADC-2009. Appendix 1 to WADC defines "prohibited substance" as any substance so described on the Prohibited List.

9 Article 2.1 of WADC-2009.

10 Article 2.2 of WADC-2009.

11 Article 2.3 of WADC-2009.

12 Article 2.4 of WADC-2009.

13 Article 2.5 of WADC-2009.

14 Article 2.6.1 of WADC-2009.

15 Article 2.6.2 of WADC-2009.

16 Article 2.7 of WADC-2009.

17 Article 2.8 of WADC-2009.

18 Article 9 of WADC-2009 (Automatic Disqualification of Individual Results).

19 Article 10.5 of WADC-2009 (Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances).

20 Article 10.4 (Elimination or Reduction of the Period of Ineligibility for Specified Substances under Certain Circumstances).

See, also, WADC-2009, Commentary to Article 2.1.1.

21 CAS 94/129, *USA Shooting & Quigley v. UIT*, award of May 23, 1995. //CAS: Digest of CAS Awards, vol. I, 1986-1998, (Matthieu Reeb, ed., 1998), p. 187-204.

22 CAS 94/129, *USA Shooting & Quigley v. UIT*, award of May 23, 1995, p. 193 (section 14).

23 CAS 94/129, *USA Shooting & Quigley v. UIT*, award of May 23, 1995, p. 193 (section 15). It should be also noted that despite the acceptance of the strict liability principle by the CAS, certain authors have criticised this principle, arguing that it is contrary to Article 6(2) of the European Convention on Human Rights (Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law). See, Janwillem Soek, *The Strict Liability Principle and the Human Rights of Athletes in Doping Cases* (2006), pp. 399-401. Others point out that since the suspension from competition will cite an effect on an athlete's income, the exclusion should at least be accompanied by an appreciation of the

subjective element of each case. This is all the more true since the Federations are monopolies in their fields of sport. See, Frank Oschütz, *Doping Cases before the CAS and the World Anti-Doping Code*. //The Court of Arbitration for Sport 1984-2004 (Ian S. Blackshaw, Robert C.R. Siekmann, Janwillem Soek, eds., 2006), p. 253.

24 Article 10.2 of WADC. Ineligibility means that the athlete or other person is barred for a specified period of time from participating in any competition or other activity or funding as provided in Article 10.9 of WADC (see, Appendix 1 to WADC: Definitions).

25 Article 10.3 of WADC.

26 Article 10.3 of WADC.

27 Article 10.3 of WADC.

28 Article 10.2 of WADC-2009.

29 Article 10.4 of WADC-2009.

30 Article 4.2.2 of WADC-2009.

31 Article 10.4 of WADC-2009.

32 Comment to Article 4.4.2 of WADC-2009.

33 CAS 2006/A/1130, *WADA v. Darko Stanic & Swiss Olympic*, award of January 4, 2007, available at: <http://www.wada->

of Malaysia (NSAM) & Cheah & Ng & Masitah, decided by CAS in 2008.³⁴

In *WADA v. Darko Stanic & Swiss Olympic*, Darko Stanic, a professional handball player, played for a Swiss club named "Grasshoppers Handball AG" ("Grasshoppers"). On April 28, 2006, after a game between St. Otmar St. Gallen and Grasshoppers, he was tested positive for Benzoylgonine and Methylegonine, which are metabolites of cocaine; cocaine being specified within WADA's list of substances prohibited In-Competition. During the disciplinary hearings, held by the Disciplinary Chamber of Swiss Olympic, Mr. Stanic stated that he had come to the conclusion that the cocaine must have entered his system as a consequence of him unknowingly smoking a cigarette containing cocaine at a discotheque in Zurich, where he went with his friend four days before the positive test.

On July 6, 2006, the disciplinary Chamber issued its decision whereby Darko Stanic was suspended for a period of six months. In reaching this decision, the Chamber considered that the athlete had committed "no significant fault or negligence" as defined by Article 17.4.2 of Swiss Olympic Doping Statute and that given the overall circumstances, including Darko Stanic's personal situation, the minimum sanction of one year's suspension should be reduced to six months.

On appeal, lodged by WADA, CAS set aside the decision of the Disciplinary Chamber and declared the athlete ineligible for competition for two years. CAS recalled that the proof by the athlete of how the prohibited substance entered his/her system is a necessary precondition in establishing lack of fault or no significant fault.³⁵ Applying this precondition in the present case, CAS came to the conclusion that on the basis of the circumstances described and evidence presented by Darko Stanic, and bearing in mind public knowledge relating to cocaine and crack, it was improbable that the athlete unknowingly smoked a cigarette containing cocaine or crack given to him in the discotheque by a stranger.³⁶ Correspondingly, CAS considered that on the balance of probabilities the athlete has clearly not provided evidence making it more probable than not that cocaine or crack entered his system as a result of him smoking a cigarette than he asked a stranger for in a discotheque.³⁷

Supposing that a similar case would have been considered under WADC-2009, the result most probably would have been the same. Although it may be expected that under the revised Code cocaine would be considered as a "specified substance", the athlete still did not manage to establish how this substance entered his body. Since one of the conditions for the application of the reduced period of ineligibility for the use of specified substances is not satisfied, the athlete would be subject to a basic period of ineligibility.

In *WADA v. National Shooting Association of Malaysia (NSAM) & Cheah & Ng & Masitah*, Ms. Cheah, Ms. Ng and Ms. Masitah, international level shooters and members of the national team of the NSAM for between 7 and 10 years, were tested positive for a specified substance, Propranolol and its metabolites, during a local shooting competition held in Malaysia in March of 2007. During the hearings held by a doping enquiry panel established from members of the NSAM, from the National Sport Council and the Medical Committee of the Olympic Committee of Malaysia, the shooters alleged that the prohibited substance was contained in the unwrapped chocolates which were given to them by their coach, but that they were not aware of the presence of the prohibited substance in the chocolates. The panel found that the shooters did not intentionally take the prohibited substance to enhance their performance and, in the end, the NSAM imposed upon the three shooters a six-month period of ineligibility.³⁸

On appeal, lodged by WADA in relation to a 6-month suspension, CAS set aside the decision the NSAM and imposed upon the three shooters a two-year suspension. CAS found that in the present case there were no circumstantial evidence - other than there mere allegation of the shooters - that they did not intend to enhance their performance. The shooters did not provide to the doping enquiry panel a piece of the contaminated chocolate. Nor did the coach admit before the doping enquiry panel to have manipulated the chocolate.

Furthermore, there was no evidence that in the given circumstances an unintentional violation of the anti-doping rules by the shooters was more likely than the intentional misuse of the substance. As a result, the CAS came to the conclusion that the shooters and the NSAM did not discharge their burden of proof that the anti-doping rule violation was committed by the shooters without their intent to enhance their performance.³⁹

Supposing that a similar case would have been considered under WADC-2009, the result most probably would have been the same. Although Propranolol is a specified substance, the shooters did not prove the lack of intent to enhance their sport performance. Neither, did they establish how this substance entered their body. Since both of the conditions for the application of the reduced period of ineligibility for the use of specified substances are not satisfied, correspondingly, the shooters would be subject to a basic period of ineligibility.

2. Broadening the possibilities of elimination or reduction of period of ineligibility based on no fault or negligence or no significant fault or negligence

Similarly to its predecessor, WADC-2009 also provides for the possibility of reduction or elimination of the period of ineligibility based on exceptional circumstances, namely in those cases where the athlete can establish that he or she had no fault or negligence,⁴⁰ or no significant fault or negligence.⁴¹ Unlike its predecessor, however, WADC-2009 does not limit the application of these provisions to certain specified anti-doping rule violations, such as presence of prohibited substance, the use of prohibited substance or prohibited method,⁴² or presence of prohibited substance, the use of a prohibited substance or prohibited method, its administration or failing to submit to sample collection.⁴³ As a result, under WADC-2009, the elimination or reduction of the period of ineligibility based on the absence of fault or negligence or significant fault or negligence would be theoretically possible in case of any anti-doping rule violation.

On the other hand, in a number of anti-doping rule violations (such as trafficking or attempted trafficking in prohibited substance or prohibited method), the knowledge of the violation is an element of the violation itself. In such cases, proving the absence of significant fault or negligence and, correspondingly, meeting the criteria for the reduction could be extremely difficult. That is why, it may be anticipated that the practical effect of innovations concerning "no fault or negligence" or "no significant fault or negligence" rules would be insignificant.

3. Strengthening of incentives to come forward

Recalling that the cooperation of athletes, athlete support personnel and other persons who acknowledge their mistakes and are willing to bring other anti-doping rule violations in light is important to clean

ama.org/rtecontent/document/CAS_Stanic.pdf (last visited May 10, 2008).

34 CAS 2007/A/1395, *WADA v. National Shooting Association of Malaysia (NSAM) & Cheah & Ng & Masitah*, award of March 31, 2008, available at: [http://www.wada-](http://www.wada-ama.org/rtecontent/document/CAS_2007-A-1395.pdf)

ama.org/rtecontent/document/CAS_2007-A-1395.pdf (last visited May 10, 2008).

35 CAS 2006/A/1130, *WADA v. Darko Stanic & Swiss Olympic*, section 41.

36 CAS 2006/A/1130, *WADA v. Darko Stanic & Swiss Olympic*, section 51.

37 CAS 2006/A/1130, *WADA v. Darko Stanic & Swiss Olympic*, section 53.

38 CAS 2007/A/1395, *WADA v. National Shooting Association of Malaysia (NSAM) & Cheah & Ng & Masitah*, section 6.

39 CAS 2007/A/1395, *WADA v. National Shooting Association of Malaysia (NSAM) & Cheah & Ng & Masitah*, section 78.

40 Article 10.5.1 of WADC, Article 10.5.1 of WADC-2009. No fault of negligence means the Athlete's establishing that he or

she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had used or been administered the prohibited substance or prohibited method (see, Appendix 1 to WADC-2009: Definitions).

41 Article 10.5.2 of WADC, Article 10.5.2 of WADC-2009. No significant fault or negligence means the athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence, was not significant in relationship to the anti-doping rule violation (see, Appendix 1 to WADC-2009: Definitions).

42 Article 10.5.1 of WADC.

43 Article 10.5.2 of WADC.

sport,⁴⁴ WADC-2009 has significantly strengthened the incentives for athletes and other persons to come forward in four major respects. First, WADC-2009 has expanded the list of exceptional circumstances which could be used as a basis for elimination or reduction of ineligibility period by adding there the admission of an anti-doping rule violation in the absence of other evidence. Under this new provision, where an athlete or other person voluntarily admits the commission of an anti-doping rule violation before having received notice of a sample collection which could establish an anti-doping rule violation (or, in the case of an anti-doping rule violation other than the presence of a prohibited substance or its metabolites or markers in the athlete's sample, before receiving first notice of the admitted violation pursuant to Article 7 of the Code) and that admission is the only reliable evidence of the violation at the time of admission, then the period of ineligibility may be reduced, but not below one half of the period of ineligibility otherwise applicable.⁴⁵

Second, WADC-2009 has enhanced the potential extent of the suspension of an ineligibility period from one half to three quarters of the otherwise applicable ineligibility period in cases where athlete or other person has provided substantial assistance to an anti-doping organization, criminal authority or professional disciplinary body which results in a criminal or disciplinary body discovering or establishing a criminal offence or the breach of professional rules by another person.⁴⁶ Furthermore, while WADC currently limits the application of these provisions only to anti-doping rule violations involving possession by athlete's support personnel, trafficking and administration of a prohibited substance or prohibited method to an athlete,⁴⁷ WADC-2009 extends their application to all anti-doping rule violations.⁴⁸

Third, WADC-2009 introduces a rule to address the situation where an athlete or other person establishes entitlement to reduction in sanction under more than one provision of Article 10 of WADC-2009 (no significant fault or negligence, substantial assistance or admission in the absence of other evidence).⁴⁹ Under this new rule, after the period of ineligibility is determined in accordance with Articles 10.2, 10.3, 10.4 and 10.6 of the Code, it would be possible to further reduce or suspend this period, but not below one-quarter of the otherwise applicable period of ineligibility.⁵⁰

Fourth, similarly to WADC, under WADC-2009, the ineligibility period, as a general rule, shall also start on the date of the hearing decision providing for ineligibility or, if the hearing is waived, on the date the ineligibility is accepted or otherwise imposed.⁵¹ Unlike WADC, however, WADC-2009 includes into the list of justifications for starting the period of ineligibility earlier than the date of the hearing decision not only delays not attributable to the athlete (as it already was under WADC),⁵² but also timely admission by the athlete of the anti-doping rule violation,⁵³ and provisional suspension.⁵⁴

As concerns the timely admission, under the new rule of WADC-2009, where the athlete promptly (which, in all events, means before the athlete competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by the anti-doping organization, the period of ineligibility may start as early as the date of sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this rule is applied, the athlete or other person shall serve at least one-half of the period of ineligibility going forward from the date the athlete or other person accepted the imposition of a sanction or the date of a hearing decision imposing a sanction.⁵⁵ Nevertheless, this rule shall not apply where the period of ineligibility already has been reduced under Article 10.5.4 (Admission of an anti-doping rule violation in the absence of other evidence).⁵⁶

As concerns the provisional suspension, if such suspension is imposed and respected by the athlete, then the athlete shall receive a credit for such period of provisional suspension against any period of ineligibility which may ultimately be imposed.⁵⁷ If an athlete voluntarily accepts a provisional suspension in writing from an anti-doping organization with results management authority and thereafter refrains from competing, the athlete shall receive a credit for such period of voluntary provisional suspension against any period of ineligibility which may ultimately be imposed.⁵⁸ An athlete's voluntary acceptance of a provisional suspension is not an admission by the athlete and shall not be used in any way as to draw an adverse inference against the athlete.⁵⁹

These four innovations would offer the athletes and other persons who committed anti-doping rule violations a possibility of a significant reduction of ineligibility period, provided that they cooperate with anti-doping organizations, criminal authorities or professional disciplinary bodies either with respect to their own violation of anti-doping rule or with respect to the violation committed by another person. The innovations concerning the early commencement of ineligibility period, in particular, would also create a motivation for the athletes for an early admission of anti-doping rule violation or acceptance of provisional suspension instead of engaging in a prolonged legal battle to challenge the fact of the anti-doping rule violation.

The practical consequences of these innovations could be illustrated on the example of the case of *World Anti-Doping Agency (WADA) v. United States Anti-Doping Agency (USADA), United States Bobsled & Skeleton Federation (USBF) & Zachery Lund*, decided by *ad hoc* Division of CAS (XX Olympic Winter Games in Turin) in 2006.⁶⁰ Mr. Lund competed as a member of the United States Skeleton Team in the World Cup races held at Calgary, Canada, in November 2005. Following a doping control test conducted on November 10, 2005 after the skeleton race, Mr. Lund tested positive for Finasteride, an alphareductase inhibitor, which has been included on the WADA Prohibited List since January 1, 2005 as a masking agent. Mr. Lund has previously disclosed on the Doping Control Form that he had taken Proscar, a medication which contains Finasteride. He did not have, and had not applied for, a Therapeutic Use Exemption (TUE) for the use of Finasteride.⁶¹ Furthermore, while he had checked the Prohibited List on the FIBT and USADA websites every year for five years from 1999 to 2004, he failed to check it in 2005 (when the changes concerning Finasteride have been introduced).⁶² Finally, Mr. Lund has openly been using medication containing Finasteride since 1999 to treat male pattern baldness.⁶³

On January 16, 2006, the USBSF selected Mr. Lund to compete in the XX Olympic Winter Games in Turin. On January 22, 2006, Mr. Lund acknowledged that he had committed a doping violation and accepted the sanction of a Public Warning and disqualification of all competition results in the World Cup in Calgary, including forfeiture of any medals, points and prizes.⁶⁴ On February 2, 2006, WADA appealed this sanction to the CAS *ad hoc* Division.⁶⁵

Having considered the appeal, the *ad hoc* Division of the CAS came to the conclusion that Mr. Lund, on his own admission, an

44 Comment to Article 10.5.3 of WADC-2009.

45 Article 10.5.4 of WADC-2009.

46 Article 10.5.3 of WADC-2009.

47 Article 10.5.3 of WADC.

48 Article 10.5.3 of WADC-2009.

49 Article 10.5.5 of WADC-2009.

50 Article 10.5.5 of WADC-2009.

51 Article 10.8 of WADC; Article 10.9 of WADC-2009.

52 Article 10.8 of WADC; Article 10.9.1 of WADC-2009.

53 Article 10.9.2 of WADC-2009.

54 Articles 10.9.3-10.9.5 of WADC-2009.

Provisional suspension means the athlete or other person is barred temporarily from participating in any competition prior to the final decision at a hearing conducted under Article 8 of WADC-2009 (Right to a fair hearing) (see, Appendix 1 to WADC-2009: Definitions).

55 Article 10.9.2 of WADC-2009.

56 Comment to Article 10.9.2 of WADC-2009.

57 Article 10.9.3 of WADC-2009.

58 Article 10.9.4 of WADC-2009.

59 Comment to Article 10.9.4 of WADC-2009.

60 CAS OG 06/001, *WADA v. USADA, USBF & Zachery Lund*, award dated February 10, 2006, available at: http://www.wada-ama.org/rtecontent/document/CASELA_W_Lund.pdf (last visited May 10, 2008).

61 CAS OG 06/001, *WADA v. USADA, USBF & Zachery Lund*, section 1.3.

62 CAS OG 06/001, *WADA v. USADA, USBF & Zachery Lund*, section 4.1.

63 CAS OG 06/001, *WADA v. USADA, USBF & Zachery Lund*, section 1.9.

64 CAS OG 06/001, *WADA v. USADA, USBF & Zachery Lund*, section 1.6.

65 The CAS *ad hoc* Division had jurisdiction over the case because the dispute has arisen "during the period of ten days preceding the Opening Ceremony of the Olympic Games and "in connection with" the Olympic Games, since Mr. Lund has been selected to compete in the United States team. See, Article 1 of the Arbitration Rules for the Olympic Games (the CAS *ad hoc* Rules), available at: [http://www.tas-cas.org/dzwfiles/document/422/5048/o/reglementJ0%20\(engl\).pdf](http://www.tas-cas.org/dzwfiles/document/422/5048/o/reglementJ0%20(engl).pdf) (last visited May 10, 2008).

admission which was contained on the Doping Control Form, committed an anti-doping violation and cannot escape a period of ineligibility. The Division has arrived at this decision "with a heavy heart" as it meant that Mr. Lund would miss the XX Olympic Winter Games. For a number of years he did what any responsible athlete should do and regularly checked the Prohibited List. But in 2005, he made a mistake and failed to do so. However, even then he continued to include on the Doping Control Form the information that he was taking medication which was known to the anti-doping organizations to contain a Prohibited Substance, and yet this was not picked up by any anti-doping organisation until his positive test in late 2005.⁶⁶ The Division found this failure both surprising and was left with the uneasy feeling that Mr. Lund was badly served by the anti-doping organizations.⁶⁷ Finally, the Panel found that Mr. Lund has satisfied it that in all of the circumstances he bears No Significant Fault or Negligence, and, therefore, reduced the period of ineligibility from two years to one year.⁶⁸

Supposing that a similar case would have been considered under WADC-2009, the result could have been different. First, since under WADC-2009, Finasteride would have been considered as a specified substance, Mr. Lund established both the lack of intent to enhance his sport performance and how this substance entered his body, and this was his first anti-doping rule violation, he would have been eligible for a reprimand and no period of ineligibility.⁶⁹ Assuming, for illustration, that the hearing panel would otherwise impose on Mr. Lund a period of ineligibility of one year (as it did in the actual case), this period could be further reduced pursuant to Article 10.5.5 of WADC-2009 on the basis of combination of No Significant Fault or Negligence (Article 10.5.2) and admission of an anti-doping rule violation in the absence of other evidence (Article 10.5.4) (since Mr. Lund admitted taking a prohibited substance on the Doping Control Form prior to the positive test). As a result, the period of ineligibility could be further reduced up to three months (one fourth of the otherwise applicable period of ineligibility). Finally, since Mr. Lund promptly admitted the anti-doping rule violation, the period of ineligibility may start on the date of the sample collection.⁷⁰

4. Greater flexibility of sanctions in case of multiple violations

As compared to its predecessor, WADC-2009 has introduced four major innovations concerning sanctions in case of multiple violations. First, unlike its predecessor, WADC-2009 prescribes detailed provisions to address the situation when the athlete or another person has consequently committed violations of different anti doping rules.⁷¹ This is achieved by including into WADC-2009 a comprehensive Table which prescribes sanctions in case of a second violation for the different combinations of the following violations and sanctions:

- reduced sanction for specified substance under Article 10.4 of the Code;
- filing failure and/or missed tests;
- reduced sanction for no significant fault or negligence;
- standard sanction under Article 10.2 or 10.3.1 of the Code;
- aggravated sanction under Article 10.6 of the Code;
- trafficking and administration.⁷²

Second, as compared to WADC, the range of sanctions for the second violation of anti-doping rules in WADC-2009 has been significantly increased.⁷³ While under WADC, the basic period of ineligibility for the second violation of Articles 2.1 (presence of prohibited substance or its metabolites or markers), 2.2 (use or attempted use of prohibited substance or prohibited method) and 2.6 (possession of prohibited substances and methods) is lifetime ineligibility,⁷⁴ the basic period of ineligibility for the same violations under WADC-2009 could be from eight years ineligibility to lifetime ineligibility. By the same token, while under WADC the reduced period of ineligibility for second similar violations involving specified substances is two years,⁷⁵ under WADC-2009 the reduced period of ineligibility in such case ranges from one to four years.⁷⁶

Third, WADC-2009 introduced a specific rule for the case when after the resolution of the first anti-doping rule violation, an anti-dop-

ing organization discovers facts involving an anti-doping rule violation by the athlete or other person which occurred prior to the notification regarding the first violation.⁷⁷ Pursuant to the new rule, in such cases the anti-doping organization shall impose an additional sanction based on the sanction that could have been imposed if the two violations would have been adjudicated at the same time. Results in all competitions dating back to the earlier anti-doping rule violation will be disqualified as provided in Article 10.8. To avoid the possibility of a finding of aggravated circumstances (Article 10.6 of WADC-2009) on account of the earlier-in-time but later discovered violation, the athlete or other person must voluntarily admit the earlier anti-doping rule violation on a timely basis after notice of the violation for which he or she is first charged. The same rule shall also apply when the anti-doping organization discovers facts involving another prior violation after the resolution of a second anti-doping rule violation.⁷⁸ Finally, another major innovation introduced by WADC-2009 is a new rule, according to which for purposes of Article 10.7, each anti-doping rule violation must take place within the same eight-year period in order to be considered multiple violations.⁷⁹

The combined effect of these four innovations could be a greater flexibility of sanctions for multiple violations, as compared to WADC, which could lead to a lesser sanction but could also sometimes lead to a bigger sanction. The practical consequences of this flexibility could be illustrated on the example of the case of *Australian Sports Anti-Doping Authority v. Marinov*, decided by CAS in 2007.⁸⁰ Mr. Sevdalin Marinov was born in Bulgaria in 1968 and migrated to Australia in 1991. He has been involved in the sport of weightlifting since 1979, starting as an athlete and winning a number of awards, including the Gold Medal for Bulgaria for weightlifting in the fly weight 52KG division at the 1988 Olympic Games in Seoul. He was the World Record Holder in the 52KG division. In 1994 he was suspended from the sport for 2 years for using a prohibited substance, and retired from competition in 1996. Nevertheless, the evidence of the case was silent as to the circumstances of the offence or the identity of the substance used.

In November 2003, when the events of the case took place, Mr. Marinov was a head coach of an Australian Weightlifting team under the control of the Australian Weightlifting Federation (AWF). On November 14, 2006, three packets each containing substances prohibited under the 2002 AWF Anti-Doping Policy were found by police in a wardrobe in a bedroom in a house belonging to a certain Mr. Murphy, which was used by Mr. Marinov following the earlier separation from his wife. The search followed the interception of Murphy's car by the police on November 13, 2006, when a number of illegal drugs have been found in it. Other illegal substances were found throughout Murphy's house, and he was later charged and pleaded guilty to a number of drug related offences including trafficking and possessing an anabolic steroid.

The Australian Sports Anti-Doping Authority (ASADA) started proceedings against Mr. Marinov for potentially committing an Anti-Doping Rule Violation, being possession of prohibited substances, namely anabolic and androgenic steroidal agents, and trafficking of prohibited substances, namely anabolic and androgenic steroidal agents.⁸¹ Mr. Marinov denied any knowledge of the substances saying that he had not seen them before and he had no knowledge of how they got into the wardrobe. Consequently, on February 15, 2007, the ASADA lodged an application with CAS Oceania Registry to deter-

66 CAS OG 06/001, *WADA v. USADA, USBF & Zachery Lund*, section 4.15.

67 CAS OG 06/001, *WADA v. USADA, USBF & Zachery Lund*, section 4.16.

68 CAS OG 06/001, *WADA v. USADA, USBF & Zachery Lund*, section 4.17.

69 Article 10.4 of WADC-2009.

70 Article 10.9.2 of WADC-2009.

71 Article 10.7 of WADC-2009.

72 Article 10.7.1 of WADC-2009.

73 Article 10.7 of WADC-2009.

74 Article 10.2 of WADC.

75 Article 10.3 of WADC.

76 Article 10.7.1 of WADC-2009.

77 Article 10.7.4, part 2, of WADC-2009.

78 Article 10.7.4, part 2, of WADC-2009.

79 Article 10.7.5 of WADC-2009.

80 CAS A1/2007, *Australian Sports Anti-Doping Authority v. Sevdalin Marinov*, award of June 9, 2007, the text of the decision was previously available on WADA website.

81 CAS A1/2007, *Australian Sports Anti-Doping Authority v. Sevdalin Marinov*, section 13.

mine whether Mr. Marinov committed the anti-doping rule violation and, if so, what sanctions to apply.⁸²

Having considered the evidence, the CAS found that Mr. Marinov had custody or control of the three packets on November 14 and since August 2003. He occupied the bedroom exclusively from August 2003 and accordingly had custody or control (possession) of the room and its contents in which the prohibited substances were found. If the packets belonged to Murphy, Mr. Marinov had the power and ability to direct Murphy to get rid of them or to remove them from the bedroom occupied by him. In the CAS's view, Mr. Marinov was able in any event to remove the packets himself and put them beyond his custody and control.⁸³ The CAS, therefore, determined that Mr. Marinov committed a doping offence of trafficking by possessing and holding prohibited substances contrary to 2002 AWF Anti-Doping Policy.⁸⁴ Accordingly, as it was Mr. Marinov's second offence, the CAS was required to impose the mandatory sanction of being ineligible for life from being selected to represent Australia in international competition, from competing in any events and competitions or under the auspices of the AWF, from receiving direct or indirect funding assistance from the AWF and from holding any position within the AWF.⁸⁵

Supposing that a similar case would have been considered under WADC-2009, the result could have been different. Since the first anti-doping rule violation have been committed by Mr. Marinov in 1994, i.e., outside the eight-year period required under Article 10.7.5 of WADC-2009, his latest violation (trafficking) committed in 2006 could not be considered as a multiple violation. Consequently, under WADC-2009, Mr. Marinov could have been potentially subject to a lesser sanction, namely, four years ineligibility for trafficking⁸⁶ or even two years, in case his acts would have been qualified not as trafficking, but as possession of prohibited substances.⁸⁷

5. Introduction of aggravating circumstances which may increase the period of ineligibility

Reflecting the trend of strengthening the firmness in fight against doping which emerged during the Code's review, WADC-2009 has introduced a specific provision allowing for the increase of sanctions in cases involving aggravated circumstances. Under this new provision, if the anti-doping organization establishes in an individual case involving an anti-doping rule violation other than Article 2.7 (trafficking) and 2.8 (administration) that aggravating circumstances are present which justify the imposition of a period of ineligibility greater than the standard sanction, then the period of ineligibility otherwise applicable shall be increased up to a maximum of four years unless the athlete or other person can prove to the comfortable satisfaction of the hearing panel that he did not knowingly violate the anti-doping rule.⁸⁸ In line with strengthening incentives to come forward, WADC-2009 further provides that the athlete or other person can avoid the application of this new Article by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation by anti-doping organization.⁸⁹

While Article 10.6 itself does not provide a list of the aggravating circumstances, the examples of such circumstances are given in the Comment to Article 10.6:

* the athlete or other person committed the anti-doping rule violation as part of a doping plan or scheme, either individually or

involving a conspiracy or a common enterprise to commit anti-doping rule violations;

- * the athlete or other person used or possessed multiple prohibited substances or prohibited methods or used or possessed a prohibited substance or prohibited method on multiple occasions;
- * a normal individual would be likely to enjoy the performance-enhancing effects or the anti-doping rule violation(s) beyond the otherwise applicable period of ineligibility;
- * the athlete or person engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation.⁹⁰

The Comment to Article 10.6 further points out that these examples are not exclusive and other aggravating factors may also justify the imposition of a longer period of ineligibility.⁹¹ As a result, in comparison with WADC, under WADC-2009 the athletes could potentially face longer periods of ineligibility in cases which, in the view of an anti-doping organization and, eventually, the CAS, while considering an appeal, involve aggravating circumstances.

Although certain authors have already expressed the view that "aggravating circumstances" are defined in WADC-2009 with sufficient precision in order to comply with the principle "no crime nor punishment without law" (*nullum crimen, nulla poena sine lege*),⁹² it may still be anticipated that the athletes would try to challenge these longer periods of ineligibility imposed under Article 10.6 of WADA-2009 on the basis of violation of this principle as well as on the basis of lack of predictability that the circumstances in a particular case would qualify as "aggravating circumstances". While making this challenge, the athletes could rely upon the decision of the CAS in the case of *USA Shooting & Quigley v. UIT*.⁹³ In this case, the CAS refused to apply a strict liability standard, because it was not clearly articulated in the Anti-Doping Regulations of the UIT.⁹⁴ The CAS pointed out that the fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-apppliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the *de facto* practice over the course of many years of a small group of insiders.⁹⁵

This reasoning of the CAS may be fully applied to the possible challenge of the validity of increased sanction imposed on the basis of aggravating circumstances not specified in the WADC-2009. Indeed, when an anti-doping organization justifies increased sanction by such circumstances, the athlete does not have any possibility of knowing in advance that a given circumstance in his/her particular case would be considered as an aggravating circumstance. Therefore, if such sanction is applied, it would clearly lack predictability, which, in light of the decision in *USA Shooting & Quigley v. UIT* could lead the CAS to reverse the increased sanction.

IV. Innovations concerning consequences of anti-doping rule violations to teams

As compared to its predecessor, WADC-2009 has introduced four innovations concerning consequences of anti-doping rule violations by individual athletes for their teams.⁹⁶ First, as compared to WADC, WADC-2009 has increased the threshold for disciplinary action

82 CAS A1/2007, *Australian Sports Anti-Doping Authority v. Sevdalin Marinov*, section 18.

83 CAS A1/2007, *Australian Sports Anti-Doping Authority v. Sevdalin Marinov*, section 77.

84 CAS A1/2007, *Australian Sports Anti-Doping Authority v. Sevdalin Marinov*, section 79.

85 CAS A1/2007, *Australian Sports Anti-Doping Authority v. Sevdalin Marinov*, section 80.

86 Article 10.3.2 of WADC-2009.

87 Article 10.2 of WADC-2009.

88 Article 10.6, part 1, of WADC-2009.

89 Article 10.6, part 2, of WADC-2009.

90 Comment to Article 10.6 of WADC-2009.

91 Comment to Article 10.6 of WADC-2009.

92 See, Gabrielle Kaufmann-Kohler, Antonio Rigozzi, Legal Opinion on the Conformity of Article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes available at: www.wada-ama.org/rtecontent/document/Legal_Opinion_Conformity_10_6_complete_document.pdf (last visited May 10, 2008).

93 CAS 94/129, *USA Shooting & Quigley v. UIT*, award of May 23, 1995, 11CAS:

Digest of CAS Awards, vol. 1, 1986-1998, (Mathieu Reeb, ed., 1998), p. 187-204.

94 Article 2 of the UIT Anti-Doping Regulations, was entitled "Definitions" and it began with the following words: "Doping means the use of one or more substances mentioned in the official UIT Anti-Doping List with the aim of attaining an increase in performance...".

Consequently, Article 2 of the Regulations required a finding of culpable intent of the

athlete. See, CAS 94/129, *USA Shooting & Quigley v. UIT*, p. 194 (sections 18 and 22).

95 CAS 94/129, *USA Shooting & Quigley v. UIT*, p. 197-198 (section 34).

96 Team sport is defined in WADC-2009 as a sport in which the substitution of players is permitted during a competition. Competition is a single race, match, game or a singular athletic contest. (see, Appendix I to WADC-2009: Definitions).

against the teams. While under WADC, a team may be subject to disqualification or other disciplinary action if more than one of its members is found to have committed an anti-doping rule violation,⁹⁷ under WADC-2009, the ruling body of the event shall impose an appropriate sanction on the team (e.g., loss of points, disqualification from a competition or event, or other sanction) if more than two of its members are found to have committed such violation.⁹⁸

Second, while WADC provides for the possibility to punish the team in case of anti-doping rule violations by its members ("the team may be subject"), WADC-2009 imposes the obligation upon the ruling body of the event to punish such team ("shall impose an appropriate sanction").⁹⁹ Third, while the possibility of imposing sanctions upon teams in addition to sanctions upon individual members already existed under WADC, WADC-2009 for the first time provides a specific rule confirming such possibility.¹⁰⁰ Finally, WADC-2009 introduces a new provision allowing the ruling body for an event to establish rules for the event which impose consequences stricter than those in Article 11.2 for the purposes of the event, for example rules, which would require disqualification of a team from the Games of the Olympiad based on a lesser number of anti-doping rule violations during the period of the Games of the Olympiad.¹⁰¹ From the point of view of their practical consequences, the combined effect of these innovations could lead to a harshening of the consequences for the teams in case of anti-doping rule violations by their members, although the increase of the threshold for imposition of sanctions upon teams could sometimes lead to their release of liability as compared to WADC.

V. Lessons for the future

The rapid pace of modern life in general and the athlete's life in particular makes the question "what if?" extremely difficult to answer. What if by the time of a certain anti-doping rule violation by a cer-

tain athlete or trainer the WADC-2009 had already entered into effect? Could this have resulted in a lesser period of ineligibility for an athlete (such as Mr. Zachery Lund)¹⁰² so that he could have participated in the next Winter Olympic Games and could have broken a new record? Could this have resulted in a lesser period of ineligibility for an experienced trainer (such as Mr. Sevdalin Marinov)¹⁰³ so that he could have trained many athletes, one of whom could have broken another record? We would never know. Nevertheless, the thing which could be said with certainty is that the WADC-2009 created stronger incentives for the athletes and their trainers to practice a drug-free sport and consequently, laid a solid foundation for the greater realization of human abilities in this area in the spirit of a fair competition. Finally, it may be recalled that one of the important goals of different sport stakeholders (for example, Federation Internationale de Football Association (FIFA)) was always to move the WADC towards more flexibility in order to enable a more individual case by case management by the competent bodies deciding the cases. This goal was partially achieved in WADC-2009 and a step into the right direction has been made.¹⁰⁴

⁹⁷ Article 11 of WADC.

⁹⁸ Article 11.2 of WADC-2009. The event is a series of individual competitions conducted together under one ruling body (e.g., the Olympic Games, FINA World Championships, or Pan American Games). (see, Appendix 1 to WADC: Definitions; Appendix 1 to WADC-2009: Definitions).

⁹⁹ Article 11.2 of WADC-2009.

¹⁰⁰ Article 11.2 of WADC-2009.

¹⁰¹ Article 11.3 of WADC-2009; Comment to Article 11.3 of WADC-2009.

¹⁰² CAS OG 06/001, *WADA v. USADA*,

USBF & Zachery Lund, award dated February 10, 2006, available at: http://www.wada-ama.org/rtecontent/document/CASELA_W_Lund.pdf (last visited May 10, 2008).

¹⁰³ CAS A1/2007, *Australian Sports Anti-Doping Authority v. Sevdalin Marinov*, award of June 9, 2007.

¹⁰⁴ See, Feedback on Code 2007: Draft Version 2.0, Comments on Article 10 by FIFA. // <http://www.wada-ama.org/rtecontent/document/c3Article10.pdf> (last visited May 10, 2008).

One World One Dream? Sports Blogging at the Beijing Olympic Games

by Evi Werkers, Katrien Lefever and Peggy Valcke*

The 2008 Olympics are finished, world records have been broken, medals have been distributed and athletes have returned home. The Beijing Games were a much discussed event even before they took place. Not only was press freedom severely restricted by the Chinese government, hindering journalists from doing a decent job, but the International Olympic Committee (IOC) also decided to put a check on new media covering the Olympic Games. Although the IOC recognizes the freedom of the media, the organization seemed to deviate with ease from this fundamental principle in its own Internet Guidelines issued for the 2008 Olympics. This raises the question whether the restrictions included in these Guidelines can be justified, or whether the IOC yielded to the pressure of the Olympic host.

In the first two Parts of this article we take a closer look at the recent developments in the sports media landscape due to sociological and technological changes. In Part 3 the risks and opportunities of broadcasting the Beijing Olympics via the Internet and the internet and blogging guidelines adopted by the IOC in order to protect the exclusive rights of stakeholders, are examined. In Part 4 we take up the challenge to analyse the aforementioned guidelines in the context of the European Convention on Human Rights to finally draw conclusions in Part 5.

1. The Olympic Games: anywhere, anytime

In the past, sports fans could only follow the Olympic Games on a traditional television set. Due to technological developments, howev-

er, the media landscape has changed tremendously. The emergence of new communication technologies, such as the Internet and interactive digital television, the convergence of these technologies, and the multiplication of the number of viewing devices, has greatly affected how sports fans follow sports events. Fans can now be informed about the Games "24/7", consult highlights on sports websites, receive news alerts or pictures on their mobile phones, and watch extensive analysis on their television sets at home. In other words, sports news has become available and accessible at a place and time that suits the viewer. Whereas the Olympic Charter¹ states that the IOC will take all necessary steps in order to ensure the fullest coverage by the different media (traditional media as well as new media) and the widest possible audience in the world for the Olympic Games,² the IOC prohibited for a long time broadcasting images of the Olympic Games on the Internet and mobile phone. Although the IOC has acknowledged

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Technology (IBBT), which was founded by the Flemish Government in 2004.

¹ The Olympic Charter, last updated July 7, 2007, is the codification of the fundamental principles, rules and by-laws for the organization of the Olympic Games and for governing the Olympic movement.

² Art. 49 Olympic Charter.