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Regulatory Features and Administrative Law  
Dimensions of the Olympic Movement's  
Anti-doping Regime

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## **ABSTRACT:**

This paper examines, from a global administrative law standpoint, the crafting and administration of the anti-doping regime by the non-governmental international sports governing bodies, grouped in the Olympic Movement. It explores the inroads made by public actors (governments and courts) in the Olympic Movement's self-constructed monopoly on norms for the international sports community. Courts are playing an important role on the margin: while they rightly defer on substantive issues to the expertise and shared understanding of the sport governing bodies ('lex sportiva'), they are willing to interfere when the latter's decisions run counter to fundamental human rights and classic administrative law protections of due process. This has pressed private bodies such as the Olympic Movement to introduce new governance structures (especially the independent Court of Arbitration for Sport), mirroring those found in more strictly public international administration. There has also been a remarkable outreach to national governments, leading to hybrid public-private bodies such as the World Anti-Doping Agency. This interaction appears to be yielding satisfactory results so far.

# **‘Regulatory features and administrative law dimensions of the Olympic Movement’s anti-doping regime’**

Alec Van Vaerenbergh\*

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## I. Introduction

The governance of global sport, including the Olympics, involves considerable administration by private bodies and by hybrid public-private bodies. This is exemplified by the construction and administration of a complex global anti-doping regime that has far-reaching impacts on athletes, sponsors, and the viability of sports. This paper examines the extent to which this largely private governance regime has come to mirror administrative law principles that are developing in state administration and in more strictly public international administration, and addresses the puzzles of why this mirroring occurs, what its limits might be, and whether it is desirable<sup>1</sup>.

The international sports regime has grown rapidly in significance throughout its history. Sports regulation is now no longer perceived as ‘innocent corporatist regulation’: professional athletes gain their livelihood through sport, most international and many national competitions involve enormous economic interests, and sports successes or setbacks may even have some political impact (the old Roman idea of providing ‘*panem et circenses*’, bread and games, to appease the populace has certainly not faltered)<sup>2</sup>. Anti-doping regulation, in particular, touches upon something traditionally considered as within the public sphere, namely health policy.

The professional sports field is intrinsically a very international polity, in which a national wayward approach is likely to upset the global system. The international character is arguably one of the merits of sports, but it makes smooth transnational co-operation ever more indispensable and the room for dissent ever tighter. If one combines this with the growing recognition of the social role of sports in general, the isolated position of this international private regime seems to become ever more threatened and demands for good governance ever more convincing.

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<sup>1</sup> This working paper was thus heavily inspired by the innovative and comprehensive analysis of the “global administrative space” by Benedict KINGSBURY, Nico KRISCH and Richard B. STEWART (see “The Emergence of Global Administrative Law”, forthcoming in *Law and Contemporary Problems* 68:3 (2005)).

<sup>2</sup> Consider the enormous importance attached by governments to hosting the Olympic Games successfully.

In our study of how elements of global governance have infiltrated this international private regulatory framework, we will first sketch out the general structure of the international sports regime and identify instances of government involvement in the fight against doping (II). We will also provide a descriptive account of recent controversies on doping due process across different sports, so as to gain a better understanding of the problems and the developments occurring in practice (III). In order to engage in a thorough analysis of these phenomena, the paper will then inquire into the exact place of the anti-doping *contentieux* in the (international) legal landscape (IV). From this basis the paper will assess the pervasiveness of typical administrative law protections in the creation of anti-doping regulation (V) and in the adjudication of international doping disputes (VI). Finally, it will draw some conclusions (VII).

## **II. Outline of the international sports and anti-doping regulatory structure**

### *II.1. Non-governmental and mixed bodies*

The *Olympic Movement*<sup>3</sup>, headed by the International Olympic Committee (IOC) and further consisting of the Organization Committees of the Olympic Games (OCOGs), International Federations (IFs, one per sport), the National Olympic Committees (NOCs) and National Governing Bodies (NGBs, one per sport per nation), is still at the heart of regulatory authority for many sports matters. This authority is linked to the Olympic Games since incorporation in the Movement's hierarchical framework and compliance with its regulations is a condition for eligibility for participation in the Olympic Games (art. 52 Olympic Charter<sup>4</sup>). Its authority has gradually also been recognized by international federations of non-Olympic sports<sup>5</sup>. Bigger IFs which are financially independent of Olympic Games do display a growing tendency

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<sup>3</sup> Official website: <http://www.olympic.org>. The Olympic Movement also contains the Paralympic Movement.

<sup>4</sup> The Olympic Charter is retrievable at [http://multimedia.olympic.org/pdf/en\\_report\\_122.pdf](http://multimedia.olympic.org/pdf/en_report_122.pdf) (last visited June 10 2005).

<sup>5</sup> A large number of them have grouped in the Association of IOC Recognized International Sports Federations, who in principle retain their autonomy but can opt in many Olympic Movement programs and are bound to respect the Olympic Charter.

to be reticent or even hostile towards some IOC initiatives<sup>6</sup>. The big American professional competitions however, such as Major League Baseball, do not adhere to the American ‘national governing body’ for their respective sports, such as USA Baseball, and thus operate outside the Olympic Movement framework<sup>7</sup>.

Thus, the Olympic Movement has a characteristic cross-hierarchical structure: while the IOC stands on top of the *NOCs*, it also controls the *IFs* for each discipline (art. 29 Olympic Charter). Those *IFs* then decide upon membership of a *NGB*<sup>8</sup> in its discipline and in this way supervise them. *NOCs* operate as national go-betweens for the selection requirements for the Olympics and in this way control the *NGBs*. IOC and *IFs* are always private associations, established according to the domestic law of a country (often Switzerland). *NOCs* and *NGBs* are ordinarily also non-governmental associations. The Olympic Movement is self-supporting: it gets its financing from the sale of broadcasting rights and sponsorship deals<sup>9</sup>.

In order to give a new boost to the fight against doping, the IOC set up a special anti-doping enforcement body in 1999, the World Anti-Doping Agency [WADA]<sup>10</sup>. This organization has a mixed composition (although it is a non-governmental association in a strict legal sense) with equal representation from the Olympic Movement and governments. Its tasks are to develop the World Anti-Doping Code [WADC] and related international standards, to conduct out-of-competition tests, to observe doping control and result management of events (through its Office of the Independent Observer) and to fund research and education programs. Its budget comes for one half from the Olympic Movement funds, for the other half from governments. Its World Anti-Doping Program [WADP] consists of an integral harmonization effort of anti-doping policies, (procedural and substantive) rules and implementing regulations

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<sup>6</sup> See Michael S. STRAUBEL, Doping Due Process: A Critique of the Doping Control Process in International Sport, 106 *Dick. L. Rev.* 523, at 533.

<sup>7</sup> This explains why they have more lenient doping testing and sanctioning procedures, which its direction has to negotiate through collective bargaining with their ‘employees’, the athletes.

<sup>8</sup> And thus on the participation of athletes of that state in the international competitions of that discipline.

<sup>9</sup> The IOC and *IFs* distribute part of the proceeds to the different *NOCs* and *NGBs*. However, the latter often receive additional subsidies from their national governments.

<sup>10</sup> Official website: [www.wada-ama.org](http://www.wada-ama.org).

for both sports federations and governments, with the World Anti-Doping Code as its centerpiece, complemented by International Standards and Models of Best Practices.

Work on the WADC finished in 2003 and it came into force in 2004. The objective of having the Code adopted by the IOC<sup>11</sup> and all IFs before the 2004 Summer Olympics was met<sup>12</sup>. The Code will replace IOC's Anti-Doping Code, which was not binding outside of the Olympic Games. Although the Code in itself is meant to be a private text, the accompanying Copenhagen Declaration promising support for WADC was signed by over 100 national governments. The Code can rightly be considered as the international "supreme doping law". Art. 15 WADC allocates the different responsibilities between the Olympic Movement bodies in anti-doping testing and adjudication (in line with the above-mentioned hierarchical system): basically the IOC establishes the general testing procedures, executes the tests for the Olympic Games and decides on ensuing disqualifications (but IFs will decide on any possible suspensions), IFs are active in testing and follow-up for specific international competitions such as World Championships, and NGBs and National Anti-Doping Organizations are responsible for other competitions within their country. Out-of-competition testing is mostly carried out by NGBs and the national anti-doping organizations, but WADA also has a cross-cutting program for out-of-competition tests.

In some countries National Anti-Doping Organizations (NADOs) have been established. They mirror WADA at the national level: they are specialized doping agencies, responsible for testing and sanctioning. Their competence, often delegated by the NOC under assent of national legislation (e.g. U.S. Anti-Doping Agency or USADA<sup>13</sup>), extends over all sports, but is limited to the country's athletes.

Finally, there is the Court of Arbitration for Sport [CAS], a non-governmental arbitral tribunal for sports-related matters, with its seat in Lausanne. Its functioning is regulated in its

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<sup>11</sup> Art 45 and 48 Olympic Charter.

<sup>12</sup> Although it took a while to convince recalcitrant powerhouses such as the international cycling federation (UCI) and the international soccer federation (FIFA), every Olympic-sport IF adopted it, and many non-Olympic IFs did the same.

<sup>13</sup> Similar to the pattern with WADA at the international level, the American Olympic Committee (USOC) conditions recognition of NGBs upon acceptance of USADA as the national doping authority: USOC Bylaws Chapter 23 2(G) (2001), available at USOC website: <http://www.usolympicteam.com>.



Code for Sports-Related Arbitration. The Court is managed by the International Council of Arbitration for Sport (ICAS), an ‘independent’ foundation under Swiss law. The court has ad-hoc divisions at the Olympics (and a branch in the US).

## *II.2. Implication of governments in the fight against doping*

In most countries, the role of governments in professional<sup>14</sup> sports regulation is limited to passing a statute formally recognizing the NOC and giving it a very broad discretion to exclusively regulate sports matters, under a few conditions relating to due process (e.g. Ted Stevens Amateur Sports Act<sup>15</sup>). Governments often grant subsidies to the NOC. The same recognition along with broad discretion is given to NADOs with regard to doping matters. In many countries, governments establish ordinary criminal jurisdiction and lay down criminal sanctions over trainers, doctors etc. who administer and traffic in prohibited performance-enhancing substances<sup>16</sup>. In some countries, governments legislate to establish a list of prohibited substances and a corresponding general prohibition of doping practices by athletes. Governments will further organize and execute tests themselves at national sports events. However, as a rule, they will delegate selection procedures for testing and sanctioning authority to sports federations. Prior recognition of the federation’s disciplinary scheme is then required to guarantee minimal effectiveness and due process<sup>17</sup>. Finally, France has taken the governmental intervention a step further: its national sport governing bodies are listed in legislation and are said to perform a

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<sup>14</sup> I use ‘professional sports’ here as a short-hand for ‘sports as exercised in official competitions, in the framework the Olympic Movement’. This does not necessarily imply that all athletes engage in these competitions on a professional basis (although this is of course the case in the major competitions). I want to contrast the notion to ‘recreation-level sports’, taking place alongside Olympic Movement structures and where the regulatory space belongs fully to the national governments.

<sup>15</sup> 36 U.S.C. 220501 (2001)

<sup>16</sup> A report from a Council of Europe Conference of European Ministers responsible for Sports from 2000 indicates that at that time there were 13 countries who had adopted specific criminal measures to suppress doping networks distributing doping agents (including France, Germany, the UK and Australia). This number of countries has grown since (e.g. Belgium, Canada). See Appendix 2 at <http://cm.coe.int/reports/cmdocs/2000/2000cm97.htm> (last visited June 10 2005). In the U.S. there have recently been amendments to the Controlled Substances Act (21 U.S.C. 802) establishing offenses for dealing in different kind of anabolic steroids: the Anabolic Steroid Control Act was signed on October 8 2004. For its text: see [http://www.nutrabis.com/News/news.steroid\\_control\\_act\\_2.htm](http://www.nutrabis.com/News/news.steroid_control_act_2.htm) (last visited June 10 2005).

<sup>17</sup> This is the case in e.g. Italy and Belgium (for Flemish Region: Vlaams Decreet inzake Medisch Verantwoord Sporten, 27 March 1991, *Belgisch Staatsblad* 11 June 1991, 12876).

‘mission of public service’. This does not only imply that all of their decisions are subject to basic principles of public law, but also that their disciplinary procedures are incorporated in the administrative law system and open for review by administrative courts (and, eventually, the *Conseil d’Etat*)<sup>18</sup>.

International efforts to eradicate doping are also increasing. The Council of Europe was the first international player to act: it adopted the European Anti-Doping Convention (1989)<sup>19</sup>. Parties undertake, where appropriate, to adopt anti-doping legislation or regulation, to make subsidies to sports organizations subject to availability of anti-doping regulations, to assist those organizations and establish testing laboratories, to educate the athletes and to foster intergovernmental co-operation. The European Union has so far limited itself to stating official positions and enacting other soft-law instruments<sup>20</sup>.

But most importantly, governmental negotiations are underway for a comprehensive International Anti-Doping Convention, under the auspices of UNESCO and closely monitored by WADA<sup>21</sup>. The goal is to have a Convention in force before the 2006 Winter Olympics. Probably the Convention shall delegate the implementation of its provisions to both WADA (standards, testing) and the Olympic Movement (sanctioning, dispute settlement process). In the meantime, many governments have signed the Copenhagen Declaration in support of WADC and some have transposed WADA’s Prohibited Substances list into national regulation (so that it would also cover those sporting activities for which this government has assumed competencies, particularly for recreation-level sports)<sup>22</sup>.

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<sup>18</sup> Act no. 89-432 of 28 June 1989, as amended by Act no. 99-223 of 23 March 1999, *Journal Officiel* no. 70 of 24 March 1999, 4399). See Jean-Christian LAPOUBLE, *Droit du Sport*, 1999, Paris, LDGJ, p. 136-138 & 159-160.

<sup>19</sup> 16 November 1991. Retrievable at the CoE website: <http://conventions.coe.int/Treaty/en/Treaties/Html/135.htm> (last visited June 10 2005).

<sup>20</sup> The initiatives are collected at the Commission website at [http://www.europa.eu.int/comm/sport/action\\_sports/dopage/dopage\\_overview\\_en.html](http://www.europa.eu.int/comm/sport/action_sports/dopage/dopage_overview_en.html) (last visited June 10 2005).

<sup>21</sup> Decision voted in the UNESCO General Conference of October 16 2003. See WADA Press Release, “WADA Praises UNESCO Decision For International Convention Against Doping in Sport” (October 17 2003), retrievable on WADA website.

<sup>22</sup> This is the case in Belgium.

### III. A few case studies on recent controversies on due process in anti-doping procedures

The 2004 U.S. Presidential State of the Union address devotes a full paragraph to anti-doping policy<sup>23</sup> and newspaper sports columns are more and more filled with elaborate polemics and legalese. The *in se* private anti-doping regime is coming under ever closer public scrutiny, with affected athletes demanding treatment that lives up to classic due process or human rights standards. This section will note some of the recent controversies that have led to change in this area, emphasizing the role of the 2004 Olympics as a probable turning point in the struggle against doping. This will provide a basis for the deeper analysis in the following section.

The investigation into the private Californian laboratory BALCO and its alleged distribution of THG ‘designer steroids’ has led to several coaches’ indictments, with track and baseball athletes testifying before a federal grand jury<sup>24</sup>. In the aftermath of the scandal, 10 leading American track athletes have been suspended (and often also stripped of titles and medals<sup>25</sup>) on the basis of positive test results for various products<sup>26</sup>. Three other sprinters were suspended in the same breath by USADA, although they had never rendered positive test results. This had never happened before. These so-called ‘non-analytical positives’ were pronounced in the cases of Kelli White and Alvin Harrison (on the basis of own admissions), and of Michelle Collins (strikingly, only on the basis of documentary and verbal evidence drawn from the federal investigation into Balco). Collins, who received a suspension of no less than 8 years, appealed this ground-breaking decision only to come away empty-handed as an AAA Arbitration Panel considered that USADA had proven “beyond a reasonable doubt” that the athlete had taken the

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<sup>23</sup> See US Pres. George W. Bush’s 2004 State of the Union Address, retrievable at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (last visited April 16 2005).

<sup>24</sup> A good account can be read on the BBC website: Tom FORDYCE, “America wakes up to doping nightmare”, June 9 2004, at <http://news.bbc.co.uk/sport1/hi/athletics/3757673.stm> (last visited April 16 2005).

<sup>25</sup> In this way the gold medal of the women’s 100m dash at the 2003 World Championships has been awarded to the athlete that came in third, as the winner and the runner-up (both American) have subsequently (in 2004) been disqualified for taking prohibited substances .

<sup>26</sup> A top-class UK sprinter, Dwain Chambers, also tested positive after taking products provided by Balco and received a two-year ban from the UK Athletics Disciplinary Committee. See BBC Online, “Chambers gets two-year ban”, February 24 2004, <http://news.bbc.co.uk/sport2/hi/athletics/3492427.stm> (last visited June 10 2005).

forbidden substances. However, only 2 months earlier, International Athletics Federation [IAAF] Secretary-General Gyulai had contended that only a positive dope test would be enough to justify suspending athletes<sup>27</sup>.

But it was triple Olympic champion Marion Jones who found herself at the centre of the media storm: in the context of the federal investigation into Balco, colleagues and doctors made accusations, substantiated by documents, that she engaged in doping, and on that basis USADA started an investigation. Information was repeatedly leaked to the media. Jones vigorously denied all assertions, filed defamation claims, called the procedures a witch hunt and asked in vain for a public hearing instead of appearing before USADA's "secret kangaroo court"<sup>28</sup>. But since eventually she was not formally charged with doping practices, she could participate in the Athens Olympics<sup>29</sup>. Many suspended athletes have indeed questioned the independence and impartiality of AAA panels conducting the hearing process for USADA, but without success<sup>30</sup>. In the meantime, the Chairman of the World Anti-Doping Agency Dick Pound, while reserving praise for the zeal of the recently created USADA criticized at the leadership of the national athletics governing body, USA Track & Field, holding them responsible for their demonstrated lack of zero-tolerance in anti-doping enforcement<sup>31</sup>.

US baseball was also hit hard by the Balco-case, and Major League Baseball overcome resistance from their players' union and reached a pathbreaking agreement launching a stricter

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<sup>27</sup> See BBC Online, "IAAF clarifies ban rule", 7 July 2004, [http://news.bbc.co.uk/sport2/hi/olympics\\_2004/athletics/3875109](http://news.bbc.co.uk/sport2/hi/olympics_2004/athletics/3875109) (last visited April 24 2005).

<sup>28</sup> What Jones is referring to is not really a trial-type proceeding, but rather a preliminary 'probable cause hearing' (see below). We can add that fellow US athlete Allen Johnson spoke out publicly in support of Jones, comparing USADA's policing to that of the Gestapo...

<sup>29</sup> However, some prestigious athletics meetings have taken the policy to refuse any athlete "involved in doping cases" and have consequently denied participation to Jones. See BBC Online, "Zurich snub for Jones", July 30 2004, <http://news.bbc.co.uk/sport2/hi/athletics/3931537.stm> (last visited June 10 2005).

<sup>30</sup> Like 1500m runner Regina Jacobs. See Jere LONGMAN, "Top Runner Challenging Drug Appeals Process" in *New York Times*, January 16 2004, p. D6.

<sup>31</sup> See A. FRASER, "Pound slams US over drugs", August 12 2004, on BBC Online: [http://news.bbc.co.uk/sport2/hi/olympics\\_2004/3558000.stm](http://news.bbc.co.uk/sport2/hi/olympics_2004/3558000.stm) (last visited June 10 2005). In fact, USA T&F has been found to have kept different significant dope failures under wraps at the end of the 1990s, without enacting suspensions and reporting to the international body IAAF. One of these cases involved Jerome Young, who had tested positive for nandrolone, but USA T&F allowed him to compete at the 2000 Olympics, where he obtained gold as a member of the 4x400m relay team. The case has been reopened by USADA/IOC and eventually brought before the Court of Arbitration for Sport. Young was stripped of his gold medal, while it is still for IAAF to decide whether it would also forfeit the gold medals for the 3 other runners of the team.

testing program in 2005. But its sanctions, as well as the covered substances, still fall way short of WADA standards, with a first doping violation resulting in a suspension of maximum 10 days and a fourth resulting in a 1-year suspension (versus a 2-year suspension for a first violation and a lifetime suspension after a second). The policy change occurred under strong pressure from US Congress, which, in the face of disturbing reports of 500,000 American teenagers experimenting with steroids, began conducting hearings within the House Government Reform Committee. Congressmen clearly feel entitled to compel the professional baseball organization into a tougher approach, stating that the anti-trust exemption they enjoy under US law, allowing them to be largely self-regulating, does not amount to ‘a public accountability exemption’<sup>32</sup>. In 2005, WADA scientists have discovered a new ‘designer drug’, which like THG was especially developed for enhancing sport performances<sup>33</sup>.

Another sport tainted by rampant doping practices is cycling. The searches and arrests by the Italian and French judicial police that marred the 1998 Giro d’Italia and Tour de France, have continued to haunt cycling to date. In France and Belgium public prosecutors have assembled compelling documentation from criminal investigations into doping practices in the cycling scene and transmitted them to national sport governing bodies, and often also to the press. Consequently, sport bodies have had no choice but to take firm action<sup>34</sup>. Cycling also had the

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<sup>32</sup> See X, “MLB agrees on steroid testing”, on the BBC website: [http://news.bbc.co.uk/sport2/hi/other\\_sports/us\\_sport/4170973.stm](http://news.bbc.co.uk/sport2/hi/other_sports/us_sport/4170973.stm) (last visited April 23 2005). The House Government Reform Committee is also directing its attention to the other major American professional sports organizations, like the National Football League, where the anti-doping regime is equally lax compared to the prevalent standards of the Olympic Movement. See the press release “Government Reform Committee Announces Hearing on National Football League and Use of Steroids”, April 19 2005, retrievable on the House Government Reform Committee’s website: <http://reform.house.gov/govreform/news/documentsingle.aspx?DocumentID=7898> (last visited April 24 2005).

<sup>33</sup> BBC Online, “WADA discovers new designer drug”, 1 February 2005, [http://news.bbc.co.uk/sport2/hi/front\\_page/4226893.stm](http://news.bbc.co.uk/sport2/hi/front_page/4226893.stm) (last visited June 8 2005).

<sup>34</sup> An emblematic example of the desperation with which athletes seek artificial performance boosts, of the shady environment they get implicated in, and of the peculiar interaction between the Public Prosecutor, the media and sports bodies, is provided by distinguished world-class cyclist Johan Museeuw (of Belgium). In 2004, he and 2 colleagues were suspended for 2 years by the Belgian Cycling Association (under the rules of the international federation UCI). The association had studied the transcripts of a still on-going criminal investigation into a doping trafficking ring, run by veterinarians (a milieu closely related to the violent Belgian ‘beef hormones mafia’ active in the 1990s), which also included the results of a highly mediatized search at Museeuw’s house. Although the procedure before the association was completely secret at the request of Museeuw, several newspapers have been able to cite extensively from the criminal investigation, like page-long transcripts from text messages between Museeuw and the veterinarian in grotesque, yet revealing code language (similar information found its way to the

dubious honor to have the first athlete who failed the newly construed test for ‘blood doping’ (administration of extra red blood cells to improve endurance): 2004 Olympic time trial champion Tyler Hamilton (US). It was disclosed that Hamilton had tested positive on the A-test after the Olympic race (August 2004), but since the required B-test was “non-conclusive” because the sample was accidentally destroyed by the IOC, Hamilton was allowed to keep his gold medal. This did not change even if immediately after it was announced that Hamilton had tested positive (A and B-tests) for blood doping at the Tour of Spain (September 2004) and was subsequently suspended by UCI. This had led to three different procedures before the Court of Arbitration of Sport (CAS). A recourse by the Russian runner-up in the Olympic time trial in order to have Hamilton’s gold medal stripped, failed, whereas an appeal by Hamilton’s cycling team Phonak succeeded. Team Phonak had been barred from participating in the inaugural ProTour, a lucrative competition, by UCI because of its initial halfhearted reaction in the Hamilton affair (which would amount to ‘unethical practices’, warranting exclusion according to the ProTour regulations). The CAS reversed the ban, as the UCI was found not to have awarded a fair procedure to Phonak<sup>35</sup>. In June 2005, Hamilton eventually decided to appeal his suspension before the CAS, asserting a lack of reliability of the test for blood doping. The case is still pending<sup>36</sup>.

English tennis player Greg Rusedski was cleared of doping charges by an Association of Tennis Players-appointed tribunal because the positive test was likely to be caused by salt tablets

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press in the Marion Jones case). Although the ban hardly affected Museeuw as he had retired just before (since 2004 UCI explicitly establishes competence over cyclists who already have retired), he sued the association before courts alleging non-respect of the presumption of innocence (preferring to ignore the mandatory appeal route to the CAS). The case is pending, but it appears unlikely that Museeuw will prevail. Museeuw is still active as a PR officer for a professional cycling team with the assent of UCI, which is apparently not willing to interpret the suspension in a broad fashion. See X, “Belgian trio hit with bans”, on BBC Online, October 8 2004, [http://news.bbc.co.uk/sport1/hi/other\\_sports/cycling/3726844.stm](http://news.bbc.co.uk/sport1/hi/other_sports/cycling/3726844.stm) (last visited June 10 2005).

<sup>35</sup> CAS *ARCycling AG v. UCI*, No. 2004/A/777, 31 January 2005 (not published, on file with author). Although the decision was reversed on procedural grounds, the CAS hinted that the mere fact that Phonak initially “raised doubts on validity and reliability of the new blood test” (on which no ruling had ever been passed by an independent judicial body) was not ‘unethical’ and could thus not justify the ban.

<sup>36</sup> In the beginning of 2004, a public feud even erupted on the ‘doping and due process’-issue between WADA Chairman Pound and cycling hero Lance Armstrong, when the latter vigorously reacted in an open letter to *Le Monde* to Pound’s earlier allegations that “all Tour de France riders take banned substances”: see Cyclingnews report, March 7 2004: <http://www.cyclingnews.com/news.php?id=news/2004/mar04/mar07news> (last visited June 10 2005).

the ATP (the international professional male tennis federation) itself had provided. The positive testing of Rusedski had been immediately publicly disclosed, probably unjustly damaging his reputation<sup>37</sup>. A similar miscarriage in the quest against doping occurred when a Belgian regional sports minister rushed to the international press, explaining that his anti-doping authorities had found that Russian tennis star Kuznetsova had taken prohibited substances when playing a tournament in Belgium. However, it quickly came to light that the substance found in her body was not prohibited at all according to the international standards. But, arguably, the damage had been done for Kuznetsova and the whole affair led to a strong outcry by the professional tennis federation because of a perceived increase of ill-advised action on doping by government officials<sup>38</sup>.

In this relative quagmire, the 2004 Athens Summer Olympics and its straight-forward, well-coordinated approach to the doping issue appear to have sketched a way forward for the future. The 2004 Summer Olympics produced a record number of 24 doping violations (the previous record stood at 12). Three gold medals were taken away in track & field alone: the hammer throw champion did not attend the doping control, the discuss throw winner tried to tamper with his urine test sample, while the women's shot put gold medal tested positive for the same crude steroid Ben Johnson had used 16 years ago in Seoul. Greek athletic stars Kenteris and Thanou were banned from the Olympics, as they apparently had faked a motor accident in order to not attend a doping control on the day of the Games' opening ceremony. Yet, the exposure of more drug cheats was a vital achievement. The harmonization and outreach efforts of the Olympic Movement, culminating in the WADC, have allowed it to take up a consistent and unmistakable line of action in the run-up to and during the Olympics, eliminating internal discord within the sports community itself and exuding renewed resolve to the general public. This, combined with a significant increase in testing and persistent efforts to keep in step with the newest technological evolutions, arguably made of the Athens Olympics "a watershed games

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<sup>37</sup>"Rusedski Cleared", March 10 2004, on the BBC website at: <http://news.bbc.co.uk/sport2/hi/tennis/3547917.stm> (June 10 2005).

<sup>38</sup> See BBC Online, "Kuznetsova threatens legal action", 19 January 2005, <http://news.bbc.co.uk/sport2/hi/tennis/4186925.stm> (last visited June 10 2005).

that took the fight to the cheats head on”<sup>39</sup>. In this respect, it is telling many of the doping violations involved doped athletes recurring to ancillary phenomena (refusal to provide body fluids, failure to provide whereabouts or straight-out fraud), whereas earlier they may have felt more confident in undergoing the testing procedures. One should also note that almost none of the IOC’s actual decisions on doping during the Olympics caused wide-spread controversy<sup>40</sup>. It appears that the policy options and related ‘jurisprudence’ stemming from the 2004 Olympics (relying on the novel WADC structure) are gradually becoming established practice across the different sports, replacing controversy with greater legal security.

#### **IV. Legal nature of the anti-doping regime**

##### ***IV.1. Delineation of the question***

How serious is the need for due process in sports cases? Is there something specific about sports anti-doping regulation and enforcement that means that national (or international) courts grant deference to decisions of those private/mixed sports bodies? The diffuse mix of private actors, public interest discourse and government involvement, as well as the confusion in case-law and doctrine, make these difficult questions about the nature of ‘governance’ in international sports organizations.

Even if the consensus would be that doping regulation is a ‘private’ matter in the legal sense, a contractual issue between an athlete and an international federation subject to party autonomy, still a high level of due process would be desirable if it can come at little cost<sup>41</sup>. A perception of fairness and responsiveness is likely to increase internal legitimacy and credibility and thus to enhance compliance with its regulation.

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<sup>39</sup> Bryn PALMER, “The dirtiest Games ever?”, BBC Online, August 30 2004, [http://news.bbc.co.uk/sport2/hi/olympics\\_2004/3610830.stm](http://news.bbc.co.uk/sport2/hi/olympics_2004/3610830.stm) (last visited June 10 2005).

<sup>40</sup> Except for the above-mentioned case of cyclist Hamilton, whose B-sample was accidentally destroyed and was also the first athlete to test positive for the new blood test.

<sup>41</sup> So does Michael S. STRAUBEL, “Doping Due Proess: A Critique of the Doping Control Process in International Sports”, 106 *Dick. L. Rev.* [2002] 523, at 545.



It seems evident that doping rules should not be considered as “technical, in-game decisions, standards or rules”, like the maximum weight of boxers in a category or disputed game calls of referees. The latter are according to international custom<sup>42</sup> not available for judicial review unless the rule or its application by sport officials is arbitrary, illegal or the product of malicious intent against an athlete.

On the contrary, doping proceedings and sanctions against an athlete arguably interfere with the enjoyment of the athlete’s fundamental personal rights: the right to privacy, the right to a good name and the right to work (also understood as ‘economic freedom’). The latter is contested, but it seems difficult to deny that professional sport is to a large extent an economic activity and that a suspended athlete effectively loses his livelihood. The US 7<sup>th</sup> Circuit Court has said that access to competition was a mere ‘privilege’<sup>43</sup>. German courts, however, take a more fitting approach, recognizing it as a right<sup>44</sup>.

#### ***IV.2. The parallel with disciplinary procedures for professional misconduct***

Even if doping regulation is capable of barring exercise of one’s fundamental rights, this does not make human rights protections applicable to doping disciplinary procedures, nor does it imply a requirement to guarantee due process according to the US Constitution. Those notions ordinarily require state involvement, while according to some the sports regime only establishes a contractual relationship or, at best, regulates private matters between individuals. The Swiss

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<sup>42</sup> In the words of the CAS (Ad Hoc Division Atlanta 1996, 006), *M. v. AIBA* [1996], in Matthieu REEB, (ed.), *Digest of CAS Awards 1986-1998*, 1998, Bern, Staempfli [hereinafter CAS Digest I], 413. See also *Lindland v. United States Wrestling Ass’n, Inc.*, 230 F.3d 1036 [7<sup>th</sup> Cir. 2000], 1038; Richard MCLAREN, “Introducing the Court of Arbitration for Sports: the Ad Hoc Division at the Olympic Games”, 12 *Marq. Sports L. Rev.* [2001] 515, 534-535 ; James A.R. NAFZIGER, *International Sports Law* (2<sup>nd</sup> Ed.), 2004, Ardsley, Transnational Publishers, 56-57.

<sup>43</sup> *Michels v. U.S.O.C.*, 741 F.2d 155 (7<sup>th</sup> Cir. 1984), 157

<sup>44</sup> *Baumann v. IAAF*, Oberlandesgericht Frankfurt, 2 April 2002 cited in G. KAUFMANN-KOHLER, A. RIGOZZI & G. MALINVERNI, “Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law”, (retrievable at the WADA website <http://www.wada-ama.org/rtecontent/document/kaufmann-kohler-full.pdf>), nr. 121. Also P. MCCUTCHEON, “Sports discipline and the rule of law” in S. GREENFIELD & G. OSBORN, *Law and sport in contemporary society*, 2000, London, Frank Cass, 118 (115-128). The ECJ held that professional athletes can be considered as workers and that transfer restrictions in sports regulations may hinder the freedom of movement for workers. Case 415/93, *Bosman v. URBSFA* [1995], *ECR* 4921, par. 73-74. Note also that the Olympic Charter boldly proclaims in its art. 8 that there exists a human right to practice sports.

Federal Supreme Court held in *Gundel*<sup>45</sup>: “a penalty prescribed by doping regulations [is] one of the forms of penalty fixed by contract and therefore based on [party] autonomy”. In later cases the Swiss Supreme Court did not expressly refer anymore to the contractual character, but continued to reject the applicability of fundamental rights guarantees, pointing more at the lack of government involvement<sup>46</sup>. The theory of contract comes under review, however, if one considers that athletes are forced to subscribe to the statutes of a private body if they want to compete<sup>47</sup>. Those ‘accession agreements’ lack the even-handedness and arms-length bargaining of an ordinary contract. The statutes resemble more a disciplinary “legislative code to be obeyed by the members [i.e. every practitioner of that sport willing to engage in competition]”<sup>48</sup> so that a different threshold appears necessary.

The threshold should be determined in light of the following circumstances, which give the whole sports regulation area a public interest cachet. Doping regulation, and sanctions in particular, *de facto* seriously infringe upon the exercise of the athlete’s fundamental rights. Similar offences (trafficking, administering or even possession of certain ‘prohibited substances’), more aimed at athlete’s coaches, doctors... than at the athletes themselves, do lead to governmental prosecution under criminal law<sup>49</sup>. In some countries sport governing bodies carry out disciplinary proceedings by virtue of an express delegation of power from the state. Some state authorities apply the Prohibited Substances Standard of the WADP for the anti-doping competencies they have assumed and for the anti-doping measures they have undertaken. Many states have signed the Copenhagen Declaration on Anti-Doping in Sport<sup>50</sup>, expressly supporting WADA, the World Anti-Doping Code (inter alia “taking appropriate steps to

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<sup>45</sup> *Gundel v. IEF*, Swiss Federal Supreme Court, March 15 1993, *CAS Digest I*, 572-574; a New Zealand District Court also rejected applicability of the NZ Bill of Rights because of the contractual aspect: *Fox v NZ Sports Drugs Agency*, [1999] DCR 1165

<sup>46</sup> See the other Swiss Fed. Court cases mentioned in FNs 70-71 and in KAUFMANN-KOHLER et al., *l.c.*, paras. 66-67. KAUFMANN-KOHLER also cites Judge Bernhardt of the ECHR who rejects applicability of the European Convention on Human Rights to sports disputes because of the lack of government involvement.

<sup>47</sup> E.g. art. 45 Olympic Charter could be restated as: “if you want to compete in the Olympics, you have no choice but to comply with all provisions of WADC”. For NGBs this problem is even more salient, because without membership an athlete will not be allowed to compete in any official national competitions.

<sup>48</sup> *Breen v. AEU*, 2 Q.B. 175 [1972], 190 (cited in James A.R. NAFZIGER, “International Sports Law: A Replay of Characteristics and Trends”, 86 *Am. J. Int. L.* [1992] 489, 510)

<sup>49</sup> See the examples on drug legislation in the US, mentioned in FN 16.

<sup>50</sup> See [http://www.wada-ama.org/en/dynamic.ch2?pageCategory\\_id=183](http://www.wada-ama.org/en/dynamic.ch2?pageCategory_id=183) (last visited June 10 2005).

withhold finances for federations who do not abide by the provisions of WADC”) and the adoption of its content in a binding Convention (UNESCO). And finally, while the WADC is not a treaty, it was adopted by WADA, where governments have a 50%-stake, and the writing process occurred in extensive consultation with the latter.

Those elements prove that anti-doping regulation can no longer be considered as pertaining to the private, contractual sphere and that one should indeed open the door for judicial review. Anti-doping law and the proceedings brought before non-governmental instances against athletes can be best equated to civil-law style “professional” disciplinary law and disciplinary tribunals. They emerge when private professional associations (e.g. doctors, lawyers, architects...) are endowed with a government mandate to regulate their profession as they see fit, provided that they observe certain due process requirements, because of the regulation’s impact both on an individual practitioner and on society in general. Classically, this would imply that the required due process guarantees of the sanctioning process are “less than the ordinary common law criminal standard, but more than the ordinary common law civil standard” (as the CAS rightly recognized<sup>51</sup>). The analogy is also brought to light in the official comment on the WADC’s article on the standard of proof in anti-doping proceedings<sup>52</sup>, which refers to the standard “applied in most countries to cases involving professional misconduct”. The due process requirements of “disciplinary proceedings” are indeed further spelled out in domestic constitutional<sup>53</sup> and administrative law and in the jurisprudence of the European Court of Human Rights [ECHR]. The ECHR, in particular, has consistently held that such proceedings involve the determination of one’s civil rights and obligations, so that the right to a fair hearing before an

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<sup>51</sup> CAS *Meca-Medina*, Nos. 99/A/234 & 99/A/235, slip op. at 14 ; CAS *N.J.Y.W. v. FINA* 98/208, [1998], in Matthieu REEB (ed.), *Digest of CAS Awards II 1998-2000*, 2001, The Hague, Kluwer [hereinafter CAS Digest II], at 271; CAS *Aanes*, No. 2001/A/317, slip op. at 27 (cited in Frank OSCHUTZ, “International Sports Law Perspectives: Harmonization of Anti-Doping Code through Arbitration: the Case Law of the Court of Arbitration for Sport”, 12 *Marq. Sports L. Rev.* [2002] 675, at 695).

<sup>52</sup> The reporting authorities must prove to “the comfortable satisfaction of the hearing body”, i.e. a standard “greater than mere probability but less than proof beyond a reasonable doubt”.

<sup>53</sup> So the Irish High Court held in *Flanagan v. University College Dublin*, [1988] IR 724, which dealt with a disciplinary charge of plagiarism against a student, that in such a case the procedures must approach those of a court hearing and thus include the procedural protections demanded by the requirements of natural justice. In the United States doping cases would probably be held under a ‘civil penalty due process’ scrutiny as set out in *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011.

independent and impartial tribunal as stated in art. 6.1 European Convention on Human Rights [Eur Cov HR], fully applies<sup>54 55</sup>.

However, in the light of the above-mentioned factors, more and more authors are advocating to apply even the criminal standard of review to anti-doping disputes<sup>56</sup>. Section B2 of the ‘Recommendation on the Basic Principles for Disciplinary Phases of Doping Control’ of the Monitoring Committee of the Council of Europe Anti-Doping Convention states that art. 6.3 Eur Cov HR is applicable to doping cases<sup>57</sup>. It should be noted that according to the jurisprudence of the ECHR criminal due process could be required: it has held that even though sanctioning proceedings are labeled or traditionally viewed as ‘disciplinary’<sup>58</sup>, the human rights protections for criminal process could exceptionally apply depending on the nature of the offences sanctioned and the nature and severity of the sanctions<sup>59</sup>. One could make the case that the doping sanctioning process warrants the application of those protections as it inevitably stigmatizes offenders as serious (and, often, intentional) wrongdoers and imposes very severe sanctions such as life-time suspensions to exercise one’s profession. Interestingly, the Panel under direction of Professor KAUFMANN-KOHLER, from whom WADA requested an advisory legal opinion on ‘the conformity of the draft-WADC with commonly accepted principles of international law’, finds that with a prospective view disputes before private sporting bodies should better respect the procedural guarantees of the criminal process<sup>60</sup>.

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<sup>54</sup> ECHR *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, par. 48-50

<sup>55</sup> *Pro*: NAFZIGER, *l.c.*, 128. *Contra*: Jan-Willem SOEK, “The Fundamental Rights of Athletes in Doping Trials”, in John O’LEARY (ed.), *Drugs and Doping in Sport: Socio-Legal Perspectives*, 2001, London, Cavendish, 58 (57-73). Whereas he recognizes that IF doping procedures are of a disciplinary character and similar to the criminal process, he still denies applicability of the fair trial rights incorporated in the ICCPR and the Eur Cov HR (and the related jurisprudence of the ECHR). According to him those rights only apply to ‘statutory disciplinary law’, i.e. disciplinary law founded in formal legislation (such as medical disciplinary law). Sports disciplinary law is on the other hand ‘entirely free from interference by government or parliament’, so it does not fall within the realm of these conventions. The athlete can only appeal to these procedural rights which are given to him by the sports organization. I have however argued that there is significant state intervention in many ways in the doping disciplinary process, so I think the fair trial standards laid down in international public law are applicable.

<sup>56</sup> STRAUBEL, *l.c.*, 569-570

<sup>57</sup> [http://www.coe.int/T/E/Cultural\\_Co-operation/Sport/Resources/etdorec98.2.asp](http://www.coe.int/T/E/Cultural_Co-operation/Sport/Resources/etdorec98.2.asp) (last visited June 10 ’05)

<sup>58</sup> ECHR *Engel and other v. The Netherlands*, 8 June 1976, par. 83; ECHR *Campbell and Fell v. UK*, 28 June 1984, par. 69-73

<sup>59</sup> ECHR *Engel* par. 80-82. These factors can be decisive separately or cumulatively. ECHR *Kadubec v. Slovakia*, 2 September 1998, par. 50-51

<sup>60</sup> KAUFMANN-KOHLER et al., *l.c.*, par. 72-73.

Eventually, we will leave it open whether full criminal due process is required for doping sanction proceedings (its surplus value over ‘disciplinary’ due process is moreover hard to define<sup>61</sup>). But most national courts, though not the Swiss at this point<sup>62</sup>, would not let the private nature of the actors stand in the way of an assessment of the rules and proceedings in the light of principles of administrative law (preliminary hearing, motivation of decisions, transparency and legal security ...) and fundamental human rights (independency of tribunal, presumption of innocence...)<sup>63</sup>.

#### ***IV.3. Possibilities for review of decisions by domestic and international courts***

The foregoing has a bearing on the amount of deference courts will grant to the decisions of the disciplinary commissions of the sporting bodies and especially to the awards on appeal of CAS. Indeed, the WADC provides that cases arising from ‘international events’ or concerning ‘international-level athletes’ (majority of cases) can only be appealed to CAS in Lausanne<sup>64</sup>. Arbitral awards have the advantage that they are easily enforceable, both in the country of the seat (Switzerland: Loi Droit International Privé [LDIP]<sup>65</sup>) as elsewhere (UNCITRAL New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards [NY Cvt]<sup>66</sup>, which

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<sup>61</sup> The ECHR has held that the disciplinary due process in the sense of art. 6.1 EurCvt also comprises the presumption of innocence and other (criminal law) due process protections of art. 6.3. ECHR: *Albert and Le Compte v. Belgium*, 10 February 1983, par. 30, 39. The CAS, for its part, neither sees a need for strictly distinguishing between the two concepts: “[The ‘lex mitior’] principle applies to anti-doping regulations in view of *the penal or at the very least disciplinary nature* of the penalties that they allow to be imposed” (my italics) CAS *Cullwick v. FINA*, No. 96/149 [1997], *CAS Digest I*, 251, par. 6.4.

<sup>62</sup> The CAS, when deciding according to Swiss law, has however found that substantive anti-doping rules (such as a strict liability rule) “should sufficiently respect the athlete’s right of personality (*Persönlichkeitsrecht*)” as laid down in the Swiss Civil Code, contrary to the jurisprudence of Swiss courts. CAS *Aanes v. XXX*, No. 2001/A/317 [2001], par. V. 2-1 (cited in NAFZIGER, *International Sports Law, l.c.*, 157).

<sup>63</sup> KAUFMANN-KOHLER et al., *l.c.*, p.12, par. 23-24. The Panel also predicts an increase in review by international judicial bodies such as the ECHR.

<sup>64</sup> To supplement that provision, statutes of the IOC, all IFs and most NOCs, NGBs and NADOs (such as USADA) provide for appellate review before CAS. Moreover, the application form for participation at the Olympic Games contains an arbitration clause in favor of CAS.

<sup>65</sup> From 18 December 1987, retrievable at <http://www.admin.ch/ch/f/rs/291/a190.html> (last visited June 10 2005). The domestic Swiss arbitration laws and court decisions are very important for this topic as almost all major IFs have their seat in Switzerland, as well as CAS. Consequently, Switzerland will be the place of arbitration for the procedures dealt with.

<sup>66</sup> 9 U.S.C. 201. In force since 1959. Retrievable at <http://www.uncitral.org/english/texts/arbitration/NY-conv.htm>, (last visited June 10 2005).

is in my view applicable on the basis of its art. II<sup>67</sup>.) The only relevant bases on which awards can be set aside, are if the arbitral tribunal was composed irregularly (art. V.1.d) NY Cvt; art. 190 2a) LDIP), if the equality of the parties or their right to be heard in a contradictory procedure was not respected (art. 190d) LDIP: “procedural public policy”) or if enforcement would be contrary to public policy (art. V.II NY Convention; art. 190e) LDIP).

Nevertheless, in my view, the mandatory submission of disputes to institutionalized arbitration does not alter the scrutiny with which national courts would approach anti-doping decisions. If courts believe an athlete’s fundamental right is violated by a body with *de facto* public responsibilities, they will interfere under the pretext of the public policy. An English court, while rightly advocating a large degree of deference to the expert judgment of the international sports federations<sup>68</sup>, recognizes in the same breath its right to overturn an arbitral award of an IAAF Tribunal if it would conflict with natural justice or an implied duty of fairness:

"I think that the courts must be slow to allow an implied obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts. This is even so where those bodies are concerned with the means of livelihood of those who take part in those activities. The concepts of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burdens."<sup>69</sup>

If, on the other hand, courts think adjudication of sports disputes falls within the sphere of self-regulation and organizational autonomy, they will refuse any review at all. Swiss courts have extensively considered the composition of CAS arbitration panels and the procedural

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<sup>67</sup> *Slaney v. International Amateur Athletics Federation*, 244 F.3d at 584; NAFZIGER, *International Sports Law, l.c.*, 42; Mary K. FITZGERALD, “Doping and Due Process during the Olympics”, 7 *Sports Law J.* 213 [2000], 225 ⇔ contra: STRAUBEL, *l.c.*, at footnote 308

<sup>68</sup> Reminiscent of the American approach to balance due process with the requirements of efficiency and practicality.

<sup>69</sup> *Gasser v. Stinson & Another*, Q.B. 15 June 1998 (available on Lexis and Westlaw): the athlete Gasser, alleging unfairness of strict liability provisions in doping regulations, thus lost on the merits. Another interesting twist to the discussion is added by *Mordahl v. British Athletics Federation* in which a runner who was suspended on doping charges by the NGB, but later cleared from charges by an independent appeal proceeding of its IF. The runner sued for damages for breach of contract (!) by the British federation consisting of a lack of fair hearing in the disciplinary proceedings. She lost on the merits, but the majority allowed the bringing of such a claim in principle (Court of Appeal (Civil Division), 12 October 2001, [2001] *EWCA Civ* 1447, [2002] 1 *WLR* 1192, (Transcript: Smith Bernal), ).

equality of the parties in the arbitration procedure itself<sup>70</sup>, but clearly rejected arguments that an alleged lack of fairness in the general anti-doping enforcement regime would amount to a violation of public policy, emphasizing the essential private character of such disputes<sup>71</sup>.

In practice there is a modest trend towards the judicial assumption of competence<sup>72</sup> whenever fundamental rights of sportspersons are jeopardized through procedures which fall short of the basic requirements of due process. NAFZIGER<sup>73</sup> identifies a willingness on the part of English courts to review decisions when they concern the livelihoods of athletes and deal with ‘public’ issues or issues of procedural fairness, in order “to vindicate natural justice, due process or fundamental human rights”. Whereas US courts generally have been reluctant to review decisions of sport bodies in the absence of state action, they have in certain contexts been willing to address due process as a constitutional requirement<sup>74</sup>. According to BELOFF<sup>75</sup> “the courts have not been shy of interfering where the allegation is of a breach of the rules of natural justice”. FITZGERALD<sup>76</sup> considers it very likely that US courts, in particular, will more frequently set aside CAS awards because they violate public policy. Finally, the Council of Europe<sup>77</sup>, finds an increase in judicial decisions reviewing sports tribunals’ awards in light of their significant effect on athletes’ fundamental rights.

The Slaney<sup>78</sup> case before the US 7<sup>th</sup> Circuit Court illustrates this trend. Runner Mary Slaney was suspended because she had a too high T/E ration in her urine, which according to the

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<sup>70</sup> *Gundel v. IEF*, Swiss Federal Supreme Court, 15 March 1993 in *CAS Digest I*, 572-574 (independence and fair hearing); *Raducan v. IOC*, Swiss Federal Supreme Court, , 4 December 2000, 3a-b, (cited in G. KAUFMANN-KOHLER, *Arbitration at the Olympics: Issues of Fast-Track Dispute Resolution and Sports Law*, 2001, Norwell, Kluwer Law International, p.86) (fair hearing); *A.B. v. IOC*, Swiss Federal Supreme Court, 27 May 2003 (CAS website) (independence and fair hearing)

<sup>71</sup> Thereby arguably indicating that if ‘notions proper to criminal law, such as the presumption of innocence and the principle ‘in dubio pro reo’ were at play in doping cases, disrespect of these principles would touch upon public policy and allow for review of CAS awards. See *Gundel v. IEF*, Swiss Federal Supreme Court 15 March 1993 *CAS Digest I*, p.575; *Lu Na Wang et al. v. FINA*, Swiss Federal Supreme Court, 31 March 1999, in *CAS Digest II*, 775; *A.B. v. IOC*, Swiss Federal Supreme Court, 27 May 2003, *l.c.* See also an Australian case: Court of Appeal New South Wales, *Raguz v. Sullivan*, 1 September 2000, in KAUFMANN-KOHLER, *Arbitration at the Olympics, l.c.*, 51

<sup>72</sup> NAFZIGER, *o.c.*, 71

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*, 73 and 159.

<sup>75</sup> Michael J. BELOFF, QC, “Drugs, Laws and Versapaks” in John O’LEARY (ed.), *o.c.*, (39-55) 53

<sup>76</sup> FITZGERALD, *The CAS: doping and due process during the Olympics, l.c.*, 238

<sup>77</sup> Richard PARRISH, *Sports law and policy in the European Union*, 2003, European Policy Research Unit Series, Manchester, Manchester University Press, 95

<sup>78</sup> See FN 67.

doping regulations automatically leads to a - difficultly - rebuttable presumption that she had ingested the performance enhancing drug testosterone. She challenged the legality of this presumption before the CAS but it upheld the rule. Subsequently, Slaney challenged the CAS award before US courts, arguing that enforcement thereof would violate public policy. The 7<sup>th</sup> Circuit Court went as far as to reject such violation by drawing the parallel that criminal defendants in the US may also be required to come forward with proof themselves as a basis for asserting affirmative defenses. It can then be understood that if it were the case that there were no similar presumptions in the ordinary American criminal law system, arbitral awards using those presumptions in doping disputes would be contravening public policy. In another classic case, a German court has effectively overstepped an international sports federation award because in its view it imposed disproportionate sanctions<sup>79</sup>.

It follows that doping disputes can be considered as classic civil law disciplinary proceedings, where a professional organization has received a considerable discretion to regulate its field from the state but where administrative safeguards and judicial review processes remain available at the margin to ensure fairness, natural justice, due process or respect for fundamental rights. This margin exactly conforms to the (procedural and substantive) public policy exceptions to automatic enforcement in the NY Convention. Therefore the proliferation of exclusive CAS arbitration clauses will in itself not help shield the international sports regime from courts eager to remedy due process deficiencies in the doping proceedings. Clearly, if a court adopts the view that submission to arbitration is more of a regulatory precondition than an express contractual choice, it may easily refuse enforcement of such an award under a public policy rationale<sup>80</sup>.

While it is still true that courts have been paying considerable deference to the regulatory autonomy of international sports federations and that very few athletes have eventually been

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<sup>79</sup> *Krabbe v. IAAF et al.*, Oberlandesgericht Munich, 17 May 1995 (cited in KAUFMANN-KOHLER et al., *l.c.*, nrs. 32,121). Athlete Krabbe received 1.2 DM in damages.

<sup>80</sup> In a radically different context, but where arbitration is also more of a regulatory precondition, namely NAFTA Chapter 11, a British Columbia Court undertook fairly extensive review of the Arbitration Panel's reasoning and holding (*Mexico v. Metalclad*, 2001 BSCS 664, 2 May 2001, see <http://www.dfait-maeci.gc.ca/tna-nac/documents/trans-2may.pdf>).



successful before national courts in anti-doping cases<sup>81</sup>, athletes demonstrate great willingness and persistence to argue their cases before national judges<sup>82</sup> and these judges increasingly emphasize the principle that private international federation rules and proceedings should provide due process guarantees traditionally required from public authorities. Moreover, the other branches of government have over time also become more implicated in the struggle against doping and in its administration (at both the national and at the international level), looking together with their courts over the shoulder of the federations (the former more with an efficiency of anti-doping policy agenda than interested in the protection of individual rights).

It should not surprise that the different echelons of the Olympic Movement do not feel very comfortable with this statal interference with their operation: former IOC President Juan Antonio DE SAMARANCH pointed to the need for international sporting organizations to fight their own battle with national courts in retaining control over settlement of sporting disputes, stating that “the application of game rules and disciplinary regulations is by and large bound to be beyond an ordinary judge”<sup>83</sup>. The recipe for keeping control seems (all too) simple: incorporate a reasonable amount of the classical due process protections in the regime. Or as Klaus VIEWEG puts it: “The threat of claims for damages ... seems to accelerate the efforts to find solutions within the relevant international sports associations and federations.”<sup>84</sup>. As will be noted later, the Olympic Movement has indeed followed this route through a commencement of ‘constitutional’ jurisprudence by CAS and the adoption of the WADC. At first sight those processes have proven efficient in the sense that national governments and courts have been kept in check. The perceived legitimacy of recent CAS jurisprudence is probably the reason why recent recourses to national courts have not been successful.

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<sup>81</sup> Basically only the German athlete Krabbe before German courts.

<sup>82</sup> As the many national court cases in this paragraph show. Another famous example is the case of Butch Reynolds, who challenged a suspension before US courts for 15 years, only to lose on jurisdictional grounds (*Reynolds v. International Amateur Athletic Federation*, 841 F.Supp.1444 (S.D. Ohio 1992), rev’d 23 F.3rd 1110 (6th Cir.), cert. denied, 115 S.Ct. 423 (1994)).

<sup>83</sup> FITZGERALD, *l.c.*, p. 241

<sup>84</sup> Cited in James A.R. NAFZIGER, “US National Reports to the XVIth International Congress of Comparative Law: Section II Dispute Resolution in the Arena of International Sports Competition”, 50 *Am. J. Comp. L.* [2002] 161, 170.

## V. Participation and accountability in the creation of anti-doping regulation

The principal body responsible for the drawing up of international anti-doping regulation is the World Anti-Doping Agency<sup>85</sup>. Its organization chart resembles that of more ‘technical’ international organizations: the chief decisions are taken by its Foundation Board, which delegates the daily management of the agency to an Executive Committee. The Executive Committee is then assisted by various advisory committees: an Ethics and Education Committee, a Finance and Administration Committee and the very important expert Health, Medical and Research Committee. The composition of the Foundation Board (36 members) and of the Executive Committee (11 members) involves roughly equal and geographically balanced representation of non-governmental officials from the Olympic Movement (IOC, IFs and NGBs) and of government functionaries (with representatives from the European Union and the Council of Europe). The participation of athletes is established at 4 representatives on the Foundation Board, 1 on the Executive Committee and 1 among the doctors on the Health, Medical and Research Committee, each one a delegate from the IOC’s Athletes’ Commission<sup>86</sup>. There are no direct representatives from parliamentary bodies active in the WADA structure.

As indicated, WADA’s extensive doping regulation harmonization program (WADP) consists of three layers<sup>87</sup>, with the World Anti-Doping Code as the basis for the development of binding International Standards and exhortatory Model Rules for International Federations.<sup>88</sup> The WADA boasts that the Code was developed through “an extensive and unprecedented

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<sup>85</sup> See WADA website at <http://www.wada-ama.org>.

<sup>86</sup> IOC’s Athletes Commission is a consultative body of the IOC, with the power to send representatives to various commissions, who should ensure that the athletes’ points of view are taken into account within the Olympic Movement. It is composed of (recently) retired athletes, the majority of whom are elected by their peers at each Olympic Games while the others are appointed by the IOC President to warrant equal geographical representation. (Art. 24.5 IOC Olympic Charter, terms of reference retrievable at: [http://multimedia.olympic.org/pdf/en\\_report\\_712.pdf](http://multimedia.olympic.org/pdf/en_report_712.pdf)).

<sup>87</sup> All texts can be easily found on [www.wada-ama.org](http://www.wada-ama.org), after clicking the ‘Codes & Standards’ tab.

<sup>88</sup> The Model Rules, perhaps surprisingly, set out in details some provisions of the WADC but do not go very much beyond the Code’s provisions and therefore we will not cover them in this paper.

consultation process”<sup>89</sup>. The Code was drafted by a special WADA Code Project Team in consultation with a large group of stakeholders and WADA has twice sent draft versions of the Code to nearly 1,000 interested parties and put them also on its website, expressly soliciting comments. Comments were subsequently published and taken into account in later versions. Nevertheless, those processes apparently did not reach individual athletes or their organizations, biopharmaceutical companies or specific public health polities as only international and national sports bodies and government’s sports departments really participated<sup>90</sup>. The Code further stipulates that athletes, sports authorities and governments should participate in the overseeing of WADC and in any amendment process<sup>91</sup>.

After the Code, WADA has turned to the drafting of international standards in order to harmonize specific technical parts of anti-doping programs, such as the list of prohibited substances, international testing and laboratory standards, and the critical standard for therapeutic use exemptions [TUEs]<sup>92</sup>. Adherence to these standards is mandatory for compliance with the Code<sup>93</sup> and therefore, after redaction by expert committees and after a notice and comment process involving all Signatories (thus the sports bodies) and governments (but only involving them: there is no general publication of drafts), they should be adopted by the Executive Committee<sup>94</sup>. The standard for testing procedures was based on an earlier standard developed by the International Anti-Doping Arrangement, a pre-WADA organization of likeminded governments, in co-operation with ISO. This standard obtained the status of ‘Publicly Available Specification’ to the general ISO 9002:1994 quality management standard. WADA is

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<sup>89</sup> See WADA site introduction to the WADC at [http://www.wada-ama.org/en/dynamic.ch2?pageCategory\\_id=166](http://www.wada-ama.org/en/dynamic.ch2?pageCategory_id=166) (last visited 10 June 2005).

<sup>90</sup> There is not much insight in the process, but I base this position on a rare WADA report stating that it received more than 120 comments on the first draft, but indicating that 63 were submitted by sports authorities and 53 by government authorities and national anti-doping organizations.

<sup>91</sup> Art. 23.6 WADC. For an amendment, a double 2/3 majority within the non-governmental and governmental sections of WADA Foundation Board is required.

<sup>92</sup> In the words of the TUE Standard: “Athletes can apply to sports federations to grant permission to use, for therapeutic purposes, substances or methods contained in the list of prohibited substances whose use is otherwise prohibited.”

<sup>93</sup> WADC Introduction, p. 2

<sup>94</sup> See e.g. for the *Prohibited List* art. 4.1 WADC and for the introduction of the TUE Standard: [http://www.wada-ama.org/rtecontent/document/international\\_standard.pdf](http://www.wada-ama.org/rtecontent/document/international_standard.pdf) (last visited 10 June 2005).

now working with ISO to have its anti-doping testing recognized as a full ISO standard<sup>95</sup>, while it also delegates WADA laboratory accreditation competencies to ISO bodies<sup>96</sup>. WADA is thus eager to incorporate itself in the international standardization community.

The mixed composition of WADA and the governance disciplines that WADA later imposed upon itself, in particular the consultation processes, tend to demonstrate that the international private sports regulation community was all too conscious of the need to achieve the greatest potential legitimacy for WADA. In this vein, it could get the governments and, to a lesser extent, athletes on board so that its harmonization and co-ordination functions could prosper. Obviously, this epistemic community was deeply aware of the growing governmental initiative in the field and the latter's superior enforcement capacity, as well as of the scandal-triggered skepticism of sponsors, media and public opinion<sup>97</sup> towards the sports ruling class' motivation, vigorousness and effectiveness with regard to the combat against doping. The discrepancies between the approaches at the domestic and the ones at the international level, as well as the different rules in force for the various sports disciplines, did not improve the outlook. In order to preserve or even increase the benefit of governmental enforcement and private financial capacities, without at the same time losing hold of the separate status of sports within, and transcending, national society or - less romantically - losing hold of their power, top-down and uniform institutional reform at the regulating level was much needed to get a sense of renewed external legitimacy. Institutionalized participation, together with a quest towards a broader consensus in the general regulatory process of WADA, has apparently convinced governments to step on board and may very well prove to be instrumental to appease the critics of a self-dealing, inefficient private sports autocracy.

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<sup>95</sup> See ISO Bulletin: <http://www.iso.ch/iso/en/commcentre/isobulletin/articles/2002/pdf/pas02-12.pdf>.

<sup>96</sup> See preamble of the Laboratories Standard (August 2004): [http://www.wada-ama.org/rtecontent/document/lab\\_aug\\_04.pdf](http://www.wada-ama.org/rtecontent/document/lab_aug_04.pdf) (last visited 10 June 2005).

<sup>97</sup> Those are the three factors making up the economic life-line of professional sports competitions. In fact, the most prolific scandals occurred during the 1998 Cycling Tour of Italy and the 1998 Tour de France, where national prosecutors revealed a structural, deeply-rooted doping plague, whereas sports federations' efforts up to that point had only been able to address isolated cases. Such scandals may not immediately drive all spectators and sponsors away, but is certainly pernicious for public confidence in the power-wielders' capacity to establish a level playing field for the athletes, an essential value of sports, and gave impetus to cries for reform and transparency.

But also governments are likely to benefit from a private-public partnership model like WADA as it will give them direct influence in the organizing bodies of international sports competitions. In this way, they can efficiently tackle cross-border issues related to sports that also happen to be of general public interest, without having to engage in a lengthy and burdensome exercise of control and command regulation at the national or international level. The WADA model could for instance be employed in the future to foster programs for sports competitions for disabled people, to combat racism in sport or to halt spectator violence. Of course this will only work if a majority of governments agree on the desirability of a given policy, but if this is the case, the joining of forces with the established international private sports apparatus will give them more leverage to persuade dissenting governments to follow the majority's course than if they have to achieve it through inter-state diplomacy. The international sports bodies can then effectively enforce the policies through exclusions from competition, canceling of events and many others subtle sticks and carrots in the context of international competition. WADA, through the wide-spread governmental backing it enjoys, through the effective tools it has created on that basis, but also through its organizational independence (incorporation in the existing private structure), appears far better equipped to deal with instances of structured and state-organized doping practices, such as apparently occurred in the Eastern bloc countries in the 70s and 80s, than both the Olympic Movement as the Western governments separately ever were. Much will however depend on the perceived legitimacy of those sports bodies and therefore it is so essential that they achieve a high level of transparency, consistency and participation in their operations.

For now, the participatory processes in the norm creating activity of WADA only cater to its direct competitors: the various sports federations and governments. WADA is only accountable for its general regulation through the supervisory task of the state representatives in its organs, yet no system of legal accountability is currently operative. The CAS, which must adjudicate disputes according to the applicable regulations themselves, and, subsidiarily, according to the rules of law chosen by the parties, the law of the country where the federation has its seat or the

rules of law the Panel deems appropriate<sup>98</sup>, has to date only been willing to disregard generally applicable rules and standards when they appear to be contrary to natural justice, which seems the case when they unreasonably infringe upon fundamental rights of defense in a sanctioning proceeding. Despite some hints in the other direction<sup>99</sup>, the CAS seems not prepared to consistently engage in judicial review of the anti-doping rules and standards of international sports federations. This once again runs parallel with the threat posed by actors from outside the international sports regime: as argued above, they will grant a lot of deference to the rules and practices of the federations except for when these violate traditional due process guarantees for disciplinary proceedings. As long as there is no danger of national courts stepping in to apply their national administrative law protections to the norm-creating process, there seems no incentive for CAS to fill the void<sup>100</sup>. Moreover, art. 4.3.3 WADC expressly provides that WADA's determination of the Prohibited Substances List shall be final and not be subject to challenge by an athlete or other person on the merits of its inclusion. In the context of the centralization of the authority and capacity in WADA, operating under the patronage of government<sup>101</sup>, this seems unsatisfactory even if we take the need into account for an effective anti-doping policy. A manufacturer of food supplements could find his product from one day to the other added on the list of prohibited substances without being preventively informed<sup>102</sup>, let

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<sup>98</sup> Code of Sports-Related Arbitration [CAS Code], R58. Provisions can be found on the CAS website: <http://www.tas-cas.org/en/code/frmco.htm> (last visited June 10 2005).

<sup>99</sup> In one case a Panel stated as dicta that rules must emanate from duly authorized bodies and be adopted in constitutionally proper ways (CAS USA Shooting, No. 94/129, May 23 1995 in *CAS Digest I*, 187, at 197). In a dictum in another case the Panel suggests that it could examine whether the rules of the International Swimming Federation (FINA) themselves comply with applicable Swiss law (CAS 95/142, *L. v. FINA*, February 14 1996, *CAS Digest I*, 225, at 238)

<sup>100</sup> The anti-doping cases are cases taken on appellate jurisdiction. The CAS can also have original jurisdiction in non-doping cases on the basis of an arbitration clause (CAS Code R27). In those cases the law chosen by the Parties is directly applicable (CAS Code R49), which led to review of decisions under Swiss administrative law (CAS *AEK Athens and SK Slavia Prague/UEFA*, No. 98/200, 20 August 1999 in *CAS Digest II*, 55-62). In the same case it held that European law could apply as mandatory law. This is in line with rulings from the European Court of Justice, which has declared itself competent to review compliance of decisions from sports bodies with European Union Law in so far as it constitutes an economic activity (Case 36/74 *Walrave v Union Cycliste Internationale* [1974] ECR 1405, par. 4).

<sup>101</sup> Thereby often extending the scope of application of private body rendered norms from professional athletes to amateur practitioners (the Belgian Sports Ministry decided to apply the WADA Prohibited Substances list for its anti-doping program for recreational sporters).

<sup>102</sup> However, WADA publishes which, in principle tolerated, substances it is monitoring in order to detect patterns of misuse in sport: art. 4.5 WADC.

alone consulted, nor would he have any possibility to have a court review the inclusion of his product.

BOYES<sup>103</sup>, for his part, censures the often-voiced ‘level playing field’ justification for the IOC’s efforts with regard to anti-doping regulation and harmonization (the need to warrant the equality of all participants at the moment of competition), as well as the protection of health rationale. He alleges that the IOC’s desire to impose its particular, Western-determined views and its desire to achieve regulatory homogeneity at the global level presupposes values which may not be shared, nor welcomed in different regions. In fact, this contrived approach only reinforces the legal, cultural, physiological and, foremost, economical disparities present in the global sports arena (both with regard to doping practices in particular – e.g. access to undetectable, genetic doping techniques - and equal opportunity in sports in general – e.g. private funding for state-of-the-art training facilities, government subsidies).

However, his account of an ‘ideological diversity’ appears rather injudicious: just from practice – e.g. the Olympic Games - it would seem that there exists at least more of a world-wide understanding, a common sports ethos, than in many other social activities. Of course one cannot deny that the budget available for sport, from both public and private sources, differs very substantially across countries. Indeed, the North-South divide has cast a shadow on the paradigm of equal opportunity for all in sports. But this can evidently not be seen as idiosyncratic to the sports domain, nor would it be any better addressed by a more flexible stance of the regime power-wielders on the doping issue. One must also note that the IOC is far from insensitive to the distributional problem, since it runs an important ‘Olympic Solidarity’ program that provides funding to sports programs of developing countries.

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<sup>103</sup> Simon BOYES, “The International Olympic Committee, Doping Policy and Globalisation”, in John O’LEARY, *o.c.*, 167-179

## **VI. The role of due process in the adjudication of international doping control disputes**

Having considered the governance principles of the norm yielding process in the international sports domain, this section will take a closer look at the presence of classical due process guarantees for suspected athletes in the actual prosecution and sanctioning activities of the sports federations. First I will look at a more general effort of WADA to increase the credibility of the doping control process and then I will discuss some specific, widely recognized elements of disciplinary /criminal due process.

### *VI. 1. WADA Office of the Independent Observer*

Although WADA has some power to monitor and sanction non-compliance with the WADC<sup>104</sup>, it has deemed it useful to create an independent auditing office, the Office of the Independent Observer [OIO]<sup>105</sup>, for the doping control process at important international sports competitions, such as the Olympic Games and that on a voluntary basis. If a sports competition so requests, an ‘Independent Observers’ team will observe the doping controls and subsequently publish a report on all aspects of the process. With the broader objective of enhancing athlete, sport and public confidence in the anti-doping operations, it seeks to ensure a fair, transparent and impartial doping control process. Actual team members are ‘experts’ with a medical, legal or athletic background and are selected by WADA from a pool it has established. In its first 2 years of operations (it started its task at the 2000 Summer Olympics) it was fully funded by the European Community<sup>106</sup>. It is a fine example of a system that uses peer review to establish peer and ‘public-reputational’ accountability<sup>107</sup>. But such accountability stands and falls with the perceived objectivity and competence of the reviewing bodies. It appears that, for now, the OIO

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<sup>104</sup> It can legally deny participation rights in international events to country athletes in event of non-compliance by its government or NOC (art. 23.5 WADC). Theoretically it could also exert its influence on the IOC to have it exclude an IF from the Olympic Movement system if it is not complying with the WADC.

<sup>105</sup> Web site: [http://www.wada-ama.org/en/dynamic.ch2?pageCategory\\_id=63](http://www.wada-ama.org/en/dynamic.ch2?pageCategory_id=63) (last visited June 10 2005).

<sup>106</sup> Now the funds stem from the general WADA budget.

<sup>107</sup> In the sense of R. GRANT and R. KEOHANE’s paper, Accountability and Abuses of Power in World Politics. The preconditions they identify for ‘reputational accountability’ appear to be present: more ‘direct’ means of accountability are not immediately available, and reputational effects for such competitions are rather significant.



system has not built up the credit among sports federations<sup>108</sup>, athletes and the general public so as to make the case that they act as “the eyes and ears of the world”<sup>109</sup> in the doping control process. But, in view of the increasing number of invitations it receives from international sports competitions to monitor their proceedings, this currently very toothless governance tool could develop into an important policy driving force in the longer term, provided it produces high-quality and consistent reports<sup>110</sup>.

## *VI. 2. Evolution in due process protections for the individual athlete*

### VI.2.1. At the outset: the jurisprudence of the CAS

The CAS is a vital actor in the protection of athletes’ due process rights. As mentioned above, the WADC and the statutes of most sports federations provide for an exclusive appeal of doping sanctioning proceedings to the CAS, upon exhaustion of legal remedies available within the concerned federation<sup>111</sup>. One should also be reminded that the applicable substantive law in a CAS appeal will be the applicable federation regulations, the rules of law of the domicile of the sports federation (or the law agreed upon by the parties) and the further rules of law the Panel deems appropriate<sup>112</sup>. On this basis, the Court has held in an advisory opinion that all decisions of sports federations should respect general principles of (national and international) law, and in particular the right to personality of the accused athlete, among other human rights<sup>113</sup>. Subsequent Panels have frequently reviewed federations’ regulations for compliance with general principles of law, without rooting them in one specific legal system, not even international law as such<sup>114</sup>. As a true constitutional court would, CAS will allow sports federations to derogate from some of these recognized due process protections if they can assert

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<sup>108</sup> The cycling IF, UCI, that for the first time invited the OIO to the 2003 Tour de France, outrightly questioned the objectivity of the latter in its reaction to the OIO’s report (see WADA website, OIO section, UCI comment, p.50).

<sup>109</sup> As the section on the OIO on the WADA website claims.

<sup>110</sup> A quick survey of different reports leads to the conclusion that while for high-profile events they are extensive and well-documented, for smaller events they are short and somewhat parochial.

<sup>111</sup> CAS Code R47.

<sup>112</sup> CAS Code R58.

<sup>113</sup> CAS IOC, Advisory Opinion No. 86/92 [1986] (cited in OSCHUTZ, *l.c.*, p.680, FN 41).

<sup>114</sup> See e.g. CAS *S. v International Equestrian Federation*, June 25 1992, 93, 95; CAS *USA Shooting*, see FN 99, 194, nr. 16, investigating whether a standard is unreasonable and contrary to natural justice.

an adequate justification, relying on the importance and necessities of the fight against doping<sup>115</sup>. Another salient feature of CAS appellate proceedings is that the CAS has full power to review both the facts and the law of the case, so the appellate hearings will be ‘de novo’ and, arguably, the Panel may even request the production of further evidence<sup>116</sup>. There is no binding authority of precedent although Panels are likely to follow earlier decisions for reasons of legal predictability<sup>117</sup>.

VI.2.2. “Everyone is entitled to a fair ... hearing...by an independent and impartial tribunal”

If civil penalty or disciplinary due process protections apply to doping control proceedings, a right for the athlete to be adequately heard before an anti-doping violation is determined appears essential. Art. 7.2 of the Council of Europe European Anti-Doping Convention provides that Member States should encourage that disciplinary proceedings respect the following principles: that the reporting and disciplinary bodies be distinct from each other, that suspected athletes receive a fair hearing and are assisted or represented, and that there are clear and enforceable appeal provisions.

However, *in the pre-WADC regime* of anti-doping enforcement, a fair hearing was not always guaranteed. A typical proceeding would go as follows<sup>118</sup>. If a national sports federation (NGB) would detect a positive sample (‘A’-sample), it would give notification - only of the test result - to the athlete and invite “him” (let us assume) to attend the investigation of the ‘B’-sample. Typically the NGB (or the IF) would already disclose the positive to the broader public. Sometimes the positive ‘A’-sample would also lead to a temporary suspension in anticipation of the hearing process. If the ‘B’-sample also gives a positive for a prohibited substance, most NGBs and IFs would now pronounce a temporary suspension. The athlete will be invited to appear for a disciplinary hearing ‘board’ or ‘commission’ of the federation. He has the right to be

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<sup>115</sup> E.g. CAS, *USA Shooting*, see FN 99, 193, nr. 14-15

<sup>116</sup> CAS Code R47 (with reference to R44.3); OSCHUTZ, *l.c.*, 679

<sup>117</sup> CAS *Cullwick v FINA*, No. 96/149 [1997], *CAS Digest I*, 251, 258-259

<sup>118</sup> In my account of the historical situation and the growing discontent of the American federations, I rely heavily on the due process critiques in the article of STRAUBEL (*l.c.*) and from thereon try to construe a typical process.

assisted by counsel and has leave to inspect his file beforehand. However, he will have very limited (if any at all) rights to ask for production of other documentation or discovery. In a few instances, federation provisions may only allow him to present his evidence in writing and in others, the right to bring witnesses to the stand and cross-examine them is very limited. Hearings always take place at the headquarters of the federation<sup>119</sup>, which could impose a serious financial burden upon athletes. The hearing board will often be made up of officials deeply embedded in the daily operations of the federation, although sometimes retired athletes may also sit in the board. The board is chosen by the parties from a not very extensive list created by the federation. At times, officials who prosecuted the athlete would also sit in the hearing panel. After the hearing, the board will take a decision, which in some cases (e.g. International Amateur Athletics Federation) does not even have to be reasoned. For cases arising out of internationally recognized competitions, the NGBs will have to apply the doping rules and prohibited substances list of the corresponding IF. If the Board finds the athlete guilty, any provisional suspension becomes definitive. An athlete thus sanctioned by the NGB could appeal to a disciplinary panel of the IF. And interestingly, most IFs have bargained the right to review the doping control processes of NGBs on their own motion<sup>120</sup>. It is very common that an IF is skeptical of an acquittal of an athlete by its own NGB, so that it will intervene and initiate its own sanctioning process. The IF will often pronounce a provisional suspension of the athlete and invite him for a hearing before its disciplinary board that often affords less due process guarantees than the NGB hearing<sup>121</sup>. The IF's rule will then in general allow for an appeal to the CAS.

It is obvious that many aspects of this process are problematic. On the national level the guarantees for a fair hearing have been extended. In the U.S.<sup>122</sup> the Amateur Sports Act requires NGBs to provide “fair notice and opportunity for a hearing before declaring an athlete ineligible”, thus outlawing the practice of provisional suspensions. That provision was

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<sup>119</sup> For IFs this is most of the time in Switzerland. The IAAF, however, is headquartered in Monaco.

<sup>120</sup> See STRAUBEL, *l.c.*, note 111 at 690

<sup>121</sup> Probably because national governments have less leverage towards international federations. According to STRAUBEL (*l.c.*, at note 88) IFs have an almost 100% winning record in such procedures.

<sup>122</sup> For the Amateur Sports Act see FN 15. The legislator also intervened e.g. in Belgium to improve the fairness and impartiality of Belgian NGB disciplinary hearings.

interpreted by the US Olympic Committee to contain a range of due process guarantees that went beyond what was recognized by IFs<sup>123</sup>. But this gave rise to frustrations and open conflicts between the NGBs/NADOs and the IFs, who would overturn decisions when athletes were cleared of charges by the former without respecting the same procedural guarantees.<sup>124</sup> The CAS has kept itself aloof from those procedural due process controversies by taking the stance that the availability of an appeal to the CAS remedies any due process imperfections in the IF's procedures<sup>125</sup>. While it is true that a CAS proceeding gives acceptably broad procedural rights to both parties, it is questionable whether this can compensate the handicaps for the athlete in the trial proceedings. Athletes have then occasionally brought challenges to the fairness of the process before national courts<sup>126</sup>.

It should come as no surprise that, faced with increased conflicts between the IFs and national federations and with more active national courts, the World Ant-Doping Code has harmonized the doping control proceedings, securing more due process elements. As a first measure, the Code has done away with the controversial discretionary powers of the IFs to review the 'test results management' of the corresponding national bodies<sup>127</sup>. This is now substituted with a right of the IF (along with WADA and IOC, if applicable) to appeal a national decision at the CAS (Art. 13.2.3).

Art. 7 WADC sets out the result management process, providing for notification after a positive A-result, the right to attend the analysis of the B-sample and the right to request laboratory documents, but expressly allows for provisional suspension after notification of a

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<sup>123</sup> E.g. right to cross-examine, right to a reasoned written decision based on the evidence of the record. STRAUBEL, *l.c.*, 547-548

<sup>124</sup> This happened e.g. in the *Reynolds* (see FN 82), the *Slaney* (see FN 67) and the *Krabbe* cases (see FN 79). In a recent CAS case, under pre-WADC rules, IF IAAF and NGB USA T&F approached the Court to settle a controversy between the bodies on the interpretation of an IAAF rule that prescribed immediate notification of positive test results to IAAF by an NGB, before holding a hearing. USA T&F opposed this, but lost the case (CAS 2002/0/401, temporarily available at <http://www.tas-cas.org>).

<sup>125</sup> CAS *USA Shooting*, No. 94/129, May 23 1995, *CAS Digest I*, 187, at 203, nr. 59. This is, probably not coincidentally, in line with the jurisprudence of the ECHR that some procedural defaults can be tolerated in disciplinary proceedings if there is the possibility to have a full appeal to a body that respects the provisions of art. 6 Eur Cov HR (ECHR *Le Compte, Van Leuven and De Meyere*, 23 June 1981, par. 51).

<sup>126</sup> E.g. *Mordahl* case (see FN 69) alleging bias of the hearing disciplinary board.

<sup>127</sup> Art. 15.3 WADC. But a national sanctioning body still has to apply the IF's substantive rules on doping when the controls involve foreign athletes.

positive A-result, provided that the athlete is given an opportunity for a provisional hearing before imposition of the suspension (or on a timely basis promptly after the imposition) or an opportunity to have an expedited full hearing on a timely basis after the imposition (art. 7.5). Art. 8 WADC then lays down the requirements for the (full) hearing process, at the end of which a definitive sanction can be imposed: a timely hearing before a fair and impartial (yet not independent) body is required and *inter alia* also the right to have assistance of counsel (at athlete's expense), to present evidence and call witnesses (testimony can be restricted to a written submission) and to a written, reasoned decision. Art. 14 WADC still allows for public disclosure of the fact that an athlete tested positive, even when the B-sample has not yet been tested (a minor internal administrative review of the A-result is required)<sup>128</sup>. Art. 13 guarantees an appeal to CAS<sup>129</sup>. The American National Anti-Doping Organization, USADA, has gone even further<sup>130</sup> and now provides for a preliminary hearing ('probable cause hearing') by an independent expert Review Board, to be followed by a full-fledged hearing in the form of a trial-type proceeding with independent AAA arbitrators<sup>131</sup> who will decide on the sanctions. IFs are invited to observe the proceedings, while an (exclusive) appeal to CAS is open to all interested parties. Interestingly, the two latest athletes to be charged by USADA (on the basis of documentary evidence in Balco) have taken the opportunity provided by USADA regulations to immediately seize the CAS, completely bypassing the trial-type instance before an AAA Panel. They consider the AAA Panels to be partial and too closely linked to USADA<sup>132</sup>.

It should also be mentioned that not only the impartiality of the federations' disciplinary boards has been challenged, but also that of the arbitration panels. The CAS had a massive legitimacy problem in its first 10 years of existence: the IOC funded the CAS entirely while its

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<sup>128</sup> Art.14 furthermore imposes the *obligation* to publicly disclose positive results after an anti-doping violation has been determined (i.e. after the hearing). Notification to IFs and WADA is already mandatory after a positive A-result.

<sup>129</sup> Or another independent arbitral tribunal, if the national organization so provides.

<sup>130</sup> See STRAUBEL, *l.c.*, at 563-566.

<sup>131</sup> Actually often arbitrators from North America who equally figure on the list of potential CAS arbitrators! Confusingly, the AAA hearing trials are sometimes referred to as the North American Court of Arbitration for Sport (NACAS).

<sup>132</sup> BBC Online, "Sprint duo to learn fates", November 16 2004, <http://news.bbc.co.uk/sport2/hi/athletics/3700900.stm> (last visited June 10 2005).

pool of 60 arbitrators consisted largely of former Olympic Movement officials<sup>133</sup>. In 1993 the Olympic Movement tried to wash away the dazzling appearance of bias by establishing ICAS (the International Council of Arbitration for Sports) as an independent and private umbrella organization for the CAS. ICAS administers the list of arbitrators, decides on the arbitration rules and the CAS budget, although certainly not all bonds with the Olympic Movement are cut through<sup>134</sup>. Challenges to the absence of bias of CAS arbitration panels have been regularly brought before the Swiss courts, but they have consistently (and rightly) held that the post-1993 CAS can guarantee an impartial consideration of the case, even if the IOC is a party to it<sup>135</sup>.

The World Anti-Doping Code, if correctly implemented in the following years by the different federations, is likely to be successful to bring the doping control processes in conformity with internationally recognized principles of a fair hearing (or procedural due process), except on one point. The continuing possibility to suspend an athlete before any hearing has taken place (even if it will follow at short notice) and also the disclosure to the public of the results before a hearing<sup>136</sup> appears very much at odds with generally recognized legal principles of disciplinary law in civil law countries, or of similar types of cases in common law countries, and with specific national legislation (such as the ASA in the US). One can not yet discount the prospect of successful challenges before state courts (with a possibility to recover for damages). The fact that WADC does not require the disciplinary body that determines the sanction in first instance to be totally independent from the prosecuting sports federation, seems less prone to be considered as a violation of due process as long as independent appeal procedures such as a CAS appeal are reasonably available.

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<sup>133</sup> 15 were chosen by the IOC, 15 by the NOCs, 15 by the IFs and the last 15 were chosen by the IOC president from outside the IOC. See STRAUBEL, *l.c.*, at 541.

<sup>134</sup> 12 members of the 20-member governing council are chosen by the Olympic movement, and those 12 then choose another 8. Financially it is still dependent of the IOC.

<sup>135</sup> *Gundel v. IEF*, Swiss Federal Supreme Court, 15 March 1993, *CAS Digest I*, 572-574; *A.,B. v. IOC*, Swiss Federal Supreme Court, 27 May 2003.

<sup>136</sup> Runner Olga Yegorova who had delivered an EPO-positive A-sample after a meeting - news that was immediately disclosed to the public – is probably permanently labeled a ‘drug cheat’ by her competitors, the media and the public, even if the A-test was “botched” and her B-sample resulted to be negative. (STRAUBEL, *l.c.*, , 568-569).

### VI.2.3. “Everyone ... shall be presumed innocent until proven guilty by law”

In the doctrine there is a heavy debate to what extent doping sanctioning processes should reflect the substantive due process guarantees of criminal proceedings and about whether there can even be found an international consensus on what those guarantees in criminal proceedings actually are. Consideration of these matters goes beyond the purposes of this paper<sup>137</sup>. In the pre-WADC era numerous regulations contained indeterminate incriminations, rejected the possibility to present exculpatory evidence - or left it open -, or did not allow for any flexibility in the imposition of sanctions. The lack of a unified approach and the differences in the conceptions of what due process required were a fertile breeding ground for conflicts between NGBs and IFs and for recourses of athletes to their national courts invoking a denial of fundamental justice and thus a violation of public policy<sup>138</sup>. The CAS has consequently received a string of cases challenging the imposition of sanctions on the ground that the presumption of innocence of the athletes was disregarded. As OSCHUTZ<sup>139</sup> demonstrates in much greater detail, the Court has used its competence to apply general principles of international law to interpret the IOC's and IF's regulations very loosely. In this way it has adopted the 'lex mitior'-principle<sup>140</sup>, it has rejected the applicability of provisions establishing doping violations that lack clarity<sup>141</sup>, and has reduced the length of suspensions to reflect the circumstances of the cases (proportionality principle), even when the rules contain fixed sanctions<sup>142</sup>. Furthermore, it has established that respect for an athlete's 'right of personality' entails that he, in order to avoid a suspension, must have the opportunity to rebut a presumption that the presence of a prohibited substance in his body is due to the athlete's intent or negligence.<sup>143</sup>

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<sup>137</sup> An interesting account can be found in the legal opinion of KAUFMANN- KOHLER et al., *l.c.*, where they make a distinction between 'strict liability offences' (nrs. 84-98) and the principle 'nulla poena sine culpa' (paras. 118-125).

<sup>138</sup> Such as the *Slaney* (see FN 67), *Gasser* (see FN 69) and *Krabbe* (see FN 79) cases.

<sup>139</sup> Frank OSCHUTZ, Harmonization of Anti-Doping Code through Arbitration: The Case Law of the Court of Arbitration for Sport, 12 *Marq. Sports L. Rev.* [2002], 675

<sup>140</sup> CAS, *UCI v Jérôme Chiotti et FCC*, No. 2000/383 [2001], *CAS Digest II*, 424, 427

<sup>141</sup> In application of the 'nullum crimen sine lege certa'-principle. See CAS *USA Shooting*, see FN 99, at 198.

<sup>142</sup> CAS *Foschi* 96/156, (unpublished, cited in OSCHUTZ, p. 700)

<sup>143</sup> CAS *Aanes v. XXX*, No. 2001/A/317, par. V.2-1 (extensively cited in NAFZIGER, *International Sports Law, l.c.*, 158). See for an earlier decision CAS *S. v. International Equestrian Federation*, No. 91/56, 25 June 1992, *CAS Digest I*, 93, 96: "the person responsible has the right to clear himself through counter-evidence (proof that the

As one commentator rightly observes, the CAS, by freely using general, non-state specific doctrine, is staking out the prerogative to develop its own jurisprudence and independence<sup>144</sup>. It appears, at least in those appeal processes, to have taken up the role as the sports regime's watchdog over individual rights. The CAS seems better equipped than national courts in this respect, as it will develop expertise and jurisprudence and can operate above the different national legal systems, while being effective in each one of them (due to the easy recognition of arbitral awards). This would be of course on the assumption that the CAS would build up the necessary credibility with national courts as an equivalent monitoring instrument for the respect of fundamental rights and due process within this specialized field. However, while its potential has been recognized<sup>145</sup>, it has had difficulty establishing clear and consistent jurisprudence on some issues<sup>146</sup>.

For that reason, the enactment of the WADC has been more than welcome to provide more legal security. Apparently very conscious of doctrinal critiques<sup>147</sup> and the incursions of national courts in the doping control regime<sup>148</sup>, while simultaneously concerned about the effectiveness of the combat against doping, the drafters have, at least on paper, succeeded to find a comfortable middle ground and clarified long-lasting controversies. So does the Code only provide for 'strict liability' offences (without a possibility for a defendant to prove lack of negligence and intent in his conduct) with a view to disqualifications (which is in essence an in-game measure), while such possibility does exist to avoid genuine sanctions such as suspensions (art. 10.5.1. WADC). The Code also lays down fixed suspension periods, while allowing

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presence of the prohibited substance is a result of an act of ill-will on the part of a third party or that the result of the analysis is wrong)".

<sup>144</sup> STRAUBEL, *l.c.*, 542

<sup>145</sup> See e.g. the introduction of an appeal to the CAS in the doping cases handled by USADA.

<sup>146</sup> Most notably the question whether 'strict liability' or 'legal presumption of guilt' is allowed in doping incriminations or none of both, where it has occasionally shifted positions and mixed up concepts. See OSCHUTZ, *l.c.*, 686-697. However, in the *Aanes* decision of 2002 (see FN 143), it clearly addressed the different concepts and established that the sport community's interest in fighting doping can justify a (rebuttable) presumption of guilt once the objective elements of a doping offense have been proven, yet not a rule of 'strict liability' (at least with a view to suspending an athlete). This is exactly what is now consecrated in the WADC (*vide infra*).

<sup>147</sup> The demand for an 'extensive legal opinion for compatibility with international law' suggests this.

<sup>148</sup> Art. 10.2: 2-years suspension for a first doping offense can be tracked back to the *Krabbe*- and *Baumann* (see FNs 79 and 44) cases in which German courts held that a suspension for a longer period violates the proportionality principle.



mitigation on limited grounds (art. 10.5.2 WADC). Finally, the Code allows facts related to anti-doping violations to be “established by any reliable means, including admissions” (art. 3.2): this provision thus provides legal support for the recent practice of sports anti-doping bodies to sanction athletes on the basis of ‘non-analytical positives’ (i.e. without them having *tested* positive for prohibited substances).

#### VI.2.4. Addendum: reach of the private international anti-doping regime towards third parties

The World Anti-Doping Code is not only applicable to athletes, but also to ‘athlete support personnel’. They can be sanctioned for possession of prohibited substances in connection with an athlete (art. 2.6.2. WADC), trafficking in those substances (art. 2.7) and administration of these substances to an athlete (art. 2.8). The only way, however, in which the international private regime can sanction them, is with ineligibility, meaning for them they can no longer get credentials as coach, as mechanic... for the competitions concerned. This may not be a great deterrent and therefore art. 10.4 WADC provides that established violations of the trafficking and administering rules<sup>149</sup> may additionally be reported to the state authorities, if they simultaneously constitute violations of state laws and regulations.

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<sup>149</sup> Those two categories of conduct are also sanctioned with a 4-year ineligibility for a first violation instead of the ordinary 2.

## VII. Conclusion

The international private sport anti-doping regime has gradually overcome many original deficiencies in accountability and responsiveness by means of top-down, self-disciplining acts of adding good governance mechanisms and due process requirements (most notably, through establishing WADA and enacting the WADC and by allowing the CAS to operate independently).

Most of these governance processes originate from a corporatist reflex as the international sports federations are under constant pressure from governmental officials (who are getting more involved in the general regulatory process) and national judges (who could be more and more tempted to review the anti-doping enforcement process).

The transnational reach of sports regime bodies is not in itself experienced as problematic, as it is an inherent and historical characteristic of the field in which a large amount of common understanding across the borders is already present. International co-operation and development through hierarchical structures are long-standing features of the Olympic Movement. The tension in the field, at both the national and international level, mainly centers around the question whether there exists a different nature for 'lex sportiva' that would justify departure from general legal concepts and traditional regulatory structures, a question ever more prevalent now that sports has a growing impact on other areas, more immediately considered of general public interest. Since the general public sphere has only a very limited transnationally shared vocabulary (contrary to the global sports world 'dèmos' that appears to exist) efforts to embed the private sports regime at the international level in a general state-powered structure are only feasible at the margin: through establishing vague, general guidelines for the sports world in international conventions, through entering into partnerships with the private federations (as in WADA), and through allowing for limited review in national (and international) courts for compliance with fundamental human rights norms. But exactly those impulses at the margin will arguably continue to foster and direct the self-disciplining process of the Olympic Movement. If

governments keep pushing the agenda and courts stay watchful, the private international sports regulatory regime may be best suited to co-ordinate and respond to diverse societal concerns with regard to sports<sup>150</sup>. Perhaps this is what Francois CARRARD, General Director of the IOC meant when he stated: “Courts will still be there to deal with issues in which fundamental principles of human rights are at stake, but the courts are not there to run the Olympics”<sup>151</sup>.

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<sup>150</sup> There may be no better way to enforce this claim than by quoting the authority of ICJ Judge Bruno SIMMA: “the *sui generis* law of the Olympic Movement [is] accepted, respected and applied as a State-independent body of legal rules in a growing number of municipal court decisions”. SIMMA, “The Court of Arbitration for Sport”, in K.-H. BÖCKSTIEGEL, H.-E.FOLZ, J.M. MÖSSMER & K. ZEMANEK (eds.), *Völkerrecht / Recht der Internationalen Organisationen / Welt-wirtschaftsrecht: Festschrift für Ignaz Seidl Hohenveldern*, 1988, (573) 588.

<sup>151</sup> Stephen PARRY, IOC Wants Arbitration Panel to Replace Court Proceedings, Reuter Library Report, Nov. 4 1992 [available on Lexis]

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