14th Commonwealth Law Association Conference
12 September 2005, London

Liabilities and obligations of event organisers,
sporting bodies and participants and of referees

THE WORLD ANTI-DOPING CODE

- THE FIGHT FOR THE SPIRIT OF SPORT

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Introduction

1. The World Anti-Doping Code ("**WADC**") represents a significant step towards a consistent harmonised approach to the handling of doping violations in sport worldwide. The WADC seeks to preserve what is intrinsically valuable in sport, "the spirit of sport[1]". This paper outlines the legal nature of WADC, sets out its core provisions and discusses those areas in which the application of the Code seems likely to give rise to legal and practical issues.

The nature and key elements of the Code

2. The World Anti-Doping Agency ("**WADA**") Code seeks to set out the principles which are to apply to anti-doping violations and to bring about agreement to those principles by a wide range of sporting bodies. The Code is not an international convention (although it will have wide international effect). Governments have, however, given their commitment to support the Code by signing the Copenhagen Declaration on Anti-Doping in Sport in 2003 and will further endorse the Code by signing and ratifying the International Convention against Doping in Sport which is being developed by UNESCO and is scheduled to be in force prior to the 2006 Winter Olympics in Turin. The support of governments by the signing of an international agreement binding on State parties will not change the way in which the Code is given effect – by agreements which bind participants in sport and signatories to the Code to a range of obligations.

3. The Code itself is intended to be signed (and has been signed) by a wide range of bodies responsible for major international sporting events and sports internationally[2]. The signatories include the International Olympic Committee, International Federations, the International Paralympic Committee, National Olympic Committees, National Paralympic Committees, Major Event Organisations, National Anti-Doping Organisations and WADA itself. The various national Olympic committees signed to the Code before the 2004 Athens Olympics. Signatories have to adopt anti-doping policies which conform with the Code[3]. The idea underpinning the enforceability of the Code is that the obligations it contains will apply in the same way as competition and sporting rules as conditions under which sport is played. Athletes, by reason of their membership of international federations and by participation in events, agree that the Code applies to them. In this way, the Code

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[1] See *The Introduction to the Code*. I thank Margaret Henley, of the Department for Film, Television and Media Studies at the University of Auckland, for her work in producing the video clips from the documentary *Dope: The Battle for the Soul of Sport* by Alan Erson.
[2] For a list of the various bodies which have signed the Code and more information on WADA and the Code, see the WADA website www.wada-ama.org/en
[3] See Article 20 of the WADC for detail on the obligations of signatories.

creates a harmonised set of anti-doping provisions which are binding internationally by agreement.

4. The Code embodies the key general principles which have gradually become a feature of sporting anti-doping regimes worldwide – and have been endorsed by Courts and the Court of Arbitration for Sport ("**CAS**"). These principles include the concept of strict liability for an anti-doping violation where prohibited substances are found in an athlete's body and the application of mandatory uniform sanctions for anti-doping violations with two years as the standard sanction for a first offence (subject, under the WADC, to the athlete's right to eliminate or reduce the period of any ban where he or she can show exceptional circumstances). In the area of the imposition of sanctions, the Code seeks to bring about a more flexible approach which balances the need for an established level of sanctions which will be strictly applied with the right of an individual athlete, in a particular case, to claim that, by reason of absence of fault or significant fault or negligence, there are exceptional circumstances justifying a reduction or elimination of the sanction.

Core anti-doping elements

5. The Code contains elements which are described in its introduction as "core anti-doping elements". The signatories to the Code have to adopt policies which contain these core anti-doping elements. The core anti-doping elements are: the definition of doping (Article 1), the list of anti-doping violations (Article 2), the provisions concerning the proof of doping (Article 3), the automatic disqualification of individual results (Article 9), the sanctions on individuals for anti-doping violations (Article 10), the consequences to teams of anti-doping violations (Article 11), the provisions on appeals (Article 13, with the exception of Article 13.2.2 which relates to appeals by national level athletes), the provisions as to limitation (Article 17) and the definitions in the Code. It is seen as critical to harmonisation in the doping area that all signatories to the Code base their decisions on the same list of anti-doping violations, apply the same burdens of proof and impose sanctions for the same anti-doping violations which are based on the same principles. In addition, it is mandatory that International Standards for testing developed by WADA are followed by anti-doping organisations.

6. On the other hand, it is not seen as necessary for effective harmonisation that all signatories use a single common results management and hearing process. The Code acknowledges that there are many different and equally effective processes for results management and hearings within different international federations and national bodies. The approaches adopted in these areas by signatories do not have to be exactly in conformity with the provisions of the Code but, rather, it is expected that they will satisfy the general principles and standards set out in the Code. The

Code sets out a standard but provides that signatories can reach that standard in different ways.

7. As noted above, the rules in the Code will be adopted as conditions of participation in sports by the various signatories in the same way as sporting and competition rules and are not intended to be subject to, or limited by, the legal standards applicable to criminal proceedings or employment matters (see Introduction to Code). The idea is that each signatory to the Code will establish the rules and procedures which ensure that all participants under its authority agree to the anti-doping Rules as set out in the Code. This basis for enforcement by private agreement may have significant effects where possible challenges to the Code based on fundamental rights are concerned.

8. The Commonwealth Games Federation has adopted the Code. From a relatively brief survey, it would appear that most Commonwealth countries have adopted the Code within their own national testing regimes by their national anti- doping organisations signing the Code and having national sporting organisations adopt model anti-doping rules which are based on the Code. This process underlines the agreement based method of enforcing the Code. In addition to this, the Commonwealth governments have all signed the Copenhagen Declaration and it is to be anticipated that they will ratify the UNESCO Convention when it has been finalised.

The core anti-doping provisions of the Code in more detail

9. Under Article 1, doping is defined as the occurrence of one or more of the anti-doping rule violations set out in Article 2.1 to 2.8 of the Code. The range of anti-doping violations in the Code is much broader than the established violations – doping or refusal to provide a sample.

Anti-doping violations

10. The anti-doping rule violations are, in summary, as follows:

- Article 2.1: The presence of a prohibited substance or its metabolites or markers in the athlete’s bodily specimen.
- Article 2.2: Use or attempted use of a prohibited substance or prohibited method.
- Article 2.3: Refusing or failing without compelling justification to submit to sample collection after notification as authorised in applicable anti-doping rules, or otherwise evading sample collection.

- Article 2.4: Violation of applicable requirements for athlete availability for out-of-competition testing, including failure to provide required whereabouts information and missed tests which are declared based on reasonable rules.

- Article 2.5: Tampering or attempting to tamper with any part of doping control.

- Article 2.6: Possession of prohibited substances or methods by an athlete or an athlete's support personnel other than where the athlete or athlete's support personnel establishes that the possession is pursuant to a therapeutic use exemption granted to the athlete or other acceptable justification.

- Article 2.7: Trafficking in a prohibited substance or in a prohibited method.

- Article 2.8: Administration or attempted administration of a prohibited substance or prohibited method to any athlete or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any attempted violation.

11. Article 2.1 underlines the principle of strict liability for the presence of prohibited substances in an athlete's body which underpins the Code and the effectiveness of anti-doping regimes. It provides that it is the athlete's personal duty to ensure that no prohibited substance enters his or her body. This provision also states that it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish an anti-doping violation under 2.1. This principle is softened by the provisions of the Code relating to sanctions which allow an athlete to apply for a reduced sanction where their conduct is shown to be without fault or without significant fault or negligence.

Proof of violations

12. Under the Code the burden falls on the Anti-Doping Organisation to prove that an anti-doping violation has occurred. The standard of proof is expressed to be that the Anti-Doping Organisation has established an anti-doping rule violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. The standard is intended to be similar to the standard which is applied in many Commonwealth countries to the proof of a charge of professional misconduct. The standard has been widely applied in doping cases before the development of the Code[4] but the need for clear proof to establish

[4] See eg. CAS decision in *J.Y.U. v Fina,* CAS 98-208 22/12/1998.

violations by evidence is likely to be of greater significance where anti-doping organisations seek to prove violations which do not involve a positive test (see paragraphs 35 to 42 below).

13. Article 3.1 provides that where the Code places a burden upon the athlete or any other person to rebut a presumption or establish facts or circumstances, the standard of proof is to be on the balance of probabilities. This standard will apply where the athlete seeks to establish exceptional circumstances for the purpose of eliminating or reducing the period of ineligibility under Article 10.5.

14. Articles 3.2 and 3.2.2 set out the methods for establishing facts and presumptions. Facts relating to the anti-doping rule violations can be established by any reliable means, including admissions. WADA accredited laboratories are presumed to have conducted sample analysis and custodial procedures in accordance with the international standard for a laboratory analysis. An athlete can rebut this presumption by establishing that a departure from the international standard occurred. If the athlete does this, then the anti-doping organisation has the burden of establishing that the departure from the international standard did not cause the adverse analytical finding. Article 3.2.2 provides that departures from the international standard for testing which did not cause an adverse analytical finding or other anti-doping rule violation do not invalidate results. It is for the anti-doping organisation to establish that a departure from the international standard did not cause the adverse analytical finding or the factual basis for the anti-doping rule violation.

Sanctions

15. Articles 9, 10 and 11 contain the important “core” provisions relating to the imposition of sanctions on individuals and teams.

16. Article 9 provides for the automatic disqualification of individual results where there has been an anti-doping rule violation on an in-competition test. The automatic disqualification includes the disqualification of the individual result with all resulting consequences, including forfeiture of any medals, points and prizes. This is the extent of strict liability because an athlete can, without any fault or negligence, lose the result obtained in an event where he or she was found to have committed an anti-doping violation by an in-competition test.

17. Article 10 sets out the provisions relating to sanctions which are to be imposed on individuals. Where an anti-doping rule violation occurs during or in connection with an event, the ruling body of the event can decide upon a disqualification of all the athlete’s individual results obtained in that event with all attendant consequences,

including the forfeiture of all medals, points and prizes (except as provided in Article 10.1.1). This is not, however, an automatic consequence.

18. Article 10.1.1 provides that, if an athlete establishes that he or she bears no fault or negligence for the violation (see Article 10.5 below), the athlete's individual results in the other competitions shall not be disqualified, unless the athlete's results in competitions other than the competition in which the anti-doping rule violation occurred were likely to have been affected by the athlete's anti-doping rule violation.

Periods of ineligibility

19. Save for certain specified substances (see below at paragraph 21), the period of ineligibility imposed for a violation of Articles 2.1 (presence of prohibited substance), 2.2 (attempting to use a prohibited substance) and 2.6 (possession of prohibited substance or methods) is:

- First violation: 2 years' ineligibility.
- Second violation: Lifetime ineligibility.

20. An athlete or other person facing such sanctions has the opportunity, before a period of ineligibility is imposed, to establish the basis for eliminating or reducing the sanction as provided in Article 10.5.

Sanctions for substances which are particularly susceptible to unintentional violation

21. Under Article 10.3 certain specified substances can be identified on the prohibited list, as particularly susceptible to unintentional anti-doping rule violations because they are generally available as medicinal products or are less likely to be successfully abused as doping agents. Where an athlete can establish that the use of such a specified substance was not intended to enhance performance, the period of ineligibility found in 10.2 shall be replaced with the following sanctions:

- First violation: At a minimum, a warning and reprimand and no period of ineligibility from future events and, at a maximum, 1 years' ineligibility.
- Second violation: 2 years' ineligibility.
- Third violation: Lifetime ineligibility.

Again, the athlete has the opportunity to reduce or eliminate the sanction in the event of a second or third violation under Article 10.5.

Sanctions for other violations

22. Article 10.4 sets out periods of ineligibility for other violations. The periods under 10.2, namely two years for a first violation and life for a second, apply to violations of Article 2.3 (refusing to submit to sample collection) or 2.5 (tampering or attempting to tamper with doping control). For violations of 2.7 (trafficking) or 2.8 (administering substance to an athlete or assisting encouraging etc), the period of ineligibility is a minimum of four years, up to lifetime ineligibility.

23. An anti-doping rule violation involving a minor is to be considered as a particularly serious violation and, if committed by an athlete support personnel and involves substances other than specified substances in Article 10.3, will result in lifetime ineligibility for the athlete's support personnel involved. There is an additional provision for such violations to be reported to the competent administrative professional or judicial authorities.

Sanction for Article 2.4 violation

24. Under Article 10.4.3 where there has been a violation of Article 2.4 (availability for out-of-competition tests and provision of whereabouts information), the period of ineligibility is a minimum of three months and a maximum of two years.

Provisions for eliminating or reducing the period of ineligibility

25. Article 10.5 contains the important provisions concerning the elimination or reduction of the period of ineligibility where exceptional circumstances are established. The burden lies on the athlete to establish that such circumstances exist. These provisions, while shifting the onus of proof to the athlete, mitigate the rigours of strict liability and when raised by the athlete allow a tribunal to assess the fault or negligence of an athlete in the violation. However, as the notes to the Code make clear[5], the provisions are intended to apply only in exceptional circumstances.

No fault or negligence

26. Under Article 10.5.1, if the athlete establishes, in an individual case involving an anti-doping rule violation under Article 2.1 (presence of a banned substance) or 2.2 (attempting to use a banned substance), that he or she bears no fault or negligence for the violation, the applicable period of ineligibility is to be eliminated. In order to establish no fault or negligence of this kind, the athlete has to establish how the prohibited substance entered his or her system. If this article is applied, and a period of ineligibility is eliminated, the anti-doping rule violation is not to be

[5] The Notes to various provisions of the Code are included to assist in the understanding and interpretation of the Code (see Article 24.2).

considered as a violation for the purpose of determining the period of ineligibility for multiple violations. The notes to the Code say that this exception can only apply in exceptional circumstances and give examples such as sabotage of an athlete's drink by someone they would usually trust. The burden on the athlete will obviously be difficult to discharge.

No significant fault or negligence

27. Article 10.5.2 provides for the reduction of the sanction where the athlete establishes no significant fault or negligence in an individual case involving certain violations. This article only applies to anti-doping rule violations involving Articles 2.1, 2.2, 2.3 or 2.8. If the athlete establishes that he or she bears no significant fault or negligence, then the period of ineligibility may be reduced but the reduced period of ineligibility may not be less than one half of the minimum period otherwise applicable. If the minimum period is a lifetime of ineligibility, the reduced period is not to be less than eight years. Again, if the violation is under Article 2.1, the athlete has to establish how the prohibited substance entered his or her system and the element of no significant fault or negligence in order to have the period of ineligibility reduced. Again, this article is to apply in exceptional circumstances and will usually only apply where the violation does not involve purposeful intentional conduct[6].

Reduction for assistance to anti-doping organisations

28. Article 10.5.3 provides that an anti-doping organisation may reduce the period of ineligibility in an individual case where the athlete has provided substantial assistance to the organisation resulting in the organisation discovering or establishing an anti-doping violation by another person. The reduction cannot be for less than one half of the minimum period of ineligibility. Again, if the period of ineligibility would be a lifetime ban, the reduced period cannot be less than eight years.

29. The Code then sets out further core provisions concerning the sanctions for multiple violations, violations involving more than one substance, the commencement of periods of ineligibility, and the consequences for teams. Appeals are dealt with under Article 13 and will generally be to CAS[7]. There is an eight year limitation period on bringing anti-doping violation allegations in Article 17.

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[6] For a consideration of Article 10.5.2 by the New Zealand Sports Disputes Tribunal see *New Zealand Rugby League Inc v Tawera* SDT/12/04 which is discussed below at paragraphs 50 to 54.

[7] For international level athletes on appeal to CAS from the national level Tribunal is a core provision of the Code. For National level athletes there should be an appeal process but the tribunal hearing the appeal is optional. The Notes to the Code suggest that an appeal to CAS be used and it seems likely that this option will be used in anti-doping policies.

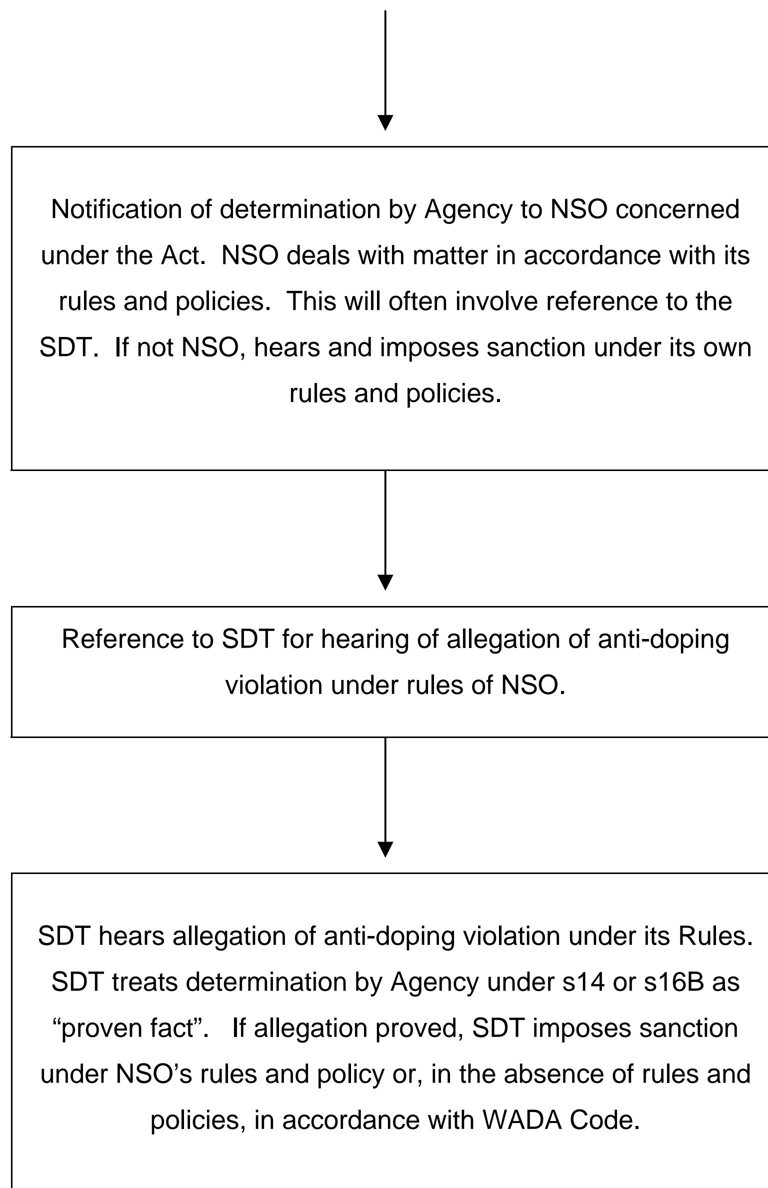
30. As outlined above, while Governments support the Code and will be subject to a further binding commitment to do so when the Convention is finalised, the essence of the Code is that it is intended to have its effect by a range of agreements. While a State might give effect to the Code by enacting legislation, making the provisions of the Code the law of the land, that is not the scheme which the Code seeks to achieve. While the Code functions in an area which has general public importance, it relies for its effect on private agreements as the signatories adopt policies which are consistent with the Code. The process of implementing the Code will, in many countries such as New Zealand, require some statutory amendments to legislation relating to government funded testing agencies and, often the establishment of new bodies to undertake the wider role envisaged by the Code for national anti-doping organisations, but the critical changes in most Commonwealth jurisdictions will come in the agreements between the various signatories to WADA and their members, the participants in sport, which will bind the participants to the obligations under the Code.

Adopting the Code – the New Zealand example

31. In New Zealand, drug testing is currently carried out by a statutory body – the New Zealand Sports Drug Agency ("**the Agency**"). That body functions under an Act of Parliament although all testing is carried out on the basis of agreement because only competitors can be tested and competitors are defined (in general terms) as those who are members of national sporting organisations[8]. Currently the Code has become effective in New Zealand by national sporting organisations ("**NSO**") adopting model anti-doping policies based on the Code under their own rules. The national sporting organisations have also, for the most part, agreed to refer anti-doping violations to a newly founded Sports Disputes Tribunal of New Zealand ("**SDT**"). The way in which anti-doping violations are currently dealt with can be illustrated by the following diagram:

Testing of "competitors" by Agency (in or out-of-competition under Regulations under the Act) – determination by Board of Agency under section 14 or 16 of the Act as to whether doping infraction or refusal committed – possible appeals to District Court from determination by Agency (s 20)

[8] See section 2 of the New Zealand Sports Drug Agency Act for the full definition of "competitor".



32. The statutory framework will be changed to reflect the Code (although the changes required overall in New Zealand to implement the Code are few because of the agreements which are already in place between NSOs and their members). The legislation will be amended to provide for the Agency to function in accordance with the Code and the Agency will be empowered to make delegated legislation in the form of rules relating to its functions which follow the Code. However, these statutory provisions will not change the fact that it will be by agreement that the Code binds sporting organisations and participants[9].

[9] Legislation has been introduced into the New Zealand Parliament – the Sports Anti-Doping Bill – and it is anticipated that the Bill and Rules made under it will become law in 2006. In other jurisdictions, similar changes to the processes which are carried out by agreement with sporting organisations by national anti-doping organisations will take place. In Australia a new body will be established to carry out the functions of the Australian Sports Drug Agency and to prepare and present cases alleging breaches of anti-doping violations before tribunals.

33. In summary, the application of the Code has the following effects:

- The Code confirms that the international anti-doping regime is based on agreements between participants in sport and sporting organisations and forms part of the rules of sport.

- The Code makes testing and analysis by reference to WADA International Standards mandatory if signatories are to comply.

- The Code significantly enlarges the range of anti-doping violations which can be investigated and established beyond violations for doping based on a positive test or for refusal to submit to sample collection, to include further violations such as using prohibited substances, tampering with doping control, possession, trafficking, administering prohibited substances and aiding, abetting the administration of a prohibited substance. Proof of these violations cannot rely on the principle of strict liability but will, in many cases, involve establishing knowing conduct.

- The Code affirms the basic principle of strict liability relating to doping violations developed under previous sporting rules and tribunal decisions[10].

- The Code confirms the need for anti-doping violations to be established to the applicable standard by evidence which matches the seriousness of an adverse finding in the same way as allegations of professional misconduct are established.

- The Code provides for flexibility in respect of sanctions to soften the rigorous application of the strict liability principle and allows a Tribunal to consider, to an extent, the question of the degree of fault or negligence of an athlete in relation to particular violations, in assessing the sanction which should be imposed.

Likely issues and challenges

34. The Code, and sports' doping policies implementing the Code, have already been applied and considered in a number of cases both before national tribunals and

[10] CAS has endorsed the rationale behind strict liability on a number of occasions, in particular in CAS 94/129, *USA Shooting v Quigley* Award of 23 May 1995, CAS Digest 1, p 187, 196-197 where the impracticality and difficulty of a sporting body having to prove fault to establish a doping violation and how, if it did, the floodgates to drug cheats would be opened, was explained. The general need for a strict liability regime for doping if the taking of performance enhancing drugs is to be combated in an effective manner has been accepted in National courts (see eg. *Gasser v Stinson*, High Court, Unreported, Scott J, 15 June 1988).

CAS and the Code builds upon established principles which have, to a large extent, withstood a number of challenges in various legal systems in the past. However, the application of the Code seems likely to give rise to a number of possible issues, both legal and practical, which will have to be addressed if it is to achieve its aims. In my view, the main issues appear to be:

(a) The practical and legal questions which will arise in relation to the investigation and proof of the wider range of violations contained in Article 2 of the Code;

(b) The possible challenge to the testing and hearing processes and sanctions imposed under the Code on the basis that an individual's fundamental rights have been infringed; and

(c) The challenge represented by the need for the consistent application and interpretation of the provisions of the Code, in particular the provisions of Article 10 relating to the reduction of sanctions.

The wider range of anti-doping violations – legal and practical issues

35. In the past, anti-doping regimes centred on the proof of doping by testing in-and out-of-competition for the presence of prohibited substances in an athlete's body. Only recently have anti-doping organisations begun to seek to prove anti-doping violations by other evidence whether factual, scientific or in the form of admissions.[11] By way of example, in New Zealand, under the current anti-doping regime, the statutory body responsible for testing – the Agency – tests urine only. The Agency can only determine that there has been a doping infraction where there has been a positive test for a prohibited substance or where there has been a refusal to provide a sample without reasonable excuse. Under the Code, in addition to violations of this kind, there are a number of other violations which an anti-doping organisation can investigate and seek to prove before the relevant Tribunal. Some of the further anti-doping violations are of a very serious nature (eg. trafficking, administering prohibited substances to athletes etc) and carry significant sanctions and stigma. Any alleged violation has to be established to the "comfortable satisfaction" of the Tribunal with due regard being given to the general principle that the more serious the allegation, the more cogent the evidence required if the Tribunal is to find the violation proven[12]. Where doping after a positive test and refusals are concerned, investigation and the proof of allegations at a hearing usually proves relatively straightforward. Refusal cases can, of course, give rise to

[11] See, for an example of telling admissions and a sad history of the pressures in professional cycling CAS 2004/A/707 *David Millar v The British Cycling Federation*.
[12] Article 3.1 of the Code.

significant conflicts of evidence, but the evidential issues are usually relatively confined and any investigation process is fairly straightforward. Where doping is concerned, and there is a positive test, the principle of strict liability removes from consideration the question of the athlete's fault or negligence in deciding whether a violation has occurred. The process of investigation and proof is likely to be much more difficult under the broader range of anti-doping violations.

36. Under the new anti-doping violations it will be necessary to establish the knowledge of the athlete that he or she was, by way of example, knowingly administering or trafficking in prohibited substances. Anti-doping organisation (and the governments which support them) will need to use a much wider range of resources and forensic skills to investigate violations and establish them to the required standard. While this area will require much more work for the organisations in investigating and presenting cases, the proof of such anti-doping violations has the potential to be one of the most fruitful ways of attacking the problem of doping in sport at source[13]. This makes the practical and forensic challenges involved for the anti-doping organisations in their roles under the Code all the more important.

37. The recent case on appeal before CAS involving the young Australian cyclist *Mark French*[14] illustrates some of the problems which can arise in investigating and proving a wider range of anti-doping violations.

38. In *French*, the athlete faced a range of particularised allegations that he had breached various provisions of the doping policy of Cycling Australia. He was found, at the initial hearing before an arbitrator, to have breached the cycling anti-doping policy as regards some of the breaches alleged. While the anti-doping policy in question did not replicate the violations in the Code, the various violations were similar in substance to the violations under the Code. The allegations involved doping, aiding and abetting others to dope or being concerned in doping by others, trafficking by buying or holding prohibited substances, admitting doping or aiding or abetting doping by others. All the alleged breaches involved Cycling Australia seeking to prove the violations by means of evidence in the form of admissions, evidence from lay witnesses, and scientific evidence (which did not involve a positive test of the athlete for a prohibited substance).

39. The allegations arose after a bag of used syringes and needles and waste products and a bucket containing used syringes and needles had been found in a room which Mr French had occupied at the Australian Institute of Sport in South Australia. This discarded material created a media storm on the eve of the Athens Olympics. Mr

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[13] The recent large scale doping operations such as the BALCO investigation by USADA illustrate this point.
[14] *Mark French v Australian Sports Commission and Cycling Australia*, CAS 2004/A/651.

French was banned at the first hearing before the Olympics and his appeal was ultimately heard by CAS in May 2005. The two banned substances which, it was alleged, were involved in the violations, were glucocorticosteroids and egH (equine growth hormone). Ultimately, the CAS panel was not satisfied to the standard required on the evidence provided that the various allegations had been established. Mr French had made admissions that he had used a substance called "Testicomp" but, in the absence of scientific evidence proving that this product contained the prohibited glucocorticosteroid, the panel found that the violations involving using the prohibited substance were not made out. The CAS panel approached the matter as requiring proof somewhere between the balance of probabilities and beyond a reasonable doubt (see para 42 of the Award). This was based on the Australian case of *Briginshaw v Briginshaw*[15] (because the parties to the anti-doping policy had chosen Australian law) and CAS jurisprudence.

40. While one set of allegations failed because there was no appropriate testing for glucocorticosteriods, the problems in the chain of custody before testing and the possibility, on the analysis of the evidence from various cyclists, that the traces of egH on needles in the bucket could have been the result of another cyclist injecting himself, not French, meant that the allegations against French involving egH were also found not to have been proven.

41. The case should be required reading for anti-doping organisations as they begin to work to investigate and present cases in relation to a wider range of allegations. It is complex both procedurally and evidentially and ultimately covered a wide range of lay and scientific evidence. On a practical level, the investigation and proof of violations such as trafficking were there are no clear admissions will be one of the major challenges represented by the adoption of the WADA Code. Anti-doping organisations will have to be conscious of the need to provide cogent evidence to satisfy the burden of proof on them where serious anti-doping violations are alleged and the principles of strict liability are not applicable.

42. On the standard of proof, the approach in *French* might be criticised. It is submitted that the standard for a serious allegation such as doping should remain the balance of probabilities but with a requirement that the evidence required to tip the balance of probabilities and satisfy the Tribunal is commensurate with the seriousness of the allegation. On the facts of *French* it seems doubtful that the application of a

[15] (1938) 60 CLR 336, 362 (HCA). The case does not appear to be authority for a different standard but rather confirms that with a serious allegation, while the standard is balance of probabilities, the proof required to prove a serious allegation to that standard will need to be clear and cogent. The different formulations may make little practical difference. See also eg. *Hornal v Newberger Products Ltd* [1957] 1 QB 247; *Re H and Ors* (minors) (sexual abuse: standard of proof) [1996] 1 All ER 1, 16 (HL); cf *Bhandari v Advocates Committee* [1956] 3 All ER 742.

different approach to the standard or of Article 3.1 would have made a difference to the outcome.

POSSIBLE CHALLENGES BASED ON GENERAL PRINCIPLES OF INTERNATIONAL LAW AND HUMAN RIGHTS

43. There has been a consistent debate since the beginning of drug testing in sport concerning the extent to which anti-doping regimes may infringe the fundamental rights of individuals. In the past, various fundamental rights have been asserted by athletes seeking either to overturn findings that a violation has occurred or to set aside sanctions. Freedoms such as the right to personal liberty, privacy, the right to a fair hearing, the right to work, the requirement that conduct be truly criminal before a penalty is imposed, proportionality, the presumption of innocence, have all been relied on[16]. The general trend in such challenges has been to accept that, notwithstanding the public significance of sport, the imposition of doping sanctions by sporting bodies sits outside the protection of fundamental human rights because it is a matter for private bodies and private agreement. In addition, in most areas of challenge, the argument that anti-doping regimes should be struck down for breaching individual rights has been rejected on the basis that the general aims of anti-doping regimes, which have international support in various international instruments, justify the curtailment of an athlete's individual rights.

44. WADA has published an opinion on the conformity of the Code with general principles of international law in which the various features of the Code are analysed for compliance with the principles of human rights and general principles of international law. The learned authors of the opinion find that the WADA testing regime, the principle of strict liability (which leads to the automatic disqualification of results), the reversal of onus which applies if an athlete wishes to have the Tribunal consider his or her fault or negligence to eliminate or reduce sanction, are all compatible with fundamental rights given the aims of the Code[17]. The fundamental points in paragraph 43 above which have made such challenges difficult will, it is submitted, apply with greater force where the Code applies because the various international agreements supporting the Code provide a strong policy justification for any infringement of the athlete's individual freedoms.

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[16] By way of example, the standard two year sanction which sports adopted originated from a successful challenge to a four year period of ineligibility imposed by IAAF in the German Courts in *Krabbe v IAAF et al* decision of the LG Munich of 17 May 1995 SPurT 1995, page 161

[17] *Legal opinion on the Conformity of Certain Provisions of the draft World Anti-Doping Code with Commonly Accepted Principles of International Law* - Professor Gabriella Kaufmann-Kohler, Antonio Regozzi, and Professor Giorgio Malinverni, 26 February 2003, see also the WADA website.

45. One general principle has had a particular influence on the imposition of sanctions for anti-doping violations by CAS. This is the principle of proportionality. Generally this principle involves the basic principle that excessive means must not be employed to achieve given ends. In Commonwealth courts the principle has been adopted as a basis for the judicial review of governmental decisions. Where individual freedoms are concerned, the principle of proportionality can be relied on to claim that the means to achieve a desired end should not go further in limiting the freedom than is necessary. However, in the anti-doping context, the principle has been used to lessen sanctions imposed by private sporting bodies where the effect on the individual athlete was seen as so great as to be disproportionate to the overall aim of the anti-doping regime in question.

46. The provisions of the WADA Code in Article 10 were introduced to provide for flexibility in the sanctions applied where the athlete can establish that he or she bore no fault or no significant fault in relation to certain violations. The view has been expressed that the Code now adopts a "proportionate approach" and that, as a consequence, the concept has no further role to play and that the provisions of the Code meet the standards imposed by the principle of proportionality[18]. If this is correct, the result would be that CAS Panels would simply interpret and apply the relevant Articles of the Code in deciding whether the mandatory sanctions can be eliminated or reduced.

47. However, a CAS Panel, in a recent decision[19] involving an appeal by an experienced Austrian skier who had tested positive for a steroid which had come from a contaminated nutritional supplement, left open the possibility that proportionality might still have a role to play in reaching an appropriate sanction where the Articles which provide for a reduced or eliminated sanction did not assist the athlete.

> 7.5.3 Insofar as the WADC prevents specific circumstances to be taken into account for the benefit of the athlete, the admissibility of such provisions is doubted again and again. In the opinion by Gabrielle Kaufmann-Kohler, Antonio Rigozzi and Giorgio Malinverni, the rigid systems of fixed sanctions in the WADC considerably restricts the doctrine of proportionality, but is nevertheless compatible with human rights and general legal principles (see notes 175-185). These experts justify this characteristic by citing the legitimate aim of harmonising doping penalties (see notes 171-174).
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> *7.5.4* Whether the conclusions to be drawn from these experts are correct in such finality can be left unanswered here (see also

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[18] For a discussion of the continuing role of proportionality, see, *CAS Doping Jurisprudence*: *What can we learn?*, Professor Richard MacClaren seminar for CAS members, 15th and 16th June 2005.

[19] CAS 2005/A/847 *H Knauss v FIS*, 20 June 2005

> CAS 2004/A/690) *Hipperdinger v/ ATP Tour Inc* [24.3.2005] marg. No. 89); for the case at hand does not require an in-depth decision of the issue. At least in the opinion of the Swiss Federal Tribunal, sports bodies can limit in their rules the circumstances to be taken into account when fixing sanctions and thereby also restrict the application of the doctrine of proportionality (Decision dated 31 March 1999 in re. N. et al./FINA, see Digest of CAS Awards, Volume II, 2002, p. 775, in particular p. 780, cons. 3.c). However, in the opinion of the Federal Tribunal, the sport associations exceed their autonomy if these rules constitute an attack on personal rights, the nature and scope of which is extremely serious and totally disproportionate to the behaviours penalised. In the Panel's opinion, this threshold has not been exceeded in the present case. The Appellant has not convinced the Panel that the FIS-Rules, by failing to take into consideration his age, his persona sporting career or the particularities of the type of sport, inflict such an extraordinary disadvantage upon him setting the period of his ineligibility that the Panel is justified in departing from the central premise of the WADC, namely the harmonisation and standardisation of doping sanctions across all types of sports and athletes (see the Introduction to the WADC). *(Emphasis added)*

48. In the particular case, the CAS panel, on appeal, did not reduce the sanction imposed by the sporting body (FIS) which found that the athlete had been negligent (and so could not eliminate the sanction) but that the athlete could show no significant negligence or fault with the result that the sanction was reduced from two years to 18 months. The possibility that the principle of proportionality may still have a role to play, where the requirements in Articles 10.5.1 and 10.5.2 are not satisfied, introduces an unwelcome element of uncertainty into the application of the Code relating to sanctions which, it is submitted, was not intended when the Articles were introduced.

The need for consistency

49. The Code will be interpreted and applied by a wide range of national tribunals and by CAS. Like international conventions in areas such as international trade, those who interpret and apply the Code will need to remain conscious of the need to adopt an approach to interpretation which is consistent and readily understood by other tribunals[20]. The *Knauss* decision introduces the possibility that, notwithstanding the words of the Articles, principles such as proportionality may be used to reach an outcome which a tribunal believes is appropriate. While the Articles are designed to introduce flexibility, care needs to be taken not to remove that flexibility, from the words of the Articles and the general purpose expressed in the Notes, namely that the elimination and reduction Articles, are for exceptional circumstances.

[20] For well known dicta in this regard in the area of construction of the Hague Rules relating to the carriage of goods by sea, see eg. *Stag Lene v Foscolo Mango* [1932] AC 328 per Lord Atkin at p 343, per Lord MacMillan at p 350.

50. Recently there was a case in New Zealand where the Sport's Disputes Tribunal had to consider the provisions of Article 10.5.2 in the context of a refusal to provide a sample which illustrates the difficult issues which can arise in interpreting and applying the Articles for reducing the sanctions.

51. Mr Tawera is a rugby league player. He was selected for testing after a game in a South Pacific tournament in Auckland. At the time of the test he was anxious to go home to his partner who was pregnant. The drug testing procedures were properly carried out. In the course of giving the required urine sample, Mr Tawera dropped the sample and, in spite of warnings, left the drug collection area. In doing that, he committed a doping infraction under the applicable Regulations. After being out of the room for a couple of minutes he came back and offered to give a test. The Agency officials carried out the test, making it clear that the first refusal would be reported.

52. The Board of the Agency determined that there had been a refusal without reasonable excuse. The Sports Disputes Tribunal had to decide whether, notwithstanding the finding that Mr Tawera did not have reasonable cause to fail to provide a sample, he could still establish that he bore no significant fault or negligence. The SDT found that Mr Tawera had acted intentionally or purposefully (although in a hot-headed manner). The question was, could Article 10.5.2 still apply? Could there be no significant fault or negligence where there was no reasonable excuse and purposeful conduct? The SDT found that, while Mr Tawera was clearly at fault, there was an exceptional circumstance, namely the negative second test, which meant that had the first test been given, it would have been negative. It found that this exceptional circumstance allowed Mr Tawera to show no significant fault or negligence "in the totality of the circumstances".

53. It is submitted that this kind of approach, although understandable, presents some difficulties given the words of the Article and the Notes. Can the conduct involved in the refusal, given the finding of no reasonable excuse and purposeful conduct, be described as showing no significant fault or negligence "in connection with the violation"? Should this kind of refusal be regarded as giving rise to "unique" circumstances?[21]

54. It is submitted that national tribunals and CAS will have to remain conscious of the overall aims and purposes of the anti-doping regime in the Code, to respect the words used in the Articles and the explanations in the notes to the Code and remain aware that outcomes in individual cases may have a broader effect on the interpretation of the Code in other cases internationally.

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[21] See Notes to Article 10.5.2.

Concluding comment

55. The Code is a significant international agreement under which sporting bodies, both nationally and internationally, have agreed on a common approach to a problem which strikes at the heart of sport. The Code will, over time, create consistency but it is to be anticipated that, in each of the areas identified, there will be significant challenges for those working to give effect to the Code. If these challenges can be met, the Code will fulfil its fundamental goal of upholding the spirit of sport and eliminating cheating by the taking of performance enhancing substances.

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September 2005