

CAS 2005/C/976 & 986, FIFA & WADA

Advisory Opinion

rendered by the

Court of Arbitration for Sport

sitting in the following composition:

President: Mr. Hans **Nater**, Attorney-at-Law, Zurich, Switzerland

Arbitrators: Ms. Corinne **Schmidhauser**, Attorney-at-Law, Bern, Switzerland
Mr. Stephan **Netzle**, Attorney-at-Law, Zurich, Switzerland

Ad hoc Clerk: Mr. Michael **Tuchschnid**, Attorney-at-Law, Zurich, Switzerland

Request by:

1. **Fédération Internationale de Football Association**, Zurich, Switzerland

-FIFA-

Request by

2. **World Anti-Doping Agency**, Montreal, Canada

Represented by Mr. François Kaiser, Carrard Paschoud Heim & Partners, Lausanne, Switzerland

-WADA-

Index

I. INTRODUCTION	4
II. THE QUESTIONS SUBMITTED TO THE PANEL	4
A. REQUEST FROM FIFA	5
B. REQUEST FROM WADA.....	6
III. ANALYSIS	7
A. PROCEDURAL REMARKS	8
B. THE OBLIGATION OF FIFA TO COMPLY WITH THE WADC	9
1. <i>Legal Nature of WADC</i>	9
2. <i>Has FIFA committed to Adopt the WADC?</i>	11
2.1 <i>The Copenhagen World Conference on Doping in Sport in March 2003</i>	11
2.2 <i>The Declaration of May 21, 2004</i>	11
3. <i>The Olympic Charter</i>	12
C. THE DIFFERENCES AND SIMILARITIES BETWEEN THE WADC AND THE FIFA ANTI-DOPING RULES	15
1. <i>The Relevant Provisions</i>	15
2. <i>Synopsis</i>	16
3. <i>Differences and Similarities between the WADC and the FIFA Anti-Doping Rules</i>	16
3.1 <i>Definition of Doping (Articles 1 and 2 WADC. Articles 60 and 62.1 FIFA DC and Articles I and II FIFA RDC)</i>	16
3.2 <i>Strict Liability with Respect to the Presence of a Prohibited Substance in an Athlete's Bodily Specimen (Article 2.1.1 WADC. Article II.1.2 FIFA RDC)</i>	17
3.3 <i>Proof of Doping (Article 3 WADC. Article III FIFA RDC)</i>	17
3.4 <i>Prohibited List (Article 4 WADC. Appendix A of the FIFA RDC)</i>	18
3.5 <i>Therapeutic Use Exemption (Articles 4.4 and 13.3 WADC. Article 61 FIFA DC and Appendix B FIFA RDC)</i>	18
3.6 <i>Testing (Article 5 WADC. Article IV FIFA RDC)</i>	20
3.7 <i>Analysis of Samples and Results Management (Articles 6 and 7 WADC. Article IV.6 FIFA RDC and Articles 133-138 FIFA DC)</i>	21
3.8 <i>Hearing (Article 8 WADC. Articles 116-118 FIFA DC)</i>	22
3.9 <i>Disqualification and Consequence for the Team (Articles 9 and 11 WADC. Article 62.5 FIFA DC)</i>	23
3.10 <i>Sanctions (Article 10 WADC. Article 62 FIFA DC)</i>	24
3.10.1 <i>Individual Case Management (Article 10.5 WADC. Article 62 FIFA DC)</i>	24
a) <i>Duration of the Sanction</i>	25
b) <i>Degree of Fault which is Relevant to Determine the Duration of the Sanction</i>	27
c) <i>Conclusions</i>	32
3.10.2 <i>Specified Substances (Article 10.3 WADC. Article 62.3 FIFA DC)</i>	33

3.10.3	<i>Second Offenses (Articles 10.2, 10.6 WADC. Article 41 FIFA DC)</i>	34
3.10.4	<i>Multiple Violations (Article 10.6 WADC. Article 43 FIFA DC)</i>	35
3.10.5	<i>Substantial Assistance (Article 10.5.3 WADC)</i>	35
3.10.6	<i>Probationary Sanctions (Article 33 FIFA DC)</i>	36
3.10.7	<i>Status during Ineligibility (Article 10.9 WADC. Article 20 FIFA DC)</i>	37
3.10.8	<i>Disqualification of Results in Competitions Subsequent to Sample Collection (Article 10.7 WADC)</i>	38
3.10.9	<i>Commencement of Ineligibility Period (Articles 10.8 WADC)</i>	38
3.10.10	<i>Reinstatement Testing (Article 10.10 WADC. Article 63 FIFA DC)</i>	38
3.11	<i>Appeal Right to CAS (Article 13 WADC. Article 61.5 FIFA DC and Articles 59 and 60.5 FIFA Statutes)</i>	39
3.12	<i>Confidentiality and Reporting (Article 14 WADC. Articles 8 and 9 FIFA RDC)</i>	40
3.13	<i>Statute of Limitations of Doping Offenses (Article 17 WADC. Article 44.2 FIFA RDC)</i>	41
4.	<i>Material Differences (Summary)</i>	41
D.	DOES MANDATORY SWISS LAW REQUIRE FIFA TO DEVIATE FROM WADC?	42
1.	<i>Applicable Law</i>	43
1.1	<i>Swiss Law</i>	43
1.2	<i>The Law of Sanctions Imposed by Associations</i>	43
1.3	<i>The Burden of Proof</i>	45
1.4	<i>Limits on the Power of an Association to Impose Sanctions</i>	46
1.4.1	<i>The Principle of Fault</i>	46
1.4.2	<i>The Principle of Equal Treatment</i>	48
1.4.3	<i>The Principle of Proportionality</i>	48
1.4.4	<i>The Moral Rights of the Offender (Article 27 and 28 Swiss Civil Code)</i>	49
1.4.5	<i>Limitations on Contractual Penalties</i>	50
1.5	<i>Conclusion</i>	50
2.	<i>Are the Rules of the WADC which Differ Substantially from the FIFA Anti-Doping Rules Compatible with Swiss law?</i>	51
2.1	<i>Discrepancy Relating to the Determination of the Sanction in Case of a First Offense</i>	51
2.2	<i>The Substantial Assistance Provision</i>	55
2.3	<i>Second Offense</i>	55
2.4	<i>No Information Right of the WADA</i>	57
3.	<i>Conclusion</i>	57
IV.	ADVISORY OPINION	58
A.	<i>ANSWERS TO THE QUESTIONS OF FIFA, SUBMITTED BY THE CAS PRESIDENT</i>	58
B.	<i>ANSWERS TO THE QUESTIONS OF THE WADA, SUBMITTED BY THE CAS PRESIDENT</i>	61
V.	ANNEX	68

I. Introduction

1 This matter comes before the *Court of Arbitration for Sport* (CAS) pursuant to the provisions concerning Advisory Opinions of the Code of Sports-related Arbitration (CAS Code). The *Fédération Internationale de Football Association* (FIFA) and the *World Anti-Doping Agency* (WADA) have each filed a request for an Advisory Opinion in order to resolve a dispute arising out of the implementation of the *World Anti-Doping Code* (WADC) into the *FIFA Disciplinary Code* (FIFA DC).

2 FIFA and WADA are in dispute as to whether certain rules of the WADC concerning the imposition of sanctions for anti-doping rule violations are admissible under Swiss law. FIFA is particularly concerned about the standard sanction of a two years' ineligibility (art. 10.2 WADC) with the limited possibility of eliminating or reducing the sanction only in the event of exceptional circumstances (art. 10.5 WADC). FIFA takes the view that Swiss law requires an individual assessment of the sanction, based on the objective and subjective circumstances of the individual case. WADA submits that the WADC is compatible with Swiss law, and that the FIFA DC has disregarded a number of mandatory provisions of the WADC.

3 The CAS Advisory Opinion is a unique process and procedure¹. It is a non-binding opinion written in an arbitration format, answering specific questions. The answers may set out certain general principles and act as guidelines as to possible ways of viewing and characterizing particular situations.

II. The Questions Submitted to the Panel

4 Independently of each other, FIFA and the WADA submitted a request for an Advisory Opinion by CAS.

¹ MCLAREN, CAS Advisory Opinions, in: BLACKSHAW/SIEKMANN/SOEK (eds.), *The Court of Arbitration for Sport 1984-2004*, The Hague 2006, p. 180.

A. Request from FIFA

5 FIFA, in its request dated September 29, 2005, submitted the following questions to CAS:

- „1. Is it correct that the Applicant, in accordance with its doping sanction provisions, in particular Art. 62 of the Disciplinary Code, has laid down a solution that is compatible with the Swiss legal system and pays heed to the generally accepted legal principle of observing the principle of culpability when imposing doping penalties?
2. Is it correct that the Applicant is obliged to lay down a sanction system in its regulations that pays heed to the ‘principle of culpability’ and thus cannot be ‘compelled’ to adapt its corresponding sanction provisions to standard specifications that show no regard, or at least no rigorous regard, for the principle of culpability (individual case management)?“

6 The CAS President, in his decision dated October 31, 2005, submitted the following questions to the Panel:

- „1. En „ratifiant“ le Code Mondial Antidopage (C.M.A.) avec la réserve „qu’il soit tenu compte des spécificités du football et des principes généraux du droit“, la FIFA s’est-elle réservé le droit de prévoir dans son „Code disciplinaire“, des sanctions inférieures à celles prévues par ledit Code?

Ou cette „ratification“ rend-t-elle juridiquement inopérante les dispositions du „Code disciplinaire“ auxquelles se substituent celles du C.M.A.

2. L’organe compétent de la FIFA a-t-il la faculté d’infliger une sanction inférieure à la sanction minimale prévue par le C.M.A. en tenant compte des circonstances de la cause et notamment du degré de culpabilité de la personne incriminée?
3. L’organe compétent de la FIFA est-il tenu de respecter les prescriptions du C.M.A., même dans l’hypothèse où elles seraient en contradiction avec les principes généraux du droit applicables en Suisse et le droit suisse lui-même?

Ou au contraire ledit organe de la FIFA doit-il obligatoirement tenir compte de ces principes et du droit suisse dans sa démarche?

4. D'une façon générale, la sanction minimale prévue par le C.M.A. s'impose-t-elle à l'organe compétent de la FIFA pour sanctionner un contrevenant au C.M.A.?

Ou ledit organe a-t-il la faculté de prononcer une sanction inférieure à la sanction minimale du C.M.A.?"

B. Request from WADA

7 In its request dated November 16, 2005, WADA, submitted the following questions to CAS:

Question 1: Is the FIFA Disciplinary Code, in particular the sanctions set forth in Article 62, in conformity with the World Anti-Doping Code, in particular Article 10?

Question 2: Is individual case management, as set forth in the FIFA Disciplinary Code, in particular in Article 62.1, in conformity with the World Anti-Doping Code, in particular Article 10.5?

Question 3: Does the FIFA Disciplinary Code, in particular Articles 62 and 63, provide for sanctions for other violations of the anti-doping rules in conformity with the World Anti-Doping Code, in particular Article 10 of the Code?

Question 4: Is Article 33 of the FIFA Disciplinary Code in conformity with the World Anti-Doping Code as regards sanctions?

Question 5: Are the provisions of the FIFA Disciplinary Code with regard to the sanctions against teams, in particular Article 63, in conformity with the provisions Article 11 of the World Anti-Doping Code?

Question 6: Are the provisions of the FIFA Disciplinary Code with regard to Therapeutic Use Exemptions, in particular Article 61, in conformity with the provisions of the World Anti-Doping code regarding TUEs, in particular Articles 4.4 and 13.3 of the Code?

Question 7: Does Article 60.5 of the FIFA Statutes offer the possibility of an appeal to the CAS in conformity with Articles 13.1 and 13.2 of the World Anti-Doping Code?"

8 The CAS President, in his decision dated November 25, 2005, submitted the following questions to the Panel:

- I. En l'état actuel des relations juridiques entre WADA et la FIFA, et en tenant dûment compte des documents fournis à la fois par WADA et par la FIFA, cette dernière est-elle tenue de mettre son Code Disciplinaire en conformité avec le Code Mondial Antidopage?
- II. Si la réponse à la question «I.» est oui:
1. Is the FIFA Disciplinary Code, in particular the sanctions set forth in Article 62, in conformity with the World Anti-Doping Code, in particular Article 10?
 2. Is individual case management, as set forth in the FIFA Disciplinary Code, in particular in Article 62.1, in conformity with the World Anti-Doping Code, in particular Article 10.5?
 3. Does the FIFA Disciplinary Code, in particular Articles 62 and 63, provide for sanctions for other violations of the anti-doping rules in conformity with the World Anti-Doping Code, in particular Article 10 of the Code?
 4. Is Article 33 of the FIFA Disciplinary Code in conformity with the World Anti-Doping Code as regards sanctions?
 5. Are the provisions of the FIFA Disciplinary Code with regard to the sanctions against teams, in particular Article 63, in conformity with the provisions Article 11 of the World Anti-Doping Code?
 6. Are the provisions of the FIFA Disciplinary Code with regard to Therapeutic Use Exemptions, in particular Article 61, in conformity with the provisions of the World Anti-Doping Code regarding TUEs, in particular Articles 4.4. and 13.3 of the Code?
 7. Does Articles 60.5 of the FIFA Statues offer the possibility of an appeal to the CAS in conformity with Articles 13.1 and 13.2 of the World Anti-Doping Code?
- III. Si la réponse à la question «I.» est non, quelles conséquences devraient être tirées de cette réponse?"

III. Analysis

- 9 This Advisory Opinion will deal with the issues which it has considered in the order set out in the Index.

A. Procedural Remarks

10 The relevant provisions of the Code of Sports-related Arbitration (the CAS Code) are:

Art. S12 para. 3:

“The responsibilities of such Panels are, inter alia:

[...]

- c. to give non-binding advisory opinions at the request of the IOC, the IFs, the NOCs, WADA, the associations recognized by the IOC and the Olympic Games Organizing Committees (“OCOGs”).”

Art. R60:

“Request for Opinion

The IOC, the IFs, the NOCs, WADA, the associations recognized by the IOC and the OCOGs, may request an advisory opinion from the CAS about any legal issue with respect to the practice or development of sport or any activity related to sport. The request for an opinion shall be addressed to the CAS and accompanied by any document likely to assist the Panel entrusted with giving the opinion.”

Art. R61:

“Initiation by the CAS

When a request is filed, the CAS President shall review whether it may be the subject of an opinion. In the affirmative, he shall proceed with the formation of a Panel of one or three arbitrators from the CAS list and designate the President. He shall formulate, at his own discretion, the questions submitted to the Panel and forward these questions to the Panel.”

11 Both FIFA and WADA made its request pursuant to art. S12 lit. c and R60 et seq. of the CAS Code. In accordance with art. R61 of the CAS Code, the requests were reviewed by the CAS President. He admitted both requests to the extent of his newly formulated questions, which were submitted to the Panel for its Opinion.

Hence, the Advisory Opinion addresses the questions submitted by the CAS President.

B. The Obligation of FIFA to Comply with the WADC

1. Legal Nature of WADC

12 The WADC is a model code which is designed to meet the stated purposes²:

- “- To protect the *Athletes'* fundamental right to participate in doping-free sport and thus promote health, fairness and equality for *Athletes* worldwide; and
- To ensure harmonized, coordinated and effective anti-doping programs on the international and national level with regard to detection, deterrence and prevention of doping."

By signing a declaration of acceptance of the WADC, entities, such as WADA³, the IOC, the IFs, the NOCs etc., became Signatories (as defined in the WADC) upon approval by each of their respective governing bodies⁴.

13 "The Code [WADC] is the fundamental and universal document upon which the World Anti-Doping Program in Sport is based. The purpose of the Code [WADC] is to advance the anti-doping effort through universal harmonization of core anti-doping elements. It is intended to be specific enough to achieve complete har-

² Cf. Introduction to the WADC, p. 1 et seq.

³ In February 1999, at the IOC-hosted World Conference on Doping in Sport in Lausanne, delegates from the Olympic Movement, IFs, the United Nations, governments, national anti-doping agencies, athletes and the medical profession took a first step towards getting sports bodies and governments to work towards a consistent and coordinated approach. Specifically, they agreed to establish an independent national anti-doping agency in time for the 2000 Sydney Olympics, with a mandate "to co-ordinate the various programs necessary to realize the objectives that shall be defined jointly by all the parties concerned (cf. FLINT/TAYLOR/LEWIS, *The Regulation of Drug Use in Sport*, in: LEWIS/TAYLOR (ed.), *Sport: Law and Practice*, London 2003, N. E4.42, p. 922).

⁴ Art. 23.1.1 WADC.

monization on issues where uniformity is required, yet generally not in other areas to permit flexibility on how agreed upon anti-doping principles are implemented"⁵.

- 14 Para. 2 of the Introduction to the WADC identifies certain rules which must be incorporated into the rules of each Anti-Doping Organization without any substantive changes:

"Part One of the *Code* does not replace, or eliminate the need for, comprehensive anti-doping rules adopted by each of these *Anti-Doping Organizations*. While some provisions of Part One of the *Code* must be incorporated essentially verbatim by each *Anti-Doping Organization* in its own anti-doping rules, other provisions of the Part One establish mandatory guiding principles that allow flexibility in the formulation of rules by each *Anti-Doping Organization* or establish requirements that must be followed by each *Anti-Doping Organizations* but need not be repeated in its own anti-doping rules. The following Articles, as applicable to the scope of anti-doping activity which the *Anti-Doping Organization* performs, must be incorporated into the rules of each *Anti-Doping Organization* without any substantive changes (allowing for necessary non-substantive editing changes to the language in order to refer to the organization's name, sport, section numbers, etc.): Articles 1 (Definition of Doping), 2 (Anti-Doping Rule Violations), 3 (Proof of Doping), 9 (Automatic *Disqualification* of Individual Results), 10 (Sanctions on Individuals), 11 (*Consequences* to Teams), 13 (Appeals) with the exception of 13.2.2, 17 (Statute of Limitations) and Definitions."

- 15 The WADC is not *per se* legally binding. The Signatories of the WADC are required to implement applicable provisions through policies, statutes, rules or regulations according to their authority and within their relevant spheres of responsibility⁶.

⁵ Cf. Introduction to the WADC, p. 1.

⁶ Art. 23.2.1 WADC.

2. Has FIFA committed to Adopt the WADC?

16 First, the Panel will consider whether FIFA undertook to implement the WADC, either at the Copenhagen World Conference on Doping in Sport in March 2003 or by its Declaration of May 21, 2004.

2.1 The Copenhagen World Conference on Doping in Sport in March 2003

17 At the Copenhagen World Conference on Doping in Sport in March 2003, the draft of the WADC was discussed and approved by the delegates by acclamation. Such general and unspecified expression of support or consent cannot be regarded as formal acceptance of the WADC⁷.

2.2 The Declaration of May 21, 2004

18 At the 54th Ordinary FIFA Congress of May 21, 2004 in Paris, FIFA passed a declaration in support of WADA and the WADC (Declaration). The Declaration was signed by Joseph S. Blatter, President of FIFA, Richard W. Pound, Chairman of WADA, and Dr. Jacques Rogge, President of the International Olympic Committee (IOC).

19 The Declaration reads:

“Declaration by the 54th Ordinary FIFA Congress in Paris (the Centennial Congress)

The 54th Ordinary FIFA Congress in Paris on 20 and 21 May 2004 is aware of the importance and necessity of the fight against doping.

In light of excellent cooperation with the World Anti-Doping Agency (WADA), the FIFA Congress declares its unconditional support for the fight against doping and its respect for the World Anti-Doping Code.

Based on the address made by WADA Chairman Richard W. Pound to this Congress, FIFA advocates continued collaboration

⁷ Cf. WADA's request p. 9, footnote 7.

with WADA in the fight against doping in the knowledge that WADA will respect the autonomy of international sports federations, including FIFA.

In the presence of the President of the International Olympic Committee (IOC) Dr. Jacques Rogge and the Chairman of the World Anti-Doping Agency (WADA) Richard W. Pound, FIFA is proud to sign this declaration at its Centennial Congress thereby officially ratifying its cooperation with WADA.”

20 FIFA submits that, by signing the Declaration, it has accepted an obligation to implement the WADC with the reservation of “*factors specific to football and generally recognized principles of law*”⁸.

21 Neither Party submitted that the Declaration constituted a contract between WADA and FIFA to implement the WADC into the FIFA Rules.

22 WADA takes the view that the Declaration did not oblige FIFA to incorporate the WADC into its bylaws. That is also the view of the Panel.

23 The Declaration primarily expresses the intention of FIFA to support WADA and its fight against doping. The Declaration refers to the WADC only in a subordinate clause by declaring FIFA’s respect of the WADC. Such wording cannot be interpreted as FIFA’s acceptance of an obligation to implement the WADC into its bylaws. The Panel understands the Declaration as a non-binding letter of intent which does not constitute a formal acceptance of the WADC pursuant to art. 23 WADC. Moreover, the Panel is of the view that the Declaration’s wording does not lead to FIFA’s conclusion that it had accepted the WADC with the reservation of “*factors specific to football and generally recognized principles of law*”.

3. The Olympic Charter

24 Rule 26 of the Olympic Charter (OC) imposes an obligation on the International Federations (IF) who wish to obtain and maintain the recognition of the IOC, to adopt and implement the WADC. Rule 26 reads:

⁸ FIFA’s request p. 2.

“26 Recognition of IFs

In order to develop and promote the Olympic Movement, the IOC may recognize as IFs international non-governmental organisations administering one or several sports at world level and encompassing organisations administering such sports at national level.

The statutes, practice and activities of the IFs within the Olympic Movement must be in conformity with the Olympic Charter, including the adoption and implementation of the World Anti-Doping Code. Subject to the foregoing, each IF maintains its independence and autonomy in the administration of its sport.”

25 FIFA became a recognized IF of the Olympic Movement⁹ shortly after its foundation in 1904. As a recognized IF, FIFA is obliged by Rule 26 of the OC to implement the WADC.

26 Rule 23 of the OC specifies possible legal consequences for an IF that does not fulfill this obligation. It reads:

“23 Measures and Sanctions

In the case of any violation of the Olympic Charter, the World Anti-Doping Code, or any other regulation, as the case may be, the measures or sanctions which may be taken by the Session, the IOC Executive Board or the disciplinary commission referred to under 2.4 below are:

1 In the context of the Olympic Movement:

[...]

1.2 with regard to IFs:

a) withdrawal from the programme of the Olympic Games of:

⁹ The Olympic Charter defines the “Olympic Movement” in section 3 of the *Fundamental Principles of Olympism* as follows:

“The Olympic Movement is the concerted, organised, universal and permanent action, carried out under the supreme authority of the IOC, of all individuals and entities who are inspired by the values of Olympism. It covers the five continents. It reaches its peak with the bringing together of the world’s athletes at the great sports festival, the Olympic Games. Its symbol is five interlaced rings.”

- a sport (Session),
- a discipline (IOC Executive Board),
- an event (IOC Executive Board);

b) withdrawal of provisional recognition (IOC Executive Board);

c) withdrawal of full recognition (Session).

1.3 with regard to associations of IFs:

a) withdrawal of provisional recognition (IOC Executive Board);

b) withdrawal of full recognition (Session).

[...]

2 In the context of the Olympic Games, in the case of any violation of the Olympic Charter, of the World Anti-Doping Code, or of any other decision or applicable regulation issued by the IOC or any IF or NOC, including but not limited to the IOC Code of Ethics, or of any applicable public law or regulation, or in case of any form of misbehaviour:

[...]

2.4 the IOC Executive Board may delegate its power to a disciplinary commission.

3 Before applying any measure or sanction, the competent IOC body may issue a warning.

4 All sanctions and measures are taken without prejudice to any other rights of the IOC and of any other body, including but not limited to NOCs and IFs.”

27

The Panel concludes that FIFA, as a recognised IF, has an obligation to the IOC to adopt and implement the WADC. Failure of a recognized IF to do so may cause the IOC to take the measures set out in Rule 23 of the OC. Neither the IOC nor WADA has, however, the authority to enforce the adoption and implementation of the WADC into the bylaws of a recognized IF.

C. The Differences and Similarities between the WADC and the FIFA Anti-Doping Rules

1. The Relevant Provisions

28 The relevant provisions of the WADC are contained in the World Anti-Doping Code as issued in March 2003. Article 24.2 of the WADC clarifies that "(t)he comments annotating various provisions of the [WADC] are included to assist in the understanding and interpretation of the [WADC]." The comments are not subject to the acceptance and implementation of the WADC by the Signatories as defined in Article 23 of the WADC¹⁰. From the very beginning, they seem to have been regarded as a mere source of interpretation of the WADC¹¹ and cannot, therefore, be considered as obligatory provisions of the WADC. The WADC's headings are for "convenience only and shall not be deemed part of the substance of the [WADC] or to affect in any way the language of the provisions to which they refer."¹²

29 The anti-doping rules of the FIFA are not contained in one self-contained part of FIFA's regulatory provisions, but are to be found in the FIFA Statutes dated October 19, 2003 and amended on September 12, 2005 (the "FIFA Statutes"), the Disciplinary Code as of September 1, 2005 (the "FIFA DC") and the "Regulations Doping Control for FIFA Competitions and Out of Competition" of January 2005 (the "FIFA RDC"). For the purpose of this Opinion, the relevant provisions are generally referred to as the "FIFA Anti-Doping Rules."

¹⁰ The Panel is not aware of any IF which implemented also the comments to the WADC into its own anti-doping rules.

¹¹ E. g. the Comment is regarded as a source of interpretation and not as a source of (contract) law by: CAS 2005/A/847 *Knauss v/ FIS*, sec. 7.3.4; CAS 2005/A/830 *G. Squizzato v/ FINA*, N 10.25; KAUFMANN-KOHLER/MALINVERNI/RIGOZZI, Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law, dated February 26, 2003, available at <http://www.wada-ama.org/rtecontent/document/kaufmann-kohler-full.pdf>, sec. 171 and 176.

¹² Art. 24.4 of the WADC.

2. Synopsis

30 The differences between the Parties relate to Part One of the WADC ("Doping Control"), i.e. Articles 1 – 17 WADC, with the exception of Art. 16 WADC covering sports involving animals.

31 A comparison of the relevant anti-doping rules of FIFA and WADA is attached to this Advisory Opinion.

3. Differences and Similarities between the WADC and the FIFA Anti-Doping Rules

3.1 *Definition of Doping (Articles 1 and 2 WADC. Articles 60 and 62.1 FIFA DC and Articles I and II FIFA RDC)*

32 Both, the WADC and the FIFA Anti-Doping Rules define doping as the occurrence of one or more of the anti-doping rule violations set forth in the respective regulations, i.e. (i) the presence of a prohibited substance or its metabolites or markers in an athlete's bodily specimen, (ii) use or attempted use of a prohibited substance or a prohibited method, (iii) refusing, or failing without compelling justification, to submit to sample collection after notification as authorized in applicable anti-doping rules or otherwise evading sample collection, (iv) violation of applicable requirements regarding athlete/player availability for out-of competition testing including failure to provide required whereabouts information and missed tests which are based on reasonable rules, (v) tampering, or attempting to tamper, with any part of doping control (tests), (vi) possession of prohibited substances and methods, (vii) trafficking in any prohibited substance or prohibited method, (viii) administration or attempted administration of a prohibited substance or prohibited method to any athlete/player or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any attempted violation.

33 The definitions of doping in the WADC and the FIFA Anti-Doping Rules are identical.

3.2 *Strict Liability with Respect to the Presence of a Prohibited Substance in an Athlete's Bodily Specimen (Article 2.1.1 WADC. Article II.1.2 FIFA RDC)*

34 Both the WADC and the FIFA Anti-Doping Rules provide that an anti-doping rule violation is established upon the mere presence of a prohibited substance or its metabolites or markers in an athlete's or player's bodily specimen and that no intent, fault, negligence or knowing use must be established.

35 The WADC and the FIFA Anti-Doping Rules are identical with respect to the strict liability principle.

3.3 *Proof of Doping (Article 3 WADC. Article III FIFA RDC)*

36 Both, the WADC and the FIFA Anti-Doping Rules are based on the same principles that (i) the anti-doping organisation shall have the burden of establishing that an anti-doping rule violation has occurred and that (ii) facts related to anti-doping rule violations may be established by any reliable means, including admissions¹³. Furthermore, both have accepted similar (rebuttable) presumptions (i) that WADA-accredited laboratories have conducted the sample analysis and the custodial procedures in accordance with the respective international standard for laboratory analysis, and (ii) that departures from the international standard for testing which did not cause an adverse analytical finding or other anti-doping violation shall not invalidate such results.

37 There is a difference in wording with respect to the standard of proof. The WADC has integrated the formula constantly applied by CAS jurisprudence, according to which "*[...] the standard of proof shall be whether the anti-doping organization 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. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond reasonable doubt. Where the [WADC] places the burden*

¹³ Art. 3.2 WADC, art. III.2 FIFA RDC.

of proof upon the athlete or other person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability." No such wording has been included in the FIFA Anti-Doping Rules. However, this formula only reflects the general principles which will be applied by CAS panels whether or not such formula is explicitly contained in the applicable anti-doping regulations.

38 The Panel concludes that the omission of the standard of proof-section in the FIFA Anti-Doping Rules does not constitute a material difference to the WADC.

3.4 *Prohibited List (Article 4 WADC. Appendix A of the FIFA RDC)*

39 Appendix A of the FIFA RDC incorporates the 2005 Prohibited List International Standard which came into effect on January 1, 2005 into the FIFA Anti-Doping Rules. Appendix A also provides that the FIFA RDC will be amended upon any update of the WADA Prohibited List.

40 Both, the WADC and the FIFA Anti-Doping Rules have the same list of prohibited substances.

3.5 *Therapeutic Use Exemption (Articles 4.4 and 13.3 WADC. Article 61 FIFA DC and Appendix B FIFA RDC)¹⁴*

41 In accordance with art. 4.4 WADC, art. 61 of the FIFA DC (as well as Appendix B of the FIFA RDC) provides that athletes subject to FIFA's jurisdiction with medical conditions requiring the use of a prohibited substance or a prohibited method may request a therapeutic use exemption (TUE) from FIFA, if there is no alternative to

¹⁴ Art. 4 WADC does not belong to the provisions which the WADC designates as "articles [...] which must be incorporated into the rules of each Anti-Doping Organization without any substantive changes."

the prohibited substance or method. The criteria to grant a TUE¹⁵ are identical with those provided in the WADC.

42 The provisions on confidentiality of information of WADA and FIFA do not materially differ despite a difference in wording. Art. 5.0 IS-TUE provides that the athlete must consent to the disclosure of information also to staff involved in the management, review or appeal of TUE. The FIFA Anti-Doping Rules provide that the athlete must consent to the disclosure to the granting body and to the medical personnel of other relevant anti-doping organisations under the FIFA RDC¹⁶ which also includes the medical personnel of WADA, since its review body consists of physicians¹⁷.

43 Art. 4.4 of the WADC further states that WADA shall be informed of the granting of TUE. Pursuant to the "TUE Commission Decision Template"¹⁸, WADA is provided with certain specific information¹⁹. According to art. B8 of the FIFA RDC, it seems that WADA will be provided with similar information²⁰. Thus, there is no difference between the WADC and the FIFA rules in this respect.

44 Art. 7.0 and 8.0 IS-TUE describe in great detail the contents of the TUE applications. Model application forms are attached, the sections and items of which – but not the form itself – are declared to be a minimum standard. Materially, the content must enable the granting body to assess the medical situation of the athlete and the necessity to use a prohibited substance or method. Even though the FIFA Anti-Doping Rules do not list the contents of the application form, the FIFA granting body requires the same information to reach its decision. The FIFA RDC fur-

¹⁵ Art. 4.4 WADC refers to its International Standard. The material criteria for granting a TUE is laid down in art. 4.0 of the WADA International Standard for TUE (version November 2004, effective as from January 1, 2005; "IS-TUE").

¹⁶ Art. B8 of Appendix B of the FIFA RDC.

¹⁷ Art. 6 IS-TUE.

¹⁸ Downloaded from WADA's website on December 22, 2005.

¹⁹ I.e. names of the athlete and the TUE Committee's members, file number, substance and the dates of decision and expiration of the TUE.

²⁰ I.e. name of the player and association, medical indication, medication and its duration.

ther suggests the use of the standard application forms of WADA. The Panel, therefore, concludes that there is no material difference in the application process.

45 Finally, art. 4.4 of the WADC provides that WADA may review the grant or, upon request of an athlete, the denial, of a TUE and reverse the decision which was subject to the review. WADA's decision is subject to appeal to CAS²¹.

46 The FIFA Anti-Doping Rules *do not contain an express provision giving WADA a right to review the granting or denial of a TUE*. WADA is only granted a more general right to appeal to CAS against doping decisions of FIFA after "every internal channel has been exhausted"²². However, this right of appeal is not a valid substitute for the right to review the grant or denial of a TUE. The appeal right applies only in the very final phase of an anti-doping rule violation, i.e. after the athlete has been notified of an anti-doping rule violation. In contrast, the right to review the granting or denial of a TUE provided by art. 4.4 of the WADC applies in a much earlier stage where the situation has not necessarily amounted to an anti-doping rule violation. Furthermore, the absence of a right of WADA to review the grant or denial of a TUE makes it impossible for the WADA to determine whether the International Federations and anti-doping organizations apply the same standards when they grant or deny TUEs. In the Panel's opinion, this is a material difference between the WADC and the FIFA DC. The Panel notes, however, that the TUE does not belong to the mandatory provisions of the WADC²³.

3.6 *Testing (Article 5 WADC. Article IV FIFA RDC)*²⁴

47 Art. 5 of the WADC requires an IF to establish a registered testing pool for international-level athletes. FIFA conducts in-competition and out-of-competition

²¹ Art. 13.3 WADC.

²² Cf. art. 61.5 FIFA DC and art. 60.5 FIFA Statutes. However, the FIFA Anti-Doping Rules neither explicitly provide for an appeal against TUE decisions of the granting body, nor explicitly give WADA a right to such appeal.

²³ Cf. para. 10.

²⁴ Art. 5 WADC does not belong to the provisions which the WADC designates as "articles [...] which must be incorporated into the rules of each Anti-Doping Organization without any substantive changes."

doping tests only at matches and competitions organized by FIFA. FIFA does not provide testing beyond.²⁵ The FIFA testing procedures as set out in great detail in art. IV FIFA RDC are not substantially different from the procedures provided by art. 5 WADC and the highly detailed WADA International Standard for Testing.

3.7 *Analysis of Samples and Results Management (Articles 6 and 7 WADC. Article IV.6 FIFA RDC and Articles 133-138 FIFA DC)*²⁶

48 According to art. IV.6.1 FIFA RDC, the analysis of the samples shall be carried out in a laboratory accredited by WADA. Such laboratories are subject to the respective International Standards as issued by WADA²⁷. This safeguards a uniform sample analysis under both the WADC and the FIFA Anti-Doping Rules.

49 Art. 7.5 WADC allows for provisional suspensions, i.e. to impose a suspension prior to the final hearing. The opportunity for a provisional hearing must be given to the offender either before imposition of the provisional suspension or timely thereafter.

50 Art. 133-138 FIFA DC provide that the chairman of the judicial body may pronounce provisional measures, including provisional suspensions. He is not obliged to hear the parties; he shall take his decisions based on the evidence available²⁸. The effective maximum of a provisional suspension is 50 days²⁹. In case of application of the maximum period, there is no timely hearing in the sense of art. 7.5 WADC.

²⁵ Testing beyond matches and competitions of FIFA is regulated by the national football federation and/or the national Anti-Doping Organisations.

²⁶ Art. 6 and 7 WADC do not belong to the provisions which the WADC designates as “articles [...] which must be incorporated into the rules of each Anti-Doping Organization without any substantive changes.”

²⁷ Art. 6.4 WADC.

²⁸ Art. 134 FIFA DC.

²⁹ Art. 136 FIFA RDC.

51 The FIFA Anti-Doping Rules do not provide for a hearing to confirm the provisional suspension, but for a right of appeal³⁰.

52 With the exception of the procedural rules on provisional suspensions, the result management as provided by FIFA does not substantially differ from the procedure as suggested by the WADC (art. 7).

3.8 *Hearing (Article 8 WADC. Articles 116-118 FIFA DC)*

53 Art. 8 WADC contains basic principles to guarantee the offender the right to a fair hearing. The hearing process shall address whether an anti-doping rule violation was committed and, if so, determine the appropriate consequences. In particular, there shall be a timely hearing by a fair and impartial hearing body, and the athlete shall have the right to present evidence. Art. 8 WADC does not belong to the provisions which the WADC designates as “articles [...] which must be incorporated into the rules of each Anti-Doping Organization without any substantive changes.”

54 According to art. 116 FIFA RDC, the Disciplinary Committee decides on the basis of the file. The athlete is allowed to present written submissions during the investigation. Upon request, the Disciplinary Committee may arrange for oral statements³¹. The FIFA Anti-Doping Rules do not specify under what circumstances the Disciplinary Committee is compelled to hold an oral hearing. Rule 57 of the Code of Sports-related Arbitration may serve as a useful guide: It provides that the panel may decide not to hold a hearing, if it deems itself to be sufficiently well informed³². Such a formula is likely to be applied by the FIFA Disciplinary Commission. Even though the Panel does not expect that, in practice, there will be a material difference, it notes that the WADC requires an oral hearing in all cases.

³⁰ Art. 137 FIFA RDC.

³¹ Art. 116.2 FIFA RDC.

³² In accordance with the CAS case law, the right to be heard does not necessarily imply the holding of a hearing (see CAS 92/84 C. v/ FEI, § 12: the right to be heard “does not include the strict right to be able to express oneself orally, in writing or both”(translation).

3.9 *Disqualification and Consequence for the Team (Articles 9 and 11 WADC. Article 62.5 FIFA DC)*

55 An in-competition anti-doping rule violation does not automatically lead to disqualification of the team result³³. The consequences for the team are specified in art. 11 WADC.

56 It must be also emphasized that neither the WADC, nor the FIFA DC determine specific sanctions when more than one team member is found to have committed a doping offence but only give to the competent authorities the responsibility to decide the appropriate measures to be taken with respect to team sanctions.

57 Where more than one team member in a team sport has been notified of a possible anti-doping rule violation in connection with an event³⁴, the team shall be subject to target testing for the event. If more than one team member is found to have committed an anti-doping rule violation during the event, the team *may* be subject to disqualification (emphasis added).

58 According to art. 62.5 FIFA DC, "(i)f more than one player from the same team is sanctioned for doping offenses, the team may also be sanctioned. The team may have points deducted and in a final competition the team's result may be annulled. The Association of the team concerned may also be subject to disciplinary sanctions." FIFA does not require target testing.

59 First, both the WADC and the FIFA Anti-Doping Rules provide for the possibility of disqualification of the team if at least two team members are sanctioned. The difference in wording does not result in a material difference.

60 Secondly, according to art. IV.3 FIFA RDC, there are always two players to be tested. If both are tested positive, the team may be sanctioned.

³³ Art. 9 WADC.

³⁴ I.e. a series of individual competitions conducted together under one ruling body, such as the Olympic Games.

61 The Panel finds that with regard to the team results, the same principles have been respected and that the FIFA Anti-Doping Rules provide for a solution which is not substantially different from the one provided by the WADC. The absence of a requirement of target testing is not considered a material difference in the light of FIFA's anti-doping policy. It is expected that FIFA will do further tests anyway if two players have been found suspicious of a anti-doping rule violation.

62 It must be also emphasized that neither the WADC, nor the FIFA DC determine specific sanctions when more than one team member is found to have committed a doping offence but only give to the competent authorities the responsibility to decide the appropriate measures to be taken with respect to team sanctions.

3.10 Sanctions (Article 10 WADC. Article 62 FIFA DC)

3.10.1 Individual Case Management (Article 10.5 WADC. Article 62 FIFA DC)

63 Both the WADC and the FIFA Anti-Doping Rules provide for a sanction of an athlete who has been found having violated anti-doping rules. The sanction consists of a suspension from competitions of a certain period of time.

64 To determine the *duration* of the sanction for the most common offenses, the WADC is based on a concept of a *fixed standard penalty*³⁵ which can be completely eliminated or reduced by up to 50% under certain conditions³⁶. On the other hand, the FIFA Anti-Doping Rules oblige the sanctioning body to determine, within a defined timeframe, the specific suspension *according to the degree of the offender's guilt and the objective and subjective circumstances of the case*. The sanctioning body is obliged to take into account generally recognised principles of law³⁷.

³⁵ Art. 10.2 WADC.

³⁶ Art. 10.5 WADC.

³⁷ Art. 62.1 FIFA DC.

65 The FIFA Anti-Doping Rules regarding doping sanctions differ in two respects from the WADC, namely in regard to (i) the possible *duration* of the suspension, and (ii) the *degree of fault* which the sanctioning body must take into account when it determines the suspension or the reduction thereof.

a) *Duration of the Sanction*

66 For a first offense of presence of prohibited substance, the WADC provides for a *standard suspension of two years* which can be reduced by a maximum of one year in cases of no significant fault or negligence, and to zero in cases of no fault or negligence. The FIFA Anti-Doping Rules set a timeframe for various first offenses of *between 6 months and 2 years*³⁸. The FIFA Anti-Doping Rules do not, however, expressly allow for the complete elimination of the sanction in cases of no fault or negligence, but provide that once a player is found to have violated the anti-doping regulations (strict liability)³⁹, "[...] *a suspension of **no less than six month** [...] shall be imposed*" (emphasis added).

67 The WADC standard suspension of two years applies also for certain other anti-doping rule violations, such as Use or Attempted Use of a Prohibited Substance or a Prohibited Method (art. 2.2 and 10.2), refusing or failing to submit to Sample collection (art. 2.3 and 10.4.1), Tampering with Doping Control (art. 2.5 and 10.4.1) and Possession of Prohibited Substances and Methods (art. 2.6 and 10.2).

68 The WADC provides for *less severe sanctions* for violations of art. 2.1 (specified substances, first offense, art. 10.3), namely, a warning or ineligibility for up to one year; and art. 2.4 (whereabouts violation or missed tests, art. 10.4.3), namely, ineligibility for between 3 months and 2 years. *More severe sanctions* will be imposed for violations of art. 2.7 (trafficking) or art. 2.8 (administration of prohibited substance or method), namely, a period of ineligibility of from four years up to lifetime ineligibility. Finally, anti-doping rule violations involving a minor shall be con-

³⁸ Art. 62.2 FIFA DC.

³⁹ Art. 60 FIFA DC and RDC II.

sidered a particularly serious violation and, if committed by athlete support personnel, result in lifetime ineligibility.

69 Art. 10.5.1 of the WADC provides for the possibility of the *elimination* of the sanction for violations of art. 2.1 (presence of prohibited substance) or art. 2.2 (use of a prohibited substance or method). *Reduction up to 50% of the sanction* is possible for violations of art. 2.1 (Presence of Prohibited Substance, including specified substances according to art. 10.3); art. 2.2 (use of prohibited substance or method); art. 2.3 (failing to submit to sample collection); and art. 2.8 (administration of a prohibited substance or method and complicity). *No reduction* of the ineligibility period is provided for violation of art. 2.4 (whereabouts violation and missed tests); art. 2.5 (tampering with doping control); art. 2.6 (possession); and art. 2.7 (trafficking).

70 Under the FIFA Anti-Doping Rules, violations of the FIFA RDC are, as a general rule, subject to a suspension of between six months and two years⁴⁰, including whereabouts violations and missed tests⁴¹. *Less severe sanctions* are provided in case of use of specified substances⁴². *More severe sanctions* (i.e. ineligibility of four years minimum) can be imposed for possession, trafficking, administration or complicity⁴³. If players of less than 21 years are affected by the trafficking, administration or complicity of the violator, the ineligibility of the violator shall be for lifetime.

71 Art. 34 of the FIFA DC provides for the possibility to interrupt the duration of the suspension by rest periods during or between seasons. Such measure has an aggravating effect, since it extends *de facto* the overall period during which an athlete is banned from competing. The Panel is, however, not aware of any practice and can therefore not assess the practical effect of that provision. The WADC

⁴⁰ Art. 62 FIFA DC.

⁴¹ Art. 62.2 and 62.4 in fine FIFA DC.

⁴² Art. 62.3 FIFA DC, i.e. warning or ineligibility of less than six months.

⁴³ Art. 62.4 FIFA DC.

does not contain such a rule and, thus, does not differentiate between competition and rest periods.

b) *Degree of Fault which is Relevant to Determine the Duration of the Sanction*

72 The WADC is based on the principle of fixed sanctions which will apply in the vast majority of cases, subject to elimination or reduction only under "exceptional circumstances" as indicated by the title of art. 10.5 ("Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances") and the Comment to art. 10.5.2. The Panel notes, however, that the wording of the WADC does not refer to "exceptional circumstances" but uses only the terms "no fault or negligence"⁴⁴ and "no significant fault or negligence"⁴⁵, which are defined in Appendix 1 of the WADC as follows:

"No fault or Negligence: The Athlete's establishing that he or she did not know or suspect, and could reasonably have known or suspected even with the exercise of **utmost caution**, that he or she had Used or been administered the Prohibited Substance or Prohibited Method" (emphasis added).

"No significant fault or Negligence: The Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation."

73 The WADC imposes on the athlete a *duty of utmost caution* to avoid that a prohibited substance enters his or her body. Case law of CAS and of other sanctioning bodies has confirmed these duties, and identified a number of obligations which an athlete has to observe, e.g., to be aware of the actual list of prohibited substances, to closely follow the guidelines and instructions with respect to health care and nutrition of the national and international sports federations, the NOC's and the national anti-doping organisation, not to take any drugs, not to take any medication or nutritional supplements without consulting with a competent medical

⁴⁴ Art. 10.5.1 WADC.

⁴⁵ Art. 10.5.2 WADC.

professional, not to accept any medication or even food from unreliable sources (including on-line orders by internet), to go to places where there is an increased risk of contamination (even unintentional) with prohibited substances (e.g. passive smoking of marihuana). Further case law is likely to continue to identify other situations where there is an increased risk of contamination, and, thus, constantly specify and intensify the athlete's duty of care⁴⁶. The Panel underlines that this standard is rigorous, and must be rigorous, especially in the interest of all other competitors in a fair competition. However, the Panel reminds the sanctioning bodies that the endeavours to defeat doping should not lead to unrealistic and impractical expectations the athletes have to come up with. Thus, the Panel cannot exclude that under particular circumstances, certain examples listed in the comment to art. 10.5.2 of the WADC as cases of "no significant fault or negligence" may reasonably be judged as cases of "no fault or negligence."

74 It is this standard of utmost care against which the behaviour of an athlete is measured if an anti-doping violation has been identified. "No fault" means that the athlete has *fully complied* with the duty of care. This does not exclude that there may still be a positive finding but such finding will not lead to a sanction other than disqualification.

75 "No significant fault" means that the athlete has *not fully complied* with his or her duties of care. The sanctioning body has to determine the reasons which prevented the athlete in a particular situation from complying with his or her duty of care. For this purpose, the sanctioning body has to evaluate the specific and individual circumstances. However, only if the circumstances indicate that the departure of the athlete from the required conduct under the duty of utmost care was *not significant*, the sanctioning body may apply art. 10.5.2 of the WADC and depart from the standard sanction.

⁴⁶ In the first contaminated supplement-cases, there may have been a valid excuse of the athlete that he had no chance to know about the contamination. Today, however, the risk of contamination is widely known and the anti-doping organizations have issued explicit warnings to use any nutritional supplements without medical advice. An athlete who is still continuing to take nutritional supplements on his or her own account is violating his or her duty of care. Thus, an athlete's attitude which complied with his or her duty of care in the past, may not suffice in the future.

- 76 The WADC does not define whether these circumstances must be "objective" or "subjective" and the sanctioning body is not required to make such a distinction. It is obvious that these circumstances must be *specific* and *relevant* to explain the athlete's departure from the expected standard behaviour.
- 77 The reference to "*exceptional* circumstances" in the title of art. 10.5 WADC has in the Panel's view no separate meaning. Whether a specific circumstance is considered "exceptional" or "truly exceptional" is not a pre-requisite for the application of art. 10.5.1 and 10.5.2 of the WADC.
- 78 Such a construction of Section 10.5.1 and 10.5.2 of the WADC is consistent with the understanding of WADA's Chairman, Mr. Richard W. Pound, as stated by him at the FIFA Centennial Congress on May 21, 2004 in Paris: "*There is a universal view that each doping case has to be considered as an individual case and that all of the facts relevant to that case (such as the circumstances of the athlete, the nature and quantity of the substance, and the repetition of offenses) have to be carefully studied before any sanction could be considered. The WADA shares this philosophy entirely.*"
- 79 Accordingly, CAS Panels have taken a similar approach when deciding cases based on anti-doping regulations of organizations which have implemented the WADC⁴⁷.
- 80 Once an athlete's specific behavior has been identified as a *non-significant* departure from the required duty of utmost care, the sanctioning body must determine the *quantum of the reduction* from the standard sanction. As a consequence, the individual sanction will be fixed within the penalty framework set by the WADC, namely between two years and one year.

⁴⁷ CAS OG 06/001 *WADA v/ Lund*, para. 4.17; CAS 2005/A/830 *G. Squizzato v/ FINA*, para. 10.26; CAS 2004/A/690 *Hippderdinger v/ ATP*, para. 77; ATP Anti-Doping Tribunal, Decision of March 24, 2005 (*Dimitry Vlasov*), para. 35; CAS 2005/A/847 *Knauss v/ FIS*, para. 7.5.1 et seq. regarding elements which should not be taken into account; CAS 2003/A/484 *Vencill v/ USADA*, considering the fault as "extremely significant".

81 There is no explicit guidance in the WADC about how the individual quantum shall be measured but CAS case law is already developing principles or criteria to assist in deciding whether the specific quantum of a sanction within the given framework corresponds to the degree of fault of the athlete.

82 The FIFA rules to determine the duration of the sanction look different: Art. 62.2 of the FIFA DC refers to "the degree of the offender's guilt" and lists factors which must be taken into account, such as "the objective and subjective circumstances" and "general principles of law", without however detailing or qualifying the meaning of such factors. To date, the Panel is not aware of any decisions by FIFA bodies based on the new art. 62 FIFA DC and does therefore not know what circumstances and principles are considered to be relevant.

83 The reference in art. 62.1 of the FIFA DC to "the offender's guilt" could be construed as carrying the implication that the FIFA Anti-Doping Rules, like the WADC, impose on the athlete a *duty of utmost caution* to avoid doping. As a consequence, under the FIFA Anti-Doping Rules, the sanctioning body must compare the specific behaviour of an athlete with the expected "faultless" behaviour of a diligent and careful athlete in order to determine the "offender's guilt". In light of FIFA's clear public stand against doping, the Panel is satisfied that the duty of care expected from an athlete under the FIFA Anti-Doping Rules will not be substantially different from the attitude expected from an athlete under the WADC. A more lenient approach to the athlete's duty of care would materially compromise FIFA's efforts to fight doping.

84 There is, however, a *substantial difference* between the FIFA Anti-Doping Rules and the WADC: Art. 62.1 of the FIFA DC refers generally to "the offender's guilt" whereas art. 10.5 of the WADC provides that the option of eliminating or reducing the standard two years' ineligibility is available only in cases of "no fault or negligence" and "non-significant fault or negligence". A fault which does not qualify as non-significant will therefore inevitably lead to the standard two-year ineligibility under the WADC. On the other hand, the two years' ineligibility is not a compulsory consequence under the FIFA Anti-Doping Rules, even if there is more than "non-significant fault". The wording of art. 62.1 of the FIFA DC rather allows the

sanctioning body *to utilize the full range between 6 months and 2 years to align the sanction to any degree of "the offender's guilt"*, i.e. from insignificant or even no guilt up to very significant guilt or even malicious intent. The wording seems to indicate that under the FIFA Anti-Doping Rules, the two years' sanction will be considered as the maximum penalty applicable to serious anti-doping rule violations whereas under the WADC, the two-year penalty is a standard which *will apply in all cases* except where there is "no (significant) fault or negligence". Still, the Panel acknowledges that different sanctioning bodies in different countries may have a different understanding as to whether a certain fault is significant or not. The same remark is also true at the CAS level, i.e. when CAS panels have to decide whether an athlete acted with utmost care or not.

85 On the other hand, art. 62 of the FIFA DC does not allow the complete elimination of a sanction in cases of "no fault or negligence." The wording of art. 62.2 of the FIFA DC is unambiguous: "For a first offense, a suspension of no less than six months and no more than two years shall be imposed." According to art. II.1.2 of the FIFA RDC, an offense is established upon the mere presence of a prohibited substance in an athlete's bodily specimen and does not require any fault or guilt of the athlete. Once an offense has been established, the sanction must be determined according to art. 62 of the FIFA DC, which provides no possibility to eliminate the sanction in cases of "no fault". Any other interpretation would be contrary to the wording of the FIFA Anti-Doping Rules.

86 When it comes to the *circumstances* to be taken into account to determine an athlete's guilt or fault, the question arises whether a sanctioning body applying art. 62.1 FIFA DC must take other or further circumstances into consideration than those addressed by art. 10.5 WADC, since art. 62.1 FIFA DC refers to "the objective and subjective circumstances of the case" as well as to "generally accepted principles of law". The Panel finds that the WADC and the FIFA Anti-Doping Rules do not diverge in this respect. The WADC requires the sanctioning body to examine "the totality of the circumstances", which includes the objective and subjective

circumstances of the case, as addressed by art. 62.1 of the FIFA DC⁴⁸. By referring to "the objective and subjective circumstances of the case" art. 62.1 of the FIFA DC must also be understood to mean that only *specific* circumstances which are *relevant* for a certain violation of the athlete's duty of care may be taken into account. This is not different under the WADC.

87 To the extent that such specific circumstances have been accepted as valid justifications for the athlete's departure from the "utmost care"-standard, they must be appropriately reflected in the quantum of the individual sanction. Accordingly, within the framework set by art. 62.2 FIFA DC, the specific sanction must be *proportionate* to the degree of departure from the athlete's duty of care. This is how the Panel understands the reference to the "general principles of law" in art. 62.1 FIFA DC. Such approach to the determination of the quantum of the specific sanction is not different from the principles which govern the determination of a sanction within the penalty framework of the WADC.

c) *Conclusions*

88 The Panel concludes that FIFA Anti-Doping Rules and the WADC are not substantially different with regard to *the method to determine the individual sanction for a specific anti-doping rule violation*. Both require the sanctioning body to measure the conduct of the athlete against a duty of utmost caution and to assess the ineligibility period within a given penalty framework in proportion of the degree of fault.

89 There are however *three significant differences* between the WADC and the FIFA Anti-Doping Rules:

⁴⁸ The effect which a specific sanction may have on an individual athlete (e.g. the fact that an ineligibility of certain duration may prevent an athlete from participating in the Olympic Games or in a number of games in the Champions League) is not a "circumstance" in the meaning of art. 10.5 WADC or art. 62.1 FIFA DC which must be taken into account to determine the degree of fault or guilt. Whether such effects may effect the duration of an ineligibility shall be discussed in the context of the principle of proportionality.

- The frameworks of the penalties for first offenses are different (i.e. 6 months/2 years according to art. 62.1 FIFA DC and 1 year/2 years according to art. 10.5.2 WADC).⁴⁹
- According to art. 10.1.1 WADC, the two years' ineligibility is the *standard* sanction from which a departure is only possible in cases of no fault or no significant fault. According to art. 62.1 FIFA DC the 2-years' ineligibility period is the *maximum* penalty. The Panel would like to stress the following: The arbitration process may still, through careful application of the rules contained in the WADC and the FIFA DC and the consequent analyzes, develop a jurisprudence that does not deviate significantly under either code save for the question of the minimum sanction.
- Once a doping offense has been established, the WADC allows for a complete elimination of the sanction in case of "no fault or negligence" whereas the FIFA Anti-Doping Rules *do not explicitly allow to reducing the sanction below the minimum threshold of 6 months*, even in cases of "no fault or negligence."

3.10.2 Specified Substances (Article 10.3 WADC. Article 62.3 FIFA DC)

90 Art. 62.3 of the FIFA DC does not define the term "certain substance". From the German and the French version of the FIFA DC, it is clear that the "certain substance" are the specified substances listed in the (WADA) list of prohibited substances.

91 Art. 10.3 of the WADC provides for a reduced frame of sanctions, if the athlete can demonstrate the use of a specified substance was not intended to enhance performance. In contrast, art. 62.3 of the FIFA DC simply provides that the minimum sanctions may be reduced without specifying the conditions of such reduction.

⁴⁹ This difference may be lessened if the FIFA sanctioning body makes use of the possibility to interrupt the ineligibility period by rest season (Art. 34 FIFA DC) .

92 For a first offense, the WADC provides for a sanction ranging from a mere warning and reprimand to a one year suspension, a two years' suspension for a second offense and a lifetime ban for a third offense. The athlete has also the possibility of eliminating or reducing the sanction under art. 10.5 of the WADC. Art. 62.5 of the FIFA DC provides, for a first offense, for a sanction ranging from a warning to a two-year suspension. For a second offense, it only provides for a minimum, i.e. two-year suspension. A third offense results in a lifetime ban.

93 The Panel recognises certain differences in the wording of the rules governing Specified Substances. In particular, under the FIFA Anti-Doping Rules, the less severe sanctions apply irrespective of whether the athlete can demonstrate that the substance was not intended to enhance his or her performance. On the other hand, a first offense under the FIFA Anti-Doping Rules can be sanctioned with a two years' ineligibility whereas the WADC limits the sanction to one year. However, the Panel does not expect that in practice, these differences will lead to a materially different treatment of an athlete under either set of rules.

3.10.3 Second Offenses (Articles 10.2, 10.6 WADC. Article 41 FIFA DC)

94 The WADC and the FIFA DC define a "second offense" differently. Pursuant to art. 41.2.d of the FIFA DC, an offense is considered as a second offense if it is committed before the lapse of two years from the imposition of a suspension of at least four months in the previous case. Art. 41.4 of the FIFA DC contains special rules regarding repeated doping infringements. However, the FIFA Anti-Doping Rules do not contain a definition of "second offense". According to art. 10.6.1 of the WADC, an offense may only be considered as a second offense, if it was committed after (i) the offender has received notice of the first offense, or (ii) after the anti-doping organization has made a reasonable attempt to give notice of the first offense. There is no particular rule on the interval between a first and a second offense.

95 The FIFA DC provides for a maximum of a lifetime ban a second offense in cases of breaches of art. 2.2 - 2.5. A minimum sanction is not specified. Regarding pos-

session, trafficking and administration/complicity, the FIFA DC does not specify penalties for a second offense. The WADC provides for the violations contained in art. 2.1-2.3 and 2.6 for a lifetime ban in case of a second offense. A reduction to a period of ineligibility of eight years is possible in all cases of no significant fault or negligence.

96 The Panel thus finds that there is at least one material difference between the WADC and the FIFA Anti-Doping Rules, since under the FIFA DC, the severe consequences of a second offense apply if the second offense occurs *within two years* whereas the WADC contains no such limitation.

3.10.4 Multiple Violations (Article 10.6 WADC. Article 43 FIFA DC)

97 As with the notion of a second offense, the Panel also notes differences between the WADC and the FIFA rules regarding multiple violations. According to art. 43 FIFA DC, if a person incurs several sanctions as a result of one or several anti-doping rule violations, the sanctioning body imposes the sanction for the most severe offense and may increase the sanction by not more than half of the maximum.

98 The WADC does not contain a general rule on how to treat such multiple violations, unless specified substances are involved: In this regard, art. 10.6.2 WADC provides that if, based on the same doping control, an athlete has committed an offense involving a specified substance and a prohibited substance or method, the athlete shall be deemed to have committed only one anti-doping rule violation and the sanction shall be based on the prohibited substance or method carrying the most severe sanction.

3.10.5 Substantial Assistance (Article 10.5.3 WADC)

99 Art. 10.5.3 WADC provides that the sanction may be reduced by a maximum of 50% if the offender has provided substantial assistance to the anti doping investigators which results in discovering or establishing a doping offense by a third

party involving possession by athlete support personnel⁵⁰, trafficking⁵¹ or administration/complicity⁵².

100 The FIFA rules do not provide for such a substantial assistance. The Panel, considers this to be a significant difference between WADC and the FIFA Anti-Doping Rules⁵³.

3.10.6 Probationary Sanctions (Article 33 FIFA DC)

101 The WADC does not allow for a suspension of the execution of a sanction or a part thereof. Art. 10.9 WADC rather provides that a sanctioned person may not, during the ineligibility period, participate in any capacity in a competition or other activity except for authorised anti-doping or rehabilitation programs.

102 According to art. 33.1 FIFA DC, the sanctioning body is required to examine whether the implementation of part of a sanction (i.e. ineligibility) may be suspended. Such suspension is permissible if the circumstances, in particular the previous record of the offender, generally "allow it"⁵⁴. The Panel notes that the French and German versions of the conditions of such suspension are stricter than the English version, the authoritative French version⁵⁵ being more lenient than the German text.

103 Art. 33.2 FIFA DC limits the possibility of probation to suspensions not exceeding six months. In other words, a probationary sanction is only possible if the minimum sanction of art. 62.1 FIFA DC of six months is applied. Art. 33.3 FIFA DC further limits the probation to a maximum of the half of the sanction. The Panel considers

⁵⁰ Art. 2.6.2 WADC.

⁵¹ Art. 2.7 WADC.

⁵² Art. 2.8 WADC.

⁵³ One may however argue that providing substantial assistance to the anti-doping organization could also be recognized as subjective circumstance which must be taken into consideration when the sanction is determined.

⁵⁴ Art. 33.2 FIFA DC.

⁵⁵ Art. 151.2 FIFA DC.

the option of a probationary sanction to be a significant difference to the WADC since *it amplifies the difference which already exists with regard to the minimum sanctions*: Whereas the minimum sanction of the WADC in cases of no significant fault is one year, the minimum under the FIFA DC is only six months and can be further *reduced to three months*, subject to probation.

3.10.7 Status during Ineligibility (Article 10.9 WADC. Article 20 FIFA DC)

104 An offender serving a suspension may not, under art. 10.9 WADC, participate in any capacity in any activity organised or authorised by any WADC-signatory. Further, sport-related financial support shall be withheld (except in case of use of specified substances). If the suspension is longer than four years, the offender may participate in local events in other sports than the sport in which the offense was committed.

105 Art. 20.1 and 20.2 FIFA DC provide that a player who has been suspended shall not be included on the players' list for the match. He is further banned from taking part in future matches or competition or to attend in the area immediately surrounding the field of play. Thus, a suspended football player is banned from actively participating in football matches or competitions but not from participating or competing in other sports (or for a ban of suspended other athletes who desire to be admitted as footballer players during their suspension in other sports). The Panel doubts whether another federation would allow an athlete who has been banned because of a violation of the FIFA Anti-Doping Rules to compete in that other sport. Likewise, it seems improbable that an athlete banned by another sports federation because of a doping offense will be admitted to football activities governed by FIFA.

3.10.8 Disqualification of Results in Competitions Subsequent to Sample Collection (Article 10.7 WADC)

106 Art. 10.7 WADC provides that all competitive results from the date of the doping offense until the commencement of the suspension shall be disqualified unless fairness requires otherwise.

107 No such provision is contained in the FIFA Anti-Doping Rules. However, it would be difficult to apply this rule only to an individual member of a team. The Panel finds therefore that art. 10.7 WADC is consummated by art. 11 WADC which leaves it to FIFA to determine the consequences of an individual anti-doping rule violation to the team.

3.10.9 Commencement of Ineligibility Period (Articles 10.8 WADC)

108 Under art. 10.8 WADC, the ineligibility period shall begin at the date of the hearing decision, unless fairness requires taking delays in the hearing process into consideration. Provisional suspensions shall be credited against the total suspension.

109 Under the FIFA Anti-Doping Rules, the sanctions become effective only upon the date on which the decision of the sanctioning body becomes final and enforceable. Art. 133 FIFA DC allows the chairman of the competent sanctioning body to impose a provisional suspension if this measure is deemed appropriate.

110 The Panel finds that the rules on the commencement of the ineligibility period are not substantially different.

3.10.10 Reinstatement Testing (Article 10.10 WADC. Article 63 FIFA DC)

111 According to art. 10.10 WADC, a suspended athlete must make himself available for testing and provide whereabouts information during the whole ineligibility period. The wording of the WADC does not require that a suspended athlete must also be tested before regaining eligibility to participate. Art. 63 FIFA DC provides

that FIFA may order a player to undergo further doping tests during the ineligibility period.

112 The Panel thus concludes that there is no material difference between the WADC and the FIFA rules.

3.11 *Appeal Right to CAS (Article 13 WADC. Article 61.5 FIFA DC and Articles 59 and 60.5 FIFA Statutes)*⁵⁶

113 Art. 13 of the WADC specifies in great detail which decisions under the WADC may be subject to appeal, and who is entitled to file an appeal. Art. 13.1 WADC also states that filing an appeal has in principle no suspensive effect unless the appellate body orders otherwise. With respect to international-level athletes (which correspond to athletes subject to FIFA's jurisdiction), art. 13.2.1 WADC provides for an appeal as of right to CAS. Art. R47 of the Code of Sports-related Arbitration states that before an appeal is accepted by CAS, all available internal remedies must be exhausted. Art. 13.2.3 WADC lists the persons entitled to appeal to CAS. It includes the athletes concerned, the relevant international federation and any other anti-doping organization, the IOC in matters related to the Olympic Games and the WADA.

114 Art. 59 and 60 FIFA Statutes provide that the CAS is competent to resolve disputes between, *inter alia*, FIFA and the players. Thus, the player (or any other person being subject of a doping related decision) and, if applicable, the other party to the case are, in principle, entitled to appeal the final decision of FIFA to CAS. According to art. 60.5 of the FIFA Statutes, WADA may also appeal decisions of FIFA in doping matters to the CAS. However, the FIFA Anti-Doping Rules do not establish a duty to inform WADA, or a right of WADA to learn, about doping decisions of FIFA institutions. The absence of any such information right renders the WADA's right of appeal inoperative. The Panel considers the *lack of right on*

⁵⁶ For the appeal relating to the granting or denying a TUE, see para. 46 above.

the part of WADA to any information about FIFA's decisions in doping cases to be a material difference.

115 Pursuant to art. 60.3 FIFA Statutes, there is no CAS jurisdiction in case of suspensions of up to three months. Suspensions of three months are possible under the FIFA Anti-Doping Rules if the athlete is granted a probation for the rest of the suspension. Thus, the minimum sanction under the FIFA Anti-Doping Rules is not subject to appeal to CAS, which means that WADA has no instrument to enforce a judicial review if it deems such a minimum sanction to be too lenient. In the view of the Panel, art. 60.3 of the FIFA Statutes also applies to appeals in doping matters, because the concerned athlete must rely on the clear wording of the FIFA Statutes.

116 The IOC is not granted an explicit right to appeal against FIFA doping-decisions, which is in contrast to art. 13.2.3(d) WADC. However, it is difficult to imagine specific circumstances in which the IOC would need such an appeal right. When it comes to anti-doping rule violations at the Olympic Games, the IOC is the competent sanctioning body and thus a party to an eventual appeal.

3.12 Confidentiality and Reporting (Article 14 WADC. Articles 8 and 9 FIFA RDC)

117 The WADC sets out several principles of coordination of anti-doping results, public transparency respect of privacy interests of persons involved, accepted by the WADC signatories: (i) an alleged offender must be informed of the charge; (ii) in International Federation, the offender's national anti-doping organization and WADA must be informed of the charge, updated during the process and provided with the decision, (iii) a conviction must be publicly disclosed within 20 days, (iv) International Federations and national anti-doping organizations must collect whereabouts information of athletes of the testing pool and provide such information to WADA; (v) testing information and results must be provided to WADA clearing house; (vi) annual statistical reports must be provided to WADA.

118 Art. 8.1 of the FIFA RDC provides that the national anti-doping organization shall be informed of a positive A-sample only if national law so requires. Pursuant to art.

9.1 FIFA RDC, the Disciplinary Committee may, if necessary, inform the national anti-doping organization of positive findings. FIFA retains the exclusive right to publish the test results and the consequences thereof⁵⁷.

119 The Panel concludes that FIFA's more lenient provisions regarding the information of the national anti-doping organization and WADA constitute a material deviation from the WADC since it aggravates the co-ordination of the international efforts against doping and renders WADA's appeals right to CAS nugatory (see also previous section).

3.13 *Statute of Limitations of Doping Offenses (Article 17 WADC. Article 44.2 FIFA RDC)*

120 The WADC provides in art. 17 that action may be commenced for a doping offense up to eight years from the date the offense occurred. Art. 44.2 of the FIFA RDC differs from this rule in providing that the prosecution of violations of anti-doping rules is only precluded after 20 years.

4. **Material Differences (Summary)**

121 The Panel finds the most significant differences to be:

- (1) the *minimum duration* of the ineligibility period for a first offense, i.e. six months according to art. 62.2 of the FIFA DC as opposed to one year according to art. 10.5.2 of the WADC;
- (2) the *degree of fault* which is relevant for the determination of the individual sanction, i.e. reduction of the standard two years' ineligibility allowed only if "no significant fault" has been demonstrated⁵⁸ vs. determination of the indi-

⁵⁷ Art. 9.2 FIFA RDC.

⁵⁸ Art. 10.5.2 WADC.

vidual sanction within the penalty framework under consideration of all degrees of guilt or fault⁵⁹;

- (3) the absence of a FIFA rule allowing complete elimination of the suspension in case of "no fault or negligence"⁶⁰;
- (4) the option of a probationary sanction under art. 33 FIFA DC where there is no such option under the WADC;
- (5) the absence of a right of the WADA to review the granting or denial of a TUE⁶¹;
- (6) the absence of any substantial assistance as provided by art. 10.5.3 of the WADC under the FIFA Anti-Doping Rules;
- (7) the absence of a rule in the WADC to determine the relevant time period during which an offense is considered as a "second offense";
- (8) the absence of an appropriate right of information of the WADA on anti-doping decisions issued by FIFA bodies, as a condition to exercise its right of appeal and the exclusion of the three months' ineligibility sanction from review by CAS.

D. Does Mandatory Swiss Law Require FIFA to Deviate from WADC?

122 FIFA takes the view that the differences identified in Chapter C and summarized in para. 121 are required by mandatory law. The applicable mandatory law is Swiss law since FIFA has been established as an association governed by Swiss law⁶².

⁵⁹ Art. 62.1 FIFA DC.

⁶⁰ Art. 10.5.1 WADC.

⁶¹ Art. 4.4 WADC.

⁶² Art. 1.1 FIFA Statutes.

1. Applicable Law

1.1 *Swiss Law*

123 There is no question, and it is not disputed by WADA, that the rules and regulations issued by FIFA, as a Swiss association, must comply with Swiss law. Swiss law grants to associations a wide discretion to regulate their own affairs⁶³. The freedom of associations to regulate their own affairs is limited only by mandatory law. The question is, therefore, whether there are mandatory provisions which prevent FIFA from adopting the WADC in its entirety.

124 The law which is relevant to answer the above question consists primarily of the Swiss law on associations⁶⁴. However, it includes also *general principles of law* which are not limited to a specific area of law⁶⁵. One of these general principles, which pervades Swiss jurisprudence and the Swiss legal system, and which is relevant in the context of this Opinion, is the principle of proportionality, a principle which has its roots in constitutional and administrative law. On the other hand, the Panel is not prepared to take refuge in such uncertain concepts as that of a "lex sportiva", as has been advocated by various authors. The exact content and the boundaries of the the concept of a lex sportiva are still far too vague and uncertain to enable it to be used to determine the specific rights and obligations of sports associations towards athletes.

1.2 *The Law of Sanctions Imposed by Associations*

125 In Swiss law, it is generally accepted that an association may impose disciplinary sanctions upon its members if they violate the rules and regulations of the association. The jurisdiction to impose such sanctions is based upon the freedom of associations to regulate their own affairs. The association is granted a wide dis-

⁶³ Art. 63 Swiss Civil Code; BK-RIEMER, ST para. 226.

⁶⁴ Art. 60 et seq. Swiss Civil Code.

⁶⁵ Swiss Federal Supreme Court 122 I 340 E. 7b; ZK-LIEBER, Art. 7 N 118.

cretion to determine the violations which are subject to sanctions, and to define the kind and the measure of the sanction. In a different context, this wide discretion is referred to as “the margin of appreciation”.

126 In order to impose a sanction an association must satisfy the following conditions:

- The violator must be subject to the rules and regulations of that association⁶⁶.
- There must be a sufficiently clear statutory basis for a penalty in the statutes or bylaws of the association⁶⁷.
- The sanction procedure must guarantee the right to be heard⁶⁸.

127 Disciplinary sanctions imposed by associations are subject to the *civil law* and must be clearly distinguished from *criminal penalties*. A sanction imposed by an association is not a criminal punishment. Neither Swiss legal doctrine nor case law stipulate that art. 63 et seq. of the Swiss Penal Code⁶⁹, which require the criminal

⁶⁶ An athlete can become subject to the regulations of an international federation by several ways, including direct membership, indirect membership or based on a specific agreement which may be embodied also in an entry form (e.g. to the Olympic Games) or a competition license, cf. FLINT/TAYLOR/LEWIS (cf. footnote 3) N. E4.61 et seq., p. 928 et seq. and HODLER, Teilnehmer- und Athletenvertrag, in: NATER (ed.), Sport und Recht: Vertragsgestaltung im Sport, Zurich 2004, p. 4 and 9.

⁶⁷ BK-RIEMER, art. 70 N 210.

⁶⁸ Swiss Federal Supreme Court 90 II 347 E. 2; BK-RIEMER, art. 75 N 36.

⁶⁹ Art. 63 of the Swiss Penal Code reads as follows:

“Le juge fixera la peine d’après la culpabilité du délinquant, en tenant compte des mobiles, des antécédents et de la situation personnelle de ce dernier.”

Art. 64 of the Swiss Penal Code reads as follows:

“Le juge pourra atténuer la peine:

- lorsque le coupable aura agi
- en cédant à un mobile honorable,
- dans une détresse profonde,
- sous l’impression d’une menace grave,
- sous l’ascendant d’une personne à laquelle il doit obéissance ou de laquelle il dépend;
- lorsqu’il aura été induit en tentation grave par la conduite de la victime;

judge to allocate the penalty according to the degree of guilt, the motives of the offender, his or her curriculum and his or her personal circumstances, are applicable directly or by analogy to sanctions imposed by an association. Art. 63 et seq. of the Swiss Penal Code *does not constitute a general principle* for any kind of sanctions. In particular, it is not applicable to sanctions based on civil law or sanction based on administrative law. This does not mean that there are no limits to sanctions outside the criminal law, but that the limits are different.

1.3 *The Burden of Proof*

128 As a general principle, it is *the association* imposing a sanction which has the burden of proof that a rule-violation has been committed⁷⁰.

129 Accordingly, it is the sanctioning body which must demonstrate that an athlete has committed an anti-doping rule violation, e.g. by a report of an accredited laboratory. Once the anti-doping rule violation has been established, the WADC introduces a *presumption* that the athlete acted with fault or negligence. This presumption is rebuttable and the athlete may demonstrate that he or she acted without (significant) fault or negligence.

130 The presumption of fault or negligence is recognized by Swiss law in various circumstances and does not conflict *per se* with the presumption of innocence which is a concept of criminal law. In contract law, where the party have a mutual duty of good faith, there is e.g. a presumption that a breach of contract was the

-
- lorsqu'il aura été entraîné par la colère ou par une douleur violente, produites par une provocation injuste ou une offense imméritée;
 - lorsqu'il aura manifesté par des actes un repentir sincère, notamment lorsqu'il aura réparé le dommage autant qu'on pouvait l'attendre de lui;
 - lorsqu'un temps relativement long se sera écoulé depuis l'infraction et que le délinquant se sera bien comporté pendant ce temps;
 - lorsque l'auteur était âgé de 18 à 20 ans et ne possédait pas encore pleinement la faculté d'apprécier le caractère illicite de son acte."

⁷⁰ Article 8 of the Swiss Civil Code: "In the absence of a special provision to the contrary, the burden of proving an alleged fact rests on the party who bases his claim on that fact."

result of negligence, and it is the burden of the failing party to demonstrate that it did not act negligently (art. 97 CO).

131 Athletes have a rigorous duty of care towards their competitors and the sports organization to keep their bodies free of prohibited substances. Anti-doping rule violations do not "just happen" but are, in most cases, the result of a breach of that duty of care. This justifies to presume that the athlete acted with fault or negligent and to shift the burden of proof from the sanctioning body to the athlete to exonerate him- or herself. On the other hand, to impose to the sanctioning body to demonstrate that the athlete acted with fault or negligence would make the fight against doping extremely difficult or even impossible. The shifting of the burden of proof to the athlete to demonstrate that he or she acted without (significant) fault does not constitute a violation of Swiss law⁷¹ provided that there is a fair and equal standard of proof⁷².

1.4 *Limits on the Power of an Association to Impose Sanctions*

132 When imposing a sanction, the sanctioning body must observe the following limits:

1.4.1 *The Principle of Fault*⁷³

133 There is no legal definition of fault in Swiss law⁷⁴. The concept of fault under Swiss law is broad and covers a wide range of different forms of fault, from light fault to

⁷¹ See also, in an international context, KAUFMANN-KOHLER/MALINVERNI/RIGOZZI (cf. footnote 11), sec. 131 et seq., especially sec. 134.

⁷² CAS 2005/A/830 *G. Squizzato v/ FINA*, sec. 10.17; ECHR *Salabiaku v/ France*, Decision of October 7, 1998, para. 27, A114-A (1998); SCHERRER, *Strafrechtliche und strafprozessuale Grundsätze bei Verbandssanktionen*, in Fritzweiler (Ed.), *Doping - Sanktion, Beweise, Ansprüche*, Bern 2000, p. 127 et seq.; SCHERRER, *Vereinsstrafe – mit oder ohne Verschulden*, in: *Jusletter* 6. September 2004, N 9.

⁷³ FIFA, in its request, uses the term "*culpability*", while the FDC refers to the "*player's guilt*". Conversely, WADA and the WADC use the term "*fault*". This Panel, in line with CAS jurisprudence, uses the term "*fault*" for the following reason: "*Fault*" is the term used in civil law (BLACK, *Black's Law Dictionary*, 6th ed., St. Paul 1990, p. 608; ROMAIN/BADER/BYRD, *Dictionary of Legal and Commercial Terms*, 5th ed., Munich/Basle/Vienna 2000, p. 315) and CAS is an arbitration court dealing with civil matters. On the other hand, "*guilt*" is derived from criminal law (BLACK, p. 708; ROMAIN/BADER/BYRD, p. 355), while "*culpability*" cannot be assigned to a specific field of law.

serious fault and intention. *Fault* is generally defined as an error or defect of judgment or of conduct respectively or as a breach of duty imposed by law or contract⁷⁵. *Negligence* is generally defined as the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do⁷⁶. According to a similar definition, negligence is a breach of due diligence⁷⁷.

134 It is controversial whether, under Swiss law, fault must be established in order to impose an association sanction⁷⁸. The Panel is not aware of an explicit mandatory provision under Swiss law, prohibiting the imposition of an association penalty without taking the fault of the rule violator into account. It is not unusual for the by-laws of associations to contain fixed penalties which apply if a member violates the rules or regulations of that association.

135 According to RIEMER, the requirement of fault to impose a sanction must be reflected in the bylaws⁷⁹. HEINI/PORTMANN take the view that sanctions (e.g. suspensions) violating the personal privacy of an athlete by damaging his or her professional reputation are valid if the athlete is at fault⁸⁰, provided, however, that art. 27 para. 2 Swiss Civil Code has been respected. RIEMER holds that art. 160 et seq. Swiss Code of Obligations (contractual penalties) cannot be applied by analogy arguing that the athlete does not provide anything in favor of the association⁸¹. HEINI/SCHERRER are of the view that fault is necessary to impose an association

⁷⁴ GAUCH/SCHLUEP/SCHMID/REY, Schweizerisches Obligationenrecht, Allgemeiner Teil, 8th ed., Zurich 2003, N 2766.

⁷⁵ BLACK (cf. footnote 73), p. 608; GAUCH/SCHLUEP/SCHMID/REY (cf. footnote 74), N 2766.

⁷⁶ BLACK (cf. footnote 73), p. 1022.

⁷⁷ GAUCH/SCHLUEP/SCHMID/REY (cf. footnote 74), N 2772.

⁷⁸ According to SCHERRER, CaS 2005, p. 48, the principle "*in dubio pro reo*" must be respected as well. This principle seems to contradict the civil law character of association sanctions and the different burden of proof of association sanctions compared to penal law. The question, however, need not to be answered in this Advisory Opinion.

⁷⁹ BK-RIEMER, art. 70 N 210.

⁸⁰ HEINI/PORTMANN, Das schweizerische Vereinsrecht, SPR II/5, 3. ed., Basel 2005, N 319.

⁸¹ BK-RIEMER, art. 70 N 221 and 222.

sanction⁸². Likewise, the German doctrine relies on the degree of fault as a fundamental criterion⁸³.

136 In common with the great majority of learned authors, the Panel concludes that the imposition of an association sanction requires fault on behalf of the athlete.

1.4.2 *The Principle of Equal Treatment*

137 Sanctions imposed by associations must comply with the principle of equal treatment, e.g. insofar as all members or constituents of that association must be treated alike. This is especially true in sports where equal treatment is fundamental for any sports competition.

1.4.3 *The Principle of Proportionality*

138 The sanction must also comply with the *principle of proportionality*, in the sense that there must be a reasonable balance between the kind of the misconduct and the sanction⁸⁴. In administrative law, the principle of proportionality requires that (i) the individual sanction must be *capable* of achieving the envisaged goal, (ii) the individual sanction is *necessary* to reach the envisaged goal and (iii) the constraints which the affected person will suffer as a consequence of the sanction are justified by the overall interest in achieving the envisaged goal⁸⁵.

139 A long series of CAS decisions have developed the principle of proportionality in sport cases⁸⁶. This principle provides that the severity of a sanction must be proportionate to the offense committed. To be proportionate, the sanction must not

⁸² BSK-HEINI/SCHERRER, art. 70 N 19a; SCHERRER, (cf. footnote 75), p. 127 et seq.

⁸³ HAAS, CaS 2004, p. 60.

⁸⁴ BK-RIEMER, art. 70 N 211.

⁸⁵ HÄFELIN/MÜLLER, Grundriss des allgemeinen Verwaltungsrechts, 4th ed., Zurich 2002, N 581.

⁸⁶ E.g. CAS 1995/122 *NWBA v/ IPC*; CAS 1995/141 *C. v/ FINA*; CAS 97/180 *P. v/ FINA*; CAS 98/214 *B. v/ IJF*; CAS 99/A/246 *W. v/ FEI*; CAS 2000/A/270 *Meca-Medina and Majcen v/ FINA*; CAS 2000/A/312 *L. v/ FILA*; CAS 2000/A/317 *A. v/ FILA*; CAS 2004/A/624 *IAAF v/ ÖLV and Lichtenegger*; CAS 2005/A/847, *Knauss v/ FIS*.

exceed that which is reasonably required in the search of the justifiable aim⁸⁷. Both the Swiss Federal Supreme Court and a significant part of Swiss legal doctrine have upheld the principle of proportionality^{88,89}. KAUFMANN-KOHLER/MALINVERNI/RIGOZZI, in their legal opinion to the WADC, consider a sanction's proportionality as critical⁹⁰, but justifiable in view of the legitimate aim of harmonizing doping matters⁹¹. The Panel is of the view that the principle of proportionality is guaranteed under the WADC⁹²; moreover, proportional sanctions facilitate compliance with the principle of fault. Consequently, each body must consider the proportionality of imposed sanctions for doping cases⁹³.

1.4.4 *The Moral Rights of the Offender (Article 27 and 28 Swiss Civil Code)*

140 The sanction must not violate the moral rights of the offender, as defined by art. 27 and 28 of the Swiss Civil Code. Art. 27.2 of the Swiss Civil Code provides that excessive legal commitments of a person are null and void. Art. 28 prohibits any violation of a person's personality, which is deemed to be illegal unless the person has agreed to the violation. This means that a person who is joining an association and participates in the association's activities, is deemed to have consented to the association's rules and regulations, including the rules on sanctions. Such sanctions are thus not considered as violations of one's personality⁹⁴ as long as they are not excessive under art. 27.2 Swiss Civil Code.

⁸⁷ LEWIS/TAYLOR/PARKHOUSE, Challenges in the courts to the actions of sports governing bodies, in: LEWIS/TAYLOR (ed.), Sport: Law and Practice, London 2003, A3.110, p. 156.

⁸⁸ Swiss Federal Supreme Court, *N., J., Y., W. c/ FINA*, Judgment of March 31, 1999, reported in CAS Digest II, p. 767, 772.

⁸⁹ FUCHS, Rechtsfragen der Vereinsstrafe, Zurich 1999, p. 110 et seq.

⁹⁰ KAUFMANN-KOHLER/MALINVERNI/RIGOZZI (cf. footnote 11), sec. 166 et seq., referring to *Krabbe v/ IAAF et. al.*, Decision of the LG Munich of May 17, 1995, SpuRt 1995, p. 161, 168.

⁹¹ KAUFMANN-KOHLER/MALINVERNI/RIGOZZI (cf. footnote 11), sec. 185.

⁹² A previous CAS Panel arrived at the same conclusion (CAS 2005/A/847, *Knauss v/ FIS*, sec. 7.5.4).

⁹³ LEWIS/TAYLOR/PARKHOUSE (cf. footnote 87), A3.111, p. 158.

⁹⁴ Art. 28.2 Swiss Civil Code.

1.4.5 Limitations on Contractual Penalties

141 The same result is reached by applying art. 163 Swiss Code of Obligations (CO) which governs contractual penalties or liquidated damages ("Konventionalstrafen", "peines"). According to art. 163.1 of the CO, liquidated damages may be agreed upon in any amount by the parties. Excessively high liquidated damages shall be reduced at the discretion of the judge⁹⁵. Whether sanctions imposed by associations upon their members can be regarded as liquidated damages or contractual penalties, is disputed⁹⁶. However, it is the Panel's opinion that it is justified in seeking assistance from these provisions since (i) the relationship between athletes and national or international sports federations is often based on contracts instead of direct membership and (ii) art. 163 of the CO reflects the fundamental principles which have been established also by art. 27 and 28 of the Swiss Civil Code, namely, the right of the parties to agree to confer a wide discretion in the regulation of their own affairs and the right or jurisdiction of the courts only to interfere if such discretion has been abused.

1.5 Conclusion

142 The Panel concludes that Swiss law grants an association a wide discretion to determine the obligations of its members and other people subject to its rules, and to impose such sanctions it deems necessary to enforce the obligations.

143 The right to impose a sanction is limited by the mandatory prohibition of excessive penalties, which is embodied in several provisions of Swiss law. To find out whether a sanction is excessive, a judge must review the type and scope of the proved rule-violation, the individual circumstances of the case, and the overall effect of the sanction on the offender. However, only if the sanction is *evidently and grossly disproportionate* in comparison with the proved rule violation and if it is

⁹⁵ Art. 163.3 CO.

⁹⁶ BK-RIEMER, art. 70 N 223.

considered as *a violation of fundamental justice and fairness*, would the Panel regard such a sanction as abusive and, thus, contrary to mandatory Swiss law.

2. Are the Rules of the WADC which Differ Substantially from the FIFA Anti-Doping Rules Compatible with Swiss law?

144 The material differences between the WADC and the FIFA Anti-Doping Rules have been identified in para. 121. These discrepancies have to be measured against the standard as defined in para. 142 above⁹⁷.

2.1 *Discrepancy Relating to the Determination of the Sanction in Case of a First Offense*⁹⁸

145 The Panel reminds the applicants that both, the WADC and the FIFA Anti-Doping Rules have adopted a concept of a minimum and a maximum penalty for first time violations. The question is only *whether that minimum shall be six months or one year*. Both sets of rules provide further that within that framework the individual sanction shall be established by determining the degree of fault, i.e. the departure of the athlete from the utmost care-standard.

146 Taking the above principles into consideration, the WADC would only be considered to be violating mandatory Swiss law if the following circumstances would be considered to be an excessive punishment for a first-time violation of the anti-doping rules:

147 (i) An athlete who demonstrates that he or she satisfies the "no significant fault" test will be sanctioned with *no less than one year ineligibility*;

⁹⁷ Excluding para. 121 (5), as art. 4 WADC does not belong to the provisions which the WADC designates as "articles [...] which must be incorporated into the rules of each Anti-Doping Organization without any substantive changes" (cf. para. 14 and footnote 14).

⁹⁸ Cf. para. 121 (1), (2), (3) and (4).

148 (ii) An athlete who does not demonstrate that he or she satisfies the "no
significant fault" test will be sanctioned with *no less than two years' ineligibil-*
149 *ity.*

149 To determine whether such sanctions are excessive, the misconduct must be
compared with the sanction, thereby taking into account not only the overall pur-
pose of the sanction, but also its specific effects.

150 The ultimate goal of the WADC is to protect all athletes' fundamental right to
participate in doping-free sport and, thus, promote health, fairness and equality for
athletes worldwide. This ambitious goal is to be reached through harmonized, co-
ordinated and effective anti-doping programs at the international and national level
with regard to detection, deterrence and prevention of doping.⁹⁹ It is common
ground of all signatories of the WADC that these goals require tough and relent-
less action. To prosecute and punish doping offenders is an important element of
the fight against doping. There must be an effective deterrent against the use of
prohibited substances or methods. There is no doubt that the two years' suspen-
sion as a standard provided by the WADC is *capable* of serve as an effective de-
terrent. Certain federations and most notably many athletes' representatives have
requested even tougher sanctions.

151 The two years' ineligibility is also accepted as appropriate and *necessary* sanction
in the vast majority of sports organizations. Any shorter ineligibility period would
inevitably reduce the deterrent effect of a doping sanction and increase the risk
that athletes would become less careful with regard to prohibited substances and
methods. This overall goal is in the predominant interest of all athletes and their
audience and justifies the consequence that the person who has violated the rules
will suffer substantial sanction. The specific interests in the coordination and har-
monization of the efforts against doping and the principle of equal treatment also
justify that the same anti-doping-rules and the same sanctions apply to all ath-
letes, irrespective of the particular sport that they practice. The Panel finds there-

⁹⁹ Cf. p. 1 of the WADC.

fore that the two years' ineligibility for doping offenses where the athlete may not demonstrate "no significant fault or negligence" is not excessive, and does not violate mandatory Swiss law.

152 The Panel is well aware that a two years' ineligibility may constitute a very harsh punishment for an athlete. Such a sanction may affect not only the player but also his team. It may even drive the player out of a team, and it may lead to a substantial loss of income. On the other hand, one must not forget that *the player has a real choice not to violate the anti-doping rules*, and will avoid these harsh consequences if he or she complies with the required standard of care. *It is the cheater who is punished not the one who plays by the rules*. The Panel shares the view of the WADA and most international federations that it is the two years' ineligibility only which constitutes a credible deterrent against doping.

153 Although it is true that especially the economic consequences of two years' ineligibility for a professional football player may be different from those which would affect an amateur athlete, the emotional effect of being barred from sports competitions for two years is the same. Furthermore, there are other professional sports where a two years' ineligibility has comparable impacts, such as professional tennis, track and field or cycling. These federations have adopted the WADC in its present form and have obviously not considered the financial consequences of a two years' ineligibility as constituting an excessive punishment. On the contrary, the Panel has concluded that it would be grossly unfair if an athlete would receive "less severe treatment" which allowed him to return to the lucrative professional sport earlier, just because he had previously earned a high salary. To sum up, the Panel finds that the economic consequences do not justify to deviate from the standard sanction.

154 This conclusion is supported by the fact that under the WADC, the standard sanction of two years' ineligibility is subject to reduction if the player can demonstrate "no significant fault or negligence". Applied to the individual case, this is in full compliance with the principle of proportionality.

155 There remains the question of whether Swiss law requires a lower minimum sanction, i.e. six months instead of one-year ineligibility. So far as the Panel is aware, there is no indication in Swiss jurisprudence that would support an argument that a minimum sanction of one year in the case of "no significant fault or negligence" would violate mandatory Swiss law whereas a minimum of six months as provided by art. 62.1 FIFA DC would not. By contrast, the Panel has concluded that a six months' minimum ineligibility is definitely not a deterrent against the use of prohibited substances or methods, particularly since this minimum eligibility period is not explicitly linked to "no significant fault or negligence" by the athlete. In the light of these conclusions, there is no need to consider whether a further mitigation of the minimum sanction by a probationary sanction is required by Swiss law.

156 According to the wording of the FIFA Anti-Doping Rules, the six months ineligibility period is to be imposed for the minimum offense, namely, a violation of the anti-doping rules without any fault at all. This is probably not in line with the Swiss law. The strict application of the fault principle according to Swiss law excludes the imposition of any sanction on an athlete who has committed no fault.

157 To summarize, the Panel considers that the *principle of proportionality* as referred to by FIFA requires the sanctioning body not only to evaluate the individual misconduct and the impact on the sanction on the athlete, *but also to take the overall goal and the need for an uniform and harmonized concept in the fight against doping into account.*

158 Accordingly, the Panel holds that mandatory Swiss law neither requires the imposition of a probationary sanction nor the reduction of the minimum sanction from one year to six month ineligibility in cases of no significant fault. Nor does mandatory Swiss law require the imposition of a less severe sanction than two years' ineligibility if the athlete cannot demonstrate that he or she bears "no significant fault or negligence".

2.2 *The Substantial Assistance Provision*¹⁰⁰

159 Art. 10.5.3 of the WADC provides for a reduction of not less than one-half of the minimum period otherwise applicable, if the athlete provides substantial assistance which results in discovering or establishing an anti-doping rule violation by another person (substantial assistance provision). The question may arise whether the “*otherwise applicable minimum period*” refers to the two year standard sanction according to art. 10.2 WADC or to the minimum sanction of one year according to art. 10.5.2 WADC. Unfortunately, the WADC does not give a clear solution in this regard. However, the Panel does not have to answer this question, since the FIFA Anti-Doping Rules do not contain a substantial assistance-provision at all.

160 The idea of a substantial assistance-provision, like the related plea bargaining, has no tradition in Swiss law. It is instead a common law-concept. However, there is no provision in Swiss law which would prohibit such a provision. The Swiss Federal Tribunal has explicitly allowed a sentencing tribunal to take into account the substantial assistance given by a criminal offender within the framework of art. 63 of the Swiss Criminal Code¹⁰¹. A fortiori, the Panel has no reservations to apply the substantial assistance-provision in the context of disciplinary sanctions.

2.3 *Second Offense*¹⁰²

161 According to art. 10.6.1 of the WADC, an offense may be considered as a second offense only if it was committed after the offender has received notice of the first offense, or after the anti-doping organization has made a reasonable attempt to give notice of the first offense. The interval between the commission of a first and the commission of a second offense is not explicitly limited. Art. of the 17 WADC,

¹⁰⁰ Cf. para. 121 (6).

¹⁰¹ NETZLE, Die Kronzeugenregelung im World Anti-Doping Code (WADC), in: Jusletter February 20, 2006, para. 30 refers to the so called "Nachtatverhalten".

¹⁰² Cf. para. 121 (7).

which provides a general limitation period of eight years, is not applicable¹⁰³, with the effect that the time frame in which a relevant second offense can take place is unlimited.

162 Assuming that the WADC does not limit the time frame, a second offense could theoretically be committed 10 or 15 years after the first offense, although the first sentence has been fully served. Such an interpretation raises substantial doubts about its compliance with Swiss law. Art. 27 Swiss Civil Code¹⁰⁴ declares an excessive commitment, which may e.g., be caused by the length of the interval defining a second offense, null and void. The Swiss Civil Code does not provide a timeframe for (non-) excessive commitments, thus a court decides due to the circumstances of the individual case whether a commitment is excessive in duration or intensity¹⁰⁵. Precedents in doping matters do not exist. As a general rule, an unlimited duration of a legal commitment is more than critical¹⁰⁶.

163 The Panel is not bound to the Comment's interpretation, as explained above¹⁰⁷: The wording of art. 17 WADC does not exclude its application to define a second offense. In reverse, this provision may be consulted to limit the timeframe that defines the second offense. This understanding would most probably be in compliance with Swiss law, as the timeframe is limited to eight years.

164 Consequently, this Panel is of the view that an unlimited period for the finding of a second offense is most likely a violation of mandatory Swiss law. If the Panel had to determine the relevant period, it would tend towards a solution that would adopt

¹⁰³ Cf. the Comment to art. 17.

¹⁰⁴ Art. 27 Swiss Civil Code reads as follows:

“Excessive commitment:

[...]

(2) No person can alienate his personal liberty nor impose any restrictions on his own enjoyment thereof which are contrary to law and morality.”

¹⁰⁵ Swiss Federal Supreme Court 114 II 159, 161 et seq.; BSK-HUEGUENIN, art. 27 N 15.

¹⁰⁶ Swiss Federal Supreme Court 93 II 290, 300; 114 II 159; GAUCH/SCHLUEP/SCHMID/REY (cf. footnote 74), N 664.

¹⁰⁷ Cf. para. 28.

the limitation period prescribed in art. 17 of the WADC and limit the time period in which a second offense could be taken into account to eight years. The Panel has no reason to believe that a time period of eight years would be excessive. Thus, FIFA is not forced by mandatory Swiss law to limit the relevant time period to two years only.

2.4 *No Information Right of the WADA*¹⁰⁸

165 The FIFA Anti-Doping Rules do not provide an information right in favor of WADA. WADA may, thus, face a practical problem in exercising its right of appeal against decisions by FIFA sanctioning bodies. Swiss law does not require FIFA to withhold information from WADA nor to provide for an information right of WADA.

166 It is not within in the Panel's authority to examine whether under Swiss law, the WADA might enforce its information rights as a condition to exercise its appeals rights. The Applicants may be well advised to design a process to safeguard the flow of relevant information to the WADA.

3. **Conclusion**

167 The WADC and the FIFA DC are in compliance with Swiss law¹⁰⁹. There are no mandatory provisions of Swiss law that require FIFA to deviate from the WADC with the only exception of the unlimited period to determine a second offense. Other differences between the WADC and FIFA Anti-Doping Rules cannot be justified by mandatory Swiss law.

¹⁰⁸ Cf. para. 121 (8).

¹⁰⁹ By signing the Copenhagen Declaration on Anti-Doping in Sport on June 26, 2003, Switzerland recognised the WADC. The UNESCO International Convention against Doping in Sport enabling the UNESCO member states to align their domestic legislation with the WADC is supported by Switzerland and in process of ratification.

* * * * *

IV. Advisory Opinion

A. Answers to the Questions of FIFA, Submitted by the CAS President

1. **Question sec. 1 para. 1:** “En „ratifiant“ le Code Mondial Antidopage (C.M.A.) avec la réserve „qu’il soit tenu compte des spécificités du football et des principes généraux du droit“, la FIFA s’est-elle réservé le droit de prévoir dans son „Code disciplinaire“, des sanctions inférieures à celles prévues par ledit Code?” (translation : By « ratifying » the World Anti-Doping Code [WADC] with the reservation that there should be «taken into account factors specific to football and generally recognised principles of law», did FIFA preserve its right to provide in its « Disciplinary Code » less severe sanctions than those provided by the WADC ?)

168 **Answer:** To date, FIFA has not "ratified" or implemented the WADC, but has adopted its own Anti-Doping Rules which are not fully consistent with the WADC. By signing the Declaration of May 21, 2004, FIFA expressed its intention to live up to the spirit of the WADC, and indicated its unconditional support for the fight against doping and its respect for the WADC. The Declaration is not enforceable. It does not contain any reservations with regard to the specificities of football.

2. **Question sec. 1 para. 2:** “Ou cette „ratification“ rend-t-elle juridiquement inopérante les dispositions du „Code disciplinaire“ auxquelles se substituent celles du C.M.A.?” (translation : Or does this « ratification » make legally ineffective the provisions of the « Disciplinary Code » which substitute for those of the WADC ?)

169 **Answer:** To date, FIFA has not "ratified" or implemented the WADC, but has adopted its own Anti-Doping Rules which are not fully consistent with the WADC. As an independent association governed by Swiss law, FIFA has the power to establish, within the limits of mandatory Swiss law, such rules and regulations as it deems appropriate. As long as FIFA has not formally implemented the WADC into

its regulatory body, the constituents of FIFA are bound only by the FIFA Anti-Doping Rules, but not by the WADC.

170 Still, FIFA is a recognized International Federation under Rule 26 of the Olympic Charter. According to Rule 26 para. 2 of the Olympic Charter, FIFA is obliged to implement the WADC. The WADC is not self-executory. If an IF does not implement the WADC, sanctions may be imposed according to Rule 23 of the Olympic Charter.

3. **Question sec. 2:** “L’organe compétent de la FIFA a-t-il la faculté d’infliger une sanction inférieure à la sanction minimale prévue par le C.M.A. en tenant compte des circonstances de la cause et notamment du degré de culpabilité de la personne incriminée?” (translation : Does the competent body of FIFA have the power to impose a sanction lower than the minimum sanction provided by the WADC, taking into account the circumstances of the case and in particular the degree of fault of the person concerned ?)

171 **Answer:** FIFA has validly adopted its own Anti-Doping Rules which are not fully consistent with the WADC. As an association governed by Swiss law, FIFA is free, within the limits of mandatory Swiss law, to determine such sanctions on anti-doping violations as it deems appropriate. This includes FIFA's competence to establish lower minimum sanctions than provided by the WADC. The competent sanctioning bodies of FIFA are obliged to apply the Anti-Doping Rules of FIFA only and may not take recourse to the WADC alternatively.

4. **Question sec. 3 para. 1:** “L’organe compétent de la FIFA est-il tenu de respecter les prescriptions du C.M.A., même dans l’hypothèse où elles seraient en contradiction avec les principes généraux du droit applicables en Suisse et le droit suisse lui-même?” (translation : Shall the competent body of FIFA comply with the provisions of the WADC, even on the assumption that they would be in contradiction to the general principles of law applicable in Switzerland and to Swiss law itself ?)

172 **Answer:** FIFA has validly adopted its own Anti-Doping Rules which are not fully consistent with the WADC. As an association governed by Swiss law, FIFA is free, within the limits of mandatory Swiss law, to determine such sanctions on anti-doping violations it deems appropriate.

5. **Question sec. 3 para. 2:** “Ou au contraire ledit organe de la FIFA doit-il obligatoirement tenir compte de ces principes et du droit suisse dans sa démarche?” (translation : Or, on the contrary, is the said FIFA body obliged to take these principles and Swiss law into account?)

173 **Answer:** FIFA is subject to Swiss law and, therefore, bound to comply with mandatory Swiss law including recognized general principles of law. The same applies to the sanctioning bodies of FIFA. However, mandatory Swiss law does not require FIFA to draft its Anti-Doping Rules as it did.

6. **Question sec. 4 para. 1:** “D’une façon générale, la sanction minimale prévue par le C.M.A. s’impose-t-elle à l’organe compétent de la FIFA pour sanctionner un contrevenant au C.M.A.?” (translation : As a general rule, is the minimum sanction provided by the WADC mandatory to the competent body of FIFA sanctioning a person breaching the WADC ?)

174 **Answer:** FIFA has validly adopted its own Anti-Doping Rules which are not fully consistent with the WADC. As an association governed by Swiss law, FIFA is free, within the limits of mandatory Swiss law, to determine such sanctions on anti-

doping violations it deems appropriate and provide for lower minimum sanctions than those suggested by the WADC.

7. **Question sec. 4 para. 2:** “Ou ledit organe a-t-il la faculté de prononcer une sanction inférieure à la sanction minimale du C.M.A.?” (translation : Or does the said body have the power to impose a sanction lower than the minimum sanction of the WADC ?)

175 **Answer:** FIFA has validly adopted its own Anti-Doping Rules which are not fully consistent with the WADC. As an association governed by Swiss law, FIFA is free, within the limits of mandatory Swiss law, to determine such sanctions on anti-doping violations it deems appropriate and apply lower minimum sanctions than those provided by the WADC.

B. Answers to the Questions of the WADA, Submitted by the CAS President

1. **Question sec I.:** “En l’état actuel des relations juridiques entre WADA et la FIFA, et en tenant dûment compte des documents fournis à la fois par WADA et par la FIFA, cette dernière est-elle tenue de mettre son Code Disciplinaire en conformité avec le Code Mondial Antidopage?” (translation : In the current state of the legal relations between WADA and FIFA, and on the basis of the documents provided by both WADA and FIFA, is the latter obliged to amend the Disciplinary Code in accordance with the World Anti-Doping Code ?)

176 **Answer:** The documents submitted by the WADA or FIFA do not constitute a formal acceptance or implementation of the WADC by FIFA. As an association governed by Swiss law, FIFA is free, within the limits of mandatory Swiss law, to adopt such anti-doping rules it deems appropriate, whether or not such own rules comply with the WADC.

177 However, FIFA is a recognized International Federation under Rule 26 of the Olympic Charter. According to Rule 26 para. 2 of the Olympic Charter, FIFA is obliged to implement the WADC. Not implementing the WADC does not render

the WADC applicable by substitution, but may lead to sanctions as provided in Rule 23 of the Olympic Charter.

178 By signing the Declaration of May 21, 2004, FIFA expressed its intention to live up to the spirit of the WADC and indicated its unconditional support for the fight against doping and its respect for the WADC. To date, this intention has not yet been completely satisfied.

2. **Question sec. II.:** "Si la réponse à la question «I.» est oui:" (translation : If the answer to question « I. » is yes :)

179 The answer is yes with regard to FIFA's obligations under Rule 26 of the Olympic Charter. The Panel deems it therefore appropriate to address the following questions.

2.1 **Question sec. II.1.:** "Is the FIFA Disciplinary Code, in particular the sanctions set forth in Article 62, in conformity with the World Anti-Doping Code, in particular Article 10?"

180 **Answer:** The sanctions provided by the FIFA Disciplinary Code for first time offenses are different from those provided by the WADC in three respects:

- (1) The penalty framework of art. 62.1 FIFA DC consists of a minimum ineligibility period of six months and a maximum of two years whereas art. 10.2 WADC establishes a standard penalty of two years' ineligibility.
- (2) The WADC standard penalty of two years' ineligibility may be reduced up to one year only if the athlete demonstrates that he or she bears "no significant fault or negligence" whereas the penalty framework of FIFA is available for all degrees of fault. Under the WADC, any violation where the athlete does not demonstrate "no significant fault or negligence" will lead to a compulsory two years' ineligibility: this sanction is expected to apply under the FIFA Anti-doping Rules only in severe cases.

(3) The FIFA DC does not allow the complete elimination of the suspension in case of "no fault or negligence" as provided by art. 10.5.1 WADC. According to art. 62.1 FIFA DC, the sanctioning body is bound in any case where an anti-doping rule violation has been established to apply "a suspension of no less than six months", even in cases where the athlete may demonstrate that he or she bears "no fault or negligence".

2.2 **Question sec. II.2.:** "Is individual case management, as set forth in the FIFA Disciplinary Code, in particular in Article 62.1, in conformity with the World Anti-Doping Code, in particular Article 10.5?"

181 **Answer:** The FIFA Anti-Doping Rules and the WADC are not substantially different with regard to the method to determine the sanction for a specific anti-doping rule violation. Both require the sanctioning body to measure the individual conduct of the athlete against a heavy duty of care and to assess the ineligibility period within a given penalty timeframe in proportion to the degree of fault, thereby taking all relevant circumstances into account.

182 The substantial difference lies, however, in the fact that the penalty framework between one and two years' eligibility of the WADC is available only if the athlete can demonstrate "no significant fault or negligence" whereas FIFA's penalty framework between six months and two years of art. 62.1 FIFA DC applies not only to "no significant fault or negligence"-situations but to all degrees of fault. This may lead to different sanctions under the same circumstances.

2.3 **Question sec. II.3.:** "Does the FIFA Disciplinary Code, in particular Articles 62 and 63, provide for sanctions for other violations of the anti-doping rules in conformity with the World Anti-Doping Code, in particular Article 10 of the Code?"

183 **Answer:** The WADC and the FIFA Anti-Doping Rules (which includes also the FIFA RDC) identify the same facts as violations of the anti-doping rules. In particular, the violations which are characterized by art. 10.4 WADC as "Other Anti-

Doping Violations” are considered as anti-doping rule violations also under the FIFA Anti-Doping Rules, as well.

184 However, the sanctions for such other anti-doping rule violations are different:

185 The differences concern the minimum sanction for a first offense of refusing or failing to sample collection, where the FIFA DC provides for a minimum of six months and the WADC imposes the standard sanction of two years’ ineligibility, subject to reduction in cases of no significant fault or negligence (see also Answer to Question sec. II.2), and the minimum sanction for a first offense related to tampering, where the FIFA DC provides for a minimum of six months and the WADC imposes the standard sanction of two years’ ineligibility *without* the possibility of reduction in cases of no significant fault or negligence.

186 The Panel notes on the other hand that the WADC allows for a reduction of the four years’ ineligibility in case of “no significant fault or negligence” whereas the four years’ ineligibility is a strict minimum sanction under the FIFA DC.

187 The Panel recognizes that there is also a different wording regarding the sanctions on whereabouts violations. However, the Panel expects that this difference will not result in a substantial discrepancy in the sanctioning of whereabouts violators.

2.4 **Question sec. II.4.:** “Is Article 33 of the FIFA Disciplinary Code in conformity with the World Anti-Doping Code as regards sanctions?”

188 **Answer:** Art. 33 of the FIFA DC allows the sanctioning body to partially suspend the sanction if the duration of such sanction does not exceed six months. As a result, the minimum sanction provided by the FIFA DC of six months’ may be further reduced to three months, subject to probation. This adds substantially to the difference to the minimum sanctions provided by the WADC. Art. 33 FIFA DC is therefore not in conformity with the WADC.

2.5 **Question sec. II.5.:** "Are the provisions of the FIFA Disciplinary Code with regard to the sanctions against teams, in particular Article 63, in conformity with the provisions Article 11 of the World Anti-Doping Code?"

189 **Answer:** Both rules provide for the possibility of disqualification if two or more athletes have violated the anti-doping rules. According to art. IV.3 FIFA RDC, there are always two players per team to be tested whereas the WADC does not contain such a requirement. On the other hand, the WADC requires target testing if more than one athletes has been notified of a possible anti-doping rule violation whereas there is no such rule in the FIFA Anti-Doping Rules. Both rules have still the same goal, namely to sanction the entire team if more than one team member has violated the anti-doping regulations. The Panel finds therefore that art. 63 FIFA DC is not materially different from art. 11 WADC.

2.6 **Question sec. II.6.:**"Are the provisions of the FIFA Disciplinary Code with regard to Therapeutic Use Exemptions, in particular Article 61, in conformity with the provisions of the World Anti-Doping Code regarding TUEs, in particular Articles 4.4. and 13.3 of the Code?"

190 **Answer:** The provisions of the FIFA Anti-Doping Rules (i.e. the FIFA DC and Annex B to the FIFA DRC) regarding the requirements for the grant of a TUE and the respective procedures are in conformity with the WADC. The Panel has, however, identified a material difference in that the FIFA Anti-Doping Rules do not provide for a right of WADA to review the granting or refusal of a TUE. Although the Panel is not aware of the practical relevance of this right, it considers such right of review to be material and important for the harmonization of the fight against doping.

2.7 **Question sec. II.7.:** “Does Articles 60.5 of the FIFA Statues offer the possibility of an appeal to the CAS in conformity with Articles 13.1 and 13.2 of the World Anti-Doping Code?”

191 **Answer:** Art. 60.5 of the FIFA Statutes offer the possibility of an appeal to CAS basically to the same parties as art. 13.2.3 WADC, including WADA. The IOC is not among the parties entitled to appeal FIFA-decisions to CAS. This exception is not significant because under the WADC the IOC's procedural rights are restricted to matters pertinent to the Olympic Games. By participating in the Olympic Games, FIFA and the players will anyway submit to the specific rules of the Olympic Games.

192 There is however a significant difference since the FIFA Anti-Doping Rules do not explicitly provide for an information right of WADA with regard to anti-doping decisions of FIFA bodies. The Panel finds that without such an information right, the appeal right of the WADA remains of limited effectiveness.

193 Art. 60.3 of the FIFA Statutes excludes suspensions up to three months from appeals to CAS. Such suspensions may well apply in cases where a probationary sanction has been granted. The most lenient sanctions under the FIFA Anti-Doping Rules (i.e. three months suspension to be served plus three months suspension subject to probation) will therefore not be subject to any judicial review.

3. **Question sec. III.:** ”Si la réponse à la question «I.» est non, quelles conséquences devraient être tirées de cette réponse?” (translation : If the answer to question « I. » is no, which are the consequences of that answer?)

[---]

Done in Lausanne, 21 April 2006

THE COURT OF ARBITRATION FOR SPORT

Hans Nater

President of the Panel

Corinne Schmidhauser

Arbitrator

Stephan Netze

Arbitrator

Michael Tuchschnid

Ad hoc clerk

V. Annex

- Comparative Table of the WADC and the FIFA Anti-Doping Rules