

[Translation]

**LEGAL OPINION**

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## I. THE EXPERT

*The undersigned legal scholar, born on June 22, 1941, holds a doctorate in law from the University of Geneva. He qualified as an attorney-at-law and as a notary in the canton of Valais and has practised these professions since 1965/1966. He has also held various public offices. Among other things, he sat on the guardianship supervisory authority (Art. 361 and 422 of the Swiss Civil Code) and for many years served on a committee of experts for bar and notary examinations. For twelve years, he chaired the Federal Office of Conciliation and Arbitration, which is responsible for settling labour disputes of national importance within the meaning of a regulation of September 2, 1949 (RS 821.421).*

*In 1975, he was elected by the Swiss Federal Assembly as a regular part-time judge, and in 1979, as a permanent judge of the Federal Tribunal (Swiss Supreme Court), where he presided the First Public Law Division. From 1992 to 1996, he acted first as Vice-President, then as President, of the Federal Tribunal. He left the Federal Tribunal at the end of his term, which, by law, was not renewable.*

*Since then, he has practised as a national and international legal consultant and arbitrator. He was a member of the Federal Experts Commission that reviewed the mutual judicial assistance legislation and the law pertaining to the mutual legal assistance treaty between Switzerland and the United States of America. He was an Expert of the Council of Europe when the countries of Central and Eastern Europe democratized, and is an active member of the Academy of European Private Lawyers, which is working on a new draft of the European Contract Code (the Gandolfi project).*

*He was appointed President of the Board of Arbitration of the Swiss Exchange by the President of the Swiss Federal Tribunal. In June 2004, the General Conference of the International Labour Organization (ILO) elected him as a member of its Administrative Tribunal (ILOAT/TAOIT), consisting of seven members, whose jurisdiction has been acknowledged by most of the organizations and agencies of the United Nations.*

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## II. THE FRAMEWORK OF THE MANDATE

### 1. The mandate

On October 7, 2005, the *World Anti-Doping Agency*, which has its seat in Lausanne (Avenue du Tribunal fédéral 34) and whose contact person at its Montreal headquarters is Mtre Olivier Niggli, CFO and Legal Director, approached the undersigned to ask him if he would be available to examine the question of whether Article 10.2 of the *World Anti-Doping Code* is compatible with the fundamental principles of Swiss domestic law inasmuch as, under the general heading “*Sanctions on Individuals*”, the said provision imposes a penalty of two years’ suspension for all first violations of the rules of the World Anti-Doping Code banning *the use of Prohibited Substances and Prohibited Methods*. After we agreed to do so, the World Anti-Doping Agency (abbreviated as: **WADA, the Agency or the Anti-Doping Agency**) confirmed the mandate by e-mail dated October 8, 2005. In that e-mail, WADA indicated that the problem that it wished to have addressed was whether this

rule of an association, given its relatively fixed nature, would be “*contrary to Swiss law to the degree that a Swiss judicial authority would not be able to apply it even in a dispute between two parties that had expressly agreed to be subject to the Code*” or whether “*on the contrary [the rule is compatible] with Swiss law.*” The Agency pointed out that the rule “*applies to “Prohibited” Substances that have been scientifically determined to be doping agents.*”

In a second e-mail dated October 11, 2005, the commissioning Agency drew our attention “*to the fact that athletes who are affiliated with a national sports federation that is itself part of the international federation for the sport concerned agree to be subject to the World Anti-Doping Code when they are granted their athlete’s licence.*” The Agency noted in the same e-mail that international sports federations<sup>1</sup> have chosen to submit their decisions in matters of doping to arbitration by the *Court of Arbitration for Sport (CAS)* which is headquartered in Lausanne; pursuant to rule (R) 58 of the *CAS’ Code of Sports-related Arbitration*, the CAS arbitrator(s) “*may be inclined to apply Swiss law, particularly where the international federation concerned is headquartered in Switzerland, which is often the case.*” It pointed out that the mechanisms of Article 10 of the World Anti-Doping Code allow athletes the possibility of “*invoking exceptional circumstances to explain the positive test and thus have the two-year penalty reduced to a minimum of one year.*”

The scope and framework of the mandate were further confirmed by a fax dated October 18, 2005, which reads in part as follows:

*... In particular, WADA would like to have your opinion in regard to the fixed nature of the minimum sanctions provided for in Art. 10.2 of the Code and its compatibility with the fundamental principles of Swiss law, considering in particular the possible reductions pursuant to Arts. 10.5.1 and 10.5.2 of the Code. I note once again that decisions in matters of doping taken pursuant to the Code ... are taken principally in the context of international arbitrations and/or domestic arbitrations before the ... [CAS] and that Swiss law is nevertheless often applied... Therefore, the additional question arises as to whether the CAS could refuse to apply Art. 10.2 of the Anti-Doping Code on the basis that the said provision is contrary to principles of Swiss substantive law.*

*Indeed, certain stakeholders in the sports world currently take the position that the imposition of a minimum penalty (two years, or one year if there are exceptional circumstances), in cases where the athlete is at fault, violates fundamental principles of Swiss law.*

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<sup>1</sup> Throughout the consultation, reference is made without differentiation to “sports federations” or “sports associations”.

*I call your attention once again to the fact that UNESCO is scheduled to adopt, on October 19, 2005, an International Convention Against Doping in Sport based on the final draft... which I forwarded to you. Only a few minor changes are expected to be made, in particular in regard to funding.*

...”

## 2. The documents provided

The commissioning Agency provided us with the following documents:

- *excerpt from the World Anti-Doping Code including Articles 9 to 13.2 (pp. 26 to 39);*
- *excerpt from a note from the World Anti-Doping Agency “on the genesis of the Agency and the Code”;*
- *excerpt from an analysis by the firm Carrard Paschoud Heim & Associates in Lausanne contained “in a memorandum on the conformity of Article 10.2 with Swiss law”.*

The Agency also drew our attention to a legal opinion issued on February 26, 2003 by the Swiss legal scholars *Gabrielle Kaufmann-Kohler, Antonio Rigozzi* and *Giorgio Malinverni* concerning the conformity of certain provisions of the World Anti-Doping Code, *which was then at the draft stage*, with general principles of the law of persons.

## 3. Customary disclaimer

This consultation is based on the documents provided to us by the commissioning Agency as well as documentation of a strictly legal nature that we compiled because it was pertinent in light of the facts submitted.

The legal opinion referred to above has been published by its authors. This consultation will, as necessary, refer to that publication.<sup>2</sup>

The expert reserves his opinion in regard to any relevant factual elements that may, inadvertently, not have been brought to his attention.

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<sup>2</sup> In *Doping and Fundamental Rights of Athletes: Comments in the Wake of the Adoption of the World Anti-Doping Code*, *International Sports Law Review*, Sweet & Maxwell (vol. 2003, p. 39-67).

### III. THE OVERALL LEGAL CONTEXT OF THE CONSULTATION

#### 1. Preamble

Sports organizations have been trying for a long time to achieve a general consensus among national and international sports associations, federations and agencies to work together to combat doping, and to enlist the support of national public authorities, inter-State institutions and intergovernmental agencies in that fight.

As early as 1967, the Committee of Ministers of the Council of Europe adopted a resolution on the doping of athletes, which was followed in 1979, 1984 and 1988 by three recommendations on the same subject, the last of which provided for the institution of *no notice out of competition* anti-doping controls. At the worldwide level, between 1988 and 2004, the United Nations Educational, Scientific and Cultural Organization (UNESCO), headquartered in Paris, also issued various resolutions or recommendations at the conclusion of the international conferences of ministers and senior officials responsible for sport and physical education that it organizes periodically.

#### 2. The European Convention of November 16, 1989<sup>3</sup>

■ On November 16, 1989, an anti-doping convention was concluded in Strasbourg, which was open for signature by member States of the Council of Europe, other States party to the European Cultural Convention and non-member States having participated in the elaboration of the Convention. The stated aim of the Convention is to reduce, and eventually eliminate, doping in sport; the signatory States undertake, *within the limits of their respective constitutional provisions*, to take the steps necessary to apply the provisions of the Convention. The Convention defines doping in sport as *the administration to sportsmen or sportswomen (persons who participate*

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<sup>3</sup> RS (Systematic Collection of Federal Swiss Law) [No.] 0.812.122.1.

*regularly in organised sports activities), or the use by them, of pharmacological classes of doping agents or doping methods.*

Under the heading “*co-operation with sports organisations on measures to be taken by them*”, Article 7 of the Convention provides that its signatories undertake to encourage their sports organizations, and through them the international sports organizations, to formulate and apply all appropriate measures, falling within their competence, against doping in sport. The provision encourages these organizations to clarify and harmonize their respective rights, obligations and duties. More specifically, it encourages them, among other things, to harmonize doping control procedures, disciplinary procedures and procedures for the imposition of effective penalties. **Letter d** of Article 7, paragraph 2 provides that disciplinary procedures are to be conducted “*applying agreed international principles of natural justice and ensuring respect for the fundamental rights of suspected sportsmen and sportswomen*”. It notes that such principles include the requirement that the reporting and disciplinary bodies be distinct from one another, the right to a fair hearing and the right to be assisted or represented, and clear and enforceable punitive provisions including the right to appeal any decisions rendered to an independent judicial authority.

■ On November 5, 1992, the Swiss Confederation ratified this Convention, which came into force for the Confederation on January 1, 1993. The Swiss Confederation did not attach any qualifications or interpretive statements to that ratification.

The preamble to the UNESCO International Convention Against Doping in Sport, which was adopted by that organization on October 19, 2005 and will be discussed below, indicates that the European Anti-Doping Convention and its Additional Protocol are “*the public international law tools, which are at the origin of national anti-doping policies and of intergovernmental cooperation.*”

3. The World Anti-Doping Agency and the World Anti-Doping Code

(a) The World Anti-Doping Agency

**(aa)** The World Anti-Doping Agency (WADA/AMA) is a Swiss private law foundation, which is governed by Articles 80 and following of the Swiss Civil Code of December 10, 1907.<sup>4</sup> It was created in Lausanne, Switzerland on November 10, 1999 at the conclusion of an international conference (*the Lausanne Conference*). It is independent of the Olympic Movement, and in particular of the International Olympic Committee (IOC) and of the States that took part in its formation or that participate in its activities.

Its seat is in Lausanne but its headquarters are in Montreal, Canada. It is directed by a *Foundation Board* which is composed principally of 18 representatives of the States and 18 representatives of the Olympic Movement. An *Executive Committee* of 12 members is responsible for its actual management. It is funded on a 50-50 basis by the IOC and the member States.

**(bb)** The Agency's mission is to promote and coordinate at the international level the fight against doping in sport in all its forms. It seeks to reinforce ethical principles for the practice of sport, to protect the health of athletes, to coordinate unannounced out-of-competition anti-doping controls, to draw up a common list of Prohibited Substances and Prohibited Methods, to harmonize and unify scientific and technical standards for sampling and laboratory accreditation, to harmonize the rules for disciplinary procedures and appeals from penalties, and to develop education and prevention programs.

**(cc)** The public interest associated with this mission in the eyes of the authorities of the Swiss Confederation is underscored by the agreement entered into on March 5, 2001 between the Confederation's government (the Federal Council) and the Agency,

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<sup>4</sup> SCC; RS 210.

which exempted the Agency from direct and indirect federal, cantonal and communal taxes as well as all levies imposed at the federal, canton and commune levels with the exception of those collected in compensation for certain special services.<sup>5</sup>

*(dd)* Article 2 of the UNESCO International Convention Against Doping in Sport, to which we will return later on, defines the Agency as an “*anti-doping organization*”, meaning “*an entity that is responsible for adopting rules for initiating, implementing or enforcing any part of the doping control process.*”

*(ee)* The Lausanne Conference and the Agency laid the groundwork for a *World Anti-Doping Program* whose essential purpose is to protect athletes’ fundamental right to participate in doping-free sport and thus promote health, fairness and equality for athletes worldwide. More concretely, the program and the World Anti-Doping Code, which will be discussed below, seek to ensure harmonized, coordinated and effective anti-doping programs at the international and national levels with regard to detection, deterrence and prevention of doping.

Besides the World Anti-Doping Code, the other legal instruments serving the World Anti-Doping Program are *the International Standards* and *the Models of Best Practice*.

The *International Standards* are approved by the Agency following consultation with the governments that participate in the anti-doping program and the organizations that are signatories of the World Anti-Doping Code. The Agency’s Executive Committee may revise the *International Standards* at any time following a similar consultation. The purpose of these standards is to ensure harmonization among the anti-doping organizations responsible for specific technical and operational parts of anti-doping programs. Adherence to the *International Standards* is mandatory for compliance with the World Anti-Doping Code.

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<sup>5</sup> RS 0.192.120.240.

The same is not true of the *Models of Best Practice*, which the Agency confines itself to recommending to the signatories of the World-Anti-Doping Code. These models are to be developed to provide state-of-the-art solutions in different areas of anti-doping.<sup>6</sup>

(b) *The World Anti-Doping Code*

(aa) The World Anti-Doping Code (abbreviated as: **the Code** or **the Anti-Doping Code**) was adopted by the Agency in Copenhagen on March 5, 2003 during a worldwide conference on doping in sport. It is the legal instrument that serves as the cornerstone of the World Anti-Doping Program.

The Code was adopted, prior to the opening of the Athens 2004 Olympic Games, by the International Olympic Committee (IOC), the 202 National Olympic Committees and the 35 International Olympic Federations. The other international federations recognized by the IOC adapted their by-laws to the Code's requirements.

(bb) The Code has its foundation in *the spirit of sport*, which is considered the essence of Olympism. The spirit of sport may be defined as the commitment to participate fairly in sport competitions by *playing true*. It reflects the ideals on which the practice and organization of sport, whether professional or amateur, are based.

This consultation does not require the expert to examine the structure and details of the Code at length. It suffices to note at this point that the Code defines doping as the occurrence of one or more of the anti-doping rule violations set forth in Article 2 of the Code.

(cc) Article 2 of the Code adopts the principle of *strict liability*, which is at the core of most pre-existing anti-doping rules at the federation level.

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<sup>6</sup> See the Introduction to the 2003 edition of the *World Anti-Doping Code*, in which each provision of the Code is annotated.

Under the strict liability principle, an anti-doping rule violation occurs whenever a Prohibited Substance is found in an athlete's bodily specimen, whether or not the athlete used a Prohibited Substance intentionally or unintentionally as a result of negligence or other failure. Strict liability results in the sanctions set out in Article 10 of the Code being automatically applied against the athlete. If the positive sample came from an in-competition test, the athlete's results for that competition are automatically invalidated.

*(dd)* However, the strict liability of the implicated athlete is attenuated inasmuch as he or she can apply to have the sanctions imposed against him or her eliminated or reduced, by demonstrating that he or she was not at fault or *significant* fault. Indeed, it is sometimes possible for the presence of a Prohibited Substance in an athlete's specimen to result from exceptional circumstances where the athlete bears no fault or negligence for the violation.

*(ee)* This relaxing of strict liability prompted the Code's commentator to consider that "*the strict liability rule for the finding of a Prohibited Substance in an Athlete's Specimen, with a possibility that sanctions may be modified based on specified criteria, provides a reasonable balance between fair, effective anti-doping enforcement for the benefit of all "clean" Athletes*" and the Code's essential objectives. In issuing that opinion, the commentator relied heavily on a very substantial award of the Court of Arbitration for Sport (CAS), which he cited at length, considering it to be determinative.<sup>7</sup> In that award, the CAS further pointed out that, from a formal standpoint, the anti-doping fight is arduous and requires strict rules to be adopted. But sports federations must also be strict with themselves in adopting, in constitutionally proper ways, clear and predictable standards for determining the sanctions that will apply to athletes.

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<sup>7</sup> Award of May 23, 1995 in *Q. [uingley] v. International Shooting Union (UIT) (CAS 94/129)*, reproduced in *Digest of CAS Awards I*, pp. 187 and following.

*(ff)* In concluding this brief descriptive review, the expert observes, first, that insofar as it strives to keep anti-doping violations in check, the Code is dominated by the paramountcy of the principle of *efficiency* in a fight whose outcome must be the eradication of a collective scourge which threatens to compromise every shred of dependability associated with the holding of sport competitions at any level.

Next, the expert notes, *first*, that from a *formal* standpoint, the Code's stringent system of rules endeavours, in spite of the strictness of the objective, to guarantee infringers' procedural rights; *secondly*, he observes that from a *substantive* standpoint, the system takes into account the need to safeguard infringers' fundamental rights through *clarity and predictability* as well as by allowing the sanctions to be reduced on a rational basis, making it possible for them to be *individualized* to the extent that it is possible to do so without stripping the Code of its substance and compromising the lofty mission of the Agency.

This particular system is not perfect from the perspective of various requirements of the constitutional law of democratic States and the conventional law that those States have established together; but it does appear to respond appropriately to the various pressing, sometimes contradictory, objectives of the fight against doping as they appear from a reading of the European Anti-Doping Convention, whose Article 7, paragraph 2, *letter d/III* sets certain limits in regard to implementation. It is obvious that efficiency and clarity are indispensable conditions for eliminating doping in the world of competitive sport, an objective now universally acknowledged as one that is clearly in the public interest. That is, moreover, the conclusion arrived at by the authors of the legal opinion cited above.<sup>8</sup>

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<sup>8</sup> On pages 51-55 of the printed version.

4. The UNESCO Convention of October 19, 2005

(a) *The adoption of the Convention and its preamble*

UNESCO adopted an International Convention Against Doping in Sport on October 19, 2005.

The preamble to the Convention points out that UNESCO has an important responsibility in this area and is determined to take further and stronger cooperative action *aimed at the elimination of doping in sport, whose consequences for the health of athletes, the principle of fair play, the elimination of cheating and the future of sport are of utmost concern*. The preamble acknowledges the role played by the Council of Europe in the rightful battle against doping in sport. It places the emphasis on the World Anti-Doping Code adopted by the World Anti-Doping Agency, which it calls on the Convention's signatories to "bear in mind".

(b) *The Convention and the World Anti-Doping Code*

The UNESCO Convention reproduces in large measure the provisions of the World Anti-Doping Code, particularly in regard to anti-doping rule violations. On the other hand, it says little about sanctions, as if it sufficed for the States that are its signatories to refer implicitly to that instrument adopted by an association. Nevertheless, Article 16 *letter g* of the Convention highlights the importance of the principle of efficiency, which presupposes that athletes can be tested with no advance notice and the samples taken subjected to technical analysis. According to that provision, States that are parties to the Convention undertake, "*where appropriate and in accordance with domestic law and procedures,*" to mutually recognize the doping control procedures and test results management of any anti-doping organization that are consistent with the World Anti-Doping Code, "*including the sports sanctions thereof*".

Taken as a whole, the UNESCO Convention appears to us to be, so to speak, a *translation* – into the positive law of treaties – of the *soft law* that the Anti-Doping Code still is. It can be seen as the legal act evidencing recognition of the Agency among States, or more precisely an act of legal recognition of the legitimacy of the Agency’s actions and objectives, as well as the means adopted by it to achieve those objectives. From this perspective, the designation of the Agency as an *advisory organization* and the reproduction of the Code as an appendix to the official text of the Convention (*Appendix I*) are neither insignificant nor devoid of legal import, even if Article 4, paragraph 2 of the Convention states that the text of the Code is not an integral part of the Convention and that it is reproduced as an appendix to the Convention for information purposes only and does not create any binding obligations under international law for States that are parties to the Convention.

#### IV. **DISCUSSION**

##### 1. Preamble

##### (a) The rules under discussion

Article 10.2 of the Code, which relates to the anti-doping rule violations set out in Articles 2.1, 2.2 and 2.6 of the Code, reads as follows:

Article 10 Sanctions on Individuals

...

10.2 Imposition of Ineligibility for Prohibited Substances and Prohibited Methods

*Except for the specified substances identified in Article 10.3, the period of Ineligibility imposed for a violation of Articles 2.1 (presence of Prohibited Substance or its Metabolites or Markers), 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) and 2.6 (Possession of Prohibited Substances and Methods) shall be:*

- **First violation: Two (2) years’ Ineligibility.**
- *Second violation: Lifetime Ineligibility.*

*However, the Athlete or other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in Article 10.5.*

Article 10.5 reads as follows:

10.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances:

10.5.1 No Fault or Negligence

*If the Athlete establishes in an individual case involving an anti-doping rule violation under Article 2.1 ... or ... Article 2.2 that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1..., the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Articles 10.2, 10.3 and 10.6.*

10.5.2 No Significant Fault or Negligence

*This Article 10.5.2 applies only to anti-doping rule violations involving Article 2.1 ... Article 2.2... Article 2.8. If an Athlete establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, **but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable.** If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 ... the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.*

...

(b) The status quaestionis

The question to be addressed is whether these rules – **taken in the overall legal context described above under heading II** – are compatible with the fundamental rights and general principles recognized by the Swiss legal system whose application the Swiss Federal Tribunal (Supreme Court) could be asked to review in a limited manner in the context of public law proceedings taken against an arbitral award contested *on a substantive basis* either pursuant to *Article 36, letter f of the Intercantonal Concordat on Arbitration of March 27, 1969*,<sup>9</sup> or pursuant to *Article 190, paragraph 2, letter e of the Swiss Private International Law Statutes of December 18, 1987*.<sup>10</sup>

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<sup>9</sup> CIA; RS 279.

<sup>10</sup> PILS; RS 291.

The answer to this question requires us to examine in turn the meaning of Article 10.2 of the Code and the legal nature of the sanctions it provides for (2), the content of the fundamental rights and general principles that could be applicable and come into play in the context of a limited review by the Federal Tribunal (3), the scope of the means of defence available to persons seeking to allege that a sanction and its confirmation by arbitrators was injurious to their interests legally protected by these rights and principles, which will require us to refer to the definition in Swiss law of the concepts of public policy and arbitrariness (4).

2. The interpretation of Article 10.2 of the Code and the legal nature of the sanctions it provides for

(a) The interpretation of Article 10.2 of the Code

While Article 10.2 of the Code is, as we shall see, a private law rule adopted by a private law legal entity, discerning its meaning requires us to resort to the methods of interpretation constitutionally recognized in Swiss law for interpreting public law texts.

*(aa)* A legal text is first interpreted according to the letter of the text (*literal or grammatical method*). Departure from the literal meaning of a clear text is only called for where there are objective reasons to suggest that the text does not convey the true intent of the provision in question. Such reasons may flow from the preparatory work, the aim and direction of the provision being examined, and sometimes its place within the law. Thus, the true intent and spirit of a legal text that admits of several interpretations are to be sought, *inter alia*, on the basis of the preparatory work that led up to its adoption (*historical method*), the aim that the rule seeks to achieve and the values on which it is based (*teleological method*), or its relationship with other legal provisions (*systematic method*). Contrary to what we might think, the historical method of interpretation is not fundamental and the interpreter is not bound to take the preparatory work into account. It is only to be taken into account to the extent that the ideas that were discussed during the discussions leading up to its adoption are

expressed in the text. The importance of the preparatory work for the analysis is, in any case, inversely proportional to how far back in time that work was done. Lastly, it should be pointed out that all of these methods are intercoordinated and not subordinated one to the other.<sup>11</sup>

Once the meaning of a text has been discerned, in a particular case, the result of the teleological and systematic methods may sometimes require one of the complementary methods, which one author has termed pseudo-methods, to be applied.<sup>12</sup> The principal complementary methods are narrow interpretation, broad interpretation, and application of the maxims *a pari* (application by analogy), *a contrario*, or *a fortiori* (*a majore ad minus*).

**(bb)** The combined application of these methods leaves no doubt in this case as to the meaning of the provision being examined, which can be discerned even from a literal interpretation, or better still, from a careful reading of the text of the provision and the provisions it refers to. If any doubt remained on a given point, it would be dispelled upon resorting to the systematic and teleological methods, i.e., determining the meaning of one rule based on its relationship with other rules, its aim and the overall scheme of the text in which it is incorporated. Consequently, the expert can refrain from any reference to the preparatory work, unlike the authors of the legal opinion who were issuing their opinion in a different context. The expert will refer to the preparatory work – and in a very general way – in one place only, and that is when dealing with the desire expressed by athletes themselves to see the strictest possible anti-doping regime adopted.

The meaning of Article 10.2 is that a competitive athlete, whether amateur or professional, who uses or attempts to use a Prohibited Substance or its Metabolites or Markers, who uses a Prohibited Method, or who uses or attempts to use such a

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<sup>11</sup> Cf ATF 109 Ia 303; 119 Ia 248 para. 7 a; 119 II 186 para. 4 b/bb, 355 para. 5; 119 V 126 para. 4 and decisions cited; 121 V 60/61 para. 3b; 122 III 310 para. 2 b; 123 III 92 para. 3 c; 127 V 488 para. 3b/bb; 128 I 41 para. 3b, 330 para. 2.1; 129 III 658 para. 4.1.

<sup>12</sup> André Grisel, *Traité de droit administratif*, volume I, pp. 138 and following.

substance or method, violates the anti-doping rules regardless of whether such use or attempted use meets with success or failure. In accordance with the rule of *strict liability*, that individual is automatically subject, *ipso facto*, to a penalty of two years' suspension. In case of a repeat offence, the penalty will be lifetime suspension. The competent bodies have no discretion to impose greater or lesser sanctions in either of these instances, except in the two cases that we shall now describe (*relatively fixed nature of the penalty*).

■ Article 10.2 relaxes this strict liability by affording the athlete concerned or any other person (for example, the organization to which the athlete belongs) the opportunity of having the sanction eliminated by establishing that the athlete bears no fault or negligence for the anti-doping rule violation; the athlete must also establish how a Prohibited Substance, or its Metabolites or Markers, detected in his or her specimen entered his or her system (*exculpatory evidence*).

■ An athlete may also have a suspension lifted where he or she is able to establish, in practical terms, that he or she did nothing wrong; a reduction of the length of the suspension may be obtained if the athlete establishes that he or she bears no *significant* fault or negligence. The concept of *significant* fault or negligence is clearly an imprecise legal concept the meaning of which will have to be defined through the practice of the competent bodies. Where the athlete bears no significant fault, the competent bodies have *limited discretion* only: the sanction may not be reduced by more than half of the period referred to in Article 10.2; accordingly, the suspension period will never be less than one year for a first violation or eight years for a second violation, except, of course, when there is no fault at all. In any event, “*when a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's sample*”, the athlete concerned may only benefit from a lighter penalty if he or she is able to establish how the substance entered his or her system.

(cc) The system of strict liability and fixed penalties established in Article 10.2 of the Code leaves little room for the violation's subjective elements; it leaves no room for personal circumstances that may have led the offending athlete, knowingly or through

culpable negligence, to contravene the doping ban. The rigorous practical consequences that result from the application of this system emerge from a very well reasoned recent decision of the CAS, which we refer to in its entirety in connection with this legal opinion.<sup>13</sup>

(b) The legal nature of the sanctions provided for

**(aa)** The Anti-Doping Code is not public law, but rather a set of rules forming part of the law of associations. Anyone who joins a private law association is subject, *ipso facto* and *ipso jure*, to the statutes and other texts that govern how the association functions. By the mere act of joining the association, such person, *implicitly or otherwise*, undertakes to abide by the standards of conduct contained in these texts and, as applicable, to submit to the sanctions the statutes impose for violations, to the extent that such sanctions are warranted.

When they join a sports federation and take part in sport competitions that are subject to the rules of international sports federations, athletes place themselves, *de facto*, in this legal situation. In doing so, they agree to bear a specific responsibility toward their federation and to behave in a manner that will serve the federation's ideals. It is incumbent on them, should the situation arise, to demonstrate, unequivocally and by serious and objective methods, that they were deliberately misled as to the tenor or the true content of a standard of conduct that they are accused of violating.

**(bb)** The authority, or the power, of an association to impose on its members standards of conduct necessary in order for the association to function properly is self-evident. This is the case for the *rules of the game* that are needed to run sport competitions, and the application of these rules is not, in principle, reviewable by a legal authority.

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<sup>13</sup> “Austrian skier” award of July 20, 2005.

The question of whether a sports association also has the authority, or the power, to lay down standards of conduct that have the character of *rules of law*, whose violation is sometimes punishable by harsh penalties entailing the restriction of personal liberty, has been debated for a long time.

(*α*) Whether a rule is a rule of the game or a rule of law will follow from the circumstances. Rules of associations that impose harsh penalties for specific types of conduct related to the sport, or for violations of the standards of conduct applicable in that domain where the violation is serious or repeated (*krass oder wiederholt*), are always rules of law. This is the case for rules that punish such conduct or violations by means of strict measures such as retroactive disqualification, invalidation of important results or suspension for a relatively long period of time. The purpose of such rules is clearly not just to ensure the smooth running of a game, but the pursuit of more general objectives of a higher order. The sanctions they provide for are truly in the nature of *statutory penalties* which have a negative impact on the legal interests of the person affected by them.<sup>14</sup>

(*β*) The right to set *punishment* and consequently the authority to codify and apply *rules of law that do so* are, in principle, the prerogative of the State.

It is nevertheless acknowledged that an association has the authority, or the power, to adopt rules of law that are punitive, on condition, *first*, that the relevant statutory texts frame these rules with sufficient clarity to allow the members subject to them to foresee the consequences unambiguously, and *secondly*, that their application be reviewable by an independent and impartial judicial authority.

The case law sometimes justifies this solution on the basis of the following considerations. The statutes of an association are a type of private constitution. That is why they can confer a certain disciplinary power on the authorities of the

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<sup>14</sup> Cf ATF (Official Reporter of Decisions of the Federal Tribunal) 103 I a p. 410; 108 II p. 15; 119 II p. 271; see also the “Turkish footballers” award of March 25, 2004, para. 4 and 5.

association. Accordingly, sanctions taken on this basis are *sui generis* institutions of private law. But the association cannot assume exclusive and autonomous authority to adopt punitive rules of law and apply them without the affected member having the opportunity to appeal to a judge. Conventional or statutory clauses that exclude such a right of recourse are null and incompatible with the protection of personality, which we will discuss later on.<sup>15</sup>

The expert fully subscribes to the conclusions of this reasoning even if the premises from which it starts may be open to debate.

(y) It is well settled that the judge appealed to may be an arbitrator, *on condition, first, that the arbitrator's jurisdiction be clearly agreed to, and secondly, that the arbitrator have the clear qualities of independence from and impartiality toward all parties, comparable to the independence and impartiality required of a state-appointed judge; this will be the case if there is no reason to fear, in concreto on the face of the subject matter of the dispute, that the arbitrator could be prejudiced against one or other of the parties.*<sup>16</sup>

(cc) The standards of conduct of the Anti-Doping Code and the sanctions for violating it are rules of law.<sup>17</sup> They no longer have anything to do with rules of the game properly speaking, irrespective of the fact that a number of acts of doping are committed in the course of sport competitions or at least in direct connection with the

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<sup>15</sup> Reference is made to two cantonal decisions which must be placed in the particular narrow context of the right to judicial review. The first of these decisions was handed down on December 22, 1987 by the Richteramt III of the canton of Berne (court of first instance); it acknowledges an athlete's right to obtain provisional relief from a doping penalty (SJZ/RSJ [*Revue suisse de jurisprudence*] 1988 (84), pages 85-88. The second decision was handed down on November 2, 1989 and February 13, 1990 by the Première Cour civile du Tribunal cantonal of the canton of Valais (highest cantonal court); it acknowledges the right of an athlete guilty of assaulting a referee to contest the suspension imposed on him before a judge. **We will refer to this case again when discussing how a suspension may be reconciled with section 27 SCC.**

<sup>16</sup> In accordance with the fundamental principles laid down by Article 30, paragraph 1 Cst., Article 6 paragraph 1 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950*, and Article 14, para. 1, second sentence of the *International Covenant on Civil and Political Rights of December 16, 1966*; these two documents were ratified by Switzerland and incorporated into its national law (RS 0.101 and 0.103.2).

<sup>17</sup> Unreported decision of October 31, 2003 para. 1.1.

holding of sport competitions. Indeed, the purpose of the anti-doping rules is to contribute toward ensuring, *in a general and universal manner for the present and for the future*, that games are played fairly, i.e., that all sport competitions take place on a fair and equitable basis (*das sportliche Wohlverhalten*).

The sanctions for acts of doping are true statutory *penalties* which are apt to have particularly serious consequences for the personal legal interests of the offending individuals. We say this by way of emphasizing – by tacit reference to constitutional control over the legality of restrictions on fundamental rights<sup>18</sup> – the fact that the *harsher* the sanction it provides for, the clearer (*klipp und klar*) an association's punitive rule must be.

**(dd)** Given the severity of the sanctions set out in the Anti-Doping Code or in the federation rules that already existed previously along similar lines, it is easy to understand how certain athletes, to whom such sanctions had been applied, appealed to the Federal Tribunal maintaining that *quasi-criminal*<sup>19</sup> sanctions had been imposed on them. That assertion, which may suggest that these sanctions exceeded the authority of the association concerned and which appeals to a concept foreign to Swiss positive law, prompts the expert to briefly examine the question of whether the sanctions set out in Article 10.2 of the Code do or do not have a criminal character. If they did, their formal validity could be in doubt in light of what was stated above in regard to the State's exclusive jurisdiction to prescribe punishment; in that case, it might not be enough to say – as is always maintained<sup>20</sup> – that these rules in the nature of criminal sanctions can apply as long as their application complies in all respects with the rules applicable in criminal law matters, such as the presumption of innocence and the maxim “*in dubio pro reo*”, and with all of the guarantees offered, *inter alia*, by Articles 5 and 6 of the European Convention for the Protection of

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<sup>18</sup> Article 36 paragraph 1 Cst.; cf in particular ATF 128 II 269.

<sup>19</sup> [footnote not used in original text]

<sup>20</sup> For example, in the legal opinion cited.

Human Rights and Fundamental Freedoms and the corresponding provisions of the United Nations International Covenant on Civil and Political Rights!<sup>21</sup>

We shall answer this question without discussion: the Anti-Doping Code is not a corpus of criminal law but strictly a set of rules of an association which encompasses a punitive system. The authority by which an association may set such rules, upon the conditions described above, derives not from public law but from private law.

*(ee)* However, employing a somewhat crude analogy, the traditional distinctions that Swiss *public* law makes between criminal law and disciplinary law, in accordance with the fundamental scheme of each system, can only lead to the conclusion that the Code's punitive provisions (*and in particular its Article 10.2*) have the character of disciplinary law. Their sole aim is to prevent or eliminate conduct that compromises the goals for which the association was created and which a would-be offender endorsed upon joining the association.

Given the severity of the *disciplinary* sanctions that Article 10.2 provides for, this conclusion does not exempt the association from the requirement of affording the affected athlete guarantees that are comparable to the minimal guarantees afforded an accused. *From a formal standpoint*, an offending individual must therefore be granted a satisfactory hearing before the sanction is imposed and the fundamental rules of procedural fairness must be observed in regard to that individual, as emphasized, moreover, by Article 7, paragraph 2, *letter d* of the European Anti-Doping Convention, cited above. *From a substantive standpoint*, the sanctions must not unduly infringe the fundamental rights and principles generally recognized in the law of persons and the domestic laws of States governed by law.

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<sup>21</sup> Unreported decision regarding the "Chinese swimmers" / FINA March 31, 1999, reproduced in Digest of CAS Awards II 1998-2000, pp. 767 and following.

3. The content of the fundamental rights and general principles of autonomous Swiss law that could be applied by arbitrators reviewing the application of Article 10.2 of the Code and that could come into play in the context of a limited review by the Federal Tribunal

(a) Introductory note

The quality of the right to a defence afforded an athlete affected by Article 10 of the Code is not as such in question here. Thus, the only issue to be resolved is whether the system set up by this statutory provision is compatible *in substance* with the fundamental rights and general principles of Swiss law.

The question of the substantive compatibility of the system under discussion with the general principles of the law of persons, as codified, *inter alia*, in a number of multilateral treaties, was examined in depth in the legal opinion referred to above. Even though – by virtue of the monistic system whereby treaties ratified by Switzerland are immediately incorporated into the legislation of that country – these multilateral (*self-executing*) treaties are an integral part of Swiss law, the expert will not go through that examination again. Indeed, he has no substantive reason to depart from the general conclusions of that opinion.

Accordingly, he will confine himself to considering whether the combination of strict liability and relatively fixed penalties that Article 10.2 of the Code sets up is compatible, in substance, with ***autonomous Swiss law*** to the exclusion of the law embodied in treaties that have been ratified by Switzerland and come into force for Switzerland. This review presupposes knowledge of both the content of the constitutional rights of personal liberty and economic liberty that may come into play and of their codification in the form of a legislative enactment, namely, Article 27 SCC.

(b) Personal liberty

**(aa)** Personal liberty is expressly guaranteed by Article 10, paragraph 2 of the Federal Constitution of the Swiss Confederation of April 18, 1999.<sup>22</sup> The Article provides that every human being is entitled to personal liberty, including his or her physical and psychological integrity and freedom of movement. Personal liberty is so entrenched in Swiss democratic society that when the Federal Constitution of May 29, 1874 (repealed on January 1, 2000), which did not talk about it, was still in force, a constitutional judge saw it as *an unwritten or implicit constitutional right*.

All individuals including foreigners who, for one reason or another, find themselves subject to Swiss authority are entitled to personal liberty. Personal liberty protects not only the physical and psychological integrity and privacy of a human person but also his or her freedom of movement, referred to more trivially as *the freedom to come and go*; it guarantees *respect for one's person*.

**(bb)** Regarding the rights that are inseparable from the natural conditions of human persons, the protection of one's person (or the right to respect for one's person) is an aspect of personal liberty that is constitutionally guaranteed. Thus, Articles 27 and 28 SCC, which protect a person from submitting to excessive commitments on the one hand and to unlawful harm on the other, tend to give concrete form to this fundamental freedom within the law ranking after the constitution.

To the extent that it punishes a first anti-doping rule violation by imposing a fixed penalty of two years' suspension, Article 10.2 of the Anti-Doping Code has *a major* impact on personal liberty from the perspective of the respect for one's person.

**(cc)** Among the various provisions of Articles 27 and 28 SCC, the only one that is relevant here is paragraph 2 of Article 27, which protects a person against himself or

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Cst.; RS 101.

herself by prohibiting that person from alienating his or her liberty or allowing himself or herself to be used in a manner contrary to laws and morals.

Article 27, paragraph 2 SCC guarantees, *inter alia*, the freedom to decide not to submit to harm resulting from a contract that is excessive and contrary to morals; no one can alienate his or her liberty by entering into an agreement in which he or she submits to the arbitrary will of the other party.<sup>23</sup> Naturally, this also applies in the case of statutory clauses that excessively restrict the personal liberty of the members of an association and unduly interfere in their private sphere.

In general, a commitment is not contrary to Article 27, paragraph 2 SCC for the sole reason that it is such as to compromise the debtor's<sup>24</sup> economic existence or results from his or her manifest inexperience or foolhardiness, in which case the question is to be resolved from a different angle, that of Article 21 CO. Indeed, a contract can only be considered contrary to morals on the basis of its content, not according to the means available to the debtor for performing the contract.<sup>25</sup>

Private law claims arising from the impairment of the personal interests protected by Article 27, paragraph 2 SCC, with the exception of patrimonial rights, cannot be assigned.

**(dd)** “[Translation] A statutory punitive clause that operated to place a constraint on the members of an association and directly prevent them from exercising a legitimate right would have to be declared null on the basis of Article 27, paragraph 2 SCC.”<sup>26</sup> But such a case of nullity would not be easily admissible having regard, *inter alia*, for the requirements of good faith, which shows up in the somewhat archaic solution proposed in the decision in which that *obiter dictum* was issued. Generally speaking, a statutory clause that restricts the liberty of the members of an association will only

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<sup>23</sup> H. Deschenaux/P. Steinauer, *Personnes physiques et tutelle*, Berne 2001, n. 311, 4th edition.

<sup>24</sup> ATF 95 II p. 57.

<sup>25</sup> ATF 84 II p. 27.

<sup>26</sup> ATF 44 II 77 para. 2.

violate good morals, within the meaning of Article 27 SCC, where it restricts the very essence of someone's personal liberty (*wenn sie betrifft den höchstpersönlichen Kernbereich einer Person*).<sup>27</sup>

By way of illustration, the decision of a medical association not to dispense medication in a particular region does not infringe the personality rights of its members.<sup>28</sup> Similarly, the ten-year prohibition to cancel an agreement for employers affiliated with an employee benefits foundation does not cross the boundary of Article 27 SCC.<sup>29</sup>

On the other hand, in the sports area, statutory provisions allowing a football club that terminates a player's employment contract to refuse to issue him the exit letter without which he is prevented from going to play for another club *for a two-year period* is not compatible with Article 27 SCC since it makes the decision in regard to its players transferring to another team subject to the discretion of the club.<sup>30</sup> In any event, an athlete's commitment to automatically submit to any sanction pronounced by the association to which he or she belongs, in a context outside the arena of competition, has not, as such, been judged negatively in the case law cited here, whether it be at the level of the Federal Tribunal<sup>31</sup> or the cantonal tribunals.<sup>32</sup> A careful reading of that case law reveals, on the contrary, that the only question that has preoccupied judges at the canton level, from the perspective of Article 27 SCC, has been the waiver in advance of all legal protection.

(c) Economic liberty

Article 27 Cst. guarantees economic liberty, a fundamental right seen as the subjective corollary of the standard of conduct that flows from the general principle

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<sup>27</sup> Cf ATF 129 III p. 209, para. 2.2.

<sup>28</sup> ATF 104 II p. 6, particularly para. 3.

<sup>29</sup> ATF 120 V p. 209.

<sup>30</sup> ATF 102 II p. 211, para. 6.

<sup>31</sup> *Passim* throughout this consultation.

<sup>32</sup> See note 15 *supra*.

of economic liberty enshrined in Article 94 Cst. In other words, it is the instrument available to individuals to require the action of the State in economic matters to respect, *in concreto*, the free market system.

The individual guarantee of economic freedom – which was, until recently, a unique feature of the Swiss constitutional system<sup>33</sup> – encompasses, *inter alia*, freedom to choose one's occupation, freedom of access to lucrative private economic activities and freedom to pursue such activities.

Article 27, paragraph 2 SCC, which, as we saw, gives quintessential concrete form to personal liberty, also tends to give concrete form to economic liberty.

(d) Brief outline of fundamental rights practice

**(aa)** In accordance with Articles 35 and 36 Cst, fundamental rights must be realized throughout the legal system by any person who assumes a task of the State. In addition, the authorities have a duty to ensure that fundamental rights are also realized in private relations, to the extent that they are amenable thereto. As already stated above, fundamental rights may only be limited by action of the State through statutory means, and the harsher the restriction the State seeks to impose, the clearer and more precise the statute must be. The restriction must also be warranted on the basis of a sufficient public interest or the protection of the fundamental rights of others. In accordance with the proportionality principle, a restriction of fundamental rights must not exceed what is necessary in order to safeguard the public interest being pursued.

**(bb)** Article 36, paragraph 4 Cst., which declares the essence of fundamental rights (*or the untouchable core of such rights*) to be inviolable, is the absolute limit upon the action of the State intervening in the private sphere of human beings; beyond that limit, individual liberty is untouchable and the action of the State is in principle

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J. P. Müller, *Grundrechte in der Schweiz*, 3rd edition, 633/634.

illegal regardless of the public interest reasons that may purportedly drive that action. This standard is undoubtedly more of a standard of identification of the State based on legal theory than an actual limit upon interventions of the public authorities in a given domain. The fact remains, however, that the concept it sets forth has a certain import in connection with this consultation; this will be explored in the chapter on the protection of public policy.

*(cc)* Article 5 Cst has elevated, *expressis verbis*, the principles of legality, public interest and proportionality, pivotal modalities in connection with the realization of fundamental rights, to the rank of principles comprising the very basis for the activity of a State governed by law.

For the purposes of this consultation, it is sufficient to briefly summarize the content of the proportionality principle, which is generally defined by the maxims of suitability (*or appropriateness*), necessity, and proportionality as such. In accordance with these maxims, which apply cumulatively, a measure that restricts fundamental rights is admissible only if it is suited to the achievement of the public interest objective sought (suitability or appropriateness), if no less intrusive measure is capable of achieving such a result (necessity) and if, in practical terms, the measure does not go beyond what is required for this purpose (proportionality as such).

*(e)* *The relative practical similarities between the modalities of application of Article 36 Cst. and the modalities of application of Article 27 SCC*

*(aa)* Articles 10 and 27 Cst. are there to protect individuals against the infringement, *inter alia* of their liberty to come and go and their liberty to practise an occupation, to which the activity of the State may give rise (*vertical fundamental rights effect*). In the case under consideration here, it is not the State that some would allege is threatening or violating that liberty through a legislative act or through a practical decision. It is a private law association that is the subject of the rebuke.

In the area being dealt with here, in the absence of a *direct horizontal effect* attaching to the fundamental rights referred to, the questions posed can only be fruitfully resolved from the perspective of Article 27, paragraph 2 SCC.

**(bb)** But this does not in any way weaken the conclusions we will come to. Indeed, in our personal experience, article 27, paragraph 2 SCC makes available to the private law judge assessment mechanisms which, in practice, function the same way as the mechanism which constitutional law makes available to the constitutional or administrative law judge ruling on the basis of proportionality.

Just as the State can restrict fundamental rights only through proportionate measures that are the only means of achieving the public interest objective sought, individuals can alienate their liberty by way of contract only to the extent that the overall scheme of the contract makes this necessary and provided the restriction concerned is in proportion to that need.

The practical analogy goes even farther. Just as Article 36, paragraph 4 Cst prohibits the State from touching, for more or less legitimate public interest reasons, the essence (untouchable core) of fundamental rights, individuals cannot alienate their liberty by way of contract or by way of statute in a manner that is contrary to morals or, to use somewhat unorthodox wording, in a manner intolerable to any reasonable subject of law.

(f) *Informal examination of the compatibility of Article 10.2 of the Code with fundamental rights and the concrete standard of Article 27, paragraph 2 Cst.*

The essential question to be answered in this connection is whether the system for sanctioning a first violation, established in Article 10.2 of the Code, respects the principle of proportionality applied, in accordance with Swiss principles, in one of the legal contexts that have just been described.

(aa) It is clear that this system is particularly strict and we are hard pressed to follow the nuanced assessment of it that was made by the Federal Tribunal in its decision of March 31, 1999 referred to above.<sup>34</sup> A penalty of two years' suspension imposed on an *amateur* athlete is perhaps benign to the extent, first, that the athlete remains free to practise his or her sport individually or in informal groups, and secondly, that the suspension does not deprive the athlete of the possibility of staying at the same level or improving his or her level in this manner. The situation is far different for a *professional* athlete. A two-year suspension will very often mean – in any case in sports where national and international performances go on regularly – the end of the athlete's career, or at least that he or she will go down in the rankings and find it hard to catch up having not had the opportunity of truly measuring himself or herself against the most talented competition in the field for the duration of the suspension period. In practical terms, the suspension gives rise to a “*Berufsverbot*” and that will always – in circumstances like these – compromise economic liberty in a grave and serious, even an irreparable manner.

The sanction is applied as soon as a Prohibited Substance is detected in the specimen of the athlete concerned. This strict liability is tempered by the possibility of adducing *exculpatory evidence*.

The sanction is for a set period of time (2 years for a first violation) and is imposed on an athlete who is unable to establish that he or she committed no fault or that the fault he or she committed is not significant; the minimum sanction in a case where the fault is not significant is also a set period of time, irrespective of the personal situation of the athlete and the personal circumstances that surrounded the commission of the act.

This is unusual. “*Relativizing the severity*” of the penalty that is applied (i.e., *weighing the sentence*) in light of the subjective elements of an offence was certainly not a given in the first codifications of penal law; *Beccaria* himself did not see it as a

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<sup>34</sup> para. 3 c, penultimate sentence.

decisive point of the reforms he recommended.<sup>35</sup> But, since those distant days, individualizing the penalty has become one of the “classical” domains where the proportionality principle is applied. We saw earlier that this is just as true for disciplinary penalties, of the kind under scrutiny, as it is for criminal sentences.<sup>36</sup>

**(bb)** It is important to point out, however, that this system, which, if it resulted from regulation by a public authority, would have to be considered susceptible of seriously infringing fundamental rights, was adopted in a universal context where its implementation was seen as indispensable, not only in the eyes of the collective organizations or officials of the various competitive sports but also in the eyes of the athletes themselves, who were concerned with preserving their occupation. The fact that the sanctions are contained in a document of an association which was the subject of broad consensus and which is attached to an inter-State convention endorsed by countries all over the world, is not insignificant. It means that an athlete who joins a federation that is a signatory knows exactly what he or she is committing to and agrees, in a deliberate manner, as many of his or her fellow athletes have done, that he or she may be the subject of an abrupt sanction. It also means that the “athletic world”, whose lengthy *global* experience cannot be ignored or relegated to secondary importance by an arbitral panel or a judicial authority acting in review, came to the conclusion that the system discussed was suited and necessary to the elimination of doping. Thus, the suitability and necessity of the rule being examined can scarcely be challenged.

The matter of *proportionality as such* is more delicate in connection with the informal examination being made here. Would it not be possible, in certain exceptional cases,

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<sup>35</sup> See his reflections on the pure objectivity of determining punishments in § XXIV of his famous treatise *Dei delitti e delle pene*; it is well known that the first French penal code adopted in September/October 1791, which followed the entire Beccaria model, proved to be impossible to apply, notably due to this flaw.

<sup>36</sup> Since we are discussing the theoretical foundations of modern law, it should be said here that proportionality has become a universal concept applicable to all areas of law; its essential significance is the same everywhere in that it governs the exercise of fundamental rights; see, for example, the decisions of the European Court of Justice in the 1976 *Peijper* case or the 2002 *Olazabal* case, in Reports p. 613, paras. 16 to 18; p. I-10981, para. 43.

to set the penalty at something less than the absolute one-year limit in order to take the personal situation of the offender into account, just as a criminal judge should do?

This way of looking at the matter is seductive. But it fails to take account of a number of factors. The Code's aim is to completely eradicate doping, which is acknowledged as potentially fatal for the future of large sports competitions. Even if deterrence does not justify every means, the punitive system, which also takes on a general preventative role, must be in keeping with what is at stake.<sup>37</sup> If the athletes themselves think, rightly, that this system is appropriate and necessary, that hardly leaves any room for criticizing it from the angle of proportionality as such, as ultimately embodied in Article 27 SCC. The athletes' endorsement can be explained on the basis that a more individualized solution would, in the ordinary course of things, result in disparities in treatment between offenders with powerful means of defending themselves and those without such means, and also that a harsh disciplinary measure of the kind Article 10, paragraph 2 of the Code provides for does not entail the societal scorn associated with a criminal sentence. And when all is said and done, there is nothing to prevent the sports authorities, if doping should one day be a marginal phenomenon, which is the objective sought, from modifying the punitive system of Article 10.2.

(*cc*) The prior and reasoned consent of the athlete is therefore of paramount importance in our view. Naturally, we cannot ignore the fact that a professional athlete can hardly be said to have any freedom of choice when, in order to start a career, he or she requests a licence and applies for membership in a federation. But the consent that is given at that time has to be considered an *enlightened consent*, if we can use the terminology of the law of medical acts here,<sup>38</sup> which it would be unthinkable to use in other respects, even by analogy. If the athlete's prior acceptance of the sanctions set out in Article 10.2 of the Code can be so characterized as

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<sup>37</sup> The reader may find it useful to refer again to the excellent CAS award of July 20, 2005 in the "Austrian skier" case, more particularly the Court's reasoning in para. 7.5 (esp. 7.5.4).

<sup>38</sup> Cf ATF 114 Ia 355 para. 4-7, 117 Ib 200 para. 2a; 119 II 458 para. 2.

enlightened consent, it is because the person concerned agrees to become a professional athlete, and in order to accede to that eminently public role, naturally agrees to abide by the “rules of the game” in the world he or she is entering, one of the most essential of which is fair play – the practical expression of the principles of fairness and equality of treatment – which holds it as an imperative that one refrain from using substances that can distort results. The interests of a loyal athlete can only coincide at that point with those of the association that will offer him or her the means to demonstrate his or her talent ... and ultimately, to make a living from it. This is an ethical rule that must apply to the athlete in a world where professional solidarity cannot be lacking. Accordingly, in this context of an association, there is no place for a requirement identical to the one that the constitutional system imposes on the State where it wishes to restrict personal liberty or economic liberty.

On the other hand, standards of an association that would be comparable to acts of the State infringing upon *the essence* of those fundamental rights, such as sanctions that society as a whole would perceive as injurious or degrading, would clearly not be admissible, in spite of the athlete’s prior acceptance. But experience shows that this is not the case for suspensions imposed on professional athletes for reasons such as those on which the Code is based.

*(dd)* Our attention was drawn to an *apparently* ambiguous point in the legal opinion referred to above. The opinion contains the statement that the system of Articles 10.2 and 10.5 of the Code could be incompatible with fundamental rights in particular factual circumstances, for example where an athlete absorbed a doping product relying on erroneous labelling on a perfectly legal product (numbers 168 and 169). This fear is unfounded. When an athlete obtains his or her licence and becomes a member of a federation or association, the athlete knows that he or she must be extremely attentive in order to avoid falling into this sort of “trap”. If he shows that he was not as attentive as he should have been and agreed to be, and if in addition the product is of a type that it can be seriously maintained that it might not have been possible for him to perceive what the effects of absorbing it during competition would

be, he will benefit – through the procedural mechanism of Article 10.2 – from the solutions of Article 10.5 for eliminating or reducing the penalty.

*(ee)* From the perspective of fundamental rights and general principles of Swiss autonomous law, it is ultimately – in the context just described – the practical quality of the defence available to the athlete concerned that is determinative.<sup>39</sup> We said that the quality of that defence is not in question; article 10 of the Code does not seem to “pose any problem” in this regard because it is at least possible for the article to be applied in accordance with the requirements we have discussed.

*(ff)* Based on an informal examination, the expert concludes that the system of sanctions established in Article 10.2 of the Code is neither disproportionate from the perspective of either personal liberty or economic liberty nor contrary to the personality rights protected by Article 27 SCC.

4. The scope of the means of defence available to persons seeking to allege that a sanction based on Article 10.2 of the Code and its confirmation by arbitrators is injurious to their interests legally protected by these rights and principles of autonomous Swiss law, and the definition in Swiss law of the concepts of arbitrariness and public policy

- (a) *The right of appeal to an arbitral tribunal*

***(aa) The ordinary appeal to the Court of Arbitration for Sport (CAS)***

International sports federations have chosen to submit their decisions in matters of doping to arbitration by the *Court of Arbitration for Sport (CAS)*.

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<sup>39</sup> See in particular the review of international arbitral awards of the CAS by the Federal Tribunal as regards procedural grievances allowed under Article 190 PILS and as regards public policy in procedural matters in the unreported decisions regarding the “Italian cyclists” of June 20, 2000, the “Portuguese footballer” of June 11, 2001 para. 2 d.

The CAS, which is based in Lausanne, was created on June 30, 1984 to resolve sports-related disputes. It does not have juridical personality. Its organization was the subject of a major reform in 1994, with the essential aim of guaranteeing that it be as independent as possible. The *International Council of Arbitration for Sport (ICAS)*, which is a Swiss private law foundation within the meaning of Articles 80 and following SCC and, consequently, does have juridical personality, was created on that date. The mission of that institution, which is also based in Lausanne, is to promote the resolution of sports-related disputes through arbitration or mediation and to safeguard the independence of the CAS and the rights of the parties. The CAS is under the administrative and financial authority of the ICAS.

The CAS sets up *panels*, composed of its members, which are entrusted with settling disputes that arise in the field of sports. The Federal Tribunal has acknowledged that these panels may be considered true arbitral tribunals where an international sports association has appointed the CAS as the appellate body that is to examine the validity of the sanctions pronounced by the association's officials.<sup>40</sup>

A document called the Statutes of the Bodies working for the Settlement of Sports-related Disputes, established by the ICAS in conjunction with a set of Procedural Rules forming part of the Statutes, came into force on November 22, 1994. The text of this document is generally referred to as the *Code of Sports-related Arbitration* (hereinafter **the Code of Arbitration**). Article R 59, paragraph 4 of the Code of Arbitration provides that CAS awards may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in particular at the outset of the arbitration.

Where that is not the case, CAS awards can be referred to the Swiss Federal Tribunal for review by way of the recourse available under public law, on the twofold

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<sup>40</sup> ATF 119 II p. 271 para. 3b; 129 III p. 445 para. 3.2.

condition that the award qualifies as an international arbitral award, within the meaning of Articles 176 and following of the Swiss Private International Law Statutes (“PILS”), and is concerned with issues of law, in other words that it is not solely concerned with the rules of the game, the application of which rules, as we have seen, is not, in principle, reviewable by a legal authority.<sup>41</sup> It should be recalled that Article 176 PILS, which defines the scope of that statute on the basis of extraneous criteria, states that its provisions apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and at least one of the parties, at the time the arbitration agreement was entered into, did not have its domicile or habitual residence in Switzerland.

Article R 58 of the Code of Arbitration provides that a panel of arbitrators asked to decide an appeal from a sanction imposed on an athlete by a federation that acknowledges the Code’s jurisdiction is to decide the dispute according to the applicable regulations and the rules of law chosen by the parties. Where the parties have not chosen the rules of law that are to apply, the arbitrators are to decide the dispute according to the law of the country in which the sports-related body which has issued the challenged decision is domiciled or according to the rules of law the application of which the arbitrators deem appropriate. This means that where no choice of law is made by the parties, arbitrators will in many cases decide disputes according to Swiss law because, as the commissioning Agency points out, a large number of international sports federations have their seat in Switzerland.

***(bb) Appeals to arbitral tribunals established on an ad hoc basis pursuant to Article 13.2.2 of the Code or to the CAS acting as a domestic arbitrator***

The possibility that, in given circumstances, sports associations could resort to *ad hoc* arbitration whose procedure would be governed by the Intercantonal Concordat on Arbitration referred to above, or that the said Agreement would have to be applied by the CAS acting as a domestic arbitrator, is not ruled out.

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<sup>41</sup> ATF 103 I a p. 410; 108 II p. 15; 118 II p. 15 para. 2; 119 II p. 271, para. 3.

Article 1, paragraph 1 of the Intercantonal Concordat on Arbitration applies to any procedure brought before an arbitral tribunal whose seat is located within the territory of one of the cantons that is a signatory of that Agreement. Article 31, paragraph 3 of the Agreement provides that the arbitral tribunal is to decide a dispute according to the rules of the applicable law, unless the parties, in the arbitration agreement, authorized the dispute to be decided on the basis of equity. For the purposes of this consultation, it would serve no purpose to delve further into the concept of equity. It suffices to say that the legality of sanctions imposed by sports federations pursuant to Article 10.2 of the Anti-Doping Code could, in given circumstances, be examined in light of Swiss law and the general principles on which it is based.

(b) *The subsequent recourse to the Swiss Federal Tribunal to quash an arbitral award (recourse available under public law)*

An award of the CAS or an *ad hoc* arbitral tribunal asked to decide an appeal of a disciplinary sanction imposed on an athlete by an association on the basis of Article 10.2 of the Anti-Doping Code can in turn be referred to the Swiss Federal Tribunal for review by way of the recourse available under public law.

(aa) ***Introductory note concerning the recourse available under public law in an arbitration matter***

This legal avenue is examined hereinafter only insofar as it allows the Federal Tribunal to review the *substantive issues* raised by an award.

The right of appeal from an arbitral award available under public law is a *sui generis* remedy inasmuch as such appeals are strictly limited either by the Intercantonal Concordat on Arbitration for awards rendered within the scope of that Agreement (review of “domestic” awards) or by the Swiss Private International Law Statutes (review of “international” awards).

Such appeals available under public law must also meet the admissibility conditions for *public law remedies for violation of the constitutional rights of citizens* within the meaning of Articles 84 and following of the Federal Code of Judicial Organization of December 16, 1943.<sup>42</sup> In this regard, the expert will refer, *in fine*, only to the issue of the capacity to proceed (active legitimacy).

**(bb) Appeal from an award rendered by a domestic arbitrator**

**(a)** A “domestic” award issued by an *ad hoc* arbitral tribunal can be challenged by way of an action in nullity before the superior court of ordinary civil jurisdiction of the canton where the seat of the arbitration is located (generally referred to as the *Cantonal Court*). Such court can review the substantive validity of the award only on the basis of Article 36, *letter f* of the Intercantonal Concordat on Arbitration, i.e., on the grounds of arbitrariness.<sup>43</sup> That being the case, the court will intervene only if the challenged award is based on findings that are patently at odds with the facts resulting from the case or if the award amounts to a clear violation of the law and of equity. So, leaving aside the issues of fact and equity which are beyond the scope of this consultation, a recourse to the Canton Court, based on Article 36, *letter f* of the Intercantonal Concordat on Arbitration, on appeal from an award of an *ad hoc* arbitral tribunal that was in turn asked to decide an appeal from a decision to suspend an athlete based on Article 10.2 of the Anti-Doping Code, cannot challenge the substantive validity of such award on any basis other than arbitrariness. Thus, insofar as the application of the law is concerned, the award will only be set aside if it is in flagrant violation of the law or contains a patently unsustainable interpretation of a rule. The concept of arbitrariness under Article 36, *letter f* of the Intercantonal Concordat on Arbitration is in fact the same concept as the one under Article 4 of the old Federal Constitution and Article 9 of the current Constitution.<sup>44</sup>

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<sup>42</sup> OJ; RS 173.110.

<sup>43</sup> See *inter alia* on this topic the general textbook of P. Jolidon, *Commentaire du Concordat suisse sur l'arbitrage*, pages 506 and following.

<sup>44</sup> ATF 115 II p. 103 para. 2.

(β) The decision of the highest judicial authority for the canton can in turn be challenged before the Federal Tribunal, not by way of an action in nullity within the meaning of Articles 68 and following of the Federal Code of Judicial Organization, but by way of a recourse under public law.<sup>45</sup> Such recourse has practically no chance of succeeding in light of the limitation on review imposed by the Federal Tribunal. At this point it suffices for the expert to refer to his own analysis of the review power<sup>46</sup> in question, which analysis appears to have contributed in some measure to the development of the current case law on the matter.<sup>47</sup>

***(cc) Appeal from an “international” arbitral award***

If an “international” award originates with the Court of Arbitration for Sport, the Federal Tribunal will exercise this review power under Article 190, paragraph 2, *letter e* PILS pursuant to which the award may be challenged when it is incompatible with public policy.

***(dd) The capacity to challenge an award before the Federal Tribunal***

Before we go on to examine the concepts of arbitrariness and public policy, it is appropriate to note that the capacity (active legitimacy) to proceed before the Federal Tribunal by way of a recourse under public law is determined solely on the basis of Article 88 of the Federal Code of Judicial Organization.

As a recourse under public law gives rise to new proceedings which are formally independent of the proceedings below, the fact that the applicant had the necessary capacity to proceed before the lower authority will not always suffice to ensure recognition of the right to bring the matter before the Federal Tribunal. It must be

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<sup>45</sup> ATF 119 II p. 190.

<sup>46</sup> C. Rouiller, *La protection de l'individu contre l'arbitraire de l'État*, in *Revue de droit suisse* 1987 II p. 365 to 368.

<sup>47</sup> Cf P. Lalive, J.R. Poudret and C. Raymond, *Le droit de l'arbitrage interne et international en Suisse*, p. 207, top of the page.

established – and the same condition also applies to appeals from arbitral awards<sup>48</sup> – that a personal, current, substantive, legal interest of the applicant is directly affected by the decision being challenged.

On that basis, it follows that an arbitral award confirming or overturning a sanction based on Article 10.2 of the Anti-Doping Code can be appealed by way of a recourse under public law either by an athlete whose penalty was confirmed or by a federation or organization whose punitive decision was invalidated or modified. A recourse under public law against a civil judgment dealing with a sanction or exclusionary measure by an association can be brought by either side in the dispute. There is no reason why things should be different where a decision dealing with a matter of this kind is rendered by an arbitral tribunal. The question of whether WADA, insofar as it was a party to the arbitral proceedings along with an association or federation, can also bring such a recourse must, in our view, be resolved in the same way, and there is no need to pursue this question further here.

***(ee) The concept of arbitrariness under Article 36, letter f of the Intercantonal Concordat on Arbitration***

*The prohibition against arbitrary conduct* is a rule of general conduct; it is imposed *implicitly* on anyone holding power. *The protection against arbitrary conduct* is the fundamental right which is *expressly* guaranteed by the constitution to every citizen subject to an administrative authority or the jurisdiction of a court who is wronged by the violation of that rule of general conduct. These concepts are too well known within the Swiss legal system, and for some decades now also within the other continental legal systems,<sup>49</sup> for the expert to dwell on them further. Suffice it to say that a decision is arbitrary when it is patently unsustainable, that is to say when it is manifestly at odds with the actual situation, is in flagrant violation of a rule or a clear

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<sup>48</sup> Myriam Gehri, *Die Anfechtung internationaler Schiedssprüche nach IRP – eine Analyse der bundesgerichtlichen Rechtsprechung*, published in *Internationales Zivilprozess-und Verfahrensrecht IV*, p. 81, ch. 3.

<sup>49</sup> Cf for example “Willkürbegriff” in German law and “détournement de pouvoir” in French law.

and settled legal principle or offends the sense of justice and fairness. Arbitrariness is not illegality; it is qualified illegality. An interpretation which is contrary to a clear text of law that admits of one *reasonable* interpretation only is an arbitrary interpretation; so is an interpretation which is compatible with a clear text of law but where the result that it leads to is clearly contrary to the intent and purpose of the text. But an *admissible* interpretation of a text of law is not arbitrary, even if that interpretation is far from the most judicious one.

Insofar as the prohibition of violations that offend the sense of justice and fairness are concerned, the protection against arbitrary conduct appeals to notions of natural law in which this fundamental right is deeply rooted. Keeping to the framework of this consultation, we can say, roughly speaking, that a solution is not arbitrary just because it is wrong or unfair; it is arbitrary only if it is so wrong or gives rise to such injustice that any citizen with ordinary sensitivity subject to an administrative authority or the jurisdiction of a court would find it untenable.<sup>50</sup>

***(ff) The concept of public policy under Article 190, paragraph 2, letter e PILS***

The concept of public policy is one of the broadest and most imprecise notions of legal theory.<sup>51</sup>

***(a)*** The concept covers, first and foremost, what is commonly referred to as *international public policy*, which is the sum of the peremptory norms of general international law, *jus cogens*, defined in Article 53 of the Vienna Convention on the Law of Treaties of May 23, 1969, which Convention came into force for Switzerland on June 6, 1990.<sup>52</sup> The said article provides that a norm that is accepted and recognized by the international community of States as a whole as a norm from which

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<sup>50</sup> For the remainder, we refer the reader as regards the concept of arbitrariness to our paper which appeared in a collection of writings that was published when the new constitution came into force, *Droit constitutionnel suisse/Verfassungsrecht...* p. 677 ss § 42.

<sup>51</sup> See also, for this concept, the general textbooks of T. Rüede/R. Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht: nach Konkordat und IRPG*, 2nd edition, pages 373 and following; J.F. Poudret/S. Besson, *Droit comparé de l'arbitrage*, pages 809-819.

<sup>52</sup> RS.0.111.

no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character is a *jus cogens* norm.<sup>53</sup> Article 64 of the Vienna Convention adds that if a new norm in the nature of *jus cogens* emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

We are not in a position to measure the concrete or global effects of these provisions on the practice of international tribunals, but there can be no doubt that they describe, in practical terms, a hierarchy of sources of international law.<sup>54</sup> It suffices to refer in this regard to certain norms of the European Convention on Human Rights and the United Nations International Covenant on Civil and Political Rights, such as those that prohibit slavery, servitude, torture or cruel, inhuman or degrading treatment or punishment, or provide that punishment can only be prescribed for an act that constituted an offence at the time it was committed,<sup>55</sup> norms from which no departure is (or should be!) possible even in the event of war or exceptional public danger.

The notion of *jus cogens* does not appear to play a truly major role in the case law of the Swiss Federal Tribunal; it has nevertheless been used *effectively*, for example to extend to a person being sought by a State, with which Switzerland had a bilateral treaty, the “*broad protection*” contemplated by Article 3, number 2 of the European Convention on Extradiction made in Strasbourg on March 17, 1978.<sup>56</sup>

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<sup>53</sup> It can be seen that *jus cogens* has nothing to do with the concept of public policy that is safeguarded *inter alia* by European Community law, for example, in Article 2, paragraph 1 of *Directive 64/221*; indeed this public policy justifies waiving the rights of individuals in order to safeguard the essential public interest of the State; see Ali Kizildag, *Les mesures restrictives justifiées par l'ordre public en droit communautaire et en droit suisse*, in RDAF 2004 469 and following, especially 474-478; the public policy that we are attempting to define here includes norms that protect individuals (citizens) against the execution of foreign judgments or that allow such individuals to challenge the validity of an international judgment by a national proceeding, precisely by invoking, *inter alia*, their fundamental rights.

<sup>54</sup> Jean François Aubert, *Observations d'un constitutionnaliste sur l'évolution des sources du droit international*, in *Annuaire Suisse de droit international* (ASDI, vol. IVVI/1989, p. 17; the author refers, by analogy, to the hierarchy between domestic constitutional law – which guarantees overriding fundamental rights – and statute law.

<sup>55</sup> Articles 3 and 7 *ECHR*, Articles 7 and 15 of the *Covenant*.

<sup>56</sup> RS 0.353.1.

(β) In order to try to provide an approximate definition of public policy in the different sense of Article 190, paragraph 2, *letter e* PILS, we must first observe that this notion was brought into the PILS in order to indicate that the power of the Federal Tribunal to review the substantive validity of an international arbitral award was even more limited than the power that the Tribunal had to review domestic arbitral awards based on the already strict ground of arbitrariness, as prohibited at the time by Article 4 Cst and now by Article 9 Cst. This public policy is not international public policy but rather Swiss public policy or more precisely *Swiss public policy in international matters*, as referred to in the clauses setting forth an exception, contained, *inter alia*, in Article 1, *letter e* of the Geneva Convention on the Execution of Foreign Arbitral Awards of September 26, 1927,<sup>57</sup> 5, paragraph 2, *letter b* of the New York Convention on the Recognition and Execution of Foreign Arbitral Awards of June 10, 1958,<sup>58</sup> and 27, paragraph 1 of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of September 16, 1988.<sup>59</sup> All of these norms refer to the *public policy of the country* and the first likens this notion to the “*principles of the law of the country in which [the arbitral award] is sought to be relied upon*”. It is this notion from the law of persons that Article 190, paragraph 2, *letter e* PILS is referring to.<sup>60</sup> The exception based on Swiss public policy in international matters must, according to legal scholars, allow for the possibility of not extending judicial protection to situations that clash with the most essential principles of the legal system of a State governed by law. The Federal Tribunal can apply this (highly imprecise and blurry!) concept to a concrete situation only after objective consideration of the outcome that will ensue if the award is examined by an executing authority in light of the law of the country where that execution will take place; rules of law that diverge from autonomous Swiss law rules may dominate that assessment, as Switzerland does not have to impose the concepts

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<sup>57</sup> RS 0.257.111.

<sup>58</sup> RS 0.277.12.

<sup>59</sup> RS 0.275.11.

<sup>60</sup> Cf Lalive ... P. 427-432; M. Gehri, *op. cit.*, pp. 78 and 99 ff; Bernard Corboz, *Le recours au Tribunal fédéral en matière d'arbitrage international*, in *Semaine judiciaire*, Vol. 124/2002, pp. 25 to 28; H. P. Walter, *Praktische Probleme der staatsrechtlichen Beschwerde gegen internationale Schiedsentscheide* (Article 190 IRPG), in *Bulletin ASA*, Vol. 19/2001, p. 19/20; T. Rüede/R. Hadenfeldt.

of its legal system on the entire world.<sup>61</sup> **Thus, the exception based on public policy can only appeal to fundamental values that enjoy very broad acceptance in the law of democratic countries.**

(γ) The case law makes a distinction between procedural public policy and substantive public policy. *Procedural public policy* relates to fundamental principles of the law of procedure insofar as they guarantee the parties the right to an independent and impartial ruling on the conclusions and the facts that were submitted to the tribunal (principles of *fairness* and right to a fair hearing). An arbitral award violates procedural public policy where the proceeding that led to its issuance offends the sense of justice in a manner so unacceptable that the award seems incompatible with the essential values acknowledged by a State governed by law.<sup>62</sup> *Substantive public policy* relates to fundamental principles of substantive law, such as – and these are age-old jurisprudential examples – “*pacta sunt servanda*”, respect for the rules of good faith, the idea that a right must not be abused, the ***prohibition of discriminatory or confiscatory acts***, and the protection of persons who are civilly incapable. An arbitral award violates substantive public policy when the result it entails violates such principles to the degree that it is no longer reconcilable with the Swiss legal system and the system of values on which that legal system is based.<sup>63</sup>

(δ) Articles 17 (*exception based on Swiss public policy*) and 18 (*application of mandatory provisions of Swiss law*) PILS also establish a subtle distinction between *negative public policy* and *positive public policy*. The exception based on Swiss public policy contained in Article 17 PILS is a general limitation on the theory of incorporation enshrined in Article 154, paragraph 1 of the PILS. This exception, referred to as a negative exception, allows a judge, on an exceptional basis, not to apply a norm of the foreign substantive law where the result would clash irreconcilably with morals and the sense of law in Switzerland (*negative public*

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<sup>61</sup> ATF 125 III p. 447 and following, para. 3 d; 126 III p. 538, para. 2 c; 128 III p. 198, para. 6 b.

<sup>62</sup> ATF 126 III 249 para. 3 b; 128 III 194 para. 6b.

<sup>63</sup> ATF 120 II 155 para. 6 a; 128 III 194 para. 4a.

*policy*).<sup>64</sup> Article 18 PILS touches on the positive aspect of public policy, creating an exception based on mandatory provisions of Swiss law which, in light of their particular objective, are to apply irrespective of the law designated as applicable to the case. Laws of immediate application are, as a rule, mandatory provisions which are most often driven by essential social, political or economic interests (*positive or formative public policy*).<sup>65</sup> In decision 120 II 155 referred to above, the Federal Tribunal pointed out that public policy, in the sense of Article 190, paragraph 2, *letter e* PILS, merely operates to reserve the right not to apply an incompatible provision, which means that it has a protective function only (negative public policy) and that it has no normative effect on litigious legal relationships (positive public policy). That is why, in the decision of the “Chinese swimmers”, which is determinative for the outcome of this consultation, the Federal Tribunal, in paragraph *c*, refers only to protection by the negative public policy provision of Article 190, paragraph 2, *letter e* PILS.

(*ε*) In his article referred to above, former federal judge Walter makes three comments which are important for purposes of defining the practical reach of substantive public policy, which is, accordingly, understood to mean negative public policy:

- *an arbitral award can only be attacked on the basis of Article 190, paragraph 2, letter e PILS, if the result and not just the reasons for the award are contrary to public policy (ATF 116 II p. 534 para. 4 b; 120 II p. 155 para. 6 c/cc);*
- *the exception based on public policy plays a defensive role (Abwehrfunktion) only, which means that its infringement by an international arbitral tribunal can result only in the dismissal of the tribunal’s award, but not in the substitution or replacement of the award by a positive solution that would be compatible with public policy (“als defensive Norm in diesem Sinne ist er den Parteien bloss Schild nicht aber Lanze”);<sup>66</sup>*
- *only an award that infringes Swiss law in a qualitative and untenable way is incompatible with public policy.*

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<sup>64</sup> ATF 120 II p. 155 para. 6.

<sup>65</sup> ATF 117 II p. 494 para. 7; 128 III p. 201 para. 1.

<sup>66</sup> ATF 120 II p. 155 para. 6 a; 121 III p. 331 para. 3 a; 126 III p. 249 para. 3 b.

This last remark affirms the distinction to be made between the concept of arbitrariness in applying the law and the concept of incompatibility with public policy. Asked to say whether an award is or is not compatible with public policy, the Federal Tribunal does not have to ask whether the arbitral tribunal applied the relevant law fairly or unfairly, *or even whether it made an obvious or gross error in doing so*; it has only to say whether the legal solution arrived at in the impugned award is tenable from the perspective of the fundamental norms of Swiss law, which should ordinarily, objectively speaking, be recognized internationally. Such an argument is, strictly, the only substantive argument that can be raised by a party to an arbitral proceeding under Article 190, paragraph 2, *letter e* PILS.

(c) *The consequence of the limits of the Swiss Federal Tribunal's power of substantive review of arbitral awards for the question at hand*

**(aa)** We saw that Article 10.2 of the Code could withstand an informal examination of its compatibility with fundamental rights and general principles of Swiss law. If one were to challenge that opinion, one would have to acknowledge that the penalty of two years' suspension imposed on an athlete in accordance with that rule of an association was neither arbitrary (if the penalty had been affirmed by a "domestic" arbitrator applying Swiss law) nor contrary to public policy (if the penalty had been affirmed by an "international" arbitrator applying international law or Swiss law).

A punitive rule adopted in the area under study would undoubtedly be arbitrary or even contrary to public policy if it were prejudicial to the essence (*or the untouchable core*) of fundamental rights, and to a corresponding degree, infringed the personality rights protected by Article 27 SCC.

The principle of proportionality (the infringement of which principle the Federal Tribunal will examine from the perspective of arbitrariness only when it is invoked *in*

*an isolated manner*<sup>67</sup> in the context of a challenge to a domestic decision) is, moreover, not *in itself* a public policy norm. Thus, a sentence that is too heavy will not, in principle, be contrary to public policy; it will only be contrary to public policy if it exceeds the ultimate boundary that was just established.

**(bb)** The limits that Article 10.2 of the Code places on the discretion that the competent body has to review the circumstances in punishing acts of doping were freely agreed to by the athletic community. Furthermore, this punitive system is deliberately agreed to by every athlete upon obtaining his or her licence. Such a personal commitment is, in any event, not contrary to public policy even if it stands to very seriously affect the private sphere of an individual on whom a sanction is imposed; it is – as we saw – compatible with the protective norm of Article 27 SCC.

The public interest to be safeguarded imposes the strict solution of a fixed punishment that incorporates certain attenuating mechanisms. Introducing exculpatory or attenuating mechanisms other than those that the Code provides for, or taking general personal circumstances (*such as the athlete's family situation*) or specific occasional personal circumstances ("*I did it because I wanted to celebrate the birth of my son with a win*") into consideration, would compromise WADA's mission, the legitimacy of which mission is recognized worldwide; it would lead, in any case, to serious discrimination depending on the respective means available to athletes who were implicated.

**(cc)** This of course presupposes that the rights of the athlete to a defence are fully respected, that is, *first*, that the athlete is always at liberty to try to invoke the exculpatory provision of Article 10.2, paragraph 2, of the Code and to adduce any evidence that could demonstrate that his or her conduct warranted a reduced penalty in accordance with Article 10.5 of the Code, *and secondly*, that the athlete has the

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<sup>67</sup> that is, alone and not as one modality in connection with the restriction of a particular individual freedom.

unqualified right to appeal the punitive decision to an arbitrator who is independent from and impartial toward all parties.

V. **THE ANSWER**

*This answer is to be read strictly in conjunction with all of the reasoning developed above under numbers III and IV.*

**(a)** In spite of its severity, the system providing for a fixed two-year suspension applicable – *subject only to the exculpatory evidence and limited attenuating mechanisms set forth in Articles 10.2, paragraph 2 and 10.5 of the Code* – in the case of a first anti-doping violation is compatible with the fundamental rights and the general principles enshrined in or recognized by autonomous Swiss law; the athlete's fundamental rights with respect to a defence would of course have to be respected, which the Code requires at least implicitly.

**(b)** A sanction properly imposed under Article 10.2 of the Code could not, *a fortiori*, be considered *arbitrary* pursuant to Article 36, *letter f* of the Intercantonal Concordat on Arbitration or be held *contrary to public policy* under Article 190, *letter e* PILS owing to the system of fixed punishment with attenuating mechanisms implemented by this rule of an association.

**CH-1905 Lutry, October 25, 2005**

*Prof. Dr. Claude Rouiller*