



The original text of this legal opinion is in French (it is however to be noted that WADA sent its questions to Judge Costa in English). In the event of any conflict between the English and French versions, the French version will prevail. The first part of this document is the legal opinion written by Judge Costa based on the second draft of the International Standard for Code Compliance by Signatories (ISCCS). Following the adoption of the third and final draft of the ISCCS – which incorporated his comments – by WADA’s Executive Committee and Foundation Board on 15-16 November 2017, Judge Costa wrote the addendum at the bottom of this document.

Opinion for the World Anti-Doping Agency (WADA), September-October 2017

Final Version

Origin and subject of the opinion: this opinion was requested by Mr. Julien Sieveking, Director of Legal Affairs at WADA, by letter dated 21 August 2017. This opinion, which I accepted to draft, addresses the compatibility of the draft International Standard for Code Compliance by Signatories (ISCCS) with accepted international law and human rights principles.

Author of the legal opinion: My name is Jean-Paul Costa, former President of the European Court of Human Rights (ECHR) and current President of the René Cassin-IIDH Foundation, situated at 3 Impasse des Charpentiers, in Strasbourg, France. I provide this opinion in my personal capacity as a consultant and my opinions are only binding on myself.

WADA’s question of 2 September 2017 (original version)

1. Is the sanctioning regime set out in the draft International Standard for Code Compliance by Signatories (version 2.0, dated 1 September 2017), compatible with accepted principles of international law and human rights?

Without seeking to limit in any way the scope of your review in considering this question, your attention is respectfully directed, in particular, to the following points/features of the sanctioning regime in the Standard:

- The fact that World Anti-Doping Code (Code) compliance by Signatories is so crucial to the objectives of the World Anti-Doping Program.

- The fact that the draft International Standard for Code Compliance by Signatories offers Signatories the support and guidance of WADA in achieving full Code compliance (ISCCS Articles 7 and 8) and full and fair notice of and opportunity to cure any non-compliance before any formal action is taken (Articles 8 and 9), subject only to the fast track procedures where urgent action is required to protect a sport or event (Article 9.4).
- The fact that, in case of dispute, WADA cannot declare non-compliance and impose sanctions and reinstatement conditions unilaterally, but instead must refer the case to an independent arbitral tribunal for determination (the Court of Arbitration for Sport, or CAS), with WADA bearing the burden of proving the alleged non-compliance and the appropriateness of the proposed sanctions and reinstatement conditions, and with other Signatories who may be affected by the proposed sanctions having a right to intervene and participate in the proceedings (Article 10).

Your attention is respectfully drawn, in this context, to:

- The potential types of sanction listed at ISCCS Article 11.1, including sanctions that, in protecting public confidence in the integrity of sport, may directly and adversely impact persons who were not responsible for the Signatory's non-compliance. In particular:
 - In cases of serious non-compliance by an International Federation, the athletes/athlete support personnel from its sport will be adversely impacted if the sport is excluded from editions of the Olympic Games/Paralympic Games/other events.
 - In cases of serious non-compliance by a National Anti-Doping Organization (NADO), representatives of the National Olympic Committee/National Paralympic Committee from that country, and/or athletes/athlete support personnel from that country, will be adversely impacted if that country is excluded from editions of the Olympic Games/Paralympic Games/other events.

(Your attention is respectfully drawn, in this context, to the CAS decisions in BWF v IWF, CAS 2016/A/4319; ROC v IAAF, 2016/O/4684; and RPC v IPC, CAS 2016/A/4745 (copies of which are attached).

- The provision contemplating that athletes whose country has been excluded from an event may be permitted to participate in that event as 'neutral' athletes, if they can demonstrate that they are not tainted by the NADO's failure (e.g., because they have been subject to a credible testing program) and therefore can participate without undermining public confidence in the integrity of the event (ISCCS Article 11.2.4). See IAAF Competition Rule 22.1A.
- The principles relevant to the determination of the consequences to be applied in a particular case, as set out at ISCCS Article 11.2, including:

- The stated role of impact of non-compliance in determining consequences, including the categorization of instances in non-compliance, in descending order of gravity, as 'Critical', 'High Priority', and 'Other'.
 - The stated role of fault in determining consequences. In particular, the role of Aggravating Factors, which (only in cases of non-compliance with Critical requirements) would likely lead to an increase in consequences, and possibly even imposition of a fine.
- The inclusion in Annex B, as a guide and as an aid to consistency and predictability, of 'starting point' consequences for different types of case (involving non-compliance with Critical, High Priority, or Other requirements), with the express acknowledgment that it may be appropriate to vary within or even depart from the consequences specified in Annex B when the facts of the particular case so warrant (Art 11.2.9 and Annex B).
- The fact that in serious cases, certain of the sanctions specified in Annex B may continue after the Signatory has satisfied all of the reinstatement conditions and been reinstated as a fully compliant Signatory (the purpose being to punish the previous non-compliance and to educate and deter that and all other Signatories from such serious non-compliance).

Additional questions from WADA dated 3 October 2017 (original version)

2. Is it compatible with accepted principles of international law and human rights to provide that in the event that WADA's assertion of non-compliance and/or its proposed consequences and/or reinstatement conditions are disputed by the Signatory, the dispute shall be heard and determined by a single instance CAS proceeding, with the only right of appeal/challenge therefrom being the right to challenge the arbitral award before the Swiss Federal Tribunal on the grounds set out in Article 190(2) of the Swiss Federal Private International Law (see Code Article 23.5.6 to 23.5.8)?
3. Given the provision that WADA and the Signatory each choose one arbitrator to sit on the CAS Panel hearing their dispute, with those two arbitrators then choosing a third to chair the Panel, is it compatible with accepted principles of international law and human rights (a) to recommend that the parties select the arbitrator from a list of anti-doping specialist arbitrators designated by the CAS; and (b) to require the two arbitrators selected by the parties to choose the chair from that list of anti-doping specialist arbitrators designated by the CAS? If use of such a list is permitted, is there a minimum number of arbitrators that should appear on that list?
4. Is the fact that WADA has to prove the non-compliance it has asserted, and the appropriateness of the consequences and/or reinstatement conditions it has proposed, on the balance of probabilities, rather than to the 'comfortable satisfaction' of the CAS Panel (see Code Article 23.5.6), compatible with accepted principles of international law and human rights?

We note in this regard that Code Article 3.1 requires an Anti-Doping Organization to prove its assertion that an athlete has committed an anti-doping rule violation 'to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt'. It originates from the decision of the CAS Panel in *Korneev and Gouliev v IOC*, CAS (Atlanta) no 003-4L, award dated 4 August 1996, which was based at least in part on the fact that 'the nature of the offence is one of strict liability if a prohibited substance is used'. The Swiss Federal Tribunal upheld the application of this standard in a doping case against an individual athlete (rather than the criminal standard of beyond reasonable doubt) in 4A_612/2009, 10 February 2010, para 6.3.2; and other CAS Panels have adopted it in other sports corruption cases, where the rules did not specify the applicable standard of proof: see, e.g., *Oriekhov v UEFA*, CAS 2010/A/2172, award dated 18 January 2011, para 53.

On the other hand, the public interest in preserving the integrity of sport requires that the standard of proof not be set too high. The CAS Panel in *Kollerer v ATP*, CAS 2011/A/2490, award dated 23 March 2012, paras 85, 87, ruled that it was not incompatible with international public policy to impose a contractual sanction on an athlete for match-fixing based on 'the preponderance of the evidence' (equivalent to the balance of probabilities).

By way of analogy, the regulators of the English legal profession are currently moving to the view that it is contrary to the public interest to require misconduct charges against English lawyers to be proven to any stricter standard than 'balance of probabilities'. See Bar Standards Board, *Review of the Standard of Proof Applied in Professional Misconduct Proceedings* (https://www.barstandardsboard.org.uk/media/1830289/sop_consultation_paper.pdf).

Consultant's opinion

I. Preliminary comments

It should be recalled that the World Anti-Doping Code has hundreds of Signatories. The Signatory entities are described in Article 23.1.1 of the Code. The fact of being a Signatory to the Code has several implications, listed in Code Article 23:

- Acceptance of the Code;
- Obligation to implement its provisions;
- For many articles of the Code, this obligation of implementation must be implemented without any substantial change;
- Obligation to dedicate sufficient resources to implement anti-doping programs that comply with the Code and the relevant International Standards;

- Obligation to *comply* with the Code and with the UNESCO Convention of 2005 (International Convention against Doping in Sport, dated 19 October 2005).

Moreover, any non-compliance has *consequences* for the signatory, which are indicated in Articles 20.1.8, 20.3.11, 20.6.6 and 23.6 of the Code. WADA, for its part, is responsible under Article 23.5 of the Code for monitoring compliance with the Code and with the UNESCO Convention. In other words, the International Standard for Code Compliance by Signatories (ISCCS) must be read and, where appropriate, assessed in the light of the relevant provisions of the Code (which the signatories have accepted). It must be noted that Code amendments are being made in parallel to the development of the ISCCS. These changes should be accepted by the Signatories at the same time as the ISCCS. These changes affect several provisions of the Code, in particular Articles 12.1, 12.2, 20.3.7, 20.6.2, 20.7.2 and 23.5.1 to 23.5.9. These provisions will enter into force at the same date as the ISCCS.

II. Procedure for monitoring compliance and consequences of non-compliance

- 1) Article 9 of the ISCC provides Signatories with the opportunity to correct any non-conformity. At least that is what the heading states, as the aim is more general.

- a) Provisions of Article 9:

If the Signatory has any rules that are identified as not in line with the Code, WADA informs the Signatory in writing and gives it three months to correct them, or to provide draft corrections, with a schedule for the adoption thereof. If non-conformities result from other elements identified by WADA, it sends the signatory a corrective action report. The timeline provided differs depending on the seriousness of the non-conformities: not more than three months for the “critical” category, not more than six months for the “high priority” category, and not more than nine months in other cases of non-conformity.

In the case of a Major Event Organizer, a fast track procedure may be adopted.

Dialogue between WADA and the Signatory is provided for. The latter will have to draw up a corrective action plan (not compulsory, but highly recommended).

If the Signatory fails to make the corrections within the specified periods, or fails to respond to the WADA questionnaire, WADA informs the signatory thereof in writing and grants it a further period of three months, which may not be extended, except in exceptional cases in the event of force majeure.

If the Signatory does not correct the non-conformities within the provided timeline, or fails to respond, WADA applies to the “CRC” (Compliance Review Committee, established by WADA in 2015) as soon as possible. WADA informs the Signatory thereof and advises it that it may provide explanations or comments, which WADA forwards to the CRC.

The CRC can determine that the alleged non-conformities are properly characterized as critical, high priority or other, and examines the Signatory’s explanations and comments fairly (including the possible excuse of force majeure). The CRC may advise WADA that the non-conformities are excusable. In accordance with CAS case law however, the Signatory may not be exempted from liability on account of third party negligence.

If the CRC considers that the Signatory’s non-conformity has no valid reason, it recommends that the WADA Executive Committee formally notify the Signatory of these shortcomings, inform it of the consequences thereof proposed by WADA under Article 11 of the ISCC, and of the conditions of reinstatement proposed by WADA within the meaning of Article 12.

If, within the scope of a corrective action plan, the Signatory fails to correct the non-conformities within the specified timeline provided (normally 4 months), WADA may notify it, without requiring a further decision of the Executive Committee (Article 9.3.5 of the ISCC).

Conversely, if the corrections have been properly made, no action will be taken against the Signatory.

The fast track procedure (Article 9.4 of the ISCC) applies in case of urgency or if Major Event Organization is involved. In these cases, WADA may apply to the CRC to consider the case as a matter of urgency, while giving the Signatory the possibility of providing the CRC with explanations or comments.

b) Is this procedure satisfactory?

The answer is yes.

In fact, care is taken under Article 9 to provide the Signatory with the information required, to give it periods that are not too short (except in the case of fast track procedure) and, finally, allows it to provide explanations. WADA Management cannot decide itself on the existence and seriousness of non-conformities¹, and is not therefore both “judge and party” as it is the CRC that decides, and ultimately refers to the WADA Executive Committee.

¹ In fact, the timelines of three, six or nine months are fixed by the WADA management, based on how serious it considers the non-conformities to be (Article 9.2.2 of the ISCCS. The CRC can correct the WADA classification by classifying non-conformities into the three categories (Article 9.3.3) but can it correct the timelines as well? This is not stated, and probably should be.

From the point of view of the principles of *non-litigation* administrative proceedings, which are less demanding than those of judicial proceedings, one may therefore conclude that the provisions of Article 9 are *compatible*, within the meaning of the questions posed in the request for an opinion.

Consequently, the fact that WADA Management, the CRC and the WADA Executive Committee all belong to the structure of this same organization may not be deemed to be a major problem. This conclusion is based in particular on the *independent* nature of the supervisory body, namely the CRC.

In particular, the fact that a further *judicial* procedure exists (see Article 10 below) allows doubts to be removed from the point of view of impartiality, or at the very least the appearance of bias. In fact, such a procedure is of such a nature as to remedy, if necessary, any defects in the non-litigation proceedings, as has been frequently judged by the ECHR².

2) Article 10 of the ISCC:

This relates to confirmation of the non-conformity and imposition of consequences.

a) Provisions of Article 10:

This is the litigation or judicial stage of the proceedings.

The CRC sends the WADA Executive Committee a recommendation containing its decision. The Executive Committee decides to publish the CRC's decision within ten days. If it does not accept it, however, in full or in part, it cannot replace the CRC's decision but returns the matter or part of the matter to the CRC for reconsideration.

When the Executive Committee accepts the CRC's decision, it sends the Signatory formal notification of assertion of non-compliance with the Code. This information is published, including on the WADA website, and provided to the International Olympic Committee (IOC) and the International Paralympic Committee (IPC).

If the signatory fails to contest the assertion within ten days, it is deemed to have accepted it. The non-compliance becomes final and immediately enforceable, pursuant to Article 23.5.5 of the new version of the Code. WADA then publishes the decision.

If the Signatory contests the assertion, it must apply to CAS (with a copy to WADA) within 21 days of notification. CAS rules as a panel (ordinary arbitration division), in Lausanne, based on Swiss law, in principle in English (unless the parties agree to another language of the proceedings). The case must be dealt with quickly (within three months), except in the event of exceptional circumstances.

² See Bryan judgment against the United Kingdom of 22 November 1995, confirmed several times in various fields (see *Alatulkila et al. vs Finland*, 28 July 2005, *Crompton vs United Kingdom*, 27 October 2009, or *Sigma Radio Television vs Cyprus*, 21 February 2011).

WADA and the Signatory each nominate an arbitrator to sit on the panel who must examine the dispute and settle it, preferably from a list of arbitrators specifically designated by CAS for anti-doping cases. The two arbitrators must, by common consent, select the person to chair the panel from that same list.

One has to insist on the fact that the burden of proof falls upon WADA, which has to prove non-compliance to the Code by the Signatory in question.

If CAS rules in favour of WADA, it shall also determine the consequences of the non-compliance to be imposed on the Signatory (and/or inform it of the conditions for reinstatement, within the meaning of Article 12 of the ISCC).

In urgent cases, WADA may ask CAS to pronounce provisional measures, to maintain the integrity of an event, for example. If CAS pronounces such measures, the Signatory may not appeal, but it does entitle it to a fast judgment on the merits.

CAS's final decision has universal effect in accordance with Article 23.5.9 of the new version of the Code. It must be recognized and applied by all Signatories.

A symmetrical procedure exists for reinstatement decisions. That is why I will only insist on the consequences of non-compliance, so as not to burden my opinion unnecessarily.

b) Is this procedure satisfactory?

It raises a number of questions and reservations, precisely on account of the increased requirements, in respect of the international law on human rights, in the case of judicial proceedings (one must clearly think of Article 6 of the European Convention on Human Rights with regard to a fair trial, as that standard has become universal).

The draft Standard contains provisions that provide significant *guarantees* for the Signatories, such as:

- A period for contesting the decision;
- Recourse to CAS, an independent and impartial international court, which over its 18 years of existence has acquired indisputable and hardly contested prestige;
- The burden of proof devolves upon WADA, while in the normal procedural rules it devolves upon the applicant (in this particular case, the Signatory) based on the adage *actori incumbit probatio*. The draft Standard thus favours a quasi-criminal design of sanctions, which implies observance of the presumption of innocence and the rights of defence;
- Observance of a reasonable period granted to CAS to rule (normally three months). This also allows us to consider that the period of 21 days

required by the Signatory to apply to CAS is not too short, and does not therefore constitute too much of an obstacle to the right of access to a court, as it is explained by the need for diligence in handling the case. These two short periods are mutually justified. Moreover, it is a normal period before CAS (see Article R. 49 of the Code of Sport-related Arbitration).

Conversely, however, other provisions are more problematic:

- It is impossible for the Signatory to appeal against provisional measures granted by CAS (Article 10.4.3 of the ISCCS). We completely understand the rationale (the urgency, or major importance of the event to be protected, such as the Olympic or Paralympic Games, or a world championship, for example) but this may prove penalizing, and contrary in principle to the presumption of innocence. Certainly the possibility of reinstatement measures exists, but they do not have a retroactive effect. This being said, it seems that even if the provisional measures cannot be contested by appeal once imposed, before they are imposed by CAS, WADA will have to prove, in addition to the urgency, the prima facie irreparable harm and the Signatories will have the possibility to contest WADA's position. Therefore, before a decision is taken, the Signatories will benefit from a number of guarantees. Further, if provisional measures are imposed, Signatories will have the right to an expedited procedure.
- The procedure for the selection of arbitrators (Article 10.4.1 of the ISCCS) is also delicate; firstly because the arbitrators designated by each of the parties must designate an arbitrator by common consent, called to chair the panel. No provision is made in the event that they are unable to reach an agreement. The system prevailing before CAS (designation by the chairman of the Chamber of the chair of the panel, following consultation of the two arbitrators, without veto rights), appears to be simpler and more correct. Secondly, the fact that it is preferable for the parties to select their arbitrators (and mandatory for the choice of chair of the panel) from a list of arbitrators specifically designated by CAS for doping cases may be criticized. There is a long, public list of CAS arbitrators (several hundred)³, and we fail to see why the parties' choice should be limited, particularly when one of the parties is WADA itself, which could designate arbitrators that appear "convenient" to it. Ultimately, this provision appears to be contrary to two aspects of a fair trial: the court must be impartial and "established by law". This being said, to address – at least partly – this issue, I suggest that CAS creates a list of arbitrators (in sufficient number) who are especially competent in doping matters. CAS would choose the chair of the panel from this list,

³ At present, the general list available on the CAS website includes almost 370 arbitrators. A shorter list, the only one that exists, of football arbitrators, has just under 100 arbitrators. But it is only an indication. The parties to a football dispute may choose arbitrators that are only included in the general list.

and the parties would keep their freedom to designate their respective arbitrator from the general list.

The universal effect (*erga omnes*) of CAS's final decisions (Article 10.5.1 of the ISCCS) may also pose a problem. Normally, in international matters, judicial decisions take effect between the parties (*inter partes*) – here WADA and the Signatory of the Code⁴. However, the consultant notes on that particular matter that if the Signatories accept the proposed amendments to the Code, and in particular Article 23.5.9, they will have accepted this *erga omnes* effect. The doubt is therefore cleared, and the consistency of both the Code and the ISCCS is safeguarded.

- One question raised with me on 3 October 2017 was that of recourse to a court, CAS, which is fundamentally the court in the first and last instance. Is this not incompatible with a principle of the international law on human rights, namely the two-stage procedure, recalled for example in Article 2 of Protocol 7 to the European Convention on Human Rights⁵? In my opinion, the answer is no. It should first be pointed out that this is not true at all: the Swiss Federal Court may be appealed to under Article 190 (2) of the Swiss law on private international law. Moreover, several cases pending before the ECHR⁶ raise questions that are not yet resolved on the competence of the ECHR and, prior to that, the scope of judicial control exercised by the Federal Court. In particular, even if the control of the Federal Court is only deemed to be minimal, the two-stage procedure only applies in *criminal* matters; and even in this case, the ECHR case law is complex and qualified.
- The last question raised with the consultant on 3 October 2017 does not appear to raise problems of real compatibility, but rather another problem. The test of evidence, or the standard of evidence (“more likely than not”; in other words, the preponderance of probabilities, “depending on the comfortable satisfaction of the panel (or hearing)”, and, finally, “proof beyond all reasonable doubt”) are certainly standards that may in practical terms lead to very different conclusions by the judges, particularly if the burden of proof is clearly defined as it is here. But it seems reasonable not to impose on a court such as CAS, unless one would disregard its independence, one criterion rather than another. This is a question of case law policy: it will be up to CAS to establish it itself. It does not appear necessary for the ISCCS to impose rules on this matter. Of course, one may object that, in the case of evidence of doping (which devolves upon the Anti-Doping Organization), Article 3.1 of the World Anti-Doping Code recommends an “average” degree of proof. But it

⁴ See for the ECHR judgments Article 46 of the European Convention on Human Rights.

⁵ Other international instruments raise the principle of the right to an examination of the judgment by a higher court. See Article 14 § 5 of the International Covenant on Civil and Political Rights; but that is for criminal matters.

⁶ In particular *Pechstein vs Switzerland* and *Mutu vs Switzerland*, which are still at the stage of notification and questions to the parties.

relates to proceedings against persons, not normally before a court, but rather before a non-judicial panel⁷ which should therefore be guided. Given my professional experience, which is mainly jurisdictional, both nationally and internationally, I would favour that a higher freedom is given to a jurisdiction such as CAS in terms of standard of proof.

III . Compatibility on the substance: the nature of the non-conformities and their consequences

Besides its important procedural provisions, the draft ISCCS contains substantive provisions that are no less important, as they determine the failings (non-conformities to the Code) and sanctions (consequences). Compatibility with the relevant principles of international law and human rights of these substantial provisions is not as demanding as if the matter were criminal in the strict sense⁸. However, these sanctions may be *heavy*, as they affect athletes, training personnel, organizations and Federations or any individual or entity. It is therefore important to examine observance of the principles of international law and human rights carefully.

Article 11 of the ISCCS (“Determining signatory consequences”) contains these rules. For the reasons mentioned above, it is not necessary to examine Article 12 in detail, which concerns reinstatement and which raises the same comments and conclusions *mutatis mutandis*, except in particular cases.

1) Provisions of Article 11:

a) This is a long list.

- The representatives of a Signatory failing to comply with the Code are no longer eligible, for a given period, for any post within WADA or any position as a member of a WADA office or committee (with a few limited exceptions). They may not either participate in a WADA “Independent Observers” program, or be eligible for a post or position as a member of an office or committee of another signatory to the Code. The signatory itself may no longer host an event organized or co-organized or hosted by WADA;
- WADA may withdraw its funding for activities or specific programs of the non-compliant Signatory;

⁷ CAS can only be appealed to directly by international or national athletes, provided they obtain several consents (Article 8.5 of the Code).

⁸ I refer to the legal opinion I gave in 2013 on the draft revision of the World Anti-Doping Code 2015, presented to the World Conference in Johannesburg on 13 November 2013, which can be found on the WADA website. I explained why I considered that the sanctions provided for by the Code are not criminal in nature (see page 6 in particular).

- The Signatory's anti-doping activities are subject to special monitoring, until WADA considers that the Signatory may engage in such activities in a manner compatible with the Code;
- WADA may assign to an approved third party the supervision or control over all or part of the Signatory's anti-doping activities, the Signatory bearing the financial cost thereof;
- Normally, it is possible to exclude athletes affected by the Signatory's anti-doping activities from participating in the Olympic or Paralympic Games or similar events⁹;
- The Signatory may have its membership of the International Olympic Committee or Paralympic Movement withdrawn;
- If the signatory is a National Anti-Doping Organization (or a National Olympic Committee acting in that capacity), the country concerned may be excluded from hosting one or more Olympic Games or Paralympic Games. If the country has already obtained that right, the Signatory must check whether it is legally and practically possible for that right to be withdrawn in favour of another country, and must ensure that it is entitled to satisfy such a requirement according to its statutes and regulations (including ensuring that the agreement for organizing the event may be annulled without having to pay any penalties);
- In the same case, the National Olympic or Paralympic Committee of the Signatory's country, and the representatives and/or athletes and training personnel of that country, and the National Federations of that country may be excluded from attending or participating in the Olympic Games, Paralympic Games and other specified events;
- Similar sanctions may be applied when the Signatory is an International Federation;
- In the event of non-compliance to a critical degree of non-compliance, with aggravating circumstances, the Signatory may receive a fine for a sufficient sum to penalize it and to dissuade the other Signatories from adopting similar conduct (this fine may also enable WADA to finance future monitoring of compliance with the Code);
- The Signatory may forfeit the right to receive funds and other benefits from the International Olympic or Paralympic Committee or from another signatory for a given period (without being able to recover them retroactively for that period following its reinstatement);
- The public authorities concerned may be recommended to withdraw all or part of the Signatory's funding and other public benefits for a given period;¹⁰
- The Signatory may also forfeit its recognition as a member of the Olympic or Paralympic Movement;

⁹ World championships, for example, or continental championships.

¹⁰ The commentary on this provision provided in the draft notes that the States are not signatories to the Code but that they could act in that way under Article 11(c) of the UNESCO Convention, which is correct.

- Lastly, if the Signatory is a Major Event Organization, WADA may subject its anti-doping program to monitoring or supervision at the following edition of that event;. The organization may forfeit the right to receive funding and other benefits from the IOC, the IPC, the Association of National Olympic Committees and any other organization supporting that event.
- b) This list is combined with principles on sanctions to be applied in the various particular cases. In short:
- The sanctions must reflect the seriousness (and therefore the degree of fault) of the non-compliance (classified in decreasing order as critical, high priority and other) as well as their potential impact on the integrity of the sport;
 - In the event of a plurality of faults, it is the rule of the most serious fault that applies;
 - Lack of intention does not constitute a mitigating circumstance;
 - Aggravating circumstances only apply to critical non-compliance;
 - No discrimination should be made in the imposition of sanctions between International Federations and National Anti-Doping Organizations, for example;
 - The sanctions must go as far as possible to achieve the aim of full compliance with the Code;
 - It is a matter of maintaining the trust of athletes, other participants and the public in WADA's and its partners' desire to defend the integrity of sport against the doping scourge¹¹;
 - But it must not go further than necessary, and it must allow athletes and their support personnel to show that they have not been affected by a Signatory's non-compliance. In this respect, the possibility for athletes to participate in international events in a "neutral"¹² form is envisaged as long as it will not render sanctions against the Signatory less effective;
 - Unless indicated otherwise, the sanctions must remain in force until the Signatory is reinstated. Moreover, if the Signatory fails to satisfy the conditions required for its reinstatement within a given period, the sanctions will have to be increased;
 - The sanctions do not obstruct those authorized by Article 12 of the Code for governments and Signatories against sports organizations.
- c) Annex A to the ISCCS provides a long list of requirements whose non-observance by Signatories constitutes non-conformity to the Code, classified in two categories: critical and high priority, the third category, "other", being residual (A3: requirements considered

¹¹ Topical CAS case law is cited.

¹² Without indicating their nationality. This is a measure that protects "innocent" athletes.

important for combating doping in sport, but not critical or high priority).

It should be noted that, although long, the two lists (A1 and A2) are identified as *non-exhaustive*, which poses a problem, as will be seen. Moreover, with regard to A3, it is noted that, when a requirement is not listed, it will have to be classified in one of the three categories based on its importance for combating anti-doping, using as a guide the way in which the requirements have been listed in the categories above.

- d) Finally, Annex B indicates the various consequences (sanctions) corresponding to the three previously mentioned categories of non-compliance.

1) Are these substantial provisions satisfactory?

- a) For the most part, the answer is yes.

Firstly, they have a legal basis in the Code itself, as the Signatories are required to implement it (Code, Article 23.2) and to implement anti-doping programs (Article 23.3); and they are also required to comply with the Code, whose monitoring by WADA is provided for, and whose consequences of non-conformity are broadly set out (Articles 23.5.1 to 23.5.8 of the new version of the Code)

The Code has been unanimously approved and therefore accepted by all the Signatories. The ISCCS aims to provide explanations and guarantees for the Signatories and it is drawn up within the scope of a vast consultation process and with transparency. Other provisions of the Code relate to the IOC (Article 20.1.8, International Federations (20.3.11) and Major Event Organizations (20.6.6).

With regard to the States (which are not Signatories), as stated above, the legal basis of their obligations vis-à-vis the Signatories, particularly with regard to consequences of non-compliance, is found in Article 11 of the UNESCO Convention of 2005.

Most of these provisions do not depart from or add to the Code. The provisions that might not be in line with the 2015 Code (which are well known to me and on which I have been working before the proposed amendments were brought to my attention) will be in harmony with the modifications of these provisions, which are pending as explained above. Therefore, there will be a more secure legal basis for the ISCCS.

Lastly, it is self-executing with regard to non-compliance since, without waiting for the entry into force of the ISCCS, WADA is already involved in major activities based on the Code as regards compliance of Signatories.

- b) However, the question raised is that of compatibility of the draft ISCCS with the accepted principles of international law and human rights.

c) In my opinion, certain provisions of the draft raise some issues. In a case that is not criminal, but that still provides for infringements and sanctions, some of which are heavy, the following principles should be recalled:

- Legal basis (we have just seen that it exists);
- Competence of the entity responsible, namely WADA;
- Clarity and foreseeability of infringements (non-compliance) and sanctions (consequences);
- Identification of sanctions;
- Need for and therefore proportionality of the sanctions.

These principles may certainly be applied with some flexibility insofar as the matter is quasi-criminal (and also treated as such by WADA, or so it would appear), but not criminal in the strict sense. But that is the general spirit.

In my opinion, the following provisions pose a problem:

- The eviction of Signatories' representatives, not only from WADA's authorities, but from all those of other Signatories (Article 11.1.1.2). This provision, which is not indicated in the 2015 Code, may be advisable, but it seems to depart from the principle of identification, as it concerns third parties which are not liable. Their consent is required. However, and once again, the amended Code will contain all the sanctions, including from the ISCCS. Therefore, this doubt can be cleared since if the Code amendments are accepted, this will constitute the consent to sanctions by Signatories.
- The possibility of depriving a country from organizing or hosting the Olympic Games or similar events when the Signatory is a National Anti-Doping Organization of that country (or the National Olympic Committee acting in that capacity) does not pose a problem, except that the provision allows exclusion from one or more editions (Article 11.1.1.5), which seems disproportionate. One would have to limit the exclusion to the next edition, without prejudice to providing for its repetition in the future if the conditions recur.
- The possibility of imposing a fine (certainly in the most serious cases) (Article 11.1.1.6) poses a problem from the point of view of clarity and foreseeability. Should not a maximum or a limit be indicated?
- The Signatory's exclusion from the Olympic or Paralympic Movement (Article 11.1.1.9) could be potentially problematic in relation to WADA's authority as the party imposing the sanction to the extent that such action relates to the exclusion of signatories from Movements organized by third parties and that would otherwise have authority to make such decisions. However, these organizations are also Signatories of the Code, which they accepted without reservation. The coherence of the Code (which also provides Signatories with broad sanctioning powers against individual athletes which would also have the effect of excluding them

from events and Movements organized by other signatories) also implies such an exclusion and therefore must be considered as acceptable.

- The lists of the first two categories of non-conformities (critical and high priority) (Annexes A.1 and A.2.) should be exhaustive, or closed, rather than indicative. Otherwise, these lists pose a problem from the point of view of clarity and foreseeability.
- Similarly, Annex A.3 poses a problem as it includes vague non-conformities and, in order to classify them into the three categories, refers to an equally vague criterion (their importance in combating doping in sport).
- One solution might be paradoxically to emphasize the nature of *examples* of Annexes A1 and A2, while reserving the right for CAS to reason by analogy, based on those examples, and not be in some way bound by these lists. This being said, Annex A3 still seems to be too vague.

Conclusion:

1) Summary of the procedural or substantial provisions of the draft ISCCS that pose problems:

- Article 9.2.2. (see footnote 1 above).
- Article 10.4.1 on the choice of arbitrators and chair of the panel, with the reservation of the suggestion I made, which would at least partly solve this issue.
- Article 10.5.1 on the effect *erga omnes* of CAS's decisions; but the acceptance of the new Code version will cure this issue.
- Article 11.1.1.2 on the exclusion of the Signatories' representatives from the authorities of other signatories, with the same comment.
- Article 11.1.5 on the impossibility for a country of organizing or hosting more than one edition of the Olympic Games or other major events.
- Article 11.1.6 on the imposition of unspecified fines, with no limits.
- Annexes A1, A2 and A3 on the lists of non-conformities, which are not closed while A3 is too vague.

2) Overview

From an objective point of view, I consider the draft ISCCS to be an instrument that should be useful for all parties involved in combating doping in sport, and that overall the number and importance of its provisions that are compatible with the international principles of law and human rights must be welcomed.

However, the detailed analysis I have made indicates that it is possible and necessary to remedy the few problems identified in this legal opinion.

Strasbourg and Chantérac, 17-28 October 2017.

Jean-Paul Costa

Addendum to the Opinion for the World Anti-Doping Agency (WADA), November-December 2017

1. In my legal opinion dated 28 October 2017, which focused on what was still a draft Standard (ISCCS), I (the consultant) indicated that the draft procedural and substantive dispositions were, in the main, compatible with the international standards prevailing in the area of human rights.
2. However, I raised a number of issues and expressed my wish to see improvements regarding related elements of the draft.
3. This was partly due to the fact that I had based my views on a version of the World Anti-Doping Code ("the Code") which was partly obsolete due to ongoing revisions to the 1 January 2015 version of the Code in parallel to the drafting of the ISCCS¹³.
4. From a normative standpoint, there is a dialectical and hierarchical articulation between the content of the Code and the content of the ISCCS. Under Article 23 of the Code, Signatories *shall* implement it through statutes, policies, rules or regulations.
5. As a result, the absence of Code dispositions that would serve as a basis for substantive dispositions in the ISCCS was in itself an issue and largely explained the reservations expressed by the consultant (§2 above).
6. However, as indicated by WADA's Legal Affairs Director to the consultant, on 16 November 2017 in Seoul WADA's Foundation Board adopted simultaneously the final draft of the ISCCS and amendments to the Code resulting from the ISCCS, or, to be fully accurate, supporting the ISCCS¹⁴.
7. These amendments concern mainly Articles 12.1, 12.2, 13.6, 20.1.3 and 20.1.4, 20.2.2, 20.2.3 and 20.2.4, 20.3.7, 20.6.2, and 23.5.1 to 23.5.10.
8. A review of the new articles by the consultant has removed any remaining doubts, precisely because these articles provide the legal basis that I was concerned the ISCCS would lack. I had recommended myself a number of these changes in my legal opinion.
9. One might assume that if these new dispositions violated commonly admitted international human rights standards, this legal basis would not be sufficient. However this is not the case. I do not consider useful therefore to dwell on this point.
10. Overall, I am satisfied that the Standard adopted in Seoul incorporated almost all suggestions I made in my legal opinion.
11. One exception is the suggestion I made in relation to the standard of proof. In my legal opinion, I indicated that I would have preferred that a jurisdiction such as CAS be given more

¹³ In addition, WADA's Foundation Board approved on 16 November 2017 the launch of a further global revision of the Code as part of a broad and interactive process. The new version of the Code will come into force in 2021.

¹⁴ See WADA's website.

freedom in choosing the standard of proof to apply. However I acknowledge that such limitation by written law to the power of the judge does not hurt any major procedural or substantive principle.

12. This addendum was written for the sake of updating and completeness.

Strasbourg, 14 December 2017.

Jean-Paul Costa