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DO ATHLETES REALLY HAVE THE RIGHT TO A FAIR TRIAL IN
“NON-ANALYTICAL POSITIVE” DOPING CASES?

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I. INTRODUCTION

Can the noble objective of a certain campaign and its intended benefits for the people at whom it is aimed justify disrespecting the human rights of a few individuals who are inadvertently or not caught in the middle of this campaign? Or, more specifically, could the noble objectives of the World Anti-Doping Program, namely protecting athletes' fundamental right to participate in a doping-free sport and thus promoting health, fairness and equality for athletes worldwide,¹ justify disrespecting an athlete's right to a fair trial?² Such questions may be asked in light of a recent Court of Arbitration for Sport ("CAS") award in a doping case involving seven female Russian track and field athletes, resulting in the imposition of sanctions by the CAS Panel of two years and nine months ineligibility to participate in all national and international competitions for a fraudulent substitution of their samples collected under the out-of-competition testing program of the International Association of Athletics Federations ("IAAF") in Russia (the "case of the seven Russian athletes").³

¹ See World Anti-Doping Agency, *Purpose, Scope and Organization of the World Anti-Doping Program and the Code*, in WORLD ANTI-DOPING CODE (2009), available at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/WADA_Anti-Doping_CODE_2009_EN.pdf (last visited Nov. 1, 2010) [hereinafter WADC].

² The right to a fair trial is a universally recognized human right expressly referred to in a number of international conventions. For example, under Article 14(1) of the International Covenant on Civil and Political Rights of the United Nations (1966), all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Similarly, Article 6(1) of the European Convention on Human Rights (1950) (the "ECHR") provides, in particular, that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

³ See Arbitral Award delivered by the Court of Arbitration for Sport in cases IAAF v. All Russia Athletics Federation & Olga Yegorova (CAS 2008/A/1718); IAAF v. All Russia Athletics Federation & Svetlana Cherkasova (CAS 2008/A/1719); IAAF v. All Russia Athletics Federation & Yulia Fomenko (CAS 2008/A/1720); IAAF v. All Russia Athletics Federation & Gulfiya Khanafeyeva (CAS/2008/A/1721); IAAF v. All Russia Athletics Federation & Tatyana Tomashova (CAS 2008/A/1722); IAAF v. All Russia Athletics Federation & Yelena Soboleva (CAS 2008/A/1723); IAAF v. All Russia Athletics Federation & Darya Pishchalnikova (CAS 2008/A/1724), dated Nov. 18, 2009, available at <http://www.tas-cas.org/d2wfiles/document/3767/5048/0/20091118165643673.pdf> (last visited May 2, 2010). The Court of Arbitration for Sport ("CAS") is a permanent arbitration institution with its seat in Lausanne, Switzerland, in charge of arbitral resolution of disputes arising within the field of sport through the intermediary of arbitration provided by panels composed of one or three arbitrators. See Statutes of the Bodies Working for the Settlement of Sports-related Disputes, ¶ S3, available at

This case first came to the spotlight of public attention on July 31, 2008, less than a week before the official opening of the 2008 Summer Olympic Games in Beijing, when the IAAF announced the provisional suspension of seven Russian athletes for alleged doping offences.⁴ All suspended athletes were charged under IAAF Competition Rules 32(2)(b) and 32(2)(e) with the fraudulent substitution of urine samples, which is both a prohibited method and also a form of tampering with the doping control process.⁵ The IAAF discovered the substitution of samples following a specific investigation instigated and carried out by the IAAF for more than a year, as it suspected that certain irregularities had arisen from its “out-of-competition” testing program conducted in Russia.⁶ In particular, the IAAF compared the DNA profiles of “out-of-competition” urine samples that had been collected from twenty-three Russian athletes in Russia with the DNA profiles of “in-competition” urine samples collected from the same athletes under conditions that could guarantee the origin of the samples.⁷ The DNA analyses revealed that, for the seven female athletes, the samples compared presented different genetic profiles, thereby excluding the possibility that the same person had provided both samples.⁸ Further DNA profile analysis of additional samples collected by the IAAF from six of the seven athletes in the form of a buccal swab confirmed these findings.⁹

This case of seven Russian track and field athletes was certainly not the first instance where a CAS panel found athletes responsible for anti-doping rule violations, not on the basis of a positive finding of a prohibited substance in the athlete’s sample by a World-Anti-Doping Agency (“WADA”) accredited laboratory, but solely on the basis of circumstantial evidence (the so-called “non-analytical positive” or “circumstantial evidence” doping cases).¹⁰ Neither was it

[http://www.tas-cas.org/d2wfiles/document/3923/5048/0/Code%202010%20\(en\).pdf](http://www.tas-cas.org/d2wfiles/document/3923/5048/0/Code%202010%20(en).pdf) (last visited June 6, 2010).

⁴ See IAAF: Anti-Doping Investigation Leads to Provisional Suspension of Russian Athletes (July 31, 2008), <http://www.iaaf.org/news/printer,newsid=47814.htm> (last visited Oct. 9, 2008). The suspended athletes were Ms. Svetlana Cherkasova (800m category), Ms. Yulia Fomenko (1500m category), Ms. Gulfiya Khanafeyeva (Hammer Throw category), Ms. Darya Pishchalnikova (Discus Throw category), Ms. Yelena Soboleva (800m/1500m category), Ms. Tatyana Tomashova (1500m category) and Ms. Olga Yegorova (1500m/5000m category).

⁵ *Id.* IAAF COMPETITION RULES (2008), Rule 32(2)(b) and 32(2)(e), available at <http://www.iaaf.org/antidoping/rules/iaaf/index.html> (last visited Oct. 9, 2008).

⁶ *IAAF v. All Russia Athletics Federation & Olga Yegorova et al.*, ¶ 10.

⁷ *Id.* ¶ 12. According to the IAAF Competition Rules, in-competition testing means testing where an athlete is selected for testing in connection with a specific event, whereas out-of-competition testing means any doping control which is not in-competition. See IAAF COMPETITION RULES, Ch. 3: Definitions.

⁸ *IAAF v. All Russia Athletics Federation & Olga Yegorova et al.*, ¶ 17.

⁹ *Id.* ¶¶ 20-21.

¹⁰ The examples of high-profile “non-analytical positive” doping cases considered by CAS panels over the last decade include the cases of Michelle Collins, Tim Montgomery

the first instance where a CAS panel found athletes responsible for a fraudulent manipulation of their doping control samples, primarily on the basis of the results of a comparative DNA analysis.¹¹ What makes the case of the seven Russian athletes truly remarkable is that never before has the very existence of the athlete's right to a fair trial in "non-analytical positive" doping cases been so obviously brought into question.

First, this case clearly revealed the existing imbalance between the procedural rights of the IAAF and those of the athletes, which could potentially result in irreparable harm to the athletes. It may be recalled that under the IAAF Competition Rules, the provisional suspension of athletes not only results in their restriction from participating in competitions until the case is resolved by the athlete's national federation,¹² but also is not subject to any appeal.¹³ From this perspective, the timing of the announcement of the provisional suspensions by the IAAF could not have been worse for those five of the seven suspended athletes,¹⁴ who not only intended to participate in the 2008 Summer Olympic Games, but were also real contenders for Olympic medals.¹⁵ In the absence of the right to

and Chryste Gaines, all related to the Bay Area Laboratory Cooperative ("BALCO") investigation. *See* United States Anti-Doping Agency v. Michelle Collins (AAA 30 190 00658 04), *available at* http://www.usantidoping.org/files/active/arbitration_rulings/AAA%20CAS%20Decision%20-%20Collins.pdf (last visited May 31, 2010); United States Anti-Doping Agency (USADA) v. M. & International Association of Athletics Federation (IAAF) (CAS 2004/O/645), Award of December 13, 2005, *available at* <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/645.pdf> (last visited June 6, 2010); United States Anti-Doping Agency (USADA) v. G. (CAS 2004/O/649), award of December 13, 2005, *available at* <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/649.pdf> (last visited June 6, 2010). *See also* Richard H. McLaren, *An Overview of Non-Analytical Positive & Circumstantial Evidence Cases in Sports*, 16 MARQ. SPORTS L. REV. 193 (2006).

¹¹ B. v. International Weightlifting Federation (IWF) (CAS 2004/A/607), Award of December 6, 2004, *available at* <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/607.pdf> (last visited June 6, 2010).

¹² Under the IAAF Competition Rules, provisional suspension means a temporary barring from participation in any competition prior to a final decision conducted in accordance with those Rules. *See* IAAF COMPETITION RULES (2008), Ch. 3: Anti-Doping, Definitions; Rule 38(2).

¹³ IAAF COMPETITION RULES (2008), Rule 38(4).

¹⁴ Ms. Yulia Fomenko, Ms. Gulfiya Khanafeyeva, Ms. Darya Pishchalnikova, Ms. Yelena Soboleva and Ms. Tatyana Tomashova. *See* *Pyat Legtoatletok iz Rossii Mogut Propustit Igry* [Five Female Athletes from Russia Could Miss the Games], BBC News, July 31, 2008, *available at* http://news.bbc.co.uk/go/pr/fr/-/russian/russia/newsid_7535000/753544.stm (last visited Oct. 20, 2008).

¹⁵ For example, in 2008 Ms. Soboleva, a World Record holder (1500m category) had the best season results in the world in the distances of 800m and 1500m, whereas Ms. Pishchalnikova had the best season result in the world in Discus Throw. *See* *Obvinenniya v Doping Vyzvali Gnev v Rossii* [Doping Accusations Caused Outrage in Russia], BBC

appeal the provisional suspension or, at least, to request “temporary suspension” of a provisional suspension until the case is resolved, the imposition of this suspension upon these five athletes less than a week before the opening of the Games meant that they would inevitably miss the Games, regardless of whether the doping charges against them were subsequently confirmed by the All-Russia Athletics Federation (“ARAF”) or by the CAS panel.¹⁶ Although in the present case the doping charges against the athletes were subsequently upheld by both the ARAF and the CAS panel, the case clearly demonstrated that the IAAF’s right to unilaterally impose provisional suspension upon athletes merely suspected of anti-doping rules violations could potentially result in a situation where an athlete misses an important competition, and the doping charges against him/her are subsequently dismissed.

Second, although it was never shown by the IAAF when and how the samples were replaced, the panel agreed with the IAAF that there was sufficient circumstantial evidence of significant probative value that supported the inference of tampering and which could be drawn from the DNA results.¹⁷ In the panel’s words, when faced with incontrovertible evidence that out-of-competition samples were not theirs and asked how the discrepancy could be explained and how the non-matching urine samples could have been substituted, the athletes’ responses ranged from “I don’t know” to “there must have been manipulations of the samples by others.”¹⁸ In this regard, recalling previous pronouncements by another CAS panel, also dealing with unsupported explanations provided by the athletes accused of anti-doping rule violations, the panel pointed out that mere speculation is not proof that the incidents actually occurred.¹⁹ Thus, once the presence of the different DNA profiles in the athletes’ samples was established, it appears that the CAS panel placed upon the athletes the burden of proving that somebody else substituted their samples. Assuming that the samples had been replaced, not by the athletes, but by someone else, the athletes could hardly have had any way of proving or even knowing how this could have happened. Thus,

News, Aug. 1, 2008, *available at* http://news.bbc.co.uk/1/hi/russian/russia/newsid_7537000/7537819.stm (last visited Oct. 20, 2008).

¹⁶ From this perspective, perhaps, it is understandable that an immediate reaction of Russian public opinion to the IAAF decision to suspend provisionally five Russian leading athletes less than a week before the Summer Olympic Games was highly critical (to say the least!). *See, e.g., Obvineniya v Dopinge Vyzvali Gnev v Rossii [Doping Accusations Caused Outrage in Russia]*, *supra* note 15. Fortunately, the Cold War ended almost two decades ago. Otherwise, it is possible that we could have heard about the “intrigues of World imperialism” and “the treacherous plot against Russian athletes to deprive them of their Olympic triumph.”

¹⁷ *IAAF v. All Russia Athletics Federation & Olga Yegorova et al.*, ¶ 202.

¹⁸ *Id.* ¶ 85.

¹⁹ *Id.* ¶ 89 *citing to* *Int’l Rugby Board v. Keyter (CAS 2006/A/1067)*, *available at* http://www.irb.com/mm/document/training/0/caskeyterfinalaward_547.pdf (last visited June 13, 2010).

shifting the burden of proof to the athletes made their exoneration an almost impossible task.

Since the anti-doping provisions of the IAAF Competition Rules are based upon the World Anti-Doping Code,²⁰ this case may also suggest that athletes in other disciplines could also be currently facing similar problems. Accordingly, the purpose of this article is to analyze the existing anti-doping rules, primarily the World Anti-Doping Code (“WADC”), the IAAF Competition Rules and the IAAF Anti-Doping Regulations, as well as their application by the CAS in “non-analytical positive” doping cases from the point of view of the athlete’s right to a fair trial.²¹ The analysis starts in Part II with a brief overview of legal aspects of the “non-analytical positive” doping cases, including the existing burdens of proof and presumptions in favor of anti-doping organizations and athletes, established by the WADC. Part II also traces the origin and evolution of the “presumption of manipulation,” gradually developed by CAS panels in favor of anti-doping organizations. Part III of the article analyzes the content of the athlete’s right to a fair trial under Article 6 of the European Convention on Human Rights (“ECHR”).

Part IV of the article explains why, in the authors’ view, the guarantees of Article 6(1) of the ECHR should be applicable to provisional suspension and analyzes provisional suspension from the point of view of an athlete’s right to a fair trial. Part V offers similar analysis with respect to the presumptions currently existing in “non-analytical positive” doping cases, notably, from the point of view of their respect for the “equality of arms” principle of Article 6 of the ECHR. Although the analysis of these issues primarily focuses on the case of seven Russian track and field athletes and on the legislation of the Russian Federation, the implications of this analysis are not limited to this particular case and would be equally applicable to athletes from other disciplines and countries, provided that their national legislation contains equivalent provisions. Finally, Part VI makes concrete proposals for action to bring the existing anti-doping rules and case law of the CAS into conformity with the fair trial requirements of the ECHR and Swiss law. It also discusses measures which could be currently undertaken by

²⁰ The World Anti-Doping Code (“WADC” or “Code”) is the document that harmonizes regulations regarding anti-doping in sport across all sports and all countries of the world. The Code provides a framework for anti-doping policies, rules and regulations for sports organizations and public authorities. *See* World Anti-Doping Agency: Questions & Answers on the World Anti-Doping Code, *available at* <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/QA-on-the-Code/> (last visited June 20, 2010). The IAAF is among the international sport federations that have accepted the Code. *See* World Anti-Doping Agency, Code Signatories, *available at* <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/Code-Acceptance/Olympic-Movement/> (last visited June 20, 2010).

²¹ IAAF Anti-Doping Regulations (2010 edition), *available at* http://www.iaaf.org/mm/Document/Antidoping/Rules&Regulations/05/63/49/20100331073253_httppostedfile_2010Anti-DopingRegulations-Website-Final-Eng_19750.pdf (last visited Nov. 1, 2010).

the athletes to safeguard their right to a fair trial until such modifications are made, including the appeal of the CAS awards to the Swiss Federal Tribunal and subsequent applications to the European Court of Human Rights.²²

II. LEGAL ASPECTS OF “NON-ANALYTICAL POSITIVE” DOPING CASES: GENERAL OVERVIEW

A. *The Meaning of “Doping” and Types of “Non-Analytical Positive” Anti-Doping Rule Violations*

The WADC defines “doping” as “the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.8 of the Code.”²³ These violations include:

- Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample;²⁴
- Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method;²⁵

²² According to Article 176(1) of the Swiss Federal Private International Law Act, the provisions of Chapter 12 of that law (“International Arbitration”), apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its habitual residence in Switzerland. Since the CAS has its seat in Lausanne (“Switzerland”), the arbitration involving athletes domiciled outside Switzerland normally would be subject to Chapter 12 of the Law, and, in particular, to Article 190. This article provides for the possibility of appeal to the Swiss Federal Tribunal against arbitration awards in a limited number of cases: (a) where the sole arbitrator has been improperly appointed or where the arbitral tribunal has been improperly constituted; (b) where the arbitral tribunal has wrongly accepted or denied jurisdiction; (c) where the arbitral tribunal has ruled beyond the claims submitted to it, or failed to decide one of the claims; (d) where the principle of equal treatment of the parties or their right to be heard in an adversary procedure has not been observed; or (e) where the award is incompatible with public policy. *See* Federal Private International Law Act, dated Dec. 18, 1987 (as amended) (*Loi fédérale sur le droit international privé (LDIP)*), RS 291, available at <http://www.admin.ch/ch/f/rs/2/291.fr.pdf> (last visited Nov. 3, 2010); Statutes of the Bodies Working for the Settlement of Sports-related Disputes, ¶ S1, available at [http://www.tas-cas.org/d2wfiles/document/3923/5048/0/Code%202010%20\(en\).pdf](http://www.tas-cas.org/d2wfiles/document/3923/5048/0/Code%202010%20(en).pdf) (last visited Nov. 3, 2010).

²³ WADC, Art. 1. The definition of “doping” in Rule 32 (“Anti-Doping Rule Violations”) of the IAAF Competition Rules is almost identical, because this definition is one of the provisions of the WADC which must be implemented by its signatories without substantive change. *See* WADC, Art. 23.2.2.

²⁴ *Id.* Art. 2.1. The list of Prohibited Substances and Prohibited Methods is published by the WADA on an annual basis. The 2010 Prohibited List could be found at <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/International-Standards/Prohibited-List/> (last visited July 2, 2010).

- Refusing or failing without compelling justification to submit to Sample collection after notification as authorized in applicable anti-doping rules, or otherwise evading Sample collection;²⁶
- Violation of applicable requirements regarding Athlete availability for Out-of-Competition Testing, including failure to file required whereabouts information and missed tests which are declared based on rules which comply with the International Standards for Testing. Any combination of three missed tests and/or filing failures within an eighteen-month period, as determined by Anti-Doping Organizations with jurisdiction over the Athlete, shall constitute an anti-doping rule violation.²⁷
- Tampering or Attempted Tampering with any part of Doping Control;²⁸
- Possession of Prohibited Substances and Prohibited Methods;²⁹
- Trafficking or Attempted Trafficking in any Prohibited Substance or Prohibited Method;³⁰ and
- Administration or Attempted administration to any Athlete In-Competition of any Prohibited Method or Prohibited Substance, or administration or Attempted administration to any Athlete Out-of-Competition of any Prohibited Method or any Prohibited Substance that is prohibited Out-of-Competition, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any Attempted anti-doping rule violation.³¹

Unlike the presence of a prohibited substance or its metabolites or markers in an athlete's sample, a "classical" doping case, which shall be established exclusively by an Adverse Analytical Finding of a laboratory or other WADA-approved entity,³² other types of anti-doping rule violations, including use or

²⁵ WADC, Art. 2.2.

²⁶ *Id.* Art. 2.3.

²⁷ *Id.* Art. 2.4.

²⁸ *Id.* Art. 2.5.

²⁹ *Id.* Art. 2.6.

³⁰ *Id.* Art. 2.7.

³¹ *Id.* Art. 2.8.

³² Two samples are simultaneously collected from the athlete – A Sample and B Sample. Under the WADC, sufficient proof of an anti-doping rule violation under Article 2.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the athlete's A Sample where the athlete waives analysis of the B Sample and the B Sample is not analyzed; or where the athlete's B Sample is analyzed and the analysis of the athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the athlete's A Sample. *See* WADC, Art. 2.1.2. The Adverse Analytical Finding is a report from a laboratory or other WADA-approved entity

attempted use of a prohibited substance or a prohibited method, under the WADC may be established by other reliable means.³³ Consequently, since in order to establish anti-doping rule violations listed in Article 2.2 through 2.8 of the Code an Adverse Analytical Finding is not mandatory, all of them could be classified as “non-analytical positive” anti-doping rule violations.

B. People Who May Commit “Non-Analytical Positive” Anti-Doping Rule Violations

The analysis of the description of the “non-analytical positive” anti-doping rule violations in Article 2 of the WADC reveals that two of such violations (use or attempted use of a prohibited substance or a prohibited method; and refusing or failing without compelling justification to submit to sample collection, or otherwise evading sample collection) could be committed only by the athletes. The violation of applicable requirements regarding athlete availability for out-of-competition testing, as a general rule, could also only be committed by an athlete, unless the anti-doping rules of an international federation provide for the athlete’s right to delegate the making of some or all of his whereabouts filings to a third party, such as a coach, manager or national federation, provided that the third party agrees to such delegation.³⁴ Consequently, in the event of such delegation, the violation of applicable requirements regarding athlete availability may also be committed by the persons to whom the reporting duties have been delegated. Finally, the remaining “non-analytical” violations could be committed by any person within the jurisdiction of the anti-doping organization,³⁵ including, but not limited to, an individual athlete and an athlete’s support personnel.³⁶

that, consistent with the International Standard for Laboratories and related Technical Documents, identifies in a Sample the presence of a Prohibited Substance or its Metabolites or Markers (including elevated quantities of endogenous substances) or evidence of the Use of a Prohibited Method. *See*, WADC, Appendix 1: Definitions.

³³ WADC, Comment to Article 2.2.

³⁴ *See, e.g.*, IAAF Anti-Doping Regulations, Sec. 4.14. *Cf.* PAUL DAVID, A GUIDE TO THE WORLD ANTI-DOPING CODE: THE FIGHT FOR THE SPIRIT OF SPORT 121 (2008).

³⁵ The anti-doping organization is defined in the WADC as a WADC signatory that is responsible for adopting rules for initiating, implementing or enforcing any part of the doping control process. This includes, for example, the International Olympic Committee, the International Paralympic Committee, other Major Event Organizations that conduct Testing at their Events, the WADA, International Federations, and National Anti-Doping Organizations. WADC, Appendix 1: Definitions.

³⁶ Under the WADC, the athlete’s support personnel means any coach, trainer, manager, agent, team staff, official, medical, paramedical personnel, parent or any other person working with, treating or assisting an athlete participating in or preparing for sports completion. *See* WADC, Appendix 1: Definitions.

C. *Foundations for Liability in “Non-Analytical Positive” Doping Cases*

With the exception of liability for the use by an athlete of a prohibited substance or a prohibited method, which is based upon the “strict liability” principle,³⁷ liability in other types of “non-analytical positive” doping cases is based upon a requirement of a finding of guilt. This conclusion can be drawn from the specific provision in the WADC that, in order to establish an anti-doping rule violation for use of a prohibited substance or a prohibited method, “it is not necessary that intent, fault, negligence or knowing use on the athlete’s part be demonstrated,”³⁸ and the absence of a similar provision with respect to other “non-analytical positive” anti-doping rule violations. Since the “strict liability” could be considered rather as an exception, liability based upon a finding of guilt, in the absence of an indication to the contrary, will be considered the general rule. That is why, in “non-analytical positive” doping cases, other than those involving the use of a prohibited substance or a prohibited method, there can be no liability, unless there is a finding of some form of guilt by its perpetrator.

D. *Proof of Anti-Doping Rule Violations in “Non-Analytical Positive” Doping Cases*

1. *Burden of Proof and Presumptions Established by the WADC*

a. *Anti-doping organizations*

Under the WADC, the anti-doping organization must prove that an anti-doping rule violation has occurred.³⁹ Although in “non-analytical positive” violations other than the use of a prohibited substance or prohibited method the athlete’s guilt may be viewed as an element of the violation, the anti-doping organization does not have to prove the athlete’s guilt, because under the WADC this guilt shall be presumed, regardless of the type of violation. The existence of such general presumption of the athlete’s guilt in the WADC may be inferred from Article 10.5.2 of the Code, allowing the athletes to reduce the otherwise applicable period of ineligibility in case of any anti-doping rule violation,⁴⁰ *if an athlete “establishes in an individual case that he or she bears No Significant Fault*

³⁷ WADC, Comment to Article 2.2.2. Under the “strict liability” principle, an athlete is responsible, and an anti-doping rule violation occurs, whenever a prohibited substance or its metabolites or markers is found to be present in an athlete’s sample. The violation occurs whether or not the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault. *See* WADC, Comment to Article 2.2.1 *See also* USA Shooting & Q. v. International Shooting Union (UIT) (CAS 94/129), in DIGEST OF CAS AWARDS 1986-1998, at 187, 193 (Matthieu Reeb ed., 1998).

³⁸ WADC, Art. 2.2.1.

³⁹ WADC, Art. 3.1.

⁴⁰ According to the WADC Commentary, Article 10.5.2 may be applied to any anti-doping rule violation even though it will be especially difficult to meet the criteria for a reduction for those anti-doping rules.

or *Negligence* (emphasis added).”⁴¹ Consequently, once the anti-doping violation is established, it is not the anti-doping organization that must prove the athlete’s fault or negligence, but the athlete who must prove his or her innocence. This conclusion is further confirmed by the decisions of the Swiss Federal Tribunal in *Gundel v. Fédération Equestre Internationale and Court of Arbitration for Sport* and in *N., J., Y., W. v. Fédération Internationale de Natation (FINA)*, according to which the notions pertaining to criminal law, such as the presumption of innocence and the principle “*in dubio pro reo*,” and corresponding guarantees which feature in the European Convention on Human Rights are not applicable to the anti-doping control and the assessment of the result of such control.⁴²

In addition to the presumption of the athlete’s guilt, the WADC provides for three other presumptions in favor of anti-doping organizations. First, in cases when the “non-analytical positive” violation is established on the basis of sample analysis conducted by a WADA-accredited laboratory, the anti-doping organization enjoys the benefit of the presumption that the laboratory conducted the analysis and custodial procedures in accordance with the International Standard for Laboratories.⁴³ If the athlete or another person rebuts this presumption by demonstrating that a departure from the International Standard for Laboratories occurred that could reasonably have caused an adverse analytical finding, then the anti-doping organization has the burden of establishing that such a departure did not cause the adverse analytical findings.⁴⁴

Second, the WADC establishes a presumption that departures from any other International Standard⁴⁵ or other anti-doping rule or policy do not cause Adverse

⁴¹ “No Significant Fault or Negligence” means the athlete has established that his or her fault or negligence, when viewed in the totality of the circumstances, and taking into account the criteria for No Fault or Negligence, was not significant in relation to the anti-doping rule violation. In turn, No Fault or Negligence means the athlete has established that he or she did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he or she had used or been administered the Prohibited Substance or Prohibited Method. *See* WADC, Appendix 1: Definitions.

⁴² *Gundel v. Fédération Equestre Internationale and Court of Arbitration for Sport* (Switz.) (1993), ATF 119 II 271, text in English can be found in DIGEST OF CAS AWARDS 1986-1998, 561-575 (Matthieu Reeb ed., 1998); *N., J., Y., W. v. Fédération Internationale de Natation (FINA)* (5P.83/1999) (Switz.) (1999), text in English can be found in DIGEST OF CAS AWARDS II, 1998-2000, 775-782 (Matthieu Reeb ed., 2002).

⁴³ WADC, Art. 3.2.1. The latest version of the International Standard for Laboratories (ISL) is available at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-Laboratories/WADA_Int.Standard_Laboratories_2009_EN.pdf (last visited July 14, 2010).

⁴⁴ WADC, Art. 3.2.1.

⁴⁵ The “International Standard” is a standard adopted by the WADA in support of the Code. In addition to the Prohibited List and the International Standard for Laboratories, currently there are three other international standards, namely the International Standard for Testing (IST) (http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-Testing/WADA_Int.Standard_Testing_2009_EN.pdf), the International Standard for Therapeutic Use Exemption (ISTUE) (

Analytical Findings or other anti-doping rule violation.⁴⁶ Similar to the previous presumption, if the athlete or other person establishes that a departure from another International Standard or other anti-doping rule or policy which could reasonably have caused the Adverse Analytical Finding or other anti-doping rule violation occurred, the anti-doping organization has the burden of establishing that such departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation.⁴⁷ Finally, the facts established by a decision of a court or professional disciplinary tribunal of competent jurisdiction which is not the subject of a pending appeal shall be irrebuttable evidence against the athlete or other person to whom the decision pertained of those facts unless the athlete or other person establishes that the decision violated principles of natural justice.⁴⁸

b. *Athletes and others accused of committing anti-doping rule violations*

Besides the burden of proving the absence of guilt, the WADC places the burden of proof upon the athletes and other individuals accused of committing “non-analytical positive” anti-doping rule violations in four other instances. First, the athlete bears the burden of rebutting the presumption that a WADA-accredited laboratory conducted sample analysis and custodial procedures in accordance with the International Standard for Laboratories by establishing that a departure from this Standard occurred which could reasonably have caused the Adverse Analytical Finding.⁴⁹ Second, the athlete bears the burden of proof that the departure from another International Standard or other anti-doping rule or policy could reasonably have caused the Adverse Analytical Finding or other anti-doping rule violation to have occurred.⁵⁰ Third, to eliminate or to reduce the period of ineligibility for Specified Substances under Specific Circumstances, the athlete or other person shall establish how this substance entered his or her body or came into his or her possession and that such substance was not intended to enhance the athlete’s sport performance or mask the use of a performance-enhancing substance.⁵¹ Finally, when the anti-doping organization has established in an individual case involving an anti-doping rule violation, other than trafficking or attempted trafficking,⁵² and administration or attempted administration,⁵³ that

Anti-Doping_Program/WADP-IS-TUE/WADA_ISTUE_2010_EN.pdf) and the International Standard for the Protection of Privacy and Personal Information (ISPP) (http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-PPPI/WADA_IS_PPPI_2009_EN.pdf) (last visited July 17, 2010).

⁴⁶ WADC, Art. 3.2.2.

⁴⁷ *Id.*

⁴⁸ *Id.* Art. 3.2.3.

⁴⁹ *Id.* Art. 3.2.1.

⁵⁰ *Id.* Art. 3.2.1.

⁵¹ *Id.* Art. 10.4. According to Article 4.2.2 of the WADC, for purposes of the application of Article 10 (Sanctions on Individuals), all Prohibited Substances shall be “Specified Substances” except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists so identified on the Prohibited List.

⁵² *Id.* Art. 2.7.

aggravating circumstances are present which justify the imposition of a period of ineligibility greater than the standard sanction, to avoid the increase of the period of ineligibility up to a maximum of four years, the athlete or other person shall prove that he or she did not knowingly commit the anti-doping rule violation.⁵⁴

2. “Presumption of Manipulation” Developed by the CAS

The analysis of the CAS arbitration awards in cases related to the alleged manipulation or tampering of doping control samples reveals the existence of an additional presumption in favor of anti-doping organizations, gradually developed by the CAS panels. The origins of this presumption, which could be designated as a “presumption of manipulation,” can be traced to the case of *B. v. Fédération Internationale de Natation (FINA)*, decided by the CAS in 1999.⁵⁵ In this case, an out-of-competition doping control of an athlete’s urine sample revealed a high content of alcohol in the sample (concentration higher than 100 mg/ml), in no way compatible with human consumption, combined with the sample showing a very strong whisky odor and its very low specific gravity (0.983 g/ml).⁵⁶ Additional laboratory results obtained from the sample (especially steroid profile and isotope ratio mass spectrometry measurements) suggested the administration of some metabolic precursor of testosterone.⁵⁷ As a result, the Doping Panel of the FINA imposed upon the athlete a four-year suspension for taking advantage of a banned procedure and using substances and methods which alter the integrity and validity of urine samples used in doping control.

Appealing her suspension to the CAS, the athlete made two main factual arguments in tandem. The first was that the chain of custody of the athlete’s sample had not been established, and therefore, the Doping Panel should have had sufficient doubts as to whether the sample tested at the laboratory was in fact the athlete’s sample. The second was that, if the sample tested were the athlete’s sample, it had been manipulated by a person other than the athlete herself.⁵⁸

Addressing the first argument, the CAS panel reviewed the various stages in the process of collecting, transporting and testing the athlete’s sample, and came to the conclusion that the athlete had failed to prove that there was a break in the chain of custody and, therefore, that the sample tested at the laboratory was not the athlete’s sample.⁵⁹ In this regard, the panel took note of the report of the Institute of Scientific Police and Criminology in Lausanne, according to which the Versapak container used to transport the sample did not show any sign (in the ways

⁵³ *Id.* Art. 2.8.

⁵⁴ *Id.* Art. 10.6.

⁵⁵ *B. v. Fédération Internationale de Natation (FINA) (CAS 98/211)*, available in DIGEST OF CAS AWARDS II (1998-2000), 255-273 (Matthieu Reeb ed., 2002).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* ¶ 29.

⁵⁹ *Id.* ¶ 36.

the Institute was able to experiment with) that there had been an attempt to illicitly open the container and to close it again prior to testing and that, within the limits of its experimentation, it was not possible to illicitly open the type of canisters tested without leaving some indication that it has been opened and closed.⁶⁰

With regard to the second argument, it did not appear to the panel that there was any person other than the athlete who at any relevant time had the motive, opportunity or technical skill to manipulate the sample in a manner that would be undetected, or indeed that the sample was in any way manipulated.⁶¹ The panel noted that, although invited to do so, the athlete's counsel declined – and, in the panel's view, was unable – to formulate any hypothesis that would point the finger at some other such person, whether identified or not. If, and insofar as counsel invited the panel to consider, in an abstract manner, the possibility that either the sampling officer or some officer or employee of FINA were guilty of such manipulation, the panel utterly refuted this suggestion.⁶² Finally, having analyzed the circumstances of the sample's collection, the panel found that the athlete had not been observed at all times during the sample collection and concluded that the athlete had the concrete opportunity and the motive to manipulate the sample.⁶³

Consequently, in light of *B. v. Fédération Internationale de Natation (FINA)*, to create a presumption that the athlete carried out the sample manipulation, the anti-doping organization must establish the following three elements: (i) the manipulation of the sample; (ii) an intact chain of custody; and (iii) the motive and the *concrete* opportunity for the athlete to manipulate the sample. Once these elements have been established, and, consequently, the presumption of manipulation has been created, the athlete may refute it by providing specific evidence that another person substituted or manipulated the sample.

The same approach was subsequently followed by another CAS panel in *B. v. International Weightlifting Federation (IWF)*, decided by the CAS in 2004.⁶⁴ In this case, B. and seventeen other members of the Bulgarian weightlifting team were subjected to an out-of-competition test. The analysis of the collected samples revealed that three of them were identical and, therefore, considered to be positive for physical manipulation. Following negotiations with the Bulgarian Weightlifting Federation, the IWF Executive Board sanctioned B. with eight years suspension (since this was his second anti-doping rule violation), whereas the other two athletes received 18-month suspensions.⁶⁵

⁶⁰ *Id.* ¶ 45.

⁶¹ *Id.* ¶ 41.

⁶² *Id.* ¶ 42.

⁶³ *Id.* ¶ 52.

⁶⁴ *B. v. International Weightlifting Federation (IWF) (CAS 2004/A/607)*, available at <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/607.pdf> (last visited June 6, 2010).

⁶⁵ *Id.* at 4.

Dismissing the appeal of B. against his suspension, the CAS panel started with the determination of where in the chain of custody the manipulation was likely to have occurred.⁶⁶ On the one hand, there was no evidence that the Berlinger Bottle caps, used to transport the samples to the laboratory, had been tampered with after the sample collection. Although the athlete suggested that he was a victim of a conspiracy, he did not mention the eventual motive or possible author of such alleged conspiracy.⁶⁷ On the other hand, the analysis of the event surrounding the sample collection, notably, the procurement of the samples in the over-crowded apartment, the absence of the constant direct supervision of the athletes and the absence of verification whether any possible manipulating devices had been used by the athletes at the moment of urine collection, led the panel to the conclusion that the conditions under which the test took place were not satisfactory and offered several opportunities for B. and the other two athletes to engage in manipulation.⁶⁸

The panel also noted that two other athletes caught with the same urine sample as B. accepted their sanction, thereby conceding that they had been involved in a doping offense and that it had occurred. Without any cogent evidence that two innocent athletes would accept a one and a half year suspension just prior to the Olympic Games, the panel did not accept the suggestion that these other two athletes accepted a suspension without some reason.⁶⁹ As a result, according to the panel, the IWF made it “comfortably satisfied” that athlete B. had the motive and the opportunity to manipulate the sample himself or with the assistance of others.

Thus in light of *B. v. International Weightlifting Federation (IWF)*, to create the presumption that the athlete had manipulated the sample, the anti-doping organization would have to prove the same three elements as in *B. v. Fédération Internationale de Natation (FINA)*. By the same token, to refute this presumption, the athlete would have to provide specific evidence that another person substituted or manipulated the sample, whereas unsubstantiated claims of involvement of unidentified persons or conspiracy would not be sufficient.

The third element required to create a presumption of manipulation in favor of an anti-doping organization has been significantly modified by the CAS panel in the case of the seven Russian athletes.⁷⁰ Similar to the cases of *B. v. Fédération Internationale de Natation (FINA)* and *B. v. International Weightlifting Federation (IWF)*, the CAS panel in this case also held that it was not necessary for the IAAF to prove an anti-doping violation in order to establish exactly how the tampering was carried out.⁷¹ Nevertheless, unlike the previous two cases, the out-of-competition samples in this case were collected from different athletes on

⁶⁶ *Id.*

⁶⁷ *Id.* ¶ 27.

⁶⁸ *Id.* ¶ 32.

⁶⁹ *Id.* ¶ 38.

⁷⁰ *IAAF v. All Russia Athletic Federation & Olga Yegorova at al.*, *supra* note 3.

⁷¹ *Id.* ¶ 185.

different dates and in different locations.⁷² Moreover, all sampling and doping controllers, representing the company which collects the samples under authorization of the IAAF, involved in the out-of-competition sample collection in this case, noted that they had not observed anything remarkable during the collection that would have justified them in noting any remarks on the doping control forms.⁷³ Neither did they recall any difficulties or problems arising during the out-of-competition testing.⁷⁴ Although the CAS panel gave weight to the evidence from the IAAF Results Manager as to how urine substitution could be effected, unlike the case of *B. v. International Weightlifting Federation (IWF)*, no evidence was presented that any of the Russian athletes had a *concrete* opportunity to manipulate their samples.

To justify its conclusions that the manipulation was somehow carried out by the Russian athletes, in addition to the results of the DNA analysis, the CAS panel found the very fact that the seven athletes came from a group of experienced, highly ranked, international level of athletes in one general discipline, track and field, from one country supported the view that a collaborative system of tampering was in effect.⁷⁵ Second, according to the panel, there was significant circumstantial evidence in the findings of an expert that several of the athletes had blood profiles indicative of the long-term use of blood doping. In the panel's view, this evidence did provide a motive for tampering with the out-of-competition samples, namely a need to disguise the use of prohibited substances.⁷⁶ Finally, the panel held that the lack of any remarks by the doping control officers clearly cannot be considered as proof that no tampering took place at the moment of the sample collection.⁷⁷

Thus, in light of the CAS award in the case of the seven Russian athletes, to create the "presumption of manipulation" an anti-doping organization need establish only: (i) the manipulation of the sample; (ii) an intact chain of custody; and (iii) the motive, but is no longer required to establish that the athlete had a *concrete* opportunity for the manipulation. Consequently, as compared with the cases of *B. v. Fédération Internationale de Natation (FINA)* and *B. v. International Weightlifting Federation (IWF)*, this CAS award significantly facilitated the task of anti-doping organizations in cases related to alleged manipulation of athletes' samples. Although from a legal point of view the CAS arbitration awards do not have to be mandatorily followed by subsequent CAS panels, in practice, they provide guidance in later cases, strongly influence later

⁷² *Id.* ¶¶ 14,177.

⁷³ *Id.* ¶ 65.

⁷⁴ *Id.* ¶ 65.

⁷⁵ *Id.* ¶ 183.

⁷⁶ *Id.* ¶ 184.

⁷⁷ *Id.* ¶ 185.

awards and often function as a precedent.⁷⁸ From this perspective, the CAS award in a high-profile case such as the case of the seven Russian athletes certainly creates possibilities that it will subsequently be followed by other CAS panels.

3. *Standards of Proof*

Where the burden of proof is placed upon the anti-doping organization, the standard of proof consists of whether such organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which has been made. The standard of proof in all cases is greater than a mere “balance of probability,” but less than proof beyond a reasonable doubt.⁷⁹ On the other hand, where the burden of proof is placed upon the athlete or other person alleged to have committed an anti-doping rule violation, to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a “balance of probability,” except when the athlete or another person is seeking elimination or reduction of the period of ineligibility for Specified Substances under Specific Circumstances⁸⁰ or is seeking to avoid the increase of the period of ineligibility up to a maximum of four years in the case of aggravating circumstances.⁸¹ To justify any elimination or reduction in the first case, the athlete or other person must produce evidence in addition to his or her word which establishes, to the comfortable satisfaction of the hearing panel, the absence of an intent to enhance sport performance or mask the use of a performance-enhancing substance.⁸² By the same token, to avoid the increase of the period of ineligibility in the second case the athlete or other person must prove, to the comfortable satisfaction of the hearing panel, that he or she did not knowingly commit the anti-doping rule violation.⁸³

4. *Methods of Establishing Facts*

Under the WADC, facts related to anti-doping rule violations may be established by any reliable means, including admissions.⁸⁴ As a result, doping offenses can be proven by a variety of means; and this is nowhere more true than in “non-analytical positive” doping cases.⁸⁵ Over the last decade, such evidence

⁷⁸ See, e.g., James A.R. Nafziger, *Lex Sportiva and CAS, in THE COURT OF ARBITRATION FOR SPORT 1984-2004*, 409 (Ian S. Blackshaw, Robert C.R. Siekmann & Janwillem Soek eds., 2006).

⁷⁹ WADC, Art. 3.1.

⁸⁰ *Id.* Art. 10.4.

⁸¹ *Id.* Art. 10.6.

⁸² *Id.* Art. 10.4.

⁸³ *Id.* Art. 10.6.

⁸⁴ *Id.* Art. 3.2.

⁸⁵ *United States Anti-Doping Agency (USADA) v. M. & International Association of Athletics Federation (IAAF) (CAS 2004/O/645)*, ¶ 4; *United States Anti-Doping Agency (USADA) v. G. (CAS 2004/O/649)*, ¶ 4.

used by the CAS panels to justify the athletes' responsibility in a number of high-profile "non-analytical positive" cases included the results of comparative DNA analysis of urine samples taken from three different athletes, together with the experts' reports and testimony that the bottles with samples were not tampered with, together with the well-documented period of custody by the DHL courier who transmitted the bottles to the accredited laboratory;⁸⁶ emails from the athlete in which she admitted to using some of the prohibited substances and techniques, and undisputed blood and urine test results that together provided evidence of a pattern of doping;⁸⁷ as well as the incontrovertible testimony of a wholly credible witness to whom the athlete admitted to having used prohibited substances in violation of applicable anti-doping rules.⁸⁸ In addition, the WADC also allows the hearing panels "in a hearing on an anti-doping rule violation [to] draw an inference adverse to the athlete or other person who is asserted to have committed an anti-doping rule violation based on the athlete's or other person's refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel) and to answer questions from the hearing panel or the anti-doping organization asserting the anti-doping rule violation."⁸⁹

III. THE ATHLETE'S RIGHT TO A FAIR TRIAL: SOURCES AND CONTENT

A. *The Components of the Right to a Fair Trial under Article 6(1) of the ECHR*

Amongst the different rights listed in Article 6(1) of the ECHR, the right of access to an "independent and impartial tribunal established by law" may be considered as the cornerstone of the right to a fair trial. Indeed, as was pointed out by the European Court of Human Rights in *Golder v. The United Kingdom*, "in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts."⁹⁰ According to the European Court,

⁸⁶ B. v. International Weightlifting Federation (IWF) (CAS 2004/A/607).

⁸⁷ United States Anti-Doping Agency v. Michelle Collins (AAA 30 190 00658 04).

⁸⁸ United States Anti-Doping Agency (USADA) v. M. & International Association of Athletics Federation (IAAF) (CAS 2004/O/645), ¶ 4; United States Anti-Doping Agency (USADA) v. G. (CAS 2004/O/649), ¶ 4.

⁸⁹ WADC, Art. 3.2.4.

⁹⁰ *Golder v. The United Kingdom*, 18 Eur. Ct. H.R. (Ser. A), ¶ 34 (1975). The European Court of Human Rights is a permanent institution set up pursuant to Article 19 of the ECHR ("Establishment of the Court") to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto. Article 19 of the ECHR initially envisaged the creation of two judicial bodies – the European Court of Human Rights and the European Commission of Human Rights. All applications lodged under the Convention by individual applicants and Contracting States were the subject of a preliminary examination by the Commission, which decided whether they were admissible. If a complaint was declared admissible, and where no amicable

“[t]he principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally ‘recognized’ fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice.”⁹¹ The right of access constitutes an element which is inherent in the right provided by Article 6(1) of the Convention. Hence, Article 6(1) secures for everyone “the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, the article embodies the ‘right to a court,’ of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only.”⁹²

“This ‘right to a court,’ of which the right of access is an aspect, may be relied on by anyone who considers on arguable grounds, that an interference with the exercise of his (civil) rights is unlawful and complains that he has not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6(1)” of the ECHR.⁹³ To this right are added the guarantees laid down by Article 6(1) as regards both the organization and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing.⁹⁴ Thus, while the following discussion mainly focuses on the athlete’s right of access to an independent and impartial tribunal and the athlete’s right to procedural equality, as being the most relevant in “non-analytical positive” doping cases, the scope of the right to a fair trial under Article 6(1) of the ECHR certainly goes beyond these two rights.

B. *The Athlete’s Right of Access to an Independent and Impartial Tribunal*

1. *The Impact of “Forced” Nature of Sports Arbitration on the Content of the Athlete’s Right of Access to Court*

Although Article 6(1) of the ECHR refers to the right of access to “an independent and impartial tribunal established by law,” in sports-related disputes

settlement was reached, the Commission drew up a report establishing the facts and expressing a non-binding opinion on the merits of the case. The Commission and/or the Government of the State in question could then decide to refer the case to the Court for a final, binding adjudication. If the case was not brought before the Court, it was decided by the Committee of Ministers. Since November 1, 1998, when Protocol No. 11 to the ECHR entered into force, the Court and the Commission have been replaced by a single full-time European Court of Human Rights, and individual applicants have been entitled to submit their cases directly to the Court. *See The European Court of Human Rights: 50 Years of Activity*, available at <http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFiguresENAvril2010.pdf> (last visited Oct. 27, 2010).

⁹¹ *Golder v. The United Kingdom*, ¶ 35.

⁹² *Id.* ¶ 36.

⁹³ *Ashingdane v. United Kingdom*, 93 Eur. Ct. H.R. (Ser. A), ¶ 55 (1985) (citing *Le Compte, Van Leuven & De Meyere v. Belgium*, 43 Eur. Ct. H.R. (Ser. A), ¶ 44 (1981); *Sporrong and Lönnroth v. Sweden*, 52 Eur. Ct. H.R. (Ser. A), ¶ 81 (1982).

⁹⁴ *Golder v. The United Kingdom*, ¶ 36.

this right is usually replaced by the right of access to an arbitral tribunal, which, despite its independence and impartiality, still cannot be considered as a “tribunal established by law.”⁹⁵ This substitution results from the “forced” nature of sports arbitration imposed upon the athletes willing to participate in a competition organized under the auspices of a sports federation having rules that provide for arbitration.⁹⁶ As was pointed out by the Swiss Federal Tribunal, the athlete who wants to participate in such competition does not have a choice and must accept the arbitration clause, in particular by adhering to the by-laws of the sports federation containing the arbitration clause, all the more when the athlete is a professional. Otherwise, he would be confronted by the following dilemma: agree to arbitration or practice his sport as an amateur. Faced with the choice to submit to arbitration or to practice his sport “in his garden,” by watching the competitions “on TV,” the athlete who wants to compete with real competitors or who is forced to do so because this represents his only source of income (monetary rewards and prizes in kind, advertising revenue, etc.) will be forced to opt, whether willingly or not, for the former.⁹⁷ In short, in the words of Don Vito Corleone in the “*Godfather*,” the athletes are made an offer which they cannot refuse.

From this perspective, the “forced arbitration” imposed upon athletes who, in an overwhelming majority of cases, may be seen as the weaker party in the relationship with national and international sports federations can be hardly considered as an arbitration based on a voluntary agreement between two equal parties. Consequently, the athlete’s forced acceptance of an arbitration clause should not be considered as a “voluntary waiver” of court proceedings in favor of

⁹⁵ An arbitral tribunal cannot be considered a “tribunal established by law” because unlike state courts, arbitral tribunals (with the exception of mandatory arbitration) are established through agreement of the parties to the dispute. *See, e.g.,* Juan Carlos Landrove, *European Convention on Human Rights’ Impact on Consensual Arbitration: an État des Lieux of Strasbourg Case-Law and of a Problematic Swiss Law Feature*, in *HUMAN RIGHTS AT THE CENTER* 73, 80 (Samantha Besson et al. eds., 2006).

⁹⁶ For example, according to the IAAF Competition Rules, “no athlete may take part in an International Competition unless he (a) is a member of a Club affiliated to a Member; or (b) is himself affiliated to a Member; or (c) has otherwise agreed to abide by the rules of a Member; and (d) for International Competitions at which the IAAF is responsible for doping control (see Rule 35.7), has signed an agreement in a form set by the IAAF by which he agrees to be bound by the Rules and Regulations (as amended from time to time) and to submit all disputes he may have with the IAAF or a Member to arbitration only in accordance with these Rules, accepting not to refer any such disputes to any Court or authority which is not provided for in these Rules (emphasis added).” *See* IAAF COMPETITION RULES (2010-2011), Rule 4(1).

⁹⁷ *X. v. ATP Tour et Tribunal Arbitral du Sport (TAS) (Switz.)* (2007), ATF 133 III 235, partial English translation can be found in CHRISTOPH MÜLLER, *SWISS CASE LAW IN INTERNATIONAL ARBITRATION* 48-49 (2nd ed. 2010). *See also* ANTONIO RIGOZZI, *L’ARBITRAGE INTERNATIONAL EN MATIÈRE DE SPORT* 249-51 (2005); Sébastien Besson, *Arbitration and Human Rights*, 24 *ASA BULL.* 395, 387 (2006).

arbitration, which is, in principle, acceptable from the point of view of Article 6(1) of the ECHR.⁹⁸ Nevertheless, until now the Swiss Federal Tribunal viewed with “benevolence” the consensual nature of sports arbitration, justifying its approach by the need to facilitate the rapid adjudication of disputes by specialized tribunals presenting sufficient guarantees of independence and impartiality, such as the CAS.⁹⁹ Accordingly, it refused to apply Article 6(1) of the ECHR to proceedings before the CAS, for example, in a dispute between a football player and the Union of European Football Associations (“UEFA”), considering that by accepting the resolution of disputes by arbitration this player had validly renounced his right of access to state courts.¹⁰⁰

Even though the Swiss Federal Tribunal views the forced acceptance by an athlete of the arbitration clause as a valid waiver of his/her right to state court proceedings, in light of the case law of the European Court of Human Rights, under no circumstances can this waiver be seen as a complete waiver of all of the athlete’s rights under Article 6(1) of the ECHR.¹⁰¹ In the Court’s view, even an unequivocal voluntary waiver of Convention rights is valid only insofar as such waiver is “permissible.”¹⁰² This “waiver may be permissible with regard to certain rights but not with regard to certain others,” and “distinction may have to be made even between different rights guaranteed by Article 6” of the Convention.¹⁰³ When deciding whether a waiver with respect to a certain right under Article 6(1) of the Convention (in particular, the right to an impartial judge) is permissible in arbitration proceedings, the European Court for Human Rights considers whether a similar waiver would be valid in the context of purely judicial proceedings under domestic law.¹⁰⁴

Applying this reasoning to the case of the seven Russian athletes, it may be recalled that under Russian domestic law the waiver of the right to apply to a state

⁹⁸ European Court of Human Rights, Decision as to the admissibility of Application No. 31737/96 *Osmo Suovaniemi and others v. Finland* (23.02.1999), available at <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=49788&sessionId=61799222&skin=hudoc-en&attachment=true> (last visited Nov. 8, 2010).

⁹⁹ See *A., B. v. Comité International Olympique, Fédération Internationale de Ski (FIS) et Tribunal Arbitral du Sport (TAS)* (2003) (Switz.), ATF 129 III 445, ¶ 3 [hereinafter *Lazutina and Danilova case*]; *X. v. ATP Tour et Tribunal Arbitral du Sport (TAS)* (2007) (Switz.), ATF 133 III 235, ¶ 4.3.2.3; *X. v. Y et Fédération Internationale de Football Association (FIFA)* (No. 4A_548/2009) (2009) (Switz.), ¶ 4.1, available at <http://www.bger.ch> (last visited Sept. 2, 2010).

¹⁰⁰ *A. v. Union des Associations Européennes de Football (UEFA) et Tribunal Arbitral du Sport (TAS)* (2001) (Switz.), ATF 127 III 429, ¶ 2a.

¹⁰¹ Decision as to the Admissibility of Application No. 31737/96 (*Feb. 23, 1999*), *Osmo Suovaniemi v. Finland* (23.02.1999).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

court is null and void.¹⁰⁵ Consequently, although the Russian athletes' acceptance of the arbitration clause in the IAAF Competition Rules could have been considered by the Swiss Federal Tribunal as a valid waiver of court proceedings in favor of arbitration, the scope of their right of access to arbitration still should have been the same as would have been the scope of their right of access to a court under the national legislation. In other words, from the point of view of Article 6(1) of the ECHR, the Russian athletes should have the right to arbitrate any claim relating to their civil rights and obligations, which they could have brought to a Russian court in the absence of an arbitration clause, provided that there are no legitimate limitations imposed on this right.

2. *The Meaning of a "Dispute Involving Civil Rights and Obligations"*

According to the text of Article 6(1) of the ECHR, the application of this article in civil cases requires not only that the matter concern civil rights and obligations, but that there be a dispute concerning the particular rights and obligations.¹⁰⁶ While the Convention itself does not define the terms of "civil rights and obligations" or "dispute," certain indications as to the meaning of these terms can be found in the decisions of the European Court of Human Rights. According to the case law of this Court, the notion of "civil rights and obligations," cannot be interpreted solely by reference to the domestic law of the respondent State.¹⁰⁷ In addition, in the Court's view, Article 6(1) of the ECHR does not cover only "private-law disputes in the traditional sense, that is disputes between individuals or between an individual and the State to the extent that the latter had been acting as a private person, subject to private law," and not in its sovereign capacity.¹⁰⁸ The character of the legislation which governs how the matter is to be determined and that of the authority which is invested with jurisdiction in the matter are of little consequence: the latter may be an ordinary court, an administrative body, etc.¹⁰⁹ Only the character of the right at issue is relevant.¹¹⁰

Until now the European Court of Human Rights has not provided a comprehensive abstract definition of the concept of "civil rights and obligations," which would be applicable to all types of rights and obligations, but rather has applied these principles to the evaluation of particular rights on a case-by-case

¹⁰⁵ Grazhdanskii Protsessual'nyi Kodeks RF [Civil Procedural Code] [GPK RF], Art. 3(2) (Russ.). See Civil Procedural Code of the Russian Federation, dated Nov. 14, 2002, No. 138-FZ (as amended), Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF], 2002, No.46, Item 4532 (Russ).

¹⁰⁶ See ROBIN C.A. WHITE & CLARE OVEY, JACOBS, WHITE & OVEY: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 253 (5th ed., 2010).

¹⁰⁷ König v. Federal Republic of Germany, 27 Eur. Ct. H.R. (Ser. A), ¶¶ 88, 89 (1978).

¹⁰⁸ *Id.* ¶ 90.

¹⁰⁹ Ringeisen v. Austria, 13 Eur. Ct. H.R. (Ser. A), ¶ 94 (1971).

¹¹⁰ König v. Federal Republic of Germany, ¶ 90; cited in Deumeland v. Germany, 100 Eur. Ct. H.R. (Ser. A), ¶ 60 (1986).

basis.¹¹¹ The resulting gap could be partially filled by an analysis of the Court's decisions in a number of cases related to the applicability of Article 6(1) of the ECHR to social security disputes. This analysis allows for identifying certain features, which, taken "together and cumulatively," confer on a social security entitlement the character of a civil right within the meaning of Article 6(1).¹¹²

To be qualified as a "civil right," this entitlement, first, should flow from "specific rules laid down by the legislation in force" and by its nature it should be a "personal, economic and individual right."¹¹³ Second, this entitlement should "form one of the constituents of the relationship between employer and employee."¹¹⁴ Third, although the State may be assuming overall responsibility for ensuring social protection, the system under which the entitlement is granted should display some similarities with the insurance system under the ordinary law.¹¹⁵ Finally, the protection of the right shall be "organized in such a way that at the judicial stage disputes over it come within the jurisdiction of the ordinary court."¹¹⁶

Regarding the meaning of a "dispute" ("*contestation*" in the French text of the ECHR), the principles of the existing case law have been summarized by the Court in *Bentham v. The Netherlands*.¹¹⁷ First, in the Court's view, conformity with the spirit of the Convention requires that the word "*contestation*" (dispute) should not be construed too technically and should be given a substantive rather than a formal meaning.¹¹⁸ Second, "the dispute may relate not only to the actual existence of a right, but also to its scope and the manner in which it may be exercised." It may concern both "questions of fact" and "questions of law."¹¹⁹

Third, the dispute must be "genuine and of a serious nature."¹²⁰ Finally, the expression "disputes over civil rights and obligations" covers all proceedings the result of which is decisive for such rights and obligations. However, "a tenuous connection or remote consequences do not suffice for Article 6(1) ... civil rights and obligations must be the object – or one of the objects – of the '*contestation*' (dispute); the result of the proceedings must be directly decisive for such a right."¹²¹

¹¹¹ See, e.g., *Bentham v. The Netherlands*, 97 Eur. Ct. H.R. (Ser. A), ¶ 35 (1985); *Feldbrugge v. The Netherlands*, 99 Eur. Ct. H.R. (Ser. A) ¶ 26 (1986); *Deumeland v. Germany*, ¶ 61.

¹¹² *Deumeland v. Germany*, ¶ 74.

¹¹³ *Feldbrugge v. The Netherlands*, ¶ 37.

¹¹⁴ *Id.* ¶ 38.

¹¹⁵ *Id.* ¶ 39.

¹¹⁶ *Salesi v. Italy*, 257-E Eur. Ct. H.R., ¶ 19 (1993).

¹¹⁷ *Bentham v. The Netherlands*, ¶ 32.

¹¹⁸ *Id.* ¶ 32(a) (citing *Le Compte, Van Leuven & De Meyere v. Belgium*, ¶ 45).

¹¹⁹ *Id.* ¶ 32(b) (citing *Le Compte, Van Leuven & De Meyere v. Belgium*, ¶ 51; *Albert and Le Compte v. Belgium*, 58 Eur. Ct. H.R. (Ser. A), ¶¶ 29, 36).

¹²⁰ *Id.* ¶ 32(c) (citing *Sporrong and Lönnroth v. Sweden*, ¶ 81).

3. *Possible Limitations on the Athlete's Right of Access to an Independent and Impartial Tribunal*

As has been repeatedly stated by the European Court of Human Rights, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication, since the right of access “by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals.”¹²² According to the Court, “[i]n laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court, it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field.”¹²³ Nonetheless, in the Court's view, the limitations applied “must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.”¹²⁴ Furthermore, a limitation will not be compatible with Article 6(1) of the ECHR, if it “does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”¹²⁵ Consequently, in light of this precedent by the European Court of Human Rights, any eventual restrictions imposed on the athlete's right of access to an independent and impartial tribunal in sport-related disputes, either by national legislation or by the rules of relevant national or international sports federations, would have to be analyzed on a case-by case basis from the point of view of whether: (i) these restrictions restrict or reduce the athlete's right of access to arbitration in such a way, or to such an extent, that the very essence of the right is impaired; (ii) these restrictions pursue a legitimate aim, and (iii) there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

¹²¹ *Id.* ¶ 32(d) (citing *Le Compte, Van Leuven & De Meyere v. Belgium*, ¶ 47).

¹²² *See, e.g.,* *Ashingdane v. United Kingdom*, 93 Eur. Ct. H.R. (Ser. A), at ¶ 57 (1985) (citing *Golder v. United Kingdom*, ¶ 38, which quoted *Case Relating to Certain Aspects on the Laws on the Use of Languages in Education in Belgium*, 6 Eur. Ct. H.R. (Ser. A), ¶ 5 (1968) [hereinafter *Belgian Linguistic Judgment*]).

¹²³ *Ashingdane v. United Kingdom*, ¶ 57 (citing *Klass v. Germany*, 28 Eur. Ct. H.R. (Ser. A), ¶ 49 (1978)).

¹²⁴ *Id.* ¶ 57 (citing *Golder v. United Kingdom*, ¶ 38); *Belgian Linguistic Judgment*, ¶ 5; *Winterwerp v. Netherlands*, 33 Eur. Ct. H.R. (Ser. A), ¶¶ 60, 75 (1979)).

¹²⁵ *Id.*; *see also* *Lithgow v. United Kingdom*, 102 Eur. Ct. H.R. (Ser. A), ¶ 194 (1986).

C. *The Athlete's Right to Procedural Equality*

1. *General Requirements Concerning Procedural Equality in CAS Arbitration Proceedings*

a. *Principle of "Equality of Arms" under Article 6(1) of the ECHR*

Although the Swiss Federal Tribunal refused to apply directly Article 6(1) of the ECHR to CAS arbitration proceedings,¹²⁶ it has repeatedly held that the guarantees it provides concerning the essential principles of procedure are still applicable to arbitration having its seat in Switzerland.¹²⁷ As the CAS has its seat in Switzerland,¹²⁸ and its decisions are subject to appeal to the Swiss Federal Tribunal,¹²⁹ CAS panels have to respect the essential principles of procedure guaranteed by Article 6(1) of the Convention.¹³⁰ Otherwise, they would be facing the risk that the Swiss Federal Tribunal could annul their awards on appeal pursuant to the Swiss Federal Private International Law Act.¹³¹

One such guarantee in Article 6(1) of the ECHR is the principle of "equality of arms" gradually developed by the European Court of Human Rights.¹³² Under this principle, inherent in the concept of a fair trial both in civil and criminal proceedings, the State must guarantee a fair balance between the parties.¹³³ "As regards litigation involving opposing private interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."¹³⁴

¹²⁶ A. v. Union des Associations Européennes de Football (UEFA) et Tribunal Arbitral du Sport (TAS) (2001) (Switz.), ATF 127 III 429, ¶ 2a.

¹²⁷ See e.g., Egemetal Demir Celik Sanayi ve Ticaret A.S. v. Fuchs Systemtechnik GmbH (2000) (Switz.), ATF 126 III 249, ¶ 3c; A. v. Union des Associations Européennes de Football (UEFA) et Tribunal Arbitral du Sport (TAS) (2001) (Switz.), ATF 127 III 429, ¶ 2a.

¹²⁸ CODE OF SPORTS-RELATED ARBITRATION, Rule R28.

¹²⁹ Loi Fédérale Sur le Droit International Privé [LDIP] (Federal Private International Law Act), Art. 190 (Switz).

¹³⁰ X v. Y., Fédération Française d'Equitation, Emirates International Endurance Racing, Organising Committee of the FEI Endurance World Championship 2005, Fédération Equestre Internationale (4P.105/2006) (2006) (Switz.) (sec.7.3).

¹³¹ LDIP, Art. 191(1) (Switz.).

¹³² See, e.g., Neumeister v. Austria, 8 Eur. Ct. H.R. (Ser. A), ¶ 22 (1968); Feldbrugge v. Netherlands, 99 Eur. Ct. H.R. (Ser. A), ¶ 44 (1986); Dombo Beheer B.V. v. Netherlands, 274 Eur. Ct. H.R. (Ser. A), ¶ 33 (1994); Stran Greek Refineries and Stratis Andreadis v. Greece, 301-B Eur. Ct. H.R. (Ser. A), ¶ 46 (1994); Ankerl v. Switzerland, 1996-V Eur. Ct. H.R., ¶ 38; De Haes and Gijssels v. Belgium, 1997-I Eur. Ct. H.R., ¶ 53; Steel and Morris v. United Kingdom, 41 Eur. Ct. H.R., ¶ 59 (2005).

¹³³ See, e.g., Feldbrugge v. Netherlands, ¶ 44; Dombo Beheer B.V. v. The Netherlands, ¶ 33; Ankerl v. Switzerland, ¶ 38; Steel and Morris v. United Kingdom, ¶ 59.

¹³⁴ Dombo Beheer B.V. v. The Netherlands, ¶ 33.

Examples of civil proceedings where the European Court of Human Rights found the principle of “equality of arms” violated include the case where only two people had been present at the meeting at which a certain oral agreement had allegedly been reached, but only one of these two key people was permitted by the national court to be heard, namely the person who had represented the defendant.¹³⁵ Another example is the case of denial of legal aid to two defendants in defamation proceedings brought against them by a large multinational company (McDonald’s), which “deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with the plaintiff.”¹³⁶ In another case, the European Court of Human Rights found the principle of “equality of arms” to be violated in defamation proceedings brought against journalists where the outright rejection by the Brussels Tribunal of the First Instance and the Court of Appeal of the defendants’ application to admit into evidence the documents referred to in the impugned articles or hear at least some of the journalists’ witnesses, put the journalists at a “substantial disadvantage vis-à-vis the plaintiffs.”¹³⁷

While Article 6(1) of the ECHR requires the State to guarantee a “fair balance” between parties in civil proceedings, this equality does not have to be “total equality.”¹³⁸ Thus, “it is not incumbent on the State to seek through the use of public legal aid funds, to ensure total equality of arms” between the opponents, “as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary.”¹³⁹ Similarly, although difference in treatment in respect of the hearing of the parties’ witnesses may, in principle, infringe the “equality of arms” concept,¹⁴⁰ the European Court found no such violation in a civil case when this difference of treatment did not place the applicant in a substantial disadvantage vis-à-vis his opponent.¹⁴¹ Although the applicant’s wife was precluded by the Cantonal Civil Proceedings Act from giving evidence under oath,¹⁴² she was heard by the Geneva Court of First Instance for information purposes. On the other hand, it did not appear from the Geneva Court judgment that this court “attached any particular weight” to plaintiff’s witness “testimony on

¹³⁵ *Id.* ¶ 34.

¹³⁶ *Steel and Morris v. United Kingdom*, ¶ 72.

¹³⁷ *De Haes and Gijssels v. Belgium*, ¶¶ 58, 59.

¹³⁸ *Steel and Morris v. United Kingdom*, ¶ 72.

¹³⁹ *Id.*

¹⁴⁰ *Dombo Beheer B.V. v. The Netherlands*, ¶ 34.

¹⁴¹ *Ankerl v. Switzerland*, ¶ 38.

¹⁴² Under Articles 225 and 226 of the Canton of Geneva Civil Proceedings Act, with the exception of proceedings for withdrawal of parental authority, in matters concerning personal status and in cases concerning judicial separation, divorce and measures to preserve marital union, the wife of a party to the proceedings may be heard without distinction, but without taking the oath and solely for information purposes. See Canton of Geneva Civil Proceedings Act of April 10, 1987 (“LPC”), available at <http://www.ge.ch/legislation/welcome.html> (last visited Oct. 26, 2010).

account of his having given evidence on oath.” Lastly, the Geneva “court relied on evidence other than just the statements in issue.” Thus, the European Court of Human Rights did not see how the fact of the defendant’s wife “giving evidence on oath could have influenced the outcome of the proceedings.”¹⁴³

By the same token, the European Court of Human Rights found no violation of the “equality of arms” principle where the “Occupational Association did not enjoy a procedural position any more advantageous” than an employee challenging the refusal of her entitlement sickness allowances before the President of the Appeals Board. Had the experts expressed an opinion unfavorable to the Association’s standpoint, it “would likewise have been unable to present oral or written arguments or to challenge the validity of the unfavorable opinion.” As a result, in the European Court’s view, “[n]o lack of fair balance [was] thus obtained between the parties in this respect.”¹⁴⁴

b. *Procedural equality under Chapter 12 of the Swiss Private International Law Act*

Chapter 12 of the Swiss Federal Private International Law Act contains a specific guarantee concerning procedural equality in arbitration proceedings, the content of which is similar to the “equality of arms” principle under Article 6(1) of the ECHR. Under Article 182(3) of the Act, regardless of what arbitral procedure is chosen by the parties or by the arbitral tribunal itself, the tribunal must ensure equal treatment of the parties and their right to be heard in adversary proceedings.¹⁴⁵ According to the Swiss Federal Tribunal, the equal treatment of the parties in arbitration proceedings requires that these proceedings be organized and conducted in such a way that each party has the same opportunities to assert its procedural rights.¹⁴⁶ In accordance with this principle, the arbitral tribunal shall treat the parties similarly during all stages of the proceedings.¹⁴⁷ This provision of the Act is an imperative norm, which the parties cannot waive,¹⁴⁸ and its violation constitutes one of the grounds for challenging the arbitral award before the Swiss Federal Tribunal.¹⁴⁹

¹⁴³ *Ankerl v. Switzerland*, ¶ 38.

¹⁴⁴ *Feldbrugge v. The Netherlands*, ¶ 44.

¹⁴⁵ LDIP, Art. 182(3) (Switz).

¹⁴⁶ *B. Fund Ltd. v. A. Group Ltd. and Arbitral Tribunal* (4P_168/2006) (Switz.) (2006), ATF 133 III 139, 143, ¶ 6.1.

¹⁴⁷ *Id.* See also *Z. v. A. and B.* (4P_167/2002) (2002) (Switz.); *A., B. v. Comité International Olympique, Fédération Internationale de Ski (FIS) et Tribunal Arbitral du Sport (TAS)* (2003) (Switz.), ATF 129 III 445; *A. v. X. Ltd.* (4P.114/2003) (2003) (Switz.); *X. Ltd. v. Y. GmbH and Z. GmbH* (4P.196/2003) (2003) (Switz.); *A. B.V. v. B.* (4P.117/2004) (2004) (Switz.); *B. v. A.* (4P_168/2006) (2007) (Switz.); *Y. v. Z.* (4A_220/2007) (2007) (Switz.); *X. v. Y.* (4A_294/2008) (2008) (Switz.); *X. SpA v. Y .B.V.* (4A_539/2008) (2009) (Switz.), all decisions available at <http://www.bger.ch> (last visited Oct. 25, 2010).

¹⁴⁸ *B. Fund Ltd. v. A. Group Ltd. and Arbitral Tribunal*, ¶ 6.1.

¹⁴⁹ LDIP, Art. 190(2)(d) (Switz).

Since Article 6(1) of the ECHR is not directly applicable to CAS arbitration proceedings, while appealing the CAS arbitration award with the Swiss Federal Tribunal an athlete cannot directly claim the violation of the procedural guarantees provided for in the Convention.¹⁵⁰ However, as was pointed out by the Swiss Federal Tribunal, this does not rule out the use of the principles flowing from Article 6(1) of the ECHR when concretizing the procedural guarantees which can be invoked based on Article 190(2) of the Swiss Federal Private International Law Act.¹⁵¹ Thus, it may be concluded that in the case of appeals against CAS awards on the basis of a violation of procedural equality under Article 190(2)(d) of the Act, the athletes would be able to invoke as well the principle of “equality of arms” and its interpretation by the European Court of Human Rights.

2. Procedural Equality and Presumptions

“Presumptions of fact or of law operate in every legal system” and the ECHR does not prohibit such presumptions in principle.¹⁵² “It does, however, require the Contracting States to remain within certain limits in this respect as regards *criminal law*” presumptions.¹⁵³ Under Article 6(2) of the Convention, “[e]veryone charged with a criminal offence shall be presumed innocent until proven guilty according to law.”¹⁵⁴ As was pointed out by the European Court of Human Rights, “[this provision] requires States to confine [presumptions of fact or of law provided for in the criminal law,] within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defense.”¹⁵⁵

On the other hand, as concerns *civil* law presumptions, “Article 6(1) of the ECHR does not, as such, regulate the allocation of the burden of proof in civil proceedings.”¹⁵⁶ From this perspective, as was pointed out by the European Commission of Human Rights in *Mayer v. Austria*, a provision laying down, in the context of a civil dispute, a certain presumption (in that case – a presumption of responsibility) may be regarded as infringing the fairness of trial only and insofar as it can result in an imbalance between the parties in the context of the

¹⁵⁰ *X v. Y., Fédération Française d'Équitation, Emirates International Endurance Racing, and Fédération Equestre Internationale*, ¶ 7.3.

¹⁵¹ *Id.*

¹⁵² *Salabiaku v. France*, 141-A Eur. Ct. H.R. (Ser. A), ¶ 28 (1988).

¹⁵³ *Id.*

¹⁵⁴ ECHR, Art. 6(2).

¹⁵⁵ *Salabiaku v. France*, ¶ 28.

¹⁵⁶ European Commission of Human Rights: Decision on the Admissibility of Application No. 26632/95, *Mayer v. Austria* (4.09.1996), available at <http://cmiskp.echr.coe.int/tkp197/viewhbkkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=48119&sessionId=61819235&skin=hudoc-en&attachment=true> (last visited Nov. 8, 2010).

“equality of arms” principle.¹⁵⁷ Consequently, in light of the case law of the European Commission of Human Rights and the European Court of Human Rights, the determination of whether a certain civil-law presumption violates procedural equality would depend on whether the party against whom this presumption operates still has a “reasonable opportunity of presenting his/her case to the court under conditions which do not place him/her at a substantial disadvantage vis-à-vis his opponent.”¹⁵⁸

The analysis of the same case law also allows for identifying some of the relevant factors that would most likely be considered by the European Court of Human Rights in making this determination. First, the European Court would probably analyze whether the decision of the national court applying the presumption “took account of all the elements submitted to them by the parties in the context of adversarial proceedings,”¹⁵⁹ or, in other words, whether the decision of the national court was arbitrary.¹⁶⁰ Second, this Court would probably also consider whether the person against whom the presumption was operating could properly argue his/her case before the court applying this presumption, including representation by counsel, and whether he/she could actually rebut this presumption.¹⁶¹

Thus, although the presumption of innocence and the principle “*in dubio pro reo*,” and corresponding guarantees which feature in the European Convention on Human Rights are not applicable to the anti-doping control and the assessment of the result of such control,¹⁶² this does not mean that the CAS panels are completely free to establish any presumptions at their own discretion. Taking into account that the CAS panels have to respect the essential principles of procedure guaranteed by Article 6(1) of the ECHR, it may be concluded that any presumptions used by these panels in arbitration proceedings shall respect the “equality of arms” principle. In other words, the use of the presumptions by the CAS panels should not deprive the athletes of a reasonable opportunity to present their case to the court under conditions which do not place them at a substantial disadvantage vis-à-vis international sports federations or the WADA.

¹⁵⁷ European Commission of Human Rights: Decision on the Admissibility of the Application *G. v France* (5.10.1988), ¶ 1, available at <http://cmiskp.echr.coe.int/tkp197/viewbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=56244&sessionId=61819235&skin=hudoc-en&attachment=true> (last visited Nov. 8, 2010); European Commission of Human Rights: Decision as to the Admissibility of Application No. 26632/95 *Mayer v. Austria* (4.09.1996), ¶ 1 (citing *Dombo Beheer B.V. v. The Netherlands*, ¶ 33; *Stran Greek Refineries and Stratis Andreadis v. Greece*, ¶ 46).

¹⁵⁸ *Dombo Beheer B.V. v. The Netherlands*, ¶ 33; *Stran Greek Refineries and Stratis Andreadis v. Greece*, ¶ 46.

¹⁵⁹ *G. v France*, ¶ 1.

¹⁶⁰ *Mayer v. Austria*, ¶ 1.

¹⁶¹ *Id.*

¹⁶² *Gundel v. Fédération Equestre Internationale and Court of Arbitration for Sport (Switz.)* (1993), ATF 119 II 271; *N., J., Y., W. v. Fédération Internationale de Natation (FINA)* (5P.83/1999) (Switz.) (1999).

Therefore, in light of the case law of the European Court of Human Rights, our subsequent determination of whether the “presumption of manipulation” used by a CAS panel in “non-analytical positive” doping cases respects the athlete’s right to procedural equality will primarily focus on the analysis of whether: (i) the decision of the panel applying this presumption against the athletes is arbitrary; and (ii) the athlete could properly argue his/her case before the CAS panel and could actually rebut this presumption. Furthermore, even though they may not directly affect the legal validity of the “presumption of manipulation,” for the sake of completeness we will also discuss related public policy considerations and the minimization of the potential social cost of this presumption for society at large.

IV. PROVISIONAL SUSPENSION FROM THE POINT OF VIEW OF THE ATHLETE’S RIGHT OF ACCESS TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL

A. *Provisional Suspension as a “Dispute Involving Civil Rights and Obligations”*

1. *The Athlete’s Right to Participate in Sports Competitions as a “Civil Right”*

The athlete’s right to participate in sports competitions should be viewed as one aspect of the athlete’s right to work. The origins of the latter can be traced to the rapid pace of the commercialization of sports throughout the world over the last several decades and the elevation of the standards of modern international competition which have resulted in the impossibility of pursuing high-level competitive sport as a leisure occupation.¹⁶³ From this perspective, the emerging occupation of the “professional athlete,” primarily earning his/her livelihood by practicing sport and engaging in related activities (product endorsements, etc.) should be regarded no differently from any other professional occupation, although some top professional athletes earn more money in one year than the majority of employees could ever earn in their lifetime.¹⁶⁴

¹⁶³ See, e.g., RICHARD VEROW, CLIVE LAWRENCE, PETER MCCORMICK, *SPORT BUSINESS: LAW, PRACTICE AND PRECEDENTS* 3 (2d ed. 2005); Leigh Robinson, *The Business of Sport*, in *SPORT AND SOCIETY: A STUDENT INTRODUCTION* 307-309 (Barrie Houlihan ed., 2d ed. 2008).

¹⁶⁴ See ADAM EPSTEIN, *SPORTS LAW* 33 (2003). According to *Sports Illustrated* magazine, in 2009 the average earning of the 50 top earning American athletes in salaries, winnings, endorsements and appearance fees fell \$1.5 million per athlete to \$23.6 million, whereas the highest grossing (Tiger Woods, golf) earned \$99,737,626.

See *SPORTS ILLUSTRATED: The Highest-Earning American Athletes* (2009), <http://sportsillustrated.cnn.com/more/specials/fortunate50/2009/index.html?eref=sihpT1> (last visited Aug. 7, 2010). Meanwhile, the average income of the athletes on the *Sports Illustrated International* 20 list of the top-earning non-American sportsmen hit an all-time high of \$29.5 million (up slightly from 2008), thanks to big gains by those in soccer and

The same conclusion would be equally true for Russian athletes and for sports in Russia in general, due to the rapid process of commercialization which became particularly visible against the background of the country's overall transition from socialism to capitalism.¹⁶⁵ Reflecting these modern-day realities, and in sharp contrast to the legislation of Soviet times, the current legislation of the Russian Federation explicitly recognizes the profession of "athlete" as a professional occupation in its own right, including relevant provisions both in the Labor Code¹⁶⁶ and in the Federal Law on Physical Culture and Sport.¹⁶⁷ In particular, this Federal Law defines professional sport as a part of sport aimed at the organization and conduct of sports competitions, where the athletes preparing for and participating in these competitions, as their principal occupation, receive the remuneration from the organizers of these competitions and (or) labor wages.¹⁶⁸ The same Federal Law also specifically lists among the athlete's rights the right to participate in the sports competitions, in the chosen discipline, in accordance with the rules of these disciplines and regulations (rules) of sports competitions.¹⁶⁹ On the other hand, this law imposes upon athletes a number of obligations associated with the exercise of their professional rights, including the obligation not to use doping substances and (or) methods and to comply with the requirements of mandatory doping control.¹⁷⁰

While Russian law explicitly provides for athletes' right to participate in sports competitions, the exercise of this right is subject to monopolistic positions of national and international sports federations in their respective disciplines. In the case of Russian track and field athletes this means, in particular, that in order to be eligible to participate in national competitions held under the rules of the

Formula 1 racing. On this list, David Beckham (United Kingdom, soccer) was the highest-grossing athlete with \$45,200,000. See <http://sportsillustrated.cnn.com/more/specials/fortunate50/2009/index.20.html> (last visited Aug. 7, 2010).

¹⁶⁵ According to some estimates, the average earnings of the 25 top-earning Russian athletes in 2008 were \$1.14 million, whereas the highest grossing athlete (Maria Sharapova, tennis) earned \$25.5 million. See *25 Samykh bogatykh sportsmenov Rossii* [25 richest athletes of Russia], 44 *FINANS* 26-28 (2008). For the sake of objectivity, it should be noted that 19 athletes on this list were NHL hockey players, earning their income outside the Russian Federation.

¹⁶⁶ Labor Code of the Russian Federation, dated Dec. 30, 2001, No. 197-FZ, Chapter 54¹ "Peculiarities of regulation of work of athletes and coaches," *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* ["SZRF"], 2002, No. 1, Item 3 (Rus.).

¹⁶⁷ Federal Law No. 329-FZ "On physical culture and sport in the Russian Federation," dated Dec. 4, 2007, Art. 2(11), *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* ["SZRF"], 2007, No. 50, Item 6242.

¹⁶⁸ *Id.* Art. 2(11).

¹⁶⁹ *Id.* Art. 24(1)(2).

¹⁷⁰ *Id.* Art. 24(2)(2).

ARAF, these athletes must be members of the ARAF,¹⁷¹ whereas to be eligible to participate in international athletics competitions held under the IAAF Rules they must agree to abide by the IAAF Competition Rules.¹⁷² Since under the IAAF Constitution only the national governing body for athletics in any country or territory may be eligible for membership,¹⁷³ individual track and field athletes cannot become “direct” members of the IAAF. Nevertheless, since one of the conditions of IAAF membership is the member’s agreement to abide by the Constitution and by the Rules and Regulations,¹⁷⁴ through their direct membership in their national federation, athletes become subject to all IAAF Rules and Regulations. That is why the relationship between the track and field athletes and the IAAF may be classified as “indirect” membership in professional associations prescribing and enforcing conditions for exercising certain professional activity.

The application by analogy of the four principles developed by the European Court of Human Rights in cases dealing with social security disputes, to the Russian athlete’s statutory right to participate in sports competitions, leaves no doubt that, for the purposes of Article 6(1) of the ECHR this right could be classified as a “civil right.” First, the right to participate in sports competitions is based upon specific rules laid down by the Federal Law on Physical Culture and Sport.¹⁷⁵ Second, for professional athletes the right to participate in sports competitions is an integral part of their employment relationship. Third, while the Russian Federation and its constituent territories (“subjects of the Russian Federation”) may participate in the organization of sports competitions in Russia,¹⁷⁶ under the Federal Law these competitions are primarily organized not by State bodies, but by non-state entities, namely legal persons (including sports federations) and individuals.¹⁷⁷ Finally, unless a Russian professional athlete has agreed that all disputes between him/her and a national federation are subject to arbitration, for example, in the Court of Arbitration for Sport at the Chamber of Commerce and Industry of the Russian Federation,¹⁷⁸ these disputes would

¹⁷¹ See, e.g., All-Russia Athletics Federation: Regulations on All-Russia Athletic Competitions in 2009, Annex 4, Sec. 1, available at <http://www.rusathletics.com/sor/docs/sor-pol-2009.doc> (last visited Aug. 8, 2010).

¹⁷² IAAF COMPETITION RULES 2010-2011, Rule 20.

¹⁷³ According to Article 4(2) of the IAAF Constitution, the national governing body for Athletics in any Country or Territory shall be eligible for Membership. See IAAF Constitution (in force as from Nov. 1, 2009), available at http://www.iaaf.org/mm/Document/AboutIAAF/Publications/05/47/96/20100113075829_httppostedfile_IAAFConstitution-01.11.09-Eng-Website_17812.pdf (last visited Oct. 10, 2010).

¹⁷⁴ IAAF Constitution, Art. 4(1).

¹⁷⁵ Federal Law on Physical Culture and Sport, Art. 24(1)(2).

¹⁷⁶ *Id.* Art. 6(4) and (5) (Competence of the Russian Federation in the area of physical culture and sport); Art. 8(3) (Competence of the subjects of the Russian Federation in the area of physical culture and sport).

¹⁷⁷ *Id.* Art. 2(8).

¹⁷⁸ The Court of Arbitration for Sport at the Chamber of Commerce and Industry of the Russian Federation deals with the settlement of disputes related to property rights and

normally be subject to the jurisdiction of ordinary Russian courts.¹⁷⁹ Thus, the preceding analysis of the legislation of the Russian Federation reveals that, under their domestic law, Russian athletes have a statutory right to participate in sports competitions, which could be qualified as a “civil right” within the meaning of Article 6(1) of the ECHR.

2. *Athlete’s Obligation Not to Use Doping and to Comply with the Doping Control Requirements as “Civil Obligations”*

The application of the same four principles to the Russian athlete’s obligation not to use doping substances and/or methods and to comply with the requirements of mandatory doping control also leads to the conclusion that these obligations could qualify as a “civil-law obligation” within the meaning of Article 6(1) of the ECHR. First, this obligation results from specific provisions of the Federal Law on Physical Culture and Sport.¹⁸⁰ Second, the Federal Law imposes these obligations on all athletes, including professional athletes.¹⁸¹ As a result, if a certain professional athlete, for whatever reason, does not wish to undertake these obligations, this athlete would be unable to participate in competitions and thus, fully exercise his/her professional occupation. Accordingly, these obligations should be considered as an integral part of a professional athlete’s employment relationship. Third, the overall organization of doping control in Russia is entrusted to the National Anti-Doping Organization “RUSADA,” which is a non-state independent organization created in January of 2008 by the initiative of the Federal Agency for Physical Culture and Sport.¹⁸² Finally, in the absence of an athlete’s acceptance of arbitration as a method of resolving disputes between

interests of individuals and legal entities involved in sport, including those arising from the Articles of Association, rules, rules of procedure and/or other documents regulating activity of organizations for physical training and sport in the staging of cups, championships and other sports events in the territory of the Russian Federation; disputes related to the definition of the status and transfers of athletes (players); disputes arising from agency services; disputes connected with sponsorship contracts; disputes related to rights to television broadcasts of sports events, or any other disputes arising in connection with contractual and civil-law obligations in physical culture activities and sports, unless laid down otherwise in the Federal Law. *See* Court of Arbitration for Sport at the Chamber of Commerce and Industry of the Russian Federation: Competence, *available at* <http://www.tpprf-arb.ru> (last visited Aug. 12, 2010).

¹⁷⁹ *Grazhdanskii Protsessual’nyi Kodeks RF [Civil Procedural Code] [GPK RF]*, Art. 22(1)(1).

¹⁸⁰ Federal Law on Physical Culture and Sport, Art. 24(2)(2).

¹⁸¹ Article 2(22) of the Federal Law on Physical Culture and Sport Defines “Athlete” as an Individual Who Practices His/Her Chosen Sports Discipline or Disciplines and Participates in Sports Competitions.

¹⁸² *See* RUSADA: Background, *available at* <http://www.rusada.ru/about/history?lang=eng> (last visited Aug. 12, 2010).

him/her and a national federation, the disputes involving these obligations would be subject to the jurisdiction of ordinary Russian courts.¹⁸³

3. *The Imposition of Provisional Suspension as a “Dispute over Civil Rights and Obligations”*

The application of the four principles summarized by the European Court of Human Rights in *Bentham v. The Netherlands* to provisional suspension leads us to the conclusion that its imposition involves a “dispute over civil rights and obligations.” First, it may be recalled that the IAAF Competition Rules provide for two types of provisional suspension, namely (i) provisional suspension imposed by the IAAF Anti-Doping Administrator, and (ii) provisional suspension voluntarily accepted by the athlete.¹⁸⁴ From this perspective, the athlete’s refusal to voluntarily accept provisional suspension indicates the athlete’s insistence on continuous exercise of the right to participate in competitions and the refusal to accept that he/she has committed an anti-doping rule violation, while, by unilaterally imposing provisional suspension on the athlete, the IAAF has taken the opposite view. Consequently, the need of the IAAF Anti-Doping Administration to resort to the imposition of provisional suspension reveals the existence of a dispute between the athlete and the IAAF as to whether the anti-doping obligations have been violated and, if so, whether the athlete may exercise his/her right to participate in sports competitions.

Although the athlete’s obligation not to use doping is also included in the IAAF Competition Rules,¹⁸⁵ the dispute between the IAAF and the athlete involving this obligation, should be considered a dispute over the application of legal rules, as opposed to a dispute over the application of “game rules,” prescribed by an international sports federation. Traditionally, doctrine and judicial practice have always deemed that game rules, in the strict sense of the term, should not be subject to the control of judges, based on the notion that the game must not be constantly interrupted by appeals to the judge.¹⁸⁶ Under this traditional theory, only sports decisions which damage the personality or property of the athlete should be reserved for the ordinary or arbitral courts.¹⁸⁷

¹⁸³ See *Grazhdanskii Protsessual’nyi Kodeks RF* [Civil Procedural Code] [GPK RF] Art. 22(1)(1) (Russ.).

¹⁸⁴ IAAF COMPETITION RULES (2001-2011), Rule 38(2). According to Rule 31(11), the IAAF Anti-Doping Administrator is the head of the IAAF’s Medical and Anti-Doping Department.

¹⁸⁵ IAAF COMPETITION RULES (2010-2011), Rule 30(3).

¹⁸⁶ See *Arbitral award delivered by CAS ad hoc Division (Olympic Games in Atlanta) in M. v. Association Internationale de Boxe Amateur (AIBA)* (CAS ad hoc Division, O.G. Atlanta 1996/006), text in English reproduced at *DIGEST OF CAS AWARDS 1986-1998*, 413, 414 (¶ 5) (Matthieu Reeb, ed., 1998) (citing the Decision of the Swiss Federal Tribunal in *Kindle v. Fédération Motocycliste Suisse* (1992) (Switz.), ATF 118 II 12).

¹⁸⁷ *M. v. Association Internationale de Boxe Amateur (AIBA)*, ¶ 6.

There is no uniform definition of “game rules” and, as was pointed out by the CAS panel in *M. v. Association Internationale de Boxe Amateur (AIBA)*, citing a 1977 decision of the Swiss Federal Tribunal, “Admittedly, the distinction between what can be submitted to a court or arbitral panel – the rule of law – and what cannot – the game rule – is vague.”¹⁸⁸ The Swiss Federal Tribunal considered as game rules, in the strict sense, those rules that prescribe how a competition unfolds, such as the number of cylinders of a vehicle participating in a motorcycle race and the weight or the age of its participants.¹⁸⁹ On the other hand, according to the Swiss Federal Tribunal, what should be subject to judicial review are those sanctions imposed by sports associations which certainly influence the outcome of a game or a competition, but the underlying facts are related, not to this particular competition, but to general obligations of its participants or clubs, such as the late payment of membership fees, sanctioned by the deduction of championship points.¹⁹⁰ A lower Swiss court also held that when the sanction (a disqualification) imposed by the IAAF related to a single competition, its imposition should be considered as an application of the game rules, which is outside the control of a judge. Alternatively, when the effect of sanctions goes beyond a single competition, the imposition of these sanctions could no longer be considered as an application of game rules and, therefore, could be submitted to an examination by a judge.¹⁹¹

This traditional distinction between legal rules and game rules has been challenged by an emerging new approach, according to which in high level sports, applying the game rules very often has consequences in terms of property and financial gain, or may affect rights relating to personality, and thus should also be open to examination by the courts.¹⁹² Nevertheless, the imposition of a provisional suspension on the seven Russian athletes should be considered a dispute over the application of legal rules, and not a dispute over the application of “game rules” even from the point of view of the former “traditional” approach. First, the imposition of a provisional suspension could have damaged the property of these athletes because by temporarily preventing them from participating in

¹⁸⁸ *Id.* ¶ 7 (citing the Decision of the Swiss Federal Tribunal in *Hockey-Club Ambri-Piotta v. Zürcher Schlittschuh-Club und Obergericht des Kantons Zürich* (1977) (Switz.), ATF 103 Ia 410).

¹⁸⁹ Decision of the Swiss Federal Tribunal in *Kindle v. Fédération Motocycliste Suisse* (1992) (Switz.), ATF 118 II 12.

¹⁹⁰ *See, e.g., id.* (citing Decision of the Swiss Federal Tribunal in *FC Zurich v. League Nationale de l'Association Suisse de Football* (1982) (Switz.), ATF 108 II 15, JT 1983 I 162); Decision of the Swiss Federal Tribunal in *Ligue Suisse de Hockey sur Glace v. Dubé*, (1994) (Switz.), ATF 120 II 369. *See also* AARON N. WISE & BRUCE S. MEYER, 2 INTERNATIONAL SPORTS LAW AND BUSINESS 1415-21 (1997).

¹⁹¹ *See* Decision of Tribunal III for the District of Bern, dated Dec. 22, 1987 (“Sandra Gasser” decision), in JACQUES BONDALLAZ, *TOUTE LA JURISPRUDENCE SPORTIVE EN SUISSE* 31-33 (2000).

¹⁹² *See* Arbitral award delivered by CAS ad hoc Division (Olympic Games in Atlanta) in *M. v. Association Internationale de Boxe Amateur (AIBA)* at 414 (¶ 8); PIERMARCO ZEN-RUFFINEN, *DROIT DU SPORT* 480-82 (2002).

competitions it could have deprived them of earnings resulting from such participation (prize money, sponsorship etc.). Moreover, since under the IAAF Competition Rules provisional suspension means the impossibility of participating in any competition, prior to a final decision conducted in accordance with those Rules,¹⁹³ the economic effect of the suspension imposed upon the seven Russian athletes went beyond their participation in the 2008 Summer Olympic Games. Finally, while the suspension of the seven Russian leading track and field athletes immediately before the Olympic Games could have certainly influenced the outcome of competitions in the relevant disciplines during these Games, the underlying facts related not to the Games, but to the alleged violation by the seven athletes of their anti-doping obligations under the IAAF Competition Rules.

With regard to the nature of the dispute (the second criterion identified in *Bentham v. The Netherlands*), by definition a provisional suspension has a limited duration, regardless of whether it is imposed by the IAAF Anti-Doping Administrator or is voluntarily accepted by the athlete.¹⁹⁴ As a result, although a provisional suspension does not affect the existence of the athlete's statutory right to participate in sports competitions, it still results in a temporary inability to exercise this right. The possibility of exercising a certain right during certain periods of time, and the impossibility of exercising the same right during certain other periods of time could be construed as a "manner in which this right is exercised." Consequently, the imposition of a provisional suspension on the athlete indicates the existence of a dispute between the athlete and the IAAF concerning the manner in which the athlete's right to participate in sports competitions can be exercised.

Third, provisional suspension involves a genuine dispute of a serious nature, because its imposition means the athlete has refused to accept charges of anti-doping rule violations. Finally, following the imposition of a provisional suspension the athlete is unable to participate in sports competitions until the matter is resolved by the athlete's national federation. Therefore, the imposition of provisional suspension is "directly decisive" to the manner in which the right to participate in sports competitions may be exercised by the athlete until the final resolution of the matter.

B. *Provisional Suspension Without the Possibility of an Appeal as a Violation of the Athlete's Right of Access to an Independent and Impartial Tribunal*

1. *No Impairment of the very Essence of the Athlete's Right of Access to an Independent and Impartial Tribunal*

Since provisional suspension may be considered as a "dispute involving civil rights and obligations" within the meaning of Article 6(1) of the ECHR, in the

¹⁹³ IAAF COMPETITION RULES (2008), Ch. 3: Anti-Doping, Definitions; Rule 38(2).

¹⁹⁴ IAAF COMPETITION RULES (2001-2011), Rule 38(2). According to Rule 31(11), the IAAF Anti-Doping Administrator is the head of the IAAF's Medical and Anti-Doping Department.

event of its imposition upon an athlete, this athlete should have the right of access to an independent and impartial tribunal, unless there are legitimate restrictions on this right.¹⁹⁵ The exclusion of appeal in the case of a provisional suspension under the IAAF Competition Rules may be considered as a restriction on the athlete's right of access to an independent and impartial tribunal. Thus, in light of *Ashingdane v. United Kingdom*, the assessment of the legitimacy of this restriction should start with an analysis of whether the exclusion of appeal restricts or reduces the athlete's right of access to an independent and impartial tribunal in such a way, or to such an extent that the very essence of the right is impaired.¹⁹⁶

Since the IAAF Competition Rules do not provide for any circumstances in which the appeal of provisional suspension may be allowed, under these Rules the exclusion of the athlete's right to appeal a provisional suspension may be seen as complete and unconditional. Nevertheless, this restriction should be seen rather as an exception, because under the IAAF Competition Rules, unless specifically stated otherwise, all decisions made under the Anti-Doping Rules (Chapter 3 of the IAAF Competition Rules), may be appealed.¹⁹⁷ Moreover, in accordance with the CAS Code of Sports-Related Arbitration, CAS panels have full power to review the facts and the law, *i.e.*, to conduct a full hearing of the case *de novo*.¹⁹⁸ In view of this possibility, CAS panels have repeatedly stated that, even if a violation of the principle of due process occurred in the first instance, any such violation may be cured by a full hearing following appeal to the CAS.¹⁹⁹ Therefore, despite the absence of the right to appeal a provisional suspension, their imposition may still be subject to a subsequent review by an independent and impartial tribunal hearing the anti-doping case on its merits. Consequently, although under the IAAF Competition Rules athletes do not have the right to appeal a provisional suspension, the existence of this restriction on an athlete's right of access to an independent and impartial tribunal does not mean that the essence of this athlete's right has been impaired.

¹⁹⁵ *Ashingdane v. United Kingdom*, 93 Eur.Ct. H.R., ¶ 57 (1985).

¹⁹⁶ *Id.* ¶ 57.

¹⁹⁷ IAAF COMPETITION RULES (2010-2011), Rule 42(1).

¹⁹⁸ Code of Sports-related Arbitration, Rule R57, available at [http://www.tas-cas.org/d2wfiles/document/3923/5048/0/Code%202010%20\(en\).pdf](http://www.tas-cas.org/d2wfiles/document/3923/5048/0/Code%202010%20(en).pdf) (last visited Oct. 6, 2010).

¹⁹⁹ See Arbitration CAS 2000/A/317, *A. v. Fédération Internationale des Lutttes Associées (FILA)*, Award of July 9, 2001, in DIGEST OF CAS AWARDS III (2001-2003), 159, 162 (¶ 8) (Matthieu Reeb ed., 2004) (citing *USA Shooting & Q. v. International Shooting Union (UIT)* (CAS 94/129), at 187, 203). See also PAUL DAVID, A GUIDE TO THE WORLD ANTI-DOPING CODE: THE FIGHT FOR THE SPIRIT OF SPORT 96 (2008) (citing Arbitration CAS 2007/A/1286, *Eder v. IOC*, Arbitration CAS 2007/A/1288, *Tauber v. IOC*, Arbitration CAS 2007/A/1289, *Pinter v. IOC*).

2. *The Absence of a Legitimate Purpose of the Restriction on the Athlete's Right to Appeal a Provisional Suspension*

The absence of any legitimate purpose in imposing this restriction on the athlete's right of access to an independent and impartial tribunal may be demonstrated by a comparison between the IAAF Competition Rules and the WADC provisions dealing with provisional suspensions. This comparison reveals that, unlike the IAAF Competition Rules,²⁰⁰ the WADC expressly provides for the possibility of appealing decisions that impose a provisional suspension.²⁰¹ In cases arising from participation in an International Event or in cases involving International-Level Athletes, these decisions may be appealed exclusively to the CAS in accordance with the provisions applicable before such court,²⁰² whereas in cases involving national-level athletes, as defined by each National Anti-Doping Organization, which do not have a right to appeal to the CAS, they may be appealed to an independent and impartial body in accordance with the rules established by the National Anti-Doping Organization.²⁰³

The inclusion of these provisions in the WADC may be seen as a reflection of the consensus of a broad spectrum of stakeholders around the world with an interest in sports that athletes should have the right to appeal in general, and, in particular, the right to appeal the imposition of provisional suspensions.²⁰⁴ Moreover, Article 13 ("Appeals") of the WADC, with the exception of Articles 13.2.2 and 13.5, is specifically listed among those articles of the Code which must be implemented by its Signatories without substantive change.²⁰⁵ This may be seen as a reflection of a special importance attached to the athlete's right to appeal within the overall framework of the World Anti-Doping Program. Consequently, the impossibility of appealing a provisional suspension under the IAAF Competition Rules not only expressly contradicts the implementation requirements of the WADC, but also runs contrary to the overall purpose of the Code – to advance the anti-doping effort through universal harmonization of core anti-doping elements.²⁰⁶

²⁰⁰ IAAF COMPETITION RULES 2010-2011, Rule 38(4).

²⁰¹ WADC, Art. 13.2.

²⁰² *Id.* Art. 13.2.1. An International Event is an event where the International Olympic Committee, International Paralympic Committee, an International Federation, a Major Event Organization, or another international sports organization is the ruling body for the event or appoints technical officials for the Event. International Level Athletes are athletes designated by one or more International Federations as being within the Registered Testing Pool for an International Federation. For these and other definitions, *see* WADC, Appendix 1: Definitions.

²⁰³ *Id.* Art. 13.2.2.

²⁰⁴ *Id.* Introduction.

²⁰⁵ *Id.* Art. 23.2.2.

²⁰⁶ *Id.* Purpose, scope and organization of the World Anti-Doping Program and the Code.

3. *The Absence of a Reasonable Relationship of Proportionality Between the Means Employed and the Aim Sought To Be Achieved*

For argument's sake, even if a certain legitimate goal of the exclusion of appeal in cases of provisional suspension under the IAAF Competition Rules could be found, this restriction on the athlete's right of access to an independent and impartial tribunal would still have to be analyzed from the point of view of a "reasonable relationship of proportionality" criterion. Since the possibility of exercising an appeal against a provisional suspension, before the matter has been resolved by the athlete's national federation, could potentially allow participation in sports competitions by athletes who have possibly committed anti-doping rule violations, such goal could be, for example, the preservation of the integrity and fairness of these competitions by preventing the misuse of the right of access to an independent and impartial tribunal to forceably obtain such participation. Thus, the legitimacy of this restriction would depend upon whether there is a reasonable relationship of proportionality between the exclusion of the right to appeal and the preservation of the integrity and fairness of the competition.

The absence of any such reasonable relationship may be revealed by a comparison of the potential costs of this restriction upon the temporarily suspended athletes and its potential benefits for the IAAF. On the one hand, the impossibility of appealing the provisional suspension, especially before important competitions, could potentially cause irreparable harm to the athletes. While the doping charges against an athlete may be subsequently dismissed or dropped, the opportunity to participate in this competition for this athlete will have been irreversibly lost. Thus, the resulting damage may be difficult to measure and impossible to repair.

On the other hand, although a certain athlete suspected of committing an anti-doping rule violation may have been allowed to participate in a competition through a successful appeal, if the doping charges against this athlete are subsequently confirmed, all of the athlete's results from this competition could still be disqualified, and he/she would forfeit any titles, awards, medals, points, and prize and appearance money.²⁰⁷ Consequently, this provision of the IAAF Competition Rules may be viewed as a suitable alternative to the restriction on the athlete's right to appeal the provisional suspension, because it allows for achieving the same result without the risk of causing the athlete irreparable harm. In view of the existence of this alternative, it may be concluded that there is no reasonable relationship of proportionality between the means employed (the restriction on the right to appeal) and the aim sought to be achieved (preservation of the competition's integrity and fairness).

²⁰⁷ IAAF COMPETITION RULES (2010-2011), Rule 40(8) ("Disqualification of Results in the Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation").

V. “PRESUMPTION OF MANIPULATION” FROM THE POINT OF VIEW
OF THE ATHLETE’S RIGHT TO PROCEDURAL EQUALITY

A. “*Presumption of Manipulation*” as a Violation of the “*Equality of Arms*”
Principle

1. *Arbitrary Nature of the “Presumption of Manipulation”*

The “presumption of manipulation” used by the CAS panel in the case of the seven Russian athletes was arbitrary because there was no rational connection between the facts proven (the manipulation of the samples and an intact chain of custody) and the fact inferred (the manipulation was carried out by the athletes).²⁰⁸ First, by the CAS panel’s own admission, the IAAF had not established exactly how the tampering was carried out,²⁰⁹ and no evidence was presented by the IAAF that any of the athletes had a concrete opportunity to manipulate their samples.²¹⁰ Second, the out-of-competition samples in this case were collected from different athletes on different dates and in different locations,²¹¹ and on each separate occasion the doping control officers had not made any remarks on the doping control forms.²¹² Thus, it is more likely that all samples were simultaneously substituted by a third person after their collection, rather than individually, at the moment of their submission by the athletes themselves. Furthermore, although stating that there was no possibility of interference with the sealed samples, the IAAF acknowledged that the chain of custody was undocumented as to the sample courier, who collected the samples from Moscow, where they had been centralized in order to be dispatched to Switzerland, and delivered them to Minsk, from where they were sent by DHL.²¹³

Third, attributing to athletes a motive for tampering with their out-of-competition samples and using this alleged motive as circumstantial evidence,²¹⁴ while pointing out that any third parties would, in principle, not have any motive to do so,²¹⁵ enters into the “dark territory” of pure speculation. Recalling that the seven Russian athletes were real contenders for 2008 Summer Olympic medals, it would not be difficult also to imagine that any third person having access to the samples and wanting the athletes from his/her own national team to win, could have substituted the samples. After all, sport nationalism still remains a powerful

²⁰⁸ Cf. PAUL RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE 1108-1109 (3rd ed. 1996) (citing *Mobile, J. & K.C.R. Co. v. Turnipseed*, 219 U.S. 35 (1919) and *Western & Atlantic R. Co v. Henderson*, 279 U.S. 639 (1929)).

²⁰⁹ *IAAF v. All Russia Athletic Federation & Olga Yegorova et al.*, ¶ 185.

²¹⁰ *Id.* ¶ 146.

²¹¹ *Id.* ¶¶ 14, 177.

²¹² *Id.* ¶ 65.

²¹³ *Id.* ¶ 150.

²¹⁴ *Id.* ¶ 184.

²¹⁵ *Id.*

force in international sport.²¹⁶ From this perspective, it is perhaps not surprising that there have been reported cases where sports officials have violated their duties for the benefit of their national team, for example, by distorting an entry form to the advantage of their national athletes.²¹⁷

Finally, the reliance of the CAS panel in a “non-analytical positive” doping case (such as the case of the seven Russian athletes) on the earlier CAS award in *International Rugby Board v. Keyter* to dispel the unsupported explanations provided by the athletes does not allow a rational justification for the “presumption of manipulation” either.²¹⁸ It may be recalled that in *Keyter*, the analysis of both samples A and B collected from the athlete showed evidence of Benzoyllecgonine, i.e., a cocaine metabolite.²¹⁹ Thus, this was a “classic” doping case, and it was reasonable for the CAS panel to expect that Mr. Keyter could exercise control over his own body and should know exactly when and how the prohibited substance entered his body. From this perspective, it was reasonable for a CAS panel to place upon the athlete the burden of proving how exactly the prohibited substance entered his body. On the contrary, once the doping control samples are collected, unlike control over their own bodies, the athletes no longer could exercise any degree of control over the process of samples transmission to the laboratory. Therefore, unlike the case of *Keyter* when the prohibited substance entered the athlete’s body, it would be unreasonable for a CAS panel to require the athletes to produce evidence as to how the substitution of samples may have occurred during a process over which they may have had no degree of control.

2. *Impossibility of Properly Arguing the Athlete’s Case and of Rebutting the “Presumption of Manipulation”*

In addition to being arbitrary, the “presumption of manipulation” did not allow the Russian athletes to submit certain crucial evidence which could have resulted in a virtual impossibility of its rebuttal. First, by using the “presumption of manipulation,” the CAS panel effectively placed upon the Russian athletes the burden of proving that somebody else substituted their samples.²²⁰ In this regard, it may be recalled that CAS panels traditionally justify the absence of the requirement for sports federations to prove the intent or negligence on the part of the athlete, in anti-doping rule violations, by the fact that neither the federations, nor the CAS have the means of conducting their own investigation or of compelling witnesses to give evidence, means which are available to the public

²¹⁶ See e.g., JAMES A.R. NAFZIGER, *INTERNATIONAL SPORT LAW* 196-97 (2nd ed. 2004); ANTHONY KING, *THE EUROPEAN RITUAL: FOOTBALL IN NEW EUROPE* 247-48 (2003).

²¹⁷ *B. v. Fédération Internationale de Natation (FINA)* (CAS 98/211), at ¶ 43.

²¹⁸ *IAAF v. All Russia Athletic Federation & Olga Yegorova et al.*, ¶ 89 (citing *Int’l Rugby Board v. Keyter* (CAS 2006/A/1067)).

²¹⁹ *Int’l Rugby Board v. Keyter*, ¶ 6.5.

²²⁰ *IAAF v. All Russia Athletic Federation & Olga Yegorova et al.*, ¶ 189.

prosecutor in criminal proceedings.²²¹ It may be assumed that, in view of financial constraints, the athletes may have even less means of conducting their own investigations (for example, by hiring a private detective) than international sports federations. Consequently, assuming that the athletes have not substituted their samples, if a certain powerful international sports federation is unable to establish how exactly the manipulation of samples was carried out, an explanation could be even less likely from the athletes. As a result, the rebuttal of the “presumption of manipulation” for the athletes becomes a next to impossible task.

Second, the Russian athletes claimed that they never had access to the documentation of LGF Laboratory, where the DNA analysis was performed.²²² Replying to this argument of the athletes, the CAS panel pointed out that the burden on the IAAF was to prove an intact chain of custody, not an intact chain of documentation.²²³ Nevertheless, since the athletes were required to prove that somebody else willfully or negligently substituted their samples, the impossibility of obtaining documents from the laboratory conducting DNA analysis certainly placed them at a substantial disadvantage vis-à-vis the IAAF, which enjoyed the benefit of the “presumption of manipulation.”

Third, the DNA analysis in the case of the seven Russian athletes was performed by a laboratory not accredited by the WADA, which did not benefit from the presumption that the laboratory conducted the analysis and custodial procedures in accordance with the International Standard for Laboratories.²²⁴ Assuming that in some future “non-analytical positive” case the DNA analysis of samples is conducted by a WADA-accredited laboratory, the international sports federation, or WADA, would enjoy the benefit of this presumption as concerns the results of the analysis.²²⁵ In other words, the athletes are facing a situation where their opponent in the adversarial proceedings enjoys the presumption established by this opponent in its own favor in its anti-doping rules and consistently supported by the CAS panels.²²⁶ On the other hand, neither the WADC nor the IAAF Competition Rules allow the athletes to carry out their own laboratory

²²¹ *A. v. Fédération Internationale des Luttes Associées (FILA)* (CAS 2000/A/317), in DIGEST OF CAS AWARDS 2001-2003, 159, 163 (¶ 34) (Matthieu Reeb. ed., 2004). See also *USA Shooting & Q. v. International Shooting Union (UIT)* (CAS 94/129), in DIGEST OF CAS AWARDS 1986-1998, 187, 193 (¶ 15) (Matthieu Reeb. ed., 1998); *C. v. Fédération Internationale de Natation Amateur (FINA)*, in DIGEST OF CAS AWARDS 1986-1998, 215, 220 (¶ 13) (Matthieu Reeb., ed., 1998); *L. v. International Olympic Committee (IOC)* (CAS 2000/A/310), in DIGEST OF CAS AWARDS 2001-2003, 127, 133 (¶ 25) (Matthieu Reeb. ed., 2004).

²²² *IAAF v. All Russia Athletic Federation & Olga Yegorova et al.*, ¶ 140.

²²³ *Id.* ¶ 195 (citing *Jovanovic v. USADA* (CAS/2002/A/360), ¶ 28, available at http://www.usantidoping.org/files/active/arbitration_rulings/arbitration_ruling_2_11_2002_Jovanovic.pdf (last visited Oct. 30, 2010)).

²²⁴ *Id.* ¶ 195; WADC, Art. 3.2.1.

²²⁵ WADC, Art. 3.2.1.

²²⁶ IAAF COMPETITION RULES (2010-2011), Rule 33(3).

analysis of the samples, which could have allowed for independent verification of the findings of a WADA-accredited laboratory.

Finally, unlike previous versions of the WADC,²²⁷ under the current version of the Code, to rebut the presumption that the laboratory conducted the analysis and custodial procedures in accordance with the International Standard for Laboratories, the athletes are required not only to show that the departure from the Standard occurred, but also that it could have reasonably caused the Adverse Analytical Finding.²²⁸ Thus, in any future “non-analytical positive” doping cases, based upon a finding of a WADA-accredited laboratory, the overall tendency of hardening the burden of proof placed upon the athletes in doping cases would make their task of rebutting the “presumption of manipulation” even more difficult.

The preceding analysis reveals that the “presumption of manipulation” in combination with the presumption in favor of WADA-accredited laboratories deprives the athletes of a reasonable opportunity to present their case to the CAS, under conditions which do not place them at a substantial disadvantage vis-à-vis sports federations and the WADA. Moreover, the practical impossibility of rebutting this presumption converts it into a legal fiction, which allows the CAS panels to dispose of the “non-analytical positive” doping cases without actually permitting the athletes to disprove it. Consequently, the “presumption of manipulation” violates the “equality of arms” principle of Article 6(1) of the ECHR, and, as such, cannot be used by CAS panels in “non-analytical positive” doping cases.

B. *Public Policy Considerations*

The “presumption of manipulation” is not sustainable as a matter of public policy, because it violates the so-called prohibition of “going against one’s own previous conduct” (*venire contra factum proprium*), recognized as a general principle of law in international arbitral practice.²²⁹ Under this principle, a party cannot act in a manner inconsistent with an understanding it has reached with the other party, and upon which that other party reasonably has acted in reliance, to its

²²⁷ See WADA: Redline Comparison Between Code 2007 Version 3.0 and Code 2003, available at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Draft_3.0/WADA_Code_2007_Redline_3.0_to_2003.pdf (last visited Oct. 31, 2010).

²²⁸ WADC, Art. 3.2.1. See also Maureen A. Weston, *Doping Control, Mandatory Arbitration, and Process Dangers for Accused Athletes in International Sport*, 10 PEPP. DISP. RESOL. L.J. 5, 34 (2009).

²²⁹ See, e.g., COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) 186 (Stefan Vogenauer & Jan Kleinheisterkamp eds., 2009) (citing Emmanuel Gaillard, *L’interdiction de se contredire au détriment d’autrui comme principe général du droit du commerce international (le principe d’estoppel dans quelques sentences arbitrales récentes)*, 1985 REV. ARB. 241-58).

detriment.²³⁰ As to the consequences of inconsistent behavior, usually it results in the other party being barred from exercising a right it would otherwise have had.²³¹

This principle is perfectly applicable to the situation of taking samples from the athletes by the doping control officers, who certify on the doping control forms that sample collection is conducted in accordance with the relevant procedures, and no additional comment is made.²³² Under the IAAF Anti-Doping Regulations, the doping control officers/chaperones have the specific obligation to take all necessary steps to satisfy themselves as to the origin and authenticity of the sample being collected.²³³ In particular, they must ensure an unobstructed view of the sample leaving the athlete's body and must continue to observe the sample after it has been provided until the sample has been securely sealed and the doping control officer/chaperone has recorded the witnessing in writing.²³⁴

That is why, when no remarks concerning possible irregularities during the sample collection are made, the athletes might rely on their absence as a possible confirmation that no substitution of samples has occurred at the moment of their collection.²³⁵ Thus, this behavior of doping control officers, representing the company which collects the samples under authorization of the IAAF, might create a reasonable expectation in the eyes of the athletes that no violations during the sample collection have occurred. Relying on this expectation, the athletes may have found it unnecessary to take any action, which they otherwise would have taken to safeguard their rights, for example, by documenting their concerns about how the sample collection session was conducted.²³⁶ Consequently, in line with the *venire contra factum proprium* principle, the IAAF should be prevented from subsequently claiming that the athletes may have substituted doping control samples at the moment of their collection. For the sake of completeness, it should also be added that the exportation of doping control samples, from a country unlawfully and without proper authorization from the authorities, admitted in the case of the seven Russian athletes,²³⁷ should also prevent international federations from relying upon these samples as possible evidence of anti-doping rule violations committed by the athletes.

C. *Minimizing the Potential Social Cost of the "Presumption of Manipulation"*

The CAS panel's need to resort to the "presumption of manipulation" results from the impossibility of sports federations or the WADA of establishing in a "non-analytical positive" doping case how exactly the manipulation of the

²³⁰ COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) at 187.

²³¹ *Id.* at 190.

²³² *IAAF v. All Russia Athletic Federation & Olga Yegorova et al.*, ¶ 111.

²³³ IAAF Anti-Doping Regulations (2010), Sec. 3.31.

²³⁴ *Id.*

²³⁵ *IAAF v. All Russia Athletic Federation & Olga Yegorova et al.*, ¶¶ 133-136.

²³⁶ IAAF Anti-Doping Regulations (2010), Sec. 3.80.

²³⁷ *IAAF v. All Russia Athletic Federation & Olga Yegorova et al.*, ¶ 192.

samples has been carried out. Consequently, the application of this presumption by CAS panels inevitably involves the risk of making erroneous decisions resulting in negative consequences for the athletes against whom the presumption is applied. The magnitude of these consequences for the athletes, who are already the weaker party in their relations with national and international sports federations, could be enormous, potentially resulting in the impossibility of participating in the Olympic Games, an athlete's lifetime dream, as well as the impossibility of participating in other important competitions, loss of sponsorship opportunities and premature termination of sports careers, to name just a few.

Furthermore, these negative consequences could go far beyond the athletes themselves, because when talented athletes are excluded from the competition, the level of competition inevitably falls, as can spectators' and sponsors' potential interest in that competition. In addition, the imposition of the possible negative consequences of erroneous CAS decisions upon the athletes does not create stimulus for improving the procedures of sample collection to completely exclude the subsequent claims of anti-doping organizations that, despite the presence of the doping control officers, the athletes still somehow manage to substitute their samples. Therefore, maintaining the "presumption of manipulation" against the athletes potentially involves significant negative social cost.

This negative social cost could be reduced if the CAS panels were no longer able to apply the "presumption of manipulation," in that the risk of the negative consequences of erroneous decisions in "non-analytical positive" doping cases would be shifted from athletes towards the sports federations and the WADA. In this case, to avoid the subsequent acquittal of athletes accused in manipulating their samples at the moment of their collection, the sports federations and the WADA would be forced to improve the samples collection procedures in such a way that they no longer need to claim that, despite the presence of doping control officers, the athletes still could manage to manipulate their samples.²³⁸ Thus, although the sports federations and the WADA would bear the risk of negative consequences of erroneous decisions, in the long run such allocation of risk would result in the strengthening of anti-doping procedures and in the eventual disappearance of sample manipulation cases altogether.

VI. PROPOSALS FOR FUTURE ACTION TO SAFEGUARD ATHLETE'S RIGHTS TO A FAIR TRIAL IN "NON-ANALYTICAL POSITIVE" DOPING CASES

A. *Proposed Modifications to the WADC and IAAF Competition Rules: Compensating for the Cost of "Broken Olympic Dreams"*

Given the serious nature of the existing violations of the athlete's right to a fair trial in "non-analytical positive" doping cases, prompt action is required in this regard. An obvious first step in this direction would be to bring the IAAF

²³⁸ *IAAF v. All Russia Athletic Federation & Olga Yegorova et al.*, ¶¶ 186-187.

Competition Rules in line with the requirements of the WADC regarding the possibility of appealing the provisional suspension to the CAS.²³⁹ Nevertheless, the introduction of such a possibility of appealing the provisional suspensions will not, by itself, effectively protect the athlete's rights unless the suspended athlete is able to file the appeal and to obtain from the CAS conservatory measures "suspending" provisional suspension and allowing him/her to participate in the competitions until the appeal is considered on the merits, before the forthcoming competition actually takes place. Otherwise, although the athlete may have filed an appeal to the CAS, by the time of its consideration by the CAS panel the competition may have already taken place and the athlete's chance of participating in and, eventually, winning is irreversibly lost. That is why it would also be desirable to prescribe in the WADC and in anti-doping rules of international sports federations certain "protected periods" immediately before important competitions (such as Olympic Games, World Championships, etc.) when the provisional suspension cannot be imposed upon the athletes.

In addition, it would be desirable to introduce provisions in the WADC and in the anti-doping rules of international sports federations, requiring international federations to pay the athletes a monetary compensation in case the doping charges against the suspended athlete have been subsequently dropped or dismissed by the CAS panel, but the athlete had already missed an important competition due to the imposition of a provisional suspension. This monetary compensation could be calculated on the basis of the sum of money which the suspended athlete would have received, if he/she had participated in the competition and would have shown his/her best result of the season immediately preceding that competition. Since under the WADC, an anti-doping rule violation, in an individual sport and in connection with an in-competition test, automatically leads to disqualification of the result obtained in that competition, with all resulting consequences including forfeiture of any medals, points and prizes,²⁴⁰ the introduction of negative financial consequences for national and international sports federations would allow for partially redressing the existing imbalance between them and the athletes, the weaker parties in relations with sports federations.

Although in the case of each individual athlete the payment of this monetary compensation could only be a partial and imperfect compensation for the cost of "broken Olympic dreams," the introduction of this system could have far-reaching consequences for the proper operation of the existing system of doping control. Any international sports federation, on several occasions having to pay to a suspended athlete significant amounts of money, would take all necessary measures to ensure that, in the future, no innocent athlete would be improperly accused of violating anti-doping rules and provisionally suspended. Otherwise, it would be facing a constant threat of negative financial consequences. In the long run, such sanctions would make the system work.

²³⁹ WADC, Art. 13.2.

²⁴⁰ *Id.* Art. 9.

B. *Possible Judicial Challenges to Provisional Suspensions Imposed by the IAAF*

1. *Challenging the Provisional Suspension Before the CAS*

Assuming that the next “non-analytical positive” doping case arises before the IAAF Competition Rules are amended to allow track and field athletes to appeal their provisional suspension to the CAS, the suspended athletes would be facing the necessity to protect their right to a fair trial to the best possible extent under the existing system. In order to do so, a provisionally suspended athlete may first consider filing an appeal against the provisional suspension to the CAS directly on the basis of the WADC.²⁴¹ Although the IAAF Competition Rules specifically prohibit appealing provisional suspensions,²⁴² the athlete may argue that this provision is null and void because it openly contradicts the WADC and violates the athlete’s right to a fair trial under Article 6(1) of the ECHR and Swiss law.

Together with filing an appeal against the provisional suspension, the athlete may also apply for conservatory measures asking the CAS to order the IAAF to allow the athlete to participate in the forthcoming competition until the appeal is heard.²⁴³ According to the case law of the CAS, when deciding whether to stay the execution of the decision appealed, it is necessary to consider whether the measure is useful to protect the appellant from irreparable harm, the likelihood of success on the merits of the appeal and whether the interests of the appellant outweigh those of the opposing party.²⁴⁴ According to the same case law, to show the likelihood of success on the merits, the appellant must make at least a plausible argument that the facts and rights cited exist and that the material conditions for a legal action are fulfilled.²⁴⁵

Normally, all these conditions would be satisfied, in the case of imposition of the provisional suspension by the IAAF without the possibility of appeal immediately before important sports competitions. First, the stay of execution of provisional suspension would avoid causing irreparable harm to the athlete in a situation where the athlete is subsequently cleared of doping charges, but his/her chance of participating in a competition is irreversibly lost. Second, by pointing out the existence of the contradiction between the IAAF Competition Rules, on

²⁴¹ *Id.* Art. 13.2.

²⁴² IAAF COMPETITION RULES 2010-2011, Rule 38(4).

²⁴³ CAS Procedural Rules, Rule R37, available at [http://www.tas-cas.org/d2wfiles/document/3923/5048/0/Code%202010%20\(en\).pdf](http://www.tas-cas.org/d2wfiles/document/3923/5048/0/Code%202010%20(en).pdf) (last visited Nov. 3, 2010).

²⁴⁴ See, e.g., *M. v. Fédération Italienne de Cyclisme (FIC)* (TAS 97/169), decision on the request for provisional measures, in DIGEST OF CAS AWARDS 1986-1998, 539, 540 (¶ 1) (Matthieu Reeb ed., 1998); *HC Prilly (HCP) v. Ligue Suisse de Hockey sur Glace (LSHG)* (TAS 98/190), in DIGEST OF CAS AWARDS II, 1998-2000, 747, 748 (¶ 1) (Matthieu Reeb ed., 2002); *S. v. Fédération internationale de Natation (FINA)* (CAS 2000/A/274), in DIGEST OF CAS AWARDS II, 1998-2000, 775, 757 (Matthieu Reeb ed., 2002).

²⁴⁵ *S. v. Fédération internationale de Natation (FINA)*, at 757.

the one hand, and the WADC and Article 6(1) of the ECHR, on the other hand, the athlete would be able to make at least a plausible argument that his/her right to appeal a provisional suspension exists. Third, in the case of the subsequent confirmation of doping charges against the athlete, the IAAF may still impose sanctions upon that athlete,²⁴⁶ whereas the athlete who was not allowed to participate in the competition has irreversibly lost this opportunity. Therefore, the interests of the athlete in a stay of execution of the provisional suspension until the appeal is heard outweigh the interests of the international sports federation in not allowing such a stay.

Nevertheless, in view of its existing case law, the CAS most probably would refuse to consider such an appeal and, consequently, to stay the execution of the provisional suspension.²⁴⁷ In this regard, the CAS would probably rely upon the first paragraph of the *Introduction* to the WADC, which states that international federations are responsible for adopting, implementing or enforcing anti-doping rules within their authority.²⁴⁸ The CAS would likely consider this wording as an indication that the WADC is not directly applicable to the athletes, and that the international sports federations have the autonomy to regulate their internal affairs – subject to mandatory provisions of law – at their discretion.²⁴⁹ Thus, the CAS may argue that by issuing its anti-doping rules, the IAAF has exercised this discretion exhaustively and exclusively without any possibility that other regulations could apply, unless there was a specific reference in the IAAF Competition Rules.²⁵⁰

Since the IAAF Competition Rules specifically exclude the possibility of appeal in the case of provisional suspension,²⁵¹ the CAS may conclude that this provision should take precedence over the WADC, and, therefore dismiss the athlete's appeal. Thus, it could be anticipated that, in case of appeal brought against provisional suspension imposed under the IAAF Competition Rules, the CAS most likely would refuse to hear this case, because under the IAAF Competition Rules such appeal is not possible.

²⁴⁶ IAAF COMPETITION RULES (2010-2011), Rule 40(8) (“Disqualification of Results in the Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation”).

²⁴⁷ See, *IAAF v. All Russia Athletic Federation & Olga Yegorova et al.*, ¶ 61-62 (citing *WADA v. Qatar Football Association & Ali Jumah A.A. Al-Mohadanni* (CAS 2007/A/1445)), ¶ 6.2, available at http://www.wada-ama.org/rtecontent/document/CAS_2007_A_1445_Mohadanni.pdf (last visited Nov. 3, 2010); *WADA v. Malta Football Association & Gilbert Martin*, ¶¶ 62, 81-82, available at http://www.wada-ama.org/rtecontent/document/CAS_2008_A_1627_Martin.pdf (last visited Nov. 3, 2010).

²⁴⁸ WADC: Introduction.

²⁴⁹ See, *IAAF v. All Russia Athletic Federation & Olga Yegorova et al.*, ¶ 61.

²⁵⁰ See *id.* ¶ 61.

²⁵¹ IAAF COMPETITION RULES 2010-2011, Rule 38(4).

2. *Challenging Possible CAS Refusal Before the Swiss Federal Tribunal*

Following the refusal of the CAS to allow appeal of provisional suspension imposed under the IAAF Competition Rules, the athlete may challenge this refusal with the Swiss Federal Tribunal, on the basis of the law of the Federal Tribunal²⁵² and the Federal Private International Law Act, claiming that the CAS has wrongly refused jurisdiction to hear the case.²⁵³ Together with its appeal, the athlete may apply to the Swiss Federal Tribunal for provisional measures necessary for the safeguarding of the athlete's threatened interests.²⁵⁴ The possibility of obtaining such measures until the CAS decision is considered by the highest judicial authority in Switzerland was recently confirmed by the Swiss Federal Tribunal in the case of Claudia Pechstein, a German skater.²⁵⁵ Although Ms. Pechstein subsequently lost two of her successive appeals to the Swiss Federal Tribunal against the CAS arbitral award,²⁵⁶ in its order dated December 7, 2009, the Tribunal ordered that the appellant could participate in the 3,000-metre speed skating World Cup race in Salt Lake City in December of 2009. Furthermore, by its supplementary order, dated December 10, 2009, the Swiss Federal Tribunal also allowed Ms. Pechstein to participate in training, provided that it was in preparation for this World Cup race.²⁵⁷

Unlike the International Skating Union, whose seat is located in Lausanne, Switzerland,²⁵⁸ the IAAF is located in Monaco, and therefore, is outside the scope

²⁵² Law on the Federal Tribunal, Art. 77. See Law on the Federal Tribunal, dated June 17, 2005 (*Loi sur le Tribunal fédéral (LTF), du 17 juin 2005*), RS 173.110, available at <http://www.admin.ch/ch/f/rs/1/173.110.fr.pdf> (last visited Nov. 3, 2010).

²⁵³ LDIP, Art. 190(2)(b).

²⁵⁴ LTF, Art. 104.

²⁵⁵ See *Claudia Pechstein v. International Skating Union, Deutsche Eisschnellauf Gemeinschaft e.V.* (4A_612/2009) (2010) (Switz.), available at <http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm> (last visited Nov. 3, 2010).

²⁵⁶ See *Claudia Pechstein v. International Skating Union (CAS 2009/A/1912)* and *Deutsche Eisschnellauf Gemeinschaft e.V. v. International Skating Union (CAS 2009/A/1913)*, available at <http://www.tas-cas.org/d2wfiles/document/3802/5048/0/FINAL%20AWARD%20PECHSTEIN.pdf> (last visited Nov. 3, 2010); *Claudia Pechstein v. International Skating Union, Deutsche Eisschnellauf Gemeinschaft e.V.* (4A_612/2009) (2010) (Switz.); *Claudia Pechstein v. International Skating Union, Deutsche Eisschnellauf Gemeinschaft e.V.* (4A_144/2010) (2010) (Switz.); *Communiqué aux médias du Tribunal fédéral: Le Tribunal fédéral rejette la demande de révision de la patineuse de vitesse Claudia Pechstein* [Press-release of the Federal Tribunal: The Federal Tribunal rejects the request for revision of speed skater Claudia Pechstein] (1.10.2010), available at http://www.bger.ch/fr/mm_4a_144_2010_d.pdf (last visited Nov. 3, 2010).

²⁵⁷ *Claudia Pechstein v. International Skating Union, Deutsche Eisschnellauf Gemeinschaft e.V.* (4A_612/2009) (2010) (Switz.).

²⁵⁸ See Trade Registry of the Canton of Vaud [Registre du Commerce du Canton de Vaud]: *International Skating Union* (federal number CH-550-1028191-0), available at www.rc.vd.ch (last visited Nov. 4, 2010).

of the territorial jurisdiction of the Swiss Federal Tribunal. Consequently, when the Swiss Federal Tribunal grants provisional measures with respect to the provisional suspension imposed by the IAAF, from a practical point of view, the Federal Tribunal most likely would be addressing its order to temporarily allow the athlete to participate in competitions, to the CAS (which is within its jurisdiction) requesting the CAS to “transmit” this order to the IAAF (which is within the arbitral jurisdiction of the CAS).

With regard to the admissibility of appealing the provisional suspension under the IAAF Competition Rules, in view of the contradiction of this prohibition with the guarantees of Article 6(1) of the ECHR concerning the essential principles of procedure, there is a strong chance that the Swiss Federal Tribunal would overturn the CAS refusal of its jurisdiction. Since the Swiss Federal Tribunal is competent to decide itself that the arbitration tribunal with its seat in Switzerland has jurisdiction to hear a particular case, the Federal Tribunal can itself decide that the CAS has jurisdiction to hear this appeal.²⁵⁹

3. *Challenging the Swiss Federal Tribunal’s Decision Before the European Court of Human Rights*

In the case where the Swiss Federal Tribunal refuses to declare that the CAS has jurisdiction to hear the appeal against a provisional suspension under IAAF Competition Rules, the suspended athlete may consider filing an application against Switzerland with the European Court of Human Rights. The claim would be a violation of his/her right of access to an independent and impartial tribunal under Article 6(1) of the ECHR in “forced” arbitration proceedings, which cannot be validly renounced by the athlete. However, by the time the Swiss Federal Tribunal decides that the CAS does not have jurisdiction to hear appeals against provisional suspension under the IAAF Competition Rules, and the athlete may proceed with the application to the European Court, the case may have already been decided by the athlete’s national federation. Where the national federation has confirmed doping charges against the athlete and imposed on this athlete a period of ineligibility, the athlete may find it more expedient to appeal directly against the decision on merits, rather than start a procedural challenge of the provisional suspension. After all, unless the decision of a national federation is subsequently overturned, the application to the European Court of Human Rights would be unlikely to result in obtaining just satisfaction in the form of compensation for the athlete’s economic losses caused by the inability to participate in a certain sports competition under Article 41 of the ECHR.²⁶⁰ Acting

²⁵⁹ See, e.g., *C.S. Ltd. V. C., C. S.A. und IHK-Schiedsgericht Zürich* (1991) (Switz.), ATF 117 II 94, 95 (¶ 4); *Fomento de Construcciones y Contratas S.A. v. Colon Container Terminal S.A* (2001) (Switz.), ATF 127 III 279, 282 (¶ 1b).

²⁶⁰ According to Article 41 of the ECHR, if the European Court of Human Rights finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

in line with its existing case law, the European Court of Human Rights most probably would not grant such compensation, because the athlete may be unable to show that, if the CAS panel considered his/her appeal, it would have found for this athlete.²⁶¹

Putting the issue of monetary compensation aside, a field and track athlete may still decide to file such application with the European Court of Human Rights as a matter of principle, common benefit and “professional solidarity,” keeping in mind not only the need to safeguard his/her own rights in this particular case, but also the rights of his/her co-competitors, who could face provisional suspension without the possibility of appeal in the future. In view of the absence of any legitimate aim of imposing this restriction on the athlete’s right of access to an independent and impartial tribunal, as well as the absence of a reasonable relationship of proportionality between the means employed and the aim sought to be achieved, it is likely that the European Court of Human Rights would rule in the athlete’s favor, declaring the provision in the IAAF Competition Rules prohibiting appeals, as well as its application by the CAS and Swiss Federal Tribunal, contrary to Article 6(1) of the ECHR.

C. *Possible Judicial Challenges to the “Presumption of Manipulation”*

1. *Challenging CAS Awards Before the Swiss Federal Tribunal*

Faced with the athlete’s appeal against the CAS panel’s award applying the “presumption of manipulation” in a “non-analytical positive” doping case, the Swiss Federal Tribunal would base its decision on the factual findings of the CAS panel.²⁶² These factual findings may only be challenged before the Swiss Federal Tribunal in connection with grievances admissible under Article 190(2) of the Federal Private International Law Act (including the violation of the principle of equal treatment of the parties) or, exceptionally, when new evidence is considered.²⁶³ Consequently, the athlete’s challenge of the “presumption of manipulation” before the Swiss Federal Tribunal will not be successful, unless the

²⁶¹ See, e.g., *Kingsley v. United Kingdom*, 2002-IV Eur. Ct. H.R., ¶¶ 42-43 (citing *Hauschildt v. Denmark*, 154 Eur. Ct. H.R. (Ser. A), ¶ 58 (1989); *Langborger v. Sweden*, 155 Eur. Ct. H.R. (Ser. A), ¶¶ 49, 51 (1989); *Demicoli v. Malta*, 210 Eur. Ct. H.R. (Ser. A), ¶ 48 (1991); *Holm v. Sweden*, 279-A Eur. Ct. H.R. (Ser. A), ¶ 36 (1993); *Findlay v. United Kingdom*, 1997-I Eur. Ct. H.R. ¶ 88; *De Haan v. Netherlands*, 1997-IV Eur. Ct. H.R. ¶¶ 59, 60; *Coyne v. United Kingdom*, 1997-V Eur. Ct. H.R., ¶ 64; *Hood v. United Kingdom*, 1999-I Eur. Ct. H.R., ¶ 86 (1999)).

²⁶² LTF, Art. 105(1).

²⁶³ See, e.g., *Emirats Arabes Unis et consorts v. Westland Helicopters Limited et Tribunal arbitral* (1994) (Switz.), ATF 120 II 155, 166; *X. S.A.L., Y. S.A.L. et A. v. Z. Sàrl et Tribunal arbitral CCI* (4P.115/2003) (2003) (Switz.), ATF 129 III 727; *B. Fund Ltd. v. A. Group Ltd. et Tribunal arbitral* (4P.168/2006) (2007) (Switz.), ATF 133 III 139; *Claudia Pechstein v. International Skating Union, Deutsche Eisschnellauf Gemeinschaft e.V.* (4A_612/2009) (2010) (Switz.), ¶ 2.3.

athlete is able to show that, under the circumstances of his/her particular case, this presumption was arbitrary and impossible to rebut, and, therefore contrary to the principle of “equality of arms.” From this perspective, the outcome of the athlete’s appeal to the Swiss Federal Tribunal would largely depend on the athlete’s ability to demonstrate that at the moment of sample collection he/she did not have a concrete opportunity to manipulate his/her sample and, therefore, that there was no rational connection between the facts proven and the facts inferred.

2. *Challenging the Swiss Federal Tribunal’s Decision Before the European Court of Human Rights*

In the case where the Swiss Federal Tribunal rejects the athlete’s challenge to the “presumption of manipulation,” the athlete may still consider filing an application against Switzerland with the European Court of Human Rights claiming a violation of the right to procedural equality in the CAS proceedings, in particular, the violation of the “equality of arms” principle. Although the exact outcome of this challenge may be difficult to predict, it is likely that, in view of its case law dealing with the compliance of the civil-law presumptions with the principle of “equality of arms,”²⁶⁴ the European Court would rule in the athlete’s favor. Since any such decision of the European Court could provide useful guidance for the CAS panels and the Swiss Federal Tribunal considering similar cases in the future, the possible positive impact of this decision could go far beyond the individual athlete who mounted the challenge. Thus, although the road to the respect of the athlete’s right to a fair trial in “non-analytical positive” doping cases may be long and thorny, the possible outcome of the athlete’s application to the European Court of Human Rights could certainly be worth the effort.

VII. CONCLUSION

While the World-Anti Doping Program certainly has noble objectives, the fight against the evil of doping in modern sports must also be conducted by using noble means, ensuring respect for the human rights of the athletes. The non-observance of the athlete’s right to a fair trial in “non-analytical positive” doping cases, in particular, the impossibility of appealing the provisional suspensions imposed under the IAAF Competition Rules and the reliance on a “legal fiction” to justify the athlete’s liability in these cases, not only does not add credibility to this fight, but could directly undermine the perception of its legitimacy in the eyes of the athletes and the public at large. It may be safely assumed that, despite all

²⁶⁴ European Commission of Human Rights: Decision on the admissibility of the application *G. v France* (5.10.1988), ¶ 1; European Commission of Human Rights: decision as to the admissibility of Application No. 26632/95 *Mayer v. Austria* (4.09.1996), ¶ 1 (citing *Dombo Beheer B.V. v. Netherlands*, 18 Eur. Ct. H.R. (Ser. A), ¶ 33 (1994); *Stran Greek Refineries and Stratis Andreadis v. Greece*, 301-B Eur. Ct. H.R. (Ser. A), ¶ 46 (1994)).

efforts currently undertaken by the international sports community, unfortunately, the case of the seven Russian athletes will not be the last “non-analytical positive” doping case. Thus, to prevent any future violations of the athlete’s rights to a fair trial, measures should be promptly undertaken to ensure that these rights are fully respected.