

SUMMARY OPINION ON THE CONFORMITY OF CERTAIN PROVISIONS OF THE DRAFT

WORLD ANTI-DOPING CODE

WITH COMMONLY ACCEPTED PRINCIPLES OF INTERNATIONAL LAW

1. Introduction

This summary opinion is the short form version of a more extensive legal opinion which WADA requested from the undersigned. It first restates the questions asked and then sets forth the conclusions reached. The qualifications of the authors are summarized in the appendix.

2. Questions

We have been asked to opine on whether the following provisions of the Draft World Anti-Doping Code conform to commonly accepted principles of international law and human rights:

- the provision about strict liability, pursuant to which the presence of a prohibited substance in an athlete's specimen constitutes an anti-doping rule violation without regard to fault.
- the provision for automatic disqualification of an athlete's results in the competition where the athlete tested positive.
- the provision for the potential disqualification of all of the athlete's competitive results at the entire event, e.g., the Olympic Games, where the athlete tested positive.
- the provision on sanctions for anti-doping rule violations.

3. Answers

There is considerable debate as to whether human rights apply to doping disputes. This being so, there are arguments in favour of their application and it may be that, in

the future, courts will enforce human right guarantees in sport matters. Hence, the Code should be in conformity with human rights and general principles of law.

Assuming they apply at all, a whole range of human right guarantees may come into play in doping matters. Commonly accepted principles of international law and human rights are embodied in different international and regional instruments as well as in national constitutions. Whatever the source, the general principles and human rights which may play a role in sports matters are by and large uniform. Among these, the principle of *nulla poena sine culpa* and the presumption of innocence play a decisive role for the matters addressed in the Code.

General principles of law and human rights are not absolute. They may be subject to restrictions provided certain requirements are met. The most important of these requirements mandates that the restriction to the fundamental right be proportionate.

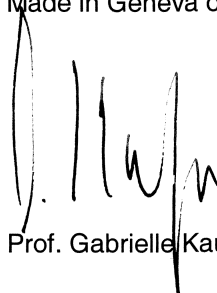
On the basis of a thorough analysis of human rights and of the validity of possible restrictions, we come to the following conclusions with respect to the draft provisions of the Code:

1. The provision of the Code about strict liability, pursuant to which the presence of a prohibited substance in an athlete's specimen constitutes an anti-doping rule violation without regard to fault or negligence, is in conformity with human rights standards.
2. The article of the Code, which provides for automatic disqualification of an athlete's result in the competition in which the athlete tested positive, complies with the requirements of the human rights and international law principles.
3. The article of the Code providing a possibility of disqualification of all of the athlete's results at the entire event where the athlete tested positive, is compatible with international law and human right standards, because the athlete is given the opportunity to establish that the doping offence was not a result of his or her fault or negligence (unless the sports governing body establishes that the athlete's results in competitions other than the one in which the anti-doping violation occurred were affected by such violation).
4. The Code provisions imposing periods of ineligibility as a consequence of a doping offence comply with international law and human rights standards, because the athlete is given the opportunity to eliminate the period of ineligibility by demonstrating no fault or negligence and to reduce the period of ineligibility by demonstrating no significant fault or negligence.

5. The provision stipulating a fixed sanction of two years for a first doping offence is not incompatible with international law and human rights requirements, because the athlete is given the opportunity to eliminate the period of ineligibility by demonstrating no fault or negligence and to reduce the period of ineligibility by demonstrating no significant fault or negligence.
6. The article of the Code providing for a life ban in the event of a second doping offence is not incompatible with human rights and international law standards, because the sanction will not be imposed if the athlete demonstrates no fault or negligence for the first or second offense and there is some flexibility to reduce the sanction if the athlete can demonstrate lack of significant fault or negligence.

The provisions of the Code in the Version 3.0 (Working Draft #17) comply with the requirements of human rights and international law referred to in the preceding paragraphs.

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Appendix

Professional Qualifications of the Authors of this Opinion

1. Gabrielle Kaufmann-Kohler is a professor of law at the University of Geneva, Switzerland. She teaches private international law, including international dispute resolution. She also teaches the comparative law of international arbitration in a post-graduate programme at the University of Lausanne, Switzerland. She regularly lectures at various universities and international conferences on the resolution of international sports disputes and international aspects of sports law.

Professor Kaufmann-Kohler also is a practicing attorney-at-law admitted to the bars of Geneva, Switzerland and New York State. She is a partner in the law firm Schellenberg Wittmer, Geneva, where she heads the international arbitration team. Her practice is focused almost entirely on international arbitration, both as counsel and as arbitrator. In addition, she represents litigants before the Swiss Federal Supreme Court in arbitration-related matters. She is on the arbitration panels of major arbitration institutions, including the International Centre for Settlement of Investment Dispute (“ICSID”) of the World Bank. She has advised the Court of Arbitration for Sport (“CAS”) and several international federations on their dispute resolution system. Professor Kaufmann-Kohler participated in drafting the amended Rules of the CAS and in preparing the related structure reform of this institution in 1994. She also drafted the Rules for the ad hoc Arbitral Tribunal at the Olympic Games and chaired this tribunal from its inception in Atlanta in 1996 to the Olympic Games in Sydney in 2000.

Professor Kaufmann-Kohler is the President of the Swiss Arbitration Association, sits on the board of the Swiss Society of International Law and is a member of the International Counsel for Commercial Arbitration, a worldwide body with forty members.

Finally, Professor Kaufmann-Kohler is the author of numerous publications in the area of private international law, international dispute resolution and the arbitration of sports disputes, including a book published in 2001 entitled “Arbitration at the Olympics”.

2. Giorgio Malinverni is a professor of law at the University of Geneva, Switzerland. He teaches constitutional law and human rights. He heads a program of continuing education in human rights. He has been a visiting professor at a number of universities over the last two decades, including Paris II and Strasbourg. He advises

international organizations and governments, including the Council of Europe, on human rights and constitutional issues. He is a member of the European Commission for Democracy through Law of the Council Europe and of the Committee for Economic, Social and Cultural Rights of the United Nations.

Professor Malinverni has published numerous books and articles in the area of human rights, constitutional and fundamental rights.

3. Antonio Rigozzi is a practicing attorney-at-law at the bar of Geneva, Switzerland, and an associate lawyer with the law firm Schellenberg Wittmer. His practice focuses on international arbitration, in both commercial and sports-related matters. He is currently acting as ad hoc secretary to CAS Panels in some high profile doping cases. Prior to professional practice, Mr Rigozzi was a research assistant in international arbitration and private international law at University of Geneva. In 2001-2002, he spent a year as a research fellow at Harvard University Law School to carry out research on sports-related and arbitration matters.

In parallel to his professional practice, Mr Rigozzi is presently completing a doctoral thesis devoted to the resolution of sports disputes. He is also the author of a number of publications of the area of international law.