Nos. 327 of 2014
328 of 2014

Federal Court of Australia
District Registry: Victoria
Division: General

ESSENDON FOOTBALL CLUB (ACN 004 286 373)

&

JAMES ALBERT HIRD

Applicants

THE CHIEF EXECUTIVE OFFICER OF THE AUSTRALIAN SPORTS ANTI-DOPING AUTHORITY

Respondent

OUTLINE OF SUBMISSIONS ON BEHALF OF THE 34 PLAYERS
(Filed pursuant to the Orders of Middleton J dated 4 July 2014)

A. Scope of Submissions

1. By Order dated 4 July 2014, this Court, *inter alia*, granted leave to the 34 current and former players of the Essendon Football Club who received notices under clause 4.07A of the National Anti-Doping Scheme ('**the 34 Players**') to file and serve any evidence or submissions they may seek to rely upon at the hearing of this matter by 4 August 2014. The 34 Players do not seek to be heard on the substantive issue in the proceeding, namely whether the 'joint investigation' conducted by ASADA and the AFL was *ultra vires*. They only seek to be heard on the question and nature of the relief to be granted by the Court, should the Applicants succeed on the substantive issue.

2. The 34 Players, have not and do not seek to file any evidence in support of these submissions. These submissions rely exclusively on the evidence already filed cited, in this proceeding along with the evidentiary material referred to in the Applicants'

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Joint Outline of Opening Submissions dated 1 August 2014 ('**the Applicants' Submissions**').

3. Insofar as the 34 Players' interests and respective positions align with those of the Applicants, the 34 Players adopt the submissions advanced by the Essendon Football Club ('**EFC**') and James Albert Hird ('**HIRD**'). Additionally, the 34 Players advance further submissions regarding matters which ought to inform the discretion to grant the declaratory and consequential relief sought, namely:

   a. The prejudicial statutory and contractually based consequences of allowing the Notices, based on an invalid investigation, to stand;

   b. The legal nature of the investigation, the capacity of "downstream" decision-makers to take account of that illegality in their deliberations and the lack of utility in allowing the matters to be dealt with by sporting Tribunals;

   c. The effect of the usurpation of the 34 Players privilege against self-incrimination.

B. Adoption of the Applicants' Submissions

4. Specifically and expressly, the 34 Players adopt the submissions advanced in the Applicants' Submissions at [316] – [332], inclusive.

C. Additional Matters Advanced by the 34 Players.

(i) The Flow-on Effect of Allowing the Show Cause Notices to Stand

5. Should this Court determine that the Joint Investigation was unlawful[1], then it ought to grant the relief sought in respect of the Show Cause Notices issued to the 34 Players.

6. The Respondent, by his defences "*admits that [his] decision to issue the Notices was based substantially upon information provided ... in the course of the joint*

[1] or invalid.

investigation."[2] Accordingly, should the injunctive relief sought not be granted, notwithstanding the admission referred to above, Notices which are "based substantially" on an process which was not permitted by law will be left to stand. Consequently, the anti-doping prosecution process pursuant to the NAD Scheme and the AFL Anti-Doping Code will be left to run its course. A consideration of that course demonstrates the grave injustice which will likely be visited upon the 34 Players as a result.

7. Pursuant to the NAD scheme, the issuing of show cause notices under Clause 4.07A triggers the commencement of a 'response period'.[3] It is within this period that the recipient of a show cause notice has the right to make a submission to the CEO as to why that person's name ought not be entered onto the Register of Findings.

8. Upon the conclusion of the response period the Anti-Doping Rule Violation Panel ('**ADRVP**') *"must, as soon as practicable, consider any submission made by the [recipient of the Notice] and decide whether or not to make an entry on the Register."*[4] In the ordinary course, entry onto the register is made if the ADRVP make a 'Finding' (i.e. *"that it is possible that an athlete ... has committed a non-presence anti-doping rule violation."*)[5]

9. To date, the Respondent has refused to provide the 34 Players with any of the material which he will be putting before the ADRVP for the purposes of permitting the 34 Players to make a submission within the response period. The Players advance no submission here as to the injustice of this stage of the process.

10. However, what is tolerably clear is that the NAD Scheme definition of 'Finding' sets a very low threshold to be met (i.e. ***"possible** that an athlete ... has committed a non-presence anti-doping rule violation"*). It is that which flows from the Finding - the placing of a player on the Register - which occasions the injustice which ought to inform any discretionary considerations.

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[2] See, e.g. Respondent's Defence to the Statement of Claim filed by EFC at [15(c)]; Defence to the Statement of Claim filed by Hird at [32.2].

[3] See Clause 4.07A(4) of the NAD Scheme: ASADA Regulations 2006, Sch 1.

[4] Clause 4.09(2) of the NAD Scheme.

[5] Clause 1.05A of the NAD Scheme.

11. In addition to making a "Finding" and determining to place a person onto the Register (which decisions are reviewable in the Administrative Appeals Tribunal)[6], under the NAD scheme the ADRVP also has power to:

    a. Make recommendations to sporting organisations as to the consequences of the possible violation;[7] and

    b. Determine to make a person's entry onto the Register public.[8]

    These latter two powers of the ADRVP are not reviewable in the AAT.[9]

12. The above references to the NAD Scheme demonstrate that if the Show Cause Notices are left to stand notwithstanding that the joint investigation is found to be ultra vires:

        i. The ADRVP will be provided with evidence and information which was unlawfully obtained;

        ii. That unlawfully obtained material will be considered by the ADRVP to determine whether it is "possible" that they have committed a anti-doping rule violation;

        iii. Consequent upon any 'Finding' being made, the ADRVP will determine whether to make the 34 Players' respective names and entries onto the Register public.

    Such will have obvious consequences for the reputations of the Players. However, that is not the end of the damage that would flow from allowing these Notices to stand.

13. In the ordinary course, the making of a Finding and the entry of any one player onto the Register would result in the AFL issuing an infraction notice to that player pursuant to the AFL Anti-doping Policy ('**the Policy**').[10] Given the circumstances of this case, such Infraction Notice would be issued with respect to the alleged substance Thymosin Beta 4 ('**TB4**').

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[6] Clause 4.12 of the NAD Scheme.

[7] Clause 10.3A(1)(e) of the NAD Scheme.

[8] Clause 4.07A(3)(g) of the NAD Scheme.

[9] *Re Peters and Anti-Doping Rule Violation Panel* [2011] AATA 333.

[10] See Annexure XC-19 to the Affidavit of Xavier Campbell dated 25 June 2014, Art 13 to the Code.

14. For the purposes of the Policy, TB4 is a "non-specified substance"[11].

15. Pursuant to the Policy, upon the issuing of an Infraction Notice for a violation involving TB4, a player would become immediately ineligible to participate in any 'Match'.[12] This immediate suspension from playing would apply unless the AFL Commission determined otherwise.[13]

16. Moreover, this period of immediate ineligibility is not a "Provisional Suspension' under the Policy and is therefore, not a period against which credit could later be reckoned.[14]

17. Assuming then the ordinary course was to follow from the Notices after such being permitted to stand, the 34 Players face:

    (i) Having their names made public notwithstanding no violation being proved against them;

    (ii) The issuing of an infraction notice against them; and

    (iii) Being immediately ineligible:

        a. to participate in any AFL 'Match'; and

        b. receive any match-related payments or bonus payments.

All of this would be based on an investigation which was legally flawed and information or evidence which was unlawfully obtained. The prejudice flowing to the Players, especially considering that:

(i) they are professional footballers;

(ii) they perform their employment duties publicly;

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[11] See WADA Prohibited List 2012 at S2. PEPTIDE HORMONES, GROWTH FACTORS AND RELATED SUBSTANCES, which pursuant to the WADA Prohibited List is excluded from being a specified substance and is thereby a "non-specified substance":

> *In accordance with Article 4.2.2 of the World Anti-Doping Code, all Prohibited Substances shall be considered as "Specified Substances" except Substances in classes S1, S2, S4.4, S4.5, S6.a, and Prohibited Methods M1, M2 and M3.*

The Prohibited List is expressly incorporated into the Policy: Art 2.1 "WADA Prohibited List" and Art 6.1:

> *This Code incorporates the WADA Prohibited List which is published and revised by WADA and changes from time to time.*

[12] Art 12.4 of the Policy.

[13] Art 12.4 of the Policy.

[14] *Cf.* Provisional Suspension pursuant to Art 14.7.

(iii) they have to take the field in matches to maintain their reputation and value in the football marketing milieu; and

(iv) as a matter of course, all such consequences would flow immediately upon the issuing of an infraction notices alleging use of TB4,

is significant.

(ii) Leaving the Consequences to So-Called 'Downstream' Decision Makers

18. The Respondent pleads that the investigation, if found unlawful and its fruits invalidly obtained, should be left unchecked by this Court and left to '*decision-makers who have responsibility for making downstream decisions.*'[15] Presumably, this is a reference to the ADRVP and Tribunal members who may be ultimately left to consider the merits of the alleged violations.

19. The Respondent's submission in this regard is misconceived. Firstly, it urges upon this Court to allow the results of an investigation which was invalid, and therefore a legal nullity, to subsist. Alternatively, insofar as it (may) relate to the ADRVP, that decision-making body is deprived of the power to consider such matters. If the matter was then to be left to a sporting Tribunal, it would be of little, or no utility.

(a) Invalid Administrative Action

20. It is not sufficient for the Respondent to submit that the remedy with respect to its unlawful conduct can be meted out elsewhere. Administrative action of the nature presently impugned may well be 'invalid'.[16] If that is the case, then the investigation is rendered a nullity.[17] That is, legally, it never happened. To allow something which never happened to have continuing legal effect in the hope that others will deal with it, should be neither encouraged nor permitted. It seeks to avoid the very classification and consequences of the conduct which fell beyond the power of ASADA.

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[16] *Cf Project Blue Sky v AB* (1998) 194 CLR 355 where McHugh, Gummow, Kirby and Hayne JJ at [94] and [100] held that as the ABA had power to do what it did, namely to make the Australian Content standard, and as a result, whilst the action was unlawful, it was not invalid.

[17] *Project Blue Sky v AB* (1998) 194 CLR 355.

(b) The Function of the Panel

21. The ADRVP's function in respect of 'Findings' is limited. It is only required to "*satisfy itself as to the immediate statutory prerequisites referred to in cl 4.9 [of the NAD Scheme] before exercising its function.*"[18] The Panel is not permitted nor empowered to consider the validity of the Notice but is, "*to determine whether or not on the material before it there was a possible Violation as asserted to it.*"[19] Accordingly, the ADRVP considers the material before it without considering the lawfulness of its gathering. The ADRVP is not a decision-maker who can relevantly take into account the lawfulness of the investigation that yielded material placed before it in discharging its function.

(c) No Utility in Leaving it to a Sporting Tribunal

22. Furthermore, the Respondent will be cognisant of the international sporting jurisprudence[20] which will apply, should the Notices be permitted to stand notwithstanding the invalidity of the joint investigation and the impact of that on the evidence obtained. The Appeal Division of the Court of Arbitration for Sport (incidentally the last Court of review for any Tribunal decision which may be subsequently made in respect of infraction notice which may issue to the 34 Players)[21], in the seminal case of *USA Shooting & Q / UTI*[22] ***('Quigley')***, observed the following in respect of anti-doping authorities not following the rules which govern them:

> *The fight against doping is arduous, and it may require strict rules. But* ***the rule makers and rule appliers must begin by being strict with themselves****. Regulations that may affect the careers of dedicated athletes must be predictable. They* ***must emanate from duly authorized bodies.***

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[18] *Anti-Doping Rule Violation Panel v XZTT* [2013] FCAFC 95 at [84].

[19] Anti-Doping Rule Violation Panel v XZTT [2013] FCAFC 95 at [97].

[20] Indeed, these cases are ones which apply the provisions of the WADA Code, or the anti-doping policies of domestic sports which relevantly adopt the provisions of the WADA Code, such as the AFL and the Policy. Moreover, Cl 1.03B of the NAD scheme provides that the Respondent and the ADRV "*must have regard to*", inter alia, WADA Code. The cases in question deal with arbitral decisions concerning the applicability of the Code, and thereby contribute to *lex sportiva*.

[21] Art 17.2 of the Policy.

[22] CAS 94/129 *USA Shooting & Q. / Union Internationale de Tir (UIT)* (Award dated 23 May 1995). (**Annexure A** to these Submissions)

> ***They must be adopted in constitutionally proper ways.*** *They should not be the product of an obscure process of accretion.*[23]
>
> [emphasis added]

23. In *Quigley*, a doping matter, the result of a positive test was overturned because the sporting body did not follow its own rules sufficiently. The procedures utilised by the sporting organisation responsible for the prosecution of an alleged anti-doping rule violation and the subsequent charges brought against the athlete were processed in a manner prohibited by the respondent's own Constitution. As such, the findings made against the athlete and the ban subsequently imposed were declared unlawful and invalid.

24. Given the strength of the pronouncements in *Quigley*, it is unlikely that there would be any utility in letting the Notices stand and the anti-doping process left to run its course. Such course would be protracted and involve significant expense to all parties involved (to the Players as well as to ASADA, a government agency). Assuming the application of the principles in *Quigley* to the conduct of ASADA in the investigation, the entire process would likely be declared invalid. There is no utility in permitting such to occur in the way suggested by the Respondent.

(iii) Abrogation of the Privilege Against Self-Incrimination

25. Whatever can be and is said of EFC and HIRD regarding free submission to a process that was invalid, the same cannot be said for the Players. The Players are employees of the EFC and were, at all material times, bound to follow the lawful directions of the EFC.[24]

26. As the Respondent highlights in its Answers (dated 28 July 2014) to HIRD's request for Further and Better Particulars, the previous President and the previous CEO of the EFC and other EFC officials each made a number of public statements regarding the cooperation of the Club, and what it expected of its employees in respect of the investigation. [25] This is not a matter in which the Players had any material choice.

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[23] At [34].

[24] Pursuant to the Terms of the Standard Playing Contract – See Applicants' Submissions at [198], footnote 181.

[25] See Respondent's Answers at [21],

27. Furthermore, by reason of the notifications received by each of the Players in the "pro forma interview pack"[26] it was made very clear to the Players that they were obliged to attend interviews and answer questions truthfully and fully, or face possible sanction by the AFL. In respect of their obligation to be truthful, they were directed to provisions of the Commonwealth Criminal Code. Their respective choices at the time were:

    a. attend and cooperate, or face AFL disciplinary charges;

    b. tell the truth throughout the interview or face criminal charges.

    Their choice should have been, insofar as it related to ASADA, attend and cooperate, or choose not to.[27]

28. As a result, the Players were put in an invidious position whereby they were effectively subjected to a compulsory examination wherein their privilege against self-incrimination was abrogated. However none of the protections that usually accompany such an abrogation and compulsory examination, such as a prohibition on the use of their information or evidence against them other than for use in perjury proceedings, were afforded to them.[28]

29. Moreover, in respect of proving any alleged anti-doping violation, ASADA and/or the AFL carries the burden of proof.[29] The standard is a sliding one, which sits somewhere between the balance of probabilities and beyond reasonable doubt, depending on the seriousness of the allegations and the consequences which flow from its proof.[30]

30. By usurping the Players' privileges and then in "substantially basing" the decision to issue Notices on that which was coercively elicited from the Players (and presumably substantially relying it to prosecute the matter) undermines the express provisions of the Policy with respect to the burden of proof.[31] The very evidence upon which the Notice and any subsequent charge is and will be based will have come from the Player, in circumstances where he had no choice but to provide it.

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[26] See Annexure AW-2 to the Affidavit of Aaron Walker dated 22 July 2014.

[27] Such a position has been notoriously enjoyed by NRL players who have been subject of similar investigations by ASADA.

[28] See for example examinations conducted under Part 2 of the *Australian Crime Commission Act* 2002 (and the like) and s 128 of the *Uniform Evidence Act.*

[29] See the Policy at Art 15.1.

[30] See the Policy at Art 15.1.

[31] In some respects it may also have the effect of reversing the burden.

31. This is the antithesis of the evinced intention behind the accusatorial nature of a hearing brought pursuant to the terms of the Policy. Moreover, to permit this to occur runs contrary to the legislative intention in respect of the powers conferred upon ASADA by parliament. It also occasions a real prejudice being visited upon the Players in respect of any defences they may advance with respect to the alleged violations.[32]

32. By the deliberate and intentional use of the AFL's powers to garner evidence which would not have otherwise been available to it, ASADA has put the Players in the position of having to cooperate or face charges. As a result of that cooperation, they now face the anti-doping equivalent of charges, the Notices. What is more, as discussed above, this has flow-on consequences in relation to reputation, legal and economic rights and the ability to continue in their chosen profession.

D. Conclusion

33. In all of the circumstances and for the above reasons, if ASADA were not permitted by its enabling legislation to conduct the investigation as it did, or for the purposes that it did, the Notices ought not be permitted to stand. The relief sought should be granted.

Date: 4 August 2014

D. GRACE

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[32] See *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [124] – [128] and *Lee v New South Wales Crime Commission* [2013] HCA 39 at [54] (per French CJ) and [79]-[82] (per Hayne J).

Annexure A

CAS 94/129 *USA Shooting & Q. / Union Internationale de Tir (UIT)* (Award dated 23 May 1995).

Arbitration CAS 94/129 USA Shooting & Q. / Union Internationale de Tir (UIT), award of 23 May 1995

Panel: Mr. Jan Paulsson (France), President; Mr. Denis Oswald (Switzerland); Mr. Luc Argand (Switzerland)

Doping of a shooter (ephedrine)
Disqualification and suspension for 3 months
Absence of strict liability rule in the UIT Antidoping Regulations
Need to establish the guilty intent of the shooter to sanction him
Right to be heard and due process

1. **If the strict liability standard is to be applied, this fact must be clearly stated. The fact that the Court of Arbitration for Sport has sympathy for the principle of a strict liability rule obviously does not allow the CAS to create such a rule where it does not exist.**

2. **The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorised bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders.**

3. **If the "hearing" in a given case was insufficient in the first instance, the fact is that as long as there is a possibility of full appeal to the Court of Arbitration for Sport the deficiency may be cured.**

Q. competed as a member of the USA Shooting Team in the men's skeet event organised under the auspices of the Union Internationale de Tir (UIT) in Cairo in April 1994. The skeet competition was held over two days. After the first day Q. was in second place.

Q. had felt ill for a number of days but his condition worsened sharply that night. He had a temperature and coughing fits, and was hallucinating. He could not sleep. At around 3.00 a.m. he called the coach to the USA Shooting Team who immediately summoned the hotel doctor, Mr. Z.

After a thorough examination the doctor diagnosed bronchitis and a chest infection. He left to obtain medication, returning with antibiotics and cough syrup. Q. testified before the Panel that the

bottled cough syrup came in a box on which there was writing which appeared to be Arabic and which he did not understand. The bottle itself, he stated, was unlabelled.

The USOC Drug Control Card was shown to Dr. Z. This card contains a list of drugs, distinguishing between banned substances (shown in red) and allowed substances (shown in blue). It was explained to the doctor that Q. was competing in a World Cup event, that he was not permitted to take any of the banned substances, and that there was a good chance that he would be drug tested the next day.

Dr Z. had a good command of English. He appeared to examine the card with considerable care. He noted that antibiotics were shown in blue and therefore permitted. Perhaps he did not see that clearly listed under the heading "Banned – Cold Medications" were the references to "ephedrine, pseudo-ephedrine ...". Alternatively, he was unaware that the cough syrup he had prescribed, of the brand name "Bronchophane", in fact contains ephedrine.

At any rate Dr Z. told Q. and his coach that neither the antibiotics nor the cough syrup were proscribed by the Drug Control Card. He signed a handwritten note stating that Q. had complained of "bronchitis and chest infection with cough", and that he (Dr Z.) had treated him with "Duricef" (the antibiotic) and "Bronchophane syrup".

Q. took a few sips of the cough syrup that night and then some more the following morning.

Q. proceeded to win the gold medal for the skeet event later that day. As a medal winner he was required to take a drug test. Q. and the assistant of his coach signed the Record of Doping Control on the UIT form, which clearly bears the mention in the space provided for "medication used... over the past seven days," that Q. had ingested Duricef and Bronchophane.

On 19 May 1994, the Secretary General of the UIT informed USA Shooting by letter that the "A" Sample had tested positive. USA Shooting were asked if they wished to avail themselves of their right to nominate a third party to represent them at the testing of the "B" Sample. For reasons of cost, USA Shooting declined to do so but agreed to the nomination by UIT of Dr Heinz Lösel, chairman of the UIT Medical Committee, to act as their "surrogate observer". In so doing, USA Shooting purported not to waive *"any right to contest the validity of the testing process or the result of either the "A" or "B" sample tests"*.

The testing was conducted on 22 June 1994 by Professor Donike at his laboratory in Cologne. At USA Shooting's request, the "B" Sample was tested not only to establish whether or not ephedrine was present but also the level of ephedrine and whether the other components of the cough syrup Bronchophane were present in the sample. The results confirmed the presence of ephedrine (at an apparently high level – 85 ppm) together with the presence of the other substances listed by the manufacturer as components of Bronchophane.

UIT informed USA Shooting of these results and scheduled a meeting of its Executive Committee for 20 July 1994 at which Q.'s fate would be decided. Neither Q. nor USA Shooting were formerly represented at that hearing, despite requests to be allowed to attend. However, a detailed file

evidencing the above facts dated 31 May 1994, which had been prepared by USA Shooting, was presented to the Committee.

On 1 August 1994, the UIT informed USA Shooting of the Executive Committee's decision as follows:

> *"The analyses have shown that the ratio of Ephedrine to the other substances in the Bronchophane syrup is such that no additional Ephedrine was taken apart from the cough syrup, Bronchophane.*
>
> *The Executive Committee therefore assumed that the data given by the shooter and his coaches and his roommate correspond to the truth. The Executive Committee is convinced that [Q.] had no intention to use forbidden medication in order to improve his performance and obtain an advantage over his competitors. His honor as shooter was not questioned by the Executive Committee.*
>
> *Nevertheless the Executive Committee had to consider the fact that the shooter competed under the influence of Ephedrine in a considerable amount. The Principle of equal treatment of all athletes has always been followed by the Executive Committee. It has been confirmed by medical research of the Medical Committees of the IOC and the UIT that "Ephedrine" can have a positive stimulating effort (sic) on the quality of the shooting performance and therefore the Executive Committee with unanimous vote and one abstention has taken the decision to suspend [Q.] for inadvertent use of a forbidden medication for 3 months, that is from 7th April to 6th June 1994. The results of the shooter in the Skeet event were annulled and he is kindly requested to return the medal and diploma".*

The 1994 Cairo event was designated as an event whose winner earned (for his country) one of three possible skeet shooting quota places for the 1996 Olympic Games. As a result of Q.s disqualification, USA Shooting therefore automatically lost an Olympic country quota place.

LAW

1. The relief requested by the Appellants is that Q. be allowed to retain the gold medal which he won at the Cairo event and that USA Shooting be allowed to retain the Olympic country quota slot earned as a result of Q.'s performance at Cairo.

2. On 8 August 1994, USA Shooting wrote to the UIT stating its intention to appeal the ruling of the Executive Committee and requesting information "on what appeals are available".

3. On 6 September 1994, UIT responded as follows:

> *"According to the UIT rules and regulations, any dispute remaining after the decision of the Executive Committee shall be settled finally by a tribunal composed in accordance with the statutes and regulations of the Court of Arbitration for Sport in Lausanne. With signing the shooter's declaration as a prerequisite for participation in the world cup, the athlete and the UIT have concluded a specific arbitration agreement, and the International Shooting Union informs you that we will comply with the said statutes and regulations and that we will accept in good faith the award rendered by the Court of Arbitration for Sport".*

4. The "shooter's declaration" referred to by the UIT, as signed by Q. on 28 March 1994, states as follows:

"I agree that any dispute arising between myself and UIT which cannot be settled amicably and which remains once the procedures provided for in the UIT Regulations have been exhausted, shall be settled finally by a tribunal composed in accordance with the Statute and Regulations of the Court of Arbitration for Sport, Lausanne, to the exclusion of any recourse to ordinary courts. The parties undertake to comply with the said Statute and Regulations and to accept in good faith the award rendered and in no way hinder its execution".

5. As noted above, the Request for Arbitration was lodged on 7 October 1994. The circumstances leave no doubt as to the jurisdiction of the Court of Arbitration for Sport.

6. In accordance with Article 29 of the Regulations of the CAS (as amended on 20 September 1990), and consistently with Order 1 of the CAS issued on 4 December 1994, the Panel will apply Swiss law, in the absence of any specific indication in the Shooter's Declaration, in any cited UIT regulations, or of any specific agreement of the parties.

7. Since the Request for Arbitration was lodged on 7 October 1994, the provisions of the Statute and Regulations of the Court of Arbitration for Sport governing this case are those amended on 20 September 1990.

8. The Appellants' case rests on four contentions:

- that Q. did not commit the offence of "doping" as defined in the UIT's Anti-Doping Regulations. The Appellants argue that the definition requires not only that the athlete has taken a prohibited substance, but also that he did so with the intention of improving his performance. The Appellants invoke Article 2 of the UIT Anti-Doping Regulations:

  "Doping means the use of one or more of the substances mentioned in the official UIT Anti-Doping List ***with the aim of attaining an increase in performance*** (emphasis added) *by injection, oral or other means, and whether the drug is administered by the competitor himself or the substance is transmitted to the competitor's body by another person".*

- that, since the athlete was not at fault and no competitive advantage was obtained, there should be no (or very light) sanctions even under a strict liability standard. The Appellants invoke the International Olympic Charter Against Doping in Sport (Annex 7 – Guidelines for sanctions and penalties) which states:

  "It is possible for a competitor to take a preparation without knowing that it contains one or several substances of a banned class, since in many countries the composition of some pharmaceutical preparations may not be listed on the label. Thus, a certain flexibility is necessary regarding the decisions that a sports governing body may wish to take when a laboratory reports on a banned substance of this type".

- that the Respondent has not satisfied its burden to defend the procedural correctness of a valid test. The Appellants argue that the Respondent has not provided sufficient documentary evidence to show that the sampling/custody/testing procedures described in the International Olympic Charter Against Doping in Sport has been complied with

and also that the Respondent has not complied with certain aspects of its own rules as set out in the UIT Anti-Doping Regulations.

- that the meeting of the UIT Executive Committee which decided to suspend Q. did not satisfy the requirements for an impartial hearing laid down by the International Olympic Charter Against Doping in Sport.

9. In essence, the Respondent maintains that its decision, though based on the UIT Anti-Doping Regulations, was not founded on an assumption that Q. had taken a drug which could have enhanced his performance and/or that he took the drug with that intent. In other words, doping is a strict liability offence which is established once the presence of a prohibited substance is established. The Respondent justifies its position in this regard by reference to the established practice of the IOC, which it contends that it has consistently followed.

10. The Respondent points out that this position is in conformity with its letter to USA Shooting dated 6 September 1994, which stated:

"We would like to repeat once more that the decision of the Executive Committee had to be based on the fact that a forbidden drug was clearly found in the body of the athlete, and the competitive result attained under the influence of that drug cannot be counted, regardless of how the drug got into the athlete's body. We regret that we had no possibility for a different decision."

a) First pleaded ground for reversal: Failure to prove a defined offence

11. The UIT has consistently taken the position that the demonstrated presence of a banned substance in an athlete's body justifies and indeed requires a disciplinary sanction. Whether or not the athlete had a guilty intent should be of no relevance. The disciplinary body should not have to determine that the athlete consciously sought to achieve an illegal competitive advantage.

12. The minutes of the UIT Executive Committee meeting of 20 July 1994, at which the challenged sanctions were decided, recites at page 13:

"A very detailed consideration of the members of the Executive Committee resulted in the opinion that ever since the introduction of the anti-doping regulations in the General Assembly of 1982, not a single medical prescription of a banned medication has ever been accepted as an excuse by the Executive Committee. In all cases, which had been decided in the past, only the fact that a forbidden medication was found in the body of the athlete was considered as a basis for punishment".

On the next page, it is said that:

"The president expressed his opinion that UIT should not give up the strict rule as well as the strict procedure. This would be also important for future cases".

13. Accordingly, the UIT wishes the Panel to apply a test of strict liability. The UIT refers to the need to harmonise anti-doping regulations in the realm of international sports, and to the fact

that the IOC has moved toward a standard of strict liability that would penalise even inadvertent absorption of banned substances.

14. It is true that a strict liability test is likely in some sense to be unfair in an individual case, such as that of Q., where the athlete may have taken medication as the result of mislabelling or faulty advice for which he or she is not responsible – particularly in the circumstances of sudden illness in a foreign country. But it is also in some sense "unfair" for an athlete to get food poisoning on the eve of an important competition. Yet in neither case will the rules of the competition be altered to undo the unfairness. Just as the competition will not be postponed to await the athlete's recovery, so the prohibition of banned substances will not be lifted in recognition of its accidental absorption. The vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or the negligence of unaccountable persons, which the law cannot repair.

15. Furthermore, it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently. Moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations – particularly those run on modest budgets – in their fight against doping.

16. For these reasons, the Panel would as a matter of principle be prepared to apply a strict liability test. The Panel is aware that arguments have been raised that a strict liability standard is unreasonable, and indeed contrary to natural justice, because it does not permit the accused to establish moral innocence. It has even been argued that it is an excessive restraint of trade. The Panel is unconvinced by such objections and considers that in principle the high objectives and practical necessities of the fight against doping amply justify the application of a strict liability standard.

17. But if such a standard is to be applied, it must be clearly articulated. This is where we reach the heart of the problem of this case.

18. Article 2 of the UIT Anti-Doping Regulations is entitled "Definition," and it begins with the following words:

"Doping means the use of one or more substances mentioned in the official UIT Anti-Doping List ***with the aim of attaining an increase in performance*** *..."* (emphasis added).

Yet in its letter dated 1 August 1994 announcing its decision to sanction Q., the UIT as seen above stated unequivocally:

"The Executive Committee is convinced that [Q.] had no intention to use forbidden medication in order to improve his performance and obtain an advantage over his competitors".

19. Q. understandably objects that, having made such a determination, the UIT could not possibly punish him for a doping violation given the UIT's own definition of the offence.

20. The UIT counters that the appropriate rule should be that of strict liability. It adds that, although it admits that there "might be a need to alter" the Article 2 definition, it has amended its practices to be aligned with those of the IOC (letter to the Court of Arbitration for Sport dated 9 March 1995).

21. The Panel has reviewed the UIT's arguments with sympathy for the objectives and practical difficulties of its anti-doping programme. But the fact that the Panel has sympathy for the principle of a strict liability rule obviously does not allow the Panel to create such a rule where it does not exist. Nor would the fact that the UIT is said to be in the process of aligning its rules with an IOC inspired strict liability principle justify punishment on the basis of rules which do not yet exist, and indeed contradict the rule presently in force.

22. The UIT had the right to punish Q. only on the basis of rules in force. Q. makes the simple but powerful argument that: 1) Article 2 requires a finding of culpable intent, 2) the Executive Committee explicitly concluded that there was no such intent, and therefore 3) there could be no punishment under the UIT Anti-Doping Regulations.

23. The Panel has carefully examined the textual arguments by which the UIT seeks to get around what it today plainly views as an unfortunate definition surviving in its Regulations. As we shall now see, none of those arguments stand up.

    The fact that Article 1 of the UIT Anti-Doping Regulations recites that they are "based on" the IOC Rules cannot mean that any provisions in any IOC rules which contradict the UIT Regulations will take precedence. The statement in Article 1 may very well be of assistance if there is an issue of interpreting the Regulations. But it is for the UIT, if it so wishes, to ensure that its Regulations do indeed incorporate relevant IOC texts. Persons subjected to the UIT Regulations can only read what is said. They cannot be asked to consider that any or all of the UIT Regulations might in fact be invalid due to the existence or emergence of unspecified IOC rules.

24. Nor does it help the UIT to invoke Supplement C of its Anti-Doping Regulations. It is true that this Supplement states that:

    *"The **inadvertent** use of forbidden doping substances such as Ephedrine ... shall be penalized"* (emphasis added).

25. The UIT argues that this statement should be read to supersede or override the Article 2 definition of doping that requires intent. But for this argument to succeed the Regulations themselves would have to explain that Supplement C has such an effect. This result might have been achieved with proper drafting (although one cannot encourage a sports federation to adopt a drafting style which overrules in one place what it has ruled in another, thus creating traps for the unwary). Nothing of the sort however appears in the Regulations, which provide in Article 10.5 that:

"Recommendations for degrees of the penalty for doping infractions by the IOC Medical Commission should be adopted in the interest of providing a uniform procedure for all athletes. Current IOC list is given as Supplement C to these regulations".

26. This passage itself invalidates UIT's argument in two ways. First, in referring to "degrees of the penalty for doping infractions," it does not purport to amend the definition of the offence, but simply to deal with the punishment once the offence has been established. Second, in contradistinction to the three immediately following paragraphs, which use the simple imperative tense "will be applied", "will be disqualified" and "will be effective", the words "should be adopted" indicate an intent to legislate and not an act of legislation.

27. In the course of its oral submissions, the UIT also referred to the following mention appearing at the end of the Regulations, immediately after the list of "Supplements to these Regulations":

"Note: Supplements are issued immediately upon receipt of official changes in information and are an official part of this Annex (sic)".

28. To reach for so weak an argument is practically an admission of defeat. It might be possible by a carefully drafted clause to provide for some form of ongoing adaptation of Regulations, e.g. by referring to a list of banned substances as may be *"revised from time to time"* by a defined authorised body. But to imagine that each and every Regulation, no matter how fundamental, is subject to being transformed or eradicated *"upon receipt of official (sic) changes in information"* would be to deny the proper constitutional functioning of an international federation, which must be orderly, predictable, and transparent.

29. The Panel has considered whether any other provisions of Article 10 of the Regulations might be said to justify the application of a strict liability rule. The very focus on Article 10 is in and of itself a problem, because Article 10 is entitled "Procedure of Punishment" and is therefore not the place where one should have to look to find a qualification (let alone a transformation) of the definition of the offence. As for the particular passages: although Article 10.1 seems to contemplate "punishment" upon the mere "detection" of "doping substances", the Regulations thus remain circular since the notion of doping substance obviously leads the reader back to the definition of doping; with respect to the very poorly drafted Article 10.7, which the Panel read many times before it could guess at its meaning, it presents the same problem of ultimately leading back to the definition of "doping".

30. Any legal regime should seek to enable its subjects to assess the consequences of their actions. While it would be naive to expect that the average athlete at all times bears in mind specific provisions of applicable regulations, the fact is that the community of persons who are subject to a body of rules gradually develops a certain understanding of it.

31. When an athlete in Q.'s position in his hotel room in Cairo in the early hours of the morning of 7 April 1994 understands that he is subject to rules which will punish him only if it is determined that he intended to take a performance-enhancing substance, he may legitimately be expected to act in a certain way, with a certain understanding of the consequences of his

actions. Similarly, his entourage may advise him in a certain way, once again with a certain understanding of the consequences of his actions. Thus, the athlete might consider that in a situation where, to take the case of Q.,

- he was engaged in a competition where he was performing well and could expect to be tested the next day,
- he was suffering from intense discomfort in a foreign country in the middle of the night,
- he (or his entourage) felt they could explain persuasively that they had done the best they could in contacting the hotel doctor and impressing on him the importance of prescribing medication allowed under the Drug Control Card,
- cough medicine is not known to contain substances whose effects are conducive to good performance in his sport,
- he fully intended to reveal that he had taken the medication identified by the doctor,

the odds were favourable that he would not be held guilty of a doping violation even if it turned out that the unknown doctor's assurance with respect to the cough syrup was unreliable.

32. In fact in the case of Q. this analysis would have been entirely correct, because the UIT explicitly determined that he had not acted with guilty intent.

33. If he had been subject to a fundamentally different regime, i.e. that of strict liability, his understanding would have been different and his conduct might therefore have been different. He might have summoned the fortitude to eschew medications prescribed by a stranger. In other words, his conduct may have been responsive to his perception of a greater risk of sanction. This is a matter of legitimate expectations, and it is crucial to any decent system of laws.

34. The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorised bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the *de facto* practice over the course of many years of a small group of insiders.

35. Reading the UIT Regulations (as they currently appear) in the light of these desiderata, the Panel has no alternative but to reach the conclusion that the UIT had no legal basis for the sanctions it pronounced against the Appellants. The sanctions must therefore be reversed.

b) Second pleaded ground for reversal: Failure to apply a rule of flexibility

36. The Appellants argue that, even if the UIT had enacted a rule of strict liability, it ought to have applied it with flexibility with the result that in the circumstances of this case, involving the administration of cough syrup in a foreign country with no plausible improvement of performance, the athlete would not be punished.

37. Having held that the UIT cannot in fact rely on a rule of strict liability, the Panel need not rule on this contention.

38. If and when the UIT adopts a strict liability rule, it will have to consider whether it concomitantly wishes to articulate guidelines as to any factors that might justify the Executive Committee (or the CAS on appeal) to show clemency.

c) Third pleaded ground for reversal: Failure to demonstrate the procedural correctness of the drug test

39. Does every athlete found by his federation to have tested positive for a banned substance have the absolute right to demand the production of detailed laboratory documentation establishing beyond doubt that every aspect of the sampling/custody/testing procedure has been followed to the letter? This is not a question on which this Panel is required to rule in order to resolve this case, the decision being founded solely on the Appellants' first contention. Nor will it make such a ruling. However, since the issues raised are of such fundamental concern and occur, and are likely to continue to occur, in most if not all doping cases, it may be instructive for the Panel to make some observations on the arguments raised.

40. The Appellants make essentially two points. The first point (which is the more important of the two) is that the Respondent has failed to follow (or at least has failed to demonstrate that it has followed) the testing procedure described in the International Olympic Charter Against Doping in Sport. Secondly, they allege breaches of the custody and control procedure provided for in the UIT Anti-Doping Regulations which they contend are apparent from the documents which have been produced by the Respondent. The Appellants' specific contentions were explained and endorsed by their expert pharmacological witness, Dr B.

41. The Respondent produced only some of the documents which would establish that it followed its own procedures and those described in the IOC Charter. The Respondent takes the position that full credit should be given to the report dated 24 June 1994 of Dr Donike, in whose Cologne laboratory the testing of the "B" Sample was carried out and who confirmed that the "B" Sample contained "85 ppm of Ephedrine", as well as to the papers forwarded to the Respondent by the laboratory. The Respondent points to the fact that the testing was carried out in an IOC accredited laboratory, and a highly reputed one at that. On this basis, it claims its results should not be questioned.

42. The Respondent also argues that, because Q. has admitted (both in the drug testing form submitted to the doping control officer after the Cairo competition and in the course of these

proceedings) that he took Bronchophane which undoubtedly contains ephedrine and, thus, that he took a banned substance, the procedural adequacy of the drug test does not need to be proved.

43. Finally, the Respondent argues that Q. was represented at the testing of the "B" Sample and, consequently, could be argued to have foregone his right to dispute the validity of a testing procedure supervised by his representative.

44. The Panel has a number of observations to make on these issues:

45. The Appellants insist, with substantial testimony by Dr B., that the Respondent failed to demonstrate that it has fully complied with the testing procedure described in the IOC Charter Against Doping in Sport. This raises the issue whether the Respondent was obliged to follow the procedure for testing described in the IOC Charter. The UIT Regulations themselves do not specifically require this; they simply state in Article 8.1 that *"the doping analysis must be conducted in a laboratory accredited by the IOC"*.

46. The principal argument in favour of following the provisions of the IOC Charter is that, in the context of doping in sport, the IOC Charter is, as was put in a circular letter by Prince Alexandre de Merode, Chairman of the IOC Medical Commission, *"a fundamental document on which the whole philosophy of the fight against doping will be based"*. In addition, all international Olympic federations and the other members of the Olympic family resolved in Lausanne on 13 January 1994 to *"unify their anti-doping rules and procedures for the controls they perform..."*.

47. The Panel is, in principle, sympathetic to the argument as to the relevance and applicability of the IOC Charter, though (as with the definition of doping) IOC practice and regulations should not be put forward as overriding contradictory rules promulgated by the competent international federation. The distinction between the first pleaded ground for reversal and this ground is that, in the case of the latter, there are no such contradictory rules. The UIT Regulations give next to no guidance as to the testing procedure, stating simply that the testing should take place in an IOC-accredited laboratory.

48. This need not mean that every step of the procedure described in the Charter (and more particularly in its Annexes) must be followed. Many, if not most, of Dr B.'s notions of what is required to come up with reliable results were, in fact, derived from definitions of what laboratories must be capable of doing if they are to receive IOC accreditation. There would seem to be a clear distinction in concept between the capacities a laboratory must show it has in order to be accredited and which of those capacities must be used to prove doping in an individual case. It is to be hoped that clear guidelines will be enacted with respect to the latter. Otherwise, cases will arise where other appellants will adopt the interpretation implicit in Dr B.'s testimony in this case and insist that: all requirements for accreditation of laboratories, and indeed any other requirements that could be found in the IOC Charter, must apply to each individual test, even if the documentation thereof might – as Dr B. admitted – exceed 200 pages. One cannot lose sight of the fact that the burden of overly strict requirements falls

on international federations which in many cases would, as a result of the cost and administrative burden of satisfying such requirements, have to reduce the frequency of testing.

49. Turning to the Respondent's second point relating to breaches of the UIT testing procedure: it is the Panel's view that, as a general matter, if breaches of specific requirements laid down by a federation for the testing procedure are sufficiently material as to call into question the validity and correctness of the positive result, any athlete would be entitled to have that federation's decision overturned. This would be the case even if the athlete concerned had admitted taking a banned substance. It would be unfortunate for an athlete who has candidly given details of medication taken (as Q. did immediately following the competition on his testing form) to find himself in a worse position than an athlete who says nothing: an athlete should not be penalised or prejudiced for having been honest. If two athletes took the same substance in amounts insufficient to result in a positive test, it must be wrong to punish the one who had admitted that he had taken (or thought he had taken) a forbidden substance, while the other one goes free. It is for this reason that a properly worked definition of doping will require a federation to establish the presence in an athlete's body of a banned substance by means of a properly conducted testing procedure and not by his or her admission.

50. In the present case, the Panel does not need to form a view as to whether or not the alleged breaches of the UIT testing procedure were material. The Panel nevertheless points out that if the UIT adopts a strict liability test, it becomes even more important that the rules for the testing procedure are crystal clear, that they are designed for reliability, and that it may be shown that they have been followed. Otherwise the door will be opened to a surfeit of litigation.

51. The parties took opposite views of whether the Appellants had waived their right to object to the testing procedure by agreeing to the nomination by UIT of Dr L. as the Appellants' "surrogate observer". The Panel is not satisfied with either side's approach in this respect. On the one hand, it surely stretches the demands of natural justice too far for an athlete to be able to send a representative to participate and supervise the testing procedures for a "B" Sample but at the same time to reserve his right to question the sufficiency of those procedures at some later date.

52. On the other hand, the Respondent should not have left unanswered the statement in USA Shooting's letter of 31 May 1994 to the effect that it reserved its right to contest the validity of the testing procedure despite its request for a "surrogate observer". The Respondent ought to have made it clear at that point that, if the Appellants wished to have an observer present, that observer's acceptance of the procedure would be binding.

d) Fourth pleaded ground for reversal: Lack of "due process"

53. In support of this contention, the Appellants invoke not only the general equitable principle of natural justice but also specifically the IOC Charter Against Doping in Sport.

54. The relevant provisions of this Charter (Annex 6 [Rights and responsibilities of sports organizations, athletes and their entourage] – paragraphs 1.7 and 6) are as follows:

"1.7 The responsibilities of sports organisations... (are) to protect the rights of suspected persons, by ensuring that the regulations ... include the right of suspected persons to an examination and hearing and the right of appeal";

"6. Hearing:

6.1 A hearing is held to provide an opportunity to the concerned parties to be heard before determining the nature of the doping infraction and the relevant penalty.

6.2 The main elements and criteria for a hearing whether at a national or international level, are:

6.2.1 The persons bringing the case and those who may impose penalties should be separate and distinct;

6.2.2 The accused person should be informed of the case against him or her in writing; the charge, and all other relevant documentary evidence and material which form the basis of the charge should be communicated to the accused person beforehand;

6.2.3 (...);

6.2.4 The accused person should have the right to present evidence comment on the accusation, to defend him/herself, and to be represented by a person with the same rights (...);

6.2.5 The proceedings should be thorough and impartial;

6.2.6 The accused person should be informed of the decision reached, together with the reasons for the decision, in writing".

55. The Appellants argue that, as a general matter, Q. did not receive a "hearing" in the proper sense of the word at all and that, specifically, the Respondent failed to comply with a number of the IOC provisions cited above. In particular, there was no distinction between the person bringing the case and the person imposing the sanction, Q. was not supplied with all the test data, he was given no opportunity to be represented before the UIT Executive Committee nor to obtain the minutes of the meeting at which the decision to suspend him was reached (these minutes were produced to the Court by the Respondent during the hearing).

56. The Respondent attempts to counter this contention by quoting from the minutes of the meeting of the UIT Executive Committee in order to show that the committee members gave the case (including the affidavits and other documents submitted by the Appellants in advance of the meeting) a thorough review. The Respondents also point out that the UIT Regulations do not provide for a formal hearing as such.

57. Again, the Panel is not required to rule on this issue in order to deliver its award in this case. On the other hand, it is obvious to the Panel that the Appellants' argument in this respect would fail; and it may be useful for this award to indicate why that is so.

58. In the first place, the Panel is not convinced that fundamental procedural rights include the right to be heard in the context of a physical meeting. In fact, the Court of Arbitration for

Sport has had occasion in the past to consider the issue of an accused person's "right to be heard". In the award in Case No. 92/84, rendered on 27 February 1993, the Panel decided that whether an accused had been accorded the right to be heard must be judged on a case-by-case basis, but that an accused can be "heard" either in person or by way of written submissions.

59. Moreover, even if the "hearing" in a given case was insufficient in the first instance – for example, by the UIT's Executive Committee – the fact is that as long as there is a possibility of full appeal to the Court of Arbitration for Sport the deficiency may be cured (It would obviously be wise to ensure that accused competitors are given a satisfactory opportunity to be heard from the start, so that they do not feel impelled to appeal out of frustration, but that is another matter). Thus, in this case the Appellants' "due process" argument, assuming it to have been valid, could not have stood alone. Nor indeed could it add anything to any of the other three grounds for reversal, including the one which was accepted.

e) Costs

60. Although it is common practice for the successful party's costs to be borne by the other party, the Panel has decided for the following reasons not to make any award of costs.

61. The Panel is not convinced in the light of all the circumstances that Q. and his entourage did everything they could to avoid the risk, however inadvertent, of the positive test for a banned substance which gave rise to these proceedings. Q. is a seasoned competitor and the USA Shooting coaches are sophisticated leaders at an elite level of their sport. They should have been keenly sensitive to the familiar problem associated with cough syrups.

62. As the reasoning of this Award makes clear, it may well be the case that the Appellants prevail not because they were victims of a substantive injustice but because of an imperfection in the Respondent's Anti-Doping Regulations which will, the Panel imagines, be rectified in due course, with the result that the next person in Q.'s situation may be validly punished for the same conduct.

63. The Appellants' principal costs relate to their legal fees, which the Appellants had the option not to incur. Furthermore, they introduced complex issues well beyond what was necessary for them to prevail.

64. The UIT, which has only limited resources available to it, conducted its defence in a very straightforward way allowing the Appellants to present their case with a minimum of difficulties.

The Court of Arbitration for Sport:

1. Grants the relief requested by the Appellants, and accordingly:
   - reinstates Q. as the winner of the 1994 UIT Cairo World Cup entitled to retain the gold medal from that event, and
   - declares that USA Shooting was therefore in principle entitled to the Olympic country quota slot earned as a result of Q.'s performance (it being recognised that this slot cannot be used in practice to the extent that U.S. athletes have already attained the maximum of three slots for any one country).

2. Makes no award of costs.