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FAIRNESS OR EQUALITY? PARTICIPATION OF ESPORTS PLAYERS WITH DISABILITIES IN ESPORTS COMPETITION

TSUBASA SHINOHARA*

INTRODUCTION

Esports (“electronic sports” or “competitive video games”) is gradually establishing itself as a substantial economic market.¹ According to Statista’s esports market research, esports revenue reach around \$4.3 billion in 2024 and is anticipated to reach \$5.7 billion by 2028.² This rapid and substantial economic growth has led to a steady rise in the population of esports players.³

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¹ JACOB HINDIN ET AL., ROUTLEDGE HANDBOOK OF GLOBAL SPORT 405-07 (John Nauright & Sarah Zipp eds., 2020).

² *Esports – Worldwide*, STATISTA, <https://www.statista.com/outlook/amo/esports/worldwide> (last visited Apr. 2, 2024); Unfortunately, Newzoo discontinued its esports report in 2023. Jake Nordland, *Newzoo discontinues its esports industry reports*, ESPORTS INSIDER (Mar. 2, 2023), <https://esportsinsider.com/2023/03/newzoo-ends-esports-report>; Therefore, this article refers to the last year’s version. See *Global Esports & Live Streaming Market Report 2022*, NEWZOO (2022), <https://newzoo.com/insights/trend-reports/newzoo-global-esports-live-streaming-market-report-2022-free-version/>.

³ HINDIN ET AL., *supra* note 1, at 407.

In this situation, persons with disabilities⁴ are progressively engaging in esports activities.⁵ In particular, esports players with disabilities⁶ require specialised equipment, known as “adaptive gaming equipment”, to assist their physical and cognitive abilities during video game play.⁷ Consequently, esports tournament organizers may encounter integrity challenges, particularly in relation to “e-doping” - a form of cheating involving manipulation of software or hardware in esports equipment to gain an unfair performance advantage over opponents.⁸

For example, esports players often employ customised game consoles and input devices, such as gaming keyboards, mice, and headsets,⁹ to gain a performance advantage over their opponents (“hardware e-doping”). Additionally, some players use external software, like aimbot (providing automated targeting in shooting) and wallhack¹⁰ (making wall surfaces transparent or nonsolid) (“software e-doping”) to enhance their performance.¹¹ When esports players with disabilities participate in esports competitions, they

⁴ See Treaty Document 112-7 – Convention on the Rights of Persons with Disabilities (2024), <https://www.congress.gov/treaty-document/112th-congress/7>. According to Article 1, para. 2, of the Convention on the Rights of Persons with Disabilities (CRPD), “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” This article will be based on this definition.

⁵ This article will use the term ‘esports activities’ that includes not only professional esports competitions but also recreational video game play; regarding the inclusion of disabled esports players, see generally Patrick Walker, *Removing Barriers: How Can Esports be More Disability Inclusive?*, ESPORTS INSIDER (Apr. 13, 2023), <https://esportsinsider.com/2023/04/disability-barriers-esports>; Patrick Walker, *Levelling the Playing Field: How to Embrace Disability in Esports*, ESPORTS INSIDER (May 25, 2023), <https://esportsinsider.com/2023/05/level-playing-field-disability-esports>; H.B. Duran, *Opinion: Esports Inclusivity for Disabled Gamers Begins in School*, ESPORTS INSIDER (July 30, 2020), <https://esportsinsider.com/2020/07/esports-inclusivity-disabled>; Rachael Venables, *Why Gaming is Not Just a Hobby but a Lifeline for Millions of Gamers*, SKY NEWS (Sept. 2, 2023), <https://news.sky.com/story/why-gaming-is-not-just-a-hobby-but-a-lifeline-for-millions-of-gamers-12952807#:~:text=Mollie%20is%20one%20of%20an,people%20in%20the%20general%20population.>

⁶ See Pauliina Baltzar et al., *“It’s Easier to Play Alone”: A Survey Study of Gaming With Disabilities*, 1 J. ELEC. GAMING & ESPORTS 1, 1-15 (2023).

⁷ Bryony-Hope Green, *What is Adaptive Gaming Equipment?*, BRITISH ESPORTS (Dec. 9, 2021), <https://britishesports.org/general-esports-info/what-is-adaptive-gaming-equipment/>.

⁸ See Diane Falconer, *ESports Fights Cheating Bugs, Bots and Hacks*, JAKARTA POST (Oct. 14 2020), <https://www.thejakartapost.com/life/2020/10/14/esports-fights-cheating-bugs-bots-and-hacks.html>; Bryony-Hope Green, *How Can Esports be More Accessible?*, ESPORTS INSIDER (Oct. 6, 2022), <https://esportsinsider.com/2022/10/accessibility-in-esports>.

⁹ For input devices, Logitech G produces esports specific products for esports players. See LOGITECH G, <https://www.logitechg.com/en-us> (last visited Apr. 2, 2024).

¹⁰ See Paul “Arkem” Chamberlain, *Demolishing Wallhacks with Valorant’s Fog of War*, RIOT GAMES (Apr. 14, 2020), <https://technology.riotgames.com/news/demolishing-wallhacks-valorants-fog-war>.

¹¹ See Falconer, *supra* note 8; Graham Ashton, *Cheating in Esports – How is it Done, and How is it Dealt With?*, ESPORTS OBSERVERS (May 27, 2019), <https://archive.esportsobserver.com/cheating-in-esports/>.

rely on special equipment to support their cognitive and physical skills. In this context, a pertinent question arises concerning how esports tournament organizers can uphold “fairness” in esports competitions between disabled esports players and able-bodied esports players.¹²

Based on this understanding, the purpose of this article is to clarify how esports tournament organizers strike a balance between ensuring “fairness” and promoting “equality” when integrating esports players with disabilities into competitive video games.¹³ To address this main question, this article will consider the following research questions: (1) What challenges will esports society face when esports players with disabilities use specialized equipment to support their cognitive and physical abilities?¹⁴; (2) What regulations and rules can esports tournament organizers apply to esports players in the case of e-doping?; and (3) How can esports tournament organizers prevent potential misuse of such specialized equipment by esports players with disabilities to obtain unfair performance advantage over other esports players without disabilities?

To explore these questions, this article will examine various arbitral awards rendered by the Court of Arbitration for Sport (CAS), including two notable cases such as *Pistorius v. International Association of Athletics Federations (IAAF)*¹⁵ and *Blake Leeper v. IAAF*.¹⁶ Through a thorough analysis of these

¹² The sports society has previously confronted the issue of “fairness” when athletes with disabilities incorporate assistive technology within the same category as athletes without such technological aids. Essentially, the question that arises revolves around whether athletes using assistive technology gain an unfair advantage over their opposing players who do not use such technology. See Rémi Richard et al., *Fairness, Regulation of Technology and Enhanced Human: A Comparative Analysis of the Pistorius Case and the Cybathlon*, 15 *SPORT ETHICS PHILOS.* 507, 507-09 (2022).

¹³ The “equity” should be distinguished from “equality.” According to the National Association of Colleges and Employers (NACE), “[w]hereas equality means providing the same to all, equity means recognizing that we do not all start from the same place and must acknowledge and make adjustments to imbalances.” See *Equity*, NACE, <https://www.naceweb.org/about-us/equity-definition#:~:text=The%20term%20%20%20equity%20refers%20to,and%20make%20adjustments%20to%20imbalances> (last visited Apr. 8, 2024). Furthermore, the Online Cambridge Dictionary refers to the word “equity” as “the situation in which everyone is treated fairly according to their needs and no group of people is given special treatment. See *Equity*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/equity> (last visited Mar. 26, 2024); Accordingly, it can be considered that the “equity” has a similar meaning with the “fairness.” *Infra* Section “Fairness” and “Equity” In Esports.

¹⁴ This article will employ the term “esports society” to denote a collective term encompassing all communities associated with esports titles. This is attributed to the fact that each esports title has forged its distinct community. For example, esports players engaged in Call of Duty form the Call of Duty community. Within this context, the term “esports society” serves as a broad term encompassing diverse esports communities affiliated with various esports titles. Conversely, the term “esports community” within the context of this article carries a more specific connotation, referring to a subset within the “esports society”.

¹⁵ *Pistorius v. IAAF*, CAS 2008/A/1480 (May 16, 2008).

¹⁶ *Leeper v. Int’l Ass’n of Athletics Fed’ns*, CAS 2020/A/6807, ¶ 1 (Oct. 23, 2020).

cases, it aims to elucidate how esports tournament organizers uphold “fairness” in competitions involving both esports players with disabilities and those without disabilities. This research will contribute to fostering a more inclusive environment for esports players with disabilities and advancing the “diversity and inclusion” within the esports society.

In light of the foregoing, this article will be divided into the following sections: After this introduction, it will expound on the general meanings of the terms “fairness” and “equality” within the esports context. Moreover, it will delineate the circumstances under which esports players with disabilities participate in esports activities and the challenges they encounter. Additionally, it will elucidate the potential risks of e-doping when they use specialised esports equipment to augment their cognitive and physical skills. In doing so, the article will define “e-doping” and expound upon the regulations and rules applicable to combat it. Drawing from these sections, the article will further examine various CAS awards to identify legal principles to strike a balance between “fairness” and “equality” when esports tournament organizers opt to integrate players with disabilities into the same category as players without disabilities. Finally, the article will consider how to apply these legal principles specifically to the context of esports players with disabilities in order to answer the main question.

“FAIRNESS” AND “EQUALITY” IN ESPORTS

As per the Online Cambridge Dictionary, the term “equality” denotes “the right of different groups of people to have a similar social position and receive the same treatment.”¹⁷ Conversely, “fairness” is defined as “the quality of treating people equally or in a way that is right or reasonable.”¹⁸ In light of these overarching definitions, this section will initially explore the tension between the principles of “equality” and “fairness” in the context of esports.

In the context of sports, if an athlete gains an unfair advantage over others through cheating, such as using performance-enhancing drugs or unjustified mechanical aids, this creates an “unfair” situation among the athletes.¹⁹ Furthermore, the sports society is currently grappling with a complex issue regarding whether intersex female athletes can participate in the female

¹⁷ See *Equality*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/equality> (last visited Mar. 26, 2024).

¹⁸ *Fairness*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/fairness> (last visited Apr. 16, 2024).

¹⁹ Regarding fairness and sport from a philosophical perspective, see Craig L. Carr, *Fairness and Performance Enhancement in Sport*, 35(2) J. PHILOS. SPORT 193, 197-200 (2008).

category of sports competitions alongside other female athletes.²⁰ In this case, intersex female athletes are considered ‘female’ and, therefore, are entitled to compete in female sports competitions (“equality”). However, this raises concerns as other female athletes may find themselves in an unfair competitive situation due to the naturally elevated levels of testosterone in intersex female athletes (“fairness”). Consequently, the sports society must strike a balance between the interests of individual (‘equality’) and those of other female athletes (‘fairness’).²¹ Therefore, it can be said that striking a balance between “equality” and “fairness” presents a complex challenge in sports.

This understanding is similarly applicable to the esports context. If disabled esports players employ specialized equipment to enhance their physical and cognitive skills for participation in esports tournaments alongside able-bodied esports players, the use of unauthorized external tools may result in an unfair competitive advantage (“fairness”). On the other hand, if disabled esports players are prohibited from using such equipment, they may be treated differently from other esports players based on their physical and cognitive abilities (“equality”). Consequently, the esports society should strive to strike a balance between safeguarding individual interests (“equality”) and ensuring societal interests (“fairness”). Therefore, the esports society should be aware of the existence of the conflict between ‘equality’ and ‘fairness’ in esports competitions. Awareness of the inherent conflict between “equality” and “fairness” in esports competitions is crucial for the esports society.

THE CHALLENGES OF ESPORTS PLAYERS WITH DISABILITIES TO PARTICIPATE IN ESPORTS ACTIVITIES

Based on the previous section, this section aims to elucidate the challenges confronted by esports players with disabilities when engaging in esports activities. Achieving inclusion for esports players with disabilities is not inherently complex within the esports society,²² as physical differences do not necessarily confer a significant advantage in esports competitions over other

²⁰ See *Mokgadi Caster Semenya v. Int’l Ass’n of Athletics Fed’ns*, CAS 2018/O/5794 (Apr. 30, 2019); *Athletics S. Afr. v. Int’l Ass’n of Athletics Fed’ns*, CAS 2018/O/5798 (Apr. 30, 2019), <https://www.sportsintegrityinitiative.com/wp-content/uploads/2019/07/Award-5794-final-with-redactions-for-publication-compressed.pdf>.

²¹ Regarding this question, see TSUBASA SHINOHARA, *PAVING THE WAY FOR THE PROTECTION OF HUMAN RIGHTS IN SPORTS: THE CASE OF INTERSEX AND TRANSGENDER FEMALE ATHLETES*, (2024).

²² The esports federation in Indonesia does not currently play a role in advocating for the inclusion of disabled esports players in esports activities. See Fakhriy Dinansyah et al., *The Role of Esports Organisations in Accessibility for Disability Players*, 14 *ULTIMACOMM: JURNAL ILMU KOMUNIKASI* 67, 77 (June 2022).

players.²³ Nevertheless, these players still encounter difficulties participating in esports activities due to their physical and mental disabilities.

To address these challenges, certain esports federations and publishers have proactively initiated efforts to encourage the participation of esports players with disabilities.²⁴ For example, British Esports has promoted the inclusion of such players in British esports activities through the provision of specialized esports equipment.²⁵ Another noteworthy instance is the Global Esports Federation (GEF), which declared that “Team #worldconnected is an ensemble team of gamers and athletes who represent refugee communities, persons with disabilities, wounded servicemen and women, and other underserved communities.”²⁶ This underscores GEF’s acknowledgment that disabled gamers should be included in esports activities without discrimination.²⁷

On the other hands, esports publishers have indeed taken initiatives to promote the participation of esports players with disabilities in esports activities. Firstly, the Entertainment Software Association (ESA) has established a universally applicable set of rules known as the Principles of Esports Engagement, designed to address common issues in the esports domain.²⁸ Notably, major esports publishers such as Microsoft, Blizzard Entertainment, Riot Games, Ubisoft, Nintendo, and Epic Games voluntarily endorse these principles as a collective effort to tackle pressing issues within the industry.²⁹ In particular, Principle 3 (Respect and Diversity) states that:

We believe the broad and diverse player base of esports contributes to its success. We support an open, inclusive, and

²³ See *The Equality and Accessibility of eSports*, DISABILITY HORIZONS (June 25, 2019), <https://disabilityhorizons.com/2019/07/the-equality-and-accessibility-of-esports/>.

²⁴ See also Duran, *supra* note 5; William Nelson, *What Accessible Gaming Tournaments Could Mean For Players With Disabilities*, GAMESINDUSTRY.BIZ (June 24, 2021), <https://www.gamesindustry.biz/articles/2021-06-24-levelling-the-playing-field-what-the-new-accessible-gaming-tournaments-could-mean-for-disabled-players>.

²⁵ Bryony-Hope Green, *Esports is For All – The Inclusion of Disabled People in Esports*, BRIT. ESPORTS (Mar. 24, 2021), <https://britishesports.org/news/esports-is-for-all-the-inclusion-of-disabled-people-in-esports/>; *Esports body calls for disability gaming tournaments*, BBC NEWS (Apr. 3, 2021), <https://www.bbc.com/news/newsbeat-56577024>.

²⁶ *Team #worldconnected: The Inclusive Power of Esports*, GLOB. ESPORTS FED’N (Nov. 25, 2021), <https://www.globalesports.org/post/team-worldconnected-the-inclusive-power-of-esports>.

²⁷ See *Constitution*, GLOB. ESPORTS FED’N (Sept. 2020), <https://www.globalesports.org/resources>.

²⁸ *Principles of Esports Engagement*, ENT. SOFTWARE ASS’N, <https://www.theesa.com/wp-content/uploads/2019/11/Principles-of-Esports-Engagement-Handout-111319-002.pdf> (last visited Apr. 16, 2023).

²⁹ *Who We Are*, ENT. SOFTWARE ASS’N, <https://www.theesa.com/about-esa/#membership> (last visited Apr. 16, 2024).

welcoming environment for all, no matter one's gender identity, age, ability, race, ethnicity, religion, or sexual orientation.³⁰

It could be argued that the concept of “disability” falls within the ambit of the term “ability” under this provision. On this basis, the esports publishers and leagues organizers that have endorsed these principles are demonstrating a commitment to upholding this principle. Their endorsement reflects a dedication to fostering an inclusive esports environment that accommodates the needs and participation of disabled esports players.

In accordance with this principle, businesses have developed adaptive gaming equipment tailored for disabled esports players. This equipment aims to support their physical and cognitive abilities, enabling their participation in esports competitions alongside able-bodied players.³¹ For instance, Microsoft pioneered the creation of the disability-friendly Xbox Adaptive Controller five years ago.³² Additionally, Logitech offers the Logitech G Adaptive Gaming Kit, designed to unlock the potential of the Xbox Adaptive Controller for all disabled esports players.³³ The Quadstick, a mouth-operated controller, empowers disabled esports players to engage in video games without using their hands.³⁴ PlayStation introduced the 3dRudder motion controller, allowing esports players to control movement with their feet.³⁵ Although this equipment was not initially designed for disabled esports players, it significantly broadens the range of esports activities they can engage in.³⁶ Consequently, adaptive gaming equipment plays a crucial role in establishing a disability-friendly environment, facilitating the participation of disabled esports players in events alongside other abled-bodies esports players.

³⁰ *Principles of Esports Engagement*, *supra* note 28.

³¹ Green, *supra* note 7; this is concerned with ‘gaming accessibility’ in esports. See Robin Mosley, *How Esports and Gaming Can Create More Accessibility For Gamers Who are Disabled*, NERDSTREET (Jan. 12, 2022), <https://nerdstreet.com/news/2022/1/how-esports-and-gaming-can-create-more-accessibility-for-gamers-who-are-disabled>.

³² Keith Stuart, *Microsoft to Launch Disability-Friendly Xbox Controller*, THE GUARDIAN (May 17, 2018), <https://www.theguardian.com/games/2018/may/17/microsoft-xbox-disability-friendly-adaptive-controller>.

³³ Logitech, *Adaptive Gaming Kit*, LOGITECHG, <https://www.logitechg.com/en-gb/products/gamepads/adaptive-gaming-kit-accessories.943-000339.html> (last visited Apr. 1, 2024).

³⁴ See *Quadstick: A Game Controller For Quadriplegics*, QUADSTICK, <https://www.quadstick.com/> (last visited Apr. 1, 2024).

³⁵ Cecile Valery, *An In-depth Look at the 3dRudder Motion Controller for PlayStation VR, launching this summer*, PLAYSTATION (Apr. 4, 2019), <https://blog.playstation.com/archive/2019/04/04/an-in-depth-look-at-the-3drudder-motion-controller-for-playstation-vr-launching-this-summer/>.

³⁶ See Jennifer Mulrow, *Gaming is Becoming Accessible, But We Need to Keep Asking For More*, REFINERY29 (Dec. 6, 2021), <https://www.refinery29.com/en-us/2021/12/10711964/gamers-with-disabilities-accessible-video-games>.

Thanks to the initiatives undertaken by esports federations and publishers, esports players with disabilities have gained increasing recognition within the esports society. For instance, Yhazzir, a Gran Turismo disabled player, utilizes adaptive gaming equipment for competitive video gaming.³⁷ The Special Olympics has also organized esports events specifically tailored for disabled gamers, featuring the use of such equipment.³⁸ Collaborative efforts from Logitech G, AbleGamers, Adaptive Action Sports, and Mount Sinai have led to the organization of esports tournaments exclusively for disabled players, known as Adaptive Esports Tournaments, with monetary prizes for the winners.³⁹ These examples underscore the evolving acknowledgment within the esports society of the significance of the participation of disabled esports players in esports activities.

In summary, the esports society has acknowledged the importance of disabled esports players and has proactively taken steps to integrate them into esports activities. Business enterprises are contributing to this inclusion by developing adaptive gaming equipment to support the physical and cognitive skills of disabled esports players. Additionally, certain esports tournament organizers are furthering this inclusivity by hosting dedicated esports tournaments specifically for disabled players, thereby promoting and facilitating their participation in the esports activities.

THE REGULATIONS AND RULES FOR THE PROHIBITION OF “E-DOPING” WITHIN THE ESPORTS SOCIETY

This section further provides an overview of the regulations and rules for the prohibition of ‘e-doping’ within the esports society.⁴⁰ To accomplish this, it will initially define the concept of ‘e-doping.’ Subsequently, it will elucidate the relevant regulations and rules made by the Esports Integrity Commission (ESIC) (third-party integrity body), International Esports Federation (IESF) (international esports federation), and Riot Games (esports publisher).⁴¹

³⁷ Green, *supra* note 7.

³⁸ Devin Coldewey, *Xbox and Special Olympics Hold First ‘Gaming for Inclusion’ Esports Event*, TECHCRUNCH (Sept. 14, 2021), <https://techcrunch.com/2021/09/14/xbox-and-special-olympics-hold-first-gaming-for-inclusion-esports-event/>.

³⁹ Logitech, *Adaptive Esports Tournaments*, AET.GG, <https://aet.gg> (last visited Apr. 1, 2024).

⁴⁰ The esports athletes also use performance-enhancing drugs to improve their cognitive skill. This is so-called ‘doping’. See Pranav Bafna, *Challenges to the Anti-Doping Regulations in Esports*, 2(1) J. SPORTS L., POL’Y GOVERNANCE 133, 135 (2020).

⁴¹ The World Esports Association (WESA), founded by ESL Gaming and several professional esports teams, establishes the Code of Conduct and Compliance for Teams and Players. This Code includes the sections “Integrity of Matches and Competitions” and “Doping” but it does not clearly stipulates the prohibition of e-

A. What Is 'E-doping'?

In traditional sports, professional athletes have used performance-enhancing substances and methods to improve their physical skills.⁴² The use of such substances, commonly known as 'doping,' is strictly prohibited, particularly under the World Anti-Doping Code (WADC) established by the World Anti-Doping Agency (WADA).⁴³ The WADA outlines the prohibited substances and methods in the WADC International Standard Prohibited List (commonly referred to as the WADA Prohibited List).⁴⁴ If professional athletes infringe the provisions of the WADC due to the use of the prohibited substances and methods, sports governing bodies have the authority to impose disciplinary sanctions, such as a lifetime ban or suspension from participating in professional and amateur tournaments, on those found in violation of the Code. This enforcement aims to uphold the integrity of sports competitions and ensure fairness among athletes.

Moreover, esports players are known to use performance-enhancing drugs, particularly substances like Adderall and Ritalin, to enhance cognitive skills, reduce brain fatigue, and improve reaction speed.⁴⁵ Recognizing this, both international and national esports federations have instituted anti-doping

doping. *Code of Conduct and Compliance For Teams and Players*, WESA (Dec. 2017), <https://wesa.gg/wp-content/uploads/2019/05/WESA-Code-of-Conduct-Teams-and-Players-Final-03052019-1.pdf>; Additionally, Epic Games has taken disciplinary action against a Fortnite player. Jarvis Khattri, a 17-year-old member of the widely popular esports group "FaZe Clan", faced a lifetime ban from Fortnite. This consequence arose from his uploading of YouTube videos on his channels, showcasing the use of software hacks and bugs, known as "aimbots", during Fortnite solo rounds and playground mode. Aimbots are software hacks designed "to allow the player's weapon to automatically focus on targets, giving them a huge advantage". It is worth noting, however, that the structure of the anti-cheat system in place for Fortnite appears less clear when compared to that of Riot Games. See Kat Tenbarge, *A Popular 17-year-old 'Fortnite' Streamer was Banned From the Game for Life After he was Caught Cheating*, INSIDER (Nov. 4, 2019), <https://www.insider.com/fortnite-streamer-faze-clan-jarvis-lifetime-ban-cheating-aimbots-extreme-2019-11>.

⁴² See Oluwatamilore Fashina, *Doping in Esports: How and to What Extent can we Look to WADA for Guidance*, 28 SPORTS LAW. J. 19, 24-30 (May 25, 2021).

⁴³ *World Anti-Doping Code*, WADA, <https://www.wada-ama.org/en/resources/world-anti-doping-program/world-anti-doping-code-resource-download> (last visited Mar. 31, 2024).

⁴⁴ *The Prohibited List*, WADA, <https://www.wada-ama.org/en/prohibited-list> (last visited Mar. 31, 2024).

⁴⁵ See Atish Ghoshal, *Ethics in Esports*, 5 GAMING L. REV. 339, 339-340 (May 22, 2019); Rebecca R. Rosenthal, *A Tough Pill to Swallow: Making the Case for Why Esports Leagues Must Adopt Strict Banned Substance Policies to Prevent Disability Discrimination*, 20 VA. SPORTS & ENT. L.J. 1, 77-8 (Apr. 30, 2021); Fashina, *supra* note 42, at 30-2. Nevertheless, esports sponsoring companies like Red Bull often supply energy drinks that contain high levels of caffeine and sugar. These energy drinks are believed to potentially enhance esports players' concentration and alleviate fatigue. In this scenario, determining a clear distinction between lawful and unlawful chemical substances becomes challenging. See H.B. Duran, *A guide to: Energy drinks in esports*, ESPORTS INSIDER (Dec. 29, 2020), <https://esportsinsider.com/2020/12/energy-drinks-esports-guide/>; Francisco Javier Lopez Frias, *The "big red bull" in the esports room: Anti-Doping, esports, and energy drinks*, 10 PERFORMANCE ENHANCEMENT & HEALTH 1 (Feb. 2022).

systems within the esports society. For instance, the Esports Integrity Commission (ESIC) has developed the Anti-Doping Code as part of the ESIC Integrity Program.⁴⁶ The Swiss Esports Federation (SESF) adheres to the ESIC Anti-Doping Prohibited List,⁴⁷ and the IESF has collaborated with the WADA to establish the IESF Anti-Doping Rules.⁴⁸ In addition, the Electronic Sports League (ESL) took a proactive step by partnering with the Nationale Anti-Doping Agentur (NADA) and WADA in 2015 to formulate a doping policy.⁴⁹ ESL has been an active member of the ESIC since 2017.⁵⁰ Even traditional sports entities like the Federation Internationale de Football Association (FIFA) implemented doping tests at the FIFA eWorld Cup in 2018.⁵¹ These efforts highlight the esports community's recognition of the importance of anti-doping measures in safeguarding esports players from the misuse of substances and methods to gain an unfair advantage in esports tournaments.⁵²

More importantly, another form of doping prevalent in the esports society is known as e-doping. The esports society grapples with instances of technology- and machine-based cheating, commonly referred to as “e-doping”, “digital doping”, and “mechanical doping”.⁵³ For example, distributed denial-

⁴⁶ *ESIC Integrity Program*, ESIC, <https://esic.gg/codes/> (last visited Mar. 31, 2024).

⁴⁷ Article 14 of the SESF Standard: “The list of the substances considered prohibited unless the player has obtained a therapeutic use exemption is the one present on the website of the [Esports Integrity Commission] (ESIC).” See also Tsubasa Shinohara, *The Protection of Esports Players against the Use of Doping Substances and Methods under the European Convention on Human Rights: the Swiss Example*, 1 INT’L J. OF ESPORTS 1, 3 (Dec. 22, 2021).

⁴⁸ See *Anti-Doping Regulations (2023)*, IESF, <https://iesf.org/anti-doping/> (last visited Apr. 10, 2024).

⁴⁹ *ESL leads anti-PED initiative for esports with the support of NADA*, ESL (July 27, 2015), <https://esl.com/article/esl-leads-anti-ped-initiative-for-esports-with-the-support-of-nada/>; The ESL Gaming started doping control in Counter Strike tournaments in 2015. See Sebastian Wochnik, *Digitales Doping*, GOLEM.DE (Aug. 18, 2015), <https://www.golem.de/news/cheating-im-e-sport-digitales-doping-1508-115791.html>.

⁵⁰ *Members & Supporters*, ESIC, <https://esic.gg/members/> (last visited Apr. 10, 2024).

⁵¹ Rob Harris, *Drug Tests for Gamers as Soccer’s eWorld Cup Jackpot Climbs*, AP NEWS (Aug. 4, 2018, 9:25 PM), <https://apnews.com/article/world-cup-ap-top-news-international-soccer-london-international-news-8504e22edd6b4e2f9c996b581dcc8a08>.

⁵² Rosenthal explores the potential consideration of applying anti-doping rules based on the WADA Prohibited List to disabled esports players and questions whether such application might be deemed as disability discrimination under the Americans with Disabilities Act (ADA). This concern arises because disabled esports players may require medical prescriptions for their physical and psychological conditions, making them ineligible to participate in esports competitions if their prescribed medications are listed as prohibited. In such cases, a Therapeutic Use Exemption (TUE) should be applicable. However, the current anti-doping policy in esports may not adequately address this issue when esports tournament organizers defer to the WADA Prohibited List. This aspect presents an intriguing area for future research in esports. See Rosenthal, *supra* note 45, at 86-99.

⁵³ Ian Smith, *The Continued Rise of eSport – Efforts to Combat Match Fixing and Improve Integrity*, LAWNSPORT (Sept. 2, 2016), <https://www.lawnsport.com/topics/features/item/the-continued-rise-of-esport->

of-service (DDoS) attacks have the potential to disrupt the internet connection of opposing players, leading to delays in esports competitions.⁵⁴ Additionally, manipulating software or hardware, as well as altering keyboard and mouse settings, can provide esports players with an unfair advantage during competitive video games.⁵⁵ Through such technology- and machine-based cheating, esports players may gain a distinct unfair advantage over their opponents.⁵⁶

To address this issue, several esports publishers have implemented anti-cheat systems designed to scan for viruses and identify third-party modifications known to be cheats or hacks.⁵⁷ Valve Corporation, for instance, has developed an extensively recognized anti-cheat system known as Valve Anti-Cheat (VAC) to combat software cheating.⁵⁸ VAC can monitor the computer logs of PC users, detecting the presence of cheating software on their systems. Ubisoft has taken measures to enhance anti-cheat measures by acquiring GameBlocks,⁵⁹ which includes the FairFight® system.⁶⁰ Additionally, Riot Games has implemented

efforts-to-combat-match-fixing-and-improve-integrity; Bafna, *supra* note 40, at 135; Timo Schöber & Georg Stadtmann, *The Dark Side of Esports – an Analysis of Cheating, Doping, Match-Fixing, and Their Countermeasures*, INT'L J. OF ESPORTS 1, 2-3 (2022); Wochnik, *supra* note 49; Jamie Hwang, *Cheating in E-Sports: A Proposal to Regulate the Growing Problem of E-Doping*, 116 NW. U. L. REV. 1283, 1295-98 (2022); Achint Johri, *Cashing in on the Esports Phenomenon: Increasing Awareness on Ethical Issues and Governance Challenges*, 2 J. OF SPORTS L. POL'Y AND GOVERNANCE 41, 54-5 (2020).

⁵⁴ Giulia Zappaterra et al., *The Concept of eDoping in eSports - Cyber Security as a Safety Measure, Enforcement and Sanctions in Case of Non-compliance*, IPT ITALY BLOG (Apr. 4, 2019), <https://www.lexology.com/library/detail.aspx?g=b3abb0aa-72da-4d26-9ad8-d5ce8204d7c1>; Eitan Gafny, *Game is far from Over: DDoS Attacks on the Gaming Industry*, MAZEBOLT (Dec. 22, 2022), <https://mzebolt.com/blog/ddos-attacks-on-the-gaming-industry/>; *DDoS Attacks in Gaming*, MICROSOFT (Feb. 17, 2023), <https://www.microsoft.com/en-us/microsoft-365-life-hacks/privacy-and-safety/ddos-attacks-in-gaming#:~:text=For%20gamers%2C%20a%20DDoS%20attack,extreme%20lagging%20in%20your%20gameplay>.

⁵⁵ Zappaterra et al., *supra* note 54.

⁵⁶ Smith, *supra* note 53; Yen-Shyang Tseng, *The Principles of Esports Engagement: A Universal Code of Conduct*, 27 J. INTELL. PROP. L. 209, 240-47 (2020).

⁵⁷ Peter K. Czegledy, *Esports Integrity Policies*, 25 GAMING L. REV. 161, 164 (2021).

⁵⁸ *Valve Anti-Cheat*, VALVE DEVELOPER COMMUNITY, https://developer.valvesoftware.com/wiki/Valve_Anti-Cheat (last updated Aug. 9, 2023, 11:18 PM).

⁵⁹ *Ubisoft Acquires Middleware Developer Gameblocks to Bolster its Anti-Cheat Efforts*, I3D.NET (Apr. 2, 2021), <https://www.i3d.net/acquisition-gameblocks-anti-cheat/>; Chris Kerr, *Ubisoft Acquires Anti-Cheat Software Developer Gameblocks*, GAME DEVELOPER (Apr. 5, 2021), <https://www.gamedeveloper.com/business/ubisoft-acquires-anti-cheat-software-developer-gameblocks>.

⁶⁰ *FairFight Anti-Cheat Software*, I3D.NET, <https://www.i3d.net/anti-cheat-software/> (last visited Mar. 31, 2024).

Riot Vanguard, a kernel-level anti-cheat system⁶¹ that requires game users to have kernel-level access to their computers to prevent cheating in Valorant.⁶² Epic Games has also employed Easy™ Anti-Cheat, a service designed to counter hacking and cheating in multiplayer PC games through the use of hybrid anti-cheat mechanisms, in Fortnite.⁶³ Despite these efforts, it is crucial to emphasize that there is no unified regulation governing the prohibition of e-doping within the esports society.

In short, the “e-doping” refers to technology- and machine-based cheating in esports competitions, such as hacking, cyberattacks, modification of hardware or software in esports equipment. Such forms of cheating enable esports players to attain an unjust competitive advantage over their opponents. To counteract “e-doping,” esports publishers have implemented anti-cheat systems designed to identify and address illicit activities within esports competitions.

B. The Prohibition of ‘E-doping’ in Esports Competitions

Based on this understanding, this subsection will consider whether the “e-doping” potentially violates regulations and rules established by the esports society. In this context, Principle 2 (Integrity and Fair Play) states that:

Cheating, hacking, or otherwise engaging in disreputable, deceitful, or dishonest behavior detracts from the experience of

⁶¹ According to L’Atelier BNP Pariba, “Kernel-Level Anti-Cheat Systems are a derivative technology that allows virtual world developers to detect illicit behaviour by identifying malware and hacks directly on the computer running them rather than through patterns inside a virtual environment (for example, an online game). Once identified, the users running the malware are blocked from the virtual environment indefinitely.” See *Kernel-Level Anti-Cheat Systems*, L’ATELIER NBP PARIBAS, <https://atelier.net/ve-tech-radar/tech-radar/kernel-level-anti-cheat-systems> (last visited Mar. 31, 2024).

⁶² Marijn Laros, *Valorant Vanguard Anti-Cheat: Full Overview*, GAME CHAMPIONS (Oct. 9, 2023), <https://www.gamechampions.com/en/blog/valorant-anti-cheat-vanguard/>; Paul “Arkem” Chamberlain, *Valorant Anti-Cheat: What, Why, and How*, RIOT GAMES (May 6, 2020), <https://playvalorant.com/en-us/news/dev/valorant-anti-cheat-what-why-and-how/>. From my perspective, the anti-cheating system raises significant concerns regarding data protection as it requires players to grant kernel-level access to their computers for the purpose of collecting personal data to prevent cheating in esports competitions. In essence, the implementation of this system implies that Riot Games could potentially access private files. This matter warrants examination in a future article, delving into the implications and potential privacy risks associated with such data collection practices in esports. In this regard, see Philipp Rüegg, *How Dangerous is Riot’s Anti-Cheating Software in «Valorant» Really?*, DIGITEC.CH (Apr. 23, 2020), <https://www.digitec.ch/en/page/how-dangerous-is-riots-anti-cheating-software-in-valorant-really-16113>; The Riot Security Team, *A Message About Vanguard From Our Security & Privacy Teams*, RIOT GAMES (Apr. 17, 2020), <https://www.riotgames.com/en/news/a-message-about-vanguard-from-our-security-privacy-teams>; Mark Hillick et al., *The Evolution of Security at Riot*, RIOT GAMES (Nov. 28, 2017), <https://technology.riotgames.com/news/evolution-security-riot>.

⁶³ *Easy™ Anti-Cheat*, EPIC GAMES, <https://www.easy.ac/en-us/#about> (last visited Mar. 31, 2024).

others, unfairly advantages teams and players, and tarnishes the legitimacy of esports.⁶⁴

While this principle lacks a legally binding effect, it serves as a widely accepted standard among endorsed esports publishers and leagues organizers. Its purpose is to deter esports players and teams from engaging in physical and machine-based cheating, thereby preventing the unfair gain of advantages over opposing players and teams.⁶⁵

Given this understanding, this subsection will provide an overview of the regulations of ESIC, IESF, and esports publisher for the prevention of match-fixing and illegal gambling. This is because the primary aim of “e-doping” is to secure victory in esports tournaments and garner substantial economic gains through illicit cheating.

1. Esports Integrity Commission

Firstly, the ESIC is a British non-profit organization established in 2016. The mission of the ESIC is “to be the recognised guardian of the integrity of esports and to take responsibility for disruption, prevention, investigation and prosecution of all forms of cheating, including, but not limited to, match manipulation and doping.”⁶⁶ To achieve this, ESIC has instituted the ESIC Integrity Program, comprising the Code of Ethics, Code of Conduct, Anti-Corruption Code, Anti-Doping Code, Disciplinary Procedure, and ESIC Prohibited List.⁶⁷

Regarding the prohibition of “e-doping,” Article 2 of the ESIC Code of Conduct outlines various levels of offenses. Notably, Article 2.3.3 of the ESIC Code of Conduct categorizes cheating or attempting to cheat to win a game or match as a level 3 offense. Furthermore, it specifies that:

Cheating to win is either a level 3 (as in this Article) or level 4 offence depending on the nature and seriousness of the cheating (in the entire discretion of the Match Referee, the Integrity Commissioner or their delegates). Without limitation, cheating can include:

“Map Hack” (using external software to gain more vision than intended by the game mechanics)

⁶⁴ Tseng, *supra* note 56, at 236.

⁶⁵ *Id.* at 236-47.

⁶⁶ *Who We Are*, ESIC, <https://esic.gg/about/> (last visited Mar. 31, 2024).

⁶⁷ *ESIC Integrity Program*, ESIC, <https://esic.gg/codes/> (last visited Mar. 31, 2024).

“Aim Bot” (using external software to automatically hit opponents when firing a weapon)

“Ghosting” (getting additional information about the game, usually the opponent, from third party sources like stream viewers or the live audience)

Any external software that directly tampers with the game software to gain any kind of advantage in the game.⁶⁸

According to this provision, ESIC unequivocally forbids esports players from engaging in “e-doping” during esports competitions. In the event of a violation of this provision, ESIC has the authority to impose disciplinary sanctions, including fines, fixed-term suspensions, and lifetime bans, on Code violators under Article 7 of the ESIC Code of Conduct.

Based on this understanding, ESIC has imposed various disciplinary sanctions on esports players found using illegal hardware and software to gain an unfair advantage over their counterparts in esports competitions.⁶⁹ An illustrative example is the utilization of “coach bugs” by esports coaches, enabling a team to gain a tactical advantage by discreetly spectating the opposing team.⁷⁰ Consequently, ESIC actively enforces its Code and issues sanctions in response to such violations.⁷¹

In summary, the ESIC offers the ESIC Integrity Program, particularly the Code of Conduct, to all ESIC members. This Code explicitly prohibits esports players from engaging in “e-doping” under Articles 2.3.3 and 2.4.4 of the ESIC Code of Conduct. Consequently, if esports tournament organizers choose to adopt this framework, ESIC retains the authority to enforce disciplinary sanctions on esports players in accordance with this Code.

⁶⁸ *Code of Conduct*, ESIC, <https://esic.gg/codes/code-of-conduct/> (last visited Apr. 25, 2024).

⁶⁹ ESIC lists all ESIC-issued sanctions for individuals who have breached the ESIC Integrity Program. *Sanctions Register*, ESIC, <https://esic.gg/sanctions/> (last visited Mar. 31, 2024).

⁷⁰ Daniel Kozelko, *ESIC's Novel Sanctioning Methods in the CS:GO "Coach Spectator Bug" Case*, LAWNSPORT (Aug. 13, 2021), <https://www.lawnsport.com/topics/item/esic-s-novel-sanctioning-methods-in-the-cs-go-coach-spectator-bug-case>.

⁷¹ However, from a legal perspective, sanctioned players cannot have access to appeal body to reexamine if the ESIC's decision is reasonable or not. Without guaranteeing the procedural aspect, there is a huge risk for a violation of procedural rights of esports players. This point will be considered in future research.

2. *International Esports Federation*

The IESF, founded in 2008⁷² with its headquarters situated in Busan, South Korea,⁷³ has the mission “to serve as the critical global organization representing, coordinating, harmonizing, and administrating Esports while preserving the rights and providing a voice to all Stakeholders of Esports.”⁷⁴ To fulfill this mission, Article B(8)(m) specifies that:

To prevent any methods or actions that could jeopardize the integrity and fairness of esports matches or competitions or lead to the abuse of esports, mainly to prevent cheating, doping, drug abuse, and match-fixing[.]⁷⁵

In essence, the IESF aims to prevent esports players from engaging in illicit forms of cheating to secure an unfair advantage over their opponents in esports competitions.

More specifically, the IESF establishes concrete rules and regulations that apply to both the IESF World Championships and its members.⁷⁶ While the term “e-doping” is not explicitly mentioned in its regulations, the IESF clearly prohibits all forms of cheating during these championships under the IESF Competition Regulations for the IESF World Championships.⁷⁷ Article 2.1.6 of the IESF Competition Regulations states that:

No forms of cheating are allowed within the tournament. This includes but is not limited to macros, changes in game files, usage of third-party software providing an unfair advantage, hardware cheats, collusion or any other means to gain an unfair advantage. Any participant found using cheats during the tournament will be immediately disqualified and banned from participating in tournaments for a minimum of two (2) years.⁷⁸

⁷² Thiemo Bräutigam, *IeSF President: “Our Biggest Goal is to Make Esports an Official Olympic Event”*, ESPORTS OBSERVER (Nov. 1, 2016), <https://archive.esportsobserver.com/iesf-president-biggest-goal-make-esports-official-olympic-event/>.

⁷³ *Get in Touch*, IESF, <https://iesf.org/contact/> (last visited Mar. 29, 2024).

⁷⁴ Article B(7), *IESF Statutes*, IESF (Aug. 28, 2023), <https://iesf.org/wp-content/uploads/2024/01/IESF-Statutes-as-of-Aug-28th-2023-1.pdf>. In doing so, Article B(8) of the IESF Statutes provides for the IESF’s objectives.

⁷⁵ Article B(8)(m), *IESF Statutes*, IESF (Aug. 28, 2023), <https://iesf.org/wp-content/uploads/2024/01/IESF-Statutes-as-of-Aug-28th-2023-1.pdf>.

⁷⁶ *Rules & Regulations*, IESF, <https://iesf.org/rules-regulations/> (last visited Mar. 28, 2024).

⁷⁷ *15th IESF World Esports Championships: Competitions Regulations Version*, IESF (Aug. 23, 2023), <https://iesf.org/storage/2023/08/wec-23-competitions-regulations.pdf>.

⁷⁸ *Id.*

According to this provision, esports players will be immediately disqualified and banned from the IESF tournaments for minimum two years once they conduct “e-doping” within the tournaments.

To sum up, the IESF prohibits esports players from engaging in “e-doping” during esports competitions. In the event of a violation, the IESF has the authority to impose disqualification and fixed-term suspension from IESF tournaments under the IESF Statutes and IESF Competition Regulations.

3. Riot Games

Riot Games is recognised as one of the major esports publishers and has a global headquarter in Los Angeles, United States of America.⁷⁹ It establishes the Riot Games Terms of Service,⁸⁰ especially Section 7 of the Riot Games Terms of Service, which reads as follows:

While using the Riot Services, you must comply with all laws, rules and regulations in the jurisdiction in which you reside. You must also comply with the acceptable use and behavioral policies that we publish from time to time on our websites, apps and games and the behavioral rules listed below (collectively the “User Rules”). The User Rules posted to our websites, apps and games or set out in this Section are not meant to be exhaustive, and we reserve the right to modify them, as well as take appropriate disciplinary measures including temporary bans, account suspension or termination and deletion to protect the integrity and spirit of the Riot Services, regardless of whether a specific behavior is listed in the User Rules as inappropriate.⁸¹

On this basis, the Riot Games provides a list of non-exhaustive examples of inappropriate behaviors within the Riot Games community, including toxic behaviors⁸² and “e-doping.”⁸³ Specifically, Section 7.10 of the Riot Games Terms of Service states that

Using any unauthorized third party programs, including mods, hacks, cheats, scripts, bots, trainers and automation programs

⁷⁹ See *Riot Games Around the World*, RIOT GAMES, <https://www.riotgames.com/en/work-with-us/offices> (last visited Mar. 28, 2024).

⁸⁰ *Riot Games® Terms of Service*, RIOT GAMES, <https://www.riotgames.com/en/terms-of-service> (Sept. 15, 2023).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

that interact with the Riot Services in any way, for any purpose, including any unauthorized third party programs that intercept, emulate, or redirect any communication relating to the Riot Services and any unauthorized third party programs that collect info about the Riot Services by reading areas of memory used by the Riot Services to store info[.]⁸⁴

This provision explicitly prohibits users from employing unauthorized hardware and software to disrupt Riot Games products and services. Consequently, cheating through the manipulation of software or hardware in esports equipment to gain an unfair performance advantage over opposing players may be considered a violation of Section 7.10 of the Riot Games Terms of Service.

Based on the Riot Games Terms of Service, Riot Games establishes distinct regulations and rules applicable to each esports title. For instance, the League of Legends (LoL) Code of Conduct, serving as a supplementary document to the Riot Games Terms of Services, explicitly forbids LoL users from engaging in “cheating” within LoL competitions.⁸⁵ Similarly, Riot Games introduces the Global Competition Policy, which prohibits Valorant users from participating in cheating activities during Valorant competitions.⁸⁶

In practice, Riot Games has already implemented disciplinary measures for individuals found in violation of its self-regulations. For example, Team Besties utilized unregistered players during VALORANT Game Changers in an attempt to gain a competitive advantage. In accordance with Rule 7.2.7 of the Valorant Global Competition Policy, both the players and manager of Team Besties were subsequently banned from any association or affiliation with a team in a Riot-sanctioned competition for 18 months - one year for ringing and an additional six months for non-cooperation.⁸⁷ Moreover, Sophia “Slaze” Ramirez engaged in cheating during a Valorant competition, leading to Riot Games issuing a three-month ban from any association or affiliation with a team in a Riot-sanctioned competition.⁸⁸ These actions demonstrate Riot Games’ commitment

⁸⁴ *Id.*

⁸⁵ *League of Legends Code of Conduct*, RIOT GAMES, <https://www.leagueoflegends.com/en-pl/event/league-of-legends-code-of-conduct/> (last visited Mar. 28, 2024).

⁸⁶ *The Valorant Champions Tour Global Competition Policy*, VALORANT <https://s3.eu-west-1.amazonaws.com/eu-tournament-assets/files/VALORANT-Champions-Tour-Global-Competition-Policy-v1.3.pdf> (last visited Mar. 28, 2024).

⁸⁷ *Competitive Ruling: Team Besties*, RIOT GAMES (July 7, 2021), <https://playvalorant.com/en-us/news/esports/competitive-ruling-team-besties/>.

⁸⁸ *Competitive Ruling: Sophia “Slaze” Ramirez*, RIOT GAMES (Sept. 29, 2021), <https://playvalorant.com/en-us/news/esports/competitive-ruling-sophia-slaze-ramirez/?linkId=100000071288284>.

to detecting cheaters and applying disciplinary sanctions in accordance with their self-regulations.⁸⁹

In conclusion, it is evident that Riot Games actively strives to develop an anti-e-doping system for their users to safeguard fair competition within the Riot community. Within this system, Riot Games possesses the authority to impose disciplinary sanctions, such as fixed-term suspension or a lifetime ban from participating in Riot-sanctioned competitions, for violators in accordance with the Riot Games Terms of Service. Notably, the company has tailored specific rules for different esports titles, exemplified by the LoL Code of Conduct and Valorant Global Competition Policy, explicitly prohibiting users from engaging in cheating during esports competitions.

HOW CAN ESPORTS TOURNAMENTS ORGANIZERS STRIKE A BALANCE BETWEEN “FAIRNESS” AND “EQUALITY” FOR ESPORTS PLAYERS WITH DISABILITIES?

Based on the previous two sections, this section will consider how esports tournaments organizers can strike a balance between ‘fairness’ and ‘equality’ for esports players with disabilities when they compete in esports events. This is because esports players with disabilities must use special equipment to support their cognitive and physical skills to play competitive video games.

In light of the foregoing, this section first provides an overview of the rights of esports players with disabilities in accordance with the Convention on the Rights of Persons with Disabilities (CRPD).⁹⁰ This is because it is necessary to clarify the interests of esports players with disabilities and weigh them against the interests of esports society to protect other abled-bodies players from an unfair advantage in esports competitions. On this basis, it will refer to two CAS awards concerning athletes with disabilities in traditional sports. The aim of the case study is to identify legal principles of how to strike a balance between ‘fairness’ and ‘equality’ in sports competitions. On this basis, it will then consider how the legal principles may apply to the context of esports players with disabilities.

A. The Rights of Esports Players with Disabilities

The CRPD, adopted on December 13, 2006, and enforced since May 3, 2008, serves as a crucial instrument safeguarding the fundamental rights of

⁸⁹ Regarding the Riot Games’ approach to anti-cheat, see Michael VanKuipers, *Riot’s Approach to Anti-Cheat*, RIOT GAMES (July 17, 2018), <https://technology.riotgames.com/news/riots-approach-anti-cheat>.

⁹⁰ G.A. Res.61/106, Art. 30, Convention on the Rights of Persons with Disabilities (Dec. 12, 2006).

persons with disabilities.⁹¹ Article 1 of the CRPD outlines its purpose, which reads as follows:

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.⁹²

For the purposes of the CRPD, Article 4(1) of the CRPD provides for the general obligations of state parties, including (1) obligation to respect, which requires parties to refrain from interfering with the enjoyment of the CRPD rights; (2) obligation to protect, which prevents state parties from violating the CRPD rights by third parties; and (3) obligation to fulfil, which requires state parties to take appropriate legislative, administrative and any other measures to achieve full realization of the CRPD rights.⁹³ In particular, Article 4(1)(e) of the CRPD requires state parties to “take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise.”⁹⁴ This provision implies that non-state or private actors may be subject to the CRPD (indirect horizontal effect).⁹⁵ In this sense, state parties to the CRPD have positive obligations to monitor whether esports tournament organizers do not discriminate against disabled esports players in their esports competitions and, if so, to take appropriate measures to protect them against such discrimination.

Based on this understanding, Article 30(1) of the CRPD guarantees the right of persons with disabilities to take part on an equal basis with others in cultural life.⁹⁶ More precisely, the Bantekas et al.’s CRPD Commentary explains the meaning of “cultural life” in the following:

⁹¹ 10th Anniversary of the Adoption of Convention on the Rights of Persons with Disabilities (CRPD), UN DEP’T OF ECON. AND SOC. AFFS., <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/the-10th-anniversary-of-the-adoption-of-convention-on-the-rights-of-persons-with-disabilities-crpd-crpd-10.html> (last visited Apr. 25, 2024).

⁹² G.A. Res.61/106, Art. 1, Convention on the Rights of Persons with Disabilities (Dec. 12, 2006).

⁹³ VALENTINA DELLA FINA ET AL., THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY 142-47 (2017); *see also* ILIAS BANTEKAS ET AL., THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY 116-17 (2018).

⁹⁴ G.A. Res.61/106, Art. 4(1)(e), Convention on the Rights of Persons with Disabilities (Dec. 12, 2006).

⁹⁵ BANTEKAS ET AL., *supra* note 93, at 122-23.

⁹⁶ G.A. Res.61/106, Art. 30(1), Convention on the Rights of Persons with Disabilities (Dec. 12, 2006).

Recreation, leisure, and sports are also an indispensable component of popular culture; to some communities and groups these activities are further considered part of their heritage. And the inclusion of sports in the overall right to take part in cultural life recognizes the possibility of individuals 'to attain their potential in and through sports.'⁹⁷

Therefore, state parties to the CRPD must take appropriate measures to ensure the enjoyment of the right of persons with disabilities to take part on an equal basis in recreation, leisure and sports within the meaning of Article 30(1) of the CRPD. Based on this understanding, Article 30(5) of the CRPD stipulates the right to participate in recreational, leisure and sporting activities,⁹⁸ which reads as follows:

With a view to enabling persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures:

- a. To encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels;
- b. To ensure that persons with disabilities have an opportunity to organize, develop and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources;
- c. To ensure that persons with disabilities have access to sporting, recreational and tourism venues;
- d. To ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system;
- e. To ensure that persons with disabilities have access to services from those involved in the organization of recreational, tourism, leisure and sporting activities.⁹⁹

⁹⁷ BANTEKAS ET AL., *supra* note 93, at 875-76.

⁹⁸ See Mary A. Hums et al., *Emerging Disability Rights in Sport: Sport as Human Right for Persons with Disabilities and the 2006 UN Convention on the Rights of Persons with Disabilities*, 40 CAMBRIAN L. REV. 36, 39-40 (2009).

⁹⁹ G.A. Res.61/106, Art. 30(5), Convention on the Rights of Persons with Disabilities (Dec. 12, 2006).

This provision specifies state obligations that state parties to the CRPD must take appropriate measures to ensure that persons with disabilities have access to recreational, leisure and sporting activities (positive obligation).¹⁰⁰ While the classification of esports as “sports” or “recreational and leisure activities” may be a debated issue, this article does not delve deeply into that question due to the lack of a common understanding. However, this provision can be argued to apply to esports, irrespective of their categorization.¹⁰¹ This is because the provision does not differentiate between recreational and leisure activities and sporting activities.¹⁰² Therefore, regardless of how esports are classified under national legislation, esports players with disabilities have the right to participate on an equal basis with others in esports activities.¹⁰³

Based on this understanding, esports players with disabilities are primarily entitled to exercise the following rights: (1) the right of access and participation in esports activities (Article 30(5)(a) of the CRPD); and (2) the right to organize, develop and participate in disability-specific sporting and recreational activities (Article 30(5)(b) of the CRPD). In particular, the Bantekas et al.’s CRPD Commentary states that Article 30(5)(a) of the CRPD “entails that state parties must support elite disabled athletes to compete in international competitions if they are doing so in respect of non-disabled athletes.”¹⁰⁴ Therefore, esports players with disabilities may enjoy the right to participate on an equal basis in esports activities, including both national and international competitions.

B. Case Study on Sports Athletes with Disabilities : “Fairness” or “Equality”?

To ensure the right to participate on an equal basis in esports competitions, esports tournament organizers can draw insights from two CAS awards, namely *Pistorius v. IAAF* and *Blake Leeper v. IAAF*. The CAS has previously addressed the issue of “fairness” in disabled sports, specifically questioning whether new

¹⁰⁰ BANTEKAS ET AL., *supra* note 93, at 910-13; CRPD Committee, *General Comment No. 2 (2014): Article 9: Accessibility*, 22 May 2014, CRPD/C/GC/2, ¶¶ 44-46; DELLA FINA ET AL., *supra* note 93, at 548. Furthermore, CRPD General Comment No. 6 explained that the CRPD is based on inclusive equality. See CRPD Committee, *General Comment No. 6 (2018) on Equality and Non-Discrimination*, Apr. 26, 2018, CRPD/C/GC/6, ¶ 11.

¹⁰¹ The question of whether ‘esports’ is considered as ‘sports’ or ‘cultural activity’ is still controversial and, thus, the definition of ‘esports’ varies from country to country. However, both ‘sports’ and ‘cultural activity’ fall within the scope of the CRPD so that this question is not important in the application of the CRPD to esports activities.

¹⁰² BANTEKAS ET AL., *supra* note 93, at 912.

¹⁰³ However, it is important to note that esports players may enjoy this right when their states signed and ratified the CRPD in accordance with international public law.

¹⁰⁴ BANTEKAS ET AL., *supra* note 93, at 913.

sports equipment or technology for disabled athletes could provide an unfair competitive advantage over able-bodied athletes.¹⁰⁵ This case study aims to identify how a balance between “fairness” and “equality” in sports events can be achieved, offering valuable considerations for esports tournament organizers dealing with the integration of disabled players.

1. *Pistorius v. IAAF*

In *Pistorius v. IAAF*, the International Association of Athletics Federations (IAAF) decided that Oscar Pistorius, double-amputee runner, was ineligible due to his prosthetic device, Cheetah Flex-Foot, having a competitive advantage over other runners in the able-bodied category of the IAAF competitions.¹⁰⁶ Therefore, Pistorius was banned from competing able-bodied athletes in IAAF’s events because he violated IAAF Rule 144.2(e) for the purpose of regulating the use of technical devices.¹⁰⁷ Based on this fact, Pistorius filed an appeal with the CAS to “vacate the IAAF Decision, and to determine that he may participate in competitions held under the IAAF Rules using his *Cheetah* prosthetic limbs.”¹⁰⁸

In this case, the CAS Panel considered the following questions: (1) “Did the IAAF Council exceed its jurisdiction in taking the IAAF Decision?; (2) “Was the process leading to the IAAF Decision procedurally unsound?; (3) Was the IAAF Decision unlawfully discriminatory?; and (4) “Was the IAAF Decision wrong in determining that Mr Pistorius’ use of the Cheetah Flex-Foot device contravenes Rule 144.2(e)?”.¹⁰⁹ Pistorius’s counsel abandoned the objection to the first question and, thus, the CAS Panel considered the second, third and fourth questions.¹¹⁰

The CAS Panel mainly considered whether his use of Cheetah Flex-Foot has advantage over other athletes without using this device.¹¹¹ To address this question, it noted that IAAF had ought to establish scientific evidence of why this prosthetic device has a performance advantage over other able-bodied athletes in accordance with the principle of ‘balance of probability.’¹¹² The CAS

¹⁰⁵ In this context, Dyer has already considered a technological unfairness due to the use of Nike’s shoes in professional athletic events. See Bryce Dyer, *A Pragmatic Approach to Resolving Technological Unfairness: The Case of Nike’s Vaporfly and Alphafly Running Footwear*, 6 SPORTS MED. 1 (2020).

¹⁰⁶ *Pistorius*, CAS 2008/A/1480 at 5.

¹⁰⁷ Int’l Ass’n of Athletics Fed’ns Rule 144.2(e) (2018-19) (“Use of any technical device that incorporates springs, wheels, or any other element that provides the user with an advantage over another athlete not using such a device.”).

¹⁰⁸ *Pistorius*, CAS 2008/A/1480 at 5.

¹⁰⁹ *Id.* at 6.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 10.

¹¹² *Id.* at 11.

Panel held that “the IAAF has not met its ‘on the balance of probability’ burden of proof that Rule 144.2(e) is contravened by Mr Pistorius’ use of the *Cheetah Flex Foot* prosthesis.”¹¹³ It indicated the following reasons: (1) the IAAF did not ask their experts to prove if the user of the prosthesis gained an overall net advantage over other runners¹¹⁴; (2) the IAAF did not establish sufficient scientific evidence to prove why the use of the prosthetic device may give the user a performance-advantage over other athletes without using it¹¹⁵ Therefore, the CAS Panel concluded that the IAAF failed to satisfy the burden of proof.¹¹⁶

In conclusion, the CAS Panel held that the IAAF’s decision was revoked with immediate effect and he was eligible to compete in the IAAF events with his prosthetic device.¹¹⁷ However, it is important to note that this case did not show how the sports society should strike a balance between “equality” and “fairness” within the sports society in the context of athletes with disabilities. It only clarified that the IAAF had ought to provide sufficient scientific evidence to support its argument that the use of prosthesis device for athletes with disabilities may make performance advantage over other athletes without using it.¹¹⁸

2. *Blake Leeper v. IAAF*

Blake Leeper, an elite bilateral transtibial amputee sprinter from the United States, participated in the 400-meter event. He used passive elastic carbon-fibre running specific prosthesis.¹¹⁹ He referred to Rule 144.3(d) of the IAAF Competition Rules¹²⁰ to use his mechanical assistance during athletic competitions.¹²¹ However, the IAAF denied his application of this Rule because he did not successfully demonstrate that his use of prostheses have no overall

¹¹³ *Id.* at 12.

¹¹⁴ *Pistorius v. Int’l Ass’n of Athletics Fed’ns*, CAS 2008/A/1480 at 12 (May 16, 2008).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 13.

¹¹⁷ *Id.*

¹¹⁸ See Shawn M. Crincoli, *You Can Race if You Can’t Win – The Curious Cases of Oscar Pistorius & Caster Semenya*, 12 TEX. REV. ENT. & SPORTS L. 133, 133-36, 141-53 (2011); Antoine Duval, *Pistorius Revisited: A Comment on the CAS Award in Blake Leeper v. IAAF – By Marjolaine Viret*, ASSER INT’L SPORTS L. BLOG (Nov. 20, 2020), <https://www.asser.nl/SportsLaw/Blog/post/pistorius-revisited-a-comment-on-the-cas-award-in-blake-leeper-v-iaaf-by-marjolaine-viret>.

¹¹⁹ *Leeper*, CAS 2020/A/6807 at ¶ 1.

¹²⁰ International Association of Athletics Federations, Rule 144.3(d) (2018-19): “The use of any mechanical aid, unless the athlete can establish on the balance of probabilities that the use of an aid would not provide him with an overall competitive advantage over an athlete not using such aid.”

¹²¹ *Leeper*, CAS 2020/A/6807 at ¶¶ 4-5.

competitive advantage over an athlete not using such prostheses.¹²² Due to the IAAF's decision, Leeper decided to appeal to the CAS to examine the following two issues: (1) "the meaning of the Rule and the validity of the provision within the Rule that places the burden of proof on the athlete who wishes to use a mechanical aid"; and (2) "the application of the Rule in respect of Mr. Leeper's use of his particular RSPs in a particular event (the 400m event)."¹²³ It is important to note that the CAS Panel indicated that this case did not consider "whether disabled athletes should be permitted to compete against able-bodied athletes in elite level international athletics competitions, and if so on what terms."¹²⁴

1.1 Leeper's Position

In this case, Leeper argued that the Rule 144.3(d) of the IAAF Competition Rules unlawfully placed the burden of proof on him to establish that his prostheses had no overall competitive advantage over other athletes.¹²⁵ This was because, in *Pistorius* case, the IAAF accepted that it owed this burden of proof.¹²⁶ Furthermore, Leeper claimed that, if the Rule placed the burden of proof on him, this was discriminatory treatment against him because (1) "it only applies to athletes who use a mechanical aid"; and (2) "it is impossible for any amputee runner to participate in competition without a mechanical aid."¹²⁷ Therefore, he alleged that the IAAF should establish that the discrimination was reasonable and proportionate.¹²⁸ In addition to this, he also argued that this discriminatory treatment violated the law of Monaco because Monaco ratified the CRPD¹²⁹ and European Convention on Human Rights (ECHR).¹³⁰ In this sense, he claimed that the Rule 144.3(d) of the IAAF Competition Rules infringed the Articles 2 and 30(5) of the CRPD and Article 14 of the ECHR.¹³¹ Furthermore, he also alleged that, even though the Rule was not unlawful, he could compete in the IAAF 400 meter events because his prostheses did not

¹²² *Id.* at ¶ 6.

¹²³ *Id.* at ¶ 8.

¹²⁴ *Id.*

¹²⁵ *Id.* at ¶ 105.

¹²⁶ *Id.*

¹²⁷ *Leeper v. Int'l Ass'n of Athletics Fed'ns*, CAS 2020/A/6807 at ¶ 106 (Oct. 23, 2020).

¹²⁸ *Id.* at ¶ 107.

¹²⁹ *Id.* at ¶¶ 108-10; Monaco signed the CRPD on 23 September 2009 and ratified it on 19 September 2017. See https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=114&Lang=EN.

¹³⁰ *Leeper*, CAS 2020/A/6807 at ¶¶ 111-13.

¹³¹ *Id.* at ¶¶ 110, 113.

provide him an overall competitive advantage.¹³² For all these reasons, Leeper concluded that the CAS Panel should overturn the IAAF decision and permit him to compete against able-bodied athletes in the IAAF events.¹³³

1.2 IAAF's Position

Against Leeper's arguments, the IAAF claimed that it could place the burden of proof on Leeper because the use of mechanical aid by athletes is an exceptional case for the participation of the IAAF events for the purpose of the protection of sports integrity.¹³⁴ Furthermore, IAAF argued that it enjoys "a significant margin of appreciation in determining what measures are necessary and proportionate to achieve their sporting objectives."¹³⁵ Therefore, this decision fell within the scope of the IAAF's margin of appreciation.¹³⁶ Furthermore, it noted that the CAS award in the Pistorius case did not indicate that "it would be unlawful to place the onus on the athlete to prove that they do not receive an overall net advantage from their prosthetic aids," but simply reflected the facts that rule in force at the time of the dispute.¹³⁷ The IAAF further argued that the Rule 144.3(d) of the IAAF Competition Rules did not violate the provisions of CRPD and ECHR because the IAAF is not a state but private association.¹³⁸ Finally, it alleged that Leeper's prostheses gave him an overall net advantage of seven seconds or more in elite 400 meter events on the basis of IAAF's scientific evidence.¹³⁹ Accordingly, the IAAF concluded that Leeper was not permitted to compete in able-bodied athletic competition with his prosthetic device because of an overall net advantage over other able-bodied athletes without mechanical aids.¹⁴⁰

1.3 CAS Award

In light of the foregoing, the CAS Panel accepted its jurisdiction and admissibility for this case¹⁴¹ and entered into the merits in accordance with the applicable law, including "the IAAF Constitution, and the WA Competition

¹³² *Id.* at ¶ 116.

¹³³ *Id.* at ¶ 118.

¹³⁴ *Id.* at ¶ 173.

¹³⁵ *Id.* at ¶ 176.

¹³⁶ *Leeper v. Int'l Ass'n of Athletics Fed'ns*, CAS 2020/A/6807 at ¶ 176 (Oct. 23, 2020).

¹³⁷ *Id.* at ¶ 179.

¹³⁸ *Id.* at ¶¶ 182-83.

¹³⁹ *Id.* at ¶¶ 184-96.

¹⁴⁰ *Id.* at ¶ 196.

¹⁴¹ *Id.* at ¶¶ 256-64.

Rules, Technical Rules and Disputes and Disciplinary Proceedings Rules in force from 1 November 2019, with the law of Monaco applying subsidiarily.”¹⁴² In the merits, the CAS Panel considered the following issues:

(1) ‘What is the proper construction of the Rule?;’ (2) ‘Is the provision in the Rule which imposes the burden on the athlete to establish the absence of any overall competitive advantage valid and lawful?;’ and (3) ‘In light of the answer to Issue 2 and the evidence before the Panel, is Mr. Leeper entitled to compete in IAAF-sanctioned events using his RSPs?’¹⁴³

1.3.1 The Construction of the Rule 144.3(d) of the IAAF Competition Rules

Regarding the first issue, the CAS Panel noted that the words of the Rule was unsatisfactory and ambiguous and, thus, it was difficult to provide a clear answer to the questions that arouse in this case.¹⁴⁴ However, it considered that:

...the only logical, principled and workable construction of the Rule is one that, in the case of disabled athletes who use a mechanical aid to overcome a disability, requires a comparison to be undertaken between the athlete’s likely athletic performance when using the mechanical aid and their likely athletic performance had they not had the disability which necessitates the use of that aid.¹⁴⁵

In other words, the CAS Panel noted that “[a] disabled athlete who uses a mechanical aid which does no more than offset the disadvantage caused by their disability cannot be said to have an ‘overall competitive advantage’ over a non-disabled athlete who is not using such an aid.”¹⁴⁶ In this context, it concluded that,

... the question whether a particular disabled athlete will derive an “overall competitive advantage” through the use of a mechanical aid can only be answered by comparing (a) the performance that the athlete is actually capable of achieving while running with their disability and their mechanical aid; and (b) the performance they would hypothetically have been

¹⁴² Leeper v. Int’l Ass’n of Athletics Fed’ns, CAS 2020/A/6807 at ¶ 279 (Oct. 23, 2020).

¹⁴³ *Id.* at ¶ 291.

¹⁴⁴ *Id.* at ¶¶ 292-305.

¹⁴⁵ *Id.* at ¶ 310.

¹⁴⁶ *Id.*

capable of achieving in the same event if they were running without the disability and without that aid.¹⁴⁷

In application of this principle to the present case, the CAS Panel held that,

. . . the only logical and workable construction of the Rule is one that requires a comparison to be undertaken (a) Mr. Leeper’s performance in the 400m event while using his RSPs to overcome his lack of fully intact biological legs; and (b) Mr. Leeper’s likely performance in the 400m event had he been born with fully intact biological legs which did not necessitate the use of RSPs in order to run.¹⁴⁸

1.3.2 The Validity and Enforceability of the Rule 144.3(d) of the IAAF Competition Rules

Secondly, the CAS Panel addressed the validity and enforceability of the Rule 144.3(d) of the IAAF Competition Rules. In this regard, it noted that the question of which party bears the burden of proving the lawfulness of the Rule depends on whether the Rule is discriminatory. If the Rule is discriminatory, the burden of proof shifted to the IAAF to establish that the Rule is necessary, reasonable, and proportionate. The CAS Panel decided to apply this legal principle to the present case.¹⁴⁹

On this basis, the CAS Panel considered that the Rule applied to all athletes who wished to use any form of mechanical aid during the IAAF events.¹⁵⁰ Nonetheless, it observed that the Rule was enacted with the specific objective of regulating the use of mechanical aid by disabled athletes to participate in IAAF events.¹⁵¹ Furthermore, it noted that “while the Rule is neutral on its face . . . the practical effect of the Rule is likely to be significantly greater for disabled athletes than able-bodied athletes.”¹⁵² Therefore, the CAS Panel concluded that the Rule was an indirect discriminatory treatment against disabled athletes who had to use mechanical aids to participate in the IAAF events.¹⁵³ In this sense, the IAAF had to bear the burden of establishing that the Rule was necessary and

¹⁴⁷ *Id.* at ¶ 311.

¹⁴⁸ *Leeper v. Int’l Ass’n of Athletics Fed’ns*, CAS 2020/A/6807 at ¶ 312 (Oct. 23, 2020).

¹⁴⁹ *Id.* at ¶ 315.

¹⁵⁰ *Id.* at ¶¶ 316-17.

¹⁵¹ *Id.* at ¶ 317.

¹⁵² *Id.* at ¶ 318.

¹⁵³ *Id.* at ¶ 319.

proportionate to achieve the legitimate aim. If the IAAF failed to meet the burden of proof, the Rule was invalid.¹⁵⁴

1.3.2.1 Legitimate Aim

Firstly of all, the IAAF argued that the Rule was to “ensure the fairness and integrity of competitive athletics by preserving a level playing field”¹⁵⁵ In this regard, the CAS Panel considered that this point did not appear to be in dispute because the fairness and integrity of sports competition are a legitimate aim for the international sports governing body.¹⁵⁶ However, it noted that this aim was unclear and different in each sport title,¹⁵⁷ and the margin of appreciation afforded to sport’s governing bodies to regulate the sport title was not unlimited.¹⁵⁸ In this context, it examined submitted evidence by both parties and considered that the Rule was not “created with the specific intention to prevent disabled athletes . . . from competing in competitive athletics against able-bodied athletes.”¹⁵⁹ In other words,

. . . the Rule was intended to pursue the legitimate objective of ensuring the fairness and integrity of competitive athletics by ensuring that the outcome of IAAF-sanctioned competitions is determined by competitors’ natural talent, training and effort, and not by the use of mechanical aids which confer an artificial competitive advantage over athletes who are not using such aids.¹⁶⁰

Therefore, the Panel held that the Rule has a legitimate aim, but the IAAF must show how the Rule was necessary and proportionate to achieve that legitimate aim.¹⁶¹

1.3.2.2 Necessity and Proportionality Tests

Furthermore, the CAS Panel considered whether the Rule was appropriate to place on athletes the burden of proving that their mechanical aids had no

¹⁵⁴ *Leeper v. Int’l Ass’n of Athletics Fed’ns*, CAS 2020/A/6807 at ¶ 321 (Oct. 23, 2020).

¹⁵⁵ *Id.* at ¶ 322.

¹⁵⁶ *Id.* at ¶ 323.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at ¶ 324.

¹⁵⁹ *Id.* at ¶ 332.

¹⁶⁰ *Leeper v. Int’l Ass’n of Athletics Fed’ns*, CAS 2020/A/6807 at ¶ 332 (Oct. 23, 2020).

¹⁶¹ *Id.* at ¶ 334.

overall competitive advantage.¹⁶² In this regard, the CAS Panel examined three reasonings provided by the IAAF.

Firstly, the IAAF argued that it was fair to require, on a precautionary basis, athletes seeking an exception to the normal eligibility rule to prove that granting this exception did not undermine the fairness of the IAAF sanctioned events.¹⁶³ The CAS Panel held that the precautionary approach in this case was misplaced because this approach could apply to a non-discriminatory rule, such as the Therapeutic Use Exemption (TUE) regulation, which applied to all athletes who need to receive prohibited medical support to overcome their medical problems.¹⁶⁴ Therefore, it considered that the precautionary approach could not apply to the present case.¹⁶⁵

Secondly, the IAAF alleged that an athlete using a mechanical aid could gather the scientific evidence and explain why the use of mechanical aids did not have an overall competitive advantage over other athletes not using them.¹⁶⁶ The CAS Panel considered that this allegation was not powerful for imposing the burden of proof on disabled athletes because the IAAF would have no difficulty in obtaining the necessary scientific data on the use of mechanical aids.¹⁶⁷

In addition to the above, the CAS Panel indicated three reasons that it was “not necessary, reasonable and proportionate to impose the burden of proof on the disabled athlete under the Rule.”¹⁶⁸ First of all, it considered that disabled athletes could not have immediate access to the experts or to appropriate testing and research institutions in order to gather the requisite scientific data.¹⁶⁹ In doing so, it observed that disabled athletes had to owe significant financial costs of obtaining such data and expert analysis and, thus, they were unable to meet the burden of proof imposed by the Rule.¹⁷⁰ In spite of this situation, the IAAF did not provide any supports for disabled athletes to obtain the scientific evidence required by the Rule.¹⁷¹ In this situation, it was impossible for disabled athletes to meet the burden of establishing that their mechanical aids did not

¹⁶² *Id.* at ¶ 335.

¹⁶³ *Id.* at ¶ 340.

¹⁶⁴ *Id.* at ¶ 341.

¹⁶⁵ *Id.*

¹⁶⁶ *Leeper v. Int’l Ass’n of Athletics Fed’ns*, CAS 2020/A/6807 at ¶ 342 (Oct. 23, 2020).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at ¶ 343.

¹⁶⁹ *Id.* at ¶ 347.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at ¶ 348.

confer any overall athletic advantage.¹⁷² Therefore, the CAS Panel held that the IAAF unfairly prevented disabled athletes from competing in athletic competition due to the Rule.¹⁷³

Second, the CAS Panel considered that the IAAF did not provide for disabled athletes a clear, accessible, and structured process to determine how they meet the burden of proof imposed by the Rule. In this case, Leeper had already asked the IAAF to know the criteria for how he could meet the burden of proof under the Rule.¹⁷⁴ Eight months later, the IAAF clarified a seven-step process that disabled athletes should follow to use mechanical aid during the IAAF competition.¹⁷⁵ This seven-step process was not enshrined in any regulations and rules of the IAAF.¹⁷⁶ Furthermore, the CAS Panel considered that, while WT Technical Rules for regulating the use of running shoes established “a clear and accessible process that is to be followed in order to resolve any uncertainty regarding whether a particular new model of shoe does or does not give the wearer any unfair assistance or advantage,”¹⁷⁷ the Rule did not enshrine such a process.¹⁷⁸

Finally, the CAS Panel observed that it was unclear “why a disabled athlete wishing to use a mechanical aid to overcome a disability should bear the burden of establishing the absence of any competitive advantage under the Rule, whereas an athlete who wishes to use a technology or appliance does not bear an equivalent burden” under the ancient Rule 144.3(c) of the IAAF Competition Rules/Rule 6.3.3 of the WA Technical Rules.¹⁷⁹ Therefore, it concluded that “the burden-shifting provision under the Rule is neither necessary, reasonable or proportionate.”¹⁸⁰

For these reasons, the CAS Panel concluded that the Rule was unlawful and invalid because the Rule was not necessary, reasonable, and proportionate to achieve the legitimate aim.¹⁸¹ Therefore, disabled athletes did not need to meet the burden of establishing that athletes using mechanical aids do not have an overall competitive advantage over other athletes not using them.¹⁸² As a result

¹⁷² Leeper v. Int’l Ass’n of Athletics Fed’ns, CAS 2020/A/6807 at ¶ 348 (Oct. 23, 2020).

¹⁷³ *Id.* at ¶ 349.

¹⁷⁴ *Id.* at ¶ 350.

¹⁷⁵ *Id.* at ¶ 351.

¹⁷⁶ Leeper v. Int’l Ass’n of Athletics Fed’ns, CAS 2020/A/6807 at ¶ 351 (Oct. 23, 2020).

¹⁷⁷ *Id.* at ¶¶ 352–53.

¹⁷⁸ *Id.* at ¶ 353.

¹⁷⁹ *Id.* at ¶¶ 356–57.

¹⁸⁰ *Id.* at ¶ 357.

¹⁸¹ *Id.* at ¶ 359.

¹⁸² *Id.* at ¶ 359.

of this, the CAS Panel found that “the IAAF bears the burden under the Rule of establishing that Mr. Leeper (or any other disabled athlete who wishes to use prosthetic aids in order to run against able-bodied athletes) derives an overall competitive advantage from the use of the particular prosthetic aid.”¹⁸³

1.3.3 Leeper’s Eligibility of the IAAF-sanctioned Events with His Prosthesis Legs

In light of the foregoing, the CAS Panel considered whether Leeper was entitled to compete in the IAAF-sanctioned events with his prosthesis legs. To address this question, it examined if his prosthetic legs enabled him to run faster times in the 400 meter event than he would be able to achieve if he had intact biological legs. In this regard, the IAAF borne the burden of proof, “balance of probabilities,” on this question.¹⁸⁴ Through the examination of scientific evidence,¹⁸⁵ the CAS Panel concluded that:

... the IAAF has established on a balance of probabilities that the particular RSPs used by Mr. Blake Leeper give him an overall competitive advantage in the 400m event over an athlete not using such a mechanical aid and that, accordingly, Mr. Leeper may not use his particular RSPs in the 400m event in the Olympic Games or World Athletics Series competitions.¹⁸⁶

Therefore, it decided that Leeper was not entitled to compete in the IAAF-sanctioned events with his prosthetic legs.

C. The Application of the Legal Principles to the Context of Esports Players with Disabilities

In contrast to the situation of traditional sports, esports society has not yet confronted this complex question of whether the use of the adaptive gaming equipment for disabled esports players has an advantage over other able-bodied esports players. However, it will, sooner or later, face the question of “fairness” to strike a balance between the interests of esports players with disabilities and those of other esports players without using the adaptive gaming equipment. Therefore, this subsection will consider how the legal principles extracted from the CAS awards may apply to the context of esports players with disabilities.

¹⁸³ Leeper v. Int’l Ass’n of Athletics Fed’ns, CAS 2020/A/6807 at ¶ 362 (Oct. 23, 2020).

¹⁸⁴ *Id.* at ¶ 363.

¹⁸⁵ *Id.* at ¶¶ 366–90.

¹⁸⁶ *Id.* at ¶ 391.

The core question to the use of technological devices for esports players with disabilities in esports tournaments is in the following: does the use of technological device for esports players with disabilities constitute an unfair advantage over other esports players without disabilities? To address this question, the CAS indicated in the *Pistorius* case that a sports governing body should provide sufficient scientific evidence to establish that the technological device may possess the unfair advantage over other athletes.¹⁸⁷

Based on this legal principle, esports tournament organizers should establish sufficient evidence to justify their decision to exclude from the esports competitions disabled esports players who must use the adaptive gaming equipment to compete against other able-bodied esports players. However, the esports society has almost unified the adaptive gaming equipment because there are three principal adaptive gaming equipment, Xbox Adaptive Controller, Logitech G Adaptive Gaming Kit, and Quadstick, within the esports society at this moment. Therefore, the esports tournament organizers may determine, in advance, which adaptive gaming equipment is legitimate to be used in order for disabled esports players to participate in the esports competitions.

In the *Blake Leeper* case, the CAS further clarified the criteria for examining whether or not the regulation is discriminatory in the context of the use of mechanical aid during the sports competitions. In this case, the most important question was who had ought to bear the burden of establishing that athletes using mechanical aids do not have an overall competitive advantage over other athletes not using them.¹⁸⁸ In doing so, the CAS considered if the regulations and rules established by sports governing bodies are considered direct or indirect discrimination against disabled athletes. If so, the sports governing bodies should meet the burden of proof. If these regulations and rules are recognised as a discriminatory treatment against the athletes, the CAS examined that they are necessary, reasonable, and proportionate to achieve a legitimate aim.¹⁸⁹ It is important to note that the legitimate aim means that a sports governing body should ensure the fairness and integrity of sports competitions and that the outcome is determined through competitors' natural talent, training, and effort, and not by the use of mechanical aids which confer an artificial competitive advantage.¹⁹⁰

Applying this legal principle, the esports tournament organizers should consider the regulations and rules prohibiting "e-doping" because the esports society should a potential problem that the adaptive gaming equipment for

¹⁸⁷ *Pistorius*, CAS 2008/A/1480 at ¶ 146.

¹⁸⁸ *Leeper*, CAS 2020/A/6807 at ¶ 362.

¹⁸⁹ *Id.* at ¶ 184.

¹⁹⁰ *Id.* at ¶ 332.

disabled esports players is modified from fair equipment to unfair equipment to win the esports tournaments. If esports tournament organizers establish the rule for regulating “e-doping” and, due to this rule, disabled esports players cannot participate in esports competitions, how can they participate in esports competitions with other able-bodied esports players? For this question, esports tournament organizers should first carefully consider whether or not the rule concerned is discriminatory against disabled esports players. If so, esports tournament organizers must establish an existence of the legitimate aim to achieve the fairness of esports competitions and explain why the special equipment for disabled esports players have an unfair competitive advantage over other esports players not using it. If they do not succeed in meeting the burden of proof, disabled esports players can participate in esports competitions with their adaptative gaming equipment.

In short, an issue of disabled esports players contains the concepts of “inclusiveness” and “fairness.” On the one hand, the concept of “inclusiveness” means that esports federations, esports organizations, and esports publishers should establish a clear condition that enables disabled esports players to participate in esports activities. For instance, they may have access to participate in esports competitions by means of special adaptive equipment. On this basis, the concept of “fairness” signifies that the adaptative gaming equipment for disabled esports players should not give them an unfair competitive advantage over other able-bodied esports players. The legal principles deduced from the *Pistorius* and *Blake Leeper* cases would serve to know how esports tournament organizers should protect “fairness” and “integrity” of esports competitions when disabled esports players wish to participate in their esports competitions with other able-bodied esports players.

CONCLUSION

The purpose of this article is to consider how esports tournament organizers strike a balance between ensuring “fairness” and promoting “equality” when involving esports players with disabilities in competitive video games. To address this purpose, this article explored the following research questions: (1) what challenges will esports society face when esports players with disabilities use specialized equipment to support their cognitive and physical abilities?; (2) what regulations and rules can esports tournament organizers apply to esports players in the case of “e-doping”?; and (3) how can esports tournament organizers prevent potential misuse of such specialized equipment by esports players with disabilities to obtain an unfair performance advantage over other esports players without disabilities? In this concluding section, the main

question will be addressed through the responses provided to the research questions.

Regarding the first question, the esports society has undertaken initiatives to integrate disabled esports players into its activities. In this effort, businesses have developed adaptive gaming equipment tailored for disabled esports players to enhance their physical and cognitive abilities. To further promote their engagement, certain esports tournament organizers host tournaments specifically designed for disabled esports players.

Second, this article provided an overview of the regulations of ESIC, IESF, and esports publishers for the prevention of match-fixing and illegal gambling. First, the ESIC introduces the ESIC Integrity Program, particularly the Code of Conduct.¹⁹¹ This code explicitly forbids esports players from engaging in “e-doping” under Articles 2.3.3 and 2.4.4 of the ESIC Code of Conduct.¹⁹² Therefore, if esports tournament organizers choose to adopt this framework, ESIC has the authority to issue disciplinary sanctions for esports players under this Code. Similarly, IESF prohibits esports players from “e-doping” during esports competitions.¹⁹³ In the event of a violation, IESF can impose disqualification and fixed-term suspension from its tournaments under the IESF Statutes and Competition Regulations.¹⁹⁴ Finally, Riot Games actively develops an anti-e-doping system to maintain fair competition within the Riot community. Under this system, Riot Games has the authority, in accordance with the Riot Games Terms of Service, to issue disciplinary sanctions such as fixed-term suspension or a lifetime ban for violators participating in Riot-sanctioned competitions.¹⁹⁵ This is further reinforced through specific rules for different esports titles, exemplified by the LoL Code of Conduct¹⁹⁶ and Valorant Global Competition Policy¹⁹⁷, explicitly prohibiting users from engaging in cheating during esports competitions. Consequently, esports tournament organizers apply their self-regulations to combat “e-doping” among esports players.

For the third question, according to *Pistorius v. IAAF* and the *Blake Leeper v. IAAF* cases, esports tournament organizers should give due consideration to regulations and rules prohibiting “e-doping.” The esports community anticipates a potential issue wherein adaptive gaming equipment for disabled

¹⁹¹ *Code of Conduct*, *supra* note 68.

¹⁹² *Id.*

¹⁹³ *ESIC Integrity Program*, *supra* note 46.

¹⁹⁴ *Id.*

¹⁹⁵ *Riot Games® Terms of Service*, *supra* note 80.

¹⁹⁶ *League of Legends Code of Conduct*, *supra* note 85.

¹⁹⁷ *The Valorant Champions Tour Global Competition Policy*, *supra* note 86.

players might be altered, transforming fair equipment into an unfair advantage to secure victory in esports tournaments. If esports tournament organizers establish rules regulating “e-doping,” and as a result of these rules, disabled players find themselves excluded from esports competitions, a careful evaluation is essential. Esports tournament organizers should, foremost, critically assess whether the rule in question discriminates against disabled esports players. If discrimination is identified, organizers must establish a legitimate aim to ensure the “fairness” of esports competitions. Additionally, they should provide clear reasoning as to why special equipment for disabled esports players could be perceived as conferring an unfair competitive advantage over other able-bodied players not using such equipment. In the absence of successfully meeting the burden of proof, disabled esports players should be allowed to participate in esports competitions with their adaptive gaming equipment.

In conclusion, the participation of disabled esports players in esports competitions contains the issues of “inclusiveness” and “fairness.” On the one hand, the concept of “inclusiveness” means that esports federations, esports organizations and esports publishers should establish a clear condition that enables disabled esports players to participate in esports activities. For instance, they may have access to participate in esports competitions by means of special adaptive equipment. On this basis, the concept of “fairness” signifies that the adaptive gaming equipment for disabled esports players should not give them an unfair competitive advantage over other able-bodied esports players. The legal principles deduced from the *Pistorius* and *Blake Leeper* cases would serve to know how esports tournament organizers can protect “fairness” and “integrity” of esports competitions when disabled esports players wish to participate in their esports competitions with other able-bodied esports players.