

OLYMPIC LAW TODAY

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Sports are exercised globally and according to the same rules. This applies to the rules of the game as well as to the rules governing the participation in and all aspects of the organization of sports events. Such rules were created before the turn of the second last century with the Olympic Charter (OCh) as the most prominent example. The Olympic Charter's history goes back to the decisions adopted by the first Olympic Congress in 1894 in Paris and was first published coherently in 1908.

With the abolishment of the "amateur rule" of the OCh at the 11th Olympic Congress in 1981, sports have become a business and a way of earning one's living for athletes. The Olympic Congress decided to

establish an IOC Athletes' Commission. That decision clearly entails that the athletes are no longer just individuals who must obey the rules and decisions of the sport's governing bodies, thus they should be given a voice through the IOC Athletes' Commission. In 1972, at the venue of the Olympic Winter Games at Sapporo, the Austrian downhill racer Karl Schranz who was the expected to win the gold medal, was excluded from the Games by a personal decision of the IOC president and had no choice but to fly home because no legal remedies were available.

These two essential concepts: (1) identical rules for all sports globally, and (2) respect for the rights of the athletes, must be balanced by the sets of rules governing the exercise of sport. Sport is basically a private activity exercised in the framework of private associations, federations, or other private entities under rules and regulations established by those private entities.

Such genuine sports law includes the rules adopted by the private bodies which govern various sports worldwide. Because the Olympic Games of Modern Age are still the most important sports event with a global audience and possesses a certain political standing, the IOC, as laid down in the OCh,¹ claims to lead all Olympic sports worldwide. Hence, according to the IOC, the OCh represents the basic "Charter" for all sports worldwide. The OCh formulates the assertive claim that it regulates all Olympic matters exclusively without the interference of the governments and domestic law of the States. When awarding the Olympic Games to a Host City like Beijing for 2022 as well as Paris for 2024 and Los Angeles for 2028,² the IOC emphasized the universal and supreme validity of the OCh and its implementing legal instruments, including the regulations of the International Federations governing their sport ("IFs") over State law.

Conflicts between sports law and domestic law of the States occur on many occasions, including, but not limited to, the holding of Olympic Games or, on an almost day-to-day basis, wherever the global anti-doping law is applied, forming an essential part of the "Olympic Law."

In view of the 2028 Los Angeles Olympic Games, some areas of potential conflict will be mentioned. However, this essay mainly attempts to explore the manifold and close interrelationship between the OCh, the World Anti-Doping Code, and the Code of Sports-related Arbitration based on a comprehensive examination of the legal statutes in the regulations

1. Int'l Olympic Comm. [IOC], *Olympic Charter in Force as from 17 July 2020*, at 15, <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf>.

2. Discussed in Section I.2.

related thereto. This approach is designed as a piece of basic research in law and is part of ongoing legal research.³

With the World Anti-Doping Code 2021 (WADA Code) the worldwide anti-doping law constitutes a comprehensive set of rules and exclusively governs all aspects of doping and excludes interference by State law. What facilitates the independent operation of the anti-doping law of sports is that any dispute arising in that area of law is determined exclusively by arbitration, to the exclusion of the jurisdiction of State courts. That has been the essential rationale for the creation of the Court of Arbitration for Sports (CAS) in Lausanne, Switzerland, which has developed into a globally recognized last instance arbitral tribunal for sports-related disputes.

However, that independence from State courts and State law, including constitutional law, was recently under review before the German Constitutional Court with potential harsh consequences for international sports. On a constitutional complaint lodged by the German speed skater *Claudia Pechstein*, after a thirteen-year course of legal disputes before the CAS, the Swiss Federal Court, the European Court of Human Rights and German civil courts, on June 3, 2022, the Constitutional Court held that the individual right of access to justice, guaranteed by the German Constitution, that included the right to have a public hearing, was violated. The Court found that, in 2009 when *Pechstein's* appeal against her doping sanction was heard by the CAS, the Statutes of the CAS, applicable at that time, did not provide for a public hearing. Therefore, the Court concluded that the CAS award of 2009 that determined that *Pechstein* committed a doping offence is not valid in Germany.⁴ Today, however, the amended CAS code provides the right of athletes to have a public hearing before the CAS⁵.

On June 30, the eve of the 1984 Olympic Games in Los Angeles, the Code of Sport-related Arbitration (CAS Code), the Statute and procedural rules applicable to the CAS, entered into force and slowly became operational since then. The creation of the CAS stems back to an event in 1976, where, for reasons of foreign policy in relation to China, the Canadian government did not allow the athletes from Taiwan to enter Canada to participate in the 1976 Olympic Games in Montreal. After the

3. Christoph Vedder, *Anti-Doping-Recht – global*, in 50 JAHRE JURISTISCHE FAKULTÄT AUGSBURG 567 (Koch et al., eds. 2021).

4. BVerfG, 1 BvR 2103/16, June 3, 2022, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/06/rk20220603_1bvr210316en.html.

5. *Code of Sports-related Arbitration*, R57 – Scope of Panel's Review, Hearing, CT. OF ARB. FOR SPORT (Nov. 1, 2022), <https://www.tas-cas.org/en/arbitration/code-procedural-rules.html>.

boycott of the 1980 Moscow Olympic Games by many Western States due to the invasion of Afghanistan by the Soviet Union in December 1979, the 1984 Los Angeles Olympic Games were the last Games that suffered from a political boycott due to foreign politics.

However, repercussions from global politics may affect the Olympic Games in Paris 2024 or, perhaps, Los Angeles 2028. Russia's armed attack on Ukraine and the Iranian government's repression against the protests in 2022 make it seem possible or even likely that, by way of a reverse boycott, States will be excluded by the IOC from participating in the 2024 Games in their entirety or by individual IFs for the sports competitions under their auspices. If such measures are not taken, it is also conceivable that individual States will refrain from sending teams to the Games for overriding political reasons. The idea of an Olympic truce during the duration of the Games, recognized in Ancient Greece and advocated by the UN,⁶ is not a solution to the political and moral dilemma between sport and politics. More generally, the repercussions of global and regional human rights and, again prompted by the war in Ukraine, of the fundamental rules of international law as expressed in the Charter of the United Nations, are a matter of increasing urgency and importance for sports.

In 1976, the author of this essay, as a freshly appointed research assistant at the Institute for Public International Law at the University of Munich, where some years later Robert Lutz did research under his Humboldt Fellowship, was involved in providing a shorthand legal opinion on that matter via a newspaper two days before the Opening Ceremony of the 1976 Montreal Games, and, in 1977, seconded in a "Pilot Study" on improving the legal status of the IOC.⁷ In this opinion, it was proposed to establish an arbitration procedure for resolving disputes between the IOC and States with an arbitral body present at the venue of the Games. That idea was followed up by Judge Keba M'Baye, member of the International Court of Justice and vice-president of the IOC, and eventually led to the establishment of the CAS under the presidency of Judge M'Baye. In October 1986, the author of this essay was invited by Robert Lutz to give a lecture on "Olympic Law."⁸ Now, leading up to the Los Angeles 2028 Olympic Games, it is time to become aware of and anticipate areas of foreseeable potential conflict between Olympic law and U.S. law or California law. Different from 1984, in 2028, the CAS will be present at

6. G.A. Res. 76/13 (Dec. 2, 2021), <https://digitallibrary.un.org/record/3950835?ln=en>.

7. Rudolf et. al., Pilot Study on the Improvement of the Judicial Status of the IOC (May 1977) (unpublished) (submitted to the IOC).

8. For recent use of the term "Olympic Law," see Mestre's work: ALEXANDRE M. MESTRE, THE LAW OF THE OLYMPIC GAMES 5 (T.M.C. Asser Press 1st ed. 2009).

L.A. with two of its divisions: the ad hoc Division and the Anti-Doping Division,⁹ with the purpose of resolving potential sports-related disputes by arbitration.

I. HOSTING OLYMPIC GAMES

Recent events have shown that the rules of sport law and the law of States hosting major international sports events may easily collide. Novak Djokovic was refused by the competent Australian authorities to enter the country to participate in the Australian Open in January 2022 because he did not meet the requirements of the applicable Australian anti-COVID measures, despite the fact that he was qualified to start according to the relevant rules of the international and national tennis federations.¹⁰

1. *Olympic law versus domestic law of the host State*

The Beijing Olympic Winter Games in 2022 dramatically witnessed clashes between the legal situation required by the OCh and the octroi of legislation or administrative measures taken by the authorities. This included the following: strict entry and stay conditions due to COVID-19, including strict limitation of the freedom of movement; very limited freedom of expression inside and outside the stadium; and almost total surveillance by digital means under the pretext of COVID-related information.

The Olympic Games, according to the OCh, are intended to be exclusively governed by the OCh and the implementing regulations thereto. According to Rule 7.2 OCh,

“the Olympic Games are the exclusive property of the IOC which owns all rights relating thereto...”

The OCh applies to the whole range of the Olympic Movement and other players in international sports by way of acceptance or agreement.¹¹ On the other hand, the Olympic Games take place on the territory of a state that hosts the Games. Consequently, the domestic law of the host state, including statutory legislation as well as constitutional law, apply to the running of the Games. Also, international treaties concluded by the host state, such as regional and universal Human Rights Conventions or climate

9. Int'l Olympic Comm [IOC], *Host City Contract Principles, Games of the XXXIV Olympiad in 2028* (Sept. 13, 2017); discussed in Section I.3.

10. *Djokovic v. Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3, 1 (Austl.).

11. Int'l Olympic Comm. [IOC], *supra* note 1, at 22; discussed in Section II.1.

change-related conventions, apply to the organization of Olympic Games. The Games are not exempt from the application of the full set of rules in force on the territory of the host state.

2. *Host City Contract, Agenda 2020*

According to Rule 36 of the OCh, immediately upon the election of the host city, a Host City Contract (“HCC”) is signed by the IOC, the City, and the National Olympic Committees (NOC) of the country. Upon its establishment, the Organizing Committee for the Olympic Games (“OCOG”) will also become a party. Local, regional, or state authorities may become parties if deemed appropriate by the IOC.

During the bidding process for the Olympic Games, the government of the country where the candidate city is located must provide guaranties to respect the OCh. Those guaranties constitute the inherent basis of the HCC. In the preamble of the HCC 2024 with the city of Paris it is stated:

“the IOC has taken note of, and has specifically relied upon, the covenant given by the government of the country in which the Host City and the Host NOC are situated (the Host Country) to respect the Olympic Charter and the Host City Contract.”¹²

With regard to those guaranties or covenants, paragraph 5.1 of the HCC 2024 speaks of “Candidature Commitments made by Host Countries Authorities” and provides that they “shall continue in effect after the election and be binding” upon the Host City, the Host NOC and the OCOG which are “responsible to ensure that all Candidature Commitments remain in effect.”

Such clauses must be understood as an indirect commitment of the government concerned. Such effect is intensified by the fact that, according to paragraph 38.2 of the HCC 2024, the non-respect of “*any material Candidature Commitment*” gives cause to terminate the HCC and withdraw the Games from the Host City.¹³ As a result, the government must encourage and support the primary parties (i.e., the Host City, the NOC, and the Organizing Committee) to the Contract, to comply with “core requirements” such as those set forth in paragraphs 13 and 14 of the HCC 2024:

12. Int’l Olympic Comm [IOC], *Host City Contract Principles, Games of the XXXIII Olympiad in 2024* (Sept. 13, 2017).

13. *Id.* at 34. (emphasis added) (The IOC is also entitled to terminate the HCC if the Host Country is, “in a state of war, civil disorder, boycott, embargo decreed by the international community.”).

- to prohibit any discrimination with regard to a country or person on whatever grounds;
- to protect and respect human rights consistent with international agreements and laws as well as “*all internationally recognized human rights standards and principles*” applicable in the Host Country;
- to refrain from fraud or corruption inconsistent with any international agreements, laws and standards applicable in the Host Country;
- to carry out all activities foreseen under the contract “in a manner which embraces sustainable development and contributes to the UN Sustainable Development Goals.”¹⁴

More specifically, paragraph 20 of the HCC 2024 provides that the Olympic Identity and Accreditation Card (OIAC), issued by the IOC, confers on its holders the right to take part in the Games and that the Host City, the Host NOC, and the Organizing Committee

“are responsible to ensure, in cooperation with competent Host Country authorities, that, together with a passport or other official travel document, the OIAC allows its holders to enter and remain in the Host Country and perform Games-related activities for the duration of the Games, including for a period of at least one month before the scheduled commencement of the Games and one month after the conclusion of the Games.”¹⁵

Similar obligations are stipulated in respect to labor laws and to the temporary entry of specialized workforce and the import of equipment.

It is possible that holders of the OIAC will be classified by a host State as terrorists or suspected terrorists, or simply as criminals under arrest warrants and be denied entry to the country or be arrested upon arrival. Holders of the OIAC may be listed under sanctions imposed by the UN Security Council or by unilateral sanctions enacted by the host State. Amongst the holders of an OIAC may be war criminals and perpetrators of other crimes under the Rome Statute or persons under international or national warrants.

The HCC 2024, according to paragraph 51.2, is exclusively governed by “the substantive, internal laws” of Switzerland to the exclusion of the rules regarding conflicts of law, i.e., the Swiss international private law. Following such choice of law, as a step further on the way to a fully independent legal environment for such contract, paragraph 51.2 of the HCC 2024 provides that any dispute arising from the HCC shall exclusively be determined by the CAS in accordance with the CAS Code, to the exclusion of the state courts of Switzerland, the Host Country, or any other

14. Int'l Olympic Comm. [IOC], *Host City Contract Principles*, 2024, *supra* note 12, ¶ 13.2.

15. *Id.* ¶ 20.1.

country. According to paragraph 51.3 HCC 2024, the Host City, the Host NOC, and the Organizing Committee waive the application of any provision under which they may claim immunity against any lawsuit or arbitration.

Furthermore, the HCC 2024, in its preamble, states that the Host City and the Host NOC “acknowledge the importance of Olympic Agenda 2020.” To cope with the internal and external challenges the Olympic sport was confronted with, in 2014 the IOC had adopted its Agenda 2020¹⁶ which displayed forty recommendations for shaping the future of the Olympic Movement. For the first time, Agenda 2020 has now been introduced into the bidding process for the 2024 Games. Fifteen additional recommendations were adopted by the IOC in May 2021 under the heading of *Olympic Agenda 2020 + 5*.¹⁷

With these documents, the IOC dedicates the Olympic Movement mainly to the following goals: sustainable development in line with the UN Sustainable Development Goals (including climate action), good governance and ethics, reduction of costs, non-discrimination in sexual orientation, support to and protection of clean athletes, athletes’ rights and responsibilities,¹⁸ and support for refugees and populations affected by displacement.

The IOC’s dedication to these goals and their cautious embodiment in the HCC awaits implementation. However, the trend towards the major goals of the Agenda 2020 is irreversible and most likely will be common ground before the 2028 Los Angeles Olympics.

An emerging area of conflict is related to the application of international human rights and freedoms within the exercise of sports and, thus, in relation to Olympic Games and other major events. Presently under debate is freedom of speech versus the prohibition of political propaganda under Rule 50 of the OCh and gender equality.¹⁹ With the references to human rights in the HCC and other documents, human rights within sports have become a matter of concern for the IOC. In 2018, the IOC established

16. Int’l Olympic Comm. [IOC], *Olympic Agenda 2020 – 20+20 Recommendations*, at 1 (Dec. 9, 2014).

17. Int’l Olympic Comm. [IOC], *Olympic Agenda 2020 +5 – 15 Recommendations*, at 3 (May 12, 2021).

18. See *Athletes’ Rights and Responsibilities Declaration*, INT’L OLYMPIC COMM. (Apr. 14, 2019), <https://olympics.com/athlete365/who-we-are/athletes-declaration> (last visited Oct. 20, 2022); discussed in Section II.2.

19. Rep. of the U.N. High Comm’r for Hum. Rts., *Intersection of race and gender discrimination in sport*, at 9, U.N. Doc A/HRC/44/26 (June 15, 2020) (The medium distance racer Caster Semenya lodged a complaint against Switzerland before the European Court of Human Rights on February 18th, 2021. The CAS had declared a relevant regulation adopted by the WA valid.).

a Human Rights Advisory Committee and received, in 2020, Recommendations for an IOC Human Rights Strategy, which led to the seminal Strategic Framework on Human Rights adopted by the IOC Executive Board on September 9, 2022.²⁰

3. *Jurisdiction of the CAS and Ad Hoc-Division at Olympic Games*

In 1984, the CAS was created to resolve any kind of sports-related disputes by virtue of an arbitration agreement or arbitration clause. As a consequence of the judgement of the Swiss Federal Tribunal of 1993 in the *Gundel* case²¹ the CAS was reorganized and released to full institutional independence from the IOC. Hence, the International Council for Arbitration in Sports (ICAS) was established as the organization responsible for the operation of the CAS. In addition to the now Ordinary Arbitration Division (OAD) a distinct Appeals Arbitration Division (AAD) of the CAS was inaugurated. According to Article R47 CAS Code, the AAD is competent for appeals

“against the decision of a federation, association or sports-related body ... if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available...”²²

Today, all sports organizations have introduced such arbitration clauses into their rules, such as Rule 61 of the OCh or the HCC and, following the WADA Code, the IFs in their Anti-Doping and other regulations. The CAS provides, depending on the circumstances, first-instance or second-instance adjudication, in any event ruling as last instance in sports-related disputes. As of 2021, more than 8,000 appeals or other disputes have been filed with the CAS. The CAS operates under the review of the Swiss Federal Tribunal which, pursuant to the Swiss Statute on International Private Law, is limited to a set number of procedural issues.

The CAS operates through a panel of three arbitrators or sole arbitrator elected from a list of about 400 experts in sports law. Its seat is in Lausanne, Switzerland where the CAS court office headed by a Director

20. PRINCE ZEID RA'AD AL HUSSEIN & RACHEL DAVIS, RECOMMENDATIONS FOR AN IOC HUMAN RIGHTS STRATEGY 1 (2020); *IOC approves Strategic Framework on Human Rights*, INT'L OLYMPIC COMM. (Sept. 9, 2022), <https://olympics.com/ioc/news/ioc-approves-strategic-framework-on-human-rights>.

21. Tribunal fédéral [TF] [Federal Supreme Court] Mar. 15, 1993, ENTSCHIEDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] 119 II, at 271. (Switz.).

22. Court of Arbitration for Sport, *Code of Sports-related Arbitration*, at R47 (July 1, 2020); DESPINA MAVROMATI & MATTHIEU REEB, *THE CODE OF THE COURT OF ARBITRATION FOR SPORT* 380 (Wolters Kluwer ed., 2015).

General operates. The awards are final and binding, and enforceable as true international awards under the New York Convention.

On the basis of the CAS Code, the CAS provides full remedies against decisions of sports bodies and, thus, legal protection of the athletes' rights with procedural guaranties respecting all rule of law requirements as equivalent to state courts.²³ The CAS with its globally accepted jurisdiction represents the institution essential for the independence of the Olympic Law and sports law in general.

During the 1996 Olympic Games at Atlanta, for the first time, an Ad hoc-Division of the CAS was present at the venue of Olympic Games in order to resolve disputes arising in connection with that edition of the Olympic Games in an expedited procedure within twenty-four hours. Since then, at every edition of Olympic Games and Olympic Winter Games an ad hoc-Division of the CAS was present.

The Olympic ad hoc divisions are governed by specific Arbitration Rules²⁴ that form an integral part of the general CAS Code. The ad hoc divisions consist of a special list of twelve arbitrators chosen from the list of CAS arbitrators, a president, and a co-president as well as a Court Office. Their legal seat is in Lausanne, Switzerland, the location of the CAS headquarters, and they operate under Chapter 12 of the Swiss Statute on International Private Law,²⁵ which governs international arbitration in Switzerland. While the first ad hoc division in 1996 settled six cases, the ad hoc division set up for the Olympic Games Tokyo 2020 (which was held in 2021) dealt with more than twenty disputes.

The ad hoc divisions have jurisdiction to hear any dispute covered by Rule 61 of the OCh, insofar

“as they arise during the Olympic Games or a period of ten days preceding the Opening Ceremony.”

Thus, all disputes arising “on the occasion of, or in connection with, the Olympic Games” shall exclusively be submitted to the CAS. That broad definition is specified by Article 1 of the Arbitration Rules for the ad hoc division which includes, but not to a jurisdictional limit, to “decisions pronounced by the IOC, an NOC, an International Federation or an Organizing Committee for the Olympic Games.”

23. Mutu and Pechstein v. Switzerland, Case No. 40575/10 & 67474/10, Eur. Ct. H.R. 14 (Oct. 2, 2018), [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-186434%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-186434%22]).

24. Court of Arbitration for Sport, *Arbitration Rules applicable to the CAS ad hoc division for the Olympic Games*, art. 1 (2021).

25. SCHWEIZER BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [SWISS STATUTE ON PRIVATE INTERNATIONAL LAW] Dec. 12, 1987, ch. 12 (Switz.) (as of February 1, 2021 after amendment).

This provides access to arbitration to all individuals participating in the Olympic Games and to all sports organizations involved in the Games as appellants against decisions taken by other such entities. With the Organizing Committee, at least indirectly, the Host City and other public authorities are captured. As paragraph 51 of the HCC 2024 does not pertain to the Host Country,²⁶ it is advisable to enter into an arbitration agreement for the determination of disputes between the IOC and the Host Country related to the Candidature Commitments made by the Host Country.

The Arbitration Rules for ad hoc divisions provide an expedited procedure with full guarantees of procedural rights, such as the right to be heard, to be represented, to provide evidence, and to have a hearing. The panel or sole arbitrator shall rule on the dispute pursuant to the OCh, the applicable regulations—that term refers to the statutes and regulations adopted by the IFs and other sports governing bodies—the “general principles of law and the rules of law, the application of which it deems appropriate.”

The disputes are heard by a panel of three members or a sole arbitrator; the arbitrators can be challenged; preliminary relief can be granted; the panel or sole arbitrator may issue a final or a partial award and/or refer the matter to the regular CAS for further consideration. The decision shall be given within twenty-four hours of the lodging of the application. The operation of the ad hoc division is free of charge. Regularly, the decisions are final and binding, and immediately enforceable.

As the Swiss Federal Tribunal ruled in 2003 in its decision in the matter of Lazutina and Danilova²⁷ regarding the CAS, the ad hoc divisions are an integral part of the structure of the CAS, representing true and independent arbitration issuing awards in the sense of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.²⁸

4 *Global Anti-Doping law, WADA Code and UNESCO Convention*

The fight against doping constitutes a major concern for the Olympic Movement. The OCh incorporates the WADA Code in Rule 40. Fair competition amongst clean athletes is the cornerstone of sports.

26. Int'l Olympic Comm. [IOC], *Host City Contract Principles*, 2024, *supra* note 12, ¶ 51.2; discussed in Section I.2.

27. Tribunal fédéral [TF] [Federal Supreme Court] May 27, 2003, ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] 129 III, at 446-7 (Switz.).

28. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, at 8 (New York, 1958), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf>.

The WADA Code, in its 2021 version, has been considerably amended. In response to the doping-related events during the 2014 Olympic Winter Games in Sochi, the monitoring and sanctioning of the code-compliance by the anti-doping organizations of sports was reinforced in order to capture and sanction doping-related misconduct of sports organizations. Generally, the various procedures available under the WADA Code have been improved and met the rule of law requirements. As a unique feature, the States committed themselves to the WADA Code through an international treaty, i.e., the UNESCO Convention against Doping in Sport.²⁹

The WADA Code provides identical rules with global application for all sports, and together with settled case-law mainly made by the CAS, constitutes a self-contained regime of genuine sports law applicable inside and out of the Olympic Games. That is emphasized by the fact that, as of 2016, the CAS, in addition to the ad hoc divisions, is present at the Olympic Games with an Anti-Doping Division (ADD) to hear doping-related disputes at the venue, as demonstrated at Beijing 2022.³⁰

II. THE OLYMPIC CHARTER—THE HUB OF INTERNATIONAL SPORTS LAW

The OCh aims at regulating all aspects of the Olympic Games and, therefore, applies to all activities and institutions related to the organization of and participation in the Olympic Games. To that end, in recent years, based upon the OCh as a constitution of sports, many implementing or complementing regulations such as the Ethics Code were adopted by the IOC and other major sets of rules and regulations such as the WADA Code, were included by reference.

As determined by Rule 1 of the OCh, the IOC

“is an international non-governmental organization, of unlimited duration, in the form of an association with the legal status of a legal person, recognized by the Swiss Federal Council in accordance with an agreement entered into on 1 November 2020.”

29. Int'l Convention Against Doping in Sport, Oct. 19, 2005, ED. 2005/CONVENTION ANTI-DOPING Rev, <https://en.unesco.org/themes/sport-and-anti-doping/convention>; discussed in Section III.4.b.

30. Court of Arbitration for Sport, Ad Hoc Division, Olympic Winter Games Beijing 2022, IOC, Wada, ISU v. RUSADA, CAS OG 22/08, 09, 10, https://www.tas-cas.org/fileadmin/user_upload/OG_22_08-09-10_Arbitral_Award_publication_.pdf (In this ad-hoc award, the panel refused to impose a provisional suspension on the fifteen-year-old Russian figure skater Kamila Valieva; the decision of the Russian Anti-Doping Agency (RUSADA) to release her from an alleged doping offense was appealed by the IOC, by WADA, and by the International Skating Union (ISU).

It follows that the IOC enjoys the status of a private legal person under Swiss law and, thus the OCh is to be considered a private statute with no capacity to issue binding rules outside its own membership or otherwise establish binding effect.³¹

1. Scope of application: Olympic Movement

Rule 1 of the OCh defines the scope of application of the OCh through the intermediary term “Olympic Movement” and the role of the IOC, in particular:

“Under the supreme authority and leadership of the [IOC], the Olympic Movement encompasses organisations, athletes and other persons who agree to be guided by the [OCh].”

According to that provision, the application of the OCh arises from agreement and, under that condition, also extends to individuals such as athletes and their support personnel.

The Olympic Movement includes the IOC, the International Federations (IFs), the National Olympic Committees (NOCs), and the Organizing Committees for the Olympic Games (OCOGs) as its “main constituents,” as well as

“the national associations, clubs and persons belonging to the IFs and NOCs, particularly the athletes, whose interests constitute a fundamental element of the Olympic Movement’s action, as well as the judges, referees, coaches, and the other sport officials and technicians. It also includes other organizations and institutions as recognized by the IOC.”³²

Abundantly, Rule 1.4 OCh sets forth:

“Any person or organization belonging in any capacity whatsoever to the Olympic Movement is bound by the provisions of the Olympic Charter and shall abide by the decisions of the IOC.”

The term “decisions” includes any regulation or other legally binding act adopted by the IOC.

The OCh, according to its “Introduction,” represents “the codification of the Fundamental Principles of Olympism, Rules and Bye-laws” adopted by the IOC and “governs the organization, action and operation of the Olympic Movement and sets forth the conditions for the celebration of the Olympic Games.” As “a basic instrument of a constitutional nature,” it defines the “fundamental principles and essential values of Olympism,”

31. Christoph Vedder, *The International Olympic Committee: An Advanced Non-Governmental Organization and the International Law*, 27 GERMAN Y.B. INT’L L. 233, 249 (1984).

32. Int’l Olympic Comm. [IOC], *Olympic Charter*, *supra* note 1, Rule 1.3.

serves as statutes for the IOC, and “defines the main reciprocal rights and obligations of the three main constituents of the Olympic Movement,” the IOC, the IFs, the NOCs, and the OCOGs “all of which are required to comply with the Olympic Charter.”

“Such scope of application, claimed by the IOC, is reiterated in the OCh on various occasions and is eventually accepted by the NOCs, the IFs, the OCOGs, and others by way of their recognition or contract.³³ Paragraph 7 of the Fundamental Principles generally stipulates: “[b]elonging to the Olympic Movement requires compliance with the Olympic Charter and recognition by the IOC.”

2. *Olympic Charter: Rules, Bye-laws, Regulations, Codes and other rules adopted by the IOC*

Narrowly, the proper law of the IOC consists of the Rules of the OCh and the bylaws within it. The Bye-laws mainly implement the rules they are attached to by setting forth more detailed provisions. These bylaws are legally binding.

Furthermore, the IOC has the capacity to adopt, by way of its respective decision-making bodies, “regulations of the IOC.” According to Rule 19.3.10 of the OCh, the IOC Executive Board has the general and extensive power to issue

“regulations of the IOC, which are legally binding, in the form it deems appropriate, such as, for instance, codes, rulings, norms, guidelines, guides, manuals, instructions, requirements, and other decisions, including, in particular, but not limited to, all regulations necessary to ensure the implementation of the Olympic Charter and the organization of the Olympic Games.”

A number of major significant regulations have been adopted by the Executive Board and form a set of secondary IOC law. Significant examples include the IOC Anti-Doping Regulations applicable specifically to each of the editions of the Olympic Games.³⁴ The authority to amend the OCh and to adopt and amend the *Athletes' Rights and Responsibilities Declaration*,³⁵ however, in accordance with Rule 18.2 OCh is reserved for

33. *Id.* at 12.

34. Int'l Olympic Comm. [IOC], *Anti-Doping Rules applicable to the Games of the XXXI Olympiad, in Rio de Janeiro, in 2016*, at 3 (Aug. 6, 2015).

35. Int'l Olympic Comm. [IOC], *Athletes' Rights and Responsibilities Declaration* (Oct. 9, 2018) (adopted by the IOC Session, Preamble: “... inspired by the Universal Declaration of Human Rights and other internationally recognized human rights standards, principles and treaties [the IOC] outlines a common set of aspirational rights and responsibilities for athletes within the Olympic Movement and under the jurisdiction of its members.”).

the Session which, according to Rule 18.1 OCh, is “the supreme organ” of the IOC.

By virtue of Rule 22 of the OCh, the IOC Code of Ethics³⁶ and other ethics-related regulations were adopted. Modifications of those legal instruments are proposed by the IOC Ethics Commission and approved by the IOC Executive Board in accordance with the Bye-laws to Rule 22 paragraph 2.

3. *The IOC Ethics Code*

In response to the 1998 corruption scandal related to the awarding of the 2002 Winter Games in Salt Lake City, the IOC, in 1999, established an Ethics Commission, adopted a Code of Ethics, and started a far-reaching overhaul of the OCh. Today, the Ethics Code, which itself forms an “integral part” of the OCh, is accompanied by a package of ethics-related regulations and other legal instruments.

The Ethics Commission is responsible for investigating complaints related to violations of the Ethics Code or ethical principles and proposing sanctions to the IOC Executive Board. The composition and procedures before the Ethics Commission are set forth in the

“Statutes of the IOC Ethics Commission” and

“Rules of Procedure Governing Cases of Possible Breach of Ethical Principles.”

In substance, the IOC ethics standards are codified in the Code of Ethics while particular ethical requirements related to various actions proved to be prone to manipulation are provided for in the following specific legal instruments:

- *Directions Concerning the Election of the IOC President*
- *Rules Concerning Conflicts of Interest Affecting the Behavior of the Olympic Parties*
- *Future Host Election, Rules of Conduct for Continuous Dialogue*
- *Future Host Election, Rules of Conduct for Targeted Dialogue*
- *Rules for the Register of Consultants*
- *Rules of Conduct for the Recognized International Federations seeking inclusion in the Olympic Games Organizing Committee’s proposal on additional sports.*

Other ethics-related legal instruments are of broader relevance:

36. Int’l Olympic Comm. [IOC], *Ethics*, at 4 (Jan. 2022).

- *The Basic Universal Principles of Good Governance of the Olympic and Sports Movement*
- *Olympic Movement Code on the Prevention of the Manipulation of Competitions*

and with regard to the Olympic Winter Games 2022:

- *Rules for the Application during the XXIV Olympic Winter Games Beijing 2022 of Articles 7 to 10 of the Code of Ethics and of Olympic Movement Code on the Prevention of the Manipulation of Competitions.*

However, the IOC Ethics Code does not include the anti-doping rules as some IFs chose to do in overarching “Integrity Rules.” As a forerunner, the IAAF (also known as World Athletics (WA) since 2019) adopted its *World Athletics Integrity Code of Conduct* in 2019 which procedurally overarched the doping offences under the World Athletics Anti-Doping Rules and delegated its power to oversee these matters to an Athletics Integrity Unit and a Disciplinary Tribunal.³⁷ Also in 2019, the International Biathlon Union (IBU) adopted its Integrity Code,³⁸ The IBU Integrity Code combines provisions to prevent and sanction both unethical misconduct and doping in the same code. Both Integrity Units and the WA Disciplinary Tribunal are created as structurally independent institutions within the framework of their respective IF.³⁹

4. *Incorporation of the WADA Code*

The “amateur rule” provided for in Rule 26 of the OCh was replaced with the new “Eligibility Rule” in 1981. The new Rule 26 simply stated that “Doping is prohibited” and the participation in the Olympic Games was linked to the compliance with an IOC Medical Code prohibiting doping more precisely. In the late 1990s, the IOC took the initiative to harmonize the anti-doping rules and eventually the WADA was founded in 1999. At the second *World Conference on Doping in Sports*, in March 2003 at Copenhagen, the first edition of the WADA Code was adopted.⁴⁰ As one of

37. *Book of Rules: Book D – Integrity Code of Conduct*, WORLD ATHLETICS § 2.4 (Nov. 1, 2019), <https://www.worldathletics.org/about-iaaf/documents/book-of-rules>.

38. Int'l Biathlon Union, *Integrity Code*, Ch. A, § 1.1.1 (Oct. 19, 2019).

39. Discussed in Section III.2.b (8) (b).

40. World Anti-Doping Agency, *World Anti-Doping Code 2003*, at 1 (Mar. 2003).

the “signatories” of the Code, the IOC was bound to implement the WADA Code within its legal instruments.

Therefore, today, Rule 40 of the OCh provides that

“[t]o participate in the Olympic Games, a competitor, team official or other team personnel must respect and comply with the Olympic Charter and the World Anti-Doping Code.”

More generally, beyond the eligibility of individuals to compete in the Olympic Games, Rule 43 of the OCh sets forth that

“[c]ompliance with the World Anti-Doping Code and the Olympic Movement Code on the Prevention of Manipulation of Competitions is mandatory for the whole Olympic Movement.”

5. *The IOC Anti-Doping Regulations*

As of the entry into force of the 2003 WADA Code before the Torino Olympic Winter Games in 2006, the IOC adopted Anti-Doping Regulations applicable to each edition of the Games. These Anti-Doping Regulations incorporate the substantial and procedural provisions of the WADA Code with adaptations necessary to meet the particular conditions of the Olympic Games.⁴¹

The IOC Anti-Doping Regulations exclusively apply to a specific edition of the Olympic Games, for example, the “IOC Anti-Doping Rules applicable to the XXIV Olympic Winter Games Beijing 2022.”⁴² These Rules are based on the “Model Major Events Organizations Anti-Doping Code” issued by the WADA.⁴³ The IOC Anti-Doping Rules implement the whole of the WADA Code with, however, some remarkable specific features which are in line with the requirements of the WADA Code.

While the IOC remains the Anti-Doping Organization responsible under the WADA Code, in 2018, for the first time, it delegated some of its responsibilities related to doping control to the predecessor of the “International Testing Agency” (ITA) which itself became fully operational in 2019.⁴⁴ According to a contract between the IOC and the ITA, the Agency is in charge of the test distribution planning, the therapeutic use exemptions, doping control, and result management. The ITA will carry out doping-testing and the results management on behalf of the IOC.

41. Int’l Olympic Comm. [IOC], *supra* note 34, at 4.

42. Int’l Olympic Comm. [IOC], *Anti-Doping Rules applicable to the XXIV Olympic Winter Games Beijing 2022*, at 3 (Nov. 2021).

43. World Anti-Doping Agency, *2021 Model Rules for Major Event Organizations*, at 6 (June 2020).

44. Discussed in Section III.3.d

Furthermore, in case an anti-doping rule violation is asserted, the ITA will file an application to the Anti-Doping Division of the CAS (ADD) in the name of the IOC. The CAS ADD also became operational in 2019 and will be present at the venue during the Games.⁴⁵

With those features, the IOC acts as the forerunner of a new policy in the fight against doping. With the establishment of the ITA and, in parallel, the creation of the CAS ADD by the ICAS (both initiated by the IOC) independent institutions were made available to conduct all aspects of doping control, including result management, and to serve as the first-instance doping hearing panel, according to Article 8 of the WADA Code in lieu of the respective IOC and IFs.

6. *Dispute Settlement by the CAS, Code of Sport-related Arbitration*

Also the Code of Sport-related Arbitration⁴⁶ is included in the realm of Olympic Law. Rule 61.2 of the OCh provides:

“Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sport-related Arbitration.”

IOC regulations, in particular the Anti-Doping Regulations, more specifically establish the CAS as a dispute settlement institution, either as second-instance appeals arbitration or, only recently, as first-instance adjudication.⁴⁷

7. *Other instruments issued by the IOC*

For each edition of the Olympic Games, the IOC constantly issues a large number of regulations, guidelines, rules of procedure, protocols, and other documents related to rules of the OCh. These include Media Guides, Protocol Guides, the Rule 50 Guidelines and many more.⁴⁸

8. *Extension of the Olympic Charter on the IFs, the NOCs, the OCOGs and Host Cities*

Rule 1.4 of the OCh generally extends the applicability of the OCh and the “decisions of the IOC” (which include all legal acts adopted by the

45. Int'l Olympic Comm. [IOC], *supra* note 42, at 29; discussed in Section III.3.e.

46. Court of Arbitration for Sport, *supra* note 22, at S1.

47. Int'l Olympic Comm. [IOC], *supra* note 42, at 9.

48. *See generally IOC Documents*, INT'L OLYMPIC COMM. (2021), <https://olympics.com/ioc/documents/international-olympic-committee>.

IOC) to all members of the Olympic Movement.⁴⁹ More specifically, in respect to the IFs, Rule 25.2 of the OCh provides that

“[t]he statutes, practice and activities of the IF within the Olympic Movement must be in conformity with the Olympic Charter, including the adoption and implementation of the [WADA Code] as well as the Olympic Movement Code on the Prevention of Manipulation of Competitions.”

According to the wording of that provision, the statutes and regulations of the IFs must be in conformity only with the OCh, the WADA Code, and the Anti-Manipulation Code.⁵⁰ That obligation pertains, as the Ethics Code forms an integral part of the OCh, to the whole set of integrity rules but not to other regulations of the IOC such as the Anti-Doping Regulations. That is consistent because the IFs, as signatories of the WADA Code, implement that Code in their own Anti-Doping Regulations.⁵¹

However, these parts of the IOC rules and regulations are mandatory for the IFs only to the extent of their activities “within the Olympic Movement,” i.e., at or in connection with the Olympic Games. Beyond that sphere of application, the IFs govern their respective sports independently but, with identical rules.⁵²

Except for the general provision of Rule 1.4 of the OCh, there is no specific provision that expressly binds the NOCs to comply with the OCh. According to Rule 27.2.2 and 27.2.8 of the OCh, the NOCs must “ensure the observance of the Olympic Charter in their countries” and adopt and implement the WADA Code.

The OCOGs and the Host Cities are bound by the Host City Contract, according to Rules 35 and 36 of the OCh. The Host City Contracts⁵³ are concluded, on the one hand, between the IOC and, on the other hand, the elected Host City, the NOC of the applicable country, the OCOG, as well as the local, regional, state or national authorities in the country. The Contracts must stipulate (amongst technical details) the adherence to the OCh and the IOC regulations.

49. Int'l Olympic Comm. [IOC], *Olympic Charter*, *supra* note 1, at 16.

50. Int'l Olympic Comm. [IOC], *Olympic Movement Code on the Prevention of Manipulation of Competitions* (adopted by the IOC Executive Board in December 2015).

51. Discussed in Section II.3.b.

52. Discussed in Section II.9.

53. Contract between the Tokyo Metropolitan Government, the Japanese Olympic Committee and the International Olympic Committee, signed in 2013.

9. *Extension of the IOC law to non-Olympic matters*

As the Olympic Games represent a major event in world sports, the rules and regulations established by IOC, as a matter of fact, also apply in the non-Olympic framework. It would not make sense to exercise sports and organize events outside Olympic Games, by the IFs, under different rules and conditions.

III. THE WORLD ANTI-DOPING CODE

The WADA Code constitutes the second pillar of international sports law. The foundation of the World Anti-Doping Agency in 1999 was the result of various international conferences convened by the IOC with the aim of creating anti-doping rules applicable globally in all countries for all sports. The WADA is a foundation under Swiss law with its legal seat in Lausanne and its headquarters in Montreal, Canada.

The WADA Code was adopted by the second World Conference on Doping in Sport at Copenhagen on March 5, 2003 and became effective on the eve of the 2006 Olympic Winter Games in Torino. Since then, the WADA Code represents the single and uniform set of anti-doping rules for all sports with global application. The original 2003 WADA Code has been amended by the 2009 and 2015 WADA Codes and was replaced by the 2021 WADA Code⁵⁴ as of January 1, 2021.

1. *Legal Nature of the WADA Code*

As set forth by Article 23.1.1, the WADA Code was signed and is binding upon various categories of sports organizations, including the IOC, the IFs, the NOCs, the Major Event Organizations (MEOs), the National Anti-Doping Organizations (NADOs), and others which became “signatories” of the Code. Beyond the sports organizations, the States are involved too. According to Articles 22 and 22.1 of the 2021 WADA Code,⁵⁵ the governments are committed to the WADA Code through the intermediary of the International Convention against Doping in Sports adopted within the framework of the UNESCO in 2005 (“UNESCO Convention”).⁵⁶

54. World Anti-Doping Agency, *World Anti-Doping Code 2021*, WADA (Jan. 1, 2021), https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf.

55. Article 22 of the 2003 version of the WADA Code was differently worded in order to first create the involvement of states. *Id.* at 139.

56. Int'l Convention Against Doping in Sport, *supra* note 29; discussed in Section III.4.

The WADA Code, although mandatory for the signatories, is not directly applicable; it does not establish rights and obligations for the athletes and other individuals. It rather obliges, according to Article 23.2.1, the signatories to implement the Code within the statutes and regulations governing their particular realm of sports-related activities. The signatories are bound to enact “Code-compliant” anti-doping rules for their particular areas of responsibilities.⁵⁷ Only those anti-doping regulations directly apply to the athletes and other persons concerned under the jurisdiction of each of the signatories. In accordance with Article 21.1.1 of the WADA Code, it is the athlete’s responsibility “to be knowledgeable of and comply with all applicable anti-doping policies adopted pursuant to the Code.”

That provision clearly refers to the anti-doping rules adopted by the signatories in accordance with Article 23.2.1 of the Code.

As a result, the IOC, the IFs, and other sport governing bodies abandoned their individual anti-doping rules in favor of almost uniform Code-compliant anti-doping regulations which mainly copy the rules of the WADA Code with organizational adaptations necessary to meet the requirements of the particular signatory. Thus, the aim of the WADA Code to establish a universally applicable anti-doping law was achieved by the core of anti-doping rules, which are uniform both in substance and procedure. Article 23.2.2 of the Code lists a great number of Articles of the Code which must be implemented without changes.⁵⁸

By way of this two-step law-making process, which is comparable to, but more stringent than, law-making through directives and implementing domestic laws of the Member States within the European Union, the IFs, and other signatories created harmonized and uniform law.

2. *The Elements of the WADA Code*

Over time, under the auspices of the WADA, the anti-doping law expanded into an elaborated web of various kinds of rules which, by way of providing detailed regulations for the application of the Code itself, aim at utmost uniformity and procedural and legal certainty.

a. The WADA Code

As set out in its “Introduction”:

57. World Anti-Doping Agency, *World Anti-Doping Code 2021*, *supra* note 54, at 145; discussed in Section III.3.

58. *Id.*; discussed in Section III.3.c (3).

“Part One of the Code sets forth specific anti-doping rules and principles that are to be followed by organizations responsible for adopting, implementing or enforcing anti-doping rules within their authority....”

These Anti-Doping Organizations (ADO) include the IOC, the IPC, the IFs, the NOCs, the NPCs, Major Event Organizations (MEO), and the National Anti-Doping Organizations (NADOs).

Part One on “Doping Control,” which constitutes the core of the WADA Code in Articles 1 through 17, (i) provides the definition of the various anti-doping rule violations, (ii) establishes the burdens, standards and methods of proof for these violations, (iii) stipulates the conditions for listing prohibited substances and methods in the WADA Prohibited List, (iv) sets out rules on doping testing and investigation, (v) provides for fundamental rules related to laboratory analysis, (vi) provides rules for the results management, including the decision on the anti-doping rule violation, to be followed by the ADOs, and (vii) establishes the right to, and conditions for, a fair doping hearing following the results management decision. Detailed rules on sanctions and the right to appeal from doping-related decisions before national independent tribunals or the CAS follow.

According to Article 1 of the WADA code, “doping” is defined as the occurrence of one or more of the eleven “anti-doping rule violations” set forth in Article 2:

- Art. 2.1: the presence of a prohibited substance or its metabolites or markers in an athlete’s sample
- Art. 2.2: the use or attempted use by an athlete of a prohibited substance or prohibited method
- Art. 2.3: evading, refusing or failing to submit to a sample collection by an athlete
- Art. 2.4: three whereabouts failures within twelve months by an athlete
- Art. 2.5: tampering or attempted tampering with any part of doping control by an athlete or other person
- Art. 2.6: possession of a prohibited substance or a prohibited method by an athlete or athlete support personnel
- Art. 2.7: trafficking or attempted trafficking in any prohibited substance or prohibited method by an athlete or other person
- Art. 2.8: administration or attempted administration of any prohibited substance or prohibited method by an athlete or other person to an athlete
- Art. 2.9: complicity or attempted complicity by an athlete or other person involving a doping offence or a participation in sports during a period of ineligibility committed by another person
- Art. 2.10: prohibited association by an athlete or other person with any athlete support person who is sanctioned for a doping offence

- Art. 2.11: threatening or intimidating another person by an athlete or other person in order to discourage or retaliate against reporting to authorities.

In the meantime, the various elements of these doping offences are clarified by the abundant case-law of the CAS and other adjudication bodies.⁵⁹

Parts Two, Three and Four of the Code contain provisions on doping-related education and research, on the roles and responsibilities of the signatories of the Code and the athletes and other persons concerned as well as the governments, and on acceptance, compliance, modification, and interpretation of the Code.

Most of the articles of the Code are annotated by Comments which, according to Article 26.2 of the Code, “shall be used to interpret the Code.”

b. The International Standards

For different doping-related technical and operational areas, the WADA adopted International Standards (IS). They aim at harmonization amongst the ADOs in execution of the WADA Code. According to the introduction to the WADA Code, “adherence to the International Standards is mandatory for compliance with the Code.”

This means that through the intermediary of the Code, the IS are legally mandatory. The IS are intended to complement particular rules of the Code in more detail. In contrast to the Code itself, the IS are adopted and regularly revised by the WADA Executive Committee outside the procedure for amending the Code. Eight IS have been adopted so far.

Today, IS exist for all key areas of the WADA Code. The majority of them were updated in line with the 2021 WADA Code while two new IS became effective with the new edition of the WADA Code on January 1, 2021, i.e., the International Standard for Education and the International Standard for Results Management.⁶⁰

59. The doping offences under Articles 2.1 through 2.11 of the WADA Code, including the Burden and standard of proof, are analyzed by Taylor and Lewis. ADAM LEWIS & JONATHAN TAYLOR, *SPORT: LAW AND PRACTICE* 739-910 (Bloomsbury Professional ed.) (2021).

60. See generally FEI Clean Sport, *WADA Code & International Standards 2021: Summary of Significant Changes*, FEDERATION EQUESTRE INTERNATIONALE (Apr. 20, 2020), available at <https://inside.fei.org/system/files/Summary%20of%20significant%20changes%20WADA%20Code%20and%20Standards%202021.pdf>.

(1) *The WADA Prohibited List*

The most well-known IS is the Prohibited List⁶¹ which, according to Art. 4.1 of the WADA Code, is published at least annually and must be given effect by the ADOs under their anti-doping regulations. The Prohibited List identifies the prohibited substances and the prohibited methods classified by different categories, and thus forms the core of the various anti-doping rule violations under the Code. The Prohibited Lists are published by end of September of each year and apply as of January 1 of the following year. Compared to its predecessors, the 2021 Prohibited List underwent major changes and has been redesigned in a new format to improve the usability for the athletes and their support personnel.

(2) *International Standard for Testing and Investigation (ISTI)*

The ADOs conduct testing and investigations to obtain analytical and other evidence of the athletes' compliance or non-compliance with the WADA Code's prohibition of certain substances and methods, and anti-doping rule violations in accordance with Article 5 of the WADA Code. As authorized in Articles 5.3.2, 5.4.1, 5.5, and 5.7 of the WADA Code, the ISTI⁶² provides detailed rules on planning and conducting testing, notification of sample collection to the athletes, conducting sample collection, maintaining the integrity and identity of the samples taken, and the transport of samples to the laboratory. Some of the areas previously covered by the ISTI have been relocated to the new ISRM.⁶³

(3) *International Standard for Laboratories (ISL)*

The ISL provides detailed requirements to be met by the WADA accredited laboratories to ensure the production of valid analytical results and evidentiary data. Compliance by the laboratories with the ISL is specifically related to the burden and standard of proof under Article 3 of the WADA Code. According to Art. 3.2.2 of the WADA Code, laboratories are presumed to have conducted the whole procedure of the sample analysis in accordance with the ISL. However, pursuant to Article 3.2.3 of the WADA Code, athletes may rebut this presumption by establishing that a departure from the ISL occurred which could have reasonably caused a positive analytical result. Then, the burden of proof shifts back to the ADO

61. World Anti-Doping Agency, *World Anti-Doping Code: International Standard Prohibited List* (Jan. 1, 2023).

62. World Anti-Doping Agency, *World Anti-Doping Code: International Standard Testing and Investigations* (Jan. 2021).

63. Discussed in Section III.2.b (8).

which must prove that such departure did not cause the positive result. According to Article 3.2.3 of the WADA Code, the same mechanism applies to departures from any other IS.

The 2021 edition of the ISL,⁶⁴ which is referred to in Articles 6.4, 6.6 and 6.7 WADA Code, sets out technical and logistical requirements for laboratories in order to produce valid results. To that end, the ISL also includes the conditions for obtaining, maintaining, or revoking the WADA accreditation and operating standards for the laboratory operation. In particular, the ISL includes the requirements for security and the A- and B-sample confirmation as well as a code of ethics. Further details are outlined in related Technical Documents.⁶⁵

(4) *International Standard for Therapeutic Use Exemptions (ISTUE)*

Also of pivotal importance for an anti-doping rule violation related to prohibited substances or methods is the possession or non-possession of a therapeutic use exemption (TUE). According to Art. 4.4.1 of the WADA Code, no anti-doping rule violation based on prohibited substances or methods is given if the situation is consistent with the provision of a TUE and refers to the ISTUE. The ISTUE⁶⁶ ensures that the process of granting TUEs is harmonized across sports and countries and provides for rules on applying for and obtaining a TUE as well as for the recognition of a TUE and the review of TUE decisions by the WADA.

(5) *International Standard for the Protection of Privacy and Personal Information (ISPPPI)*

The anti-doping law and procedures have a deep impact on privacy and personal data of the athletes and other persons concerned. Art. 14 of the WADA Code provides detailed rules related to collecting, storing, processing, and disclosing personal information and, in Art. 14.6, refers to the IS, in general, and, specifically, to the ISPPPI. Regarding the “Whereabout” information to be delivered by the athletes, Art. 5.6 of the WADA Code refers specifically to the ISPPPI. To comply with the General Data Protection Regulation of the EU, the 2021 edition of the ISPPPI was seriously amended.⁶⁷ The ISPPPI focuses on proportionate data processing,

64. World Anti-Doping Agency, *World Anti-Doping Code: International Standard for Laboratories* (2021).

65. See World Anti-Doping Agency, *infra* note 80.

66. World Anti-Doping Agency, *International Standard for Therapeutic Use Exemptions* (Oct. 2020).

67. World Anti-Doping Agency, *International Standard for the Protection of Privacy and Personal Information* (Sept. 24, 2020).

disclosure and security of personal data, and retention regarding the biological passport.

(6) *International Standard for Code-Compliance by Signatories (ISCCS)*

The WADA monitors the compliance with the WADA Code, including the IS,⁶⁸ and the UNESCO Convention, by the signatories in accordance with Articles 23.3 and 24.1 of the WADA Code. The signatories are obliged to report on their compliance. The ISCCS⁶⁹ provides detailed rules which ensure that “Code-compliant” anti-doping rules are consistently and effectively applied and enforced, so that clean athletes can have confidence in fair competition and a level playing field, and public confidence in the integrity of sports can be maintained. The monitoring of Code-compliance has evolved into the main legal procedure in order to sanction doping-related misconduct of ADOs, laboratories, and other sports organizations as shown by the events at the 2014 Sochi Games.⁷⁰

For that purpose, the ISCCS provides for the responsibilities and procedures of various bodies involved in the WADA compliance monitoring system and supports the signatories to ensure compliance. Particularly important is that the CAS is the sole authority to hear and adjudicate on compliance as well as determine consequences and sanctions. The CAS alone has the authority to impose sanctions for non-compliance on a signatory of the WADA Code.

(7) *International Standard for Education (ISE)*

The ISE⁷¹ is a new IS and, based on Article 18.1 of the WADA Code, complements Article 18 of the WADA Code on education. The ISE establishes mandatory standards and principles rather than contents and details. Chiefly, the athletes must receive anti-doping education tailored for the local cultural and sporting environments, while the NADOs and the IFs are responsible for education plans within their areas of responsibility.

68. Discussed in Section II.2.b

69. World Anti-Doping Agency, *World Anti-Doping Code: International Standard Code Compliance by Signatories*, (Jan. 2021).

70. *World Anti-Doping Agency v. Russian Anti-Doping Agency*, Ct. of Arb. for Sport, CAS2020/O/6689 (2020).

71. World Anti-Doping Agency, *World Anti-Doping Code: International Standard for Education* (2021).

(8) *International Standard for Results Management (ISRM)*

The most recent IS is the ISRM⁷² adopted in November 2019 by the WADA Executive Committee and became effective as of January 1, 2021, together with the 2021 WADA Code. The ISRM is an example for the law-making process within the WADA: since October 2014, the matter was dealt with in the non-mandatory *Results Management, Hearings and Decisions Guidelines*.⁷³

With the 2021 WADA Code, the results management was profoundly amended. The results management process which was, and still is, governed by Article 7 of the WADA Code, now extends to the hearing process, set forth in Article 8 of the WADA Code, and, as a last step, the right to appeal in Article 13 of the WADA Code, which includes two stages: the *pre-adjudication phase* and the *adjudication phase*. While the sparse provisions on the hearing previously contained in Article 8 underwent no substantial amendments, Article 7 of the WADA Code has been changed fundamentally.

According to Article 7,

“a process designed to resolve anti-doping rule violation matters in a fair, expeditious and efficient manner”

is established by Articles 7, 8, and 13 of the WADA Code. Article 7 acknowledges that each ADO “is permitted” to implement its own results management process which, however, must respect the principles set forth in Article 7. For that purpose, the processes established by the ADOs

“shall at a minimum meet the requirements set forth in the International Standards for Results Management.”

In the same way, Article 8.1 of the WADA Code, as a minimum standard, provides for

“a fair hearing within a reasonable time by a fair, impartial and operationally independent hearing panel in compliance with the International Standard for Results Management.”

Based on these authorizations, the ISRM constitutes the most extensive of the IS under substantive and procedural aspects related to the handling and adjudication of doping cases. It complements the whole range of Article 2 through 15 except for Article 4 (the Prohibited List) and Article 6 (laboratory analysis) of the WADA Code and, thus, provides for detailed rules applicable to the results management process.

72. World Anti-Doping Agency, *World Anti-Doping Code: International Standard Results Management* (2021).

73. World Anti-Doping Agency, *ISTI: Guidelines for Implementing an Effective Testing Program* (Oct. 2014).

That process, according to the definition contained in Article 3.1 of the ISRM, encompasses the timeframe between the notification of an adverse analytical finding, i.e., a positive result, or other indications of a doping offence through the “charge,” i.e., the decision that a doping offence was committed, “until the final resolution of the matter, including the end of the hearing process at first instance or on appeal.” Generally, the whole result management procedure is confidential and must be terminated within six months.

With the ISRM in force, from January 1, 2021 onwards, the provisions of the Code on doping control are accompanied and completed by International Standards in this order: the Prohibited List, the ISTI, the ISL the ISTUE, the ISRM, and the ISPPI.

Though the ISRM including its annexes is “mandatory” pursuant to its own Article 1.0 and Article 3.7.6, a departure from the ISRM only “may give rise to compliance consequences under the (ISCCS)” but

“shall not invalidate analytical results or other evidence of an anti-doping rule violation and shall not constitute a defense to an anti-doping rule violation, except as expressly provided for under Code Article 3.2.3.”

Like the WADA Code itself, the ISRM is annotated by Comments which, by virtue of its Article 3.7.3, “shall be used to guide its interpretation.” As a general rule of interpretation, Article 3.7.2 of the ISRM sets forth that the ISRM

“shall be interpreted and applied in the light of the principle of proportionality, human rights, and other applicable legal principles.”

In conformity with Articles 7, 8, and 13 of the 2021 WADA Code, the ISRM subdivides the result management into two major parts: *pre-adjudication phase* (Articles 5 through 7 of the ISRM) and *adjudication phase* (Articles 8 through 10 of the ISRM) and provides for mandatory requirements to be complied with by the ADOs acting as *Results Management Authorities* (RMAs) in a particular case.

(a) Pre-adjudication phase

For the pre-adjudication phase, Article 5.1 of the ISRM sets forth detailed provisions for the initial review of a positive analysis result which reviews whether a TUE has been granted or a departure from the ISL occurred that could have caused the positive result, or whether the positive result was caused by the ingestion of the prohibited substance through a permitted route. Article 5.1.2 of the ISRM specifies the elements of the notification to the athlete, including but not limited to the right to the opening of the B-sample and the right to provide an explanation. With

respect to the scheduling and conduct of the B-sample, the ISRM grants more rights and options than before to the athletes.

Furthermore, Article 5.2 of the ISRM establishes requirements applicable to atypical findings, such as when the laboratory results need further investigation, or to other potential doping offences, such as whereabouts failures or findings on the athlete's biological passport. Article 6 of the ISRM provides detailed requirements for the notification of the mandatory provisional suspension or related to an optional or voluntary suspension.

If, after receipt of an explanation by the athlete or after the expiry of the deadline to provide such explanation, the RMA maintains that a doping offence was committed, the RMA shall promptly charge the athlete with that anti-doping rule violation. Article 7.1 of the ISRM sets out the elements of such a "letter of charge" in details, in particular regarding the right to a hearing.

(b) Adjudication phase

The adjudication phase of the results management process consists of the hearing process and the decision emanating thereof. Compared to the sparse rules in Article 8 of the 2015 WADA Code on the right to a fair hearing, Article 8 of the 2021 WADA Code and the implementing Article 8 of the ISRM establish detailed provisions on the first instance hearing process which considerably improves the process and takes into consideration the rights of the athletes. Ultimately, the conditions set forth in the ISRM related to the adjudication phase significantly develop and enhance the legal standards of resolving doping-related disputes from the first-instance adjudication and onward.

The ADOs

"shall confer jurisdiction on hearing panels to hear and determine whether an athlete ... has committed an anti-doping rule violation and, if applicable, to impose the relevant consequences."

Hereafter, the RMA acts as a party to the proceedings and the ADO may delegate that task to a third party, such as the ITA.⁷⁴

The hearing panels must consist of "a wider pool of panel members" with "anti-doping experience, including legal, sports, medical and/or scientific expertise." The relevant rules of the ADOs

74. World Anti-Doping Agency, *World Anti-Doping Code: International Standard Results Management*, *supra* note 72, at 31; discussed in Section III.3.d.

“shall provide for an independent person or body to determine in their discretion the size and composition of a particular hearing panel to adjudicate an individual case.”

This provision, at least, opens the avenue for a regime where the particular panels were to be appointed by an independent third person or institution. However, according to the comment to Article 8.2, “the independent person may be a designated chairperson of the pool.” Such a system seems to be the one regularly chosen by the ADOs.⁷⁵ Upon appointment, the designated panel members must sign a declaration of independence and the parties may challenge an appointed panel member.

The hearing panels, under the rules of the ISRM, can, and most likely will, be established within the framework of the ADOs, in particular the IFs. However, in accordance with Articles 8.6 and 8.7 of the ISRM, the ADOs

“shall guarantee the operational independence” of the hearing panels and “provide adequate resources to ensure that hearing panels are able to fulfill their tasks efficiently and independently...”

As a matter of fact, the institutional requirements set forth in Articles 8.1 through 8.7 of the ISRM, were met by the Anti-Doping Hearing Panel set up by the IBU⁷⁶ in 2008 and operational until 2019 as a forerunner of independent hearing panels of IFs. The same applies to the Integrity Units recently established by the WA (formerly known as the IAAF) and the IBU in 2019. The Athletics Integrity Unit is completed by a Disciplinary Tribunal of the WA⁷⁷ whereas the IBU delegated its power to first instance adjudication to the CAS ADD.⁷⁸

Article 8.8 of the ISRM sets out the following minimum principles for the hearing process: the hearing must be fair, impartial, and independent; the hearing must be accessible and affordable and must be conducted within a reasonable time. In addition, the athlete has the following rights: to be informed of the asserted doping offence, to be represented by counsel, to have access to and to present evidence, to present written and oral submissions, to call and examine witnesses, to request an interpreter at the

75. According to Rule 8.1.5 of the Anti-Doping Rules of the IBU as in force until October 2019, the chairman of the IBU Anti-Doping Hearing Panel, which existed from 2008 until 2019, appointed the particular panels for each case; Int'l Biathlon Union, *IBU Rules 2016* at 5-34.

76. *Id.* at 5-33.

77. *World Athletics (WA) Constitution*, arts. 70, 75 (2019); *WA Integrity Code of Conduct* (2019); *Anti-Doping Rules* (2020) and *Athletics Integrity Unit Rules* (2020), *World Athletics Book of Rule*, WORLD ATHLETICS, <https://www.worldathletics.org/about-iaaf/documents/book-of-rules> (last visited Nov. 23, 2022).

78. *International Biathlon Union 2019 Constitution*, arts. 28, 30.2; *International Biathlon Union 2019 Rules* at 01-33, 01-36.

hearing, to be provided a schedule for the course of the hearing, and the right to request a public hearing.⁷⁹

Furthermore, the ISRM, in Article 9, stipulates that, in the panel's decision, the following issues must be addressed and determined: the panel's jurisdiction and the applicable law, the factual background, the anti-doping rule violation committed, the applicable consequences, and the appeal routes and deadlines. The decisions shall be promptly notified by the RMA to the athlete or other persons concerned and other ADOs with a right of appeal (the WADA in particular) and reported to the Anti-Doping Administration and Management system of the WADA (ADAMS).

Article 13 of the WADA Code on appeals from doping-related decisions emanating from the results management has become part of the results management process under the 2021 WADA Code with few changes. Therefore, as authorized by Article 13.1 of the 2021 WADA Code, the ISRM, in Article 10, contains a few principles to be met.

National appeal hearings are governed by Articles 8 and 9.1 of the ISRM and the national hearing institutions must be "fully institutionally independent" from the RMA. With respect to appeals before the CAS, Article 10.3 of the ISRM contains a few rules about the notification of proceedings before and decisions rendered by the CAS.

Annex A and Annex B to the ISRM, which have the same legal nature as the ISRM itself, collect rules that, before 2021, were comprised in the ISTI and now transferred to the ISRM. Annex A provides specific rules for the review on cases of "failures to comply" (i.e., doping offences under Article 2.3 WADA Code—evading, refusing, or failing to submit to sample collection—and Article 2.5 WADA Code—tampering with doping control). Annex B sets forth particular rules related to anti-doping rule violations in the form of "whereabout failures" under Article 2.4 WADA Code.

(c) Guidelines, Model Rules, Technical Documents, Best Practices

Guidelines and models of best practice based in the Code or IS, as well as Technical Documents are adopted and provide solutions in different areas of anti-doping action. According to the "Purpose and Scope of the Code," stated at the beginning of the 2021 WADA Code, guidelines and models of best practice which are based on the Code of IS "to provide solutions in different areas of anti-doping"

79. Mutu and Pechstein v. Switzerland, Case No. 40575/10 & 67474/10, Eur. Ct. H.R. 14 (Oct. 2, 2018), [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-186434%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-186434%22]).

“are recommended by WADA ... to the signatories and other relevant stakeholders, but will not be mandatory.”

Technical Documents, however, are adopted for the implementation of ISs and

“are mandatory for compliance with the Code,”

thus creating a third level of binding rules.

The wide range of those instruments are addressed to the signatories of the WADA Code and, even though not mandatory *per se*, may entail legal effects which depend on their specific aim and content. Generally, they aim at facilitating compliance with, and implementation of the WADA Code and the IS.

(1) *Guidelines*

Guidelines provide the signatories with best practices for various aspects of the anti-doping action and offer technical guidance to the ADOs for the implementation of the anti-doping programs and procedures. Presently, WADA issues Guidelines on a great variety of subjects: privacy protection, information gathering and intelligence sharing, major events, a collaboration between IFs and NADOs as well as between international ADOs, implementing effective testing programs, conducting and reporting doping analysis related to specific aspects such as human growth hormones, blood sample collection, urine sample collection, alcohol testing, sample collection personnel, therapeutic use exemptions, the Athlete Biological Passport, and, together with the ISE guidelines for anti-doping education.

(2) *Technical Documents*

At present, thirteen Technical Documents are in place which apply to various aspects of the sample analysis and reporting as well as the athlete's biological passport.⁸⁰

(3) *Model Rules*

Model Rules issued by WADA, however, have a different quality. Based on Art. 23.2 of the WADA Code, WADA made revised Model Rules available for the signatories to implement the 2021 WADA Code: Model

80. World Anti-Doping Agency, *WADA Technical Documents*, TD2022INDEX (2022).

Rules for the NOCs, the IFs, the Major Event Organizers and NADOs.⁸¹ According to Art. 23.2.2 of the WADA Code, many of the Code provisions must be reproduced without substantive changes, or even verbatim, while other clauses may be amended or reworded in order to fit best to the needs of the signatories. These Model Rules, in principle, reiterate the provisions of the Code.

3. *Implementation of the WADA Code*

According to Article 23.2, the WADA Code (including its related legal instruments) compel the signatories

“to implement applicable Code provisions through policies, statutes, rules or regulations according to their authority and within in their relevant spheres of responsibility.”

Only through the intermediary of the statutes and regulations adopted by the signatories, the WADA law becomes binding and directly applicable upon the athletes and other persons concerned. Article 23.1.1 lists as signatories the IOC and the IPC, the IFs, the NOCs, and the NPCs, as well as the major event organizations and the NADOs.

The “roles and responsibilities” of the various categories of signatories under the WADA Code are clarified in Article 20 of the Code. Article 23.2 of the Code sets out a list of Code provision which must be complemented by the signatories mandatorily and “without substantial changes.”⁸² That list includes the whole of Part One of the Code dealing with doping control with the exception of Articles 5 through 8 (on testing, investigation, laboratory analysis, results management and first-instance hearing⁸³) and Articles 12, 14, and 16 (on sanctions against sports bodies, confidentiality and animals). According to Article 23.2.3, the signatories are encouraged to use the Model Rules recommended by WADA.⁸⁴

Article 24 of the WADA Code provides for detailed rules on the monitoring and, if needed, enforcement of the signatories’ compliance with the Code.⁸⁵

81. World Anti-Doping Agency, *2021 Model Rules*, <https://www.wada-ama.org/en/model-rules-guidelines-and-protocols>.

82. Discussed in Section III.2.c (3).

83. Discussed in Section III.2.b (8).

84. Discussed in Section III.2.c.

85. Discussed in Section III.2.b (6).

a. IOC, IPC, NOCs, and other parts of the Olympic Movement

Articles 20.1, 20.2 and 20.4 clarify the particular responsibilities of the IOC and NOCs as well as the IPC and NPC under the WADA Code. How the WADA Code is implemented by the IOC and, thus, for the Olympic Movement, in its entirety is described above under II. 4, 5, and 8 of this essay.

b. International Federations

Article 20.3 of the WADA Code clarifies the particular responsibilities of the IFs under the WADA Code. How the WADA Code is implemented by the IFs is described above under II. 8 of this essay in relation to their role in the Olympic Games. The relevant anti-doping regulations of the IFs, of course, apply to their non-Olympic activities in the same way.

c. NADOs

Article 20.5 of the WADA Code clarifies the responsibilities of the NADOs under the WADA Code. As signatories of the WADA Code, pursuant to Article 23.1.1, the NADOs must implement the Code. In Germany, implementation is accomplished by the National Anti-Doping Agency (NADA) by adopting a National Anti-Doping Code (NADC) which partly literally reproduces Articles 1 through 21 of the WADA Code in the German language. According to its “Introduction,” the NADC 2021 constitutes “the fundamental, general and binding” legal anti-doping instrument in Germany and the national sports federations and other sports bodies are required to implement the NADC and the IS within their areas of responsibilities, respectively.⁸⁶

Interestingly, in Austria, the implementation of the WADA Code is achieved under a different approach. The “NADA Austria” does not adopt a national anti-doping code; it confines itself to publish a WADA-certified German translation of the WADA Code for informational purposes only. Instead of an Austrian NADA Code, the main rules of the WADA Code are incorporated through a domestic statute: the Federal Act on Combatting Doping in Sports.⁸⁷ The Austrian anti-doping statute also provides the

86. National Anti-Doping Agency Germany, *National Anti-Doping Code 2021*, at 7 (Sept. 2021).

87. ANTI-DOPING BUNDESGESETZ 2021—ADBG 2021 UND ÄNDERUNG DES BUNDESGESETZ SPORTFÖRDERUNGSGESETZES 2017—BSFG 2017 [FEDERAL ANTI-DOPING ACT 2021 AND AMENDMENT TO THE FEDERAL SPORTS PROMOTION ACT 2017] BUNDESGESETZBLATT [BGBl.] I NO. 152/2020, AS AMENDED ON DEC. 23, 2020, https://www-ris-bka-gv-at.translate.google/eli/bgbl/I/2020/152?_x_tr_sl=de&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=sc (Austria).

establishment and functioning of the Austrian NADA and the various, however structurally independent, dispute settlement bodies under its umbrella.

In the U.S., the USADA⁸⁸ is responsible for implementing the WADA Code. That is done mainly through “Protocols” and “Policies” such as the USOPC National Anti-Doping Policy of January 1, 2021.⁸⁹ As of this date, the Rodchenkov Anti-Doping Act is in force and stipulates criminal sanctions for doping offences.⁹⁰

d. International Testing Agency

Beginning in the late 1990s, the IOC launched the WADA with the goal to establish a set of anti-doping rules uniformly applicable to all sports worldwide and to act as an international agency for amending and monitoring compliance with those rules. At that time, the CAS was already available for adjudication in doping-related matters.

However, experience showed that efforts to properly apply the WADA Code may differ between IFs and between other sports governing bodies responsible for the fight against doping. Therefore, in cooperation with the WADA, the IOC took the initiative to take testing and results management (including first instance doping hearing) out of the hands of the responsible sports bodies and outsourced it to an institution independent of the sport governing bodies and other anti-doping institutions.

As a result, the International Testing Agency (ITA) was established as a foundation under Swiss law domiciled in Lausanne in January 2018 and became fully operational in July 2018. The ITA offers management of the anti-doping programs of the international sports federations, major event organizers and any other entity with responsibility in the fight against doping. These anti-doping organizations remain responsible but may delegate the execution of their anti-doping programs to the ITA by way of agreement. Up until the present, a great number of IFs, the IOC, and some other organizations delegated their doping-related responsibilities to the ITA.

88. Implementation of WADA by the USADA is established in the USADA’s bylaws. The United States Anti-Doping Agency, *Bylaws of the United States Anti-Doping Agency*, (Oct. 12, 2017). The USADA is a non-profit organization funded on the basis of the USADA Reauthorization Act of 2021. *See* United States Anti-Doping Agency Reauthorization Act of 2021, S. 585, 117th Cong. (2021).

89. United States Olympic & Paralympic Committee, *National Anti-Doping Policy* (Jan. 1, 2021).

90. Rodchenkov Anti-Doping Act of 2019, Pub. L. No. 116-206, 134 Stat. 998.

In accordance with the definition of *Testing Authority* attached to the WADA Code, ISTI and ISRM, the ADOs

“may authorize a Delegated Third Party to conduct testing pursuant to the authority of and in accordance with the rules of the Anti-Doping Organization. ... The Anti-Doping Organization remains the Testing Authority and ultimately responsible under the Code to ensure the Delegated Third Party conducting the testing does so in compliance with the Requirements of the (ISTI).”⁹¹

More generally, Article 20 of the WADA Code stipulates a large authority to delegate:

“each Anti-Doping Organization may delegate aspects of doping control ... for which it is responsible but remains fully responsible for ensuring that any aspect it delegates is performed in compliance with the Code.”⁹²

and indirectly provides for an obligation of any delegated third party to apply the WADA Code and the IS:

“To the extent such delegation is made to a delegated third party that is not a signatory, the agreement with the delegated third party shall require its compliance with the Code and International Standards.”⁹³

As a result, the ITA, though not signatory, is bound by the WADA law when it acts by the delegation on behalf of an IF, the IOC, or another sporting body.

The ITA executed its functions on behalf of the IOC at the 2021 Olympic Games in Tokyo and the 2022 Winter Games in Beijing.

e. Anti-Doping Division of the Court of Arbitration for Sport

For the first time, the CAS, on an ad-hoc basis, had established an Anti-Doping Division in charge of doping-related disputes arising on the occasion of the Olympic Games 2016 at Rio de Janeiro and, thus, replaced the IOC Disciplinary Commission which was formerly competent for such disputes.⁹⁴ Also, for the Olympic Winter Games 2018 at PyeongChang an Anti-Doping Division was created.⁹⁵ These CAS ADDs acted as first instance authority for doping-related matters.

91. World Anti-Doping Agency, *World Anti-Doping Code: International Standard Testing and Investigations*, *supra* note 62, at 16.

92. World Anti-Doping Agency, *World Anti-Doping Code 2021*, *supra* note 54, § 20.

93. *Id.*

94. Court of Arbitration for Sport: Anti-Doping Division, *Arbitration Rules applicable to the CAS Anti-doping Division* (2016).

95. Court of Arbitration for Sport: Anti-Doping Division, *Arbitration Rules applicable to the CAS Anti-doping Division* (2018).

For that purpose, the IOC Executive Committee delegated its power to decide upon any violation of the WADA Code arising on the occasion of Olympic Games, based on Rule 59.2.4 of the OCh, as a first instance authority. Consequently, the CAS ADD had jurisdiction to apply the Anti-Doping Regulations of the IOC. This occurred in the more general context of removing the anti-doping activities from the IOC, the IFs, and other sports bodies, thus transferring them to independent institutions.

These temporary anti-doping divisions were replaced by a permanent CAS ADD⁹⁶ which became operational as of 2019. It exercises its jurisdiction as the first instance hearing body by delegation from the sports bodies responsible for anti-doping policies. Therefore, the CAS ADD represents a doping hearing body according to Article 8 of the WADA Code and must comply with the WADA ISRM.

Pursuant to A1 of its Arbitration Rules, the ADD

“has been established to hear and decide anti-doping cases as a first instance authority pursuant to the delegation of powers from the International Olympic Committee (IOC), International Federations of sports on the Olympic program (Olympic IFs), International Testing Agency (ITA) and any other signatories of the World Anti-Doping Code (WADAC).”⁹⁷

According to A2 of its Arbitration Rules, the CAS ADD

“has jurisdiction to rule as first instance authority on behalf of any sports entity which has formally delegated its powers to CAS ADD to conduct anti-doping proceedings and impose applicable sanctions.”⁹⁸

In line with its jurisdiction by delegation, the CAS ADD applies the Anti-Doping Regulations of the delegating sports body and thus accomplishes the duty to provide a doping hearing under Article 8 of the WADA Code of those signatories which delegated this task to the CAS ADD. At present, the IOC and some IFs have accepted the CAS ADD as a first instance doping tribunal by agreement.

The CAS ADD, though part of the CAS, operates organizationally independent from other CAS Divisions with a distinct list of arbitrators, under its own Managing Counsel, at a distinct location.

Under particular arbitration rules, the CAS ADD is present at each edition of the Olympic Games⁹⁹ with a special list of arbitrators in order to resolve doping-related disputes within twenty-four hours.

96. Court of Arbitration for Sport: Anti-Doping Division, *Arbitration Rules* (2019).

97. *Id.* at A1.

98. *Id.* at A2.

99. Court of Arbitration for Sport: Anti-Doping Division, *Arbitration Rules Applicable to the CAS Anti-Doping Division, Olympic Games Beijing 2022* (2022).

4. *The Role of Governments in Anti-Doping policies*

In the fight against doping in sports, a remarkable and unique cooperation between the sports governing bodies and State governments has evolved. That cooperation reflects the delimitation of responsibilities between the world of sports and their primary regulatory autonomy, and the overall political responsibility of the State governments. The IOC and the UNESCO joined forces on their way to a global anti-doping policy.

The UNESCO has instituted itself as the global intergovernmental forum responsible for Olympic and top-level sports since its *World Conference of Ministers Responsible for Physical Education and Sports* (MINEPS) 1976 in Paris. The IOC convened the first *World Conference on Doping in Sport* which, in its final *Declaration of Lausanne* of February 2, 1999, called for a worldwide convention against doping.¹⁰⁰ That Declaration led to the foundation of the WADA on November 10, 1999 and, in December 1999, the third MINEPS Conference put an anti-doping convention on the agenda of the UNESCO.

After the Additional Protocol to the *European Convention against Doping* of November 16, 1989 of the Council of Europe was adopted on September 12th, 2002¹⁰¹ and the second *World Conference on Doping in Sport* convened by the IOC and the WADA had approved the WADA Code on March 5, 2003, the fourth MINEPS Conference in December 2004 decided to draw up an international convention. As soon as October 19, 2005, the General Conference of the UNESCO unanimously adopted the *UNESCO Convention against Doping in Sports*¹⁰² which entered into force on February 1, 2007, and includes 191 State parties in 2022, including the U.S., Russia, China, and the European countries.

a. Involvement of governments under the WADA Code

For obvious reasons, States could not become parties to the WADA Code set up by private sports governing bodies. Article 20 of the WADA Code does not define governments as Code signatories. However, according to the Copenhagen Declaration of March 3, 2003 adopted by the second *World Conference on Doping in Sports* with the participation of representatives of governments, the governments shall support the WADA Code and create an international convention in order to implement the Code.

100. World Anti-Doping Agency, *Lausanne Declaration on Doping in Sports* (Feb. 4, 1999).

101. Additional Protocol to the European Anti-Doping Convention, Sept. 12, 2002, E.T.S. No. 188.

102. Int'l Convention Against Doping in Sport, *supra* note 29.

Accordingly, Article 22 of the 2003 WADA Code stated,

“each government’s commitment to the Code will be evidenced by signing a Declaration ... to be followed by a process leading to a convention ... to be implemented as appropriate to the constitutional and administrative contexts of each government.”¹⁰³

As of its 2009 versions, Article 22 of the WADA Code establishes a direct link to the UNESCO Convention which already had become effective in 2007:

“Each government’s commitment to the Code will be evidenced by its signing the Copenhagen Declaration ... and by ratifying, accepting, approving or acceding to the UNESCO Convention.”¹⁰⁴

Article 22 goes on and expresses the expectations of the signatories, that

“Each government should take all actions and measures necessary to comply with the UNESCO Convention....

Each government should respect arbitration as the preferred means of resolving doping-related disputes, subject to human rights and fundamental rights and applicable national law....

Each government should respect the autonomy of a *National Anti-Doping Organization*.”¹⁰⁵

Finally, Article 22.10 of the WADA Code provides that

“Failure by a government ... to comply with the UNESCO Convention ... as determined by the UNESCO, may result in meaningful consequences by UNESCO and WADA as determined by each organization”¹⁰⁶

and Article 23.4.1 of the WADA Code stipulates:

“Compliance with the commitments reflected in the UNESCO Convention will be monitored as determined by the Conference of Parties to the UNESCO Convention following consultation with the State Parties and WADA.”¹⁰⁷

According to that provision, WADA is involved in the surveillance of compliance by governments with the UNESCO Convention as far as it “reflects,” i.e., incorporates, the WADA Code.

103. World Anti-Doping Agency, *2003 World Anti-Doping Code*, art. 22, https://www.wada-ama.org/sites/default/files/resources/files/wada_code_2003_en.pdf.

104. World Anti-Doping Agency, *2009 World Anti-Doping Code*, art. 22.

105. World Anti-Doping Agency *World Anti-Doping Code 2021*, *supra* note 54, arts. 22.1, 22.6, 22.8.

106. *Id.*

107. *Id.* art. 23.

In conclusion, throughout the WADA Code and related legal instruments, close legal connections are established between the WADA Code and the UNESCO Convention.

b. The UNESCO Convention

Beginning with its preamble, the UNESCO Convention displays a close and narrow interrelation with the WADA Code. Most of the definitions given in Article 2 are taken from the WADA Code. Article 3 of the Convention provides:

“In order to achieve the purpose of the Convention, States Parties undertake to:

- (a) adopt appropriate measures at the national and international levels which are consistent with the principles of the Code; ...
- (c) foster international cooperation between State Parties and leading organizations in the fight against doping in sport, in particular with the World Anti-Doping Agency.”¹⁰⁸

Though, according to Article 4 paragraph 2 of the Convention, the WADA Code is not an integral part of the Convention. Articles 4 and 5 express a clear commitment to the “principles of the Code”. Article 4 paragraph 1 provides that

“State Parties commit themselves to the principles of the Code as the basis for the measures provided for in Article 5 ...”¹⁰⁹

and Article 5 paragraph 1 sets forth that

“In abiding by the obligations contained in this Convention, each State Party undertakes to adopt appropriate measures. Such measures may include legislation, regulation, policies or administrative practices.”¹¹⁰

The second part of the Convention, Articles 7 through 12, contains specific obligations for anti-doping activities of the governments at the national level: cooperation with anti-doping organizations and sports authorities, financial support and sanctions for sports and anti-doping organizations, and facilitating doping control. The most relevant is the obligation set forth in Article 8 paragraph 1:

“to adopt measures to restrict the availability of prohibited substances and methods in order to restrict their use in sport by athletes ... These include measures against trafficking to athletes and, to this end, measures to control production, movement, importation, distribution and sale.”¹¹¹

108. See Int'l Convention Against Doping in Sport, *supra* note 29, art. 3.

109. *Id.* art. 4.

110. *Id.* art. 5.

111. *Id.* art. 8.

Pursuant to Article paragraph 2, the States shall “encourage” the sport organizations to adopt measures to prevent and to restrict the use and possession of prohibited substances and methods by athletes. Article 9 extends these obligations beyond the athletes to athletes’ support personnel.¹¹²

c. National anti-doping legislation

Based upon the general commitment set forth in Articles 3, 4, and 5 and the specific obligation under Article 8 of the UNESCO Convention, the States are required and legally bound to enact national anti-doping legislation. In its explanatory statement to the German Federal Anti-Doping Statute of 2015,¹¹³ the German government stated that Germany is bound to implement the UNESCO Convention by public international law. Article 1, paragraph 1 of the Austrian Federal Anti-Doping Act of 2007¹¹⁴ refers to the Convention by stating that the Convention “obliges Austria to support the measures ... laid down by the Convention.”

Essentially, the national anti-doping laws provide for penal provisions which enable the state authorities to prosecute anti-doping violations and impose criminal sanctions¹¹⁵ independent of and in addition to the sports anti-doping organizations under the WADA law. In the U.S., the Rodchenkov Anti-Doping Act of 2019¹¹⁶ introduces criminal sanctions for doping violations.

As a result, in the pyramidal hierarchy of the world-wide anti-doping law, at the foot we recognize domestic legislation of the States in the field of doping. In accordance with binding obligations under public international law emanating from the UNESCO Convention, which establishes the legal link to the WADA Code, domestic law is put into the service of Olympic law which is genuine sports law created by private entities.

112. *Id.* art. 9.

113. Anti-Doping-Gesetz [Act against doping in sport], Dec. 10, 2015, BUNDESGESETZBLATT [BGBl] I at 2210, as amended on Aug. 12, 2021 (Ger.).

114. ANTI-DOPING BUNDESGESETZ 2021—ADBG 2021 UND ÄNDERUNG DES BUNDES-BUNDESGESETZ SPORTFÖRDERUNGSGESETZES 2017—BSFG 2017 [FEDERAL ANTI-DOPING ACT 2021 AND AMENDMENT TO THE FEDERAL SPORTS PROMOTION ACT 2017] BUNDESGESETZBLATT [BGBl] I No. 152/2020, AS AMENDED ON DEC. 23, 2020, https://www.ris-bka-gv-at.translate.goog/eli/bgb/I/2020/152?_x_tr_sl=de&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=sc (Austria).

115. Anti-Doping-Gesetz, arts. 2.3, 4 (Ger.); ANTI-DOPING BUNDESGESETZ 2021, art. 22 (Austria).

116. Rodchenkov Anti-Doping Act of 2019, *supra* note 90.