



Extraterritoriality of the Rodchenkov Anti-Doping Act and Its Impact on the Anti-Doping Regulatory System

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Abstract: The paper examines the Rodchenkov Anti-Doping Act (Rodchenkov Act) and its impact on the World Anti-Doping Agency (WADA). WADA has a dominant status in the field of anti-doping regulation in sport and builds relationships with other actors in sport based on a hierarchy. Maintaining WADA's status as the primary regulator and coordinator of anti-doping activities in sport appears necessary for the further effective development of anti-doping policy and maintaining parity between States in matters of anti-doping activities. However, extraterritorial application of the Rodchenkov Act challenges WADA's position as the universal and exclusive entity responsible for coordinating the fight against doping in sport, and, therefore, this poses threats to the harmonized governance model of the anti-doping system by States. The paper examines the legal aspects of the Rodchenkov Act, its impact on the anti-doping regulatory system and the feasibility of introducing the extra-territorial principle of operation. The authors also analyze the first investigation under the Rodchenkov Act carried out in 2022 and the future prospects of its application. The authors focus on examination of permissibility of extraterritorial provisions of the Rodchenkov Act and the possible implications for the anti-doping system if the Rodchenkov Act is applied extraterritorially.

Keywords: extraterritoriality; Rodchenkov Act; WADA; national anti-doping organizations; World Anti-Doping Code; international law; anti-doping regulations

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I. Introduction

The World Anti-Doping Program is implemented by the World Anti-Doping Agency (WADA) that is a non-governmental organization. Under Art. 22 of the World Anti-Doping Code (the Code), Signatories of the Code expect each government to support the mission of WADA, including by putting in place legislation, regulation, policies or administrative practices for sharing of information, transport of urine and blood samples, etc. However, the adoption of laws criminalizing the use of doping is a measure that a number of states have taken to enhance the prevention of doping in sport.

In the Russian Federation, Art. 230.1 and 230.2 of the Criminal Code of the Russian Federation have been in force since 2016. These provisions introduce differentiated criminal liability for inducing an athlete to use prohibited substances and methods as well as for using prohibited substances and methods against an athlete.¹ The Criminal

¹ Criminal Code of the Russian Federation dated 13 June 1996 No. 63-FZ. (In Russ.).

Code of the Russian Federation establishes various sanctions, including a ban on certain activities, fines and imprisonment, depending on the gravity of the violation and its consequences.

Germany has also introduced an anti-doping law specifying that even in cases of “self-doping” (Selbsdoping), athletes can be prosecuted.²

In this context, the Rodchenkov Anti-Doping Act, as a national act of the United States of America (U.S.) criminalizing doping-related conduct, does not stand out from similar measures taken by other states. Its extraordinariness lies in permissibility of extraterritorial action.

In 2022, the media reported the first case of its application.³ It is therefore relevant to consider the impact of the extraterritoriality principle on the World Anti-Doping Program and its implementation.

II. The Principle of Extraterritoriality/Exterritoriality of Legal Provisions

Extraterritoriality of legal provisions constitutes one of the most important institutions for the application of law. The problem of extraterritoriality received special attention in the doctrine of international law (Usenko, 1996, pp. 13–14) due to the aggressive approach of the U.S. in this area, which in a unipolar world could, in the author’s opinion, lead to negative consequences. The adoption of the Rodchenkov Act in 2020 demonstrates that Usenko’s assumptions were sufficiently valid.

The principle of extraterritoriality takes on significance where the objectives of the law cannot be achieved within the territorial limits of the State’s jurisdiction (Klishas, 2017). Prof. J.A. Meyer of Yale Law School (Meyer, 2010, pp. 123–124) defines the state law as territorial if it prohibits or regulates the conduct or acts of a person that takes place within the borders of that State. In contrast, the law is recognized

² Gesetz gegen Doping im Sport (Anti-Doping-Gesetz — AntiDopG). Available at: <https://www.gesetze-im-internet.de/antidopg/BJNR221010015.html> [Accessed 23.03.2023]. (In Germ.).

³ Law In Sport, “The Okagbare/Lira Doping Case — First Prosecution Under the Rodchenkov Act.” Available at: <https://www.lawinsport.com/topics/item/the-okagbare-lira-doping-case-first-prosecution-under-the-rodchenkov-act> [Accessed 23.03.2023].

as extraterritorial if it regulates acts committed outside the borders of the State, even if committed by citizens of that State. Based on these assertions, the authors conclude that the territoriality distinction in the law focuses on the location of acts or conduct that are expressly controlled by the law, regardless of where any consequences of such acts may occur and regardless of any purpose, intention or motive of the regulation.

The American and French doctrine uses the term “extraterritoriality,” while the Russian doctrine generally applies the term “extritoriality” (Terentieva, 2021). These terms may be identified in the literature, but authors also propose criteria for distinguishing them (Usenko, 1996; Terentieva, 2021). The difficulty in defining a single concept of extraterritoriality and explaining this phenomenon lies in the difficulty of separating such theoretical categories as operation of law, application of law and compliance with law (Usenko, 1996, p. 13). Prof. L.V. Terentieva (2021, p. 192), analyzing approaches to the definition of “extraterritoriality” and “extritoriality” comes to a significant conclusion that “the difference between application of foreign law and manifestation of the extraterritorial prescriptive jurisdiction over a foreign state is that the former occurs with the direct sanction of the State applying the foreign law, while the latter occurs in the absence of sanction of the State against which prescriptive jurisdiction applies.”

In such a case, the theory of international law may raise the problem of the effect of the operation of state sovereignty on the limitation of extraterritorial jurisdiction. State sovereignty should act as a concept precluding uncoordinated interference with the state’s jurisdiction (Marchenko, 2003; Tunkin, 1956; Traynin, 1938).

However, the legal foundations for the prevention of doping in sport are laid by the WADA. WADA is established as a foundation under the Swiss law.⁴ The non-governmental nature of WADA is also underlined in the World Anti-Doping Code. Under Art. 20.7.1 of the Code, WADA’s responsibility is to accept the Code and commit to fulfill its roles and responsibilities under the Code through a declaration approved by

⁴ Constitutive instrument of foundation of the World Anti-Doping Agency. Available at: https://www.wada-ama.org/sites/default/files/resources/files/english_translation_wada_statutes_12_april_2021.pdf [Accessed 23.03.2023].

WADA's Foundation Board. At the same time, Comment 112 to Art. 22 of the Code states that the Code is a private non-governmental instrument.⁵

Thus, WADA, as a legal entity, has no conceptual protection against encroachments by both individuals and States on its sphere of jurisdiction in the form of state sovereignty.

III. The Content of the Rodchenkov Anti-Doping Act (Rodchenkov Act)

The Rodchenkov Act was passed in 2020 in the U.S., but it is referred to as the Rodchenkov Anti-Doping Act of 2019.⁶ The Rodchenkov Act criminalizes violation of anti-doping rules at international sporting events where U.S. interests are represented. The objectives of the Rodchenkov Act are enshrined in its preamble:

- to impose criminal sanctions on persons involved in international doping fraud conspiracies;
- to provide restitution for victims of such conspiracies;
- to require sharing of information with the United States Anti-Doping Agency (USADA) to assist its fight against doping;
- other purposes.

Thus, the text of the Rodchenkov Act does not explicitly mention the purposes that could directly indicate the need for extraterritorial application. The need for extraterritorial application can be indirectly derived from the purpose of restitution for victims of doping conspiracies, as the extraterritorial principle of the Rodchenkov Act has the potential to create broader opportunities for such victims. However, it should be emphasized that the list of purposes is not exhaustive.

Illegality of the conduct is disclosed through Section 3(a) of the Rodchenkov Act. Thus, the Rodchenkov Act prohibits to knowingly carry into effect, attempt to carry into effect, or conspire with any other person to carry into effect a scheme in commerce to influence by use of a prohibited substance or prohibited method any major international

⁵ WADA Code 2021. Available at: https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf [Accessed 23.03.2023].

⁶ Rodchenkov Anti-Doping Act of 2019. Available at: <https://www.congress.gov/bill/116th-congress/house-bill/835/text> [Accessed 23.03.2023].

sports competition. Section 3(b) of the Rodchenkov Act establishes that there is extraterritorial federal jurisdiction over the offence set forth for the conduct, as defined in Section 3(a) of the Rodchenkov Act.

The Rodchenkov Act envisages the following types of consequences for persons who commit doping offences, as described in Section 4 of the Rodchenkov Act. Section 4(a) of the Rodchenkov Act imposes penalties for persons of not more than 10 years of imprisonment, a fine of \$ 250,000 for individuals and \$ 1,000,000 for others. Under Section 4(a(2)) of the Rodchenkov Act, forfeiture of property related to the offence affects real or personal property, as well as tangible and intangible objects. It also provides a criminal sanction and includes deprivation, without compensation, of property rights in that property which is believed to be closely connected to the offence committed.

One of the consequences of the Rodchenkov Act also provides for the restoration of rights to victims of schemes to misuse doping at major sporting events. The remedy in this case is restitution, which is found in both civil and criminal law. The Rodchenkov Act amended the U.S. Code by extending the scope of Para. 3663A that sets out mandatory restitution rules for victims of certain crimes.⁷

Restitution of the rights of victims of criminal offences appears to be a separate issue, a detailed analysis of which is beyond the scope of this paper. It should be noted, however, that national legal systems have a different approach to the definition of the term “restitution” that derives from Roman Law (Tuzov, 2007). In Russian law, restitution is usually understood as a consequence of annulment of a transaction in the form of the mutual return of everything received under the transaction. A significant feature of the restitution under Russian Law reflects the bilateral nature of the consequence in the form of restitution. However, restitution may also be understood as a means of protection consisting of restoration of the situation that existed prior to the offence. Thus, for example, this can be manifested in return of an item to the owner, but generally this is an ordinary claim for damages. Russian law is not

⁷ 18 U.S. Code § 3663A — Mandatory restitution to victims of certain crimes. Available at: <https://www.law.cornell.edu/uscode/text/18/3663A#:~:text=18%20U.S.%20Code%20%C2%A7%203663A,Law%20%7C%20LII%20%2F%20Legal%20Information%20Institute> [Accessed 23.03.2023].

familiar with the remedy in the form of the claim for restitution as applied in common law jurisdiction (Novak, 2010; Tuzov, 2007). Under the provisions of Art. 44 (1) of the Criminal Procedure Code of the Russian Federation, as clarified by the Supreme Court of the Russian Federation, both an individual and a legal entity are entitled to bringing a civil action in a criminal case containing a claim for compensation for property damage, if there are reasons to believe that this damage was directly caused by the crime, and an individual may also claim compensation for moral damage caused to him by the crime.⁸

The U.S. model of restitution for a crime does not include the requirement for compensation for moral damage (losses for “pain and suffering”).⁹ It is worth noting that, while the property status of the defendant must be taken into account when imposing a fine as a type of punishment under criminal law, these circumstances are not taken into account in damage’s compensation. The amount of compensation is determined on the basis of the data collected by the investigating authorities and on the basis of the victim’s testimony as to how the crime has affected him or her.¹⁰ If, in practice, it is too difficult or impossible to determine the amount of compensation, the court may deny the claim,¹¹ but the U.S. courts have demonstrated a loyal approach to dealing with restitution claims, relying on a reasonable assessment in difficult cases (Doyle, 2019, pp. 9–10).

IV. The Need for Adopting the Rodchenkov Act and its Extraterritorial Effect

The need for adopting the Rodchenkov Act is set out in the report of the U.S. House Committee on the Judiciary as follows:

⁸ Criminal Procedure Code of the Russian Federation dated 18 December 2001 No. 174-FZ. Resolution of the Plenum of the Supreme Court of the Russian Federation dated 13 October 2020 No. 23 “The practice of consideration by the courts of a civil action in a criminal case.” *Rossiyskaya Gazeta* (2020), 240, 23 October. (In Russ.).

⁹ See: U.S. Department of Justice, “Restitution.” Available at: <https://www.justice.gov/criminal-vns/restitution-process> [Accessed 23.03.2023].

¹⁰ See: U.S. Department of Justice, “Victim Impact Statements.” Available at: <https://www.justice.gov/criminal-vns/victim-impact-statements> [Accessed 23.03.2023].

¹¹ See: U.S. Department of Justice, “Restitution.” Available at: <https://www.justice.gov/criminal-vns/restitution-process> [Accessed 23.03.2023].

“There is no federal statute that provides explicit, comprehensive protection against doping in international sports competitions. The federal statutory protections that currently exist are limited and criminalizes gambling-related corruption, bribes, kickbacks, money laundering, and other illegal activities... The bill would allow extraterritorial jurisdiction specifically over doping fraud conspiracies linked to international sports events. It will establish criminal penalties for participating in a doping conspiracy in international sport competitions, provide restitution to victims such as athletes, protect whistleblowers from retaliation, and establish coordination and sharing of information with USADA.”¹²

Thus, the Judiciary Committee saw the need for the Rodchenkov Act due to the lack of specific federal legislation in the U.S. for doping cases in international competitions. However, the Judiciary Committee does not focus specifically on the “extraterritorial” principle used and does not provide sufficient legal justification to give the Rodchenkov Act “extraterritorial” effect.

According to the Report of the Judiciary Committee, the so-called “Russian Doping Scandal” was one of the prerequisites for adopting the Rodchenkov Act. “Russian Doping Scandal” related to the allegations derived from the R. McLaren Report of a “doping scheme” in the Russian Federation and the consequences arising from it.¹³ The name of the act is also linked to the name of Grigory Rodchenkov, who in 2016 told the New York Times about the existence of “doping schemes” in the Russian Federation (Ruiz and Schwirtz, 2016). Grigory Rodchenkov’s testimony was one of the main elements of the R. McLaren Report, published in two parts in 2016.¹⁴

¹² Report of the Committee on the Judiciary (to accompany H.R. 835) (The Rodchenkov Anti-Doping Act of 2019). Available at: <https://www.congress.gov/116/crpt/hrpt251/CRPT-116hrpt251.pdf> [Accessed 23.03.2023].

¹³ Report of the Committee on the Judiciary (to accompany H.R. 835).

¹⁴ McLaren Independent Investigation Report — Part I. Available at: https://www.wada-ama.org/sites/default/files/resources/files/20160718_ip_report_newfinal.pdf; McLaren Independent Investigation Report — Part II. Available at: https://www.wada-ama.org/sites/default/files/resources/files/mclaren_report_part_ii_2.pdf [Accessed 23.03.2023].

In particular, the Report of the Judiciary Committee notes that despite the allegations, the Court of Arbitration for Sport (CAS) overturned the International Olympic Committee's (IOC) bans issued against 28 Russian athletes shortly before the start of the 2018 Olympic Games, IOC and WADA subsequently also lifted restrictions imposed on the Russian Olympic Committee and the Russian Anti-Doping Agency (RUSADA) respectively. Such decisions were met with "fierce opposition" from USADA, athletes and others, including G.M. Rodchenkov.¹⁵

The Report of the Judiciary Committee states that in 2018 the Commission on Security and Cooperation in Europe (Helsinki Commission) held a number of meetings. During the summer meeting of the Helsinki Commission, a group of witnesses¹⁶ testified about the current state of anti-doping policy and addressed the following aspects in their testimony: 1) ineffective responses of WADA, IOC, and CAS; 2) the need for stiff criminal penalties and civil remedies for international doping fraud, 3) the deprivation of "clean" athletes of lucrative career opportunities such as sponsorship contracts and many others due to athletes using prohibited methods and substances winning medals at competition; 4) the necessity to protect whistleblowers and ineffective counteraction to doping violations by WADA, IOC and CAS.¹⁷

The final position of the Helsinki Commission, as outlined in the Report of the Judiciary Committee, was that the international sports governing bodies, such as WADA, IOC, and CAS, have failed to address the underlying problems with doping in sport.¹⁸

Another Report by the U.S. Senate Committee on Commerce, Science and Transportation (the Committee on Commerce) noted that according to USADA and athlete representatives, WADA sanctions were not effective enough in the context of countering organized doping, since Russian athletes were still allowed to compete under a neutral

¹⁵ Report of the Committee on the Judiciary (to accompany H.R. 835).

¹⁶ The Chief Executive of USADA, a U.S. Olympian, Russian Olympian Yuliya Stepanova, Chairwoman of the Sports Committee of the German Bundestag and the attorney for Dr. Rodchenkov.

¹⁷ Report of the Committee on the Judiciary (to accompany H.R. 835).

¹⁸ Report of the Committee on the Judiciary (to accompany H.R. 835).

flag, while in their opinion, Russian athletes should have been barred from participating in the postponed 2020 and 2022 Olympics.¹⁹

In this regard, the Report of the Committee on Commerce cites as the primary purpose of the Rodchenkov Act the empowerment of U.S. law enforcement agencies to investigate and prosecute individuals involved in international doping fraud schemes that affect international sporting competitions governed by the Code.²⁰

The reported ineffectiveness of WADA, IOC and CAS should be interpreted to mean that dissatisfaction with the actions of the international sports community has led to independent action on the part of the U.S. The stand-alone measures are expressed, among other things, in giving the Rodchenkov Act extraterritorial effect.

The conditions for accepting the principle of “extraterritoriality” for the operation of national acts are suggested by the Restatement of the Foreign Relations Law of the United States published by the American Law Institute (ALI). The Restatement is said to express the American Law Institute’s view “as to the rules that an international tribunal would apply if charged with deciding a controversy in accordance with international law” (Houck, 1986, p. 1362).

Part IV of the Restatement is intended to resolve conflicting jurisdictional claims between states. For the purposes of limiting the powers of states under international law, the Restatement divided jurisdiction into three types: “jurisdiction to prescribe,” i.e., to make its law applicable to public relations; “jurisdiction to adjudicate,” i.e., to adjudicate in judicial or administrative proceedings in both civil and criminal cases regardless of whether the state is a party to the proceedings; “jurisdiction to enforce,” i.e., the ability to compel execution. Based on Prof. Lowenfeld’s lectures, a system of criteria has been proposed to prevent conflicts between legal systems. The criteria

¹⁹ Report of the Committee on Commerce, Science, And Transportation on H.R. 835 (The Rodchenkov Anti-Doping Act of 2019. Available at: <https://www.congress.gov/congressional-report/116th-congress/senate-report/247/1> [Accessed 23.03.2023]).

²⁰ Report of the Committee on Commerce, Science, And Transportation on H.R. 835.

should ensure the identification of the state most interested in regulating a particular legal issue (Houck, 1986, pp. 1367–1368).

With regard to prescriptive jurisdiction, the Restatement suggested that a state may establish jurisdiction over the activities, interests, status, or relations of its nationals outside as well as within its territory, and also over certain conduct outside its territory by non-nationals which is directed against the security of the state or against a limited class of other state interests.²¹ The limitations to prescriptive jurisdiction are:

- the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

- the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

- the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted.

- the existence of justified expectations that might be protected or hurt by the regulation;

- the importance of the regulation to the international political, legal, or economic system;

- the extent to which the regulation is consistent with the traditions of the international system;

- the extent to which another state may have an interest in regulating the activity;

- the likelihood of conflict with regulation by another state.

The right to exercise prescriptive jurisdiction over the activities, interests, status or relationships of its citizens both within and outside its territory is argued to exist because there is a need for a state to protect its reputation in the international arena (Neuman, 2014). However, it should be noted that the Rodchenkov Act does not quite meet the criteria suggested by the U.S. academic community.

²¹ Restatement (third) of the foreign relations law of the United States § 402(2) (Am. Law Inst. 1987).

Having the criminal law aimed at combating doping is not unusual, but the Rodchenkov Act goes beyond the U.S. own national boundaries and is aimed at combating doping at events outside the U.S. The Rodchenkov Act seeks to regulate the fight against doping in the international sporting field, which is almost entirely within the jurisdiction of WADA, including under international treaties. Given that, WADA is the primary organization responsible for developing and harmonizing anti-doping policy in international sport, this “going outside the box” has a direct impact on the standing and credibility of WADA and the entire international anti-doping system in sport. The U.S. regulation is not in keeping with the tradition of the international anti-doping system, in which the unification and harmonization of anti-doping rules under the control of WADA is of particular importance.

V. The Role and Responsibilities of WADA

As previously noted, WADA is established as a foundation; it is a private entity and it is not protected from intrusion into the jurisdiction defined by the Code. The main instrument for States to recognize and protect WADA is the 2005 UNESCO International Convention against Doping in Sport (the UNESCO Convention).²²

Art. 3 and 14 of the UNESCO Convention stipulate that States Parties are required to foster international cooperation between States Parties and leading organizations in the fight against doping in sport, in particular with WADA, and to support the important mission of the World Anti-Doping Agency in the international fight against doping.

WADA was founded as a non-governmental organization. This means that WADA is independent of governments but has the right to cooperate with them (Kornbeck, 2013). Member States of the UNESCO Convention are required to comply with the Code through ratification of the UNESCO Convention. Notwithstanding this, WADA does not have the authority to compel or discourage States to take anti-doping actions.

²² International Convention against Doping in Sport, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in Paris on 19 October 2005. Available at: <https://www.unesco.org/en/legal-affairs/international-convention-against-doping-sport> [Accessed 23.03.2023].

WADA has also been described as a hybrid organization exercising law-like powers through its links in both the sporting and public spheres while remaining independent. Such a position allows WADA to have more influence than many other non-governmental organizations and to bear less accountability than state organizations (Henne, 2010).

WADA's role and responsibilities are set out in Art. 20.7 of the Code 2021 as the following:

- to accept the Code and commit to fulfill its roles and responsibilities under the Code through a declaration approved by WADA's Foundation Board;

- to adopt and implement policies and procedures which conform with the Code and the International Standards;

- to provide support and guidance to Signatories in their efforts to comply with the Code and the International Standards and monitor such compliance in accordance with Art. 24.1 of the Code and the International Standard for Code Compliance by Signatories;

- to approve International Standards applicable to the implementation of the Code;

- to accredit and reaccredit laboratories to conduct sample analysis or to approve others to conduct sample analysis;

- to submit to the WADA Executive Committee for approval, upon the recommendation of the WADA Athletes Committee the Athletes' Anti-Doping Rights Act which compiles in one place those athletes' rights which are specifically identified in the Code and International Standards, and other agreed upon principles of best practice with respect to the overall protection of athletes' rights in the context of anti-doping;

- to promote, conduct, commission, fund and coordinate anti-doping research and to promote anti-doping education;

- and other.

It is apparent from Art. 20.7 of the WADA Code that WADA has a significant list of functions. As noted in Comment 106 to the Art. 20.7.1 of the Code, WADA cannot be a Signatory because of its role in monitoring Signatory compliance with the Code. Consequently, WADA has a coordinating and monopoly role in the development of doping-free sport. This policy is set out in the WADA Code and other

documents of the World Anti-Doping Program that provide the basis for much of the global effort to combat doping in sport, and specifically in Olympic sports.

While WADA is the world leader in the field of anti-doping, with its dominant and predominant position in how anti-doping policies are formulated and implemented in sport, it must also be guided by the principles of cooperation and compliance. WADA requires Signatories and states to comply with its policies, which also helps to strengthen its position in the international arena as a global authority on anti-doping matters.

However, as has been pointed out by researchers, to a great extent WADA's policy is based on a rather vague set of values and ideals in the field of sport that are too ambitious because WADA or any other organization cannot achieve all of its goals in practice (Dimeo and Møller, 2018).

It seems that this judgement is not fully correct because, with WADA working well with other stakeholders, the stated objectives of the anti-doping policy can be achieved. The global anti-doping policy is indeed developed by WADA, but the implementation of such a policy requires other, supportive actors, such as National Anti-Doping Organizations. The WADA Code defines "National Anti-Doping Organizations" as "the entities designated by each country as possessing the primary authority and responsibility to adopt and implement anti-doping rules, direct the collection of samples, manage test results and conduct results Management at the national level."

WADA shall build relationships with National Anti-Doping Organizations that, in turn, shall implement WADA's policies in conjunction with the International Sports Federations that have signed the Code. A hierarchy of authority exists between WADA and National Anti-Doping Organizations. WADA shall set the main thrusts of anti-doping, and National Anti-Doping Organizations shall implement them and be responsible for the key functions set out in the Code at the national level, including testing and education.

There is a problem with WADA's lack of responsiveness to the voices and opinions of National Anti-Doping Organizations causing a number of difficulties. National Anti-Doping Organizations have

an interest in being involved in shaping anti-doping policy. If their opinion is not taken into account, the consequence is that some National Anti-Doping Organizations comply formally or even feign their compliance rather than innovate in response to local needs and anti-doping implementation contexts (Zubizarreta and Demeslay, 2020). This is a problem because it reduces the level of implementation of anti-doping policy in sport, its effectiveness and the WADA credibility. Consequently, it is necessary to create an environment of interaction where two conditions are met simultaneously — maintaining WADA's authority and role in the international arena and taking into account the opinions of National Anti-Doping Organizations. Compliance with these conditions will create a balance of interaction between WADA and National Anti-Doping Organizations.

However, in addition to working with National Anti-Doping Organizations, effective cooperation with public authorities and law enforcement agencies is also required at the national level to ensure that the objectives are met. Anti-doping activities encompass many aspects (medical support, advocacy, education, investigative measures, etc.). In this regard, a number of countries have adopted their own national laws to enhance anti-doping efforts (Henning and Dimeo, 2017). This certainly highlights the existing relationship between national legislation and international anti-doping regulations.

That said, anti-doping policies for the sporting community may take precedence over national legislation, for example, in countries where substances permitted within the country (drugs or even some recreational drugs) are available but remain prohibited for athletes.²³ Establishing the primacy of international anti-doping rules, on the one hand, allows countries, national sporting organizations and athletes to comply with the Code and, on the other hand, serves to reinforce the primacy of WADA.

In doing so, it is important that WADA ensures that other countries comply with anti-doping rules, including through their national laws.

²³ See, Discussions on the inclusion of cannabis on the WADA Prohibited List: WADA Executive Committee Approves 2023 Prohibited List. Available at: <https://www.wada-ama.org/en/news/wada-executive-committee-approves-2023-prohibited-list> [Accessed 23.03.2023].

However, as a private entity, WADA cannot directly interfere with national legislation or compel states to act. WADA has the power to provide indirect, rather than direct, support from states to exercise its jurisdiction and funding (Kornbeck, 2013).

In this context, it is the model of strict parity between states and WADA's role as an independent arbiter, controlling independent National Anti-Doping Organizations, that ensures the overall coherence of the fight against doping. The fact that generally binding rules, including the rules that compel states to take certain actions, emanate from an independent international actor contributes to the recognition by states of the authority of these rules. It is not a group of states or an individual state, but an independent private entity that has the exclusive authority, and this is what allows states to recognize decisions made by WADA, as the existence of WADA ensures that all states are on an equal footing in matters of anti-doping regulation. WADA's ability to harmonize regulations across all states and apply them uniformly also facilitates the acceptance by states of the anti-doping mechanisms proposed by the Code.

Adoption of the Rodchenkov Act by the U.S., allowing it to encroach on the jurisdiction of other states and the sporting community, could undermine established parity by giving the U.S. special and exclusive powers. The fact that the Rodchenkov Act has been passed with the assertion of extraterritorial effect is a challenge not only to WADA, whose effectiveness is thereby called into question, but also to the agreed equal system of anti-doping.

VI. WADA's Position concerning the Rodchenkov Act

Even before its adoption, the proposed legislation had provoked debate with representatives of the U.S. Government and USADA on the one hand, and WADA, IOC and other sports federations and states, on the other.

WADA's position on the introduction of the Rodchenkov Act is detailed in the WADA Comments on the Rodchenkov Anti-Doping Act

of 2019.²⁴ WADA caveats at the beginning of the Comments that it does not prevent, but encourages governments to protect athletes who are not doping in sport, and applauds governments' desire to impose fair punishment on those who use or facilitate doping. However, WADA has recommended that the principle of extraterritoriality of the Rodchenkov Act be removed.

It is worth noting that in the Comments, WADA does not focus solely on the negative consequences of the Rodchenkov Act, but elaborates on both the promising and threatening aspects associated with its enactment. In the Comments, WADA highlights the following consequences which in the view of the Agency are detrimental:

A. Extraterritoriality

WADA notes that the current global system for regulating doping in sport has been formally accepted by numerous states and stakeholders through accession to the UNESCO Convention or the new version of the Code approved in November 2019. The anti-doping policy framework has been established with the support and active leadership of the U.S. Attempts to criminalize doping activities under U.S. law and then extraterritorial application of the law would undermine the international harmonization of rules, which is crucial to promoting clean sport.²⁵

B. No guarantee of restitution

WADA is concerned that the redress mechanism proposed in the Rodchenkov Act will not be effective as there is no guarantee that foreign governments will cooperate with U.S. public authorities.²⁶

C. Introducing chaotic into the anti-doping regulatory system

WADA believes that the response to the Rodchenkov Act could be the adoption of similar legislation by other states. The trend toward similar laws exposes athletes and sporting organizations (including the

²⁴ WADA's Comments on H.R. 835, The Anti-Doping Act of 2019 S. 259, The Rodchenkov Anti-Doping Act of 2019. Available at: <https://www.sportsintegrityinitiative.com/wp-content/uploads/2020/02/US-Senate-Commerce-Committee-Feb-3.pdf> [Accessed 23.03.2023].

²⁵ WADA's Comments on H.R. 835, The Anti-Doping Act of 2019 S. 259, The Rodchenkov Anti-Doping Act of 2019.

²⁶ WADA's Comments on H.R. 835, The Anti-Doping Act of 2019 S. 259, The Rodchenkov Anti-Doping Act of 2019.

U.S. athletes and organizations) to chaotic and confusing extraterritorial jurisdiction. WADA fears that the new rules and national laws could be used by states as tools to unduly influence each other.²⁷

The current revision of the 2021 Code places special emphasis on the separation of powers and jurisdictions between various Anti-Doping Organizations, e.g., by establishing rules to determine the only Anti-Doping Organization that will conduct in-competition testing (Art. 5.3 of the Code).

D. Creating problems for whistleblower interaction

WADA is concerned about the effect that the Rodchenkov Act may have had on handling whistleblowers, as a careful, considerate and thoughtful approach is required in this regard. WADA notes that certain benefits need to be given to whistleblowers and the interest of whistleblowers, usually involved in doping cases, is to mitigate the consequences of anti-doping rule violations. In addition, enforceability of the cooperation agreement is compromised if several states have competing rules.

As evidence of the effectiveness of its work in this area, WADA cited specific examples of its major investigations initiated by whistleblowers.

WADA's updated Code 2021 also introduced an additional Eleventh Anti-Doping Rule Violation aimed at protecting whistleblowers.

Throughout 2020, WADA made statements regarding the Rodchenkov Act, urging the U.S. government to address the criticisms.²⁸ Following the passage of the Rodchenkov Act, WADA reiterated that "unilaterally exerting U.S. criminal jurisdiction over all global doping activity, the Act will likely undermine clean sport by jeopardizing critical partnerships and cooperation between nations."²⁹ WADA has also questioned why extremely popular and influential professional sports

²⁷ WADA's Comments on H.R. 835, The Anti-Doping Act of 2019 S. 259, The Rodchenkov Anti-Doping Act of 2019.

²⁸ WADA calls on US Senate to consider widely held concerns about Rodchenkov Act. Available at: <https://www.wada-ama.org/en/news/wada-calls-us-senate-consider-widely-held-concerns-about-rodchenkov-act> [Accessed 23.03.2023].

²⁹ WADA statement on U.S. Senate's passage of the Rodchenkov Anti-Doping Act. Available at: <https://www.wada-ama.org/en/media/news/2020-11/wada-statement-on-us-senates-passing-of-the-rodchenkov-anti-doping-act> [Accessed 23.03.2023].

leagues and college leagues originally included in the Rodchenkov Act, were excluded from the scope of the Rodchenkov Act.³⁰

VII. Application of the Rodchenkov Act

Despite considerable public response the Rodchenkov Act has generated, evidence of its use remains sparse, likely due to the pandemic period in 2020–2021.

However, according to media reports, 2022 was the first time a charge under the Rodchenkov Act had been filed.³¹ On 30 July 2021, athlete from Nigeria Blessing Okagbare was suspended from the Tokyo Olympics due to the detection of a prohibited doping substance (recombinant erythropoietin and human growth hormone) in her system.³²

On 12 January 2022, the U.S. Attorney’s Office for the Southern District of New York announced that it had filed criminal charges against Mr. Lira, an entrepreneur who was the owner of Med Sport LLC, a company based in El Paso, Texas that also operated in Mexico. Mr. Lira was charged under the Rodchenkov Act with distributing doping agents to participants in the Tokyo Olympics.

The Athletics Integrity Unit (AIU) decision also included another athlete who had purchased doping substances from Mr. Lira, but his details were anonymized until the AIU decision against athlete from Nigerian Divine Oduduru in February 2023.³³

³⁰ IOC and WADA question why U.S. sport exempt from Rodchenkov Act. Available at: <https://www.reuters.com/article/us-sport-doping/doping-ioc-and-wada-question-why-u-s-sport-exempt-from-rodchenkov-act-idUSKBN27X2O6> [Accessed 23.03.2023].

³¹ Law In Sport, “The Okagbare/Lira Doping Case — First Prosecution Under The Rodchenkov Act.”

³² Decision of the Disciplinary Tribunal. *World Athletics v. Blessing Okagbare*. Available at: https://www.sportresolutions.com/images/uploads/files/220214_-_World_Athletics_v_Blessing_Okagbare_-_Decision_%28Final%29.pdf [Accessed 23.03.2023].

³³ Inside the Games, “Nigerian sprinter Oduduru provisionally suspended after link to Lira doping case.” Available at: <https://www.insidethegames.biz/index.php/articles/1133502/divine-oduduru-provisional-suspension> [Accessed 23.03.2023].

There is no additional information available in the public record to better qualify Mr. Lira's actions and the effect of the Rodchenkov Act. It is likely that Mr. Lira was a U.S. citizen and therefore this example cannot support the extraterritorial effect of the Rodchenkov Act.

However, this example is indicative enough to conclude that the Rodchenkov Act was not a political declaration. Thus, USADA was extremely positive about the first case of investigation under the Rodchenkov Act, highlighting the quality of interaction with the AIU.³⁴ The example of Mr. Lira demonstrated that the Rodchenkov Act is being used by the U.S. public authorities to prevent doping in sport and therefore further extraterritorial action cannot be excluded.

VIII. Conclusion

To sum up, if the criteria proposed by the ALI are taken into account, the relationship covered by the Rodchenkov Act is not entirely consistent with the need for extraterritorial prescriptive jurisdiction.

Firstly, the Rodchenkov Act is inconsistent with the traditions of the international anti-doping system, in which states and the multitude of individuals with an interest in anti-doping have agreed to delegate exclusive and special powers only to WADA as a non-governmental organization.

Secondly, other states, as demonstrated by their adherence to the UNESCO Convention, have a significant interest in regulating this activity in accordance with the principles set out in the Code and under the exclusive direction and control of WADA. In this regard, WADA's role as an organization independent of political interests of states ensures that all states are willing, on an equal footing, to submit to and voluntarily comply with certain requirements of the Code.

Thirdly, a breach of the uniform system of accountability built into the Code could result in a high likelihood of conflict with an accepted system of anti-doping regulation and regulation by another state.

³⁴ Statement from U.S.DA CEO Travis T. Tygart on Eric Lira Investigation Conducted Under the Rodchenkov Anti-Doping Act. Available at: <https://www.U.S.da.org/statement/eric-lira-rodchenkov/> [Accessed 23.03.2023].

However, several years after the passage of the Rodchenkov Act, only one case of prosecution under its provisions has been made public, and it is likely that the extraterritoriality principle did not apply in that case. Further action by the U.S. public authorities can demonstrate whether the extraterritoriality of the Rodchenkov Act was a political declaration intended to highlight U.S. dissatisfaction with WADA, or a rule was intended to be implemented in practice.

Notwithstanding the positive aspects of the Rodchenkov Act highlighted by WADA for U.S. jurisdiction, maintaining the extraterritoriality rule poses potential threats to the anti-doping system. Given the specific nature, role and mission of WADA, it should be noted that the extraterritoriality of the Rodchenkov Act threatens the system of parity established between states through the creation of an independent non-governmental organization with exclusive authority. The adoption by a state of an instrument similar in effect to the Code encroaches on the universal harmonized anti-doping system based on the UNESCO Convention.

It must be emphasized that anti-doping policies require not only the presence and functioning of WADA, but also the support of the entire sporting community and the assistance of states in order to be successfully implemented. WADA's anti-doping policy must be open to implementation by other sports organizations to achieve their own objectives. The credibility of WADA derives from the sports movement and the contribution of governments to the anti-doping ideology promoted by WADA. In such circumstances, it is high time to maintain a system of collaboration between WADA and other actors interested in the fight against doping in sport, to ensure parity among states and to avoid the dilution of the jurisdiction and status of WADA by individual actors in the fight against doping.

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