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EDITORIAL

Dear Readers and Authors,

This is the second issue of our Journal in 2023. Our esteemed authors covered in it most pressing theoretical and practical problems of sports law and *lex sportiva*.

Dimitrios P. Panagiotopoulos analyzes in his study the nature of *lex sportiva* / *lex olympica* — international "unethnical" law, in his terminology — and comes to the conclusion that it is a regulatory system fundamentally different from international sports law. This is a *sui generis* legal order, created by various international nongovernmental sports organizations. The author is convinced that this normative order is in need of an International Sports Constitutional Charter with rules for international sports activities and a special International Sports Court.

Nikolay L. Peshin examines the existing system of sports disputes resolution and the central place the Court of Arbitration for Sport (CAS) located in Lausanne (Switzerland) occupies in it. One of the most problematic aspects of its activities is the non-consensual (compulsory) jurisdiction imposed on athletes by statutory documents of international sports federations. When athletes turn to national courts trying to appeal against unfavorable decisions of the CAS, the former render "political" decisions to keep the *status quo*.

The tremendous task of countering doping in sports attracted the attention of three groups of our authors. Alexander A. Orlov and Anastasia A. Gali trace the history of fighting against doping from rather sporadic efforts undertaken by States in the early 1900s and later and better coordinated activites carried out by the Olympic Movement throughout the 20th century. The modern system to counter doping in sports began to take shape with the creation of the World Anti-Doping Agency (WADA) in 1999 and the adoption of the World Anti-Doping Code in 2003. The authors call it "a unique system" since WADA initiatives are now reinforced by classic international instruments such as the 1989 Anti-Doping Convention adopted by the Council of Europe and the 2005 International Convention against Doping in Sport adopted by UNESCO.

Tuyana V. Norboeva and Larisa I. Zakharova in their research set a goal to find out the content of the four existing criteria that guide the process of including new substances and methods on the Prohibited List by the WADA experts. The authors identify the problems that need to be taken into account in this process. These are the need to make the decision-making procedure in WADA more transparent and the need to resolve the issue of using new technological devices, more specifically nanotechnologies and nanomaterials (technological doping).

Vera V. Tikhonova and Aleksandr A. Mokhov examine in their article the Rodchenkov Anti-Doping Act adopted by the United States Congress in 2019. In their opinion, its extraterritorial application appears to challenge the position of WADA as the universal entity that carries main responsibility for

coordinating the efforts of States and sports organizations in their fight against doping. The results of the first investigation under the Rodchenkov Act carried out in 2022 increased the doubts in the utility and legitimacy of extraterritorial provisions of the Rodchenkov Act.

The legal status of sports stakeholders also provokes interest among the researchers. James A.R. Nafziger argues that the Olympic Charter (with its Fundamental Principles 5 and 6) and international legal acts in the sphere of human rights (the 1951 Convention for the Protection of Refugees and the 1989 Convention on the Rights of a Child, more precisely) should be applicable to reinforce the rights of athletes to be free of political discrimination when the question of their would-be participation in international competition is discussed. This approach can be conducive to the search for solutions to the problems Russian athletes face in order to gain admission into foreign territory for international competition.

Igor V. Ponkin, Alena I. Lapteva examine in their study the content and specificity of the legal status of the sports judges (sports referees) and explain in a detailed manner their functional and instrumental roles throughout the game. The researchers pay special attention to professional rights of sports referees offering a specific taxonomy in this field and reveal problems that exist in the process of recruiting for the positions of sports referees by competent officials.

Ilia Alex. Vasilyev calls for the need to differentiate ethical and disciplinary duties of sports stakeholders. Ethical norms enshrined in the acts of sports federations must meet specific standards of law, at least the general principles of legal certainty and proportionality. Otherwise there remains a high probability that the negative trend to impose disciplinary liability for "disrepute" demonstrated by international sports organizations in 2022, will continue.

In the section "Academic Events" most important developments that took place during the first Central Asian International Legal Forum in January 2023 are highlighted by Vladislav L. Tolstykh. Mostafa Abadikhah, a speaker at the Forum whose report caused an intense discussion, conveys in his article Iran's position on the need to be guided by the straight baselines approach trying to delineate the continental shelf of the Caspian Sea in accordance with the 2018 Aktau Convention. Saitumbar A. Rajabov, another distinguished speaker at the Forum, makes a detailed overview of the main directions of the international legal policy of the Republic of Tajikistan at the present stage.

We hope our coverage of topical issues in the sphere of sports as well as highlights of the Central Asian International Legal Forum will bring some fresh perspectives to your understanding of modern international relations in general.

Larisa I. Zakharova,
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SPORTS DISPUTES RESOLUTION

Article

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Implementation of Lex Specialis in Sports Jurisdiction

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Abstract: The present study sets out the implementation of Lex Specialis in Sports Jurisdiction. It presents an introduction to Sports Law and the rules of Lex Sportiva and Lex Olympica. Following the introduction, this paper presents the concept of Sports Jurisdiction and the competence of the Sport Arbitral Bodies to rule on the constitutionality of the law. Furthermore, this study focuses on the necessity for the establishment of an International Sports Constitutional Charter with special rules for international sports activities and the establishment of a special International Sports Court. Finally, is investigated the application of the Lex Specialis Derogat Legi Generali Principle in Sports Law. In particular, this study points out that Special rules of sports law prevail over ordinary rules of law, according to the general principle of law Lex Specialis Derogat Legi Generali. It is highlighted that Sports Law is not a subcategory of international law, as International Sports Law, but a different kind of law, Lex Sportiva/Olympica. Lex Sportiva/Olympica is an international "unethnical" law, which exists in parallel to the international law. It constitutes a sui generis sports law legal order, imposed heteronomously on the sporting world by various international organizations.

Keywords: Sports law; Lex Sportiva; Lex Olympica; Lex Specialis Derogat Legi Generali; sports jurisdiction

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Contents

I. Introduction to Sports Law

At the international level, Sports Law, or Lex Sportiva, is, in fact, private and non-domestic law that lies out of the legal framework (Panagiotopoulos, 2014a). It is imposed by higher instances and becomes binding and applicable to the parties involved by necessity. Although legal doctrine does not attribute a particular force to Lex Sportiva, it nevertheless internationally constitutes a sui generis sports legal order, since it is imposed on the lower sporting bodies by the higher ones through international sports organizations, and it is characterized by an utmost subjectivity. It nonetheless regulates the relations between people of various countries, who take part in international sports and Olympic events, in a space with no geographic borders, the one of sports competitions, situated outside the legal framework. Some Lex Sportiva rules often include legal rules that govern individual and financial freedoms of the parties involved. This leads to conflicts between Lex Sportiva and the law applying the traditional legal order, as well as with the law established by supranational entities, such as the European

Union. So far, various countries have yet to adopt a uniform approach towards the international sports and Olympic practice. It is so because states are unable or not interested in regulating international sports legal relations (Panagiotopoulos, 2017).

This kind of attitude expressed by different states in the context of international competitions and sports games may be explained by the fact that the Lex Sportiva system:

(i) has led to the unprecedented development and the international establishment of international sports bodies' large scale moral authority, and,

(ii) has implemented absolute control over the sporting activities within the framework of the Lex Sportiva system, thus imposing this law not only on sports structures and on the international sports life but also to the countries themselves.

The rules of Lex Sportiva and Lex Olympica and the quality of these norms with their particular characteristics in the international context of practice, demonstrate that sports law is not a subcategory of international law, as International Sports Law, but a different kind of law, Lex Sportiva/Olympica.

Lex Sportiva/Olympica is another kind of law resulting from the synthesis of characteristics of international law (subject, object and content regulations) and internal characteristics of domestic legal orders (effective mechanism of coercion, automatic incorporation norms in national laws exclusive and binding jurisdiction of judicial bodies) (Panagiotopoulos, 2020).

This new kind of international law puts old accepted practices and established organizational structures in a different perspective that exists in parallel to the international law and constitutes a sui generis sports law international legal order, imposed heteronomously on the sporting world by these international organizations.[1]

[1] For example, the ESKAN First Instance Disciplinary Committee, a public body appointed by the Greek state as a public law body working under the National (Hellenic) Anti-Doping Council (ESKAN) in line with the Greek Law 4373/2016. *See*, Panagiotopoulos et al., (2020). The National Anti-Doping Organization (EOKAN) according to the Greek Law 4791/2022. *See*, Panagiotopoulos et al., (2023). (To appear).

International Sports Law involves the rules of international acts and conventions of bodies that are governed by rules of international law such as international treaties and acts on Sport, the rules of WADA Code and the International Charter for Sport but not by the Lex Sportiva/Olympica rules. The need for fundamental changes in the international sport practice organization under the principle of legality in international sports field becomes imperative, for example, through the creation of a constitutional charter for sport and international jurisdiction in the framework of a Corpus Juris Athletiki (International Sports Law Code).

Lex Sportiva needs to be developed in line with the framework of general law principles on the power of legislative delegation. International legitimacy has to become the basis for Lex Sportiva in order to ensure justice in the field of personal and financial freedoms and to safeguard sports ideals. This is the only way for a well-functioning sports system as a cornerstone of our civilization (Panagiotopoulos, 2019).

Intervention of a supranational entity might define the legal framework in sports action by the establishment of an International Sports Constitutional Charter with intent to enable an institutional autonomy of international sports bodies, a genuine Lex Sportiva, as well as the constitution of an International Sports Court, in CAS standards, under the framework of an international legality (Panagiotopoulos, 2013a).

II. Sports Jurisdiction

II.1. Concept

Sport at international level today, such as the Olympic Games, operates under its own rules and is organised within a community that is outside of, beyond the state-organised community and its supervision has led to the development of specific institutions (Panagiotopoulos, 2007a).[2] These rules shape and regulate relationships that emerge solely and exclusively within the context of the international sporting legal order, the Lex Sportiva (Panagiotopoulos, 1999; 2003a, pp. 16–

[2] Many of the texts in this paper have been previously published in Greek. *See,* Panagiotopoulos (2007a).

27; 2004; 2007b, p. 153; Gaiger and Gardiner, 2001; Nafziger, 2004). Implementation of rules of law to sporting issues to resolve disputes is a recent occurrence because sports law is a new branch, which found *a raison d'etre* after the development of professional sport and the important financial gains it offers to all those operating in the economically-driven market (Pinna, 2005, p. 8). These relationships are exclusively contractual and in addition to their transnational dimension cross the boundaries of various states where people involved in sporting activities reside (Panagiotopoulos, 2005, pp. 87–105).[3] The use of the term "transnational" Sports Law, in my view, primarily seeks to emphasise the nature of sports law as a form of law that moves beyond the boundaries of various states and not in a sense that sports law is international.[4] In effect, this law is non-national and can be expressed by the term Lex Sportiva[5] as a law parallel to international law that incorporates elements of supra-national legal orders such as the European Community and elements of domestic law (Panagiotopoulos, 2005, pp. 87, 153). This sui generic sporting legal

[3] In the case of Sports Law, theory doubts this characterisation of law. The traditional theory of law characterizes law as public international law when generated by traditional methods of international law. Traditional legal theoreticians consider that the state is supreme in generating law. The main proponent of this view is Hans Kelsen (1920, p. 13). Among those who support the view that sports law is real law include Luc Silance (1970, p. 293), and Jean-Pierre Karakuillo (1988, pp. 51–52), and Anne Leroy (1980, p. 5).

[4] At the Special Session of the 11th IASL Congress in Johannesburg (Nov. 29, 2005) there was extensive discussion on this matter between the author following his paper titled "International Law and Lex Sportiva" (Panagiotopoulos and Panayiota, 2005) and Luc Silance, the supporter of the opposite view that this law is International Sports Law (Silance, 1998; 1976; 1977, p. 120). Furthermore, *see also* Nafziger (2013). According to the author's opinion, "*These papers trace the burgeoning field of international sports law from its origins about a half-century ago, through the course of complex challenges ranging from political boycotts of competition to doping of athletes, corruption, discrimination, players' rights, and commercial influences such as broadcast rights*" (Panagiotopoulos and Panayiota, 2005).

[5] The relevant chapter of Sports Law I provides a detailed presentation of the key elements of the international legal situation in sport and in particular the non-national sporting legal order by analogy with the lex mercatoria (Panagiotopoulos, 2005, pp. 96–104), *see also,* Panagiotopoulos (2003a; 1999, pp. 41–45). Some ideas on the view that the foundation of international sporting legal order is pluralism can be found in the Ch. Pamboukis' work (2007, p. 3).

order, the Lex Sportiva, in the context of other legal orders, not only has jurisdictional organs among its constituent elements but at national level also has self-regulatory mechanism which seeks to ensure that it is fully implemented (Auneau, 1992). In this context, the Court of Arbitration for Sport (CAS) has acquired considerable power within the sporting legal order. As is well known it was established by an international body, the International Olympic Committee (Mbaye, 1997, p. 13; 1987a; 1987b, pp. 1–3; Informative Report, 1983, p. 20) whose Olympic Charter as the Lex Olympica is in line with the Lex Sportiva sporting legal order. It operates independently (Panagiotopoulos, 2007a, p. 155) as the most valid jurisdictional organ for resolving sporting disputes for the international sporting community where, according to Andrea Pinna (2005, p. 9), arbitrators are called to decide on the validity of decisions of disciplinary tribunals of federations, unions or other clubs. In the domestic setting, the sporting jurisdictional organs in the context of the relevant legal order take form either as public bodies appointed by the state (*see* the Supreme Sports Disputes Resolution Tribunal) or private law bodies operated by sporting legal entities (Panagiotopoulos, 2005, p. 243).

II.2. Sport Arbitral Organs' Competence to Rule on the Constitutionality of the Law

The jurisdiction of bodies within the jurisdictional order is of dualistic covering: (a) jurisdiction to provide rulings in the context of the Lex Sportiva and sports law; (b) a review function as a public authority, if the law specifies it (Panagiotopoulos, 2007a, pp. 55–58).

In disputes brought before the sporting jurisdictional organs, in addition to other things, questions of a constitutional nature are raised concerning the normative rules of law.[6] These instances give rise to the major question to what extent these organs can and have a legitimate basis for ruling on aspects of the constitutionality of the rules of law concerning sporting activities and life. One important example of such a ruling was the decision of the Hellenic Football Federation's

[6] *See* HFF Appeals Tribunal decision No. 116/2001.

(HFF) jurisdictional body of first instance[7] that ruled that a provision of the sports law[8] conflicted with provisions of the constitution and other provisions of law with higher value and other legal provisions (Panagiotopoulos, 2016).

III. A New Type of Internationalized Sports Law

There are some differences between Lex Sportiva and international law on issues fundamental to the nature and the quality of the law itself. The position that Lex Sportiva[9] is merely a category or a subtype of international law does not appear to be true on closer examination. *We are faced with a system of law that, although it undoubtedly possesses characteristics from the General Principals of Law, regulates relations in the international domain*. The international sports system has succeeded in establishing an impressive system of coercion, through sanctions and binding jurisdiction of the judicial institution, comparable only with national domestic law and Community law, in terms of efficiency and application.

We are before another type of international legal system that cannot be a simple category or a diversification of international law. *Between the system of Lex Sportiva and public international law there is no conflict because there is a law of private nature, internationally, which is the sports "unethnical"*[10] *that regulates a field of relations*

[7] *See* Greek Union of Football Clubs Jurisdictional Organ decision No. 420/8.12.2000 which rejected the application of the Deputy Minister of Sport dated 30 November 2000 relating to the issuing of an ascertainment decision in line with the provisions of Art. 83(1) and 96(6) of Law 2725/1999. The chairman of the Board of Directors of Greek Union of Football Clubs and Vice Chairman of the Board of Directors of HFF were subject to the impediments in Art. 3(1) of Law 2725/1999 as amended by Art. 1(1) of Law 2858/2000, following final referral by the bill for the felonies he was charged with.

[8] *See* Art. 3(1) of Law 2725/1999 as amended by Art. 1(1) of Law 2858/2000.

[9] Analogous to the Lex Mercatoria*, see* Panagiotopoulos (1999; 2002).

[10] This outside of nations sporting character of law is not identical with a national one, has a substantial similarity in the Community legal order, which can be found midway between the legal systems of the Member States and the international legal order, borrowing elements from all of them while remaining independent of them, "Supra Nationalität" and "supra nationalité" German and French literature, respectively. But in this case the term that is more appropriate is "unethnic" law, or Lex Sportiva-Olympica.

that could regulate the public order to apply the provisions of this regulation. This is another kind of law at the international level, which is parallel to international law, shares common elements, such as the general principles of law but in a new composition (Wali, 2010), a type in the international arena of Lex Sportiva/Olympica. This is not an amalgam of law, but an independent system of unethnical sports law. *The rules of this new legal order is a new system of rules derived from the composition of rules in proportion to the Lex Mercatoria,*[11] *international law and domestic legal systems*. When a legal system has such a binding effect and effective enforcement of its rules, then we face the same ideological dilemmas that for centuries we are trying to solve at a domestic jurisdictions level. The theoretical debate has remained for years and the results have crystallized into principles that are fair, clear and undeniable. In any organized structure when we have a concentration of power in a few hands the solution is made through the principle of legality and the separation of powers. Prerequisite is the complete separation of the institutions that exercise legislative, executive and judicial authority. Separation of instruments and separation of powers. The separation of powers and the implementation of democratic processes must be under the guarantee that will provide an independent judicial body and the existence of effective judicial protection,[12] an international Court for Sports of special procedural rules of state standing, in a statutory framework of international legitimacy for sport and sports activity.

Sports law in the international sporting field as Lex Sportiva / Lex Olympica is in fact private. It means that it is a law that is internationally unethnical because *it necessarily regulates an area with no geographic boundaries, the relationships of persons involved in international and Olympic sports and activities, people coming from different countries* that *requires coordination of their activity within their states*. That is, the Lex Sportiva/Olympica is indeed "unethnical"

[11] *Lex Mercatoria:* A creation, of a set of customary rules and general principles, which constitute an autonomous legal system capable of governing in a meaningful way the international trade, although not referring to a particular state legal system, previously *see,* Goldman (1987. p. 116).

[12] Under the conditions imposed by the Art. 6 of the ECHR.

law internationally, which, however, does not receive any special power (Panagiotopoulos, 2011, pp. 117–152; 2004, pp. 34–49). Nevertheless, it constitutes a sui generis sports law legal order imposed in the sports world heteronomously, through these international sports organizations (Panagiotopoulos, 1991, pp. 249; 1993, pp. 527–528).

IV. Lex Specialis Derogat Legi Generali Principle

The rules of ordinary law apply in sports for many issues. They may apply directly due to the lack of special sports rules or indirectly by absorption with analogous adaptation and implementation where appropriate (Panagiotopoulos, 2009, pp. 1–10; Panagiotopoulos et al., 2010, pp. 301–310). In many cases sports rules prevail over the rules of ordinary law. As many have claimed the general provisions of civil law need to be tailored by special rules of public law for individual sports relations (Kefalas, 1993). One example of this in Greece is the implementation of the general provisions of the Civil Code, which relate to elections at sports clubs (Art. 101 of the Hellenic Civil Code). These provisions relate to the illegal participation of sports club members due to restrictions, on their holding their positions, or other impediment. The court, despite the existence of sports rules of law and specialized provisions in the Sports Act for such cases, does not implement special provisions in the sports rules as prevailing rules as it ought to do in a case of declaring the elections invalid under the *Lex Specialis Derogat Legi Generali* principle (Panagiotopoulos, 2003b; 2014b). Nonetheless, based on the principle of the *causal link* contained in the general principles of civil law and the characterization of such disputes as an internal matter for the club, to the extent that the result of the elections are not affected by the illegal participation of those members in sports law terms, no issue of invalidity arises (Králík, 2014).[13] However, the

[13] *See also*, Judgment No. 149/1992 of the Piraeus Magistrate's Court and judgment of the Court of Appeals of Larissa 500/1995 that states that "*...The Court of the First Instance of Larissa gave a false interpretation and application of the provisions of the sports legislation... and accepting the appeal declared INVALID the actions and decisions of the supervisory committee, dated at 24th and 25th of July 1993, as well as those of the general meeting of the member-unions of the defendant association which refer to a) the declaration and acceptance of candidatures and*

moral aspect of sports is affected and the sports order is shaken, which then seeks to protect the sports rule of law since the internal activities of the sports club have repercussions of sport life, sports order, and ethics.

Consequently, in sporting activity we cannot talk of direct and absolute implementation of the rules of ordinary law but rather about implementation by analogy, by absorption based on special sports rules of law, of a Lex Sportiva (Panagiotopoulos, 2013b). Besides, it is necessary to account the special conditions under which sporting events take place and the special nature of sports as an institution and the objectives that it serves.

China has already established a western model of management in Sports, which provides sport's unions with an opportunity to set private rules of management and express independence including the possibility for funds to be gathered from private sources according to the new law (Nafziger and Wie, 1998; Tang Yong, 2014).

The nature of sport requires special sports rules, which ought to absorb the substance of the rules of ordinary law where and when these are absent (Shevchenko, 2013). This is so because law cannot limit sport but ought to be focused on promoting it. The substantive core of Lex Sportiva, sports rules of law in other words, ought to relate to the compulsory application of such rules, their interpretation, application and review of sports provisions within the context of sports and competitive activities generating what one might call sports jurisdiction — "sports justice"— while also raising issues about who is the most appropriate judge in such cases (Panagiotopoulos, 2013c).

b) the holding of elections for the officials for the nomination-election, 23600/95. Court of the first instance of Athens — Presentation of documents 1862/95, Court of the first instance of Athens Annulment of verdicts — Water Ski Federation — the illegal representation of the union, number of participants, causal link because of the small number of participant members, 1587/96 Court of the first instance of Athens — Election of Athens Union of Football Clubs officials. Participation of illegal representatives, practicing members and coaches in violation of the law (incompatibility of holding two or more positions in Act 75/1975 and 2725/1999 Art. 3) — preparation of party ballots in violation of the law and of the charter — counting of ballots for persons not marked with a cross on the ballot paper. There is no causal link between the reported violation and of the decision taken, appeal declined. *See,* Magistrate's Court of Athens 8874/17-10-1996, as well as the Supr. Court 116/1997, 25/96 Court of the first instance of Nafplion. Injunction-Challenge to election of officials of the sports club.

The reasons underlying the emergence of law in sports rules are sports events themselves and not the "game," as established by the Western thought because sports is an athletic activity and not game but AGON (ancient Greek term). Sporting activity, and in many cases, the conduct of the event requires special rules on how the competition is to be held.

The interest and presence of athletes themselves and the conduct of sports agon-games, as a practical procedure, shape or jointly shape rules of law whose objective is to ensure (a) some measure of comparability between competitors; (b) the terms of participation in competitions; (c) how the sports competition is to be conducted; (d) certainty and the validity of the result of the competition; (e) the ability to check the terms of participation in competitions; (f) the reliability of the result; and (g) the imposition of sanctions in the case of breaches of the terms and the way in which the sports competitions are held. Therefore, together with the ordinary law framework these rules of law constitute a Lex Sportiva, or Sports law.

Sports Law is the science of the Sports object by definition; it constitutes an inner part of the other branches of the sports science, which are included in that science, define it and govern the athletic activities, sports and physical education. The athletic and physical activity within the field of sports, physical education and wellbeing, constitute the main Sports Law object of study, given that these activities are governed by specific legal rules. Physical exercise in general and the right to do it for health, recreational and social purposes, or its practice within the educational framework, are also part of Sports Law, given that these activities are also regulated by legal provisions.

Such athletic actions as sports agon-games, a practical procedure and particularly the sports competition can be achieved only within a specific framework of rules governing the contest (competition) and rules of law, so as for all the above-mentioned issues to be regulated. These rules are applicable to all either because they are accepted by the interested parties, or because their mandatory application in the practice of an athletic activity is associated with the fear of the sanctions to be imposed if these rules are violated.

The rules governing sporting competitions (*ad hoc*), as sports rules of law (there are also technical rules of sports as non-law rules area) of prevail over ordinary rules of law on special matters since they have been specially enacted for sporting competitions even though they may come into complete conflict with those ordinary rules. The general principle of law *Lex Specialis Derogat Legi Generali*, also applies to Lex Sportiva, sports law, according to which special rules of sports law prevail over ordinary rules of law.

V. Conclusion

The rules of Lex Sportiva and Lex Olympica and the quality of these norms with their particular characteristics in the international context of practice, demonstrate that sports law is not a subcategory of international law, as International Sports Law, but a different kind of law, Lex Sportiva/Olympica.

Lex Sportiva/Olympica, is another kind of law resulting from the synthesis of characteristics of international law (subject, object and content regulations) and internal characteristics of domestic legal orders (effective mechanism of coercion, automatic incorporation norms in national laws exclusive and binding jurisdiction of judicial bodies).

This new kind of international law puts necessarily old accepted practices and established organizational structures into a different perspective that exists in parallel with the international law and constitutes a sui generis sports law international legal order, imposed heteronomously on the sporting world by various international organizations.

The imposition of disciplinary penalties on persons in the sports field via decisions that relate to issues concerning sporting life and non-technical issues concerning sport, such as the threat of serious sanctions, demotion of a team to a lower division or expulsion from a championship or exclusion of an athlete are mandatory arbitration decisions taken by sporting jurisdictional organs and are subject to legality review. These organs then have the exclusive jurisdiction and competence to impose disciplinary penalties. Moreover, according to the prevailing view in the case law, the decisions issued in these sporting disputes are private

decisions, whose review is subject to civil courts, block the path to the administrative and the civil courts.

The above-mentioned special rules of sports law prevail over ordinary rules of law, according to the general principle of law *Lex Specialis Derogat Legi Generali*. The rules governing sporting competitions and sports rules of law prevail over ordinary rules of law on special matters since they have been specially enacted for sporting competitions even though they may come into complete conflict with those ordinary rules. Finally, the establishment of an International Sports Constitutional Charter with special rules for international sports activities is necessary. Also, a special International Sports Court should be established, which will have jurisdiction according to the rules of the International Sports Constitutional Charter.

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Article

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The Issue of Voluntariness of Consent to Refer Disputes to the Court of Arbitration for Sport based on the Analysis of Its Status and Principles of Functioning

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Abstract: The article is devoted to the study of institutional and procedural problems related to the resolution of conflicts arising in professional and Olympic sports (elite sports). Modern sport seeks to isolate itself from state and international legal regulation, to create its own system of corporate standards, the subjects of which are sports organizations and athletes. In order to impart stability to the introduced system of corporate rules, international non-governmental organizations leading the world sports and Olympic movement also create their own jurisdictional bodies (arbitration courts, the so-called sports tribunals), the purpose of which is to resolve disputes between athletes, sports organizations on corporate rules established by international sports federations and the International Olympic Committee. The central part of this system of sports arbitration courts is the Sports Arbitration Court in Lausanne (Switzerland), whose status is analyzed in detail in this paper.

One of the main problems to which the author pays attention, is the non-consensual, in fact forced nature of the spread of the jurisdiction of the sports arbitration courts on athletes, often combined with a prohibition (established in the corporate act — for example, the regulations of sports federations) to appeal to the state courts under a threat of lifelong disqualification. Thus, the structures that govern the world professional and Olympic sports require athletes to refuse to exercise their constitutional right to access to justice. But could an

arbitration clause be considered valid if the athlete did not give consent to the consideration of his disputes in the arbitration court (arbitration) and to the choice of arbitration jurisdiction, which in fact was forced? Unfortunately, practice shows that in most cases, when athletes ignore this ban and apply to national courts, appealing against the decisions of the sports arbitration court in Lausanne, the latter make "political" decisions that take the interests of the leading forces in the world sports movement into account.

Keywords: sports arbitration; sports law; arbitration clause; right to access to justice

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Contents

I. Introduction

The Court of Arbitration for Sport in Lausanne (hereinafter — CAS) is an institution that heads the so-called "Sports Justice" — a system of arbitration courts whose purpose is to resolve disputes arising in the field of sports. This system, in addition to CAS, includes arbitration courts of international sports federations (hereinafter — IF) and national sports federations (hereinafter — NSF) — international and national public organizations that manage the world sports movement. It should be pointed out that arbitration courts in the field of sports at the national level are created not only by NSFs, but with the participation of national Olympic committees (herein after NOC). In this context, it is especially

important to pay attention to the fact that this system was formed and exists separately from the classical judicial system existing in any state. Equally, it is not connected with international courts established by states. Therefore, the principles of building the system of "sports justice" are exclusively contractual, based on its activities, and the consent of all parties involved is needed. Problems and "slippage" in its activity arise when it turns out that the subjects involved in it do not completely comply with the rules (including the "voluntary recognition of the CAS jurisdiction"), according to which this "sports justice" system functions. The problem is complicated by the fact that in the world of sports there is no uniform legal framework that could be the basis for the dispute resolution mechanism — either at the intergovernmental level (in the form of conventions, charters and other acts of international law), or at the level of public associations in the field of sports — IF, NSF, the leading structures in the Olympic movement. In fact, the identification of this gap led to the creation of CAS — laws of various states are inconsistent, there is no single approach in the world to sports disputes of a particular type, as well as there are no developed international rules to resolve the claims. It can be seen that the judgment of the judicial authorities changes according to their jurisdiction (Konstantinidis and Panagiotopoulos, 2020, p. 107). Finally, appealing to the national justice system is a time-devouring process, which is extremely expensive. In addition, the specificity of sports is such that not every qualified lawyer or judge is able to make an objective decision, not being an expert in this particular sport, and not being immersed in the relevant issues.

II. The Creation and Development of CAS

CAS was officially established on 6 April 1983, at the session of the International Olympic Committee (hereinafter — IOC) in New Delhi on the initiative of the IOC President Juan Antonio Samaranch and the IOC Vice-president Keba Mbaye. Despite the fact that it was the IOC that established CAS, this arbitration court is considered as independent (including from the IOC), and the highest judicial authority in Switzerland which is the Swiss Federal Tribunal, had considered the complaint of one of the athletes about the fairness and impartiality of

the proceedings (Blackshaw, 2013, pp. 64–74), came to the conclusion that in a situation where the IOC is a CAS structure financier, doubts arise about the impartial solutions against the IOC or some other sports organizations. In this regard, the Swiss Federal Tribunal recommended the IOC (this is a remarkable legal construction indeed — by virtue of the Agreement between the IOC and Switzerland, in fact, the courts of this state cannot make binding decisions in respect of the IOC) to reorganize the CAS so that the CAS becomes fully independent — both legally and organizationally, and also financially. The IOC followed this recommendation and reorganized the CAS. Together with the Associations of Sports Federations in Winter and Summer Sports and the Association of National Olympic Committees (hereinafter — ANOC), the IOC established the public non-commercial foundation International Council of Arbitration for Sport (ICAS) with its seat in Lausanne (Switzerland), whose board of trustees included 12 representatives (4 each from the IOC, Associations of Sports Federations in Winter and Summer Sports and ANOC, term of office — 4 years). These 12 representatives of international sports organizations elected another 4 representatives from among candidates nominated by Olympic athletes; and finally, all 16 elected 4 independent representatives. This organization — ICAS — became the founder of the CAS. It also approves the statute and regulations of the CAS and approves the arbitrators (meditators), of which, as of 2022, there are more than 400.

Nevertheless, despite this more than 20-year successful history of functioning of the updated CAS, its independence, as well as the impartiality of the arbitrators, have recently been again subjected to doubts, including appealing its decisions to the courts of general jurisdiction. One of the most striking examples of this kind is the so-called "case of Claudia Pechstein," an athlete, an Olympic champion who was accused of a violation of the anti-doping rule and was disqualified by the International Skating Union. It should be noted that in organizations that currently lead the world sports and Olympic movement, an extremely negative attitude to this kind of complaints and lawsuits from athletes has been formed. Moreover, international and national sports federations, in fact, compel an athlete (under the threat of so-called "sports sanctions," the most common of which is

non-admission to competitions) to agree to an "arbitration clause" — acceptance of the CAS jurisdiction in any dispute arising from of sporting relationships that includes a "voluntary" athlete waiver of appeal to the ordinary courts or the courts of any other state decisions made within the "sports justice system" headed by the CAS, that makes the CAS decisions final and not subject to dispute.

But is such a rejection of the constitutional right of access to justice legitimate? Is the athlete's consent to enter into this kind of an agreement on the arbitration voluntary? And is it permissible in today's global sport, in which all the leading countries of the world are deeply involved, to administer justice based on the principles of private international law?

To answer these questions, first of all, we shall consider the legal nature of the so-called "sports law," or *lex sportiva*. The heart of today's regulation of modern sports is corporate regulation — this is primarily the Olympic Charter of the IOC, the charters of the IF, the regulations adopted by international and national sports structures. States rarely invade this area, mostly in cases where they seek to jointly protect some common humanitarian values and human rights. For these purposes, a number of conventions was signed and ratified — these are acts of public international law, such as the International Convention against Apartheid in Sports (adopted by Resolution 40/64 of the UN General Assembly on 10 December 1985) and European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches adopted within the Council of Europe and the Council of Europe Convention against the Manipulation of Sports Competitions (adopted in Maglingen, Switzerland on 18 September 2014).[1] But no international interstate treaty directly defines the principles of justice administration in sports. In fact, the only act of public international law applied in connection with decisions made by CAS is the United Nations Convention on the Recognition and Enforcement of Foreign

[1] European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches (ETS No. 120). Available at: https://www.coe.int/en/web/conventions/-/council-of-europe-european-convention-on-spectator-violence-and-misbehaviour-at-sports-events-and-in-particular-at-football-matches-ets-no-120 [Accessed 11.03.2023].

Arbitration Awards (adopted in New York, USA, 10 June 1958),[2] which will be discussed later.

Moreover, despite the fact that the CAS is often referred to as an international court, it does not have anything to do with the international justice system created with the participation of states or based on the norms of international law. Existing international courts created by states, such as the International Court of Justice or the European Court of Human Rights are essentially multifunctional organs. In addition to the administration of justice, they largely act as international intergovernmental structures, and their direct activity in the consideration of certain issues is based on the norms of Public International Law, and on the implementation of conventions (international interstate treaties). But, as noted above, modern sports law is not based on intergovernmental agreements. It is not based on the norms of national legislation, despite the fact that, undoubtedly, the implementation of sports activities in each particular country is always connected with implementation of the norms of national law.

Athletes by cultivating certain sports may require non-interference from states in, for example, sport rules, refereeing, rules of the game, etc., although in many cases states such requirements ignore. For example, in the Russian Federation, the Ministry of Sport of Russia approves the rules of each sport — otherwise, it does not enter the All-Russian Register of Sports and, accordingly, does not receive financial support from the state budget. In the same cases, when it comes to the employment contract of the athlete and the club, paying taxes and the like, it is absolutely impossible to avoid government intervention. The paradox is that if a dispute arised is brought to the judicial sphere, then its consideration and, quite likely, the final decision, will be completely different in the system of state justice and the system of sports courts. The reason is quite simple — for national courts, undoubtedly, the norms of national law will prevail — relatively speaking, the priority of the Labor Code of the Russian Federation over corporate norms approved by a public organization developing this sport in the Russian Federation,

[2] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. SPS Garant. Available at: http://base.garant.com/10164637/#ixzz4sZqt3AqN [Accessed 11.03.2023]. (In Russ.).

for example, the provisions of the regulations of the Russian Football Union (hereinafter — RFU) will be absolutely obvious. However, in the "sports justice system" — the RFU Dispute Resolution Chamber, the Federation of International Football Associations (hereinafter referred to as FIFA) Dispute Resolution Chamber — and, finally, the CAS, this approach will not be obvious, since the norms of the RFU Regulations are based on the provisions of the FIFA Regulations and based on the principle of organizational and legal autonomy of sports, it is corporate regulation, and not national legislation, that should have priority for making a decision.

III. CAS as an INGO

It is undoubtedly that the principle of the "organizational and legal autonomy" of sport and the associated status of international sports organizations, including the CAS, deserve closer attention. An international non-governmental organization (hereinafter referred to as an INGO) is an association of legal persons whose members are entities from various countries registered in a state whose legislation allows foreign individuals or legal entities to form public organizations and be elected to the governing body of such an organization. Such associations serve a variety of purposes based on common interests in the political, cultural, social and economic spheres.

Modern international law has not developed a unified, generally accepted definition of an INGO. The UN Charter refers to INGOs in Art. 71 where the Economic and Social Council (ECOSOC) is entrusted with the powers to consult with INGOs (in other words, to give them a consultative status). Currently, the UN system has a dual mechanism of interaction with non-governmental organizations. This is largely due to the difference in the definition of a non-governmental organization in the system of UN bodies and organizations. The first definition is related to the ECOSOC documents. According to the definition of ECOSOC (Resolution 288 (X) of 27 February 1950), the INGO is any international organization established not on the basis of an interstate agreement. Resolution 1996/313 of 1996, Para. 12, clarifies that a non-governmental organization for the purposes of ECOSOC means an

organization that is not established by any government body or on the basis of an intergovernmental agreement and satisfies the following conditions:

1) has a "representative structure,"

2) has "appropriate accountability mechanisms for its members,"

3) its members "exercise effective control over its policies and activities through the use of the right to vote and through other relevant democratic and transparent decision-making processes."

On the contrary, the Department of Public Information of the UN Secretariat defines a non-governmental organization in its publications as follows, "A non-governmental organization is any voluntary non-profit union of citizens organized at the local, state or international level." As it can be seen, this approach excludes the participation of legal entities in the INGO.

Historically, the goals of creating international sports organizations were either related to the formation and development of a particular sport, inter alia, introduction of unified rules for conducting competitions, ensuring refereeing, etc. (this is how international sports federations arose), or to organizing a sporting event. The event-supporting nature is the most obvious example of the IOC, the purpose of which is the holding of the Olympic Games. These two trends in the development of international sports organizations predetermined the dual structure of modern sports movement. On the one hand, it has a common system linking (in a simplified form) the IOC and the National Olympic Committees (hereinafter referred to as the NOC), and on the other hand, in every sport there is an IF that manages all NSF for this sport. This relationship is, in fact, imperative (subordinate) in nature, since it is based, firstly, on the institute of recognition of any NOC (or IF) by the IOC. Secondly, both the IOC and the IFs are based on membership (the IOC members are individuals, the IFs members are legal entities — NSFs, and this casts doubt on the status of IFs as INGOs). As a result, the IOC (in the Olympic movement system) and the IFs in each particular sport (for example, FIFA in football, FIBA in basketball, etc., although there are certain exceptions to this rule) became, in essence, monopolistic organizations that fully control the Olympic movement or specific sports, respectively.

In the early years, during the birth of both the IOC and the IFs, they were exclusively social structures that united amateur athletes who compete for their own pleasure (the term "sport" is originated (by the most popular opinion) from one of the versions of the old French term "*dusport*" — entertainment, pleasure), and the arranged competitions based on one or another set of rules. However, when millions were involved in this process — both athletes and fans, after sport became "big" in every sense and big money came into it — the situation changed in a completely fundamental way. But is it possible to say that modern international sports organizations are carriers of public authority, and their members are public officials? From the point of view of possession of public authority, the answer seems to be a negative one. Public authority, in essence, is identified with the state, it is power which is hierarchically organized, subordinating and not based on the principle of equality and coordination. One can, of course, point out that with respect to the NOC and other subjects of the Olympic movement, the IOC possesses, in essence, such imperative power. But the peculiarity of public authority is that it extends this power to an indefinite circle of subjects, regardless of their will or desire — everyone who is in any state obliged to comply with the laws of that state. Anyone who is in a city or rural settlement (municipality) is obliged to comply with the instructions of local authorities. In the system "IOC — IFs" — the rules are different: only those who voluntarily agree with the supreme power of the IOC/IFs must fulfill their demands, obey their decisions; but in reality, disobeying these rules leads to the dismissal of those who disagree, not allowing them to participate in events held under the auspices of the IOC/IFs, and such removal (acting as an "economic baton"), as practice shows, successfully replaces any possible legal liability measures.

A separate issue is the relationship between the IOC/IFs and the states. The already mentioned principle of the organizational and legal autonomy of sport always comes to the fore. In the most concentrated form this principle was set out by Mr. Samaranch at the IOC General Assembly in Seoul: "It is important that each of you (NOCs) stay in close contact with the governments of your countries, and the governments, for its part, recognized our independence" (Stolyarov, 2015, p. 227). And the fact that these organisations are subject to the law of the country

in which they are based, does not contradict with their international nature or personality (Panagiotopoulos, 2019, 415).

The autonomous nature of the leading forces in modern sports means that the international sports movement does not organizationally constitute a single whole. Athletes and sports organizations are united by completely different criteria: territorial, professional, etc., even, for example, religious (the International Catholic Union of Physical Education and Sport can serve as an example). All of them, on the one hand, quite clearly declare the principle of non-interference in the internal politics of states, and, on the other hand, have long since abandoned the concept of "separation" of sports from the state. Throughout the state, based on the principles of Public-Private Partnership, together with sports organizations develops elite sports and sports infrastructure of national level, while local (regional) authorities develop mass sports — and all this means the inflow of state money into the field of sports, and, accordingly, government methods to control their spendings. Thus, recognition of public status of INGOs in the field of sports is an extremely subtle point. Being so closely involved in sport, it is the state confer this status on sporting organization (or, more precisely — *de facto* recognize it, as an example — granting the status of Observer at the General Assembly of the United Nations to the IOC). So, public status may be recognized as a result of manifestation of public will. In addition, it is no secret that in most constitutions of developed countries, the interests of society, and not of the state, are put in the first place, and therefore the law always speaks of the possibility / necessity of imposing restrictions, based on the needs of society. That is why the English term "*public*" is traditionally interpreted as "society-based."

Therefore, *lex sportiva* does not always lend itself to explanation based on the principles of private law, either. Corporate rules are based on the principle of organizational and legal autonomy of sports, but at the same time, *lex sportiva* intersects with the norms of public law. And decisions made by the CAS become the basis for the emergence of the "case law" phenomenon in the world of sports, since it is used as precedents on the basis of which the CAS itself tries to base decisions on similar matters. While such a system has not developed and, analyzing the decisions made in similar cases, it is often possible to encounter mutual contradictions, but nevertheless it is impossible to deny the

role of the CAS in trying to create uniformity in the application of *lex sportiva* standards.

However, the CAS has been created as an INGO of a very specific type (the above shown signs of a classical INGO can hardly ever be found in the CAS and with a lot of approximations regarding its structure and principles) — as an alternative to national judiciary, where the courts of various countries carried mutually exclusive solutions. However, the CAS cannot dominate or, in general, in any way compete with state courts, if we talk about the validity of the decision. None of the arbitral tribunals can make and enforce a decision in the territory of a state that violates the norms of national law of that state. However, in the case of CAS, this is what happens periodically. Moreover, in order to execute CAS decisions states often directly violate their own laws. Thus, the Law of the Russian Federation adopted in 29 December 2015 No. 382-FZ "On Arbitration in the Russian Federation"[3] did not allow the arbitral tribunal to consider disputes arising from labor relations, since the Federal Law of 24 July 2002 No. 102-FZ "On Arbitration Courts in the Russian Federation" that was in force until 1 September 2016, explicitly stated that by agreement of the parties to the arbitration proceedings, only a dispute arising from civil law relations may be transmitted.[4] Meanwhile, as it is known, most of the disputes between professional athletes, coaches and sports clubs are associated with the implementation of provisions of labor contracts concluded between them. And only the appearance in December 2016 of the Chapter 5.1 "Consideration of Disputes in Professional Sports and Sports of the Highest Achievements" (Art. 36.4 "Foreign arbitration institutions") in the Federal Law "On Physical Culture and Sports in the Russian Federation"[5] legitimized the system of "sports justice," headed by the CAS. However, by obtaining CAS judgments rendered in cases involving labor disputes, the courts of the Russian Federation

[3] Collection of Legislation of the Russian Federation. 2016. No. 1 (Part I). Art. 2. (In Russ.).

[4] Federal Law of 24 July 2002 No. 102-FZ "On Arbitration Courts in the Russian Federation." Collection of Legislation of the Russian Federation. 2002. No. 30. Art. 3019. (In Russ.).

[5] Federal Law of 22 November 2016 No. 396-FZ "On Amendments to the Federal Law 'On Physical Culture and Sports in the Russian Federation' in terms of the regulation of high-performance sports and professional sports." Collection of Legislation of the Russian Federation. 2016 (Part I). No. 48. Art. 6736. (In Russ.).

issued "executive inscriptions" and, thus, gave them legal force. This happened in many respects due to the fact that the appearance of the CAS as an institution of justice in the sport gradually changed the whole sports system of arbitration, and it has become widely used in the resolution of the sport disputes. But the flip side of this process — the transformation of CAS into the highest sports dispute resolution body — became fundamentally non-consensual nature for the athletes. The arbitration agreement in the sports system has ceased to be a voluntary agreement between the parties "to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether was of such a legal relationship contractual or not" because athletes have no other choice but to submit to the corporate standards, which contains the statutes, regulations, IFs and NSFs rules of competitions, etc., and they include the provision on the consideration of emerging disputes in the system of "sports justice," which is headed by the CAS. Moreover, statutes and regulations of the IFs and NSFs go further: it is forbidden for athletes to appeal decisions made by sports arbitration to state courts. Violation of this prohibition entails the so-called sports sanctions, the most severe of which is disqualification, that is, the prohibition of participation in competitions held under the auspices of IF or NSF.

But the (conditional) status — "the highest judicial body to review the sports dispute" raises a number of legal problems in the theory, and the main question is whether or not the CAS may be considered as the "the creator of law," that is, whether to consider it possible decisions as judicial precedents, otherwise (from the perspective of, for example, countries belonging to the system of "common law") — as a source creating the case law.

IV. Case of Claudia Pechstein as a Stress-Case of the CAS existence

Formally, Para. R 59 of the CAS Code[6] provides that "the decision of the Court is binding only for the parties, and only for this particular

[6] Sport Arbitration Code (as amended on 1 January 2022). Available at: http://www.tas-cas.org/fileadmin/user_upload/Code2017FINALen.pdf [Accessed 21.03.2023].

case." But in practice, when considering cases, each panel of arbitrators takes into account previous court decisions and bases own decisions on the legal positions of the CAS formulated earlier. It does not mean that the arbitrators are obliged to make decisions based on previous precedents, but the logic and the basis for deciding on similar previous cases is always investigated in the framework of a new process. In fact, the study of decisions issued by the CAS shows that, starting in 2003, every decision in a particular case necessarily contains references to previously created precedents. However, the system of sports law — *lex sportiva* — is still in a very early stage of its formation. Therefore, periodically there are situations in which the CAS is not able to rely on the current practice. And the objectivity and fairness of its decision first (and thus the status of "the highest judicial body for consideration of sports disputes") questioned and disputed, despite the introduction of corporate restrictions.

Such a situation arose in the so-called "case of Claudia Pechstein" — a German skater, a five-time Olympic champion, the World Champion of 2000 in a classic all-around and the five-time World Champion in the individual distances, which for 11 years in a row (from 1996 to 2006) became the winner of the World Championships in the classic all-around. The athlete was held accountable for the use of doping. Norms of *lex sportiva* rather rigidly regulate the issues related to anti-doping rule violation. Worldwide Doping Code[7] (sometimes referred to as the WADA Code) based on the so-called principle of "*strict liability*" (legally it is close to the concept of "objective imputance"), according to which responsibility for the use of doping comes regardless of guilt. Para. 2.1.1 of the Art. 2 of the Code states, "[t]he personal duty of every Athlete is to prevent the Prohibited Substance from entering the body. Athletes are responsible for any Prohibited Substance, or its Metabolites, or Markers found in the Samples taken from them. Accordingly, there is no need to prove the fact of intent, Guilt, negligence or deliberate Use by the Athlete when establishing a violation in accordance with Art. 2.1." The problem with Ms. Pechstein was that neither the banned

[7] World Anti-Doping Code. Available at: https://www.wada-ama.org/sites/default/files/resources/files/wada-2023-world-anti-doping-code.pdf [Accessed 23.03.2023].

substance, nor its metabolites, or markers were detected in the samples taken from the athlete. The reason for her accusation of doping was the so-called "biological passport," more precisely, the "*blood passport*" used at that time in cyclic sports — an individual statistical document (a *profile*), reflecting the whole period of his sports life. It is based on basic parameters that shows an athlete's blood test (hemoglobin level, red blood cell count, etc.). Changing these parameters could indicate that an athlete used the doping substances or prohibited method (like *blood transfusions*). In essence, the basis for the application of sports sanctions (2-year suspension) was the analytical conclusion of experts who studied the athlete's *blood passport*. This kind of evidence base was introduced the first time in the CAS, and after that as the CAS acknowledged this evidence permitted, it ruled on upholding sports sanctions imposed by the International Skating Union on Ms. Pechstein (disqualification). The CAS, considering this case, proceeded from the fact that according to Clause 3.1 Art. 3 of the World Anti-Doping Code, "the Anti-Doping Organization has the burden of proving that an anti-doping rule violation has occurred. The standard of proof will be the detection by the Anti-Doping Organization of an anti-doping rule violation at **an acceptable level for experts conducting the procedure** (*highlighted by the author. — N.P.*), taking into account the seriousness of the allegations made. This standard of proof in all cases is more compelling than only a balance of probabilities, but a less proof in the absence of a reasonable doubt. When the Code places on the Athlete or other Person alleged to have committed an anti-doping rule violation, the burden to rebut a presumption or establish certain facts or circumstances, the standard of proof will be a balance of probabilities. The athlete tried to appeal the CAS decision according to the established procedure: since CAS is registered in Switzerland, its decisions, as well as decisions of any arbitration court, can be appealed to the court of general jurisdiction, in this case, in accordance with the Art. 100 of the Federal Law of 17 June 2005 "On the Supreme Court of Switzerland," the competent authority to deal with complaints against decisions of the CAS is the Supreme Court of Switzerland (usually it is called — the Swiss Federal Tribunal, Bundesgericht, Tribunal fédéral). But due to the established limits, the Supreme Court of Switzerland takes such complaints only in a narrow range of issues, mainly related with the

violation of procedures for handling cases in the CAS. Ms. Pechstein in her appeal submitted that CAS is not independent tribunal and, therefore, its judgments are not fair and equitable, that is the basis for the appeal of the arbitral award in accordance with Part 2 Art. 190 of the Federal Law "On the International Private Law."[8] However, the Supreme Court of Switzerland rejected the complaint, stating that the athlete appealed to the CAS, and signed all procedural documents, including the complaint of 29 September 2009, without pushing any objections regarding the independence and impartiality of the CAS. In such a situation, the objections regarding the independence and impartiality of the CAS at the hearings in the Supreme Court of Switzerland are unfair.

Having received a refusal to consider the appeal in Switzerland, the athlete (despite the "voluntary" refusal to consider sports disputes in the courts of general jurisdiction) filed a complaint against the CAS decision at the place of residence — in the District Court of Munich. From the bottom of her complaint, it was reduced to the invalidity of the CAS jurisdiction in her case due to the lack of voluntary consent to sign the arbitration agreement. The court, however, upheld the decision of the CAS on the principle of *res judicata* (*Latin, "resolved case")*, the essence of the principle is that the court's decision is final and not subject to appeal: the athlete herself came before the court — the CAS, — demanded consideration of her case and received the decision. But at the same time it was noted in the decision that the arbitration clause cannot be considered valid if the athlete did not give consent to the consideration of his or her disputes in the arbitration court or tribunal and if he or she was, in fact, forced to accept the choice of arbitration jurisdiction. And, as a matter of fact, it stated that these types of approaches related to the jurisdiction of CAS, which are generally accepted in the world of sports, do not correspond to Art. 6 of the European Convention of Human Rights and Fundamental Freedoms (hereinafter — the European Convention) (right to a fair trial).[9]

[8] Swiss Federal Law "On Private International Law." Available at: https://www.admin.ch/opc/de/classified-compilation/19870312/index.html [Accessed 27.03.2023].

[9] Collection of Legislation of the Russian Federation. 2001. No. 2. Art. 163. (In Russ.).

This decision of the Munich District Court was appealed by the athlete to the appellate (land) court on the basis of the violation of the right to a fair trial, enshrined in Art. 6 of the European Convention and on the basis of that in the sports system, both CAS and IFs are, in fact, monopoly players dictating their will to athletes. The Court of Appeal recognized the validity of the complaint and accepted it for consideration. Moreover, in its final decision, made in terms of the action of Competition Law in Germany, the court indicated that a condition in which one party (in this case, Sports Federation — the International Skating Union) is predominant in its field and, therefore, the other side has to agree with the proposed forms of interaction, can lead to the so-called "structural imbalance," which deprives an athlete of the opportunity to either choose an arbitration court or select arbitrators in a particular arbitration court (the CAS). As for the procedural grounds (the *res judicata* principle already discussed above), the court pointed out that, as a general rule, this principle should of course be applied and national courts should not reconsider or evaluate decisions made by foreign arbitration courts. But any national court has the right to make sure that the decision was made by properly arbitration, i.e., the fundamental principles of arbitration proceedings are observed. This national trial is defined by Clause B Part 1 Art. 5 of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention of 10 June 1958), "[r]ecognition and enforcement of an arbitral award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, evidence that the party against whom the decision was made was not duly notified of the appointment of the arbitrator or of the arbitral proceedings or for other reasons could not provide it with explanations."[10] As for the provisions of Art. 6 of the European Convention, from the point of view of the appellate court, the case cannot be considered by an arbitration court unless the parties give their consent. However, if the party points out that the agreement was "forced" because otherwise the party would not

[10] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"). Available at: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards [Accessed 31.03.2023].

be able to carry out an economic activity (under the auspices of the other side), then this consent is not valid and does not conflict with the norms of the European Convention.

In general, the appellate court decided that:

1) the arbitration agreement between the athlete and the International Skating Union shall be canceled — it is not valid;

2) the International Union of Skaters has a monopoly position in the market (in the sphere of organizing sports competitions in speed skating), therefore the German Federal Law on Competition can be applied to this organization, and this Law prohibits taking benefits from the dominant position in the market, in this case requiring the athlete to conclude arbitration (arbitration clause);

3) the CAS is not an independent and impartial arbitration court;

4) the CAS decision in the case of Ms. Pechstein is not subject to recognition in the territory of the Federal Republic of Germany, since it violates public policy, including the fundamental provisions of competition law.

This decision, in fact, "shocked" both the world of sports justice and many international experts, who strongly opposed the power of national courts to review decisions of foreign arbitration courts. As a rule, their reasoning was limited to the formal contradictory of this approach with the provisions of the New York Convention of 10 June 1958 (Mavromati, 2016, pp. 1–15). However, during the two subsequent years, the CAS — until the determination of the appeal complaint against this decision filed by the Supreme Court of Germany, — was in a state of uncertainty, and any of its decision raised doubts. However, the Supreme Court canceled solutions of the two lower levels (appeal trial and trial court (district court) and legitimated CAS as "real" (proper) arbitration court and corresponding to the principle the independence of justice within the meaning of the German Code of Civil Procedure. The presence of a "closed" list of arbitrators does not threaten the independence of the CAS to such an extent that could cast doubt on its position as an appropriate arbitration court, the Supreme Court of Germany decided.

In the same decision, the Supreme Court of Germany essentially evaluated the validity of the "arbitration clause," stating that

1) athlete voluntarily accepts the arbitration clause enshrined in the statute or regulations of sports federations; this kind of ("implied") arbitration clause is valid and does not violate the principle of prohibiting the use of a dominant position in accordance with Art. 19 of the German Competition Act;[11]

2) key feature of any contractual relationship is the fact that the parties themselves determine their civil rights and duties that are legally bounded from the moment the contract is concluded.

V. Conclusion

Thus, the practice of CAS must comply with the fundamental requirements associated with the arbitration proceedings, namely the requirement on the voluntary consent of the parties to the proceedings before the arbitration court; in the absence of such an agreement — an arbitration clause — the case cannot be considered in a sports tribunal. But the peculiarity of this clause in the "Sports Law" system has a special nature. In modern sports, the arbitration clause in the "classic form" — in the form of a special agreement (separate agreement or a paragraph of the contract), signed by the parties — replaced (and recognized as being valid by the national courts, at least, in Switzerland and in the Federal Republic of Germany) by the "implicit" "arbitration clause." It is the "reservation" that contains corporate (regulatory) standards adopted by both international and national sports federations. Athletes simply do not have the right to participate in competitions held under the auspices of the respective federation, if they "voluntarily" do not agree to the arbitration of disputes arising in connection with this kind of competitive activity, in a specialized sports arbitration court.

In a similar way, this system is also formed in the field of anti-doping prevention: the World Anti-Doping Code (which is also adopted by an absolute majority of sports federations) contains Art. 13 "Appeals," Para. 13.2.1 of which ("Appeals concerning International Athletes or International Sporting Events") states that "if a violation occurred

[11] Gesetz gegen Wettbewerbsbeschränkungen (GWB). Available at: https://www.gesetze-im-internet.de/gwb/BJNR252110998.html [Accessed 01.04.2023]. (In Germ.).

during an International Sporting Event or if Athletes of an international level are involved, an appeal against a decision must be made exclusively to CAS."[12] In addition, the note to Art. 13.2.1 specifically states that the CAS decisions are final and binding, with the exception of any revision provided for by law, which applies to the annulment or execution of arbitral awards.

Within the framework of the "doping" ("disciplinary") case, as key as Ms. Claudia Pechstein's case, it was the precedent of tennis player Guillermo Cañas.[13] A decision made during the consideration of the appeal by the Supreme Court of Switzerland, also contains a reference to the fact that the agreement (arbitration clause) in the sports arbitration for disputes related to doping, is "non-consensual in nature." Athletes have no choice but to accept the relevant rules and agree on the proposed procedures if they intend to participate in international sports competitions; firstly, any dispute about an anti-doping rule violation must be addressed to the court of arbitration: the NSF tribunal, the Chamber for dispute resolution of the respective IF, and then — to the CAS, and, secondly, mustn't be addressed to any other court (especially national) which means the waive of the constitutionally universally recognized human right of access to justice. For example, in the Russian Federation this issue is regulated in Art. 46 of the Constitution: "Everyone is guaranteed judicial protection of his rights and freedoms... Everyone has the right to apply to intergovernmental bodies for the protection of human rights and freedoms in accordance with international treaties of the Russian Federation if all available domestic remedies have been exhausted." And the Swiss Supreme Court, in essence, recognizes that with an athlete, if he or she intends to participate in sports competitions under the auspices of the corresponding sports federation, the procedural (corporate) norms of which require "tacit" accession to the arbitration clause, have no choice

[12] The World Anti-Doping Code. Available at: https://www.wada-ama.org/en/what-we-do/world-anti-doping-code [Accessed 03.04.2023].

[13] Judgment of 22 March 2007 1st Civil Law Court of Guillermo Cañas with the vs ATP Tour and Court of Arbitration for Sport (CAS). Available at: https://law.marquette.edu/assets/sports-law/pdf/2012-conf-canas-english.pdf [Accessed 03.04.2023].

but to accept these terms. That is, "voluntarily" forcing to recognize the arbitration clause and to refuse to exercise the right of access to justice. However, from the point of view of Swiss judges, this kind of approach can be considered admissible due to the "incontestable" (from the point of view of the court) advantages of "sports arbitration" (consideration of arbitration disputes in specialized arbitration courts). These benefits arise from the fact that from the point of view of Swiss judges, it is only specialized sport tribunals that may consider the fact that the sport (professional and elite) is characterized by a highly centralized structures on both national and international levels. Establishing a relationship of subordination between the athletes and sports federations to manage sports differ from the horizontal relations level (private law relations arising between the parties under the contract). This structural difference between the two types of a relationship has a fundamental impact on the process of will expression itself, which leads to an agreement between the athlete and the federation. If the parties are equal, then each of them formulates their requirements in respect of the contract, for example, so as in the case of international commercial practice. But in the world of the sports the situation is quite different: apart from a hypothetical and possible situations when the athlete is so well known that he or she is able to dictate the conditions to the IF governing its sport, as a rule, in most cases, athletes do not have any power over their Ifs or NSFs and must comply with the requirements of sports federations, regardless of whether they are satisfied with them or not. This problem is particularly relevant in the field of professional sports, because it is here that an athlete faces a dilemma: either to accept the "rules of the game" (including the "mandatory" arbitration clause) or to be engaged in this chosen sport as an amateur. Of course, the choice in this situation is obvious, as opposed to the case when the athlete's motives are not material (the want to meet with "real opponents"). In majority of cases such motivation is materially determined, for example, when the only significant source of income for an athlete is "prize money "or earnings in kind, or advertising revenue, etc.

In this kind of situation, there is no doubt that the "refusal" of an athlete to appeal to the organs of the state judicial system is not voluntary but is a consequence of submission to the decisions of the

sports federation. There is no doubt that this kind of "voluntary refusal" cannot be recognized and is not recognized by the national courts in the event that an athlete does apply to them. On the whole, such an approach cannot but be recognized as highly questionable from the point of view of the norms of international law — for example, the European Convention for the Protection of Human Rights and Fundamental Freedoms,[14] which Art. 6, Para. 1 provides that "everyone in the case of a dispute about his civil rights and obligations or upon presentation of any criminal charge to him is entitled to a fair and public hearing of the case within a reasonable time by an independent and impartial court established by law." And the common "argument" of the representatives of IF is that the federation is not a monopoly, "no one twists the athlete's hands" and does not force them to obey the rules of the federation — if he or she does not agree with these rules, he/she can unite all the "dissenters" sport shifts to "their own" federation and compete according to the rules that suit them, competing with such a federation, must also be declared insolvent. Formally, athletes can create an "alternative federation," but the realities of today's professional sports are such that in most (primarily Olympic) sports, all professional athletes are united under the auspices of a single International Sports Federation. Therefore, an athlete is not free in his or her will, agreeing both to the jurisdiction of the arbitral tribunal of this sports federation and to the jurisdiction of the CAS. And, therefore, if the athlete applies to the national court for protection, regardless of whether he or she is signed the arbitration clause or not, and corresponding "impartial" arbitration agreement concluded or not, the national court must accept any application and resolve the case. But, on the other hand, all the above arguments are not the basis for a national court to declare that the CAS is not an independent or fair court, but "impartial" arbitration clauses void because of their "commitment" for an athlete, regardless of the presence or lack of agreement. The doctrine commonly states that despite the "mandatory rule" sports arbitration proceeding is effective

[14] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14. Rome, 4 November 1950. Available at: https://www.echr.coe.int/Documents/Convention.pdf/ [Accessed 05.04.2023].

for an athlete and fully takes into account his or her interests due to the following reasons:

— it provides sufficient quick consideration of the case (in the world of sports, where the "age" of a professional athlete is usually extremely short, this is extremely important);

— it is professional due to the competence and narrow specialization of the arbitrators;

— it creates more opportunities for execution of the decision, since it operates not only with property (as in the case of the national court), but also with the so-called sports sanctions, which include disqualification, deprivation of points, prizes, etc. (Pashorina-Nichols, 2015, pp. 1–74).

Equally, the supreme national courts of European countries (Switzerland, Germany) do not agree with the definition of sports federations as "monopolistic." In particular, in the case of Ms. Pechstein examined above, the Supreme Court of the Federal Republic of Germany indicated that the concept of a "dominant position" and an "abuse of dominant position" should be distinguished. The dominant position itself is not illegal, and the requirement of a sports federation (International Skating Union (ISU) in the case under consideration) to "agree" with the arbitration clause is not an abuse of the dominant position.[15]

Finally, the independence and impartiality of the CAS also remains recognized (consistent with the principle of "good governance"), despite certain difficulties related to the fact that, firstly, the CAS is funded by both the IOC and IFs (which could be a party to the dispute), and, secondly, most of the CAS arbitrators are somehow connected with sports federations.

The Supreme Court of Germany concluded that the CAS is an independent and impartial court of arbitration (corresponding to the relevant provisions of German civil law), the Swiss Federal Tribunal recognized as sufficient the arguments set forth in the case of Russian skiers O. Danilova and L. Lazutina (Nafziger, Ross, 2011, p. 256), the essence of which is that the CAS is a proper arbitration court, since

[15] Under Civil and German Law Competition // The Pechstein Ruling of the German Federal Tribunal (BGH) of 7 June 2016. Pp. 1–15. Available at: https://ssrn.com/abstract=2800044 [Accessed 05.04.2023].

it really ensures the independence and impartiality of the arbitrators who are considering the cases of the athletes, even in disputes with the IOC. The principled position of the Supreme Court laid down in the decision in the case of O. Danilova and L. Lazutina and constantly maintained up to the present time is that the court is convinced that the CAS arbitrators are intended for all parties involved in the dispute, including the IOC, to be based on the principle of *pari passu* (equality of the parties): despite the fact that the IOC partially finances the CAS: there was not a single case when the CAS would deprive athletes of their rights to equality and fair trial.[16]

Another important position from the point of view of the Supreme Court of the Federal Republic of Germany is that the appointment of the arbitrators of the case is carried out not only by one party: the two parties are equal in their choice as arbitrators (despite the fact that the general list of arbitrators is "closed" and compiled by the ICAS). And although the formation of such a general list is indirectly influenced by sports federations (some ICAS members appointed by the federations), this influence is not so strong as to suggest the bias of the arbitrators. If the general list of arbitrators includes more than 400 people — definitely the athlete (as a party to the dispute) will be able to find neutral-minded judges among them.[17]

Finally, the Supreme Court of the Federal Republic of Germany expressed the view that if it comes to doping in sport, athletes and sport federations should not be seen as "two opposing camps" as, for example, in commercial and labor disputes involving with the opposition parties, as in the first case a common goal of both sides is to eradicate/prevent the use of doping substances in sports.[18]

Summing up the consideration of the legitimation of rejection of the constitutional right of access to justice, it should be noted that such an approach must be considered as unacceptable. Basic constitutional rights

[16] Claudia Pechstein vs International Skating Union, (2016). German Federal Court (BGH). Available at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2016&Sort=3&nr=74892&pos=0&anz=97 [Accessed 07.04.2023].

[17] Claudia Pechstein vs International Skating Union, (2016).

[18] Claudia Pechstein vs International Skating Union, (2016).

have become basic because their role and significance is the foundation of law and law enforcement, and their violation is unacceptable either from outside or from any other subjects. Of course, any individual may refuse to exercise any of these rights. But on the basis of the principle of voluntariness, on the basis of an independently and consciously decision made by him/herself, and not under the influence of any regulations.

Thus, in today sport we have the dominant international sports federations "not abusing" this dominance, and the independent and impartial international arbitration court — the CAS, whose right to consider cases of athletes without their consent has been confirmed by the highest national European courts, although in many cases the specific precedents got other solutions, other than those which issued by the CAS — it is enough to recall, for example, a precedent of Mr. Zubkov, who is "the Olympic champion in the territory of the Russian Federation" in accordance with the decision of the Moscow City Court.[19] Whether this system will turn out to be stable enough is unknown, attempts to change it in the latter are being made more and more often.

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[19] The Moscow City Court partially refused to recognize the decision of the Court of Arbitration for Sport against Alexander Zubkov in Russia. The question of the return of medals the court did not consider. Available at: https://www.mos-gorsud.ru/mgs/news/mosgorsud-chastichno-otkazal-v-priznanii-na-territorii-Rossii-resheniya-sportivnogo-arbitrazhnogo-suda-v-otnoshenii-aleksandra-zubkova-vopros-o-v-ozvrashhenii-medalej-sud-ne-rassmatrival [Accessed 17.04.2023]. (In Russ.).

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FIGHT AGAINST DOPING

Article

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Anti-Doping Rules as a Unique System of Legal Relations: Background and Regulatory Issues

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Abstract: Coordinated efforts of the States and sports organizations to eliminate doping in sport all over the world have formed a unique legal model that stands out for high uniformity in its implementation and enforcement despite differences in national regulations, and this legal model continues to evolve. Erosion of the principles of amateurism, growing governmental interest in sport, concerns about the health of athletes have affected the shape of the modern anti-doping legal system. This study analyzes the key historical stages in the development of anti-doping rules and regulations, as well as the prerequisites for the formation of its modern legal principles and methods. The study details the first anti-doping rules adopted by the Jockey Club at the beginning of the 20th century and describes the legal activities of the International Olympic Committee, States and intergovernmental organizations on creating anti-doping rules and legislation before the adoption of the UNESCO Convention in 2005. Special emphasis is placed on the explanation of ideological and political influence on the development of anti-doping rules and assessing the roles of the main actors in the anti-doping system.

Keywords: sport; doping; anti-doping regulation; anti-doping rules; international law; World Anti-Doping Code; World Anti-Doping Agency; International Olympic Committee; UNESCO

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Contents

I. Introduction

Historical researches show that the use of performance-enhancing drugs among athletes has been practiced since ancient times (Boje, 1939; Yesalis and Bahrke, 2003). However, the idea of fighting against doping among athletes using legal instruments has evolved since the 1960s. The current system of anti-doping regulation based on the World Anti-Doping Code (the WADA Code) attained a relatively complete form only in the early 2000s. Anti-doping regulation continues to develop. The World Anti-Doping Agency (WADA) has regularly undertaken reforms

over the last twenty years since the first version of the WADA Code was adopted in 2003.[1]

The use of performance-enhancing drugs by athletes is a philosophically and ethically controversial phenomenon. As there was no consensus on the prohibition of doping practises in the early days of anti-doping, there is nowadays an opinion, shared also by professional athletes, that performance-enhancing drugs should not be banned (D'Angelo and Tamburrini, 2010; Lee, 2006).[2] It has been argued in the literature that the idea of anti-doping itself runs counter to the ideological underpinning of professional sport, and this inherent contradiction prevents the total cease of doping (Gleaves, 2011; Gleaves and Llewellyn, 2014).

When ideological foundations of the anti-doping movement were weak and the medical abilities and sports governance systems were not yet sufficiently robust to ensure the effectiveness of anti-doping measures, coordinated efforts of the sporting community and intergovernmental organizations to formalize the fight against doping were particularly significant. The interaction between States and the sporting community has created a unique modern system of anti-doping rules. The uniqueness of the anti-doping legal model lies in the binding force of the elements of the World Anti-Doping Program implemented through the activities of a non-governmental organization (WADA) and the achievement of almost full uniformity in regulation across the world.

Determining the history and problems in the development of the modern system of legal anti-doping regulations introduces the research interest and it should contribute to the enforcement of effective anti-doping policies in the future.

[1] WADA is reforming both its anti-doping rules and its governance structure. *See*, for example: WADA Foundation Board unanimously approves final round of governance reforms. Available at: https://www.wada-ama.org/en/news/wada-foundation-board-unanimously-approves-final-round-governance-reforms [Accessed 23.03.2023].

[2] In "Cyclingnews" (2018) Westra admits using tramadol and caffeine as performance enhancers. Available at: https://www.cyclingnews.com/news/westra-admits-using-tramadol-and-caffeine-as-performance-enhancers/ [Accessed 23.03.2023]. In the editorial "Fear of Regulation" of the newspaper "Economic and Political Weekly" (2004) it was also suggested that, without global anti-doping regulation and fear of sanctions, athletes, coaches and sports bodies would continue to "resort to unfair means."

II. Anti-Doping Rules Evolution

II.1. First Anti-Doping Rules of the Jockey Club

Researchers of the history of doping in sports note that the first significant legal steps in counteracting performance-enhancing practices were taken in horseracing (Gleaves and Llewellyn, 2014). Stewards were the most active in putting a stop to doping, as drugging horses allowed for the manipulation of race results and betting.

Striking developments of doping practices in horseracing, which prompted the racing community to introduce the first anti-doping rules from 1902 onwards, began, according to newspapers, around 1900 in America.[3] Doping practices in horseracing involved the use of not only drugs, but also of other mechanical appliances that allowed horses to accelerate.[4]

Although the problem of doping was often discussed, it did not provoke a response from the governing bodies of horseracing in Britain in 1900–1902.[5]

At the same time, an active fight against doping of racehorses began in America. On 13 December 1902, a newspaper reported that the New York Jockey Club adopted the first rule banning doping and other extraneous aids to speed in horseracing.[6]

The significance of this step is designated by the fact that previously legally indifferent relations were subjected to normative regulation. A normative prohibition was initiated by the sporting community. It

[3] Sport and Athletics (1900). *The Cardiff Times*. 29 December; "Doping" Racehorses (1900). *South Wales Echo*. 20 November; "Dope" Evil of the Turf (1903). *The New York Times*. 19 October.

[4] Doping (1900). *South Wales Daily News*. 15 November; By the Way (1900). *Evening Express*. 20 November.

[5] Sport of the Day (1900). *Evening Express*. 5 November; Sport of the Day (1900). *Evening Express*. 13 November; "Doping" Racehorses (1900). *South Wales Echo*. 20 November; "The Bard's" Gossip (1902). *Evening Express*. 4 October; Bennets for Horses (1901). *The Cardiff Times*. 10 August; Official Scratchings (1902). *Evening Express*. 13 December; Sport of the Day (1903). *Evening Express*. 4 June.

[6] Official Scratchings (1902). *Evening Express*. 13 December. According to the press, the rule stated, "Anybody administering a drug to a horse internally or hypodermically prior to racing or using any electrical or mechanical appliances, except the whip or spur, shall be ruled off the club's courses."

substantiated unlawfulness of artificial influence on competition results as well as the consequences for non-compliance with the rules. A specific structure of the basic and cornerstone legal rule against doping in sport was established.

The use of any aids that could alter the horse's behavior during a race was prohibited, irrespective of the actual consequences of the usage and with the only one punishment (exclusion). Prohibited practices were defined on the principle of "anything not permitted is prohibited."[7]

Thus, doping in horseracing was perceived as a very unacceptable practice, with no leniency for offenders and no tolerance for the destructive conduct. There was neither indication of permissible practices nor requirement to establish the actual effect of the drug on the horse or race results. No alternative penalties were introduced (e.g., a warning, disqualification of results or a fine). The degree of fault did not affect the severity of the penalty.

On 16 May 1903, the *New York Times* reported the death of a horse called Dr. Riddle as the first case involving the use of drugs since race officials banned the use of doping.[8] During the race, Dr. Riddle's unusual behavior attracted the attention of the racing staff. A veterinarian managed to examine the horse before it died. Based on the veterinary report, the stewards' meeting ruled that the entries of J. Gardner, in whose name the horse had raced, and Dr. Riddle should be refused and the trainer W. Howell's license should be suspended.

The case was referred to the Stewards of the Jockey Club and at the Stewards' meeting, on 23 May 1903; they decided that the trainer W. Howell should be ruled off the turf under the provisions of the new Rule 162 prohibiting doping. As the trainer accepted full responsibility for the use of doping, J. Gardner, a newcomer as an owner of racehorses, was acquitted.[9]

[7] It differs from the modern model, in which only specified substances and methods are prohibited. The model of prohibition adopted is an important one. Some researchers point out that the current system based on a negative list is not effective in terms of social perception (Bird and Wagner, 1997).

[8] "Doped" Race Horse Died (1903). *The New York Times*. 16 May.

[9] Horse Drugger Rulled Off (1903). *The New York Times*. 23 May.

Subsequently, on 19 October 1903, the *New York Times* published a summary article on American practices against doping in horseracing.[10] The emphasis of the article was that there were no effective ways of identifying the doping and only the death of the animal in *W. Howell case* allowed the stewards and experts "to make a clean conviction."[11] In addition, the lack of the anti-doping rule was cited as having only one negative consequence (exclusion). The issue of doping was submitted to the Society for the Prevention of Cruelty to Animals (SPCA) for discussion. The SPCA also had data "concerning the effects of the stimulants most commonly employed." The authors also expressed the hope that the problem of doping would be called to the attention of the legislature who would introduce a legislative regulation in the field.

Similar attempts to fight against doping were made in other countries. In 1903, the British press claimed that the Jockey Club had imperative duty to take immediate steps to prevent doping practices, stop ignoring the problem and adopt a prohibiting rule.[12] It was announced that on 30 September 1903 a new Rule would be added by the decision of the Jockey Club.[13] The British rule differed from the American rule only in that that it did not include the use of mechanical appliances in doping practices explicitly, although the list of methods remained open-ended. The British rule also added the wrongful purpose (affecting on the speed of a horse) as an element of the rule.

On 28 September 1903, it was reported that the doping was so widespread in France that the national governing body for racing

[10] "Dope" Evil of the Turf (1903). *The New York Times*. 19 October.

[11] However, on 22 August 1903, a British newspaper published details of several other cases of exclusion due to doping in America. Sport of the Day (1903). *Evening Express*. 22 August. In 1900, newspapers also stated that there should be an experienced veterinary surgeon to identify a drugged horse. Sporting Items (1900). *South Wales Echo*. 21 December.

[12] Sport of the Day (1903). *Evening Express*. 4 June; [No title] (1903). *Evening Express*. 2 April. P. 3.

[13] "Doping" to be dealt with (1903). *Evening Express*. 11 September. According to the press, the Rule stated "If any person shall be proved to have administered, for the purpose of affecting the speed of a horse, drugs or stimulants internally, by hypodermic or other methods, every person so offending shall be warned off Newmarket Heath and other places where these rules are in force."

appointed a veterinary committee. The veterinary committee was authorized to investigate not only the immediate effect of doping upon the animals, but also its influence upon horses raised for their stud purposes.[14] On 15 December 1903, a committee of the French Jockey Club adopted the rule prohibiting doping in the first reading, and later French stewards were authorized to examine any suspicious horse for three hours before and after a race.[15]

The French practice demonstrates that further legal measures were taken immediately to implement the prohibition of doping, including the introduction of a doping control rule.[16]

In 1905, it was mentioned that the horseracing bodies of the Russian racing lacked cohesion on doping issues, as the suspended trainer was reinstated in Warsaw and Moscow, but still without the license of St. Petersburg Jockey Club.[17]

It is likely that the active opposition of the sporting community had the desired effect, and attention to doping problems began to fade in 1904–1905.[18] In summer 1914, an American newspaper called the period of the early 1900s as a "Crusade" against doping in horse racing, emphasizing that it had been 14 years since doping was last public discussed.[19]

However, horse doping was not eliminated completely. According to newspapers, the American federal laboratory improved the method of testing the horse saliva. Due to the doping prevalence in horse racing, in 1936 States of America requested that doping tests be made.[20] In 1960–

[14] The "Doping" of Horses (1903). *Evening Express*. 28 September.

[15] Doping Horses (1903). *Evening Express*. 16 December; Chips of News (1903). *The Aberdare Leader*. 26 December.

[16] In 1904, the press reported also on the unusual use of doping (electrical stimulation) in Germany, upon detection of which a race participant was disqualified. Sport of the Day (1904). *Evening Express*. 16 June.

[17] [No title] (1905). *Evening Express*. 27 July. p. 3.

[18] Sport of the Day (1904). *Evening Express*. 12 October; Sport of the Day (1904). *Evening Express*. 13 October; Sport of the Day (1905). *Evening Express*. 20 October.

[19] Some illegitimate ways of doping racehorses and of bringing up athletes also (1914). *Fergus County Democrat*. 27 August.

[20] Rule Bars U.S. Act in Horse Doping (1936). *Washington Times*. 6 October.

1963, the press published news about "British Scandals" in horseracing, according to which Scotland Yard and the Jockey Club investigated the cases when doping was used.[21] It was, in particular, stated that, unlike the previous practices, when anyone associated in any way with doping was barred from the tracks, the Jockey Club offered an amnesty for anyone shared information.[22]

Besides, the American article in 1961 mentioned that the participants involved in the doping offense were suspend under different rules defining that:

— a trainer is responsible for the condition of the horse regardless of acts of a third party (trainer);

— there shall be no failure to protect a horse (assistant trainer);

— there shall be no possession of illegal drugs and hypodermic needle (hot walker at track).[23]

However, it was suggested that trainer's and assistant trainer's suspension could be lifted immediately if hot walker who possessed hypodermic needle admits the violation. Moreover, trainer offered a high reward for information

II.2. Early Steps in the Fight against Doping Among Athletes (1920–1950s)

The idea that athletes should not be allowed to use performance-enhancing drugs during competitions had different reasons and was legislatively developed much later than anti-doping rules in horseracing.

As the authors point out, the birth of the concept of anti-doping in human competitions was linked to the rise of the ideology of "amateurism" in the early 20th century (Gleaves, 2011; Gleaves and Llewellyn, 2014). Amateurism, introduced from Britain and promoted by the upper and middle classes, was described as participation in sports

[21] Veteran Jockey, 3 Others Jailed in British Scandal (1960). *Evening Star*. 1 November; British Bookies Offers Big Reward to Curb Doping Syndicate (1961). *Evening Star*. 25 November.

[22] Doping Scandal threatens Britain: Relko Mentioned (1963). *Evening Star*. 18 July.

[23] Stable Hand is Hunted in Doping Case (1961). *Evening Star*. 17 February.

for spiritual raising. It was opposed to professional sport that generated income and was perceived as an occupation for the lower social classes. Stimulation used to win competitions was not seen as unethical if it allowed participants to earn more money. The growing socio-cultural division in the 1900s led to the emergence of anti-doping ideas among amateurs as a way to distinguish amateur and professional sports. The revival of the ancient Olympic Games was a continuation of the desire to organize amateur sports following the British model. Such games were designed to affirm the beauty of the human body and spirit (Gleaves, 2011; Gleaves and Llewellyn, 2014; Merkel, 2003).

However, it cannot be denied that the doping among athletes was a cause for essential concern. In 1913, for example, the Official Bulletin of a leading French athletics clubs contained a strong warning against the practice of administrating artificial stimulants; the attention of the football organization was called to the fight against doping.[24] In 1914, an American newspaper reported that although the doping among athletes had never attracted much attention, American athletics authorities were concerned about the use of strychnine in sprint races.[25]

Such concerns, however, did not translate into forceful legal activity of the sporting community. The lack of active opposition meant that the public did not perceive the use of doping by athletes as a genuine problem.

The first prohibition of performance-enhancing drugs among athletes was intended as a further stable point for the ideals of amateurism that refrained from artificial stimulation because it conflicted with the high "spirit of sport" (Gleaves and Llewellyn, 2014). It is not surprising, therefore, that the legal prohibition of doping in 1928 emanated from the amateur sports organization, the International Amateur Athletic Federation (IAAF).[26]

[24] Drugged Footballers (1913). *The Cambria Daily Leader*. 8 December.

[25] Some illegitimate ways of doping race horses and of bringing up athletes also (1914). *Fergus County Democrat*. 27 August.

[26] World Athletics, (2006). A Piece of Anti-Doping History: IAAF Handbook 1927–1928. Available at: https://worldathletics.org/news/news/a-piece-of-anti-doping-history-iaaf-handbook [Accessed 23.03.2023].

The first IAAF rule was the same in substance as the first rules of the Jockey Club.[27] However, there is no information available that further action was taken by the IAAF, including introduction of rules regulating doping control or establishing commissions to identify the influence of doping practices.

The intensification of doping activities within sporting community in the late 1930s was associated with the further erosion of the principles of amateur sports and the fight against "pseudoamateurism." The 1936 Berlin Olympic Games raised concerns about the possible existence of government programs to train and fund athletes that contravened the amateur rules of the International Olympic Committee (IOC). The 1936 Olympic Games probably demonstrated for the first time that governments were continuously interested in sport and success of their athletes, especially in the context of growing political confrontation (Beamish, 2013; Gleaves and Llewellyn, 2014).

By 1937, the head of the IOC had written an essay on amateurism that raised the issue of the ideals of amateur sports and, in particular, the essay dwelled on the issue of doping. His work stimulated the IOC's work on the problem of doping, and, subsequently, in documents of 1937–1938, doping was declared by the IOC as dangerous to health and inconsistent with the "spirit of sport." However, there were no specific proposals for anti-doping measures (Gleaves and Llewellyn, 2014).

In 1938, the IOC adopted ten resolutions on amateur status that were published as part of the 1946 Olympic rules (Gleaves and Llewellyn, 2014). The first resolution (Examination of the question of nationalization of sports for political aims) explicitly stated that the Olympic movement regards as a danger to the Olympic ideal that the amateur Olympic Games caused a national exultation based on the success achieved, rather than implementation of a harmonious objective that is the essential Olympic rule. The sixth resolution (Doping of

[27] The Rule stated, "Doping is the use of any stimulant not normally employed to increase the poser of action in athletic competition above the average. Any person knowingly acting of assisting as explained above shall be excluded from any place where these rules are in force or, if he is a competitor, be suspended for a time or otherwise from further participation in amateur athletics under the jurisdiction of this Federation."

Athletes) determined that the use of drugs or artificial stimulants of any kind must be condemned most strongly, and no one who accepts or offers dope, no matter in what form, should be allowed to participate in amateur sports meetings or in the Olympic Games. In the Olympic rules of 1950, the provisions of the resolutions were designated as "Decisions Regarding Amateur Status."[28]

III. International Olympic Committee and its Anti-Doping Regulations (1960–2000s)

Researches of the history of doping have often linked the intensified IOC fight against doping to the two tragic deaths of cyclists in 1960 and 1967 (Gleaves and Llewellyn, 2014).[29]

In 1962, the IOC established a medical working group.[30] It should be noted how much time passed from the first doping prohibition by the IOC to the establishment of an authorized medical structure and implementation of anti-doping rules as compared with the actions of the stewards at the beginning of the 20th century.[31] It is also characteristic that the basic Olympic rules regarding doping changed rather slowly.

In 1956, the wording of the prohibition on doping in the Olympic rules no longer referred to amateurism and the prohibition itself was no longer bound with amateurism ideology, although it did not differ substantively from the wording approved in the Olympic Rules of 1946. The six resolutions were no longer entitled "Decisions regarding Amateur Status" but simply "Decisions of the IOC."

[28] All IOC main Olympic rules are available at: https://library.olympics.com/default/olympic-charter.aspx?_lg=en-GB [Accessed 23.03.2023].

[29] IOC has taken a similar position. IOC. *1967: Creation of the IOC Medical Commission*. Available at: https://olympics.com/ioc/1967-creation-of-the-ioc-medical-commission [Accessed 23.03.2023].

[30] IOC. *1967: Creation of the IOC Medical Commission*. Available at: https://olympics.com/ioc/1967-creation-of-the-ioc-medical-commission [Accessed 23.03.2023].

[31] Although a number of international federations, e.g., IAAF or Union Cycliste Internationale (UCI), worked also in the forefront on the anti-doping rules adopting and conducting testing, their activities lie beyond this research.

In the 1964 Olympic rules, the provision on doping was one of the eligibility rules for the Olympic Games. The separation of consequences for individual and team sports appeared in the 1966 Olympic rules. The doping of one athlete should result in the disqualification of the whole team in that sport.

In 1967, the Medical Group was transformed into the IOC Medical Commission. Alexandre de Merode, a Belgian nobleman, was appointed as the chairperson of the Medical Commission that was requested to set up a medical testing service.[32] In 1968, the IOC introduced the first athletes' testing for stimulants and narcotics (Gleaves and Llewellyn, 2014; Meier and Reinold, 2018).

In the 1971 Olympic rules, an athlete was held liable for the failure to attend for the control. A fairer differentiation of penalties for teams was in place in the event of an athlete doping.[33] In the 1973 Olympic rules, a number of provisions were added to the Eligibility Code that contained a prohibition on doping:

— the authority of the Medical Commission to propose sanctions;

— enforcement of elimination by the International Federations (IFs) from Olympic Games on proposal of the Medical Commission;

— forfeiture of the competition in question by the team if sole athletes were doping;

— the right for teams to provide explanations if athletes were doping and to hold the discussion with IFs before the team's disqualification from the Olympic games;

— withdrawal of medals by the IOC Executive Board;

— authority of IFs to apply further sanctions.

In the 1975 Olympic rules, the anti-doping provisions were separated from the Eligibility Code. They formed specific provisions for the Medical Code (Rule 27) and they were supplemented with the following rules:

— the power to set up a Medical Commission to implement the Medical Code; its members were forbidden to act as team doctors;

[32] Medical Commission Fonds list, IOC (2015).

[33] A team is excluded if it benefited from usage of doping; if disqualification of one athlete resulted in the inability of the team to compete, team members were permitted to compete individually.

— the right of the Medical Commission to pass by-laws to the Rule on Medical Code;

— the authority of the IOC to prepare a list of prohibited drugs;

— the obligation of all Olympic competitors to subject themselves to medical control and examination under the rules of the Medical Commission.

In the 1976 Olympic rules, it was noted that IOC Medical Controls brochure was deemed to be a by-law to Rule 27. The brochure also contained the lists of prohibited classes of substances and methods.[34]

The 1978 Olympic Charter recommended the National Olympic Committees (NOCs) to strive against deviations from sporting principles and particularly against all forms of doping or any improper athletes' manipulation. It is noteworthy that the 1968 Model Constitution for NOCs made no explicit reference to the prohibition of doping.

The 1980 Olympic Charter stated that the IFs' proposals concerning the selection procedure and the number of athletes for doping control were subject to the approval of the IOC. The 1982 Olympic Charter, as a part of Guidelines to Eligibility Code for the IFs, stipulated those persons who, in the practice of sports and in the opinion of the IOC, manifestly contravened the spirit of fair play in the exercise of sports, particularly due to the use of doping or violence, could not participate in the Olympic Games.

In the 1987 Olympic Charter, the wording of the Medical Code was taken away from the main rules of the Olympic Charter and included in its by-laws. Rule 29, as revised, specified that all competitors must comply with the IOC Medical Code. The by-laws also added that if any person other than the athlete was involved in the doping offence, that person could have been subjected to the action comparable to that taken against the athlete. Thus, the scope of the IOC anti-doping prohibition was explicitly extended over other persons who participated in the doping offences. Moreover, it was added that further sanctions could be implemented not only by IFs, but also by NOCs.

In 1991, a major update of the IOC main rules on doping in the Olympic Charter took place. One of the IOC's roles under Rule 2 of

[34] Medical Commission Fonds list, IOC (2015).

the Olympic Charter 1991 was to lead the fight against doping in sport.[35] Rule 48 of the Olympic Charter 1991 stipulated that the IOC contained the Medical Code that was, among other things, to provide for the prohibition of doping, to establish the lists of the classes of prohibited medicaments and procedures, to provide for the obligation for competitors to submit themselves to medical controls and examinations, and to make provision for sanctions to be applied in the event of a violation of the Medical Code. The Medical Code also included provisions relating to the athletes' medical care and applied to all Olympic Games participants. Compliance with the IOC Medical Code was one of the eligibility conditions under the Eligibility Code (Rule 45).

The by-laws to Rule 48 of the Olympic Charter 1991 contained three sections: the Medical Commission, establishment and implementation of the Medical Code, and provisions against the trafficking of prohibited drugs. The IOC President appointed the Medical Commission to be responsible for the elaboration and implementation of the Medical Code.

Rules regarding doping control athletes' and teams' offences, consequences of a violation in the Olympic Charter 1991 remained in the substantive part the same, although they were slightly edited to clarify the procedures.

However, another significant change should be rather designated, namely, that the, offences related to distribution of doping were included in the Olympic Charter. By the decision of the IOC Executive Board, any person committing such an offence was subject to sanctions that might extend to life exclusion from all forms of participation whatever in the Olympic Games or in any other competitions organized under the authority or patronage of the IOC. The attempted conduct was deemed as a punishable act under those provisions. The violations under consideration included:[36]

[35] The Olympic Charter 1991. Available at: https://stillmed.olympic.org/Documents/Olympic%20Charter/Olympic_Charter_through_time/1991-Olympic_Charter_June91.pdf [Accessed 22.05.2023].

[36] These violations would later be more clearly separated by the WADA Code 2003, with addition the rule regarding availability of out-of-competition testing.

— manufacture, possession, transporting, preparation, commercialization, acquisition and distribution in other manner of substances prohibited by the Medical Commission without prior authorization from the IOC;

— taking any measures for such purpose;

— funding or intermediation to finance such measures;

— inducing the consumption or use of such forbidden substances, or revealing means of procuring or consuming them;

— involvement in procedures forbidden by the Medical Commission without prior authorization from the IOC.

Ignorance of the nature, composition and effect of prohibited substances and procedures did not constitute extenuating circumstances (a defense) and could not render the act as permitted.

However, the relevant provisions did not apply to medical professionals when the act in question was necessary for them within the strict limits of *exercising the art of healing*, nor to persons performing acts in the course of the lawful exercise of their professional activities.[37]

In 1994, the IOC negotiated the Medical Code with the IFs to uniform the rules (Meier and Reinold, 2018, p. 6).[38] Consequently, the Olympic Charter 1995 no longer contained by-laws to the Medical Code and definitions of unacceptable conduct and consequences. Only the first provisions relating to the appointment of the Medical Commission and the adoption of the Medical Code remained in the Olympic Charter 1995, with the addition that members of the Medical Commission could also not participate in discussions concerning non-compliance if members of their NOCs were involved.

In the beginning of 1999, when the WADA was in the process of foundation, the Olympic Charter included previous provisions for IOC

[37] The provisions regarding the inadmissibility of members of the Medical Commission to act as support personnel, the consequences for teams, and the right of the IFs to impose additional sanctions and IFs authority to propose a selection of athletes for doping control for approval by the IOC were retained.

[38] However, in 1997 the press reported that IOC acknowledged that agreement 1994 did not work, so IOC brought new proposal to harmonization IFs anti-doping rules based on Medical Code. The Spokesman-Review, (1997). IOC Seeks Uniform Drug Code. Available at: https://www.spokesman.com/stories/1997/sep/01/ioc-seeks-uniform-drug-code/ [Accessed 23.03.2023].

approval of the Medical Code. However, it already had rules to make the Olympic Movement Anti-Doping Code (OMAC) binding on the Olympic Movement. Thus, for the IFs to be recognized and admitted by the IOC and for the sport to be included in the Olympic Programme, two conditions had to be fulfilled: the OMAC application and the performance of the out-of-competition testing. Notably, the athlete's solemn oath during the Olympic Ceremony included words that the athletes committed themselves to the sport without doping. In the later version of the Olympic Charter, the rules on the Medical Code were deleted and replaced by the OMAC.

It is noteworthy to mention that literature stated at this time that need for international collaboration between the IOC, governments and sports federations is the most important area for change (Mottram, 1999, p. 9). The trend towards making the anti-doping rules mandatory for the entire Olympic Movement continued at the beginning of the 21st century and, finally, in 2003 a provision stipulating that the WADA Code was obligatory for the whole Olympic Movement was introduced in the Olympic rules.

IV. Intergovernmental Efforts on Anti-Doping Regulation (1960–2000s)

The relevance of the anti-doping campaign is also associated with the emergence of politicization of sports reflected in the increased interest of States in the development of sports to demonstrate the State's success on the international stage. Indeed, the endeavors of the IOC might not have been sufficient to intensify anti-doping efforts if the States had not become involved in that struggle in 1960s. It is clear that, for example, laboratories and the widespread system of medical analyses, researches and education, as well as many other anti-doping elements can only be set up with the State support. States' efforts to regulate doping in sport were very significant and they probably determined the success of anti-doping activities.

The first participation of the Soviet Union in the 1952 Olympic Games and the further development of the political confrontation between several world powers during the Cold War are deemed to have

had a particular impact on States. The containment of the political confrontation in sport that might have entailed the use of doping, along with concerns for the welfare of the athletes and the population, may explain the interest of States in regulating the field of doping in the second half of the 20th century (Beamish, 2013, pp. 217–219; Meier and Reinold, 2018, p. 7).

Belgium and France passed first anti-doping laws in 1965. In 1970s, other countries also engaged themselves with drafting laws on doping issues.[39] It is noteworthy to emphasize that during the debate in the French National Assembly in late 1964, a rapporteur drew attention to the fact that the reason for the introduction of the draft anti-doping law was not only the spread of doping among adult or professional athletes, which might have had little impact, but also among young athletes.[40] Thus, it was reiterated that the mere fact of doping by professional athletes did not seem to be a real problem.

Initially, since the problem of doping was most acute in the context of international sports competitions that became a platform for international power competition between States, it was at the international level where the ideas about anti-doping began to be discussed in a coordinated way.

IV.1. First Intergovernmental Steps in the Anti-Doping System Development (1960–1980s)

The modern system of anti-doping regulation was developed by the Council of Europe in the 1960s and 1980s in close co-operation with the IOC.[41]

[39] UNESCO Study on the technical and legal aspects of the desirability of developing a new international instrument to combat doping in sport, covering education, prevention, co-operation and information 27 C/43 (1993) Available at: https://unesdoc.unesco.org/ark:/48223/pf0000095299 [Accessed 23.03.2023].

[40] Anti-Doping Convention (T-DO) Project on the Compliance with Commitments Compliance by France with the Anti-Doping Convention Available at: https://rm.coe.int/project-on-compliance-with-commitments-respect-by-france-of-the-anti-d/168073ac52 [Accessed 23.03.2023].

[41] Detailed politic steps of the international community on fight against doping in 1960–1980s are outlined in Explanatory Report to the Anti-Doping

In 1967, when the IOC appointed the Medical Commission, the Committee of Ministers of the Council of Europe adopted the first international act in this field, namely, Resolution No. (67) 12 on the Doping of Athletes.[42] It outlined the philosophical, ethical and sociological aspects of anti-doping, presenting doping as a means that jeopardized the health and dignity of those who resorted to it and offended against the spirit of fair play essential to all sport.

The Member States were recommended to persuade the national sports associations and federations:

— to take action if necessary with their international federations; and

— to issue a regulation condemning the use of doping, penalizing offenders by prohibiting them to participate in sports, applying to any person who, in another Member State, has been penalized.

The study carried out by Alexander de Merod, devoted to the Conference of European Ministers responsible for Sport in 1978, demonstrated that the available international and national rules had significant discrepancies and were inefficiently implemented. By the end of the 1970s, only three IOC-approved laboratories were in place to serve twenty-two states.

In 1978, European Ministers adopted a Resolution in charge of Sport on Ethical and Human Problems in Sport that formed the basis of Recommendation No. (79) 8 concerning Doping in Sport.[43] Member States were recommended:

— to encourage sport community to take the steps necessary for the simplification and harmonization of the anti-doping regulations;

— to develop, in co-ordination with the governing bodies of sport, an educational campaign;

— to set up systems for the control of the use of artificial stimulants in sport;

Convention. In this study, in Section IV, we refer to this report, highlighting only aspects relevant to the formation of the law. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cb349 [Accessed 23.03.2023].

[42] Resolution of the Committee of Ministers on the Doping of Athletes. 67/12.

[43] Resolution of the European Ministers in charge of Sport on Ethical and Human Problems in Sport. 78/3; Recommendation concerning Doping in Sport. Rec (79) 8.

— to encourage as a priority the creation of suitable laboratories for the comprehensive testing and control.

In particular, member states should consider the establishment of a national anti-doping committee that could consist of representatives of sports organizations and governmental administration responsible for sport and public health.

In 1984, the European Anti-Doping Charter for Sport was drawn up by the expert group of the Committee on the Development of Sport (CDDS) chaired by Alexandre de Merode which substantially consolidated all the previous Council of Europe acts.[44] The first part of the European Anti-Doping Charter set out the requirements for States, the second part included the requirements that States were obliged to impose on sports organizations within their jurisdiction. Thus, States shall:

— ensure implementation of anti-doping rules, for example by making it obligatory to adopt and apply them or making it a condition for receiving public subsidies;

— mutually cooperate to reduce the availability of doping and ensure that doping controls can be conducted;

— set up laboratories;

— provide research, information on anti-doping policy and funding for anti-doping policy, help with the publication of the results of research.

States shall also encourage sports organizations:

— to harmonize anti-doping rules and procedures based on the international acts of the IOC and the IAAF, and ensure that anti-doping rules provide adequate protection of the rights of participants who are charged with an anti-doping rule violation;

— to ensure that the lists of prohibited substances were uniform based on the IOC lists;

— to make efficient use of the facilities available for doping control;

— include in their rules as an eligibility condition a provision that the athlete agree to submit at any time to doping control decided on by an official authorised by that federation or its superior federation;

[44] Recommendation of the Committee of Ministers to Member States on the "European Anti-Doping Charter for Sport." Rec (84) 19.

— to agree on similar and substantial penalties for anti-doping rules violation.

It was then necessary to make the achievements of the Council of Europe accessible to the rest of the nations and activities began to expand anti-doping practices.

In 1984, Otto Jelinek, a former Olympian, was appointed Canadian Minister responsible for Sport. Jelinek made a great effort to put Canada at the forefront of the anti-doping movement (Beamish, 2013).[45] Thus, Canada's efforts may have helped move anti-doping activities beyond the Council of Europe.

In 1986, European Ministers formulated a resolution welcoming the proposals made, inter alia, by the Canadian Minister responsible for Sport on future action to widen the impact of the European Anti-Doping Charter for Sport, and accepting his offer to collaborate with the Council of Europe member states. Resolution No. (86) 4 invited the Committee of Ministers to ask the CDDS to present proposals for involving more countries in the fight against doping.[46] During 1988, European officials concluded that a binding convention should be adopted to allow non-member states of the Council of Europe to join the anti-doping activities of European states.[47]

The international legal work carried out over two decades resulted in adoption of the first significant international act in the field of fight against doping in sport, namely, the Anti-Doping Convention, adopted within the Council of Europe in Strasbourg on 16 November 1989 (ETS No. 135; Strasbourg Convention). The Strasbourg Convention was open for signature by non-member states and it was binding on the parties.

The development of the anti-doping policy was also undertaken by other members of the international community. By this time, the International Conference of Ministers and Senior Officials Responsible

[45] It may be interesting how Jelinek's views on the communism and sport affected his efforts to eliminate doping (Beamish, 2013, p. 223).

[46] Resolution of the European Ministers in charge of Sport on Doping in Sport. 86/4.

[47] On 21 June 1988, the Council of Europe also issued a Recommendation on the Institution of Doping Controls without Warning outside Competitions to introduce out-of-competition doping control procedures. At this time, out-of-competition doping control was seen as an important part of the anti-doping policy success.

for Physical Education and Sport (MINEPS) and the Intergovernmental Committee for Physical Education and Sport (CIGEPS) were functioning within UNESCO. The UNESCO International Charter of Physical Education and Sport was adopted in 1978. It defined in broad terms the principles of sporting activities.

In 1985, the Nordic Anti-Doping Convention was adopted. It enshrined an agreement on cooperation and harmonization of the rules on doping tests during competitions and training (Sweden, Norway, Denmark, Finland and Iceland). The American-Soviet agreement containing joint procedures with a view to reciprocal testing during training was signed in 1988. In 1990, co-operation agreement was also signed between Australia, Canada and the United Kingdom.[48]

In 1988, the first World Anti-Doping Conference was held in Ottawa. It brought together 85 individuals (government officials, physicians and leaders of sport federations) from 27 nations, including China, the Soviet Union, East Germany and South Korea. They met to approve the draft International Anti-Doping Charter that was intended to be presented to the IOC during the Seoul Olympic Games (Cart, 1988).

In November 1988, the MINEPS II discussed also the problem of doping. The attention of participants was linked to:

— the proposal made by leaders of Socialist countries on establishment permanent doping control commission at their previous meeting (IOC expressed the intention to support this proposal);

— the possibility of adopting within UNESCO an international anti-doping instrument (however, there was also an objection that doping control is a matter for voluntary sports movement);

— the approval of coordinated efforts based on the International Anti-Doping Charter.[49]

[48] UNESCO Study on the technical and legal aspects of the desirability of developing a new international instrument to combat doping in sport, covering education, prevention, co-operation and information 27 C/43 (1993) Available at: https://unesdoc.unesco.org/ark:/48223/pf0000095299 [Accessed 23.03.2023].

[49] Physical education and sport in the cause of humanism; final report Conference, International Conference of Ministers and Senior Officials Responsible for Physical Education and Sport, 2nd, Moscow, 1988. Pp. 10, 40. Available at: https://unesdoc.unesco.org/ark:/48223/pf0000082899 [Accessed 23.03.2023].

IV.2. Further Anti-Doping Harmonization and the International Convention against Doping in Sport (1990–2000s)

During 1990s, the international community and the Council of Europe, continued its legal activities and adopted a number of instruments forming the basic provisions establishing the principles of "fair play," including prohibition of doping. The European Sports Charter and Code of Sports Ethics "Fair Play — The Winning Way" acting as a complement to it were the most significant instruments adopted 1992.[50] The Monitoring Group of the Strasbourg Convention adopted also a number of recommendations which reflect the content of the later WADA World Anti-Doping Program.[51]

The background for further changes in the organization of global anti-doping enforcement was provided by the events of 1997–1998. Allegations of doping affected athletics, football, swimming and cycling (Wilson, 1998).

In 1997, W. Franke and B. Berendonk published an article on the use of doping in the East Germany (GDR), accusing the state authorities in the use of drugs in high-performance sport based on several secret documents (Franke and Berendonk, 1997). In August 1998, the first court sentence was passed in Germany for the use of doping. The court held that coaches and doctors of swimming teams from the former East Germany administered anabolic steroids and hormones to swimmers without their knowledge, causing detriment to the girls' health.[52]

[50] Actual versions: Recommendation CM/Rec(2021)5 of the Committee of Ministers to member States on the Revised European Sports Charter; Recommendation CM/Rec(2010)9 of the Committee of Ministers to Member States on the revised Code of Sports Ethics.

[51] E.g., Recommendations on: blood sampling for doping medical controls (Rec (98) 3); basic principles for disciplinary phases of doping control (Rec (98) 2); standard operating procedures at doping control laboratories [procedures for non-analytical phases] (Rec (98) 1); disciplinary measures to be taken with regard to members of the athlete's entourage in application of Art. 7.2.e of the Convention (Rec (96) 1); Standard Urine Sampling Procedures for Doping Control in and out of Competition (Rec (95) 1).

[52] BBC, (1998). *Sport East German officials fined for doping*. Available at: http://news.bbc.co.uk/2/hi/sport/154808.stm [Accessed 23.03.2023].

The 1998 Tour de France was also affected with unprecedented doping cases involving numerous athletes and officials from different teams. The cycling races were accompanied with constant arrests, protests and seizures of banned substances (Wilson, 1998).

These events, as well as a number of other doping incidents, resulted in public criticism of the actions of the IOC (Meier and Reinold, 2018, p. 11). It is noteworthy to emphasize that, at the end of 1990s, sports participants assumed that the sport community was not unanimous on doping and some disciplines found doping is a part of sport (Wilson, 1998). Anti-doping principles, introduced from amateurism, were still in conflict with the mind-set of professional sport.

In summer 1998, the IOC held a meeting where four points were formulated to be discussed at the forthcoming World Anti-Doping Conference:

— protection of athletes;

— the political and legal position, the definition of doping, and government cooperation;

— ethics, education and prevention;

— financial stakes and the relationship between doping and money.

Responsibility of each IFs for out-of-competition testing, for which the IFs lacked funds, was declared as one of the key problems. To address this problem, it was proposed to create a new agency that would be responsible for out-of-competition testing and that could receive sufficient funding. It was expected that IOC would use television revenues to pay for the agency.[53]

In early 1999, the World Conference on Doping in Sport was held. It resulted in the Lausanne Declaration on Doping in Sport adopted by representatives of governments and sports organizations. The OMAC was adopted as the basis for the fight against doping. It also announced that an International Anti-Doping Agency should be created for the 2000 Olympic Games. The IOC, international and national sports organizations maintained their respective competence and responsibility to apply anti-doping rules in accordance with their own procedures, but

[53] BBC news, (1998). Sport "We will never eliminate doping." Available at: http://news.bbc.co.uk/2/hi/sport/155056.stm [Accessed 23.03.2023].

they should cooperate with the International Anti-Doping Agency. The recognition by IOC, the IFs and the NOCs of the jurisdiction of the Court of Arbitration for Sport, established in 1984 as the court of last resort for sports disputes, was one of the most important steps.

In December 1999 in Europe, the Community support plan to combat doping in sport was issued. It shaped the framework of new organization of the anti-doping system highlighting that over-commercialization of sport caused the doping problem and opting for a three-layer approach in this field: to assemble the experts' opinions on the ethical, legal and scientific dimensions of doping, to contribute to preparing the World Anti-doping Conference and collaborate with the Olympic movement on the WADA creation, to work further on the European international instruments. Constitutive Instrument of Foundation of WADA (WADA Statutes) was an its annex.[54]

Based on this framework, an Additional Protocol to the Strasbourg Convention was adopted in 2002. The Additional Protocol updated certain aspects of joint anti-doping activities of member states, called on states to recognize the competence of the established WADA, ensured certification of the national anti-doping organization (NADO) in accordance with the requirements of applicable international standards, and strengthened the control mechanism of the Strasbourg Convention.

In 2003, WADA finally adopted the WADA Code. Stakeholders signed the Copenhagen Declaration on Anti-Doping in Sport that supported the changes that had taken place.

At the same time, since the beginning of 1990s, UNESCO had undertaken actions to prepare a new international instrument.[55] In 1993, it was stated that the UNESCO General Conference should decide whether the fight against doping should become the subject matter of a

[54] Communication from the Commission to the Council, the European parliament, the Economic and Social Committee and the Committee of the regions — Community support plan to combat doping in sport COM(1999)643 Commission of the European Communities. Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0643:FIN:EN:PDF [Accessed 23.03.2023].

[55] UNESCO Desirability of adopting an international instrument to combat doping in sport 26 C/35, (1991). Available at: https://unesdoc.unesco.org/ark:/48223/pf0000089424 [Accessed 23.03.2023].

new international instrument and in what form such instrument could be adopted:

— in the form of convention in order to give it the force of law and made it binding on the States;

— in the form of recommendation in order to summarize guiding principles and standards and invite States to apply them at the national level;

— in the form of declaration as a formal, solemn instrument in order to specify the universal principles to which States agree to accord their widest authority.[56]

UNESCO initiated the process of drawing up an international instrument against doping in sport in the form of convention in January 2003, at the same time with the WADA Code adoption within Olympic movement. The Council of Europe has been taking an active part in the drafting process and reported in preparation for MINEPS IV in 2004 on the UNESCO's work emphasizing the importance of a number of significant legal issues concerning new instrument. In this regard, it seemed important from the perspective of the Council of Europe:

— to ensure that the standards under the new draft international instrument conform to the purposes of the WADA Code;

— to promote compatibility between commitments under UNESCO Convention and the commitments under existing instruments;

— to clarify the relationship between the draft instrument and its annexes and the WADA Code and its International Standards.[57]

So, the Council of Europe supposed that the WADA Code should be the core document, and the UNESCO Convention was intended to made the anti-doping system included in the WADA Code binding on the States.

[56] UNESCO Study on the technical and legal aspects of the desirability of developing a new international instrument to combat doping in sport, covering education, prevention, co-operation and information 27 C/43 (1993).

[57] Information on progress in UNESCO's work on the draft international anti-doping convention. Council of Europe. Ministers' Deputies. Notes on the Agenda. CM/Notes/905/8.1. 30 November 2004. Available at: https://rm.coe.int/09000016805db854 [Accessed 23.03.2023].

On 9 October 2005, the UNESCO adopted the International Convention against Doping in Sport, the most successful convention in the history of UNESCO in terms of the speed of its ratification by States after adoption and the second most ratified of all the UNESCO conventions (191 States Parties).[58]

V. Discussion

A brief look at the major milestones in the development of anti-doping regulation shows the importance of legal cooperation between States and the sporting community concerning joint elaboration of rules and polices for prohibiting doping among athletes.

One of the earliest examples of doping prevention in sport demonstrates that the outlines of modern legal fight methods were established by the sporting community when doping was perceived as a real issue. The actions of the racing community lead us to the following conclusions:

— active opposition was provoked by significant interference of doping in the normal course of competitions and its unpredictable effects on competition results, stakes and the health of horses;

— the initiative to prevent doping came from the sporting community that regulated the industry independently at its own discretion and it also adjudicated cases when the rules were violated; governmental involvement was negligible;

— as supplements to the main anti-doping rule, satellite provisions were established to enforce the rule, including rules enshrining doping-control and good care;

— the lack of clear criteria for the concept of doping has not hindered enforcement rules;

— the primary and only sanction chosen was the exclusion of an offender from the sporting community;

— the sporting community could not always demonstrate the uniformity in the execution of the imposed punishment.

[58] UNESCO. International Convention against Doping in Sport. Available at: https://en.unesco.org/themes/sport-and-anti-doping/convention [Accessed 23.03.2023].

It was important to highlight the practice of anti-doping in horseracing in order to demonstrate the differences in anti-doping between the racing community and the athlete community. Thus, when the IOC only created a first medical group, the racing community had already recognized the need for standardized testing, public financial support and cooperation with prosecuting authorities, and applied rules encouraging whistleblowers. Moreover, it implemented a strict liability, so a trainer or assistants can be subject to sanctions in any case where a horse suffers from doping, regardless of whether they were guilty and actually used the stimulants or were involved in other way in the offence. The case of horseracing shows that the problem with the first anti-doping rules for athletes in 1920s and 1950s was associated not with the lack of objective enforcement capacity and the uncertainty of the concept of doping, but probably with the lack of a real need to enforce them. Despite the absence of sufficiently advanced medicine and a specific definition of doping, the Jockey Club and stewards across the world were still able to effectively implement anti-doping rules and suspend the offenders.

The IOC's attempts to define the illegality of doping during this period were associated both with the refusal to involve sport in the public interest, which discredited principles of amateurism, and with the detrimental effects that doping could have on the health of athletes. The ban on doping among athletes was intended to preserve the ideals of amateur sport rather than to serve the suppression of doping. However, the illegality of doping was not apparent to the sporting community, and according to the Boje (1939, pp. 439–441), despite the widespread use of doping in sport, public debate continued over the ethical and medical aspects of the problem. These debates presume that the community was not fully prepared to oppose doping among athletes by the mid-twentieth century.

The change in attitudes towards doping among athletes can be explained by politicization of sport, which is reflected in the increased interest of States in the sporting success of their athletes. International competitions, especially the Olympic Games, have become an arena for demonstrating the political and economic power of States. Stimulants, including steroids, could be a means of political confrontation on all

sides in such circumstances. It is pointed out that one of the reasons for prohibiting doping is that the society says it should be banned (Lee, 2006, p. 55), but it should rather be highlighted that the States also want doping among athletes to be banned.

In the light of the above, it seems understandable that it was States, rather than members of the sporting community, that began the coordinated and concerted legal work to uniform the anti-doping rules and made them binding to all sports. It is observed not coincidentally that the current anti-doping system favors complete suppression and is similar to the fight against drugs carried out by public authorities (Kayser and Smith, 2008). A blanket and general prohibition on doping for all states was able to contain political confrontation, put states shared an equal footing when it came to international competition and protection of public health. The anti-doping regulation development mostly through the efforts of states may also show that the researchers are right to argue that the modern failure to eliminate doping stems from the mind-set and objectives of professional sport.

Thus, it can be seen that between 1960s and 1980s, the most intense legal activity took place at the level of intergovernmental organizations, while the IOC faced with scientific and administrative deficiencies and doubted whether the IOC should take a leadership in doping control instead of IFs (Dimeo, Hunt, and Bowers, 2011). The documents of the Council of Europe have shaped the principles and guidelines of international anti-doping policy, including:

— recognition of the demand for coordinated government assistance in the fight against doping, especially as it relates to forcing the universal binding power of anti-doping rules and ideology, financial support and establishment of laboratories with the development of adequate technical standards;

— clear separation of powers, terms of reference and responsibilities between state authorities and sports organizations, as well as states' acceptance of the legitimacy of anti-doping rules issued by the sporting community;

— states' mutual recognition of doping procedures, adjudicational process and sanctions imposed by sports organization or other states

if anti-doping violations take place in order to harmonize their enforcement;

— recognition of the demand for forcing science and use of scientific knowledge in organizing anti-doping activities and education.

The Council of Europe also outlined the responsibilities of each actor involved in anti-doping activities. States were tasked with coordinating, enabling the development of anti-doping policy, and persuading participants to take adequate steps to eradicate doping; international sports organizations were tasked with ensuring uniformity of anti-doping practice, including through the development of anti-doping rules; national sports organizations were tasked with the direct implementation of anti-doping rules and raising an atmosphere of no tolerance to doping.

The development of the IOC's anti-doping rules demonstrates that the Olympic Movement anti-doping rules changed rather consistently, responding to current needs and resources of sports community. The IOC first articulated the prohibition of doping as an ideological benchmark for amateur sport. Compliance with the anti-doping rules then regarded as a condition of eligibility for the Olympic Games, which led to the formation of an independent corpus of rules consolidated as the Medical Code. The IOC implemented prohibited list and made the independent Medical Commission responsible for proposing sanctions, while retaining the ability for the IFs to take additional measures. An original ban on the use of doping was supplemented with a duty to participate in doping controls, the non-compliance of which constituted a separate offence. Later condemnation of the distribution and promotion of prohibited practices was also added in the Olympic rules. The scope of persons subject to liability and consequences of the anti-doping rules violations, including individual and team disqualification, forfeiture of results, withdrawal of accreditation and awards, expanded also by the IOC successively. So, the core and substantive parts of modern anti-doping system are based on the principles adopted by the IOC from the 1960s to the 1990s step by step.

The Strasbourg Convention that was binding on the member States has put an intermediate point in the development of the anti-doping system. The certain completion of governmental legal activities and

the creation of the infrastructures necessary for the implementation of anti-doping rules has allowed a greater focus on the enforcement of the Olympic movement cohesion and on the content of the anti-doping rules. In 1990s, the Monitoring Group of the Strasbourg Convention implemented basic principles on doping control (sample collection, disciplinary proceeding, etc.). Since 1990, the IOC's anti-doping regulations began also to undergo their most significant changes and they laid the basis for the future WADA Code.

At the end of the 20th century, anti-doping had developed into a broader field, extending beyond the Olympic Games. The anti-doping mechanism had to take into account the coordination of sporting organizations and nations, the medicine improvement, monitoring of athletes, management of control procedures, adjudication of cases, imposition of sanctions and other legal aspects. Placing the primary responsibility on the IOC to develop system of anti-doping regulation was likely to place a significant burden on the IOC.

In this connection, at the beginning of the 21st century, WADA was established as a separate non-governmental body, with the IOC assuming the role of organisation enforcing uniformity and binding nature of the anti-doping rules across international sport and its participants, as reflected in the provisions of the Olympic Charter in later 1990s and early 2000s. The main objective of the IOC at this point was to harmonize rules within the all Olympic sports and form the basis for hierarchic regulations for WADA to be able to function uninterrupted.

In early 1990s, the discussion on the need the international anti-doping instrument continued within UNESCO, and some doubts remained among the UNESCO States in the connection with further intergovernmental regulation. However, organizational changes in the anti-doping system at the beginning of the 21st century predetermined the updating of international legal instruments. The Strasbourg Convention adopted by the Council of Europe was only a regional international treaty and it no longer fully corresponded to the current legal reality. The international sporting community needed legal instruments that, at the global level, would have established the binding nature of the

changes in the system of anti-doping regulation, in particular, the WADA competency, the fundamental role of the WADA Code, the duties of equal funding of the WADA, etc. The UNESCO Convention has fulfilled these objectives.

VI. Conclusion

Twenty years after the adoption of the first version of the WADA Code, the Olympic Movement achieved considerable uniformity. WADA adopted, inter alia, the model rules for IFs, major events organizations, NOCs, NADOs. It was authorized to exercise the exclusive powers of oversight. International Testing Agency (ITA) was established under WADA and IOC control.[59] The IOC intended, through the creation of an independent organization, to reduce the risk of conflicts of interests that could arise when IFs conduct testing at competitions under their jurisdiction.[60]

Thus, the current system of provisions runs the risk of monopolizing doping control and reducing transparency of the regulation. In 2022, 13 NADOs signed the Declaration of Guiding Principles for the Future of Anti-Doping, calling for development of the anti-doping system.[61] The Guiding Principles declared separation of powers concentrated within WADA and NADOs, transparent division of the roles and responsibilities among the legislative, executive and the judiciary functions protected from being controlled by political interests, attention to the voices of athletes and the equal participation in science.

[59] As a significant development, the UCI, one of the main IFs for anti-doping, that it hands over its anti-doping activities to the ITA from 2021. Cyclingnews. (2020). *UCI to shift anti-doping away from CADF in 2021*. Available at: https://www.cyclingnews.com/news/uci-to-shift-anti-doping-away-from-cadf-in-2021/ [Accessed 23.03.2023].

[60] The International Olympic Committee, (2015). Olympic Summit supports next steps in implementation of Olympic Agenda 2020. Available at: https://olympics.com/ioc/news/olympic-summit-supports-next-steps-in-implementation-of-olympic-agenda-2020 [Accessed 23.03.2023].

[61] Sport Information Resource Centre, (2022). *Group of NADOs Proposes Declaration of Guiding Principles for the Future of Anti-Doping*. Available at: https://sirc.ca/news/group-of-nados-proposes-declaration-of-guiding-principles-for-the-future-of-anti-doping/ [Accessed 23.03.2023].

However, harmonization and increased anti-doping WADA and IOC budgets (Burke, 2022a; Owen, 2022) have not led to a solution to the problem of doping. In addition, not all participants of the global sporting community really implement regulations uniformly and consistently, as, for example, approximately 90 % of American athletes remain beyond WADA control.[62] The problem also exists with the unannounced tests among young Norwegian athletes because of the national legislation (Burke, 2022b). Besides, literature reports about systemic issues in the implementation of the WADA Code in India (Star, 2022).

In this regard, the effectiveness of activities aimed at harmonization of the anti-doping regulation remains debatable. Since efforts taken during 1990s and 2000s focused on harmonization, it is likely that the global community now needs to address its disadvantages and evaluate critically the methods of the regulation used to eliminate doping in sport.

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[62] WADA statement on the U.S. Office of National Drug Control Policy report to Congress. Available at: https://www.wada-ama.org/en/news/wada-statement-us-office-national-drug-control-policy-report-congress [Accessed 23.03.2023]; TASS. (2022). WADA reacts to possible suspension of Norway from the Olympics. Available at: https://tass.ru/sport/15517967 [Accessed 23.03.2023]. (In Russ.).

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Article

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In Search of Clear Scientific Criteria for Including New Substances and Methods on the WADA Prohibited List

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Abstract: In the World Anti-Doping Code and in the practice of its application in the sports world, four criteria were elaborated to guide the process of including new substances and methods on the Prohibited List, namely representing an actual or potential risk to the health of athletes, enhancing sport performance, violating the spirit of sports, masking the use of other prohibited substances or prohibited methods. However, these criteria do not fully address the question of how the selection should be carried out when a substance or method is included on the Prohibited List. The approach according to which the presence of any two out of the three following criteria — enhancing sport performance, representing a risk to the health of athletes, violating the spirit of sports — in a specific case can hardly be considered exhaustive and definite (the fourth criterion — masking the use of other prohibited substances or methods — is self-evident). The authors identify new problems that need to be taken into account in the future. These are, in particular, the need to improve the decision-making procedure for including new substances and methods on the List and to make it more transparent and the need to normatively settle the issue of using new technological devices, more specifically nanotechnologies and nanomaterials (technological doping).

Keywords: sports; athletes; doping; World Anti-Doping Agency (WADA); World Anti-Doping Code (WADC); International Convention against Doping in Sport (UNESCO Convention); Prohibited List; substances; methods; chemicals; nanotechnologies

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Contents

I. Introduction

The process of including new substances and methods on the list compiled by the World Anti-Doping Agency (hereinafter referred to as WADA) is long and scrupulous. As explained by Dr. Olivier Rabin, Director of Science at WADA, it includes the following stages. In January of each year soon after the introduction of the new Prohibited List, the first International Standard to the World Anti-Doping Code, WADA has its initial meeting with the List Expert Group (hereinafter — the List Committee). From January until February the Prohibited List

Committee that consists of twelve experts of various profiles appointed by the President of WADA, the Director General and the Chairman of the WADA Committee on Health, Medical and Research, the Committee summarizes the comments received from the stakeholders on the Prohibited List published on 1 January, collects information on new drugs on the market and new trends in the field of doping, discusses possible changes in the list. During the second meeting of the Committee, which usually takes place in April, the proposed changes are further discussed and included in the draft List, which is distributed to the stakeholders and WADA partners (i.e., governments, anti-doping organizations, sports federations, laboratories accredited by WADA) for a consultation period of about three months. These parties subsequently submit their comments and recommendations directly to WADA by the end of July.

When the final draft List is ready, the List Expert Group passes it on to the Health, Medical and Research Committee (hereinafter — HM&R Committee), a WADA working committee for science and medicine research, which is a different group of experts that provides additional opinions and makes adjustments to the draft List. After approval by the HM&R Committee the draft list is then submitted to the WADA Executive Committee in mid-September. The Executive Committee consisting of sixteen members is the decision-making body of WADA. It is composed equally of representatives of the Olympic Movement and Governments of the world. The Executive Committee reviews the List and makes further changes, takes final decisions if necessary, and then officially approves the updated text of the List, which is published on the WADA official website no later than October 1 of each year, that is, at least three months before the entry into force on January 1 of the following year. At the same time, the text of the List is distributed among the stakeholders and UNESCO Member States.[1]

[1] An Explanation of How the World Anti-Doping Agency Decides Which Substances are Included on The Prohibited List. An Interview with Olivier Rabin, Director of Science at WADA. 27 January 2016. *Law In Sport*. Available at: https://www.lawinsport.com/topics/features/item/an-explanation-of-how-the-world-anti-doping-agency-decides-which-substances-are-included-on-the-prohibited-list [Accessed 29.03.2023].

II. Traditional Criteria for Including Substances and Methods on the Prohibited List

Both modern international sports law and *lex sportiva* are aimed at ensuring the principle of fair play in general, which includes more specifically the need for fighting doping. According to the WADA report in 2019, out of 278,047 samples taken, 1,537 samples (57 %) contained prohibited substances.[2] In total, in 2022, by the decision of the Russian Anti-Doping Agency (RUSADA), 79 athletes were disqualified for violating doping regulations,[3] and 18 more Russian athletes were disqualified for the same violation by the decision of international sports federations and national anti-doping agencies.[4]

It should be noted that there is a set of international normative acts at various levels ("international anti-doping law" (Vedder, 2022, pp. 52–76)) that provide the necessary basis for fighting doping. Currently, at the regional (European) level, this is the Convention against Doping, adopted within the framework of the Council of Europe in Strasbourg on 16 November 1989 (ETS No. 135) (hereinafter referred to as the "Strasbourg Convention") and its Protocol of 2002, at the universal level — the International Convention against Doping in Sport, adopted by the General Assembly of the United Nations Educational, Scientific and Cultural Organization (UNESCO) Conference in Paris on 19 October 2005 (hereinafter — the UNESCO Convention). The UNESCO Convention points to the fundamental role of the World Anti-Doping Code (hereinafter — the WADC) in the international crusade against doping. The WADC is a fundamental *lex sportiva* act, first adopted in 2003 and reviewed every six years by the World Anti-Doping Agency. It is "the fundamental universal document on which the World Anti-

[2] World Anti-Doping Program, Anti-Doping Rule Violations (ADRVs) Report, 2019. Available at: https://www.wada-ama.org/sites/default/files/2022-01/2019_adrv_report_external_final_12_december_2021_0_0.pdf [Accessed 29.03.2023].

[3] The list of athletes serving disqualification at the moment by the decision of the RAA "RUSADA". Available at: https://rusada.ru/disqualifications/ [Accessed 29.03.2023].

[4] List of athletes currently serving disqualification by decisions of international sports federations and national anti-doping agencies. Available at: https://rusada.ru/disqualifications/ [Accessed 29.03.2023].

Doping Program in Sports is based."[5] Its main components are the Code, eight International Standards adopted to elaborate its specific provisions, as well as models of best practices and guidelines. The WADC, as amended in 2021, contains 11 anti-doping rule violations that entail the responsibility of perpetrators in individual and team sports.

The domestic and foreign doctrine notes that the established approaches to the regulation and control of doping need to be reformed. The Russian researcher A.V. Chebotarev notes that the current anti-doping rules create a certain degree of confusion in determining the content of the concepts of "doping" and "anti-doping rule violations," in fact viewing both concepts as synonymous (Chebotarev, 2018, p. 770). Another Russian researcher V.I. Pavlov points out in this regard that the concept of "doping" is characterized through the enumeration of actions prohibited by law, although it reflects a certain material object (Pavlov, 2018, p. 12). Indeed, the WADC contains a rather laconic definition of the concept of "doping." Art. 1 of the WADC defines it as "the commission of one or more anti-doping rule violations referred to in Art. 2.1–2.11 of this Code." It should be noted that a slightly different approach to the definition of the concept in question is laid down in the 1989 Strasbourg Convention where it is stated in Part 1(a) Art. 2 that "doping in sports" is "the introduction to athletes or their use of various types of pharmacological doping drugs or doping methods." The legislative definition of doping in the Russian Federation is contained in Part 1 Art. 26 of the Federal Law "On Physical Culture and Sport in the Russian Federation," which establishes that "doping in sports is recognized as a violation of an anti-doping rule, including the use or attempt to use a substance and (or) a method included in the lists of substances and (or) methods prohibited for use in sports."

Thus, a common definition of the concept of "doping" at the present time can be formulated by listing active or passive actions on the part of the athlete(s), which entail the responsibility of this person or these people, collectively. In determining these actions as violating anti-doping rules, the WADA Prohibited List is especially significant — chronologically, it is the first International Standard to the WADC.

[5] The official text of the World Anti-Doping Code as amended in 2021. Available at: https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf [Accessed 29.03.2023].

In accordance with Art. 4 of the WADC and Part 3 Art. 4 of the UNESCO Convention the WADA Prohibited List is an international standard legally binding on all States parties to the UNESCO Convention. To add substances to the Prohibited List, it is necessary to demonstrate, at WADA's sole discretion, that these substances simultaneously meet two of the three following criteria, and the Agency is guided then by the so-called "2-out-of-3" rule (Art. 4.3.1 of the Code):

"4.3.1.1. Medical or other scientific evidence, pharmacological effect or experience that the substance or method, alone or in combination with other substances or methods, has the potential to enhance or enhances sport performance;

4.3.1.2. Medical or other scientific evidence, pharmacological effect or experience that the use of the substance or method represents an actual or potential health risk to the athlete;

4.3.1.3. WADA's determination that the use of the substance or method violates the spirit of sport,"[6] as stated in the introductory part of the Code.

Thus, the alternative criteria are those of improving sports results, posing a risk to the health of athletes and being contrary to the spirit of sports (Pugh and Pugh, 2021, p. 143). However, it is also stated in Art. 4.3.2 that a substance or method shall also be included on the Prohibited List "if WADA determines there is medical or other scientific evidence, pharmacological effect or experience that the substance or method has the potential to mask the use of other prohibited substances or prohibited methods." In such a case one criterion alone — being a masking agent — would be sufficient in order to include new substances or methods on the Prohibited List.

The WADA Prohibited List is updated at least once a year. However, Art. 4.1 of the WADC allows to revise the List "as often as necessary." In 2014, the List was revised twice, namely on 1 January and on 1 September. WADA added Hypoxia-Inducible Factor (HIF) activators, more specifically Xenon and Argon, to amend Section S2.1 of the 2014 List of Prohibited Substances and Methods as a result of

[6] The official text of the World Anti-Doping Code as amended in 2021. Available at: https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf [Accessed 29.03.2023].

the List Committee meeting in April, when the experts had clearly reached the conclusion that these substances should be considered as prohibited. The recommendation to revise the List was made and approved by WADA's Executive Committee during its meeting in May.[7]

Currently, the WADA list includes the following main categories of prohibited substances: anabolic agents, peptide hormones, growth factors and related substances, beta-2 agonists, hormones and metabolic modulators, diuretics and masking agents (Sections S1–S5), as well as stimulants (amphetamines, ephedrine, cocaine, etc.), narcotics (morphine, oxycodone, etc.), cannabinoids (marijuana, hashish) and glucocorticosteroids (Sections S6–S9). WADA also enumerates prohibited methods, including manipulations of blood and its components, chemical and physical manipulations including tampering and sample substitution, as well as gene and cell doping (Sections M1–M3).

As noted by I. Mazzoni, O. Barroso, O. Rabin, the Prohibited List is the result of taking into account the opinions and comments voiced by numerous stakeholders and it is an evolving document (Mazzoni, Barroso and Rabin, 2011, p. 611). However, WADA does not publicly disclose the scientific justification or literature (bibliography) used to include substances on the Prohibited List. It is obvious that such secrecy and the inability to have access to the scientific basis of the inclusion criteria and challenge them creates grounds for criticism and controversy. For example, J. Sisik and P. Korti find a disadvantage of the current approaches in that it is difficult to predict what substances will be included on the WADA List (Sisik and Korti, 2021, p. 950). In addition, the decision to ban the use of certain substances if it meets at least two of the three criteria mentioned above — for example, if a substance is considered potentially harmful to the health of an athlete and its use is contrary to the spirit of sport, even if this substance does not have an effect of improving athletic performance — indicates the fragility of these criteria (Houlihan et al., 2019, p. 196). The Prohibited List, the International Standard that determines substances and

[7] Minutes of the WADA Executive Committee Meeting 17 May 2014, Montreal, Canada. Available at: https://www.wada-ama.org/sites/default/files/resources/files/wada_exco_minutes_17may2014_en.pdf [Accessed 29.03.2023].

methods prohibited for use by athletes both in competition and out of competition, according to A.V. Chebotarev, establishes the presumption of guilt of an athlete or other person in the proceedings in connection with the violation of anti-doping rules (Chebotarev, 2018, p. 773). At the same time J. Heuberger and A.F. Cohen concluded in their study that there is insufficient evidence confirming the ability of banned substances to influence the performance of athletes (Heuberger and Cohen, 2019, p. 533).

According to Russian researchers A.A. Mokhov, V.V. Blazheev and O.A. Shevchenko, there are three groups of criteria necessary to determine the essence of the concept of doping: a *social* criterion (contradiction to the spirit of sport), a *target-oriented* criterion (improvement of sports performance) and a *legal* criterion (a system of measures to prevent and combat doping) (Mokhov, Blazheev and Shevchenko, 2017, p. 48). It is difficult to disagree with their position.

II.1. Posing a Risk to the Health of the Athlete

There is a common agreement in academia that the key emphasis of the anti-doping regulation should be placed on protecting the health of athletes rather than on providing their equal status in sports performance (Pavlov, 2018, p. 14; Foddy and Savulescu. 2007, p. 518). However, some scholars view this criterion as paternalistic and highly subjective since most athletes push themselves to their limits during performances or training processes, and these athletes cannot be prevented from training on the basis of any "actual or potential health risk" (Goldsworthy, 2019, p. 168).

When adding new substances to the Prohibited List, it is necessary to be first and foremost guided by this criterion — a risk to the health of athletes (Art. 4.3.1.2 of the Code) — since it is potentially capable of affecting a wide group of the population and it indicates both the interest of the sports community in resolving the issue and the public interest of States to ensure the health of their citizens in general.

An example of substances that fall under this definition can be the substances capable of causing cancer and other serious diseases of internal organs. For instance, the substance GW1516, which was

categorized as prohibited by WADA in 2009 due to its presumed performance-enhancing properties resulting from the regulation of fatty acid transport and oxidation and formation of slow-twitch muscle fibers in skeletal muscle (Pokrywka et al., 2014, p. 470), was altogether banned by WADA in March 2013 after severe carcinogenesis was observed in animals (in rodents, more specifically).

II.2. Enhancing Sport Performance

This criterion comes first in the list of the criteria for including substances and methods on the Prohibited List (Art. 4.3.1.1 of the Code). The International Network of Humanistic Doping led by I. Waddington argues, "it is precisely the performance-enhancing nature of a substance which is the central defining characteristic of doping" (McNamee, 2012, p. 382). This position has quite a number of supporters in different circles, among scholars and practitioners alike.

This criterion should definitely be supported by scientific evidence, "the results of high-quality research published in peer-reviewed and indexed journals" and "WADA's own research and expert consultations" (Bezuglov et al., 2021). "Evidence based on interdisciplinary and transparent abductive reasoning within a still to be defined framework could lead to a Prohibited List that serves both analytical and preventive goals (Simon and Dettweiler, 2019, p. 499).

However, at present two studies conducted by J. Heuberger and A. Cohen, contain conclusions that only five of the eighteen classes of substances on the WADA Prohibited List — namely, anabolic agents, beta-2-agonists, stimulants, glucocorticoids and beta-blockers — have evidence of the ability to improve the performance of athletes (strength or sprint performance). One more class — growth hormones — has similar evidence in untrained subjects (Heuberger and Cohen, 2019, p. 525; more extensively in Heuberger et al., 2022, pp. 568–571). Unfortunately, WADA does not publicly disclose the scientific sources used to justify the reasons why certain substances have to be included on the Prohibited List. As scholars claim, "there is a paucity of competent data to support the conclusion that the majority of the listed substances in fact enhance performance, which is the main reason athletes use various drugs, methods, or dietary supplements" (Melethil, 2006, p. 76).

The inclusion of meldonuim on the 2016 List can serve as an example. When WADA published its notice on meldonuim, it referred to the claims of performance enhancement that had been made by various authors, including the manufacturer.[8] It turned out later that in this case "there is no evidence of performance improvement and no evidence of a relevant health risk in the dosage generally used by healthy physically active people" (Heuberger et al., 2022, p. 568; *see also* Section 4.1 in Bezuglov et al., 2021). At the same time it was well-known that the use of meldonium had been widespread among athletes from Russia and other countries — former republics of the USSR.

Quite often the substances thought to have the general ability to enhance athletic performance cannot produce this effect in some specific sports that require other skills. For instance, the research carried out by A. Riiser, T. Stensrud, J. Stang and L.B. Andersen demonstrates that beta-2-agonists do not affect aerobic performance in non-asthmatic subjects regardless of a type, dose, administration route, duration of treatment or performance level of participants (Riiser et al., 2021, p. 983).

II.3. Violating the Spirit of Sports

According to the Fundamental rationale of the World Anti-Doping Code the spirit of sport is "the ethical pursuit of human excellence through the dedicated perfection of each Athlete's natural talents."[9] WADA considers it an intrinsic value of sport, even though some scholars tend to view it as an axiological category rather than a normative one. M. McNamee, for instance, calls it "an ideal" and illustrates the way the ideal can be defended to uphold positive social values associated with sports in case of the prohibition of cannabinoids (McNamee, 2012, pp. 381, 384–387).

[8] World Anti-Doping Agency. Notice on the inclusion of meldonuim on the Prohibited List. 12 April, 2016. P.1, Section A. Available at: https://www.wada-ama.org/sites/default/files/resources/files/wada-2016-04-12-meldonium-notice-en.pdf [Accessed 29.03.2023].

[9] The official text of the World Anti-Doping Code as amended in 2021. P.13. Available at: https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf [Accessed 29.03.2023].

A significant disadvantage of the modern mechanism for including new substances on the Prohibited List is the opacity of the decision-making process. Most WADA decisions even if they are scientifically based, are not transparent and subject to publication. The timely publication of research results according to the researchers would help to increase the transparency of this process and prevent speculation (Bezuglov et al., 2021, p. 7). They argue that the reformed anti-doping system, as well as conventional medicine, should be based on an evidence-based approach. In particular, they propose an approach according to which the criterion of the "contradiction to the spirit of sport" (Art. 4.3.1.3 of the Code) would be excluded when making decisions to include new substances on the Prohibited List due to its very vague wording (Heuberger et al., 2022, p. 576).

According to the observation formulated by B. Foddy and J. Savulescu, this criterion is already met in case of the violation of the first two criteria of "improving athletic performance" and "harming the health of athletes," so there is no need to isolate and single it out separately (Foddy and Savulescu, 2007, p. 512). In addition, M. McNamee rightly emphasizes that in the absence of a requirement for transparency in the process of reviewing substances and methods within WADA, it is almost impossible to determine which of the criteria is predominant and what circumstances are taken into account when a decision is made that the contradiction to the spirit of sport takes place (McNamee, 2012, p. 379).

II.4. Masking the Use of Other Prohibited Substances or Prohibited Methods

Art. 4.3.2 of the World Anti-Doping Code stipulates that that a substance or method will be included on the Prohibited List in case WADA determines "there is medical or other scientific evidence, pharmacological effect or experience that the substance or method has the potential to mask the use of other prohibited substances or prohibited methods." Fulfilling this criterion alone — acting as a masking agent — is a sufficient reason for the inclusion of substances or methods on the Prohibited List.

As stated by R. Ventura and J. Segura, there are multiple possibilities for masking the evidence of doping in sport, and these substances have wide differences in physical and chemical properties (Ventura and Segura, 2009, p. 347). So, the authors expect the expansion of the Prohibited List as other challenging areas will increase in number.

Section S5 of the Prohibited List is entitled "Diuretics and Masking Agents." These are the largest group of substances presented on the List. Currently this group includes albumin, amiloride, acetazolamide, bendroflumetiazide, bumetanide, epitestosterone, hydrochlorothiazide, desmopressin, drospirenone, canrenon, mannitol, methylephedrine, pamabrom, plasma expanders, probenecid, salbutamol, spironolactone, thiazides, tolvaptan, triamterene, vaptans.

In contrast to the above-mentioned criteria of enhancing sport performance, posing risks to health and violating the spirit of sport, the prohibition to use such substances as diuretics and other substances is based primarily on their ability to cover properties of prohibited substances. Besides, they can provide rapid weight loss (Cadwallader et al., 2010, p. 161). As stated by J. Heuberger and A.F. Cohen, not all the researchers share the view that diuretics have the ability to improve athletic performance (Heuberger and Cohen, 2019, p. 531). Nevertheless, most diuretics can result in dehydration and a potassium deficiency and may also cause athletes to suffer from fatigue, hypotension or low blood pressure and seizures.[10] The same consequences arise as a result of using probenecid and plasma expanders (Bird et al., 2016, p. 214). Therefore, the inclusion of diuretics and masking agents on the Prohibited List is vitally important.

III. Emerging Criteria for Including Chemicals on the WADA Prohibited List

III.1. Management of Chemical Substances to Protect Human Health

Recognizing that there is a growing consensus in the search for new criteria to identify doping substances and methods that need to

[10] Symes, S., (2023). What Is the Role of Diuretics in Sport? Sports n' Hobbies. Available at: https://www.sportsnhobbies.org/what-is-the-role-of-diuretics-in-sport.htm [Accessed 29.03.2023].

be prohibited and improve the present decision-making process, we argue that it would be appropriate to focus on identifying chemicals of international concern within the framework of international legal governance of chemical management. Although we understand that doping is not always defined as chemicals (pharmaceuticals) alone, in order to identify possible areas of discussions that help to set the criteria for defining prohibited substances, it could be useful to make an overview of those substances (methods) that are not banned by the current Prohibited List, but have a potential to fulfill the WADA criteria in the future.

Doping substances are often defined as chemical substances with different mechanisms of action. The distinction in the areas of management of such substances, specifically for industrial and pharmaceutical consumption, makes a difference between the area of chemical management and the pharmaceutical industry (doping control regulation, respectively). Nevertheless, the object of legal regulation in both systems — international regulation of chemicals management and anti-doping regulation — is similar (chemical substances), besides, both regulatory systems are aimed at establishing a proper mechanism to protect human health.

One of the instruments of human health protection within the sound management of chemicals is the Strategic Approach to International Chemicals Management (hereinafter — SAICM). SAICM is an international program, adopted by the First International Conference on Chemicals Management (ICCM1) on 6 February 2006 in Dubai, with the aim of achieving the sound management of chemicals throughout their life cycle so that by the year 2020 chemicals are expected to be produced and used in ways that minimize significant adverse impacts on the environment and human health.[11] According to the SAICM Overarching Policy Strategy (Para. 24 (j)), the ICCM as SAICM's regulative body, has a function "to call for appropriate action on emerging policy issues as

[11] Overarching Policy Strategy, report of the International Conference on Chemicals Management on the work of its first session. 2006. SAICM/ICCM.1/7. Available at: https://www.saicm.org/Portals/12/documents/meetings/ICCM1/Final%20ICCM%20Report%20Eng.pdf. [Accessed 29.03.2023].

they arise and to forge consensus on priorities for cooperative action."[12] To date, the following SAICM emerging policy issues have been identified and addressed through specific projects: lead in paint; chemicals in products; hazardous substances within the life cycle of electrical and electronic products; nanotechnology and manufactured nanomaterials; endocrine-disrupting chemicals; per fluorinated chemicals and the transition to safer alternatives. In order to forge the regulatory basis for that issues of concern, ICCM and other involved stakeholders gathering and disseminating information devoted to the scientific-based evidence of a proper way to manage these issues.

It could also be useful to examine a similar mechanism in the field of chemical management. In the international management of chemicals there are several bodies that are empowered to modify the list of substances under their regulation. For example, the Stockholm Convention on Persistent Organic Pollutants of 2001 established a special committee called the Persistent Organic Pollutants Review Committee (hereinafter — the POPs Committee).[13] The procedure for including chemical substances proposed by the parties on the Convention Lists consists of five stages:

1) submitting a proposal by any party to the Convention to list a chemical in Annex A, B and/or C of the Stockholm Convention;

2) reviewing the proposal by the Convention Secretariat to ensure that it meets the selection criteria listed in Annex D of the Convention;

3) transmitting the information to the POPs Committee by the Secretariat to confirm compliance with the criteria for the chemical in question, if the selection criteria are met. A risk-structure report is created, on the basis of which the Committee decides whether the chemical in question could, through a long-range environmental transport, cause significant adverse effects on human health and/or the environment that require global action;

[12] Overarching Policy Strategy, report of the International Conference on Chemicals Management on the work of its first session. 2006. SAICM/ICCM.1/7.

[13] Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, Art. 8. Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-15&chapter=27&clang=_en [Accessed 29.03.2023].

4) reviewing the proposal by the Committee taking into account any relevant additional information received and developing a draft risk profile in draft on the socio-economic considerations of the parties in accordance with Annex E of the Convention;

5) taking a decision by the Committee to include new chemicals on the Lists of substances controlled by the Convention.

It is important to note that the following screening criteria are listed in Annex D of the Stockholm Convention: persistence, bioaccumulation, potential for a long-range environmental transport, and adverse effects of a chemical substance. The evaluation of the long-range transport capability of a chemical is based on monitoring data, levels of the chemical in remote areas, and the environmental "fate" of the substance. As opposed to the spirit of sport, the ecological fate of a chemical substance is endowed with a quite specific meaning. The fate of a chemical substance is to be understood as its ability to transform itself into other substances, to travel at great distances moving in air, water and by land, etc.[14] Thus, in considering the issue of regulating chemicals under the Stockholm Convention, two criteria must be fulfilled, namely scientific certainty (with some exceptions[15]) and the risks of causing harm to human health and the environment. This approach has two advantages. First of all, the availability of scientifically confirmed data contributes to the implementation of the objectives of the Convention. Second, it eliminates possible disputes and discussions on the legitimacy of including new chemicals on the Convention lists, which is in accordance with Para. 3 Art. 8 of the Stockholm Convention that indicates the need to take a flexible and transparent approach to the profile and risk identification of the proposed chemical substances for consideration.

Another difference between two areas is in the requirement that in order to be included on the List of chemicals under the Stockholm Convention all the screening criteria must be met as opposed to the

[14] Davidson H., (2021). The fate of chemicals in the environment. Available at: https://www.epa.govt.nz/community-involvement/science-corner/the-fate-of-chemicals-in-the-environment/ [Accessed 29.03.2023].

[15] Para. 7 Art. 8 of the Stockholm Convention indicates that "lack of full scientific certainty shall not prevent the proposal from proceeding".

WADA approach where the application of the criteria is more flexible. According to Bengt Kayser, the use of the "two-out-of-three criteria" approach under the WADC has led to an increasingly long and confusing list of substances and methods that do not exist yet (Kayser, 2020, p. 4). In this case, it is important to point out that the decision-making procedure regarding the consideration of the prohibition of substances or methods as doping, as well as the strictness of the procedure should be based on the fair play principle, which includes inter alia the transparency in decision-making.

The transparency criterion is under active discussions in both chemicals and anti-doping agenda. As for the chemicals management system, this criterion is equally important to be fully implemented in the supply chain, so all the consumers and industry representatives would be aware of the need to bear risks in case of using chemical substances or products. Same benefits can be enjoyed in case of establishing a stricter control in the anti-doping regulation system. As J. Kornbeck notes, anti-doping regulation could even profit from such measures by strengthening individual and public trust (Kornbeck, 2016, p. 118). The researcher proposes to include the transparency criterion as the way to ensure public awareness by means of publishing clear explanations why stakeholders' proposals were accepted or rejected, implementing the revision clause, introducing an election procedure for the WADA Chair and WADA Vice Chair open to public view and scrutiny, etc. (Kornbeck, 2016, p. 120).

III.2. Nanotechnologies — a New Area for the Anti-Doping Regulation?

One of the cross-cutting issues between the management of chemicals and anti-doping regulation is the management of nanomaterial and nanotechnologies. In the ICCM's Resolution II/4 on "Emerging policy issues" the nanotechnology and manufactured nanomaterials were recognized as an emerging policy issue, and it was proposed to governments

"a) to facilitate access to relevant information, realizing the needs of different stakeholders;

b) to share new information as it becomes available;

c) to use upcoming regional, subregional, national and other meetings to further increase understanding of such information, for example through the use of workshops if appropriate."[16]

Nanotechnology and manufactured nanomaterials are in close relation with the anti-doping regulation system. However, according to the definition of doping given in the WADC nanotechnologies as a form of technological improvements are hardly considered as a part of doping at all. The very definition of nanomaterials or a nanotechnology is still under discussion. While no definition has been agreed upon among governments at the international level, nanomaterials are commonly defined as materials having at least one external or internal dimension between 1 and 100 nm (Miernicki et al. 2019, p. 209). On the other hand, a nanotechnology could be understood as a manipulation of materials at the nanometre scale. Taking into account the fact that nanomaterials are the same materials, but made at the nanometric level, nanotechnologies used in sports area could be defined as a type of technological doping. According to K. Vieweg, technical measures that are "suited to creating unfair advantages in competition, to endangering the health and bodily integrity of the athletes, and/or damaging the reputation of the sporting discipline and the organizations representing it are better to be defined not as 'techno-doping' but 'forbidden measures and methods'."[17]

As the researchers noted in 2021, there are a lot of intergovernmental organizations that have been involved in the sound management of nanomaterials over the last two decades, these are the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Economic and Social Council (ECOSOC), Food and Agriculture Organization (FAO), International Labour Organization (ILO), Inter-Organization Programme for the Sound Management of Chemicals (IOMC), International Organization for Standardization

[16] Report of the International Conference on Chemicals Management on the work of its 2nd session SAICM/ICCM.2/15. Available at: https://digitallibrary.un.org/record/735430?ln=ru [Accessed 29.03.2023].

[17] Vieweg, K. "Techno-doping" — legal issues concerning a nebulous and controversial phenomenon, p. 2. Available at: http://www.irut.de/Forschung/Veroeffentlichungen/Aufsaetze_KV/Techno-Doping.pdf [Accessed 29.03.2023].

(ISO), Organization for Economic Co-operation and Development (OECD), SAICM, United Nations Environment Programme (UNEP), UNESCO, United Nations Institute for Training and Research (UNITAR), World Health Organization (WHO) (Aungkavattana et al., 2021, p. 463). Nanosafety has been addressed in many SAICM workshops and conference, and it contributed to ensuring nanosafety awareness worldwide. But there is still much to be done. According to the last ICCM Resolution devoted to the nanosafety, some of the measures are defined as the continuation of raising awareness and enhancing capacity of the sound management of manufactured nanomaterials, paying particular attention to the situation and needs of developing countries and countries with economies in transition, including through regional consultations and e-learning courses.[18]

There is a growing number of the strategies to enhance performance efficiency that are not under the WADA regulation. According to the research by Chui Ling Goh, those strategies are regulated by each specific sport governing body for particular sport (Goh, 2021, p. 52). One of the well-known examples is increasing the use of technologies, especially nanotechnologies connected with carbon fibre-plated road running shoes after the development of the Nike Vaporfly and Nike Alphafly with a proved running economy and benefits of metabolic costs (Hunter et al., 2019, p. 2367). These athletic shoes have been controversial since 2019 when Eliud Kiphoge, a famous marathon athlete, ran a full marathon in less than two hours wearing them. The achievement of this record provoked a debate in sports circles about the limited "fairness" of the technology. In 2021, the World Athletics revised its Technical Rules with the aim to ensure that prototype shoes are no longer allowed to be used. According to Art. 1.2 of the Athletic shoe regulations of the World Athletics Organization, the following principles were declared as specific limitations and requirement of shoe regulations:

[18] Resolution IV/2 II existing emerging policy issues, D: Resolution of nanotechnologies and manufactured nanomaterials, adopted by the International Conference on Chemicals Management on the work of its 2nd session in Geneva. Available at: http://www.saicm.org/Portals/12/documents/meetings/ICCM4/doc/k1502183%20SAICM-ICCM4-9-e.pdf [Accessed 29.03.2023].

"1.2.1 fairness within the sport of Athletics;

1.2.2 measures that support health & safety (including injury prevention) of Athletes upon whom high levels of physical and mental demands are placed;

1.2.3 performances (including records) in Athletics are achieved through the primacy of human endeavor over technology in Athletic Shoes and advances in the same (e.g., to allow for meaningful competition);

1.2.4 acknowledging that Athletes wish to compete in 'high quality', 'innovative' and 'leading' Athletic Shoes."[19]

As stated above, gaining any unfair additional assistance and advantages is forbidden by Art. 15 of the Athletic shoe regulations (such actions are punishable by sanctions, including disqualification).

Another example of a regulatory strategy that improves athletic performance is the attempt by World Athletics to regulate the usage of a prosthesis as a "technical device" at the Olympics and, more specifically, Oscar Pistorius's case. In March 2007 the International Association of Athletics Federation (IAAF) amended its Competition Rules by including a ban on the use of "any technical device that includes springs, wheels or any other element that gives the user an advantage over another athlete who is not using such a device." The IAAF's decision was supported by a statement made by the German professor Gert-Peter Brüggemann, who tested a prosthetic limb (J-shaped carbon fiber) and concluded that the energy consumption of a double amputated athlete with the prosthetic limb is lower than that of an able-bodied athlete with the same speed, thereby giving the user of the prosthetic device more than a 30 % competitive advantage. Oscar Pistorius was not allowed to join the running competition of the Olympic Games in 2008. He argued that Brüggemann's findings did not take into account other factors associated with running (e.g., the ratio of stride lengths produced when running between prosthetic legs and artificial legs, a comparison of fatigue levels, and a comparison of metabolic consumption produced by running between athletes with prosthetic legs and human legs). Oscar Pistorius then appealed the ban in the Court of Arbitration for Sport

[19] Athletic shoe regulations. Approved by Council on 22 December 2021 and effective from 1 January 2022. Book C — C2.1A. Available at: https://worldathletics.org/about-iaaf/documents/book-of-rules [Accessed 29.03.2023].

(hereinafter — CAS),[20] after conducting an independent comparative study at the Houston lab in February 2008. Test results showed that Oscar Pistorius' fatigue level was at the same level as athletes with a regular physique. Based on this evidence CAS referees decided to revoke the ban, concluding the fact that the conclusions of the Brüggemann report were insufficient.[21] CAS referees stressed the fact that the IAAF would be able to resume the review of the case as soon as it found new evidence proving a comparative advantage. The report explained, "The Panel does not exclude the possibility that, with future advances in scientific knowledge, signed and carried out to the satisfaction of both Parties, the IAAF might in the future be in a position to prove that the existing Cheetah Flex-Foot model provides O. Pistorius with an overall net advantage over other athletes."[22] According to this paragraph, the question of enhancing the performance by the use of advanced techniques (nanotechnologies) and considering it a doping method is yet to decided.

There is an opinion that technological doping is not about increasing physiological performance of athletes, it is connected with improving performance to gain a competitive advantage (Anam and Pujiyono, 2023, p. 673). Nevertheless, there is a lot of research devoted to the performance-enhancing possibilities while using nanomaterials in sports, especially in sports equipment. Sport equipment containing various nanoparticles provides higher performance, increased flexibility and durability along with a light weight. Nanotechnologies applications in sports competitions include such nanomaterials as carbon nanotubes (hereinafter — CTN), silica (SiO2) nanoparticles, fullerenes, carbon nanoparticles (NP), giving many properties to various sports equipment (Harifi and Montazer, 2017, p. 1148). Carbon nanotubes have been applied in tennis and badminton racquets to reduce their weight and increase their elasticity, durability and hand velocity (Saleh, 2015, p. 164). These racquets are mostly made of graphite and carbon fibers. Coating tennis balls with nanoparticles such as nanoclay greatly extends

[20] *See* CAS 2008/A/1480 Pistorius v. IAAF. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/1480.pdf [Accessed 29.03.2023].

[21] *See* CAS 2008/A/1480 Pistorius v. IAAF.

[22] *See* CAS 2008/A/1480 Pistorius v. IAAF.

the ball service life due to gas barrier effect slowing down the speed of air penetration into the ball. Athletes choose nanotechnology-based sports equipment to improve their performance (Ćibo et al., 2020, p. 360).

Referring to the nanomaterial and nanotechnologies as an issue of concern under the chemicals management regulation, it should be noted that there is a common agreement among the scientists upon the risks to human health possessed by the unsound management of these materials (Zhang and Zheng, 2021, p. 599). As an example, CTN have been classified by the International Agency for Research of Cancer (IARC) as possible carcinogens (group 2B).[23] In total, health impacts for a range of CTN can be compared in its characteristics of toxicity to asbestos (Takagi et al., 2008, p. 105).

In the research of R. Richard, D. Issanchou, S. Ferez, the authors suggest that the principle of fair play (fair sport) which is ensured by a process of classification of the technology, substances and methods employed in order to prepare the sporting performance, allows to classify a situation in which an athlete obtains an illicit advantage due to the use of technologies as an unfair advantage that needs to be banned (Richard, Issanchou and Ferez, 2020, p. 2).

Summarizing all the possibilities of using nanotechnologies in the area of sports we should conclude that in accordance with the two of the three traditional WADC criteria mentioned above in Part II of the present article — a risk to the health of athletes and improving athletic performance — there is a strong chance that nanotechnologies would be defined as doping in the near future.

III.3. Precautionary Approach as a Basis of Anti-Doping Regulation

The absence of sufficient scientific evidence devoted to the possibilities to enhance sport performance while using certain substances and methods, brings us to the idea of a new approach to the WADA

[23] The International Agency for Research on Cancer. Some Nanomaterials and Some Fibres. 19 May 2017, publication of Volume 111 of the IARC Monographs. P. 192. Available at: https://monographs.iarc.who.int/wp-content/uploads/2018/06/mono111-01.pdf [Accessed 29.03.2023].

Prohibited List. Looking beyond the emergence of new substances and methods to be defined as doping, it is important to continue searching for an appropriate normative approach to counter doping in sports. It should be guided by the concept of a precautionary approach to protect human health instead of gaining possible advantages in athletic performance. Moreover, under the conditions of a continuing development of new methods and chemical substances, as Chui Ling Goh noted, "putting every substance and method of the WADA Prohibited List on the same pedestal for implementation and enforcement may contribute to a waste of resources" (Goh, 2021, p. 51). This scholar thinks it necessary to introduce restrictions in various sports areas through a "sport-specific regulatory regime" (Goh, 2021, p. 55). It could become a solution to the emerging problem of difficulties in differentiation between a "natural performance" and an "enhanced performance" as a result of the access to best technologies and most innovative medical treatments aimed to bring humans beyond their physical limits.

There are opinions that all sports activities are hazardous to health on their own, but if proper and sufficient preventive measures are applied, possible negative effects would be minimized (Breitsameter, 2017, p. 290). Same preventive concept forms the basis of the sound management of chemicals as new substances enter the market, and there are no proper ways to regulate its flows. That is why it is necessary to be guided by the concept of the sound management of chemicals taking into account the "full lifecycle of chemicals" approach, inspired to a significant extent by the precautionary approach. Moreover, the Stockholm Convention obliges States to exchange information on existing safe alternatives to persistent organic pollutants (Art. 9).

The commitment to protect human health identifies possible pathways for further research of substances and methods that fall under the terms of anti-doping rule violations. For example, within the framework of international legal governance of chemicals, in particular within the SAICM, the management of endocrine-disrupting substances was recognized as one of the main problems. Such substances include such contraceptives as levonorgestrel and ethinylestradiol. Although scientific research results in controversial conclusions about their

ability to improve athletic performance, the criterion of causing harm to the health of athletes has already been proven.[24]

Moreover, it has been known for a while now that nutritional (dietary) supplements can be "contaminated" with doping (De Hon and Coumans, 2007, p. 805) and recent studies show that the problem remains (Mathews, 2018, p. 19). Dietary supplements are a type of non-doping performance enhancing strategy. According to the scientific data, there are from 40 to 100 % of athletes who use supplements, depending on their country, sport, athlete level, and supplement category (Garthe and Maughan, 2018, p. 133). The recent study by Ph. Hurst proves that the use of dietary supplements is likely to precede doping (Hurst, 2023, p. 365). Unlike medications, dietary supplements are not tested for quality before releasing on the market. These products are sold quite liberally all over the world (Rangelov Kozhuharov, Ivanov and Ivanova, 2022, p. 2).

Taking nutritional (dietary) supplements is often viewed as a safer alternative to doping in order to improve athletic performance. Thus, the problem of supplements "contaminated" by forbidden substances still remains. The recent studies reported that many dietary supplements contain undeclared substances like sibutramine, anabolic steroids, hygenamine, and 1,3-dimethylamylamine and athletes are under the risk of inadvertent doping (Rangelov Kozhuharov, Ivanov and Ivanova, 2022, p. 12). This is a good reason to believe that professional athletes can fall victims to unintentional doping as a result of taking prohibited substances without the slightest suspicion. According to the UNESCO Convention States are also encouraged to share information on nutritional supplements, including their analytic composition and quality assurance, but this obligation is formed under the condition "where appropriate" (Art. 10), thus this provision does not allow to prevent unintentional doping.

[24] The research findings on the possibility of increasing physical performance as a result of taking combined oral contraceptives (OCs) are contradictory. The evidence for increased physical performance comes from the following research. *See* Schaumberg, M.A., et al., (2018). Use of Oral Contraceptives to Manipulate Menstruation in Young, Physically Active Women. *International journal of sports physiology and performance*, 13(1), pp. 82–87, doi: 10.1123/ijspp. 2016-0689.

One of the main objectives in the management of chemicals is to prevent any harm to human health. Despite the differences in the objects of the legal regulation, both systems — international legal governance of chemicals and anti-doping regulation — are similar in their intention to create a safe and fair environment and to ensure human health.

IV. Conclusion

To sum it up, within the context of the anti-doping regulation several issues need to be clarified in the near future by collective efforts of States and WADA.

The existing procedure of adding new substances and methods to the Prohibited List lacks in transparency. The chemicals management mechanism established by the Stockholm Convention on Persistent Organic Pollutants of 2001 can serve as a good model to follow in the process of taking decisions on new substances and methods to be added to the Prohibited List.

The present criteria used to include doping substances and methods to the Prohibited List could be improved for a better understanding and application.

First, in the authors' opinion, WADA's approach to including substances and methods on the List should be first and foremost based on the criterion of protecting human health, including the health of athletes, more specifically. In practice both WADA and States ought to be interested in vesting this criterion with primary significance since this is an issue of public health.

Second, the criterion of enhancing sport performance viewed as the leading one by many in the sports community, should be supported by scientific evidence obtained as the results of high-quality academic research and WADA's own research and expert consultations.

Third, the criterion of violating the spirit of sports is of particular concern since there remains a good deal of ambiguity regarding its content. The main direction for interpretation is clear: its requirements should go hand-in-hand with the guidelines of common ethics.

Fourth, there remains a need to normatively settle the issues of using new technological devices, more specifically nanotechnologies and nanomaterials (technological doping), which requires strengthening ties between science and policy measures with the aim of ensuring transparency and precaution. The search for right solutions to new problems that arise in the field should be continued.

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Article

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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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Contents

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 extraordinarity 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 "exterritoriality" (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 "exterritoriality" 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 witnesses[16] 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]

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[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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LEGAL STATUS OF SPORTS STAKEHOLDERS

Article

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Migration Law and Issues in Sports

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Abstract: The international migration of athletes has become an essential feature of sports competition. These days foreign travel is often the name of the game. The purposes and duration of such migration range from participation in single events to long-term, even permanent relocation involving professional transfers. Each purpose or duration may generate a different body of law and regulations. Varying national visa, residence and other requirements for territorial entry of non-citizens are of course essential. Regional, especially European Union law may also be foundational as it was, for example, in defeating a practice within the EU of transfer payments between clubs in different member states that impeded freedom of movement. Also applicable is international law, notably that of the several institutions within the Olympic Movement insofar as it is one of the very few NGOs vested with international legal personality. Supporting that legal authority or extending beyond it are bilateral treaties of friendship and cooperation. More broadly, international human rights law applies, particularly in reinforcing the rights of athletes to be free of political discrimination against their participation in international competition.

Keywords: migration; sports; athletes; competition; Olympic Charter; IOC; discrimination; EU; nationality; eligibility

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Contents

I. Introduction

The globalization of sports has generated substantial migration of athletes and related issues for sports institutions, such as those within the Olympic Movement and national governing bodies in each sport.[1] At the grass roots, sports clubs and teams have become ethnically mixed and multicultural. Both amateur[2] and professional competition are affected. European football/soccer clubs are perhaps the best examples

[1] The comprehensive Olympic Movement is one of few nongovernmental organizations (NGOs) with international legal personality and agency. It includes numerous institutions, ranging from International Federations representing each sport, to National Olympic Committees, the International Olympic Committee and the World Anti-Doping Agency that govern not only the Olympic and Paralympic Games and participation in them but other sanctioned international competition as well. Today's open competition in most sports means that compensated professional athletes are to that extent participants in the Olympic Movement and are bound by its rules in the open competition.

[2] Historically, an amateur is simply an athlete who is not compensated for his or her sports activity. That is still its colloquial meaning, but for nearly a half-century, as a term of legal art, it has had a broader meaning to refer to any eligible participant in sanctioned international competition within the Olympic Movement. *See,* e.g., The Ted Stevens Olympic and Amateur Sports Act, 36 USC ss.220501 b (1): "amateur athlete" means an athlete who meets the eligibility standards established by the national governing body or paralympic organization for the sport in which the athlete competes."

of dependency on international migration of talent from within the continent as well as from outside. In North America, too, the teams in the professional leagues have become increasingly international. In basketball an estimated 23 % of the players are foreign, in baseball, 29 %, and in hockey 72 %.[3]

Even in amateur sports the significance of migration is apparent, as athletes seek to travel outside their national country for promising educational opportunities either directly related to or simply consonant with their athletic activity, as well as improved sports infrastructure, better training facilities, exemplary coaching, greater access to professionalization, and other means to fulfill their aspirations. More than 20,000 foreign students compete as student-athletes in United States colleges and universities. Educational advantages, especially, encourage migration, which is often being viewed to transcend normally short athletic careers. In an in-depth study of migrant swimmers, one interviewee observed that "education could be my winning lottery ticket for future life after swimming is over" (Vaicaitis, 2021, p. 42).

Short-term migration, more a matter of authorized travel under national immigration laws, is also critical. Indeed, coveted eligibility for imminent participation in the Olympics, regional Games and other sanctioned international competition may be at least as important to many athletes as long-term resettlement in a foreign country. Obviously, such competition relies on international cooperation in admitting foreign athletes into territory that is hosting particular competition. International agreements and protocols help ensure the necessary measures of cooperation but face political barriers such as boycotts, often highly technical visa disabilities and discriminatory policies.

II. The Olympics

II.1. The Legal Framework Under the Olympic Charter

The Olympic Charter[4] repeatedly asserts its mission to promote and protect universality and international harmony through solidarity

[3] *See* National Foundation for American Policy, Report, July 2020.

[4] The Olympic Charter (last republished in 2021) is the basic instrument of the Olympic Movement. It includes a brief Introduction, a Preamble, seven Fundamental Principles and 61 detailed Rules, many with attached Bye-laws.

of competing athletes,[5] but offers very little specific support in its 103 pages of detailed provisions. Instead, its overarching Principles and detailed Rules establish an authoritative framework to pursue its lofty mission. In selecting the venues for the Summer and Winter Games and derivatively for the Paralympic Games, the International Olympic Committee (IOC) relies primarily on local Organizing Committees that have been authorized by National Olympic Committees (NOCs). Under Rule 36 of the Charter the IOC enters into a tripartite agreement (an "Olympic Host Contract") with the selected local organizer and the NOC of the country concerned.

That binding agreement determines the responsibilities of the host NOC and local Organizing Committee concerning the organization, financing and staging of particular Games. Rule 36 provides that "[o]ther entities such as local, regional, state or national authorities… may also become parties to the Olympic Host Contract." Thus, the Olympic Charter does provide a general institutional framework that provides ample space within which a prospective host state's obligations to admit foreign athletes may be negotiated and agreed upon. Under Rule 52 of the Charter an official Olympic Identity Accreditation Card, together with a passport or other travel document, "authorizes entry into the country of the host," allowing the holder of the Card to "stay and perform" during the Games, "including a period not exceeding one month before and one month after the Olympic Games."

A prospective host of the Games must enlist the support of the national government of the prospective host state to assume several fundamental obligations. Under Rule 33(3) of the Charter, "[t]he national government of the country of any candidate must submit to the IOC a legally binding instrument by which the said government undertakes and guarantees that the country and its public authorities with and respect the Olympic Charter." More specific sovereign obligations, such as to grant eligible athletes short-term immigration rights, are subject to negotiation and agreement given the lack of specific provisions to that effect in the otherwise detailed Olympic Charter.

[5] *See,* e.g., Olympic Charter, Fundamental Principles 1, 2, 3. Rule 1(1) establishes that "[t]he goal of the Olympic Movement is to contribute to building a peaceful and better world by educating youth through sport practiced in accordance with Olympism and its values."

Other issues arise out of the staging of the Olympic Games. For example, those involving potential environmental impact. It can be enormous, from the creation of athlete and visitor villages to the construction of sports facilities. More to the point of migration law and practices, the protection of typically large numbers of foreign workers to build the sites demands substantial attention by the IOC. It has therefore pledged to intervene in the event of "abuse of migrant workers" and to comply with national labor laws and international standards such as those under agreements of the International Labor Organization (ILO); in practice this commitment has not prevented serious abuses of migrant workers including forced labor (Gauthier, 2017, pp. 88–90).

II.2. The Issue of Discrimination Against Russian Athletes

In the context of the war in Ukraine a particularly challenging issue involves the capacity of Russian athletes to gain admission into foreign territory for international competition. Both international (for example, Olympic) and national authorization are required. A salient example is the predicament of the Paris Organizing Committee for the 2024 Summer Games. It must rely on both the French government and the IOC to support the short-term admission of the Russian athletes. The French government, however, somewhat surprisingly supported by the mayor of Paris, has joined 33 other governments, mostly in Europe and North America, in seeking to bar participation in those Games by the Russian athletes despite Rule 33 (3) (Roush, 2023).

On the other hand, the IOC, having changed its mind between 2022 and 2023, supports at least a qualified participation of Russian athletes in the Games.[6] Its legal basis is the Charter's prohibition of political discrimination. The Charter not only establishes a fundamental human right to practice sport under Fundamental Principle 4, but under Fundamental Principle 5 provides that sport organizations within the Olympic Movement "shall apply political neutrality." Fundamental Principle 6 then amplifies Fundamental Principle 4's requirement of practicing sport "without discrimination" to include, specifically,

[6] Germano, S. World Athletics Upholds Ban on Russian Athletes Ahead of Paris Olympics, *Financial Times,* 23 March 2023.

"political or other opinion." Finally, one of the first and most basic Rules in the Charter is number 6, which confirms that "[t]he Olympic Games are competitions between athletes in individual or team events and not between countries." To be sure, it is often difficult to protect athletes from nationalism, but to do so is essential whenever it threatens to extend substantially beyond inevitable patriotism, which can be constructive in marshaling support for sports activity. These fundamental provisions of international sports law (recalling that the Olympic Movement enjoys international legal personality) have additional resonance in soft law and expressions of concern by two rapporteurs appointed by the United Nations Human Right Council to provide advice on the issue of the Russian athletes.

Of course, within the margins of this international legal framework, geopolitics may establish modest requirements for the participation of a national group of athletes, for example, by minimizing his or her national identity, prohibiting certain colors in wearing apparel and so on, just as the rules of participation normally impose constraints on the blatant commercialization of athletes or highly visible political gestures by them. Such qualifications are entirely acceptable so long as all meritorious and otherwise eligible athletes are assured of participation without political constraints. Indeed, Russian athletes between 2014 and 2023 have been subject to special requirements, initially because of violations of the World Anti-Doping Code by the Russian NOC and later the discovery of its coverup of prohibited practices.

III. Beyond the Olympics

Other international authority bearing on migration in sports includes a broad array of authority including, for example, environmental law, refugee law and human right law (for an introduction to sports-related treaties, *see* Zakharova, 2018, pp. 37–39). For example, the Convention for the Protection of Refugees[7] inspired a new classification of Olympic

[7] Convention Relating to the Status of Refugees, concluded 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954); Protocol Relating To the Status of Refugees, concluded 31 January 1967, 606 UNTS 267 (entered into Force 4 October 1967).

athletes that is defined not by nationality but by refugee status (Michelini, 2023; Spaaij et al., 2019, p. 12). Refugees can therefore join their own team. An example of human rights law is the Convention on the Rights of a Child,[8] which provides for the educational opportunities and general welfare of minority-age, often migrant athletes. For example, Canadian teenagers playing in the minor league of hockey in the United States must be housed in authorized private homes, enrolled in local schools and otherwise given benefits of social welfare befitting their age.

IV. Regional (EU) Level

At the regional level European Union (EU) law stands out in protecting migration of athletes. Art. 21 the European Union on the Functioning of the European Union (TFEU)[9] provides for freedom of movement among member states. Also, the overlapping Schengen Area encompasses 26 European states, including some but not all EU members together with several non-members. This pact establishes visa-free travel among the parties in the area without border controls, thereby securing freedom of movement for both nationals and non-nationals of those parties.

Art. 21 of the EU agreement has had profound effects on migration in sports. A landmark decision in *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman*[10] has been particularly significant. There the European Court of Justice struck down a traditional practice in football/soccer that had required a club acquiring a player after his contract had expired with another club to pay that club a transfer fee. More indirectly the Court in the same case also struck down a migration-inhibiting norm that, in the interest of

[8] Convention on the Rights of the Child, concluded 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

[9] Treaty on the Functioning of the European Union, done 13 December 2007, OJ C202 (entered into force 1 December 2009.

[10] *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal club liégeois SA v. Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v. Jean-Marc Bosman,* case C-415/93, 1995, *European Court Reports* 97. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993CJ0415 [Accessed 04.06.2023].

national identity, had strictly limited the number of players from other EU member states who could become members of a club. The *Bosman* decision was later extended to benefit players from non-member states that were in the process of applying for EU membership.[11]

Other regions have similarly ensured international travel for invited players. These commitments are established under both bilateral agreements (e.g., Australia and New Zealand) and multilateral pacts (e.g., among the Mercosur member states of Argentina, Brazil, Paraguay and Uruguay).

V. National Level

Last, but certainly not least, national laws govern migration of athletes as well as determinations of nationality that may affect the migratory capacity of an athlete (on the compatibility of eligibility criteria and nationality law, with reference to "nationality swapping" and quickie citizenships to acquire foreign athletic talent (Wollmann, 2016, p. 295 et seq). For example, among foreign citizens seeking to enter the United States, the country's immigration law distinguishes more permanent immigrant or "green card" status from from non-immigrant or more temporary, typically visiting status. Most foreign athletes have non-immigrant status. Of these the law has several alternative categories of required visas unless a foreign citizen is a national of any of several dozen visa-waiver countries. The most important of these categories for athletes are the "O"[12] and "P"[13] categories that between them require alternative levels of recognized athletic achievement and provide alternative periods of duration.

The visa and admission process of nearly every country can be complicated and prolonged. Problems may in effect preclude an athlete's admission into a foreign country even if he or she possesses a visa to enter its territory. For example, a visa may be rejected at an

[11] *Deutscher Handballbund eV v. Kolpak*, case C-438/00, 2003, *European Court Reports* 1-04135. Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000CJ0438:EN:HTML [Accessed 04.06.2023].

[12] Immigration and Nationality Act s. 101 (a)(15)(O).

[13] Immigration and Nationality Act s. 101(a)(15)(P).

athlete's port of entry into that country. Or, if an athlete receives a visa contingent on being a member of a foreign team scheduled to compete in the visa-issuing country and at least one key player on that team is denied a visa, the team may not be able to compete as planned, and contingent visas are simply canceled (*see* Nafziger, 1991, p. 68 noting actual consular interview; for a concise description of "O" and "P" visas, see Aleinikoff et al., 2016, p. 405).

VI. Conclusion

In all, the international regime for both long and short-term immigration of athletes is creditable. As one study concluded, "[i]n the twenty-first century, sports activity is open and global, leaving fewer and fewer barriers to the free movement of athletes" (Vaicaitis, 2021, p. 33). Even so, international sports competition, however hallowed it may be as an agent of global solidarity and peace, is subject to a complex array of migration-related laws and sometimes creditable issues.

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Article

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Legal Status of Sports Referees: Legal Nature, Features, Problems

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Abstract: The paper is devoted to the content and specificity of the legal status of sports judges (sports referees) as one of the categories of active participants — subjects of sports. The paper dwells on underestimation of the role and importance of sports referees in general and in particular for specific kinds of sports. A sports referee is the most important and integral element of sports in any of its forms and at any level. Understanding of the status and ontology of the professional activity of a sports referee allows us to understand the nature of sports, its autonomy. The paper describes the essence of the concept and the legal status of sports referees, explains possible functional and instrumental roles of sports referees in detail. The authors highlight and explain existing determinants of the complexity of the concept and legal status of a sports referee and the peculiarities of the ontology of this profession. The paper shows the most pressing problems in the field of staffing positions of sports referees with qualified personnel. The paper suggests a detailed taxonomy of professional rights of sports referees noting that there is a complex and non-linear picture of the distribution of the recognition and significance of certain rights depending on specific jurisdictions. The authors define a specific ordering (order-forming and order-retaining) of the sports product, which is the integral result of refereeing and fulfilling by sports referees of other official powers.

Keywords: sports referee; sport; sports law; extra-legal regulation in the field of sports (lex sportiva); legal status of a sports referee

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Contents

I. Introduction

Sport plays an important role in the social life (Aristov, 2016, p. 52). Sport relies on a specific category of active participants — subjects of sports. Usually, these individuals receive a very small "piece of the pie" from high incomes of the sports industry, and they are deprived of wide popularity and love from sport fan communities. They are rarely well appreciated. As a rule, the main place of professional occupation for persons in this category of sports subjects is not directly related to the field of sports, or even completely unrelated to it. In most cases, these persons work in sports on a voluntary basis or receive only a nominal fee for their activities. In sports, they do not strive for personal victory, and they cannot lose personally. Yet without them, there would never have been and will never be (meaning — impossible even today) sports.

We are talking about referees.[1] It is difficult to overestimate the sports referee's role and significance. The referee is the most important and essential part of sports in any form, at any level. To be a referee means not only to manage a fight or game, not only to control a competition, but to take full responsibility during the play.

According to Jean-Pierre Escalettes, the referee is the guarantor of compliance with the sporting regulations and there can be no game without respect for the referee (As cited in Chapron, 2005). Referees represent an integral and important part of the sport environment, because they oversee the game rules and facilitate fairness and sporting behavior (Samuel, 2021, p. 249).

In the paper, we are not talking about arbitrators of the arbitration authority, e.g., arbitrators of the Court of Arbitration for Sport in the city of Lausanne (Switzerland) or the similar authorities, but we are talking about referees who judge sports matches, games, fights, i.e., about sports referees or sport arbitrators known in various positions and capacities regardless of the title.

Referees in sports play a unique role because they are usually the only persons on the field of play who are not interested in the outcome of the competition, and the referee essentially acts both as a participant and as a spectator (Wolin and Lang, 2013, p. 86).

The independence of sports referees determines the foundations of autonomy in the field of sports. The legal status of sports referees is possible to be researched, understood, and discussed, but it has not been researched and clarified in full yet. This needs additional scientific understanding, and the status itself needs to be clarified despite the fact that it cannot be said that the rights of the sports referees are provided and ideally protected, if at all.

The authors of this paper have already addressed this subject matter in their previous works. However, time moves on, everything develops.

[1] Different types of sports due to their unique and comprehensive rules can resort to different designations for sports officials in charge of maintaining standards of play (e.g., *referee*, *umpire*, *judge*, *linesman*, *arbitrator*, etc.). In our paper, we use the term *referee* as the most common term describing a sports official presiding over a competitive sporting or athletic event and playing a vital role in maintaining standards inherent to a particular sport.

It should be noted that there is a clearly fixed tendency of complicacy of subject group and ontology of sports relations (both as regulated by the sports law, and determined by the *lex sportiva* regulations), due to many reasons.

All this actualizes a new scientific understanding of the problem of defining the legal status of the sports referees properly, taking into consideration the international experience in this field.

II. Methodology

The regulatory foundations of this study include legislation and law enforcement practices, as well as extra-legal regulation systems and experience concerning appropriate normative realization practice of the following foreign states: Australia, Argentina, Belgium, Brazil, Germany, India, Spain, Italy, Canada, China, Mexico, Portugal, Serbia, USA, France, Chile, Switzerland, and, together with the above, — the Russian Federation.

The regulatory acts and documents of several dozens of international and national sports federations have been examined (in particular, International Biathlon Union, International Gymnastics Federation, International Boxing Federation, World Boxing Association, International Basketball Federation, Fédération Internationale de Football Association, International Volleyball Federation, World Baseball Softball Confederation).

The empirical basis of the present study covers several dozen court decisions primarily USA courts decisions,[2] in relation to the sports referees.[3]

[2] US Justitia formal website: https://law.justia.com/.

[3] Pamela A. Postema, Plaintiff, v. National league of professional baseball clubs, American League of Professional Baseball Clubs, Triple-A Alliance of Professional Baseball Clubs, and Baseball Office of Umpire Development, Defendants, Decision of the US District Court for the Southern District of New York No. 799 F. Supp. 1475 of 17 July 1992; Alexander J. Salerno and William Valentine, Plaintiffs-appellants, v. American League of Professional Baseball Clubs, an Unincorporated Association, Joseph E. Cronin, Individually and As President of the American League of Professional Baseball Clubs, and Paul Porter, Defendants, Bowie Kuhn, Individually and as the Commissioner of Baseball, Defendant-appellee. Decision of the U.S. Court of Appeals for the Second Circuit No. 429 F.2d 1003 of 13 July 1970; Major League Umpires'

III. The Essence of the Concept and Legal Status of a Sports Referee: Essential Responsibilities and Skills Required

In accordance with Alfredo Trentalange, a sports referee is a person who must make decisions and be responsible for them within a few moments (Marchi, 2022).

In different sports and in relation to different types of sports events, different names of this category of sports subjects are used (e.g., in English we can use *umpire*, *official*, *judge*, *arbitrator*, *referee*, etc.), but generally it is possible to designate them as "sports referees." There is also the status of a commissioner of a sports league, granted with the elements of sports and refereeing authority.

In the French language covering the variety of French sports, the following terms are used: *Arbitre assistant*, *Commissaire*, *Juge*, *Juge de ligne*, *Marshal*, *Officiel*, *Arbitre*, *Scorer*, *Juge du départ (Starter)*, *Chronométreur*, *Juge de touche* (Descripteur des rôles de juges et d'arbitres sportifs en Europe, 2020, p. 6).

Association v. American League of Professional Baseball Clubs, National league of Professional Baseball Clubs. Decision of the U.S. Court of Appeals for the Third Circuit No. 159 F.3d 1352 of 23 July 1998; Case "Richard G. Phillips, et al., v. Alan, H. "Bud" Selig, et al. Decision of the US District Court for the Eastern District of Pennsylvania No. 157 F. Supp. 2d 419 от 28 March 2001; Case "Angel Hernandez, Plaintiff, v. The office of the commissioner of baseball and major league baseball blue, Inc., Defendants" / Opinion and Order of the United States District Court of the Southern district of New York, No. 18-CV-9035 (JPO) of 31 March 2021; Donald A. Gale v. Greater washington softball umpires association et al. Decision of the Court of Special Appeals of Maryland of 30 November 1973 No. 311 A.2d 817; Office of the Commissioner of baseball, Plaintiff, v. World umpires association, Defendant. Memorandum opinion of the U.S. District Court for the Southern District of New York of 28 January 2003 No. 242 F. Supp. 2d 380; Curtis C. Flood, Plaintiff-appellant, v. Bowie K. Kuhn et al., Defendants-appellees. Decision of the US Court of Appeals for the Second Circuit of 7 April 1971 No. 443 F.2d 264; Atlanta national league baseball club, Inc., and Ted Turner v. Bowie K. Kuhn, individually and as Commissioner of Baseball. Decision of the US District Court for the Northern District of Georgia of 19 May 1977 No. 432 F. Supp. 1213; Davis v. The Atlantic League of Professional Baseball Clubs, Inc. Decision of the US District Court District of New Jersey of 2 June 2009 No. 07-5023; Milwaukee American Association et al. v. Landis (Bennett, Intervener). Decision of the US District Court for the Northern District of Illinois of 21 April 1931 No. 49 F.2d 298; Jacqueline Ann Reckling v. Pontiac 358 INC. d/b/a The Ultimate Sports Bar and Grill" / Decision of the State of Michigan court of Appeals of 5 January 1999.

Thus, the functional diversity of sports referees is very, very wide. A sports referee is a subject (actor), who is responsible for control and guidance of a sporting event (game, fighting, etc.) and compliance of its participants with the rules of the sport in which they are involved and additional rules, established by organizers, ensuring the sports order and atmosphere of respect between the athletes, recording violations of the sports rules and, if necessary, resolving and preventing a conflict in the current play space. All these should be done by a sports referee in a neutral and composed manner, interpreting challenging situations in an impartial manner, making adequate decisions within a game time, exercising control over emotions and emotional behavior in the current play space.

In fact, the sports referee guides the course of a sporting event, taking care to ensure its unfailing course, framing it by applying the sports rules. The sports referee provides the course of a sports event, makes decisions of a technical nature (scoring, timing).

Based on sports rules, a sports referee has the authority to impose sports penalties, to issue warnings, to stop or terminate a sporting event or its element, to exclude from participation some athletes, and a sports team. A sports referee, acting as an impartial third party, is endowed with certain quasi-judicial authorities. However, people say that a good sports referee is intended to help in understanding the sports rules and finding acceptable solutions rather than to punish even wrongful athletes.

Jurisdiction conferred by the rules of the game is exercised cumulatively during the game by the designated officials on the spot, and it is virtually certain to be held non-reviewable by the courts. One could not realistically suppose that a court would ever overturn a decision to award try or a penalty. A referee's or an umpire's exercise of discretion and judgment is beyond challenge, unless the rules of the game provide for this, as they do in the case of an assistant referee in football whose provisional decision may be summarily reversed by the referee (Beloff, Kerr, and Demetriou, 1999, p. 107).

There are three different roles for referees in the sport competitions, namely: 1. a judge running the rules and making the decisions; 2. a manager responsible for the match and managing all of the persons

engaged; and 3. a mediator ensuring the conflict resolution. Referees have different duties in performing these roles; the referee's negligence of the duties makes them liable and forces him to compensate the damages (Mohamadinejad, Mirsafian, and Soltanhoseini, 2012, p. S25).

A sports referee may occasionally fulfill other roles, such as being a witness. Whether a show will be colorful and memorable for the spectators largely depends on the sports referee. The sports referees have representative authority, representing the world of sports in various formal institutions, joining the boards, etc.

The specific functionalities of any sports referee are varied and numerous. Thus, a football referee provides compliance with the rules, evaluates the players' actions, and intervenes during the course of the game. His decisions affect the dynamics of the match, the behavior of the players and, especially, the crowd, and referee's decisions are made throughout the match. The critical aspects of the football referee status are that his actions are definitive, immediate and direct, as he decides whether the game follows the rules and acts accordingly.

A very important element in the actions of a sports referee is his mobility across a sports field, as well as the possibility to communicate with players and referee's assistants. The football referee makes decisions based on the rules, but always leaving a wide scope for subjectivity, interpretation and for the use of common sense depending on many factors, a few of which are very difficult to control in short periods of time. Also, the proximity and absence of the public determines the actions of a football referee and sometimes even have negative consequences for the safety and health of a football referee. Moreover, emotional atmosphere arising during some matches when teams play not only for the result puts pressure on sports referees. This social transcendence with the victorious feeling as the only important and definitive moment makes the work of sports referees very difficult (Ruiz Caballero et al., 2010).

In many sports, referees are under significant pressure to make crucial decisions affecting the outcome of a competition very quickly. This varies from sport to sport: in figure skating and gymnastics, for example, referees are responsible for the entire score, while in other sports, such as football, referees' decisions can greatly influence or

even determine the outcome of the competition. In order to make these decisions effectively, referees must have a complete understanding of the rules of the sport and be able to apply their knowledge in a very short time, often in very stressful situations, and if they make the wrong decision, they are often blamed for unfavorable outcome of the game (Kerr, 2017, p. 114).

As Monica Mandico notices, the sports system is placed in the position of autonomy and subsidiarity in relation to the state system: it has its own administrative, technical and dispute resolution regulations different from other regulations prescribed by the state system and specific for the majority of subjects that follow it. A sports referee is essentially a "hand" of the sports system in terms of the sports rules that must be observed and respected in the scope of competitions, but the referee is also a kind of "official," in particular during sports events (Mandico, 2018).

The sports referee plays another very important and specific role, without which understanding of the nature of a sports referee would be incomplete. As Tony Chapron writes, this is a role of transferring of the institutional sports ethics, the function of which is to normalize social behavior (Chapron, 2005). Generally, the legitimacy of the sport institution mainly relies on the definition of rules for different practices and their effective use. Developing the regulatory framework (in the 19th century), the institution defines the social project of violation euphemization and, permitting its use, establishes the social tolerance threshold.

From this point of view, the role of a sports referee is to guide this violence and to remind the athletes constantly about thresholds of their physical personal expression. Thus, the rules of sport become the regulatory framework for physical human behavior and they help build a civilization where morals are more peaceful.

This social project, founded on the ancestors' values, is supported with certain enthusiasm and, often, with unfailing veneration. Thus, the role of a sports referee is based on double logic.

Firstly, he works for perpetuation of the sports rule, so as he provides its compliance thereby contributing to the promotion of the rule in a kind of sports *evangelization*. From this moment, a sports

referee imposes a behavior model that applies to the players, but the consequences go far beyond the playing field. In fact, his authority as a sports referee leads to the presence of jurisprudence form that "inspires" observers of the practice. If the rule exists in writing, it only gains meaning and life when it is applied in the field and extends to a very large number of people exclusively through the decisions of the referee. Let us give a simple example to test this statement: for watching or visiting a football, tennis, rugby, or basketball match, there is no necessity to familiarize yourself with the rules of these types of activity. However, nothing prevents understanding of general rules, because a referee not only administers a game, but he also fills the sports law with consent by his gestures and interferences, thereby contributing to its comprehensive understandability.

Beyond this logic of regulation saturation, another score is played. Understanding (in terms of internalization of the coded behavior) of the sports rules includes normalization of interpersonal relationships as a subfunction (moral). In this perspective, the referee promotes the moral values that can be attributed to the ethics as a real behavioral philosophy. The referee realizes this ethics in two ways. As the institution, the referee represents justice through its elements such as indifference, honesty and truth. As an agent of this institution, a sports referee strives to ensure compliance with the values traditionally associated with sports (Chapron, 2005).

IV. Objective Determinants of the Concept and Legal Status Definition Complexity: Peculiarities of Professional Ontology of a Sports Referee

In most cases, the status of sports referees is defined by the legislation (both Russian and foreign) concisely and summarily enough, just in the most general terms, allowing these issues to be resolved by the sports regulations, including extra-legal regulation in such acts that are significantly different depending on the country or sports type. The status of the sports referees "is clarified" very fragmentarily and superficially, mainly, regarding the issues concerning the discipline of sports referees, their categorization, qualification confirmation, etc.

It should be understood that such state of affairs is predetermined by complexity of the sport sector and relations therein, by too large differences between different kinds of sports and, on the other hand, by different models of sports competitions, by significant differences in consent and scopes of functionalities of the subjects — the sports referees.

The sport we are talking about makes its more than significant contribution to the specifics — whether this concerns professional sport or amateur sport, elite sports or mass sports, sport of one of the most common types (even the Olympic sports) or exotic sports (narrow-ethnic, narrow military-applied sport, etc.).

In these sports, qualified roles and modalities of the referee's behavior (referee's roles) are too varied. For example, it is obvious to everyone that a sports referee in a football match and a sports referee in a boxing match are very different roles.

The sports refereeing can be performed singularly and independently (a referee in boxing) or collectively when sports referees work in a complex group, i.e., each referee of a group has different functionalities and obligations depending on purposes, presence and importance that they will have during the game or competition. The required number of referees depends on the scope of the game or competition, as well as on specialization and kind of sport. In a standard football match, the judging panel is composed of 4 sports referees, in baseball, there are 4 referees, one at each "base" and one at the "home." At the same time, one referee is responsible for calling balls and hits, while the others are responsible for calling fair and foul balls in the field.

In a volleyball match, the sports refereeing is performed by the first referee, watching the actions from the bleachers and looking down at the court, and by the second referee, placed at ground level on the opposite side of the net. In hockey, sports refereeing is performed by on-ice referees who are usually assisted by the on-ice linesmen (the panel of on-ice referees and on-ice linesmen and their functionalities may vary depending on the hockey league). Sports refereeing in an American football match can be performed by three, four, five (usually), six or even seven sports referees. Thus, the logistics of sports refereeing are very different depending on the types of sport.

A great deal depends on which model of sport public administration is realized in the specific state (Soloviev et al., 2017, pp. 125–134). The high increase in excessive variety and diversity in the legal status of a sports referee provides significant heterogeneity (diversity and inequality) of the forms of regulation of relations between a sports referee and a sports organization.

In fact, a unified system of the contractual regulation in sports refereeing has not developed anywhere in the world. We can talk about professional sports labor and legal relations (Shevchenko, 2014; 2015), "employment" on the basis of a civil law contract (appropriate in the case of rare execution of referee's judicial authority), a military service contract (for example, a referee of the Cup of the Armed Forces of the Russian Federation in international military Pentathlon in Russia), and a wide range of other forms. However, it has to be said that this circumstance significantly reduces the guarantees of social rights of sports referees, namely, first, the guarantees on stability of employment for a sports referee, recovery of expenses, salary, and promotion and occupational advancement, and, finally, legal protection. In this situation, "outsourcing" can only hinder the normal organization of sport.

A form of involvement of a sports referee (whether it is an individual sports labor activity or a collective sports labor activity) is also significant. Both approaches are applied in the field of professional sports.

To sum up, all the above mentioned, integrally and due to objective reasons, prevents the rights, legal status and activity of sports referees from being consistently regulated by the legal provisions. We have to deal with this, to accept the situation for what it is. However, at court, this creates more than significant difficulties in consideration and investigation of cases (according to our examination of the court practice stated above).

V. Serious Problems in the Field of Recruiting for the Positions of Sports Referees by Competent Officials

Roles and obligations of referees in various types of sports are very different depending on the rules, laws, and background of each

kind of sport. Despite their importance, referees face a lot of problems and realities. Their important roles are often overlooked and, when this happens, the degree of respect they receive from competitors, coaches, and spectators rarely corresponds to the training, increased focus, and efforts that referees put into their work under close surveillance and tremendous stress often increased due to the growing use of innovation technologies. Thus, the main role played by sports judges and referees to provide the smooth running of sports competitions each and every week and each and every year, usually, is left out of consideration, underestimated and, sometimes, it comes under abrasive and unfair criticism. In many kinds of sports, referees' training and development can focus on the technical aspects of sport to the detriment of more serious skills, such as communication, teamwork, conflict management and permanent personal growth. They are often isolated in their type of sport and have little opportunities to learn via experiences from the best practice in other sports (Descripteur des rôles de juges et d'arbitres sportifs en Europe, 2020, pp. 31, 7).

Alfredo Trentalange, the President of the AIA, articulated the existence of many problems, connected with the status and work of sports referees, "The referee is just as much of an athlete as is a football player. We need to work on communication and to exercise our best efforts to spread this message and humanize the person of sports referee" (Marchi, 2022).

The current recovery of the sports industry and sports in general after the pandemic is the greatest problem. This problem exacerbates the problems of functioning of sports refereeing mechanisms.

The main sources of problems with the functioning of the legal institution of sports referees can reasonably be identified as the following (the list is non-exhaustive):

— problems associated with the work of sports referees and escalated social problems (significant exceedance of the normal workload criteria, problems of the financial reward);

— problems of public pressure in relation to the sports referees on the part of certain persons acting for their own interest and still unresolved in total;

— problems associated with the aggressive illegal behavior of sports fans in relation to the sports referee (moreover, young sports referees get it worse and experience it more acutely);

— organizing problems of decentralized systems of high-quality vocational training of sports referees (due to their overwhelming variety);

— problems of pendency and lack of proper regulation of issues on responsibilities of sports referees for the faults and other failures of sports refereeing.

Sports referee's work is inherently associated with a very high and pronounced psychological stress and psychological overstrain of a sports referee, provoked by this overstrain, when appointing them the sports refereeing. The risk of bodily injury and even death at work is very high in this profession.

In particular, cases of death of sports referees and the use of violence against them are known: in 2007, a sports referee was killed for a controversial decision in the Netherlands, in 2013 in Brazil there was a similar case with an amateur referee. In the USA, in 2016 in Argentina and Mexico, the referees were killed by the players, in 2017 there was a similar case in the United States. In 2021, an English referee stepped down from refereeing following death threats to him and his family on social media (Skene, 2023).

There can be a lack of respect for sports referees at all levels of the sport. All in all, this is a very dangerous job, and once referees' integrity is undermined, this triggers an environment that encourages verbal or physical abuse (Skene, 2023).

Cruel and pronounced disrespectful, aggressive treatment (taking out aggression) of referees on the part of the players, coaches, spectators and parents of minor athletes lead to the serious nervous and emotional exhaustion of the sports referees. Health problems constitute a typical occupational aftermath for a sports referee job. Referees suffer from emotional burnout syndromes, other negative mental conditions.

The problem of hiring sports referees is also important. It is necessary to pay more attention to their motivation to stay in their jobs or quit, since the lack of the required number of sports referees limits the possibility of holding sports competitions in the planned

extent, which is especially important for certain sports. In addition, it is necessary to maintain the required number of sports referees due to the following considerations:

— from a macro perspective, the ongoing health of the population through organized sport requires referees;

— referees help to provide a proper safe environment for the competitors;

— the existence of different sports and development of athletes through sports within the framework of organized competitions requires a sufficient number of sports referees;

— referees also provide assurance that standard rules of competition are applied so that events can be sanctioned and recognized by national and international governing bodies (Kellett and Shilbury, 2007, p. 210).

Overall, this determines the problem of not only a critical lack of personnel in the sports refereeing community, but also a serious outflow of qualified personnel.

During the past few years, sports referees have left the sport in large numbers. These numbers are significantly impressive. From the season of 2018–2019 to the summer of 2022, sports have lost about 50,000 referees in the USA, and in the summer of 2022, many sporting events were conducted in a period of critical deficiency of sports referees (Cordell, 2022).

Low qualifications of sports referees (that offset losses — the new generation), therefore, put the issue of who, in what procedure and to what degree shall take responsibility (and what kind of responsibility) for the faulty sports refereeing.

Referees are being positioned as having enhanced knowledge of the sport, and they are compensated for their knowledge and ability to apply it to the game. Most importantly, they are being compensated, in part, to make sure that they do not perform their job negligently and to assure the safety of the players. In this sense, they serve as a type of insurance for their employer (Mayer, 2005, p. 88).

A very high importance of sports officiating (let us emphasize — with high quality) is determined, among other things, by the fact that, as notes Stefanie Koch (referring to other authors' opinions as well), the negative consequences of improper refereeing can have a significant

impact on many stakeholders. As the result of influencing the outcome, competitions can suffer financial and emotional harm; in the event of an unjustified loss of the team, the team may not move further and also may have economic negative consequences, as well as lower its rating among the fans. It can also have a general impact on the mood of the fans (Koch, 2008, pp. 5–6).

The question of who is liable for the financial loss if the referee makes incorrect decisions is important. Should sports referees be responsible? They may enjoy immunity like public judges and officials because of their vulnerable position. One of the possible ways to solve this problem may include imposing responsibility on the organizers of the competition (Koch, 2008, pp. 5–6).

However, there is the dark side of the picture: except for cruelty and aggression in relation to the sports referees, there is a problem connected with the previous one of cruelty and aggression on the part of sports referees in relation to the child athletes.

As Patrick Skene says, every year millions of parents sign their children up to play sports in good faith that they are doing the best thing for their development. A small sliver will make the full journey to become a professional and represent their country. For the vast majority, sport will not be their occupation but it serves a role as a key pillar in developing a different set of life skills beyond those their family or school provide. Lessons like learning to cope with losing, sportsmanship and how to celebrate the accomplishments of others, the power of teamwork, listening and submitting to a system and most importantly learning the art of respect for elders, coaches, teammates, opponents and officials.

But what happens when sport performs the reverse role? It teaches children and the youth bad habits that derail their development and normalize anti-social and coward behavior that could negatively affect their lives in the future. What if the sport forms the anti-social behavior that it purports to be a cure for or prevention from? Nothing can prepare you for referee abuse. A referee is tasked with not showing some discretion over, not officiating, not humiliating certain kids who continue to make mistakes (Skene, 2023).

As Martin Luther King Jr. wrote in his letter from the Birmingham Jail, "Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly." These problems are interconnected.

In the study of the legal status of sports referees, the issue on limitations of referees' obligations and responsibilities, on the extent a sports referee is responsible for what happens on the field of game is important. One more issue that is important includes the issue of how this works in situations when behavior of participants in a competition is beyond the pale of sport and may lead to a violation of law.

Competitors trust the referee to control the match in a manner that ensures safety and does not expose competitors to high risks of harm (Caddell, 2005, p. 415).

Fighting and other injury-prone situations are inherent in some sports, such as contact sports, and they play an important role in making those sports enjoyable for participants. There are situations when referees have to make decisions of whether to step in and stop the competition or allow it to continue. On the one hand, too frequent interferences in the flow of the game can affect it due to too many stoppings. On the other hand, a referee is there to help protect the players who are often caught up in the emotion of the game (Mayer, 2005, p. 56).

According to A. Mohamadinejad, H. Mirsafian, and M. Soltanhoseini, sports referees might be liable for any failure to display reasonable competence resulting in injury to a player, including referees' failure to implement relevant rules designed to protect against injury. At the same time, it is necessary to take into account many factors, in particular, a duty of care owed the player by the referee, breach of that duty by the referee, damage to the player resulting from the breach, the foreseeability of harm, the degree of certainty that player has suffered that harm, the connection between the referees' alleged misconduct and potential injury (Mohamadinejad, Mirsafian and Soltanhoseini, 2012, p. S32).

In general, the duty to exercise reasonable care does not usually require a referee to avoid risks that are inherent in the game itself, and

it is unlikely to imply consent to risks going beyond those inherent in the certain sport when considering such cases in courts (Beloff, Kerr, and Demetriou, 1999, p. 123).

Indicative of this issue is the Decision of the State of Michigan court of Appeals dated 5 January 1999 *Jacqueline Ann Reckling v. Pontiac 358 INC. d/b/a The Ultimate Sports Bar and Grill*. According to the statement of facts, the Plaintiff participated in an arm-wrestling contest sponsored by the Defendant. The Defendant hired a referee, a patron. At the contest, the Plaintiff arm-wrestled two women and Plaintiff's humerus bone broke. The Plaintiff filed a premises liability lawsuit for personal injuries against the Defendant alleging that the individual who defendant had chosen to referee the contest failed to stop, prevent or otherwise intervene in the arm-wrestling match when the referee should have known to do so.

The Plaintiff stated the following:

— the Defendant selected and employed personnel to act as referee(s) to protect the safety of the participants, maintain the integrity of the contest and ensure that the rules of the contest were followed;

— the personnel that the Defendant selected and employed to act as referee(s) of said contest failed to stop, prevent or otherwise intervene in the match between the Plaintiff and the other as yet unidentified individual when the necessity of doing so was known or should have been known to the said personnel.

However, the court concluded, "Plaintiff failed to establish in his statement that the Defendant owed her a duty. The Plaintiff consented by her participation in the arm-wrestling match to the risk of events such as a broken arm, which are known, apparent and are reasonably foreseeable. The Defendant did not have a duty to ensure that the Plaintiff's humerus did not break. The Plaintiff did not allege that her opponent engaged in criminal activity. In fact, the Plaintiff testified that her opponent was not trying to injure her. Therefore, the Defendant did not have a duty to protect the Plaintiff from the events leading to her broken humerus."

It is important to protect referees by permitting liability only for intentional or gross meaningless actions; and negligence in refereeing a sporting event should not be allowed to give rise to legal liability (Wolin and Lang, 2013, p. 110).

VI. Structural Composition and Content of Sports Referees' Rights

It is clear that the sports referees have a line of social and labor rights, including the right to work (including the right to award also for their referee work when hosting sports events), the right to rest (vacation, holidays, the maximum amount of works in hours in the time interval), the pension rights, the social rights (social security rights), the rights to health protection, the right to to health insurance and healthcare, the right to proper working time (due to the difficult working conditions).

Usually, the very low concernment and motivation of sports organizations to deal with these problems (at best, assigning them to the state, at worst — ignoring them completely) determines the relevance of these issues that in fact, are important and presenting an independent academic interest. However, these certainly important aspects of the activity ontology of a sports referee are not the matter of this paper.

We have focused on the professional rights of sports referees. We reasonably believe in the need to enunciate them. Due to this informative point, the proper comprehension and understanding of the legal nature and ontology of the sports refereeing, the comprehension and understanding of the sports referee's status can be achieved in accordance with the required comprehensiveness and broadness, relevance and adequacy.

As the result of the study, the authors have developed the following taxonomy of the professional rights of sports referees:[4]

The professional rights of sports referees include:

1) the right to participate as a sports referee in refereeing of sports events with appropriate execution of professional obligations and authorities (according to their sports referee's status and qualification, an appropriate frequency and capacity in accordance with a sports event schedule), including the right to perform sports referee's activities, to perform the sports referee's authorities and to submit the sports refereeing in favor of sport rather than in favor of private personal

[4] There is a complex and nonlinear view of distribution of the recognition and recognized ponderability of some or other rights depending on specific states.

interests of the sports organization authorizing the referee, employers or other third parties with no pressure from them;

2) a complex of ontological-supporting referee's rights[5] that arise out of specific features of the professional activity of a sport referee, directly related to execution of professional capacities and authorities of a sport referee and exercised independently in the refereeing discretion (in terms of sports regulatory rules of the extra-legal regulation and law with no whosoever's pressure of any type):

— the right to submit regulating and sports-disciplinary authority during a sports event by presuming legitimacy (regulatory conformity), accuracy and correctness of the decisions taken by a sports referee;

— the right to actual professional discretion (discretion) in the sports referee's decision-making and actual advocacy of this discretion in complex, questionable, and sports situations;

— the right to resolve disputes by the referee's authority during a sports event;

— the right to disbar (temporary or in total) a participant of a sports event on the sports and disciplinary grounds (to remove a player from the field, etc.);

— the right to impose sports and disciplinary penalties (punishments) immediately during a sporting event or upon its completion, including withdrawal of a prize or award (in case of an unfair competition of participants of a sporting event);

— the right to stop or terminate a sporting event in total (match, fighting, other sports competition) or in part (half, round, leg, race) if necessary (disruptive behavior or other disorders in the play space; injury and serious problems of health and physical state of an athlete (athletes) or other sports referee; critical damage of the involved sports infrastructure facility; sudden bed meteorological conditions acting as a significant hazard; life hazard to those who are present at a sporting event, other serious problems);

3) a complex of the rights of a sports referee to proper provision of his working conditions (performance of obligations and authorities) while carrying out sports refereeing:

[5] Including the right to sports proceedings.

— the right to proper procedural cooperation between athletes and heads of sports teams with a sports referee in the process of sports refereeing submitting to them and performance of referee's professional obligations and authorities and on their grounds;

— the right to the necessary conditions, outfit and equipment for performance of professional obligations and authorities of a sports referee;

— the right to positioning in the sports playing space, providing necessary visibility to a sports referee during a sporting event;

— the right to support and validation of the referee's decision by technical means (a video replay of a goalmouth action, a time of player's collision, etc.);

— the right to privacy for sports referees in the conditions of their direct work (performance of obligations and authorities) on administration of sports refereeing during sporting events (and at other times in connection with such refereeing);

— the right to receive highly qualified and accessible legal assistance, legal services and defense, to receive the qualified legal and translation services and support, the other support from the relevant sports organization, occupational sports refereeing community or government body in cases of conflicts and disputes in connection with execution by a sports referee of his professional obligations and authorities and administration of sports refereeing by him (for example, in terms of disciplinary proceedings, initiated against a sports referee, in terms of action proceeding on a case of protection of honor and personal dignity, etc.);

— the right to covering the expenses on transport, accommodation, etc. in connection with participation in a sports event;

— the right to a priori protection from actions of a sports referee (acting in terms of the sports regulations) being qualified as a civil tort, and from relevant occurrence of civil law liability for harm due to commission or omission of an act (if the sports referee's behavior was confirmed to be in good faith or rational);

4) the right to stability of the sports referee's status during the entire specified period of election (confirmation) with a complicated clearly specified procedure for the suspension or termination of referee's authorities;

5) the right to prior election for the position of sports referee for the following period (if the sports regulations do not contain reasonable constraint limitations in this respect);

6) the right to honest professional assessment of referee's vocational activities in a specific conflict (disputable) sports situation, associated with official execution by sports referees of their occupational obligations and authorities (regardless of the court or administrative procedures and/or parallel to them) by other sports referees (and/or by specialists in the field of the sports law), and the right to professional assistance from them (other sports referees) in connection with such situation;

7) a complex of reputational personality rights of a sports referee:

— the right of an honest objective assessment of the actions of sports referees during administration of sports refereeing;

— the right to recognition, security and protection of the personal dignity and personal occupational business reputation and professional integrity of a sports referee, as well as recognition and supporting of a high honorable image of this profession;

— the right to proper respect from the part of the referee's colleagues — sports referees, as well as athletes, sports administrators (management and staff of sports organizations and sports facilities), sports technical support personnel, sports medical personnel and sports fans;

— the right to special legal protection from humiliation of honor and dignity, from damage to professional reputation of a sports referee when executing one's occupational obligations and authorities and in connection with such execution;

— the right of administration of using one's name in public space in connection with executing occupational obligations and authorities;

— the right to affiliation with the name of a sports referee with an articulate high-quality performing of a sports event that caused a wide positive resonance in the public space;

8) the right to own professional sports refereeing opinion and to free public expression of the referee's qualified opinion on issues related to the profession of a sports referee (with the exception of confidential data protected by the law or sports regulations), including expression of an opinion against shortcomings in the field of sports and in the sports management system;

9) the right to one's vocational and career advancement (sports refereeing requires high, permanently supported and improving qualification under the sports law and *lex sportiva*, in sports medicine, sports psychology, conflict psychology, etc.);

10) a complex of the rights to improve qualification in this profession, to access to the professional training system at the expense of the relevant sports organization, professional sports refereeing community or public authority;

11) the right to join professional sports refereeing communities, the right to elect and to be elected to the governing bodies of the professional sports refereeing communities and competent authorities of sports organizations;

12) a complex of the rights to personal safety, protection of life and health in connection with the execution of the referee's professional obligations and authorities of a sports referee and administration of sports refereeing by the referee (including the right to priority provision of the necessary emergency medical services and the right to health insurance);

13) a complex of the rights to protect the referee's legal interests, rights and liberties, including the right to present one side of the matter and referential arguments and to be assessed in an impartial manner (e.g., in terms of disciplinary proceedings, initiated against a sports referee);

14) the right to receive (if necessary and confidentially) the qualified psychological and psychiatric assistance and consulting;

15) the right to moral rewards to assiduities and hard labor of a sports referee (the award system, increasing class ranking system);

16) the right to timely notification (informing) about changes in the referential sports rules of the referee's sports refereeing activity (regulations — *lex sportiva*) and the statutory regulations (the sports law).

The specified list of the rights of a sports referee is a kind of attractive central invariable field within a wider scope of such rights, a kind of the "core," but the list does not exhaust the entire scope of the referee's rights. In some types of sports and in some modalities of objectification of sports competitiveness, we can find another (in any

case, no less important) rights of sports referees that need articulation and discussion, practical and normative-supporting elaboration.

Is it possible to talk about the "room to fail" (one-time, in the rarest case, in a difficult situation) of a sports referee? This is a topic of another discussion.

VII. The Impact of New Technologies Development on the Legal Status of a Sports Referee

Currently, there is an active development of new technologies used for ensuring the integrity of a sports competition and correctness of decisions made by sports referees.

Technological means for preventing consequences caused by wrong decisions of a sports referee, the latest technical means for providing the sports refereeing, e.g., artificial intelligence units, drones, digital twin models, complex sensor systems and video cameras, etc., are being increasingly introduced. In particular, we are talking about the use of video cameras for fixing and public video replay of an element of a sports match from a certain angle,[6] as well as the use of a special ball with a magnetic field that fixes the result when it hits a goal (*Goal Ref*).

In R. Leveaux's opinion, the management of the game remains ultimately a human function and there will always be the need to interpret and assess an infraction based on the situation surrounding it, and this could not be done just using technology (Leveaux, 2009, p. 1190).

The possibility of increased use of immediate video replay in refereeing may provide for summary appeal procedures in certain cases but, subject to that point, the risk of unfairness to a player is conclusively outweighed by the overwhelming sporting imperative of immediate certainty (Beloff, Kerr, and Demetriou, 1999, p. 107).

As R. VerSteeg and K. Maruncic note, "before Instant Replay, we all 'lived with' mistakes made by officials. As a rule, everyone involved accepted mistakes as 'part of the game.' Mistakes made by umpires and referees were considered a 'human element' with no viable alternative. Some incidents fueled impassioned debates. Dozens of examples from

[6] *Hawk-Eye* technology is already used in tennis and football.

the history of sport could easily illustrate officiating errors that might have been corrected with video replay had it been available" (VerSteeg and Maruncic, 2015, p. 154). All the above determines the issues on methods of control over the technical controllers and in the future the question will arise whether it is possible, in full or partially, to shift the functions of a sports referee to appropriate technological tools.

VIII. Conclusion

The autonomy of sport is an attractive center of a governance nature in the field of sports. At the level of sports relations, it determines the schedule of distribution and correlation of public administration and private administration in sports, the schedule of distribution and correlation between legal regulations in the field of sports (the sports law) and extra-legal regulation in the field of sports (*lex sportiva*). Understanding of the legal status and ontology of the activity of a sports referee is the most important thing for understanding the nature of sports and its autonomy.

A sports referee is necessary for permanent reproduction of the organized, disciplined sport. A sports referee, in the process of administration of sports refereeing and fulfilling referee's occupational obligations and authorities, being a perpetuator and embodiment of the specific regulating (regulatory-determining and regulatory-framing) sports-imperious foundation, is a special active participant (actor) of a sports competition and an active element of sports process.

The integral result of sports refereeing and execution of the other official authorities by a sports referee is a specific regulating sports product (regulatory-determining and regulatory-framing) that includes achievement and compliance with the sports rules, integrity and morality in the behavior of athletes and relations between athletes (fair play), objectivity and qualification of the visual and intellectual assessment of sports results made by a sports referee and sports refereeing in general, as well as such refereeing as an important framing element of the competitive sports process.

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ETHICS IN SPORTS

Article

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Legalization of Ethics in Sports and Disciplinary Liability for "Disrepute"

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Abstract: The norms of ethics in sport have practically merged with the disciplinary norms of sports federations. However, the apparent identity of ethical duties and disciplinary duties has not resolved the existing problems of law enforcement. Ethical norms enshrined in the acts of sports federations must meet certain standards of law. In this case, we are referring to the general principles of legal certainty and proportionality, as well as some other related principles. These principles are the first and main guarantees for the subject of sport in case of a breach of an ethical obligation. They are used at different stages of disciplinary liability. Legal certainty protects against unclear ethical norms and unpredictable consequences of their use by sports federations. Proportionality obliges the measure of disciplinary responsibility not to exceed the necessary negative effect of coercion. The ethical obligation to abstain from disrepute is widespread in the acts of federations. The practice of non-disrepute has been intensified by geopolitical events of 2022. The examples of the practice on non-disrepute do not allow us to state that legal certainty and proportionality really protect in any situation from improper disciplinary liability. The tendency has appeared to understand the reputation of sports and sports federations through the prism of the public positions of a particular federation. Confrontation with such positions automatically creates the risk of disciplinary liability.

Similarly, the test for real harm to reputation is ignored unlike potential harm or harm existing only in subjective judgements.

Keywords: sports ethics; disrepute; disciplinary liability; sports sanctions; legal certainty; strict interpretation; predictability of sanctions; proportionality; equal treatment

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Contents

I. Introduction

According to the known foundations of the theory of law, the norms of ethics and the norms of law are formally different types of social norms. In the Ozhegov's Explanatory Dictionary, "ethics" is defined as "a set of norms of behavior for a certain group" (Ozhegov, 1960). It is difficult to argue with such a definition. Ethical norms are characterized by the use of tools of social coercion in a certain community. The norms of law in society are supported by legal coercion. The seemingly simple division of norms actually has many nuances. What is meant by ethics? Do the ethical standards of identical professional groups in the same society differ? What norms of morality constitute ethical norms? Is it possible to transfer legal norms to ethical norms and vice versa? Finally, what values of a professional group are protected by ethical

norms, and who determines such values? These questions emphasize the ambiguity of the institution of ethical standards as the norms of a certain professional community. Flexibility in understanding ethical standards is a two-way street. And such a movement can hardly be called safe. On the one hand, the flexibility of norms is necessary to protect ties within the community and quickly adjust them depending on the communication situation of community members and external circumstances.

On the other hand, the flexibility of "ethics" entails the risk of abuse — the free interpretation of ethical norms by the professional community against its members. Historically, ethical norms have been unwritten. In recent decades, there has been a written consolidation of ethical standards in corporate acts of professional communities. Sports federations created on the basis of membership of their subjects are no exception. Federations adopt ethics regulations that set standards for expected behavior. The written form of ethical norms should protect subjects from unjustified content and unpredictable consequences of non-compliance. However, ethical requirements for the professional community are always difficult to formulate exhaustively.

The general nature of the norms does not always mean that they are ambiguous.[1] Testing for ambiguity accompanies any rule of law. Forced interpretation by the law enforcer of the norms of regulations (codes) of ethics of the federations is also subject to the principle of legal certainty.[2] Ethical norms are complex in nature and include morality. Therefore,

[1] The distinction has been consistently upheld by the jurisprudence of the Court of Arbitration for Sport: Arbitration CAS 2014/A/3516 George Yerolimpos v. World Karate Federation (WKF), award of 6 October 2014, Para. 105. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/3516.pdf [Accessed 23.03.2023]; Arbitration CAS 2017/A/5086 Mong Joon Chung v. Federation Internationale de Football Association (FIFA), award of 9 February 2018, Para. 151. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/5086.pdf [Accessed 23.03.2023]; Arbitrations CAS 2020/A/7008 Sport Lisboae Benfica SAD v. Federation Internationale de Football Association (FIFA) & CAS 2020/A/7009 Sport Lisboae Benfica SAD v. FIFA, award of 10 May 2021, Para. 55. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/7008,%207009.pdf [Accessed 23.03.2023].

[2] Arbitration CAS 2018/A/5957 Galatasaray v. Union of European Football Associations (UEFA), award of 15 February 2019, Para. 89–91. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/5957.pdf [Accessed 23.03.2023].

such rules run the risk of being ambiguous, more likely than the rules of law. Endowing ethical norms with a legal nature (juridification) only scales up this problem.

The process of legalization of ethics in sports today can be called a completed event. This status quo can be viewed in different ways. Sports lawyers are well aware of examples of ethical regulations (codes): FIFA Code of Ethics[3] or the Code of Ethics of the Russian Figure Skating Federation.[4] The transfer of ethical norms to the plane of legal regulation has always been supported by protection from the institution of disciplinary responsibility. Attention to ethics on the part of sports regulators (Olympic committees, multi-level sports federations and associations) can be due for several reasons.

First, by delineating various responsibilities of the subjects of sports. Historically, disciplinary obligations are the first to form, originating in private law relations between organizers of competitions and competitions' participants. Simplifying a little, it can be defined that disciplinary duties are related either to the status of a member of a sports organization or to the process of conducting and participating in a competition. Such norms support the internal structure of a sports organization and its rules established for the organization and conduct of competitions (van Kleef, 2014, pp. 24–45).

It seems that ethical norms in sports regulations should extend to conduct outside the sporting event. If we take a different approach, a reasonable doubt arises: how would an "ethical norm" in some Ethics Code of sports federation differs from the classical "disciplinary norm" in a Disciplinary Code of the same federation? The ethics of sport (lex sportiva by its legal nature) inevitably copies some standards of a special type of ethics (social norms). Thus, the norms of "non-disrepute" are therefore identical to those of corporate ethics. In both cases, norms and negative consequences will be adopted in corporate acts (of course, if we consider lex sportiva as corporate regulations of sports). And there may be a broader view on the subject of regulation of sports-related

[3] FIFA Code of Ethics. Available at: https://digitalhub.fifa.com/m/4f048486c1f7293c/original/FIFA-Code-of-Ethics-2023.pdf [Accessed 23.03.2023].

[4] Russian Figure Skating Federation Code of Ethics. Available at: https://fsrussia.ru/files/docs/code_of_ethics_fsfr.pdf [Accessed 23.03.2023]. (In Russ.).

ethical standards. For example, the ethical prohibition in competition of certain behavior of non-athletes. These may include referees, coaches, team leaders, officials, and employees of sports clubs and organizations. Sports federations have the right to establish their own disciplinary standards in competition, out of competition, and not to allocate "ethical duties." The principle of autonomy and self-regulation of federations makes it possible to implement such a straightforward version of regulation. However, the other option is the most common. Certain responsibilities, most often beyond the conduct of the competition, are called the ethics of sport and are assigned to all sports entities under the jurisdiction of the federation. Federations can single out such duties in the charter (constitution) of the organization, in a separate regulation (code) or include them in the general disciplinary regulation.

One can notice the lack of a uniform approach to the sources fixing the norms of ethics. Differences should not be expected with regard to sanctions for ethical misconduct, which may create obstacles to the implementation of the goal of general prevention accompanying any punishment (Tyran and Feld, 2006, pp. 154–156). This confirms the formal separation of the legal dimension of the ethics of sports from the social norms of ethics. The obligation not to harm the reputation of the sport and the sports federation is no exception.

The problems of applying legal norms on ethical obligations can be systematized into two groups. The first group covers the observance of guarantees of legal certainty of ethical norms. Legal certainty is based on a set of general principles. In sports jurisprudence, there is no question of respect for such principles. We have studied the practice of the Court of Arbitration for Sport (CAS, arbitration) and with its help in the first part of our paper we will consider the requirements of legal certainty of ethical norms. At the end of this part, we will analyze the decisions of arbitration and the jurisdictional bodies of international sports federations on bringing subjects to disciplinary liability for damaging the reputation of sports and federations. The second group of problems in the application of ethical standards in sports is the proportionality of sports sanctions and the equal treatment expressed of subjects under the jurisdiction of sports federations. We will devote the second part of the paper to this issue, using the practice of CAS. We will also check

compliance with the principle of proportionality in individual decisions on disciplinary liability for damaging the reputation of sports and sports federations. At the end of the paper, we will provide concise conclusions regarding the current state of the practice of bringing to disciplinary liability for damage to reputation.

II. The Basic Principles of Disciplinary Responsibility for Harm to the Reputation of Sports or Sports Federations

II.1. Requirement of Legal Certainty for Ethical Norms in Sports

The so-called "pyramid" in the European sports has caused the transfer of ethical standards developed by international sports federations to the regulations (codes) of national federations (Nafziger, 2008, p. 102). Thus, the consequences of the ambiguity of the "ethical standards" (have codified to Codes or regulations) as grounds for disciplinary liability are multiplied. Legal certainty is a guarantee against unclear and unpredictable norms (*nulla poena sine lege certa, nulla poena sine lege clara*) and means also prohibition of arbitrary or unreasonable sports sanctions and measures. The legal certainty principle sets out the requirements for the proper normative system of the sports federations: they must adopt only clear, precise and predictable duties, prohibitions and disciplinary sanctions for violation of ethical standards.

We agree that "soft law" often does not give rise to specific legal prescriptions. It is also difficult to argue about the fact that the principle of the autonomy of sports makes it possible to introduce both unclear and unpredictable duties, which we see from time to time and not only in the definition of ethical rules. Especially on the example of decisions of international federations in global sports after 24 February 2022. At the same time, the sports regulations may lead to the disciplinary sanctions. The degree of negative impact of sports sanctions (e.g., disqualification or suspension from competition) may not significantly differ from some penalties in public law (e.g., suspension of activities). That is why we want to emphasize that the norms of the *lex sportiva*

as special "soft law" are subject to the general principles of law.[5] Similarly, CAS case law does not grant norms of sports ethics entailing disciplinary responsibility immunity from scrutiny for compliance with the fundamental principle of legal certainty.[6]

The predictability test developed by the arbitral tribunal aims to test whether the rule meets the requirement of legal certainty. The test consists of six elements: 1. the relevant norm, based on which the sanction was applied, was adopted by the authorized body of the federation; 2. the procedure for adopting the norm took place in accordance with the requirements established by the federation in the charter (constitution) or another act; 3. the norm is not the result of an unobvious process of broad interpretation; 4. the norm is not mutually defining with respect to another norm or in conflict with it; 5. the content of the norm should not be clear due to many years of practice only for a small group of specialists; 6. there is a clear link between the alleged unacceptable behavior and the sanction applied.[7]

However, a sports federation is obligated to establish absolutely specific ethical standards (for example, the exact amount of sanctions for every ethical misconduct), rather than general standards for the application of norms (references to general principles such as proportionality)[8] at the same time, CAS jurisprudence confirms that the norms of sports federations can also be of a general nature — they are not required to be as strict as in criminal law.[9] However, the regulations

[5] Arbitrage TAS 2007/O/1381 Real Federación Española de Ciclismo (RFEC) & Alejandro Valverde c. Union Cycliste Internationale (UCI), sentence du 26 septembre 2007, Para. 59. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/1381.pdf [Accessed 23.03.2023]. (In Span.).

[6] Arbitration CAS 2019/A/6345 Club Raja Casablanca v. Federation Internationale de Football Association (FIFA), award of 16 December 2019, Para. 59. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/6345.pdf [Accessed 23.03.2023].

[7] Arbitration CAS 2018/A/5622 Londrina Esporte Clube v. Federation Internationale de Football Association (FIFA), award of 7 August 2018, Para. 68. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/5622.pdf [Accessed 23.03.2023].

[8] Arbitration CAS 2019/A/6345 Club Raja Casablanca v. Federation Internationale de Football Association (FIFA), award of 16 December 2019, Para. 59.

[9] Arbitration CAS 2010/A/2188 General Taweep Jantararoj v. International Boxing Association (AIBA), award of 29 July 2011, Para. 50. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/2188.pdf [Accessed 23.03.2023].

(a code) on ethics should contain certain principles based on which the sanctions are chosen. Thus, the subjects of sports will be aware of the size of the potential liability measure. The position of arbitration in one of the decisions is indicative: in order to comply with the principles of legality and certainty, it does not need to know in advance the type of sanction for a violation. The Fundamental Principles are respected if the disciplinary rules have been properly adopted, if they describe the violation and directly or indirectly provide for a sanction.[10]

Subsequently, this position was expanded. CAS believes that decisions should not include discussions leading to the choice of a disciplinary sanction. At the same time, it is imperative that the sanctions fit into a predictable framework and that it is possible to establish the arguments that served as the basis for the application of the sanction.[11] In other words, in the analysis of each particular case, the methodology used by those who are entrusted with the right to make decisions is important.[12] Exercising of discretion *ipso facto* does not contradict either the principle of proportionality or the principle of legal certainty. At the same time, it is necessary to pay attention to whether the jurisdictional body of the federation or the arbitral tribunal used their powers correctly or abused them, since disproportionate sanctions are always unpredictable[13] and violate equal treatment.

The prohibition of arbitrary or unreasonable sports sanctions and measures is violated when there is a serious violation of an ethical regulation (code) or a clear, undeniable legal principle, for example, the

[10] Arbitration CAS 2014/A/3665, 3666 & 3667 Luis Suárez, FC Barcelona & Asociación Uruguaya de Futbol (AUF) v. Federation Internationale de Football Association (FIFA), award of 2 December 2014, Para. 71–73. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/3665,%203666,%203667.pdf [Accessed 23.03.2023].

[11] Arbitration CAS 2019/A/6278 Cruzeiro EC v. Federation Internationale de Football Association (FIFA), award of 16 December 2019, Para. 51, 53. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/6278.pdf [Accessed 23.03.2023].

[12] Arbitration CAS 2019/A/6345 Club Raja Casablanca v. Federation Internationale de Football Association (FIFA), award of 16 December 2019, Para. 60.

[13] Arbitration CAS 2019/A/6345 Club Raja Casablanca v. Federation Internationale de Football Association (FIFA), award of 16 December 2019, Para. 64.

principle of fairness or equal treatment.[14] Arbitrariness of any decision of a federation body may result in a refusal to recognize its compliance with proportionality and equal treatment to sports subjects. Indeed, in one of the disputes the arbitration concluded the following, "the appealed decision of the FEI Judicial Committee is arbitrary, because it harms a feeling of justice and of fairness and because it lacks a plausible explanation of the connection between the facts found and the decision issued. In particular, the FEI Judicial Committee departed from its constant practice, without any further explanation or specific justification as to why it imposed a suspension of 12 months, that is 4 months longer than the most severe sanction ever imposed in identical situations."[15] The CAS requires the jurisdictional body of the sports federation to justify the link between actual circumstances and the sanction applied. The law enforcement decisions should be adopted only within the framework of the current regulation and the prohibition to use sanctions when there are no grounds for them. A strict interpretation of the rules must apply.[16] It can be agreed that the powers of the appellate instance do not extend to assessing the merits or value of the decision of a lower body, and respect for the autonomy of sports federations is of paramount importance in sports law.[17] At the same time, it is required to comply with the prohibition of arbitrary or unreasonable administrative and jurisdictional decisions.

The CAS jurisprudence often does not have positions regarding ethical standards in sports. However, in sports acts, in fact, general rules are allowed to establish duties, which is supported by the apparent

[14] Arbitration CAS 2005/A/944 FC Aris Thessaloniki v. Federation Internationale de Football Association (FIFA), award of 7 June 2006, Para. 20. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/944.pdf [Accessed 23.03.2023].

[15] Arbitration CAS 2006/A/1132 Ismail Mohammed v. Federation Equestre Internationale (FEI), award of 29 November 2006, Para. 61. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/1132.pdf [Accessed 23.03.2023].

[16] Arbitrage TAS 99/A/230 B Federation Internationale de Judo (FIJ), sentence du 20 décembre 1999, Para. 10. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/230.pdf [Accessed 23.03.2023]. (In French).

[17] Arbitration CAS 2020/A/7090 Club Universidad de Guadalajara, Venados FC Yucatán & CF Correcaminos v. Federación Mexicana de Fútbol (FMF) & Mexican Liga MX / Liga Ascenso MX, award of 19 November 2020, Para. 142, 148. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/7090.pdf [Accessed 23.03.2023].

orderliness of decisions of lower courts by arbitration (van Kleef, 2015, p. 21). Such norms are built on an open list model and apply to a variety of behaviors. Arbitration considers the concept of the ethics of sport as flexible as the principle of integrity of sport. However, this does not prevent sports federations from establishing obligations for the observance of sports ethics and holding sports accountable for violations.[18] In comparison, we note the need for normative boundaries for an open list of ethical obligations of sports subjects. Thus, CAS noted in relation to the charge "for bringing the Aquatics sports and/or FINA into disrepute" that the norm of the regulation is not aimed at potential harm to the reputation of the sport and the federation. This rule does not indicate behavior that could potentially damage reputation.[19] It requires only the damage to reputation that has taken place. The literal, ordinary meaning of the words used constitutes the starting point in the strict application of the rules. This is especially important when it comes to possible sanctions. Therefore, damage to the reputation of a sport or sports federation is not identical to potential damage to reputation.[20] Thus, it is required to consolidate that the ethical obligation not to cause harm to the reputation of the sport and the federation means to find an accurate and understandable, predictable wording in terms of consequences. At the same time, it is necessary to create a legal basis for the prosecution of various behaviors. However, damage to the reputation of individuals in sport is not identical to damage to a sport or a sports federation. Reputational damage takes place when the subject's behavior leads to degradation in public opinion concerning the sport or particular federation.

The broad normative approach to the prohibition of damage to reputation, as noted by the arbitration,[21] is expressed in the use of the

[18] Arbitration CAS 2017/A/5086 Mong Joon Chung v. Federation Internationale de Football Association (FIFA), award of 9 February 2018, Para. 153.

[19] Arbitration CAS 2007/A/1291 Mikhaylo Zubkov v. Fédération Internationale de Natation (FINA), award of 21 December 2007, Para. 19. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/1291.pdf [Accessed 23.03.2023].

[20] Arbitration CAS 2007/A/1291 Mikhaylo Zubkov v. Fédération Internationale de Natation (FINA), award of 21 December 2007, Para. 20.

[21] Arbitration CAS 2016/A/4558 Mitchell Whitmore v. International Skating Union (ISU), award of 29 September 2016, Para. 68. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/4558.pdf [Accessed 23.03.2023].

word "broadly" ("intended to apply broadly when an ISU interest is involved"). With this option, even the remote interest of the sports federation can involve reputation, the encroachment on which will entail disciplinary responsibility. For example, a fight between sports entities that took place two days before the official competition in the immediate vicinity of the sports facility was confirmed by the CAS as damaging the reputation of the sports federation.[22] Another example: "If any Member Federation or members or officials thereof, by reason of conduct connected with or associated with doping or anti-doping rule violations, brings the sport of weightlifting into disrepute, the IWF Executive Board may, in its discretion, take such action as it deems fit to protect the reputation and integrity of the sport."[23] Hereby the CAS confirmed the literal meaning and foreseeable consequences of the above rule — a few anti-doping violations committed by athletes of the national federation were enough to damage the reputation of the sport.[24]

By comparison, the arbitral tribunal does not agree that a conviction for criminal defamation is clearly understood as damaging the reputation of a sports federation and preventing a member of its board of directors from holding the position (e.g., "as a result of the conviction the Appellant's presence on the Board would bring the ITF into disrepute"). Probably, decriminalization of defamation in national law by the time when the CAS decision was made, also influenced the conclusion.[25] For such consequences, a rule is needed that literally provides for the conviction for defamation as damage to the reputation

[22] Arbitration CAS 2016/A/4558 Mitchell Whitmore v. International Skating Union (ISU), award of 29 September 2016, Para. 68.

[23] Arbitration CAS 2016/A/4701 Weightlifting Federation of the Republic of Kazakhstan (WFRK) v. International Weightlifting Federation (IWF), award of 10 March 2017, Para. 144. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/4701.pdf [Accessed 23.03.2023].

[24] Arbitration CAS 2016/A/4701 Weightlifting Federation of the Republic of Kazakhstan (WFRK) v. International Weightlifting Federation (IWF), award of 10 March 2017, Para. 144.

[25] Arbitration CAS 2018/A/5987 Bernard Giudicelli v. International Tennis Federation (ITF), award of 21 May 2019, Para. 73. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/5987.pdf [Accessed 23.03.2023].

of the federation. It is understandable that the federation wants to provide for the future an indefinite range of behavior of subjects as a violation of ethics and harm to reputation. For this purpose, it is necessary to correctly formulate the norm. The general rule on harm to reputation cannot cover any negative consequences for the individual in the form of criminal punishment. This would be a broad interpretation, while for the interpretation of the grounds for disciplinary liability only a strict approach is allowed, strict interpretation of rules.[26] However, the law enforcer does not always follow immutable logic. As examples, let us recall two last year's disputes involving Russian athletes in chess and swimming.[27]

Previously acting FIDE Code of Ethics included Clause 2.2.10 saying that "…in cases of occurrences which cause the game of chess, FIDE or its federations to appear in an unjustifiable unfavorable light and in this way damage its reputation." The FINA Constitution on moment behavior to the athletes contained regulation C 12.1.3, "…for bringing the Aquatics sport and/or FINA into disrepute." In both cases, the regulations covered damage to the reputation of the sport and damage to the reputation of sports federations.

We again see general norms about the understanding of "disrepute," which means the question of their legal certainty for athletes. First, the behavior of the subject must lead to a real deterioration in public opinion about the sport or the federation. The subject of sports should understand such consequences of his behavior — a negative impact on public opinion.

Second, the damage to reputation is to be real, not potential. The very decline in opinion about the sport or federation should be assessed objectively and supported by evidence of decline in reputation. Both disputes involving Russian athletes are united by one line — they

[26] Arbitrage TAS 99/A/230 B Federation Internationale de Judo (FIJ), sentence du 20 décembre 1999, Para. 10.

[27] FIDE vs Sergey Karjakin, Sergei Shipov. Available at: https://www.fide.com/docs/decisions-resolutions/FIDE%20EDC%20Decision%20case%202%202022.pdf [Accessed 23.03.2023]; FINA vs Evgeny Rylov. Available at: https://resources.fina.org/fina/document/2022/04/20/02762dbe-c54a-4ffb-ad8e-d9e3a47b4172/FINA_Ruling_Evgeny-Rylov.pdf [Accessed 23.03.2023].

demonstrated their personal position in relation to certain geopolitical events (special military operation). The demonstration took the form of both statements on social networks[28] and participation in public events.[29] In both cases, the jurisdictional bodies of the federations made controversial decisions to bring two athletes to disciplinary liability for damaging the reputation of the sport and the federations. As a result, many discussion points remain unsolved, for example, the question of the limits of the right to freedom of expression that do not mean an insult or hate speech.

But let us return to the legal certainty of the duty of non-disrepute. The standard of proof used in both disputes involves comfortable satisfaction that implies a fairly high level of justification exercised by international federations of the facts of violations that has a sliding scale depending on the severity of the accusation (Vasilyev, Kislyakova, and Yurlov, 2019, p. 178). Both decisions fail to examine the real damage to the reputation of the sport and to sports federations. Instead, conclusions are proposed about a certain global condemnation of geopolitical events, officially supported by sports federations, opposite to the personal positions of athletes. This conviction was recognized by the jurisdictional bodies of the federations as indisputable evidence of damage to reputation.[30] A separate evidentiary value is attached to the international level of the athlete that is believed to be the second trigger for proving the fact of causing harm.[31] The legal certainty of our two athletes did not allow us to avoid undue disciplinary action. Unfortunately, the principle of proportionality did not allow us to choose the appropriate sanction in the two cases we have examined.

II.2. Proportionality of Sports Sanctions for Ethics Violations

Proportionality is recognized in arbitration practice as a "widely recognized principle of sports law." The severity of the sanction must be

[28] FIDE vs Sergey Karjakin, Sergei Shipov, Para. 5.1–5.3.

[29] FINA vs Evgeny Rylov, Para. 1.2.

[30] FINA vs Evgeny Rylov, Para. 7.11-7.12; FIDE vs Sergey Karjakin, Sergei Shipov, Para. 7.37–7.39.

[31] FINA vs Evgeny Rylov, Para. 7.10; FIDE vs Sergey Karjakin, Sergei Shipov, Para. 7.22–7.23.

proportionate to the seriousness of the infringement.[32] Thus, a sanction is a reasonable balance between the goal pursued and the means used to achieve it.[33] On the one hand, the sanction should help to make amends for the harm caused by the offender. On the other hand, the sanction should prevent a second violation. As a consequence, more severe sanctions are justified in case of serious violations, non-compliance with a set of ethical obligations and in case of recidivism.[34] All sports organizations should include in their regulations (codes) on ethics well-thought-out and realistic sanctions. As arbitration noted in one of the disputes, graded sanctions should be applied to all violators.[35] We propose to understand the gradation of measures of disciplinary responsibility as a combination of the following main parameters.

First, the normative consolidation of the range for sanctions. Discretionary power in the choice of sanctions is respected by sports arbitration that "will take into account the experience"[36] of practice, but if signs of disproportion are found (evidently and grossly disproportionate),[37] it is entitled to change the decision and apply

[32] Arbitration CAS 99/A/246 W. / International Equestrian Federation (FEI), award of 11 May 2000, Para. 31. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/246.pdf [Accessed 23.03.2023].

[33] Arbitration CAS 2017/A/5299 Olympique Lyonnais v. Union des Associations Européennes de Football (UEFA), award of 10 August 2018, Para. 137. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/5299.pdf [Accessed 23.03.2023].

[34] Arbitration CAS 2015/A/3875 Football Association of Serbia (FAS) v. Union des Associations Européennes de Football (UEFA), award of 10 July 2015, Para. 127. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/3875.pdf [Accessed 23.03.2023].

[35] Avis consultatif TAS 93/109 Federation Française de Triathlon (FFTri) et International Triathlon Union (ITU), du 31 août 1994, page 5. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/109.pdf [Accessed 23.03.2023]. (In French).

[36] Arbitration CAS 2018/A/5977 FC Rubin Kazan v. Union des Associations Européennes de Football (UEFA), award of 29 May 2019, Para. 178. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/5977.pdf [Accessed 23.03.2023].

[37] Arbitration CAS 2009/A/1817 World Anti-Doping Agency (WADA) & Federation Internationale de Football Association (FIFA) v. Cyprus Football Association (CFA), C. Marques, L. Medeiros, E. Eranosian, A. Efthymiou, Y. Sfakianakis, D. Mykhailenko, S. Bengeloun, B. Vasconcelos and CAS 2009/A/1844 FIFA v. CFA and E. Eranosian, award of 26 October 2010, Para. 68. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/1817,%201844.pdf [Accessed 23.03.2023].

a sanction corresponding to the violation.[38] However, such self-restraint of the appellate instance should be called relative, but by no means absolute. Sometimes in the practice of the CAS, we see an emphasis on interfering with the position of the jurisdictional body of the federation only when the sanction is evidently and grossly disproportionate.[39] Other decisions postulated respect to competence body on solution[40] or meet the statement "It is the decision body of the federation which is in the best position to decide which rules and which sanctions are fair and appropriate in light of the facts constituting the violation."[41] The former position is also interesting, since arbitration extends "respect" for the position of the law enforcer to the administrative, management body of the federation (FINA Bureau). This recognizes a high level of autonomy in the discretion of the administrative authorities in the application of

[38] Arbitration CAS 2009/A/1817 World Anti-Doping Agency (WADA) & Federation Internationale de Football Association (FIFA) v. Cyprus Football Association (CFA), C. Marques, L. Medeiros, E. Eranosian, A. Efthymiou, Y. Sfakianakis, D. Mykhailenko, S. Bengeloun, B. Vasconcelos and CAS 2009/A/1844 FIFA v. CFA and E. Eranosian, award of 26 October 2010, Para. 68.

[39] Arbitration CAS 2009/A/1817 World Anti-Doping Agency (WADA) & Federation Internationale de Football Association (FIFA) v. Cyprus Football Association (CFA), C. Marques, L. Medeiros, E. Eranosian, A. Efthymiou, Y. Sfakianakis, D. Mykhailenko, S. Bengeloun, B. Vasconcelos and CAS 2009/A/1844 FIFA v. CFA and E. Eranosian, award of 26 October 2010, Para. 68; Arbitration CAS 2016/A/4501 Joseph S. Blatter v. Federation Internationale de Football Association (FIFA), award of 5 December 2016, Para. 313. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/4501.pdf [Accessed 23.03.2023].

[40] Arbitration CAS 2016/A/4840 International Skating Union (ISU) v. Alexandra Malkova, Russian Skating Union (RSU) & Russian Anti-Doping Agency (RUSADA), award of 6 November 2017, Para. 45. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/4840.pdf [Accessed 23.03.2023]; Arbitration CAS 2019/A/6239 Cruzeiro Esporte Clube v. Federation Internationale de Football Association (FIFA), award of 17 February 2020, Para. 110. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/6239.pdf [Accessed 23.03.2023]; Arbitration CAS 2019/A/6665 Ricardo Terra Teixeira v. Federation Internationale de Football Association (FIFA), award of 14 September 2021, Para. 157. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/6665.pdf [Accessed 23.03.2023].

[41] Arbitration CAS 96/157 Federation Italiana Nuoto (FIN) / Federation Internationale de Natation Amateur (FINA), award of 23 April 1997, Para. 22. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/157.pdf [Accessed 23.03.2023].

sports sanctions. This conclusion is relevant, for example, for the Code of Ethics of the Russian Figure Skating Federation. According to the Code, the decision on sanctions is made by the Executive Committee of the Federation. Separately, we note that some authors expand the content of the principle of proportionality and propose to give any sports authority the right to impose a sanction less than the minimum amount (Exner, 2020, pp. 143–144).

Secondly, the sanction is chosen in accordance with the guilt of the violator. This requirement is relevant if in the ethical regulation (code) the subtypes of disciplinary liability is based on the *nulla poena sine culpa* and (or) implies the influence of any or a separate form of guilt on the sanction.

Thirdly, the choice of a sanction is based on the nature of the violation (including the amount of damage and losses), actual circumstances (including mitigating and aggravating ones — when using the institution of exceptional circumstances in the regulations (code) on ethics of the federation), the behavior of the subject (actions to prevent violations and consequences, including in the future). The presence of certain factual circumstances may dictate a special approach to the final decision (De Vlieger, 2016, pp. 231–232).

Certain sports sanctions can only have a limited right-restricting or right-depriving effect on the subject, or legitimately cause more serious negative consequences. Thus, the size of the fine has a direct impact on the existence of a particular subject in sports. For example, in one of the decisions of the UEFA Control, Ethics and Disciplinary Commission, the limited financial capabilities of a football club were recognized as a mitigating circumstance. This fact was confirmed by the average home match attendance statistics, which should be taken into account, especially when using a penalty as a type of sanction.[42] The application of the principle of proportionality in the considered dispute was aimed at finding a balance between the interests of the sports federation and the club. It seems that the law enforcer correlated the scale of fines with the calculation of the consequences for the subject of responsibility

[42] Decision CEDB of 10 October 2014. Dundalk FC. Available at: https://disciplinary.uefa.com/cases/archive [Accessed 23.03.2023].

(Lacey and Pickard, 2015, p. 232). At the same time, one should not absolutize the sequence of sports instances, taking into account the impact of sanctions on the property status of clubs. For example, in one of the cases, the club asked to take into account the serious economic losses associated with tickets that will not be sold for upcoming matches due to the disqualification of the club from the competition.[43] However, the CAS considered the suspensions to be only a temporary economic impact, not resulting in a complete ban on commercial activity, and not affecting either the exercise of sports activities at the national level, or the right to participate in the next competition.[44] We highlight here — not a fine was applied to the club, as in the first of our examples, but the highest measure of sports sanctions — disqualification from the competition.

Justice, which is the measure for proportionality, should not become a way to satisfy requests for establishing the actual equality of sports subjects. A necessary sign of justice is the regulatory certainty of norms, as well as compliance with the guarantees of proportionality and equal treatment to all sub-jurisdictional entities in relatively identical situations. Equal principle treatment requires a consistent approach to resolving similar, and even more so, identical situations.[45] In the presence of discretionary powers of the jurisdictional body or arbitration, it is necessary to take into account the specific circumstances of the ethical misconduct: cases that are not similar should be treated differently.[46] However, the principle of proportionality protects against distorted understanding and application of equal treatment. Despite the

[43] Arbitration CAS 2007/A/1217 Feyenoord Rotterdam v. Union of European Football Associations (UEFA), award of 20 April 2007, Para. 35, 39. Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/1217.pdf [Accessed 23.03.2023].

[44] Arbitration CAS 2007/A/1217 Feyenoord Rotterdam v. Union of European Football Associations (UEFA), award of 20 April 2007, Para. 40.

[45] Arbitration CAS 2012/A/2750 Shakhtar Donetsk v. Federation Internationale de Football Association (FIFA) & Real Zaragoza SAD, award of 15 October 2012, Para. 133. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/2750.pdf [Accessed 23.03.2023].

[46] Arbitration CAS 2012/A/2750 Shakhtar Donetsk v. Federation Internationale de Football Association (FIFA) & Real Zaragoza SAD, award of 15 October 2012, Para. 133.

fact that arbitration is not formally bound by its practice, CAS regularly takes it into account when making decisions (Diaconu, Kuwelkar, and Kuhn, 2021, p. 45). The sanction must comply with the established practice of applying the norms of the regulation (code) on ethics, and not be evidently and grossly disproportionate.[47]

In the decisions on the disciplinary responsibility of our two athletes[48] for supposed disrepute, the preventive nature of the sanctions is not visible. On the contrary, both sanctions have only a punitive focus. At the same time, even the most severe sports sanctions should have a preventive effect (Jun, et al., 2014, p. 360). For example, in *FIDE vs Sergey Karjakin, Sergei Shipov* did not cite a single CAS decision on the application of the principle of proportionality when choosing a sanction.

The practice of arbitration in disputes on the disqualification of athletes for disciplinary or ethical offenses has not been studied. The logic of the reasoning of the jurisdictional body is not traceable, which means it is impossible to understand the relationship between the cause (sane disrepute) and the effect (sanction). Not a word is said in the decision about weighing interests or about an attempt to identify the presence or absence of a balance of interests when choosing a sanction. Instead, there is a laconic statement about impossibility of applying another sanction or choosing a conditional nature of disqualification.[49] All the listed shortcomings are "mirror-like" in the *FINA vs Evgeny Rylov*.[50] This approach of law enforcers seems to be unlawful, especially when a high-ranking sanction in the form of disqualification is applied. As a result, it is difficult to speak about both the proportionality of the sanctions and the equal treatment of the subject of the respective sport.

[47] Arbitration CAS 2016/A/4595 Al Ittihad Saudi v. Federation Internationale de Football Association (FIFA), award of 21 November 2016, Para. 60. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/4595.pdf [Accessed 23.03.2023].

[48] FIDE vs Sergey Karjakin, Sergei Shipov; FINA vs Evgeny Rylov.

[49] FIDE vs Sergey Karjakin, Sergei Shipov, Para. 8.8.

[50] FINA vs Evgeny Rylov, Para. 9.1-9.6.

III. Conclusion

To begin with, we want to emphasize that we have no objection to the use of the term "ethics" in the regulations of sports federations. This type of ethics is a special kind of corporate ethics. The peculiarity of sports ethics is the establishment of disciplinary responsibility for its violations. At that, disciplinary responsibility for violation of ethical norms is not identical to the disciplinary responsibility of an employee for violation of corporate ethics: the degree of negative impact on the offending subject differs. Therefore, we consider it necessary to extend to the norms of sports ethics the same legal guarantees for sports subjects as in cases of disciplinary regulations. The key is the legal certainty principle against unclear, unpredictable norms and arbitrary or unreasonable disciplinary sanctions must be observed.

The expansion of disciplinary norms through active legalization of ethical obligations underlines the importance of strict and consistent adherence to general principles when using the institution of disciplinary responsibility. Since International Federations enjoy a certain degree of monopolistic position, it is legitimate to require regulatory decisions from their administrative and jurisdictional bodies, as well as to exercise equal and non-arbitrary treatment in the application of sports sanctions.[51] However, the effect of this approach significantly weakens the opinion that vague doctrines (unsportsmanlike conduct, sports justice) have long been legalized in sports, which means that ethical duties can also be as flexible as possible.[52]

Now, federations prefer to choose the last of these rule-making options, considering it possible to prove in any dispute the observance of the principles of legal certainty and proportionality. At the same time, the test for predictability of the norms of non-disrepute ethics leaves big doubts if we are talking about their strict, literal application in the conditions of a balance of interests of the subject and the federation. An

[51] Arbitration CAS 2013/A/3247 CS Concordia Chiajna v. Romanian Football Federation (RFF) & SCFC Rapid SA, award of 10 October 2013, Para. 61. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/3247.pdf [Accessed 23.03.2023].

[52] Arbitration CAS 2017/A/5086 Mong Joon Chung v. Federation Internationale de Football Association (FIFA), award of 9 February 2018, Para. 153.

extremely dangerous situation is the deliberate definition of a general norm with the expectation of a subsequent broad interpretation as far as the interests of sports federations require, e.g., the interest in the politicization of the sphere of sports going beyond the limits of legal science.

Unfortunately, the few examples of the practice of applying the duty of non-disrepute do not allow us to state that legal certainty and proportionality effectively protect against unlawful disciplinary liability in any situation. The reputation of sports and sports federations is beginning to be understood through the prism of subjective views — the public positions of a particular sports federation. Conflict with such positions automatically creates the risk of disciplinary action. It also ignores the check for real harm to reputation, and not for potential harm or harm that exists only in subjective judgements.

The CAS does not formally recognize the stare decisis principle of its decisions. This does not, however, prevent it from reviewing compliance with the principle of proportionality as a general principle of law: "…to take note of the decisions in previous cases which involved broadly similar circumstances, in order to aid it in determining whether the sanction is proportionate in all the circumstances."[53] In CAS case law a more categorical view can also be found — arbitral decisions are a valuable body of sports jurisprudence and contribute to the predictability of sporting justice. Therefore, previous legal positions can and should be taken into account to help shape the legal expectations of sporting subjects. Following this view, although the CAS can in principle render a decision without taking into account similar disputes, it should maintain the value of its own positions. As a consequence, a sporting entity advocating a change in this practice should present sufficiently convincing evidence to do so. In any event, arbitral decisions on disputes having similar factual circumstances contribute to a more precise test of the disciplinary sanction against general principles of law. The CAS jurisprudence we have cited regarding compliance with some fundamental principles of law and ethics norms demonstrates a focus

[53] Arbitration CAS 2018/A/6072 Kwesi Nyantakyi v. Fédération Internationale de Football Association (FIFA), award of 9 April 2020, Para. 60. Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/6072.pdf [Accessed 23.03.2023].

on prior arbitral decisions. Unfortunately, however, it is premature to assert the precedential value of this case law.

The formulation of non-disrepute as a flexible norm is probably deliberately used by sports federations to legalize *de facto* prohibition of an open list of behavior of subjects. Sports federations, represented by their administrative bodies, formulate political positions, leading sports subjects to a dilemma: self-restriction in freedom of expression vs. taking the risk of disciplinary action for disrepute. In current regulatory realities disrepute is highly likely to be proved by the jurisdictional body of the federation (even with the standard of comfortable satisfaction) in the presence of a combination of three conditions: the current policy of the federation, the international level and fame of the athlete, the publicity of his statements.

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ACADEMIC EVENTS ACADEMIC EVENTS: CENTRAL ASIAN INTERNATIONAL LEGAL FORUM

Overview

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First Central Asian International Legal Forum (Moscow, 22 January 2023): Problems of Central Asia as a Factor of Political, Economic and Scientific Integration

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Central Asia is a very important region of Eurasia, cradle of ancient civilization and high culture, birthplace of the Turkish and Iranian people, transport artery connecting the east and west of the continent, intersection of the history of Russia, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan. The international relations of the states of Central Asia have been dynamically developing in recent years; along

with positive trends (new forms and fields of Eurasian integration, growth of mutual trade, intensification of cross-border cooperation), there are several pressing problems (conflicts over borders and water resources, etc.). International law, both general and regional, should be the main instrument for developing these trends and, more generally, for strengthening friendly relations between the states and peoples of the region. International legal doctrine in its turn should pay close attention to these issues. Guided by this agenda, Kutafin Moscow State Law University (MSAL) and the Moscow State Institute of International Relations (MGIMO University) decided to hold the First Central Asian International Legal Forum.

The Forum was held on 26–27 January 2023. It hosted over 300 experts in the field of international law, representing universities, government bodies, non-government organizations and companies from Russia, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Azerbaijan, Iran, Mongolia and China. The Forum was also attended by high embassy delegations from Kazakhstan, Uzbekistan and Iran. The guests of the Forum were welcomed by Deputy Minister of Science and Higher Education of the Russia Konstantin Mogilevsky, Rector of the Kutafin University Viktor Blazheev, Vice-Rector for Research of MGIMO University Andrey Baikov, Chairman of the Court of the Eurasian Economic Union Erna Airiyan, President of the Russian Association of International Law Anatoly Kapustin, Deputy Director of the Legal Department of the Ministry of Foreign Affairs of Russia Inna Kotkova.

The participants of the discussion organized within *the first part of the plenary session* of the Forum were:

— Bekbosun I. Borubashov (Kyrgyzstan), Doctor of Law, Professor of the Department of International and Constitutional Law of the Kyrgyz-Russian Slavic University, Advisor to the President of the Kyrgyz Republic;

— Saitumbar A. Rajabov (Tajikistan), Doctor of Law, Professor, Head of the Department of International Law of the Institute of Philosophy, Political Science and Law of the National Academy of Sciences of Tajikistan;

— Akmal Kh. Saidov (Uzbekistan), First Deputy Speaker of the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan, Vice-President of the Inter-Parliamentary Union (IPU), Academician, Doctor of Law, Professor;

— Marat A. Sarsembaev (Kazakhstan), Doctor of Law, Professor of the Department of International Law of the Eurasian National University, member of the Scientific Advisory Board under the Constitutional Council of the Republic of Kazakhstan.

In his speech, *Bekbosun Borubashov* spoke about the features of the international legal policy of Kyrgyzstan. The main principles of Kyrgyzstan's foreign policy are openness, consistency, multi-vector approach, pragmatism and equilibrium. In recent years, Kyrgyzstan has been paying great attention to the problem of delimitation of state borders and protection of priority state interests. The latter include international security, sustainable development and protection of human rights, including the rights of migrant workers. Kyrgyzstan maintains diplomatic relations with 170 states. It effectively cooperates with neighboring states, Eurasian states (including Russia) and other states and international organizations. Kyrgyzstan is a party to 2,700 bilateral treaties and a number of multilateral conventions. It is a member of 70 international organizations. The cooperation is not always effective — for example, in 2010, the Collective Security Treaty Organization did not respond to Kyrgyzstan's request for assistance. In conclusion, B. Borubashov suggested establishing the Eurasian Association of International Law, which would unite the specialists in the field of international law and could make a serious contribution to solving the problems of the region.

Saitumbar Radjabov highlighted the main directions of the international legal policy of Tajikistan. The Concept of Foreign Policy, Concept of Legal Policy and President's annual addresses, forms the normative base of this policy. Its important direction is to ensure state independence and national security. Tajikistan faced very serious challenges — the civil war of 1992–1997, acute socio-economic problems, etc. All these challenges have been gone through, including through cooperation with other states (the "open door" policy). The recent challenge is international terrorism (situations in Syria and Iraq). In order to respond to this challenge the government of Tajikistan has

updated anti-terrorism laws and acceded to anti-terrorism conventions. Another important direction is the protection of rights and interests of citizens abroad. Tajikistan has acceded to a number of conventions on the protection of human rights and rights of migrant workers; it currently sends regular reports to the bodies responsible for monitoring the application of these instruments. The third direction is the water-energy cooperation. Tajikistan authors a number of international initiatives: the Year of Fresh Water (2003), International Decade for Action "Water for Sustainable Development" (2018–2028) and so on. The fourth direction is the cooperation in the field of labor migration. Tajikistan has signed a number of agreements on the legal status of migrants and their social guarantees. The fifth direction is the preservation of the historical, national and cultural identity of the people of Tajikistan in cooperation with the UN agencies. Tajikistan has ratified the Convention for the Protection of Natural and Cultural Heritage and has implemented other numerous activities.

Akmal Saidov characterized the international legal policy of Uzbekistan. According to Art. 17 of the Constitution, Uzbekistan is a "full-fledged subject of international relations." Its international legal policy is determined by normative legal acts and presidential addresses. These addresses, in fact, appeal to the people. Uzbekistan maintains diplomatic relations with 140 states, has opened 56 diplomatic missions, and is a member to more than 100 organizations. The capital of Uzbekistan (Tashkent) hosted 113 representative offices of foreign states and international organizations. Uzbekistan pays much attention to the development of a new and promising form of diplomacy, namely inter-parliamentary cooperation ("friendship groups"). It adopted the Law on international treaties and ratified the 1969 Vienna Convention and more than 200 other instruments (including 70 human rights conventions). It is actively involved in international rule making and, in particular, was the author or co-author of 6 resolutions of the UN General Assembly (both related to Central Asia and of a general nature). In the second part of his speech, A. Saidov highlighted the concept of international legal policy. He criticized some approaches based on the secondary nature of international law (M. McDougal). In fact, international law is a value in itself and should determine policy (and not be determined by it). International law is called upon to overcome

anarchy and chaos; in this context, the general principles of international law, which play a structuring role, are of great importance. The theory of international legal policy needs further development. In conclusion, A. Saidov formulated a number of proposals for the development of humanitarian cooperation in the region — the establishment of the Central Asian Association of International Law, writing the collective work "International Legal Policy in Central Asia," and holding a regular Summer School on International Law.

Marat Sarsembaev's speech was devoted to the strategic tasks of the states of the region, in particular, the issues of innovative economy and auto industry. Currently, the auto industry is concentrated in two countries — Uzbekistan and Kazakhstan. The industry has great prospects, diversification of the product line is expected. International law can play an important role in the development of the industry. In this regard, the creation of a regional interstate automobile concern, uniting all five states of the region, looks very promising. Kazakhstan and Uzbekistan could assist Kyrgyzstan, Tajikistan and Turkmenistan in setting up their own industrial facilities. New treaty instruments could play a big role. These could include conventions on the implementation of infrastructure projects, transfer of digital technologies, cooperation in the training of highly qualified specialists and scientific cooperation.

Within *the second part* of the plenary session, *Venera Seitimova* (Kazakhstan, Court of the EAEU) described some institutional problems of the Eurasian Economic Union. The first problem is the procedure for selecting the President of the EAEU Court. Currently 10 judges are appointed for 9 years, and the President — for three years. Under the circumstances, representatives of some states do not have the opportunity to participate in the administration of the Court. The second problem is the formation of the EAEU budget in unequal shares — Russia contributes a share equal to 85.33 %, Kazakhstan — 7.11 %, Belarus — 4.55 %, Kyrgyzstan — 1.9 %, Armenia — 1.11 %. However, all Member States are equally interested in the administration of judicial system, — so it would be more appropriate to use a funding system that implies an *equal* contribution, especially since the Court's budget is only 2 % of the Union's budget. Another problem is the institution of dissenting opinion. To date, the judges have delivered 81 dissenting opinions,

some of which express their personal ambitions rather than make a constructive contribution to the development of jurisprudence. Another problem is the impossibility of appealing some acts of the Commission. The Court has rejected such appeals 25 times. This state of affairs looks like an atavism and deprives business entities of the right to judicial protection. All these problems should be analyzed and solved taking into account the interests of all states, otherwise the goals of integration will not be achieved.

Aleksey S. Ispolinov (Russia, Moscow State University) devoted his report to the peculiarities of international courts in Asia. This issue has not been studied well; relevant scientific publications began to appear only recently. International courts are the result of the concerted will of states: each international court is a unique institution. The absence of a developed system of international courts in Asia is not accidental: Asia is the largest and most populous continent. Three regional superpowers — China, India and Japan — have a number of unresolved territorial problems. There are no supranational organizations in the region. Sub-regional organizations such as ASEAN are based mostly on inter-state cooperation. In Asia, the practice of simultaneous participation in several integration projects (the practice of a "measured geometry") is common, while in Europe the states use a completely different approach. As a result, in Asia, there is no need for judicial review of acts of international organizations. Similarly, there are no human rights courts in the region. Asian states rarely recognize the compulsory jurisdiction of the International Court of Justice, International Criminal Court and International Centre for Settlement of Investment Disputes. China's sharply negative attitude towards international courts has begun to change only recently. However, China recognizes only the jurisdiction of arbitration courts and only for economic disputes. This approach is determined by cultural features: Asian states prefer negotiations and mediation, the use of these procedures allows them to "save face," the very fact of going to court indicates an inability to negotiate (to solve the problem by compromise). These factors impose certain restrictions on the development of international courts within the framework of the organizations established by Russia — BRICS, EAEU, and so on.

Vladislav Tolstykh (Russia, MSAL) considered features of the international legal policy in Central Asia, factors influencing it (economic

specialization, influence of external actors, intensity of ethno-genesis, Islamic political theories, Soviet legacy) and some interstate problems. The first group of problems arise from the National-territorial demarcation of 1924. Theoretically, they are eliminated by the principle of *uti possidetis*, but in fact political elites and the population do not always consider legal issues. The second group is related to the politics of the Soviet government: its decisions on the development of virgin lands (*Tselina*, 1954–1965), use of the Semipalatinsk nuclear test site (1949–1991), conversion of the region's agriculture to monoculture (cotton), resettlement of peoples, and so on. Hypothetically, these problems may lead to claims against Russia as the successor of the USSR. These claims, however, cannot be satisfied under the regime of succession (Russia is not the only successor and is not responsible for internal relations within the USSR). They also cannot be satisfied under the regime of self-determination. Indeed, the Central Asian republics were not colonies, and the policy of the central authorities can hardly be defined as a policy aimed at depriving the peoples of their livelihoods — rather, in some cases there were serious economic miscalculations. However, as in the previous case, these problems can seriously complicate interstate relations. The third group of problems is due to the disappearance of a single state and the collapse of a single economic system; it includes the problem of distribution of water and energy resources, uncertainty of the regime of the Caspian Sea, problem of enclaves, a problem of minorities and so on. General international law is not always able to effectively solve these problems. Regional instruments, in their turn, are on an insufficient level of legal technique. In this regard, the best means of solving all these problems would be a broad political and economic integration. The conditions for this are the cooperation of elites, design of original solutions, and radical transformation of the political and legal systems. The strategic goal of the integration may be the creation of a federal state.

Within *the third part* of the plenary session, *Leonid Syukiyainen* (Russia, Higher School of Economics) considered the relationship between Sharia, fiqh and customs. In Islamic legal consciousness, Sharia and customs often do not differ. The Russian authorities often wrongly perceived Sharia as a part of customary law. In fact, Sharia and customs

are different and separate entities. Sharia allows any customs that do not contradict its norms. In practice, Muslims are guided by a complex system of intertwined norms, and it is often not Sharia that determines the place of custom, but rather custom that determines the place of Sharia. Some existing customs directly contradict Sharia (blood feud, "honor killing," etc.). Customs tend to be more archaic than Sharia — in this regard, the policy of the Russian Federation may be to use Sharia to overcome these customs. This issue needs a further development.

Sergey Belov (Russia, St. Petersburg University) reviewed the constitutional reforms in the region. The vector of modernism and globalization is not organic for all regions and countries; in some cases it can have a destructive impact on national cultures. Global challenges such as Covid-19 demonstrate the undesirability of political unification, since the response to these challenges should not be monotonous. A number of factors determines the legal tradition of Central Asia, for example, religiosity, ethnic-clan system, agrarian nature of the economy. There are several important political trends. The first trend is the development of national statehood. This trend determines language policy, status of minorities and many other issues. The second trend is the striving for the modernization ideal. A striking example is the revival of the Constitutional Court in Kazakhstan. The third trend is directly opposite and manifests itself in political crises (civil war in Tajikistan, crises in Kyrgyzstan, etc.). These crises testify to the inability of constitutional mechanisms to ensure modernization and unwillingness of society to follow the path of modernization.

At the plenary session, Professor *Vladimir I. Przhilensky* (Russia, MSAL) presented the "Kutafin Law Review" (KuLawR) — one of the journals covering most topical legal issues.

The second day of the Forum provided the participant with an opportunity to discuss relevant topic in different sections.

The main subject of discussion within the first section ("*The international legal regime of the Caspian Sea and transboundary water resources, state borders in Central Asia*") was the status of the Caspian Sea in the light of the 2018 Convention. *R. Mammadov* (Azerbaijan), *V. Batyr* (Russia) and *M. Abadikhan* (Iran) took active part in this discussion. On the one hand, the speakers noted the

rapprochement of the positions of the states and significant progress in determining the legal regime of the Caspian Sea. On the other hand, they identified a number of problems: ambiguity of the prospects for the entry into force of the 2018 Convention (the Convention has been ratified by all Caspian states, except for Iran), lack of consensus on the methodology for the shelf delimitation (the positions of Iran and other Caspian states do not coincide), inefficiency of cooperation in the field of environmental protection. The speakers also emphasized the desire of the Central Asian states to complete the process of territorial delimitation and analyzed the latest international treaties (2017 Treaty between Kazakhstan, Turkmenistan and Uzbekistan on the area of the junction point of state borders, 2022 Treaty between Kazakhstan and Uzbekistan on demarcation of the state border).

Within the second section ("*Central Asia in the system of regional and global security*"), the speakers tried to identify the main threats to security in the region and possible legal responses to them. Among these responses are the preservation of the nuclear-weapon-free zone (*V. Gavrilova*), positive role of Russia in ensuring regional security (*N. Khlystova*), neutrality of Turkmenistan (*S. Kochumova*) and implementation of the 1992 Collective Security Treaty (*Yu. Revizskaya*). Several reports were devoted to the problems of biosafety (*E. Belyaev, S. Vasiliev*) and information security (*E. Vasyakina*).

The third session ("*Constitutional and legal construction in Central Asia*") was held with the support of St. Petersburg State University (*S. Belov,* Dean of the Faculty of Law). The main subject of discussion was the constitutional reforms in the region. The speakers discussed the status of the Republic of Karakalpakstan (Uzbekistan)[1] (*Z. Zaitov, A. Ponomarenko, V. Tolstykh*), features of the new Constitution of Kyrgyzstan, the status of the President and the status of the People's

[1] According to the 1992 Constitution of Uzbekistan, "The Sovereign Republic of Karakalpakstan is a part of the Republic of Uzbekistan" (Art. 70), "The Republic of Karakalpakstan shall have the right to secede from the Republic of Uzbekistan on the basis of a nation-wide referendum held by the people of Karakalpakstan" (Art. 74). In July 2022, mass protests took place in Karakalpakstan against the draft of a new version of the Constitution, according to which the Republic loses the right to secession and the attribute of sovereignty.

Kurultai[2] in particular (*B. Borubashov, N. Eshmuradova*), Opinions of the Venice Commission on the draft constitution of Kyrgyzstan and on the amendments to the Constitution of Kazakhstan. The speakers also discussed the advantages and disadvantages of the presidential form of government used in Russia and the countries of Central Asia and came to the conclusion that the functioning of this model is influenced not only by the wording of legal acts, but also by the national mentality, informal political traditions, etc.

The fourth section ("*Legal Aspects of Economic Cooperation in Central Asia*") was devoted to the problems of economic integration. *M. Entin* characterized the main trends of modern integration processes, *A. Dementiev* highlighted the prospects for the expansion of the EAEU, *A. Nasibova* considered the problem of the simultaneous participation in two geopolitical projects — EAEU and Organization of Turkic States. Several reports were devoted to cooperation in the scientific and technical sphere (*M. Shugurov, Zh. Seydalina*), as well as cooperation in the field of energy policy (*S. Vasilkova*).

The speakers of the fifth section "*Development of business law in the countries of Central Asia"* discussed the problems of codification (*L. Khvan*), financial and legal regulation (*N. Kravchenko, K. Karpov, A. Musagaliev*), etc. Participants of the sixth section ("*Development of criminal law in the countries Central Asia*") considered the issues of combating money laundering (*F. Fazilov*), drug traffic (*A. Shcherbakov*), etc. *E. Trikoz's* report was devoted to the Asian model of codification of international criminal law. Finally, within the seventh section ("*Legal Issues of Migration in Central Asia*"), issues of protecting the rights of migrants were discussed, both in general and in relation to certain categories of migrants (students, IT-specialists, etc.).

The key event of the Forum was the Round Table "*University Cooperation in Central Asia*," at which the Vice-Rector of the Kutafin University *Maria Mazhorina* spoke about the plans to create the Central Asian University Consortium. This consortium has to be established as an association of educational and scientific institutions

[2] Art. 7 of the Constitution of 2021 states "National Kurultai — public representative assembly. The national Kurultai as consultative, observation meeting makes recommendations about the directions of social development."

of the Central Asian region. It must operate based on the following principles: objectivity, publicity, freedom of expression, inclusiveness and non-discrimination. Its goals should include: a) encouragement and organization of humanitarian studies; b) design and implementation of educational programs; c) promotion and coordination of academic exchange programs. Membership in the Consortium will be open to any university, other educational or research institution registered in a country belonging to the region and / carrying out fundamental scientific research related to the problems of the region. The Consortium will give priority status to certain projects. One of these projects would be the regular Central Asian International Legal Forum. The priority status can also be given to scientific conferences and round tables, educational programs, textbooks, monographs and other publications, exchange programs, etc. The Consortium is planned to be established at a special session of the Forum, which will be held in autumn 2023.

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Article

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The Straight Baselines under the Convention on the Legal Status of the Caspian Sea: Iran's Approach

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Abstract: In 2018, the Presidents of Azerbaijan, Iran, Kazakhstan, Russia and Turkmenistan signed the Convention on the Legal Status of the Caspian Sea (the Aktau Convention). Despite this, some specific issues related to the straight baseline, remain unresolved. The result is that Iran has yet to ratify the Convention subject to negotiations concerning a separate agreement in the future. Since 2018, the signatories to the Aktau Convention have not reached an agreement in the course of negotiations on a separate agreement. The main question raised in the article is why Iran has not ratified the Aktau Convention yet. The paper shows that the authorization of the convention under Para. 4 Art. 1, the specific shape of Iran's coastline, and the lack of agreement in the negotiations related to the special agreement prevented Iran from ratifying the Convention. The paper finally concludes that the border delimitation considered by Iran differs from the border delimitation agreed on by the four other states, namely Russia, Kazakhstan, Azerbaijan and Turkmenistan, and it is only when the straight baseline is established with respect to Iran's will and model that Iran will complete the ratification process.

Keywords: straight baselines; normal baseline; Aktau convention; Caspian Sea; Iran; Russia

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Contents

I. Introduction

With the collapse of the Soviet Union and the emergence of five independent states in the region of the Caspian Sea, which claimed full sovereignty or limited sovereignty rights in relevant sectors of the Caspian Sea, the question of delimitation of the Caspian Sea has become urgent. The lack of well-established national maritime zones often leads to poor resource and environmental management (Janusz-Pawletta, 2022, pp. 74–82),[1] as well as to discord, conflicts, or even border disputes in interstate relations (Orazgaliyev and Araral, 2019). Undoubtedly, the interstate relations in this region required a strict order in the form of a convention. Hence, the Convention on the Legal Status of the Caspian Sea or the Aktau Convention was signed on 12 August 2018 by the five Caspian littoral states: namely Russia, Iran, Kazakhstan, Turkmenistan and Azerbaijan.[2] The purpose of this convention is to develop cooperation among the coastal states of the Caspian Sea. As stated in the preamble to the convention: "this Convention will facilitate the development and strengthening of cooperation among the Parties,

[1] *See also* Caspian Environmental Information Center. Caspian Sea 2018 State of Environment Report. Available at: https://ceic-portal.net/fa/node/3173 [Accessed 08.06.2023].

[2] Aktau Convention, 12 August 2018. Available at: http://www.en.kremlin.ru/supplement/5328 [Accessed 31.01.2023].

and promote the use of the Caspian Sea for peaceful purposes and rational management of its resources, as well as exploration, protection and conservation of its environment."[3]

There are two points that can be clearly seen. The first point is that many issues have been resolved after years of negotiations and agreements, for example, Art. 5 has precisely divided the water areas into four parts.[4] The second point is that some issues are only covered from a more general point of view and only encouraged the parties to negotiate further to reach an agreement in future. Therefore, this approach means that some issues remain unresolved. According to the present paper, the most important issue in this regard, which has only been raised in a general way and the agreement on its details is subject to future negotiations, is the issue of the straight baseline. According to Para. 4 Art. 1 of the Convention, the accord regarding the details of the straight baseline is subject to a separate agreement. Therefore, if the states want to establish a straight baseline along their coast, they can conclude a separate agreement specifying the details.[5] In fact, the four states (Russia, Kazakhstan, Azerbaijan and Turkmenistan) seem to be satisfied with delimiting the boundaries of the Caspian Sea and determining the straight baseline in accordance with the text of the Aktau Convention. Still, Iran, citing Para. 4, is willing to continue negotiations as to the details of the straight baseline and the conclusion of a separate agreement.[6] However, since 2018, the parties of the Aktau Convention have not been able to conclude a separate agreement and the negotiations are still ongoing.[7]

[3] Preamble to the Aktau Convention. Available at: http://www.en.kremlin.ru/supplement/5328 [Accessed 31.01.2023].

[4] The water area of the Caspian Sea shall be divided into internal waters, territorial waters, fishery zones and the common maritime space. Art. 5 of the Aktau Convention. Available at: http://www.en.kremlin.ru/supplement/5328 [Accessed 31.01.2023].

[5] The last part of Para. 4 Art. 1 of the Aktau Convention.

[6] According to Para. 4 Art. 1 of the Aktau Convention.

[7] According to the Statements of the Legal General Director of the Ministry of Foreign Affairs of Iran at the first session at 11:00 am. on Friday, 27 January 2023 under the title of the International Legal Status of the Caspian Sea, made at the first Central Asian International Law Forum, held at Kutafin Moscow State Law, 26–27 January, 2023.

Hence, there are two hypotheses presented in the paper. First, Russia, Kazakhstan, Turkmenistan, and Azerbaijan are satisfied with delimiting the boundaries of the Caspian Sea according to the current text of the Aktau Convention, and they are trying to convince Iran to conclude a separate agreement. Second, Iran has not ratified the Aktau Convention since 2018. This means that Iran has not agreed with other countries and proposes its own model. In addition, Iran is trying to convince the four other states to agree on its own model.

The main question under discussion in the paper is why Iran has not ratified the Aktau Convention yet. In order to answer it, the descriptive and analytical methods are applied. Alongside these methods, not only does the author analyzes the related provision of the Aktau Convention but also examines the Iran's position and approach for assessing the question. The paper proceeds in four steps. The first part ponders on the content of the baseline under the United Nation Convention on the Law of the Sea (UNCLOS). The second part focuses on the definition and types of the baseline under the Aktau Convention. The next part covers and explains the Iranian standpoint on the matter in question, the shape of Iran's coastline and finally Iran's proposal. The last part concludes.

II. The Baseline under the 1982 Convention on the Law of the Sea

The UNCLOS parcels the sea into a variety of maritime zones that a coastal state may claim. Each zone grants certain rights to the coastal states and imposes certain obligations on the foreign states and vessels (Kastrisios and Tsoulos, 2018). The scope of territory for sea states provides for sovereignty, sovereign rights, and jurisdiction in maritime zones as its fundamental concepts. When the UNCLOS define a territory, these fundamental concepts are used. The UNCLOS considers a variety of duties and rights within the maritime areas (Cotula and Berger, 2021). Hence, there are three parts of the maritime zones based on the duties and rights:

1. Internal waters, territorial seas and the continental shelf subject to sovereignty and sovereign rights of states.

— Internal waters, which cover all the water on the landward side of the baseline. Internal waters are considered part of the state's territory.[8] The coastal state exercises full sovereignty in internal waters, a sovereignty that is applied over the seabed, water column, and air space (Cotula and Berger, 2021).

— Territorial sea, as measured from the baseline seaward, the breadth of which may not exceed 12 NM.[9] The sovereignty of a coastal state over its territorial sea is almost as extensive as its sovereignty over its land territory (Galea, 2009). The coastal state's sovereignty is extended beyond its land territory and internal waters in the territorial sea, but within this zone, the freedom of innocent passage for foreign vessels is retained.[10]

— The continental shelf. In contrast to the other maritime zones, this is not on the surface but on the floor of the sea. It begins from the baseline to a distance of 200 NM. In this zone, the coastal state has sovereign rights for the purpose of exploring and exploiting, conserving, and managing natural resources, both living and nonliving.[11]

2. The Contiguous Zone and Exclusive Economic Zone, subject to jurisdiction.

— A contiguous zone may not extend beyond 24 NM from the baseline, and in this zone, the coastal state has its jurisdiction, but no sovereign rights, to regulate, prevent, and punish infringements of its customs, fiscal, immigration, or sanitary laws committed within its territory or territorial sea (Kastrisios and Tsoulos, 2018, p. 2).[12]

— An Exclusive Economic Zone, which is adjacent to the territorial sea and may not extend beyond 200 NM from the baseline.[13] In the EEZ, the coastal state has the jurisdiction to establish artificial islands or installations and to conduct scientific research.[14]

3. High seas, subject to no sovereignty or sovereign rights and jurisdiction of states.

[8] UN Convention on the Law of the Sea, Art. 8.
[9] UN Convention on the Law of the Sea, Art. 1.
[10] UN Convention on the Law of the Sea, Art. 3, 17.
[11] UN Convention on the Law of the Sea, Art. 76, 77.
[12] UN Convention on the Law of the Sea, Art. 33.
[13] UN convention on law of the sea, Art. 57.
[14] UN Convention on the Law of the Sea, Art. 55.

— The high seas are all parts of the sea that is not in any of the above maritime zones.[15] Within the high seas, all freedoms are retained for every state and the vessels flying their flag. Here, "the Area" comprises the seabed, ocean floor, and subsoil below the high seas, with the exception of that which is claimed as a state's extended continental shelf. The Area, with its resources, is the common heritage of humankind and must be used for the benefit of all states (Kastrisios and Tsoulos, 2018).

Therefore, the current law on the seas is based on the maritime zones of coastal states, whose breadth is determined under the Convention on the Law of the Sea and has become a customary rule today (Tanaka, 2012). It is clear that to measure the breadth of these areas, the reference points are needed to measure the distance to them. In fact, this is the main function of the baseline. The baseline is the line from which the breadth and, consequently, the outer limits of the maritime areas of the coastal States are measured. The two main types of baselines are normal and straight baselines, which are considered in the Convention on the Law of the Sea. Following this Convention, the Aktau Convention also covers the normal and straight baseline, still with some differences.

II.1. Normal Baseline

According to the customary rule reflected in Art. 5 of the UNCLOS, the principle is that the Baseline of maritime zones is "the low-water line along the coast marked on large-scale charts recognized by the coastal state;" And this type of baseline is called normal baseline.[16] The low-water is also a line on the sea charts that shows the place where the land meets the water surface at low tide. Hence, the normal baseline is the same as the coastline of the coastal state at low-water.

[15] UN Convention on the Law of the Sea, Art. 86.

[16] "Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." *See*, UN Convention on the Law of the Sea, Art. 5.

The appearance of the phrase "on large-scale charts recognized by the coastal state" in Art. 5 of the UNCLOS indicates that determining the type of the low-water line is at the disposal of the coastal state, because maritime charts are always based on a tidal base level, which is called "map-based level" and is the reference for water depth measurement. Therefore, based on the recognized maritime charts, it is possible to recognize the type of low-water line or the normal baseline of each state.

II.2. Straight Baseline

In contrast to the normal baseline, there is a straight baseline. According to the Convention on the Law of the Sea, the normal baseline is a rule, the straight baseline is an exception to this rule, and if there are natural configurations, the direct baseline can be used. In accordance with Para. 1 Art. 7 of the UNCLOS:

> *"In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured."*[17]

According to the mentioned article, the use of straight baseline is limited to two criteria: (1) the coastline is deeply indented and cut; (2) there is a margin of islands along the coast and in its close vicinity. These criteria regarding the baseline first appeared in the decision of December 1951 in the case of British and Norwegian fisheries.[18] In fact, in this decision, the judges confirmed the legal validity of the Norwegian straight baselines, which had been declared in 1935. The Court's findings in this decision were based on Art. 4 of the 1958 Geneva Convention

[17] UN Convention on the Law of the Sea, Art. 7(1).

[18] United Kingdom v. Norway [1951] ICJ 3, also known as the Fisheries Case, was the culmination of a dispute, originating in 1933, over how large an area of water surrounding Norway was Norwegian waters (that Norway thus had exclusive fishing rights to) and how much was "high seas" (that the UK could thus fish). *See*, the judgement of Fisheries (United Kingdom v. Norway). Available at: https://www.icj-cij.org/case/5 [Accessed 04.04.2023].

regarding the Territorial Sea and the Contiguous Zone (Treves, 1958), and finally, with a slight change, it was included in Art. 7 of the 1982 Convention on the Law of the Sea.

III. The Baseline under the Aktau Convention

The Aktau Convention was intended to put an end to a very long and difficult negotiation process to determine the legal regime for this closed water body (Caspian Sea). The Convention was supposed to fill the gaps in the management of this water area existed in the framework of the previous Soviet-Iranian agreements of 1921 and 1940, which were in force but not timely. One more thing was to give all the Caspian states common and equal rights and powers to use and exploit the spaces and resources of this maritime region (Gudev, 2022, p. 168). Still, one of the main issues, namely the baseline, is challenging. Despite the special geographic position of the baseline under the new legal regime of the Caspian Sea, there are few provisions in the text of the Aktau Convention concerning this matter. In fact, only Art. 1 of the Convention defines some terms such as baseline, normal baseline, and straight baseline.[19] The Aktau Convention established the new legal regime of the Caspian Sea based on distance-oriented maritime zones for the coastal states of the Caspian Sea. Para. 5 Art. 1 stipulates that internal waters mean the "*waters on the landward side of the baseline*." Therefore, the maritime territory of the state parties to the convention in the Caspian Sea will be determined by the baseline delimitation discussed the by these states.[20] Moreover, Para. 2 Art. 1 of the Convention defines the baseline as "*the line consisting of normal and straight baselines*."[21] In fact, the Aktau Convention, similar to the UNCLOS, prescribes the use of normal and straight baselines. However, unlike the UNCLOS, the Aktau Convention stipulates that straight baselines are not an exception, but are the

[19] *See* generally, Art. 1 of the Aktau Convention on terms. Available at: http://www.kremlin.ru/supplement/5328 [Accessed 31.01.2023].

[20] Para. 5 Art. 1 of the Aktau Convention.

[21] Para. 2 Art. 1 of the Aktau Convention.

same as normal baselines.[22] In fact, the drafters of the Para. 2 seem to believe that all coastal states will use the straight baseline to measure their maritime areas. The next part of the paper describes the types of baselines within the Aktau convention.

III.1. Normal baseline

Para. 3 Art. 1 of the Aktau Convention states that the normal baseline is "*the line of the multi-year mean level of the Caspian Sea measured at minus 28.0 meters mark of the 1977 Baltic Sea Level Datum from the zero-point of the Kronstadt sea-gauge, running through the continental or insular part of the territory of a Caspian littoral State as marked on large-scale charts officially recognized by that State*."

Two criteria are important in this definition:

A. Water level

In the normal baseline definition given in the Aktau Convention, the low-water line, as stipulated in Art. 5 of the UNCLOS,[23] is not a criterion, because the Caspian Sea has a small low-water range. Therefore, the Aktau Convention has defined the normal baseline based on a specific level, namely minus 28.0 meters mark of the 1977 Baltic Sea Level.

First, the importance of determining the water level in the definition of the normal baseline is its effect on the displacement of the coastline. If the water level is considered to be lower, the coastline and consequently the normal baseline will also advance further towards the sea. In addition, the amount of displacement also depends on the slope of the coast. If the slope of the coast is high, the low water level does not have a noticeable effect on the coastline; but if the slope of the

[22] For more information on the straight baseline under the Convention on the Law of the Sea (UNCLOS) 1982, *See*, Art. 7 of UNCLOS.

[23] Art. 5 of the UNCLOS: "Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."

coast is mild, the reduction of the water level will lead to a noticeable advance of the coastline.

However, assuming that the coastal states of the Caspian Sea often use straight baselines to set up their maritime zones, the displacement of the normal baseline due to determining the water level will not be very important in this regard. It seems that the importance of this issue appears in the delimitation of maritime zones as well as the seabed because the delimitation will be based on the natural coasts of the coastal states. Besides, in this regard, due to the great depth of the sea and the great slope of the coast in the southern part of the Caspian Sea, especially along the coast of Iran, it seems that the change in the water level does not have a decisive effect on Iran.

B. Maritime charts

Another point that is stipulated in Para. 3 Art. 1 of the Aktau Convention, as well as Art. 5 of the UNCLOS, is that the normal baseline must be marked on large-scale charts officially recognized by the coastal state. According to the first criterion, i.e., water level, it is clear that the recognized charts must match the water level. Therefore, the states do not have freedom of action under the Aktau Convention, unlike the UNCLOS.

III.2. Straight Baseline

According to Para. 4 Art. 1 of the Aktau Convention, straight baselines are defined as *"straight lines joining relevant/appropriate points on the coastline and forming the baseline in locations where the coastline is indented or where there is a fringe of islands along the coast in its immediate vicinity."*

Two criteria are included in the definition:

A. Relevant/appropriate points

As stated, according to the Aktau Convention, the straight baselines connect the relevant/appropriate points on the coastline. According to Para. 1 Art. 7 of the UNCLOS, straight baselines only connect appropriate

points.[24] The wording of *"appropriate points"* in Para. 1 Art. 7 of the UNCLOS is one of the main ambiguities in this article. Therefore, since there is no criterion for identifying the appropriate points in Art. 7, the identification of these points is left to the coastal state; hence, the coastal states have reached a consensus that the appropriate points or, more precisely, the base points should be located on land and cannot be determined on water.

Despite the approach of the UNCLOS, it is interesting that the term relevant/appropriate points are used within the Aktau Convention, and this issue has created ambiguity. In fact, the exact criteria for appropriateness and relevance are not clear. The only thing that is clear is that "the relevant/appropriate points" phrase was included in order to sum up the demands of the states since Iran has paid attention to the relevant points and other countries of the Caspian Sea have considered appropriate points. However, it seems that most of the states use the criteria of appropriate points nowadays.

B. Geographical Criteria

The Aktau Convention, like the UNCLOS, considers the existence of one of two geographical criteria requirements to establish the straight baseline. According to the Aktau Convention, the establishment of straight baseline is possible in locations where the coastline is indented or where there is a fringe of islands along the coast in its immediate vicinity.

If we compare Art. 1 of the Aktau Convention and Para. 1 Art. 7 of the UNCLOS, it becomes clear that according to the Aktau Convention, the Caspian littoral states have more freedom of action in using the straight baselines. This is possible because the UNCLOS uses the "localities where the coastline is deeply indented and cut into" words, but the Aktau Convention considers the existence of "indented coastline" sufficient for establishing the straight baseline.

[24] Para. 1 Art. 7 of UNCLOS: "In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured." For more interpretation of Art. 7 *see*, Churchill R., Lowe V., and Sande A., (2022). The Law of the Sea. Manchester University Press, 10 May 2022.

IV. Iran's Approach to the Matter

The main innovation of the Aktau Convention regarding the baseline is not in the relevant provisions, but in the separate agreement among all the states to establish the straight baseline.

IV.1. Separate Agreement

According to the Aktau Convention, "*The methodology for establishing straight baselines shall be determined in a separate agreement among all the Parties*."[25] It means that the rules related to the straight baseline in the new legal regime of the Caspian Sea have become subject to a separate agreement to be concluded after the signing of the Aktau Convention. It seems that the drafters of the Aktau Convention have foreseen the conclusion of a separate agreement in this regard, knowing about the ambiguities of Art. 7 of the UNCLOS. In fact, if the Aktau Convention, like the UNCLOS, got by with the broad and vague provisions in this regard, it would practically mean the absolute freedom of the coastal states in determining the straight baseline. It is clear that this way it will create possibilities for subsequent disputes regarding the straight baselines. Threfore, the parties may arrange the straight baseline by concluding a separate agreement.

IV.2. Iran's Standpoint

In this part let me consider the standpoint of Iran because I believe it must be included in a separate agreement. Among the coastal states of the Caspian Sea, Iran is in a special position in terms of coastal geography in determining the straight baseline:

First, the shape of the Iran's coastline is completely concave. This shape of the coastline leads to: (1) the straight baseline of Iran is becoming more concave; (2) this line deviates more from the general direction of the coast. **Second**, Iran's coastline is very smooth and does not have coastal cuts, so that there are not many advanced land points in the sea so that they can be connected to each other as the base points

[25] The second part of Para. 4 Art. 1 of the Aktau Convention.

of the straight baselines. **Third,** Iran lacks effective islands that can be used to determine straight baseline. This is while the two neighboring countries of Iran, Turkmenistan and Azerbaijan, have convex coasts with advanced points and numerous islands that provide them with sufficient base points to establish straight baseline.[26]

The specific shape of Iran's coastline resulted in a particular wording of the last part of Para. 4 of the Art. 1 of the Aktau Convention that during the last negotiations on the Aktau Convention was drafted as follows:

> "*If the configuration of the coast puts a coastal State at a clear disadvantage in determining its internal waters, that will be taken into account in developing the above methodology in order to reach consent among all the Parties*."

This provision is actually a clear example of the geographical position of Iran's coastline. Thus, it is essential to pay attention to this fact while negotiating a separate agreement as well as the ratification of the Aktau Convention by Iran. Since 2018, the Caspian littoral states have failed to reach an agreement during the negotiations on straight baseline and Iran has not ratified the Aktau Convention. Besides, it will prevent its entry into force according to Art. 22 of the Convention.[27]

VI.3. Iran's Proposal

According to the current text of the Aktau Convention, the borders considered by the four countries other than Iran (i.e., Russia, Azerbaijan, Turkmenistan and Kazakhstan) are not accepted by Iran due to the shape of the coast of Iran in the Caspian Sea. The shape of Iran's coastline causes the limitation of the Caspian Sea in the coastal

[26] For more information on coast of Iran *see*, Iran — Caspian Sea Coast. In: Bird, E.C.F. (ed.), (2010). Encyclopedia of the World's Coastal Landforms. Springer, Dordrecht. Available at: https://doi.org/10.1007/978-1-4020-8639-7149 [Accessed 31.01.2023].

[27] Art. 22 of the Aktau Convention: "This Convention shall be subject to ratification. The instruments of ratification shall be deposited with the Republic of Kazakhstan acting as the Depositary of the Convention. This Convention shall enter into force on the date of the receipt by the Depositary of the fifth instrument of ratification."

part related to Iran, and greatly restricts Iran's rights in exploiting the Caspian Sea. The delimitation of the Caspian Sea as it is considered by Russia, Azerbaijan, Turkmenistan and Kazakhstan is as follows:

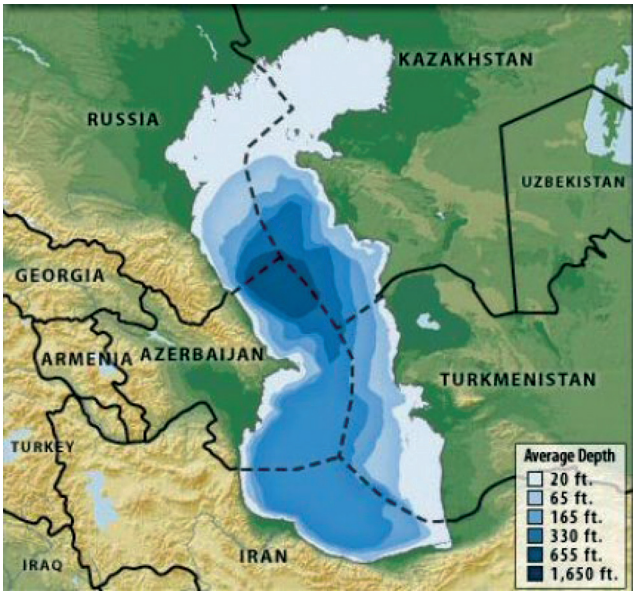
Map 1. The current delimitation according to the text of the Aktau Convention[28]

Still, as stated previously, Iran does not agree with the current delimitation. In addition, Para. 4 Art. 1 of the Aktau Convention establishes this delimitation exactly in accordance with the shape of the Iran's coastline. As in line with the signing of the Aktau Convention, the Minister of Foreign affairs of Iran clarified and emphasized within the interpretative declaration in correspondence with the ministers of foreign affairs of the four other countries that:

[28] For more information *see*, https://www.eurasian-research.org/publication/current-developments-in-a-dispute-over-the-legal-status-of-the-caspian-sea/ [Accessed 30.01.2023].

> *"the third part of Para. 4 Art. 1 of the Convention on the Legal Regime of the Caspian Sea refers exactly to the situation of the coast of Iran in the Caspian Sea and its purpose is to draw attention to the special situation of Iran."*[29]

Therefore, as the Aktau Convention provides for a separate agreement to specify the straight baseline, as well as emphasizes the need to pay attention to the special situation and configuration of states' coasts (Para. 4 Art. 1). In future, Iran expects the conclusion of a separate agreement as to determination of the straight baseline. This is to be achieved provided the states consider the specific shape of the Iran's coastline. This delimitation is as follows:



Map 2. The Delimitation according to Iran's Standpoint[30]

[29] Interpretive Declaration of Iran regarding the Convention on the Legal status of the Caspian Sea, Presidential media, August 2018. Available at: https://www.president.ir/fa/105628 [Accessed 31.01.2023].

[30] What Does the New Caspian Sea Agreement Mean for the Energy Market? 17 August 2018. Available at: https://worldview.stratfor.com/article/what-does-new-caspian-sea-agreement-mean-energy-market [Accessed 31.01.2023].

It is certain that if Iran cannot establish the straight baseline in accordance to its standpoint and the states do not accept these delimitations through the negotiations on a separate agreement, Iran will not ratify the Aktau Convention.

V. Conclusion

As Tullio Treves, the judge of the International Court of Law of the Sea, has stated, the Convention on the Law of the Sea is actually the Constitution of the seas. In accordance with the *United Nations Convention on the Law of the Sea (1982),* the maritime zones include internal water, territorial sea, contiguous zones, exclusive economic zones (EEZs), the continental shelf, high sea, and seabed; in each of these areas, rights and duties have been considered for governments. The basic point is that in order to determine the maritime ones, the baseline must be defined. In other words, the governments must specify their baseline and based on that baseline, the breadth of the maritime zones is measured. This issue in particular is also applicable in connection with the Aktau Convention and the legal regime of the Caspian Sea. Therefore, the states around the Caspian Sea must accurately determine their baselines.

The Aktau convention includes two types of baselines: straight baselines and normal baselines. The parties to the Convention do not have a challenge regarding the normal baseline, and in fact, none of the states has chosen the normal baseline. It means that the governments are focused on the straight baseline, and all the five states, i.e., Iran, Russia, Azerbaijan, Turkmenistan and Kazakhstan, choose the straight baseline as the baseline. The main point is that the Caspian littoral states have faced difficulties in determining the straight baseline. In fact, the straight baseline provides more benefits and advantages for states. Since 2018, other states of the Caspian Sea, except for Iran, have chosen a straight baseline for themselves, but due to its geographical conditions, Iran has not been able to determine the appropriate baseline. In fact, Para. 4 Art. 1 of the Aktau Convention allows states to agree on a straight baseline based on geographical conditions. According to Para. 4, "*If the configuration of the coast puts a coastal State at a clear*

disadvantage in determining its internal waters, that will be taken into account in developing the above methodology in order to reach consent among all the Parties." This provision is actually a clear example of the geographical position of Iran's coast because the geographical position of Iran's coastline clearly puts Iran in a disadvantageous position. Therefore, Iran asks other states to consider the shape of Iran's coastline. However, it is clear that other governments have not considered the shape of Iran's coastline and Iran has not been able to determine a straight baseline for itself.

Furthermore, I must state that it is true that some issues have been resolved by the Aktau Convention (such as maritime zones in Art. 5 and marine scientific research in Art. 13), but without a precise determination of the baseline, nothing has actually been resolved since the baseline is the basis for deserving other rights in maritime areas. For example, fisheries, the right to exploit oil and gas, the right to invest in renewable energy and so on will be determined when the states know where the exact territory of their maritime zone is. Hence, they should know in advance where their precise baseline is and based on that determine the water area according to Art. 5 of the Convention. Therefore, I believe that the most important issue in the Aktau Convention is the straight baseline. In order for Iran to ratify the Convention, it is necessary that the states reach an agreement in negotiations with Iran based on the Iranian model (map 2) and Para. 4 Art. 1 of the Convention in future negotiations on a separate agreement. It is only in this case that Iran will ratify the Aktau Convention.

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Overview

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The Main Directions of the International Legal Policy of the Republic of Tajikistan at the Present Stage

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Abstract: The article is devoted to topical issues related to ensuring peace, security and cooperation among the states of the Central Asian region. It pays great importance to international law as the most important means of implementing the foreign policy of the states of the region and as the basis for maintaining the modern world order. It considers such areas of the international legal policy of the Republic of Tajikistan at the present stage as the protection of the state independence and national security of Tajikistan at the international level; development of trusting relations, friendship and cooperation with all countries of the world, especially with the countries of Central Asia on the basis of mutual interests; protection of the rights and freedoms of citizens of Tajikistan abroad; combating terrorism, extremism and crime in general; cooperation in solving global environmental, water and climate problems; cooperation in the field of labor migration, taking into account the protection of the rights of Tajik migrants in foreign countries; cooperation in order to preserve the identity, national identity and self-knowledge of the Tajik people. The detailed consideration of main directions makes a unique contribution to the understanding of the international legal policy of the Republic of Tajikistan at the present stage.

Keywords: international legal policy; main directions; state independence; national security; development of trusting relationships; friendship and cooperation; protection of the rights and freedoms

of a citizen and a person; combating terrorism, extremism and crime; water and climate problems; environment; labor migration; national identity

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Contents

I. Introduction

The declaration of state independence of the Republic of Tajikistan in 1991 contributed to the fact that the country became a full-fledged subject of international law. It was accepted as a member of the United Nations and more than 60 international and regional organizations and institutions. International legal policy of Tajikistan is determined in accordance with recognized acts of international law, on the basis of

generally recognized principles and norms of international law, taking into account the Concept of Legal Policy of the Republic of Tajikistan (The Concept of Legal Policy, 2018–2028), the Concept of Foreign Policy of the Republic of Tajikistan (The Concept of Foreign Policy, 2015), as well as the annual Addresses of the Leader of the Nation, the President of the Republic of Tajikistan, Emomali Rahmon to Majlisi Oli (Address, 2022; Address, 2021; Address, 2018).

The main directions of the international legal policy of the Republic of Tajikistan can be conditionally divided into several areas. Let me dwell on each of the directions in details.

II. Protection and strengthening of state independence and ensuring the national security of Tajikistan at the international level

The legal policy of the country provides for the implementation of such a foreign policy that promotes the integration of Tajikistan into world processes, creates new development opportunities, helps to prevent and eliminate possible threats and challenges for national security, and provides favorable conditions for the consistent implementation of national interests on the basis of objectivity and balance.

When implementing the tasks in this area, Tajikistan went through three stages. The first stage begins with the acquisition of state independence. This stage developed very slowly, taking into account the difficulties of the transition period, the rupture of stable economic ties, the financial and economic crisis and the imposed civil war (1992–1997). In his first address to the people of Tajikistan dated 12 December 1992, the Head of the Tajik state E. Rahmonov defined the main principles of foreign policy in which "the republic's entry into the world community, the establishment of diplomatic relations with all countries that want to develop equal and mutually beneficial cooperation with Tajikistan, entry into international organizations, strengthening and further development of good-neighborly relations and comprehensive cooperation with the CIS states, primarily the Russian Federation, Uzbekistan, Kazakhstan, Kyrgyzstan, Turkmenistan and others" played an important role (Rahmonov, 2004).

At the second stage, which began with the adoption of the first Foreign Policy Concept of the Republic of Tajikistan, approved by Decree of the President of the Republic of Tajikistan on 24 September 2002 No. 900, the main priority was the implementation of foreign policy based on the "open door" policy. Thanks to such a foreign policy, Tajikistan gradually took its rightful place in the international arena and established cooperation relations with countries of the world, regional and international organizations, and international institutions. During this period, the country's leadership announced an "open door" policy and the need for a worthy presentation of the cultural heritage of Tajiks to the world, in connection with which a multi-vector, balanced and pragmatic foreign policy was launched, the expansion and strengthening of friendly ties, fruitful cooperation with various countries of the world. As a result of this policy, Tajikistan strengthened its position in the international arena, contributed to solving world problems, began interacting with many countries and, taking into account national interests, ensured a balance of its own and common interests in foreign policy.

But it must be emphasized that the fundamental changes in international relations and the vulnerability of nation states in 2013–2014 revealed a new reality. It was at this time that the formation of the third stage began, associated with the emergence of new threats and realities on a global scale. In this regard, taking into account the provision of national interests, the republic had to introduce new values into the new concept of the country's foreign policy. These values are a timely response to modern realities to protect independence and the conduct of a balanced foreign policy. That is why the new Foreign Policy Concept was adopted by Decree of the President of the Republic of Tajikistan dated 27 January 2015 No. 332, which defines and regulates the basic principles, goals and objectives, priority areas of the foreign policy of the Republic of Tajikistan, taking into account the long-term national interests of the country. It emphasizes that the policy of "open doors" is the basis of Tajikistan's foreign policy. "The currently implemented Foreign Policy Concept of Tajikistan is a logical continuation of this course and ensures that the international relations of our country are brought to a qualitatively new level in the

new conditions of world development," emphasized E. Rahmon, the head of the Tajik state (Address, 2018).

Despite the success, the foreign policy of the Republic of Tajikistan at the third stage is facing some modern challenges and threats:

— fundamental changes in the system of international relations with changes in the approaches of the rivalry of superpowers and geopolitical regions;

— the emergence of new extremist and radical ideas, including religious extremism, nationalist and neo-fascist sentiments — taking into account the loss of identity and the spread of Western values, nationalist values arose and were further developed, which gradually transformed into neo-fascist and radical ones;

— the vulnerability of nation states and self-sufficient terrorism with elements of a state structure — this type was formed after the emergence of the Islamic State of Iraq and Syria (ISIS) terrorist state;

— the negative impact of information threats (brainwashing, attracting young people through social networks to radical groups and the spread of extremist religious ideas);

— the desire not to fall into geopolitical dependence on superpowers (Sharipov, 2019).

Nowadays the international legal policy of the Republic of Tajikistan aimed at solving the aforementioned problems.

III. Development of trusting relations, friendship and cooperation with all countries of the world, especially with the countries of Central Asia on the basis of mutual interests

In this vein, the task of creating a zone of security and good-neighborliness along the country's borders, developing trusting relations, friendship and cooperation with the countries of the region based on mutual interests, creating favorable conditions for economic, social, cultural development and gradually improving the living standards of people, ensuring economic security of the country. Tajikistan currently has diplomatic relations with 180 countries and trade and economic relations with 130 countries of the world (Address, 2021).

Based on the generally recognized principles and norms of international law, Tajikistan has concluded more than 350 international legal documents, such as agreements, treaties, charters and international declarations, and fulfills its obligations to achieve global goals, such as social development, improvement of the economic situation, protection of human rights. human, environmental protection, etc.

To date, the Republic of Tajikistan has signed more than 2,500 bilateral documents with various countries of the world that regulate issues of bilateral relations and cooperation in the political, economic, trade, military-technical fields, in the field of security, scientific, cultural, educational, medical, tourism and other fields. These agreements create favorable conditions for entering into world processes and the flow of international relations, contribute to the further development and strengthening of independence, the protection of territorial integrity, and the strengthening of statehood, ensure energy and food security, accelerate the industrialization of the country and seek to bring the country out of the communication impasse through the establishment of international cooperation.

In this direction, Tajikistan seeks to strengthen relations with the states that today play a rather significant political and economic role in the life of the regional space adjacent to Tajikistan, namely with Iran, Afghanistan and Pakistan in order to form transit and transport corridors from Tajikistan to the Iranian ports of Chobahar and Bander-Abbas, the Pakistani ports of Karachi and Gwadar, and through the Wakhan Corridor, a narrow strip of territory in Afghanistan that extends to China.

The Republic of Tajikistan is a supporter of the fact that the emerging new world system should be completely free from wars and conflicts, rudeness and violence, religious and civilizational fanaticism, xenophobia, and based on equal and mutually beneficial cooperation and partnership of all states of the world, and any kind of threat to international and regional peace and stability must be neutralized through agreement and creative dialogue based on international legal acts, primarily the UN Charter, as the main organization regulating international relations. “Tajikistan, as an active member, will continue to cooperate with international partners within the UN, CIS, SCO, CSTO,

OSCE, ECO, OIC and other multilateral structures" stated E. Rahmon, the President of Tajikistan in his Address to the Parliament (Address, 2022).

IV. Ensuring and protecting human rights and freedoms, authority and interests of citizens of Tajikistan abroad

The Republic of Tajikistan, confirming its adherence to recognized international legal acts, carries out its foreign policy based on the principle of respect for human rights and fundamental freedoms. Our state adheres to such international legal documents as the International Convention on the Elimination of Racial Discrimination (1965), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), Convention on the Elimination of All Forms of Discrimination against Women (1979), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Convention on the Rights of the Child (1989), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Convention on the Rights of Persons with Disabilities (2006). With regard to the implementation of the obligations arising from these international legal instruments, the Republic of Tajikistan regularly submits its national reports to the treaty committees established under the UN universal agreements, and its universal periodic reviews to the UN Human Rights Council (Working Group on the Universal Periodic Review, 2021). This is undoubtedly one of the achievements of the Republic of Tajikistan in strengthening the promotion and protection of human rights in the years of independence.

The proclamation of any human rights is nothing without real guarantees of their implementation. In the field of protection of the rights and freedoms of the individual, domestic mechanisms are of paramount importance, since the individual is directly under the jurisdiction of the state. The implementation of human rights largely depends on the quality of normative legal acts, the full and accurate presentation of international human rights standards in them, of course, taking into account national interests.

The analysis shows that there is some deviation and inadequate formulation of human rights in national legal acts in comparison with international human rights standards, which should be eliminated. For instance, Art. 1 of the Universal Declaration of Human Rights of 1948 states: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." The Preamble proclaims the equality and inalienability of fundamental human rights and freedoms. There is no such wording in the Constitution of Tajikistan where Part 2 Art. 5 states: "Life, honor, dignity and other natural rights of a person are inviolable. The International Covenant on Civil and Political Rights of 1966 states: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life" (Art. 6). The absence of this wording in the Constitution of the country can lead to unforeseen situations when political or social circumstances change. Therefore, it seems necessary to adequately formulate this provision and set out Part 2 Art. 5 of the Constitution of the Republic of Tajikistan as follows: "Life, honor, dignity and other natural human rights are inviolable and inalienable."

Summing up, it should be said that in order to improve the current state and level of development of human rights, the interaction of international legal and domestic (national) legal systems is necessary. If the improvement of national structures, institutions and organs of society play a certain role in protecting human rights and freedoms within the state, then international cooperation to promote universal respect, observance and protection of human rights and freedoms is an essential condition for lasting peace, security, justice and well-being of all mankind. Therefore, one should strive to harmonize these levels of legal systems in order to create a universal system for the protection of human rights.

V. The fight against terrorism, extremism and crime in general

The documents of the UN Security Council emphasize that there is a close connection between international terrorism and transnational

organized crime, illegal drug trafficking, weapons, money laundering, illegal transfer of nuclear, chemical, biological and other lethal means, and requested Member States to do so in order to improve the fight against them to carry out cooperation and coordination of actions at the national, sub-regional, regional and international levels (Resolution 2462 (2019)). In this regard, the valuable proposals of the Tajik leadership on combating terrorism, extremism, separatism, drug trafficking, and transnational organized crime in general found resonance and support from the international community.

To implement this policy in the Republic of Tajikistan, a number of legal acts have been adopted at the national level. In particular, on 2 January 2020, the Parliament of Tajikistan adopted the updated Law on Countering Extremism, and on 23 December 2021, the Law on Countering Terrorism. The Supreme Court of Tajikistan recognized a number of organizations and associations as extremist and terrorist and banned its activities, both on the territory of Tajikistan and in the Commonwealth of Independent States and the Shanghai Cooperation Organization.

At the regional and sub-regional levels, Tajikistan, as one of the CIS members, on 4 June 1999, signed the Agreement on Cooperation of the CIS Member States in the Fight against Terrorism and the Decision on the establishment of the Counter-Terrorism Center of the CIS Member States was approved on 21 June 2000. Tajikistan, as one of the founders of the SCO, signed the Shanghai Convention on Combating Terrorism, Separatism and Extremism of 15 June 2001 and the Agreement on the Establishment of the SCO Regional Counter-Terrorism Center of 7 June 2002, which is an effective mechanism for the implementation of the goals and objectives of this agreement.

Tajikistan has taken steps to strengthen the legislative and institutional framework for combating terrorism. The government cooperates with the program to combat extremism and terrorism through the Organization for Security and Cooperation in Europe. As part of this program, the government has developed two draft national strategies for 2016–2020 and for 2021–2025 to prevent violent extremism and terrorism.

At the international level, the Republic of Tajikistan has recognized and ratified all agreements and documents, including 16 anti-terrorist conventions that prohibit terrorist activities in the international arena, and is taking decisive measures to implement them. In addition, realizing the importance of combating crimes of a transnational nature, the Republic of Tajikistan ratified the UN Convention against Transnational Organized Crime and its protocols of 15 November 2000 and the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948. Tajikistan will continue to make a worthy contribution to solving such problems of the international community as the fight against terrorism, transnational organized crime, arms and drug smuggling, and cybercrime.

VI. Bilateral and multilateral cooperation in solving global environmental, water and climate problems

In the international arena, the Republic of Tajikistan is recognized as an initiating state in solving global environment, water and climate problems. In particular, the resolutions adopted by the UN General Assembly on the announcement of the International Year of Clean Water, 2003, International Decade for Action "Water for Life," 2005–2015, International Year of Cooperation in the Water Sphere, 2013, International Decade for Action "Water for Sustainable Development," 2018–2028, and finally, on 14 December 2022, at the 77th session of the UN General Assembly, the announcement of 2025 as the International Year for the Protection of Glaciers is evidence and confirmation of this thesis, which was highly appreciated. For example, the congratulatory telegram of the UN Secretary-General António Guterres to the President of the Republic of Tajikistan Emomali Rahmon reads: "Your Excellency, I would like to congratulate you on the adoption of Resolution A/77/443 entitled "2025, International Year for the Preservation of Glaciers," which was proposed at the initiative of the delegation of the Republic of Tajikistan in co-authorship with 153 countries of the world. This is an important confirmation in a cloud of trust from UN member countries to your country as a leader in advancing the protection of glaciers around the world and a supporter of demonstrating the links between

clean water, mountains and climate change on the way to realizing the interconnected goals of the 2030 Agenda for Sustainable Development" (Congratulatory telegram of the UN Secretary-General).

Tajikistan is expanding international legal cooperation with the International Atomic Energy Agency (IAEA), the European Union and other international organizations and institutions to solve environmental problems, including the neutralization and destruction of radioactive waste in the country, and also activates bilateral and multilateral international legal cooperation on climate change, preventing the melting of the country's glaciers.

VII. International legal cooperation in the field of labor migration, taking into account the protection of the rights of Tajik migrants in foreign countries

The main international acts in the field of labor migration at present are the International Convention on the Protection of the Rights of All Labor Migrants and Members of Their Families (1990), the ILO Convention on Migrant Workers (No. 97 of 1949) and the ILO Convention on Abuses in the Field of Migration and Ensuring Equal Opportunities and Equal Treatment of Migrant Workers (No. 143 of 1975), ratified by the Republic of Tajikistan. It should be noted that the main recipients of Tajik labor migrants are the Russian Federation and the Republic of Kazakhstan, which are not parties to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990). Therefore, international cooperation of the Republic of Tajikistan in the field of labor migration is very actively carried out within the framework of bilateral agreements, especially with countries that receive labor migrants from our country.

To date, Tajikistan has signed a number of bilateral agreements in the field of labor migration with the Russian Federation, the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic, the State of Qatar, the United Arab Emirates, etc The norms of these agreements regulate the organized, official and controlled labor migration of citizens of our country to these countries based on international standards in the direction of labor migration, issues of legal status, social protection,

including medical care and treatment, social insurance benefits in case of temporary disability, industrial injury, housing, access to education and other issues during the labor activities of migrants in these countries, as well as issues of readmission of migrants (Agreement between the Government of the Republic of Tajikistan and the Government of the Russian Federation, 2004; Agreement between the Government of the Republic of Tajikistan and the Government of the Republic of Belarus, 2011; Agreement between the Government of the Republic of Tajikistan and the Government of the Republic of Kazakhstan, 2006; Agreement between the Government of the Republic of Tajikistan and the Government of the Republic of Kyrgyzstan, 1998; Agreement between the Government of the Republic of Tajikistan and the Government of the State of Qatar, 2019; Memorandum of Understanding between the Government of the Republic of Tajikistan and the Government of the United Arab Emirates).

VIII. Preservation of identity, national self-consciousness and self-knowledge, taking into account national interests, cultural, historical, moral and ethical features

The Republic of Tajikistan considers all-round cooperation with the specialized agency of the United Nations Educational, Scientific and Cultural Organization (UNESCO) to be consonant with its national interests and intends to actively use the capabilities of this institution as a platform for the protection and revival of the tangible and intangible heritage of the Tajik people, to promote their spiritual cultural achievements. Tajikistan is a member of the UNESCO Convention for the Protection of the World Cultural and Natural Heritage of 1972 and the UNESCO Convention for the Protection of the Intangible Cultural Heritage of 2003.

One of the positive results of cooperation between the Republic of Tajikistan and the UNESCO was the inclusion of the following dates in the UNESCO Anniversary List: 1150th anniversary of the founder of the Tajik-Persian classical literature Abu Abdulla Rudaki (2009); 600th anniversary of the Tajik-Persian writer and poet, philosopher and musicologist, humanist and public figure Mavlana Abdurahman Jami

(2014); 700th anniversary of the Tajik-Persian poet, scientist, philosopher and mystic Mir Sayyid Ali Hamadani (2015); 3000th anniversary of the ancient city of Hissar (2015); 5500th anniversary of the ancient city of Sarazm (2010); 1250th anniversary of the Tajik-Persian thinker and scientist Hakim Tirmizi (2016); 1150th anniversary of the Tajik-Persian scientist-encyclopedist, doctor, alchemist and philosopher Zakiriya Razi (2018); 400th anniversary of the Tajik poet and educator Mirabid Sayida Nasafi (2018); for 2022–2023 included the 2500th anniversary of the ancient city of Takhti Sangin and the joint nomination of the Republic of Tajikistan, the Republic of Uzbekistan and the Islamic Republic of Iran regarding the 1050th anniversary of the birth of the outstanding scientist of the East Abu Raihan Beruni.

In addition, as a result of cooperation between Tajikistan and the UNESCO, the capital of Tajikistan, the city of Dushanbe, became a laureate of the UNESCO City of Peace award (2002); classical music of Tajikistan and Uzbekistan "Shashmakom" was recognized as a masterpiece of the oral and intangible heritage of mankind (2003); Navruz received the status of an international holiday (2015); the national dish of Tajiks and Uzbeks "Oshi palav" (2016), the art of embroidery in Tajikistan "Chakan" (2018) and the art of singing in Tajikistan "Falak" (2021) were included in the Representative List of the Intangible Cultural Heritage of the UNESCO (Achievements of the Republic of Tajikistan within the Framework of UNESCO)

Along with achievements in the international legal policy of the Republic of Tajikistan, there are certain difficulties that negatively affect its effectiveness. Among them, one can note the presence of economic and social threats, conflict-generating factors and their unsettledness, the proliferation of nuclear, chemical and biological weapons, international terrorism, extremism, separatism, transnational organized crimes, the imperfect guarantee of international and regional security, the mismatch of interests of superpowers, the clash of civilizations, unresolved disputes related to water in the region and the world, disrespect for democracy and infringement of human rights, discrepancy between the norms of national law and international law, etc.

IX. Conclusion

To overcome difficulties and increase the effectiveness of the international legal policy of the Republic of Tajikistan, it is necessary to determine the real position of national legislation in accordance with the process of developing relations between international public and private law; constantly, accurately analyze and eliminate contradictions between national legislation and acts of international law recognized by Tajikistan; make greater use of the right to express reservations in the process of giving consent to the conclusion of multilateral international treaties, in particular in the economic, social and cultural spheres; promote the creation and entry into new economic unions in order to create a single market with free movement of people, free delivery of goods, works and services; ensure energy and food security, accelerate the industrialization of the country and seek to bring the country out of the communication impasse through the establishment of international cooperation; to expand legal cooperation in combating international offenses, including international terrorism, extremism, separatism, transnational organized crime, etc.; improve the activities of consular offices in foreign countries, including the consular agencies at airports and railway stations of countries in which or in the neighborhood of which armed conflicts occur, in order to prevent the joining of citizens of the country in extremist groups.

In this regard, the Republic of Tajikistan is taking confident steps in the international arena, strengthening its position through the promotion of legal policy and constructive proposals, and in the future with its unique approach to diplomacy based on the protection of national interests and respect for universal values, as an active and influential country in addressing important issues of the modern world at the global and regional level, makes its tireless contribution to ensuring peace, security and cooperation between states. This international legal policy works to strengthen the external image of Tajikistan as a peaceful, democratic, legal and secular state.

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