

The International Sports Law Journal



2012/1-2



Olympics – Special Edition

Sports Fraud

Gambling-led Corruption

Match-fixing

Doping

Advertising Regulations

Broadcasting Rights

Racist Chanting

Osaka Ruling

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Ian Blackshaw

As we celebrate this tenth anniversary of the ISLJ, two key figures of the Asser International Sports Law Centre (ISLC) and The ISLJ are retired from Asser. Rob Siekmann and Jan Willem Soek have each been with Asser for more than three (3) decades. They were instrumental in the development of Asser ISLC, and as creators and editors of the ISLJ nurtured it for the past 10 years. The contributions they have made to the evolution of international sports law and critical legal analysis in this discipline is immeasurable. I am fortunate to have had the privilege to work with them this past year, and in particular, personally honoured to have the direct mentorship and tutelage of Rob. We thank them both for their tremendous contributions to Asser and to the area of international sports law.

As we look to the future, we will continue the good work that was begun by Rob and Jan Willem, and strive to make the Asser ISLC and the ISLJ even better. Since beginning my role as Editor of the ISLJ in January, I have gained a great appreciation for what has been achieved with the Journal over the past ten (10) years, and I am focused on the goals of producing a high quality journal that meets the expectations of our readers, contributors, and the legal and academic communities. As we continue forward with the ISLJ it will be vital to maintain the traditional character of the Journal, while continuing to improve the quality and addressing the present needs of our readers within the dynamic sports law community.

I am excited about this current edition. With final preparations well underway for the 2012 Olympics in London, it seemed only fitting that this publication of the ISLJ should have the Olympics as its focus. This issue contains a dozen articles that analyse various interesting aspects of the Olympic Games. In addition to the primary focus, there are articles that discuss the crucial area of sports fraud, and relative issues involving gambling and doping. The important *Osaka* case is also examined in-depth, including discussion on the implications for future athletes. The wide range of impressive contributing authors from around the world and the broad scope of articles that cover all aspects of international sports law is what the ISLJ has been known for in the past and continues to be reflected in this new edition.

I extend a special thank you to the Editorial and Advisory Board members of the ISLJ for your support throughout this transition and for welcoming me into my role as Editor of the ISLJ. You have been the backbone of the ISLJ in the past and we look forward to continued cooperation in the future. To all contributing authors and commentators - past, present and future - thank you for providing articles, papers, reviews and commentary that keeps moving the Journal forward and maintaining it as a vital tool in the sports law community.

The Editor - KLJ

Prof. Dr. Rob Siekmann & Dr. Jan Willem Soek

As the founders of the Asser International Sports Law Centre and The International Sports Law Journal, in recognition of your immeasurable contributions to Asser and your lasting impact on the field of sports law.

Thank you!! Best wishes and kindest regards as you retire!

Gambling-led Corruption in International Sport: an Australian Perspective*

by Jack Anderson

Overview

In 2011, the President of the International Olympic Committee, Jacques Rogge, identified gambling-related corruption as the biggest single threat to the integrity of international sport. Recent events have highlighted that Australian sport is not immune from such corruptive behaviour. Moreover, the threat posed is not confined to sport. By utilising online gambling platforms, recognised international crime syndicates have the capacity to launder money and to engage in assorted secondary criminality of a financial nature including identity theft, economic conspiracy and fraud.

Against this backdrop, the Australian Research Council's (ARC) Centre of Excellence in Policing and Security (CEPS) co-ordinated and hosted a one-day workshop in July 2011 with partner organisations, sports bodies and researchers to discuss the following: the vulnerability of sport to betting-led corruption; risk management and preventative measures currently in place in Australian and international sport; and future resilience enhancement mechanisms that could be applied through the sports industry. Further, an objective of the workshop was to identify and agree areas where academic research could strengthen the understanding and expertise on sport's vulnerability to gambling-led corruption and how that could inform a coordinated and more effective response by sport and relevant government agencies in an effort both to underpin the integrity of sports events and undermine the illicit, online behaviour of criminal syndicates. What follows is a thematic (and updated) review of the workshop's deliberations including the author's keynote address.¹

Historical overview and context

Two brief historical and contextual points need to be highlighted on the topic of gambling-led corruption in sport.

First, cheating in, and the fixing of, sports events have a history that is almost as old as organised sport. Modern sports organisations have developed quite sophisticated, if largely private, self-regulatory mechanisms in identifying cheats and fixers. In particular, the manner in which international sport, as directed by the World Anti-Doping Agency, monitors, internally prosecutes and sanctions those who take prohibited performance enhancing drugs is instructive as to how sport might deal with the integrity threat posed by illicit, online gambling and match-fixing. In addition, the relationship between gambling and sport is long in history. The manner in which the oldest organised professional sport, the horse racing industry, monitors, internally prosecutes and sanctions those associated with gambling-inspired corruption is again highly instructive as to how sport deals with betting-led conspiracies.²

This institutional history notwithstanding, it is the combination of cheating and betting in sport, based on inside information supplied by officials or players and placed upon online and offshore gambling platforms, that poses a significant integrity threat to modern sport and also reveals certain regulatory vulnerabilities within international sport to such activities such that certain sports betting platforms are being used as a conduit for transnational financial crimes, cross border money laundering and associated economic criminality or fraud.

The second contextual point lies in an explanation of the meaning of an "integrity" threat. Borrowing from the Australian Sport Commission's definition of the "Essence of Australian Sport, integrity in competitive sport has four essential elements: fairness; respect; responsibility; and safety.³ Put simply, integrity in this regard concerns a respect for the core

values of fair and open competition in the game or event in question. In the context of modern professional sport, however, integrity has, for sports governing bodies, a meaning that extends beyond the playing field and is related to modern sport's business model and branding.

Taking Australia's leading sports as an example, revenue streams - gate receipts, associated merchandising, sponsorship and, crucially, TV and media rights deals - in the world's leading sports leagues remain relatively robust with the primary financial stability threat tending to be internal (in the form of spiralling player wages) rather than external (in the form of the global economic downturn). Nevertheless, sports governing bodies across the world are acutely aware that professional sport's business model is based fundamentally on an implied contract of trust and confidence with its spectators and sponsors. That contract or bond is predicated on supporters and sponsors believing in the "controlled unpredictability" of what occurs on the sport field. Accordingly, if that trust is undermined because, for instance, supporters and sponsors suspected that players' actions are motivated for nefarious reasons, then consumers and sponsors will quickly move their money elsewhere and thus destabilise that sport's financial viability. In this, leading sports governing bodies are aware that in today's highly competitive sports market (again epitomised by the various codes in Australia) there are a number of alternatives for this support and money.

In sum, it is the credibility or integrity of the brand that is of the utmost importance to sports bodies and thus the associated anxiety of leading sports bodies, as led by the IOC, with the issue at hand. Analogies abound from the world of sport about the corrosive impact that (lack of) integrity issues can have on a sport's brand and goodwill and, as a corollary, on the difficulties a sport can have in trying to regain that trust and confidence of supporters and sponsors. The regulatory corruption that has led to the demise of professional boxing as a mainstream sport is noteworthy. The allegations of corruption surrounding the administration of the Indian Premier League have seen turnover figures for that cricket tournament decline markedly in the last year. The reputational difficulties that athletics and professional cycling have with regard to doping continue, despite recent progress in cleaning up the sports in question.

Applying this to gambling, the integrity threat emerges where doubts or suspicions arise about, for example, an unusually slow run rate in cricket or a high number of dropped balls in the field; a decision by a player to take a tap rather than a kick at goal in rugby; a tennis or snooker result that is at odds with the form or ranking of those involved; idiosyncratic positional moves by a coach; or the inconsistent decision-making of a referee during the course of a game. Although all of the above may be underpinned by perfectly rationale explanations, recent gambling related events illustrate that on occasion certain happenings on

* Reader, School of Law, Queen's University Belfast. This research is supported by a Leverhulme Study Abroad Research Fellowship, 2011.

1 The workshop, held at the Queensland Cricketers Club on 27 July 2011 was entitled "Combating Serious Crime and Corruption in Sport: International and Comparative Perspectives". For further details on both the work of CEPS and this workshop, including an accompany-

ing briefing paper (Issue 6, Nov 2011) see www.ceps.edu.au/about/publications. The author thanks CEPS Director, Professor Simon Bronitt for his support with this project.

2 For an interesting Australian example of this, see Glesson Review of Sports Betting Regulation in the State of Victoria (2011); available through www.justice.vic.gov.au.
3 www.ausport.gov.au/about/essence_of_sport.

the pitch may be underpinned by a more sinister rationale or, at the very least, attract the suspicion of betting-led conspiracy.

Betting + Sport = Corruption?

Does the close relationship between betting and/on sport lend itself to corruption? The answer to this question is no, not necessarily so, and certainly not always. Nevertheless, and drawing from five brief case studies of examples of betting corruption (from international cricket, European soccer, major league sport in the United States and Australian sport); identifiable patterns begin to emerge. These common features, which have also been referred to in other research - notably the research commissioned by the EU Sports Platform, *Examination of Threats to the Integrity of Sport* (2010) - can assist sports governing bodies both in identifying and isolating their regulatory vulnerabilities to the threat and in instigating preventative and investigative mechanisms to address the problem.⁴

Case Studies

Case Study A: NBA, United States

Tim Donaghy was a referee in the National Basketball Association from the mid 1990s until his resignation in 2007. His resignation related to a FBI investigation into allegations that Donaghy gambled on games that he had officiated and made decisions affecting the point spread in those games, so as to facilitate spread-betting patterns on the games. In July 2008, Donaghy was sentenced to 15 months in federal prison on charges relating to the investigation.⁵

Case Study B: Rugby League, Australia

Two minutes into a NRL game between the North Queensland Cowboys and the Canterbury Bulldogs in August 2010, the Bulldog's Ryan Tandy was penalised for a delaying offence. Ordinarily, the Cowboys would have taken a kick at goal but elected to tap the ball and eventually scored a try. Irregular betting patterns involving significant amounts of money were identified by betting operators on a Cowboys' penalty goal to be the first scoring play. An investigation by the NSW Casino and Racing Investigation Unit has led to four arrests including Ryan Tandy and his agent. The charges were based on economic conspiracy and obtaining money by deception and, in the player's case, relate to providing false and misleading information to a parallel investigation by the NSW Crime Commission. In December 2011, Tandy was found guilty on the "knowingly providing false evidence" charge and received a six month, non custodial sentence.

Case Study C: Rules Football, Australia

In July 2011, Heath Shaw a player with leading AFL club Collingwood was suspended for eight matches and fined Aus\$20,000 after being involved in a betting scandal also involving Collingwood captain Nick Maxwell. Shaw and a friend bet Aus\$10 each on Maxwell kicking the first goal of a league game against Adelaide, knowing that Maxwell was to start the game not in his usual position but in the forward line. Shaw also passed the information to friends who also laid a series of minor bets. Maxwell was fined Aus \$5,000. Three members of Maxwell's close family also placed bets. There was evidence that betting odds in the markets on Maxwell scoring came in from 100-1 for the first goal to 25-1.

Case Study D: Cricket, International

In October 2011, three Pakistan cricketers and their agent faced trial in London on charges relating to economic conspiracy, accepting corrupt payments and cheating at gambling. The charges emanated from accusations that the players received money for deliberately bowling no-balls at pre-determined times during a Test match against England in August 2010. They received custodial sentences.⁶ An International Cricket

Council anti-corruption investigation had previously imposed lengthy playing sanctions on the players in February 2011. That decision has since been appealed to the Court of Arbitration for Sport.

Case Study E: Football, Finland

In June 2011, nine players from Zambia and Georgia, and a Singaporean man accused of bribing them, went on trial in Finland in a match-fixing investigation into that country's football league. The players were charged with accepting bribes of up to Aus\$70,000 to influence the outcome of matches. A series of other bribery related scandals involving individual players and the suspension of a leading Finnish club, Tampere United, for an unexplained amount of Aus\$400,000 on its balance sheet from a Singaporean company, has led to an investigation into the league by the Finnish authorities, as well as a Court of Arbitration of Sport hearing into Tampere's breach of FIFA's regulations on third party investment in clubs.

Identifiable Patterns

1. Evolving sophistication of the betting market

Traditional forms of gambling fixes, for example, a boxer taking a dive or the nobbling of the favourite in a horse race, appear somewhat quaint to the contemporary eye. In the horse racing example, for instance, the fix had to be quite elaborate: the horse in question had to be "got at" physically; the money placed on laying the favourite or backing another horse or both had to be put on in a conspiratorial manner so as not to attract the suspicions of an irregular betting pattern by the relatively small and highly risk aware bookmaker community; and finally the fix had to come off in the sense that the favourite duly had to lose.

Contrast this with today's online betting environment. The where, when and what a gambler can bet on is virtually unlimited. Wireless and telecommunication developments mean that a punter can, and on various multimedia platforms, bet incessantly and do so from home or in the pub or at the event itself. This flexibility and anonymity lends itself to betting conspiracies. Moreover, while in the traditional form of betting, the punter gambled on the final outcome of the event i.e., who might or might not win, the various different in-play forms of betting now available mean that punters can engage in bets on much more defined aspects of the game itself such as spot-bets or spread-betting.

It follows, and as illustrated variously by case studies B, C and D above and building on the investigations of Declan Hill and others, that if a third party can convince a player to do something particular at a specific time in a game, which need not necessarily impact on its final outcome (and thus cause no great moral hesitancy for the player), this inside information can be used to the advantage of that third party on betting exchanges.⁷ Again it must be stressed that, although bets of the kind outlined appear somewhat "exotic" in nature, a quick perusal of online betting exchanges and spread betting facilities illustrates that the combination and category of bets available to the modern punter are bewilderingly broad. Put simply, no matter how exotic a bet appears, there is nearly always a market online for the punter's money.

2. Vulnerable players

Player education and awareness, as supplemented by strict sanctioning, is a central preventative measure in dealing with this activity. Players are sometimes unaware that seemingly innocuous information, such as positional or tactical changes for a forthcoming game, may be used to the betting advantage of third parties.

Players also need to be educated as to the undue influence that might be placed on them for such information be it through a commercial agent or their wider social entourage. Matters such as the profiling of vulnerable players (such as those from countries where corruption is a facet of everyday life) and the regulation of sports agents is of importance here, as is - and as illustrated by case study E above - the proper regulation of and financial accountability for, the entry of private equity into sport and particularly on the ownership of individual clubs.

4 EU Sports Platform, *Examination of Threats to the Integrity of Sport* (2010); available through www.eusportsplatform.eu.

5 See also CAS 2010/A/2172 Oleg Oriekhov v UEFA.

6 R v Amir & Anor [2011] EWCA Crim 2914.

7 Declan Hill, *The Fix*, McClelland & Stewart, 2008 and <http://www.howtofixsoccergame.com/>

Elite players in well-paid leagues, for example the English Premier League, are unlikely to be targeted in this regard, unless they have a gambling problem or related debts. These players are well paid but players further down the leagues and into the semi-professional leagues may be more susceptible. Further, note that in a league that has salary caps where, although leading players are well paid, the remainder of the roster may not be, the resulting inequality might heighten the vulnerability of the latter to illicit betting approaches.

3. Vulnerable games

Sports that attract high betting volumes, such as football, may be targeted by illicit betting syndicates in an attempt to hide otherwise irregular betting patterns in the general weight of money bet on the particular game or event.

Episodic games, such as tennis or snooker, where an individual player can exert a significant amount of control over whether a set or frame is won or, more likely, lost, have been known to have resulted in betting-related conspiracies.

Similarly, games where there is little at stake, for example, so-called “dead rubbers” or games between teams who are untroubled by the play-offs but safe from relegation, can be vulnerable.

4. Referees

As case example A above shows, a referee can control the point spread in a high scoring game and thus aid those who bet on spread-betting or points handicap betting markets. In a relatively low-scoring game, such as football, one decision (the award of a penalty kick) can decide or materially change the outcome of a game - and there have been celebrated examples of this in, for instance, football in Germany in 2005, which led to a large scale review of match-fixing in that sport.

Overall, in games as diverse as cricket, rugby and boxing how the referee “calls” a game can be of the utmost importance and therefore protecting referees who, in professional sport are usually the least paid person on the pitch, is critical.

5. Poor regulatory ethos

Where a sport's central governing authority is weak or sets a poor example, this may lessen the impact that its integrity regulations have on participants and even, in a gambling sense, open that organisation to targeting by criminal syndicates. Writing in the *New York Times* in July 2011, the Secretary General of Interpol, Ronald K Noble, noting that corruption in international football is “widespread”, argued that a central problem in addressing the problem was that “public confidence in FIFA's ability to police itself is at its lowest.” In August 2011, Transparency International published a document entitled “Safe Hands: Building Integrity and Transparency at FIFA” in which it sets out an “integrity audit” agenda for FIFA.⁸ The recommendations include the creation of a multi-stakeholder group, an independent investigation of the past and a zero tolerance policy of bribery.

Similarly, in a recent review of corruption in Britain by Transparency International (UK), a survey ranked sport as the second most corrupt sector in British society - political parties were ranked first; parliament third.⁹

Sports bodies also have to reconcile their integrity anxiety relating to gambling with the heavy amounts of sponsorship accepted by such bodies from online betting companies. In addition, there may be a potential conflict of interest in a betting company sponsoring a club or league on which it takes bets.¹⁰

8 Transparency International, *Safe Hands: Building Integrity and Transparency at FIFA* (2011); available through www.transparency.org.

9 Transparency International UK,

Corruption in the UK (2011); available through www.transparency.org.uk.

10 See the comments at Case C-42/07 Liga Portuguesa de Futebol [2009] ECR I-7633, para 71.

What can sports bodies do?

The answer here is that many sports organisations at national and international level are, in light of this integrity threat, already implementing quite sophisticated risk assessment strategies. Many of these strategies are based on those first established in the horse racing industry and typically combine programmes that have three central elements: education, investigation and sanctioning.

Dedicated player education programmes; codes of conduct; moral clauses in player contracts; anti-corruption compliance and investigative units; and lengthy sanctions are essential to the anti-corruption policy of any leading sports governing body. In Australia's highly regulated horse racing industry, requirements that jockeys do not bet, statute-based investigative units and lengthy sanctions, epitomised by the “warning-off” penalty, are well established, as is the fact that administrators within racing's integrity units provided specialised advice, and even personnel experienced in compliance matters, to other sports.

The horse racing industry was also among the first to reach out to the licensed betting operators, entering into memorandums of understanding with them so that both early warning could be provided on a potential race-fix and further investigation facilitated.

The mutual benefits of this relationship remain central to the effective policing of match-fixing in all sports. As was seen to good effect in the Ryan Tandy case study outlined earlier, where substantial bets are taken on unusual, exotic bets, this can alert the receiving operator and that information can be passed onto the rest of the betting community and to the sports authorities in question.

It is in the licensed betting operators' interest that their industry in not taken advantage of by match-fixers, as much as it is in the interest of sport itself.

The twofold approach of education and prevention has been adopted by football's international governing body. This year, FIFA presented Interpol at its Singapore base with Aus\$30 million to establish a training centre for education and preventative programmes for key stakeholders and officials in sport in the region as well as national law enforcement agencies. FIFA also has continued to develop its relationship with the European Sports Security Agency, which is an informational conglomeration of most of the leading online sports betting providers and which presents FIFA with research and early warning on matches that are revealing unusual betting patterns.

Implications beyond sport

The problems associated with sports betting have implications beyond the industry.

The transnational criminal law aspects to this issue were summarised by an Australian Crime Commission (ACC) submission to the Australian Parliament's Joint Select Committee into Gambling Reform on 23 June 2011: “Online gambling is an identified money laundering risk and increasingly is also acknowledged as a risk for revenue and taxation fraud.”

Although, it appears that the ACC is satisfied that the threat to Australian sport is not yet systemic, nevertheless, individual participants may be at risk. Associating with a local sports star sometimes provides a medium for criminal elements to enhance their social, community and business status and thus engender them with an air of legitimacy. Further, as online betting in Australia grows rapidly - from an industry worth a little over Aus\$100million in the mid-1990s to one that is projected to reach Aus\$3billion by the end of this decade - the systemic risks increase, as aggravated by the online nature of the industry.

As with any financial service offered online, the danger is that at the margins of the industry, it can be difficult to police and regulate effectively, if at all, given the offshore, relatively anonymous nature of such

activity and the huge resources needed to trace money flows through various identity theft and customer identification traps.

Furthermore, in a recent review by the Paris-based Financial Action Task Force on money laundering in the football sector, it is also of interest that FATF highlighted that in order to facilitate such activities international crime syndicates were establishing their own online gambling platforms on which to take a wide variety of bets.¹¹

Unlicensed betting operators operating online and offshore have caused problems for the proper regulation of the industry in the UK, EU and United States and in Australia breaches of the Interactive Gambling Act (Cth) 2001 have been brought to the attention of the Australian Federal Police with increasing recent frequency.

What are governments doing?

In 2011, the federal Minister for Sport in Australia, and his state and territory counterparts, had various meetings and correspondence with Malcolm Speed, the former chief executive of the ICC and now chairman of the Coalition of major Professional and Participation Sports, a union of chief executives from the AFL, NL, ARU, Cricket Australia, Tennis Australia and Netball. The policy that has emerged from this initiative is based largely on the model that exists in Britain and in the state of Victoria. It is four fold in nature.

- The adoption of codes of conduct by sports;
- The possibility that federal funding of sports would be made contingent on sports bodies implementing appropriate anti-corruption policies and practices;
- That legal and licensing arrangements would be developed between betting companies and sports bodies that include obligations to share information and veto bets, as overseen administratively by a newly established National Integrity of Sport Unit;
- That agreement would be pursued on achieving nationally consistent legislative arrangements and specifically with regard to a criminal offence of cheating at gambling, which would assist in targeting those involved in such conspiracies but who do not come within the regulatory remit of a sports body.
- A commitment on behalf of all parties to continue to pursue an international solution and further international co-operation in the area.

The policy is welcome and correct, though it is a very early stage in its development. Moreover, problems can be envisaged in terms of obtaining, for example, a commonwealth consensus on the legislative framework.¹² Three further points are noteworthy about the proposal.

First, central to the policy will be the operation and funding of the National Integrity of Sport Unit (NISU). A NISU-type body would likely be quite resource intensive, requiring a diverse body of expert personnel from law enforcement agencies (economic crime units) and those with experience in sports administration (compliance units) and the betting industry (integrity units). A long-term, stable funding model would be central to NISU's credibility. One suggestion under consideration is that sports bodies are given the right to exploit betting rights to their sport and part of the revenue raised by sports bodies from the

betting companies in this regard would then be siphoned off to underwrite NISU.

The operation of NISU would also have to be premised on full cooperation from betting companies, in terms of supplying information on irregular betting patterns, and it would also have to have certain accountability mechanisms imposed on sports bodies to ensure that the information supplied to them by NISU would always be properly and pursued, irrespective of the consequences that might have for the sport in question. Without full compliance (from the betting industry) and accountability (from the sports industry) it is unlikely that law enforcement agencies such as the Australian Crime Commission would feel comfortable in, or be permitted to, supply any sensitive data or information that they might have, and thus the effectiveness of any putative NISU would be limited.

Second, ultimately the solution to this problem lies in greater international cooperation between sports bodies and law enforcement agencies. Nevertheless, it is only when a country has its own "house in order" can it contribute materially and with due moral weight to the international debate. In this, the above commonwealth proposals are of the utmost importance and can ensure that Australia plays an influential role in the international resolution of this problem, and even in the formation of a World Anti-Corruption Agency.

Moreover, it must be stressed that countries such as Australia and the UK, where sports industries such as horse-racing are deep-rooted, have an important cultural education role to play in this debate. In many jurisdictions, such as in continental Europe, sports administrators do not have an intuitive or cultural understanding of betting and this may be resulting in leading sports bodies underestimating this integrity threat. In contrast, the integrity threat emanating from drugs in sport is clear to all and thus a settled ethical stance on it among all stakeholders was achievable, as manifested in the World Anti-Doping Agency. The ethical stance towards, even the understanding of, gambling is not so clear with the added problem that in many of the jurisdictions where the threat originates (such as in India or South East Asia) betting is largely illegal and unregulated and thus it is harder and politically sensitive to convince authorities that this is a matter that should be pursued or is even a threat in the first place.

In sum, Australia can play a critical advocacy role in this debate on the dangers of unregulated betting in sport.

Conclusion

Finally, a recent review of corruption in UK sport by Transparency International highlighted three common risk factors, also alluded to in this briefing paper - the problem of self-regulation, the difficulty of regulating against international corruption, and links with organised crime. It is of interest that even in the UK where the matter of corruption and crime in sport appears to be well-regulated, and a sports betting integrity unit is already in operation, Transparency International nevertheless recommended "a full independent enquiry into corruption in UK sport commissioned by the UK governing bodies of major sports, with a view to setting up a coordinated response to corruption across all UK sports."

Building on that, academic researchers would in the medium term be well placed to carry out a similar study in Australia and elsewhere with a view to assessing sport's vulnerability to gambling-led corruption and informing a coordinated and more effective response by sport and relevant government agencies in an effort both to underpin the integrity of sports events and undermine the illicit, online behaviour of criminal syndicates.

¹¹ Financial Action Task Force, *Money Laundering through the Football Sector* (2009); available through www.fatf-gafi.org

¹² Each state or territory has its own perspective on the problem and in New

South Wales, for instance, see NSW Law Reform Commission, *Consultation Paper on Cheating at Gambling* (CP12, 2011); available through www.lawlink.nsw.gov.au/lrc.

Gambling related match-fixing: a terminal threat to the integrity of sport?

by Tom Serby*

ABSTRACT

This sports law paper looks at betting related match-fixing and its variant spot-fixing. Proposals to curb fixing are discussed as are recent laws and moves at self regulation in the gambling industry. Particular focus is made of cricket and the law of the UK in the light of the jail sentences handed down to three Pakistan cricketers in 2011 and an English first class player in 2012; other sports are also discussed as are European initiatives to fight fixing.

1. INTRODUCTION

*'Like other forms of entertainment, sport offers a utopia where everything is simple, dramatic and exciting and euphoria is always a possibility. Sport entertains, but can also frustrate, annoy and depress. But it is this very uncertainty that gives its unpredictable joys their characteristic intensity'*¹. Take away the uncertainty and you remove the *raison d'être* of sport; and its appeal to spectators. Betting related match-fixing, although not a new phenomenon, is threatening to overtake doping as the greatest threat to sport's integrity and appeal. Jacques Rogge, the president of the International Olympic Committee, and one of the most powerful men in sport, issued a stark warning in 2011 that betting is as much a danger as illegal drug use, describing it as "potentially crippling" and a "cancer" with links to "mafia" organisations². Michel Platini, President of UEFA, has called cheating at gambling and match-fixing "the biggest threat facing the future of sport in Europe"³. Ranking the threats to sport's integrity from doping and match-fixing is no easier than defining corruption in sport. But there is a fundamental difference between athletes taking banned substances in order to perform better and sportsmen pretending to compete but actually deliberately underperforming. There are gradations within match-fixing. Take for example the case of the 2002 Australian Formula One Grand Prix, where Rubens Barrichello, on team orders, deliberately slowed up before the finish line to allow his team mate Michael Schumacher to win; leading to the banning of team orders the following season. This practice can be defended, betting related match-fixing, or its cousin, spot fixing, can not. Spot fixing is the manipulation of individual incidents within the game, such as in cricket the occurrence of a no-ball (where the bowler oversteps the line in delivering the ball) or in football the awarding of a corner kick. Both spot fixing and match-fixing will be referred to hereafter as "fixing". This article will review the apparent rise in betting related fixing in sport, and the legal issues surrounding some of the proposals to curb the problem. It is widely acknowledged that the International Cricket Council ("the ICC") has taken a lead in matters relating to the policing of fixing (perhaps because the sport may have the biggest problem with betting related corruption) and particular focus will be given to cricket's battle against corruption which in 2011 saw the jailing of three Pakistani

international cricketers and in February 2012 the first prison sentence for an English cricketer arising from corruption in domestic first class cricket.

2. THE ECONOMICS OF SPORT

If gambling related fixing is on the rise (after all it is not a new problem, there was the infamous fixing scandal in the 1919 baseball World Series scandal involving the Black Sox and Shoeless Joe Jackson) it must be largely due to the way global sport continues to transform itself from its origins as an amateur pastime into big business. According to figures from PricewaterhouseCoopers LLP by 2013 global sports spending will stand at a level of US\$ 133 billion⁴. This represents a considerable transformation in the relationship between sport and business. It was not until 1988 that the International Olympic Committee decided to make all professional athletes eligible for the Olympics, subject to approval by the individual sports' governing bodies. It was not until 1995 that the International Rugby Board endorsed rugby union as a professional game. In a relatively short time sport has changed from a pastime into a business estimated to equal 2% of the European Union's Gross Domestic Product.⁵ One aspect of the increasing commercialisation of sport is the growth in betting on it. Sport betting worldwide was estimated at a £65.3 billion industry in the 36th Annual Report of the Gaming Board for Great Britain.⁶ So in the space of a few years the economic context in which professional sport is played has been transformed, with some unintended consequences, as reflected in the words of Mr. Justice Cooke in his sentencing remarks in the trial in November 2011 of the Pakistani cricketers Salman Butt, Mohammed Amir and Mohammed Asif: "*The image and integrity of what was once a game, but is now a business is damaged in the eyes of all...*" Uncontrolled commercialisation and the growth in sport betting have increased the incidences of fixing.

3. IS FIXING IN SPORT WIDESPREAD OR A MEDIA CREATION?

Until recently Sports Governing Bodies ("SGBs") have been keen to play down the extent of fixing; after all, bad publicity is not good for business. By way of example in 2007 the in-house lawyer at the ICC wrote "*Five years ago corruption threatened to tear international cricket apart... Cricket is now back on the right path and the sport seems largely free from serious corruption but the risk remains*".⁷ These words were shown to be naive in the light of the Pakistan cricket fixing scandal discussed in this article.

No one knows for sure the extent of fixing (gambling related or otherwise) in sport. Maennig⁸, Forest et al⁹ and Chadwick and Gorse¹⁰ have all compiled lists of the extent of fixing incidents related to betting in sport globally. They list 22, 26 and 33 cases respectively. In Maennig's and Forest's lists almost 50% of the cases relate to the years 2000-2010 whereas Chadwick and Gorse concentrate only on those years in their study. Whilst these statistics do not prove that European sport is widely infested with gambling related match-fixing, they do show that incidences are increasing.

In their study into corruption in sport in the decade 2000-2010 Gorse and Chadwick separated out doping offences from gambling related fixing offences. They included all incidences of corruption evidenced either by a tribunal hearing (whether of a SGB or an arbitral body or Court) or an admission. According to their data over 90% of corruption offences related to doping offences, with less than 10% relating to gambling related fixing. This breakdown is misleading however because doping has long been accepted as a threat to sport's integrity and it is relatively easy to carry out checks on athletes and sports players to monitor illegal doping. Gorse and Chadwick's report is a useful summary

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1 Whannel, G. (1992) *Fields in Vision: Television Sport and Cultural Transformation*, London, UK: Routledge
2 www.independent.co.uk accessed 1st March 2011
3 www.guardian.co.uk accessed 26th August 2011
4 www.ukmediacentre.pwc.com; accessed January 2012
5 www.coe.int accessed 5th March 2012
6 www.gamblingcommission.gov accessed 5th March 2012
7 Naidoo, U. and Gardiner, S. (2007) "On the front foot against Corruption"

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8 Maennig, W. (2005) "Corruption in International Sports and Sport Management: Forms, Tendencies, Extent and Countermeasures". *European Sport Management Quarterly*, Vol. 5, No 2, 187/225
9 Forest, D., McHale, I. and McAuley, K. (2008) "Say It Ain't So: Betting-Related Malpractice in Sport". *International Journal of Sport Finance*, 3, 156-166
10 Chadwick, S. and Gorse, S. (2011) "The Prevalence of Corruption in International Sport A Statistical Analysis"; Coventry University's Centre for the International Business of Sport

of the major incidences of cheating in international sport in the last decade and they break down the data into the different sports and continents. Overall they conclude that North America and athletics and cycling carry the greatest percentage of doping offences while football, tennis and Europe are the worst offenders when it comes to gambling related fixing.

Forest et al have created a model for predicting where and when fixing is most likely to take place, along the lines of a cost/benefit analysis. The major costs include: the chances the fix will be unsuccessful; the penalty if there is detection; feelings of guilt; loss of esteem among team mates; loss of opportunity to play if deselected. The benefits are the size of the bribe and the probability of a successful fix. Forest et al concluded that match-fixing is most likely to occur where:

1. Betting volume is high;
2. The athletes are poorly paid;
3. The fixing involves the actions of an individual rather than a complex interactive sequence of events;
4. The scrutiny on the competition is less intense, for example the match is played out at a lower league level;
5. The outcome of the match does not effect final placing in for example a tournament
6. The match-fixing does not involve losing
7. Salary level is regarded as unjust
8. There is high level of corruption generally in the society.

4. THE IMPACT OF CHANGES IN GAMBLING PRACTICES ON INTEGRITY IN SPORT

The well publicized problems cricket has had with gambling related corruption stem mainly from the popularity of the sport in the Indian sub-continent where it is the number one sport and where betting, although illegal and unlicensed, is widespread. According to Reuters \$427million was bet on the Indian Premier League in 2010. In Europe where gambling is legal the focus has been on regulating online gambling which has surged in popularity. In March 2011 the European Commission published a Green Paper¹¹ on on-line gambling in the Internal Market which followed a series of Presidency conclusions and a resolution of the European Parliament on integrity in on-line gambling (discussed further below). Online gambling is the fastest growing segment of the overall gambling market and much of it is unlicensed. The Commission's consultant, H2 Gambling Capital, estimated that in 2008 the online market in the EU accounted for over six billion Euros accounting for 7.5% of the overall market, expected to double in size by 2013. The Paper states that out of 14,823 active gambling sites in Europe more than 85% operate without a licence. These statistics help explain the rise in betting related fixing which generally flourishes in unlicensed betting markets.

5. INITIATIVES IN THE UK TO PROTECT SPORT'S INTEGRITY FROM GAMBLING RELATED CORRUPTION

The UK government has been more progressive than most in the fight against betting related fixing but self-regulation has been a more effective tool to date than state initiatives in addressing the problem. *'Maintaining integrity within sport is primarily an issue for the sport governing and regulatory bodies, particularly when it involves licensed/registered sports participants who commit disciplinary offences against the rules of their sport.'*¹² This comment from the Gambling Commission, the regulatory body which polices the UK's gambling industry and which was created by the 2005 Gambling Act, highlights the prevailing governmental view on how to take the fight to corruption in sport. Since 2005 the Gambling Commission has regulated all gambling in the UK other than the National Lottery and spread betting which is regulated by the Financial Services Authority. Under s 42 of the Gambling Act

2005 the Commission has powers to investigate suspicions that a person is cheating at gambling (or enabling another to do so) and can void an individual bet accepted by the holder of a license, but these powers have been conspicuous for their lack of use.

The new Gambling Act passed in 2005 included *inter alia* a new offence at section 42 of cheating at gambling which was introduced in part in reaction to the growth in gambling related fixing. Ironically the two recent criminal cases resulting in criminal convictions for betting related fixing by cricketers in the English courts (the Pakistan Test players Asif, Amir and Butt in 2011, and the Essex player Westfield in 2012, see further below) were based primarily on charges under a 1906 statute, the Prevention of Corruption Act.

After the high profile police investigations into alleged betting corruption in football (Bruce Grobbelaar, 1995) and horseracing (Kieran Fallon in 2004) the last Labour government appointed a panel under the chairmanship of Rick Parry, called the Sports Betting Integrity Panel (which reported in February 2010) to investigate the problem of gambling related fixing and to make proposals for combating the problem. The Panel comprised of experts from the major stakeholders in sport including representatives from the largest bookmakers (William Hill and Ladbrokes) and SGBs such as the Football Association and the British Horseracing Authority as well as members of the legal profession and players associations. *'Our main focus was the design and implementation of an integrated strategy to uphold integrity in sports and associated betting.'*¹³ Parry went on to describe the three key elements of the SGBs' response to the problem of fixing: the adoption of robust rules and disciplinary procedures, the implementation of a comprehensive education programme for all participants, and the creation of integrity units for gathering and analysing intelligence. The Parry Report recommended the setting up of a Sports Betting Intelligence Unit, to be a central body to whom the different SGBs would report known or suspected misdemeanours, with the Unit located within the Gambling Commission since that body already had substantial powers of investigation and prosecution.

In June 2010 the Gambling Commission duly published the terms of reference of the new Sports Betting Intelligence Unit ("SBIU"):

'The SBIU will produce intelligence products to inform investigative decision making on the prosecution or disruption of criminal offences (eg cheating) or regulatory action under the Gambling Act. Where relevant and appropriate, these intelligence products may be made available to third parties to assist disciplinary action. The intelligence products will also inform strategic analysis on Sports Betting Integrity issues.'

It is fair to say that the SBIU has not secured any scalps in the fight against corruption. This is not surprising given its *modus operandi*, scant financial resources and terms of reference. In December 2010 the Gambling Commission published the "Betting Integrity decision making framework" which described the means through which an investigation and any decision to prosecute gambling related fixing through the Gambling Act s 42 would be taken. The Gambling Commission would receive information on any suspicious betting patterns from betting operators who are obliged through their licence to do so. The SBIU as part of the Gambling Commission enjoys investigatory powers, such as those under the Regulation of Investigatory Powers Act 2000 (RIPA) and Proceeds of Crime Act 2002 (POCA), which can only be utilised when investigating a potential crime. In other words the SBIU has to be satisfied that the malpractice is a crime and not just an offence which would fall foul of a SGB's own code of conduct for players (the report gave the example of a player betting on himself to win, which while potentially an offence under a SGB's own code of conduct would not be a criminal offence). Where *'the scope and scale of criminality is high'*¹⁴ the SBIU would most likely refer the matter to the police who would then take the lead in investigation. The Commission accepted that resources would impact on the decision as to how to proceed, noting that the Commission's budget was £13 million and reducing, which covers all its activities, not just investigation into betting irregularities.

11 www.ec.europa.eu/internal_market/services/gambling_en.htm accessed November 2011

12 Gambling Commission (2007) Integrity in Sports Betting Issues Paper. May 2007. Page 1 Para 1.2.

13 www.webarchive.nationalarchives.gov.uk Report of the Sports Betting Integrity Panel, Chair's Forward para 1

14 www.gamblingcommission.gov.uk "Betting Integrity decision making framework" p 8

prohibits restrictions on the freedom to provide services to recipients in other Member States. The ECJ confirmed in *Schindler*¹⁹ that the provision of cross-border gambling is an economic activity that falls within the scope of the treaty. There are of course a number of secondary EU laws which impact on the provision of gambling such as the Distance Selling Directive and the Data Protection Directive to name but two; for a full list see page 13 of the Commission Staff Working Paper accompanying the Green paper on online gambling in the Internal Market²⁰.

7. THE JUDICIAL WAR ON FIXING

Built into the regulations governing athletes is usually a right to appeal a disciplinary decision of a SGB to the Court of Arbitration for Sport (“CAS”). In *Oriekhov v UEFA* (CAS 2010/A/2172), a case involving football, CAS showed a zero tolerance approach towards corruption when a panel upheld a lifetime ban on an official whose offence was not to report an approach by a betting syndicate offering money to fix a game. The approach comprised a course of dealings between the official and syndicate. The context was that this was a senior official in a game in the Europa League which commands significant prestige. In its conclusion the panel stated:

‘78. [The] Panel has to remind itself that match-fixing, money laundering, kickbacks, extortion, bribery and the like are a growing concern, indeed a cancer, in many major sports, football included, and must be eradicated. The very essence of sport is that competition is fair; its attraction to spectators is the unpredictability of its outcome.

80. It is therefore essential...for sporting regulators to demonstrate zero-tolerance against all kinds of corruption and to impose sanctions sufficient to serve as an effective deterrent to people who might otherwise be tempted through greed or fear to consider involvement in such criminal activities. Match officials are an obvious target for those who wish to make illicit profit through gambling on match results (or indeed on the occurrence of incidents within matches). They must be reinforced in their resistance to such criminal approaches.’

More lightly treated were the Russian tennis player Ekaterina Bychkova and the snooker player John Higgins, both of whom received suspensions after disciplinary hearings conducted by their respective regulatory bodies, Bychkova being suspended for thirty days (including the Australian Open) and Higgins for six months (both were also fined). These were both “failure to report” cases. Mr Higgins’ manager, Mr Mooney, arranged for the player to attend a meeting where an undercover journalist in a “sting” operation bearing many resemblances to the 2010 Pakistani cricketer case, discussed fixing games in return for money. John Higgins did not report the approach but was not given much opportunity to do so as the story was published in a newspaper two days after the meeting. In Bychkova’s case she was approached on her internet blog by someone offering to pay her to lose.

8. FIXING IN CRICKET

Cricket’s problems with fixing seem to have commenced in the 1980s; and in the early 1990s international cricket within a few months, and as a result of separate enquiries, lost three international captains to lifetime bans. One of these men, captain of South Africa, Hansie Cronje testified to the King Commission in South Africa to contacts with bookmakers and illegal fixing, despite his strongly religious views (he even sported a wristband marked WJJD standing for What would Jesus do?). As an illustration of how the threat of fixing has increased dramatically it is instructive to recall how when back in 1981 England snatched glorious victory from the jaws of defeat in a famous match against the old enemy Australia in Leeds (trading on the London Stock Exchange came to a temporary halt as the match reached a finale) the fact that two members of the Australian team placed bets on England

to win when over half way through the match the bookies were offering 500-1 against such a seemingly impossible outcome caused barely a raised eyebrow. Noone has ever believed the wager was remotely untoward, such was the relative innocence of international sport just a generation ago. Fast forward to 2011 and England beat Australia in a test series in Australia for the first time in 26 years; but in years to come cricket in 2011 will be remembered most not for events on the field of play but for what happened in a courtroom in south London when Mr. Justice Cooke ordered a combined custodial sentence of six years on three Pakistani cricketers (Salman Butt, Mohammed Asif and Mohammed Amir) and their agent, for having engaged in deliberate acts of a criminal nature while rigging elements of the match involving England and Pakistan at Lord’s cricket ground, London in August 2010. The criminal charges against the three players and their agent were brought under the Prevention of Corruption Act 1906 as well as under the Gambling Act 2005, where the charge was conspiracy to cheat at gambling; not cheating as such because there was no evidence that anyone actually placed a bet. The criminal trial of Butt, Asif and Amir in October and November 2011 came ten months after they had been banned by the ICC, in a hearing in Doha, for periods of ten, seven and five years respectively, although the actual bans were five years in each case with the balance suspended. The paper’s renowned investigative journalist Mazhar Mahmood aka the “fake sheik” after a previous undercover expose, recorded and filmed Mazhar Majeed a cricket agent with close relations to many in the Pakistan cricket team, taking £150,000 from the NOTW in return for arranging for the bowling of three “no-balls” by Amir and Asif during the Lords Test. Butt was the Pakistan captain at the time and during the subsequent criminal trial was shown to be the prime mover in the affair along with Majeed, the players’ agent. Before both the ICC hearing and the criminal trial was evidence of a very high volume of text and telephone messages between Majeed and the cricketers immediately after the NOTW journalist’s taped meeting with Majeed and before the no-balls were bowled. The police recovered some of the money paid in cash by the journalist to Majeed (in marked notes) in the possession of Butt and Amir. Two of the cricketers appealed their criminal conviction unsuccessfully to the Court of Appeal. The youngest of the players, Mohammed Amir, was released from custody early in 2012 and in March 2012 the ICC announced he had informed them he was not going to appeal his five year ICC ban.

In February 2012 for the first time a professional first class English cricketer, Mervyn Westfield formerly of Essex CCC, received a custodial sentence (four months) for a conviction for fixing relating to deliberately underperforming in a one day match two years previously. Westfield changed his plea to guilty on the first day of his trial on the basis of the evidence against him (an admission to a teammate of his guilt). The England and Wales Cricket Board then brought in an amnesty for first class cricketers playing in England to report any inducements to fix and it has been reported that this has brought out new evidence of fixing in English first class cricket matches²¹.

9. PROPOSALS TO ROOT OUT MATCH-FIXING

Detection of fixing is acknowledged by SGBs to be extremely difficult. It took the “fake sheik” (aka Mazhar Mahmood), an investigative journalist to expose corruption in cricket in 2010 which seemingly the ICC’s dedicated Anti Corruption and Security Unit (“ACSU”) either believed did not exist or were powerless to prevent. There is an ongoing discussion among sports administrators, journalists, academics and lawyers about what are the best methods to employ to attempt to cut out, or at least prevent the further spread of, the life threatening cancer that fixing represents. Increased licensing of online gambling has been discussed above; of the other various proposals mooted two that currently attract serious debate have been lie detector tests for players and monitoring of “unexplained wealth”²² by sports integrity units. The first can be ruled out at least for the time being; at least until the technology is in place to make such tests a reliable form of evidence. The second is currently an area being seriously explored. Another issue being debated is whether and to what extent, given the law on entrapment, investigation into suspected wrongdoers by SGB Integrity Units such as the ICC’s ACSU can

19 Case C-275/92, ECR 1994 Page I-13031

20 See footnote 11 above

21 www.telegraph.co.uk accessed 29 February 2012

22 Bartels, L. (2010) Unexplained wealth laws in Australia, Canberra: Australian Institute of Criminology

take the form of the type of “sting” operation that was so successful in the case of Butt, Asif and Amir.

In Australia state federal legislation has existed for several years enabling the police to confiscate assets where they appear not to be the result of lawful gain. Clearly such legislation raises serious legal issues such as the reversal of the usual burden of proof in criminal charges (the defendant having the onus of proving the legitimacy of the earnings) and the presumption of the right to silence. In the UK the Proceeds of Crime Act 2002 was passed to make it easier for both criminal and civil court actions to proceed with a view to separating individuals from the proceeds of crime. The first such confiscation order achieved by the Gambling Commission, for £30,000, was reported in the Gambling Commission's Annual Report 2010/11²³. Jenny Williams, the Chief Executive of the Gambling Commission in her introduction to that Report includes a section on Betting Integrity, and refers to the work of the Commission's Sports Betting Intelligence Unit (“SBIU”) in real time monitoring of sports betting.

In 2012 the ICC's ACSU received a report it had commissioned by a former Solicitor General of Hong Kong and adviser to the Council of Europe Multidisciplinary Group on Corruption, Bertrand de Speville.²⁴ The Report contained in all 27 recommendations; including the following:

2. An offence of unexplained wealth applicable to players, player support personnel, match officials and ICC employees should be included in the relevant codes of conduct....

17. The ICC with the involvement of the ACSU and member boards should introduce an accreditation system for agents of international players.

18. The ICC should not introduce or support the use of the polygraph until its validity and admissibility have been accepted by the courts.'

Other recommendations made by de Speville included increasing the number of ICC ACSU Regional Security Managers and making the ACSU more autonomous and accountable to the ICC's Chief Executive Officer. Early on in the Report de Speville issued a stark warning that corruption was probably not confined to players, when he quoted from Lord Condon (as he now is) writing in his report into fixing in cricket of April 2001: *'Whilst corruption at the playing level is now well documented, equally serious allegations are emerging about individuals involved past and present in the administration of cricket.'*

A second report received by the ICC in 2012 was the Report of the MCC World Cricket Committee dated 20th February 2012. The Marylebone Cricket Club (“MCC”) based at Lord's Cricket ground in London, although in recent years shorn of some its control over the international game, is the guardian of cricket's law's and acts in many ways as the conscience of the global game. Its World Cricket Committee is therefore a highly influential body comprising chiefly of former “playing greats”. The first sentence of the Executive Summary reads: *'MCC believes that corruption is the biggest danger facing cricket. It is an ongoing problem which requires persistence and vigour in all responsible bodies and leaders in the game in trying to combat it.'* The Report criticises as too lenient the bans given to Amir, Asif and Butt but did back the move to remove minimum sentences for betting related fixing. *'To have a minimum sentence can go against the ideas of ordinary justice'* in the words of Committee chairman Mike Brearley, former captain of England. On the subject of polygraph tests (lie detection machines) the Committee concluded that they should not be made compulsory, as there is scientific evidence that they are not 100 percent reliable, but that voluntary submission to a test should be encouraged for a player wishing to clear his name of an allegation of corruption. The Report noted that the ICC code (section 3.2) is not bound by judicial rules regarding admissibility of evidence, so an ICC anti-corruption tribunal could cite a lie detector test. The Report

welcomed the short term amnesty for reporting knowledge or suspicion of corruption introduced by the England and Wales Cricket Board in January 2012 after Westfield's conviction. But the most interesting aspect of the Report is the approval given for so-called “mystery shopper” operations, in acknowledgement of the successful “sting” operation by the News of the World in uncovering corruption. The Report concluded that mounting such operations would act as a deterrent to players tempted to take part in corruption and would also offer an opportunity to players under suspicion to help to clear their name by reporting an approach; failure to report would of course be an offence attracting a ban. Brearley commented *'There's a balance to be reached between winning the confidence of the great mass of players, who don't want to be treated like suspects in advance, and having whatever you can have as parts of an armoury to meet this serious threat.'*

So called “mystery shopper” investigations are of course contentious. Under English law the leading authority on the issue of entrapment (the name of the process whereby an investigator or law enforcer actually incites a suspect to commit an offence so as to produce evidence of their guilt) is **R v Loosely, Attorney General's Reference (No. 3 of 2000)**, where Lord Nicholls categorically stated:

'It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and to then seek to prosecute them for doing so. That would be entrapment ... The role of the courts is to stand between the state and its citizens and make sure this does not happen.'

Entrapment therefore potentially leads to proceedings being stayed where the Court considers the nature of the investigation amounted to an abuse of process; but not all entrapment is unlawful. Guidelines laid down by the Court in **Loosely** point to entrapment being legitimate where (i) the offences under investigation cannot be detected by normal means, (ii) the “entrapment” is not especially vulnerable and (iii) where the incitement of the investigating party relates to an unexceptional opportunity to commit a crime, and the entrapped person freely took it. Applying the principles of **Loosely** to sport, it seems “mystery shopper” investigations by Sports Integrity Units might be lawful, particularly where, as has happened, athletes have received education programmes about the danger of fixing and the need to report it to the authorities.

The MCC Committee's Report also endorsed de Speville's call for players' agents to be properly vetted and licensed. On cricket's special problem, that so much interest and betting on the game exists in the Indian subcontinent where betting is illegal so not licensed, the Committee considered calling for legalization of gambling, but concluded that for cultural and religious reasons this was impracticable and they considered anyway that gambling would still flourish away from regulated markets, were it legalized. The Committee emphasized the requirement for the ICC's ACSU and other national units to work with players closely, building up a relationship of trust, continuing with educational programmes with players *'The more the players can take ownership of the problem, the more chance there is of minimising or eradicating it'*. The Report also recommended *'Where not already in place, specific anti-corruption clauses should be included in players', officials', coaches' and administrators' contracts.'*

SGBs outside cricket have also been proactive. In May 2011 FIFA provided Interpol with a grant of £20 million over a ten year period towards investigations into irregular betting in football. The International Tennis Federation has its own Integrity Unit and Code of Conduct as do the other major sports. The Rugby Players' Association in collaboration with the Rugby Football Union has designed an educational course on fixing on which attendance is compulsory for players in the British Aviva Premiership. As part of their employment first class cricketers in England now have to do an online test before the start of the season to prove their familiarity with the Code of Conduct which contains a requirement to report any approach from fixers.

²³ [http://gamblingcommission.gov.uk/PDF/AnnualReport accessed 10/11/11](http://gamblingcommission.gov.uk/PDF/AnnualReport%2010/11/11)
²⁴ De Speville, B. (2012) A Review of the

Anticorruption Arrangements of the ICC, August 2011, reissued with amendments January 2012

10. CONCLUSION

The threat of fixing has been recognised and sport's fight-back is underway, but much remains to be done both in terms of evolving state regulation of sport and betting (better licensing of online gambling and statutory protection for competition organiser's rights), and the processes that are available to SGBs to stop future fixing (athletes' educational programmes) and uncover any that might have occurred (more use

of amnesties such as the recent one by the England and Wales Cricket Board). Cricket has in some senses led the way and if fixing is to be controlled it would seem likely that Sports Integrity Units have to adopt a proactive approach towards investigation and policing such as the "mystery shopper" technique recently recommended by the MCC World Cricket Committee and greater use of "unjust enrichment" laws.

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Practice Makes Perfect: An analysis of the World Anti-Doping Code 2009

by John O'Leary

Introduction

The reality of elite sporting competition today is that cheating in one form or another is relatively commonplace. No example of cheating however carries the stigma nor results in such punitive and emotive reaction as doping. For whatever reason, doping more than any other type of sports cheating, has transcended sport and entered the public domain. The public consciousness of anti-doping has been raised in part because of the stringent sanctions attached to such a breach and because the loss of a lucrative career often forces the hand of the sanctioned athlete to utilise appeal mechanisms built in to the regulations of sports governing bodies and, if unsuccessful, to seek recourse from the courts. For these reasons anti-doping and the law enjoy a complex and special relationship¹.

Over the past ten years anti-doping regulation has been radically revised. Two landmark regulatory models epitomise the rigorous approach the issue: the World Anti-Doping Codes of 2003 and 2009. The 2009 model contains some important amendments to the 2003 code. The objects of this chapter are twofold: to evaluate the importance of the World Anti-Doping Code (the Code) in the light of a changing legal and political landscape and to evaluate whether the 2009 Code improves on the 2003 model by satisfactorily balancing between the right of individual athletes to complete with the desire on the part of sports governing bodies to regulate effectively against those who seek to avoid anti-doping restrictions. In this context it is necessary to consider both the legal and the sport regulatory framework because, whether it is considered conceptually as a process of juridification or as an example of legal pluralism, the interaction between law and regulation has become so interwoven that the significance to the athlete of this distinction is practically irrelevant. Equally, as lawyers are actively involved in both the process of law and regulation, such a distinction might be considered more accurately as the difference between hard and soft law.

The changing legal and political landscape

It is important to observe the way in which, since 2003, the law has embraced the Code thereby further blurring the distinction between law and regulation. What in 2003 could have been perceived as little more than a professional code of conduct has now taken on a greater judicial and political significance. Courts, for many years, have condoned the use of the Code but tended to do so on the basis of Lord Denning's philosophy that 'justice can often be done... better by a good layman than by a bad lawyer'² as might befit an approach to the Code predicated on a view that such regulation covered merely internal sports disputes which, for the most part, were not worthy of legal intervention. Although the Court of Appeal in *Modahl v British Athletics Federation Ltd*³, did seem to strengthen the legal status of the Code by holding relationships between athletes and governing bodies was contractual and as a consequence, the Code constituted contractual terms,

it did so only on a majority. The strong dissenting judgment of Jonathan Parker LJ followed a line of argument promulgated by Lord Denning who, in cases such as *Nagle v Feilden* and *Lee v The Showman's Guild of Great Britain* expressed his concern that the identification of a contractual nexus in such situations was little more than a fiction.

This lowly legal status is now in need of reappraisal following the ECJ decision in *Meca-Medina v Commission of the European Communities*⁴. The European Court of first Instance agreed with the European Commission that the anti-doping rule fell outside the scope of European competition law. The ECJ disagreed and gave an important judgment which helps to establish the sphere of legal influence and also whether the anti-doping regulations contained within the Code are a proportional response to the perceived problem. The Court stated: 'although anti-doping regulations fall within the ambit of the law as an economic activity, they did not, on the facts, breach principles of proportionality under EU law.' It would be fair to state therefore, that those sporting bodies that draft anti-doping regulation that is broadly in conformity with the Code will not be susceptible to legal challenge. The Code allows for deviation in certain articles and it is here that governing bodies must beware if they deviate to any significant degree by making their regulations more stringent⁵.

The Code is not wholly justiciable. As Weatherill points out, the judgment brings the Code into line with other areas of sports regulation where the courts have been more active:

The same point, delivered in slightly different vocabulary and in relation to Art.39 not Art.81, is found in *E.C.L.R. 657 the Court's judgment in *Bosman* which accepts as "legitimate" the perceived sports specific anxiety to maintain a balance between clubs by preserving a certain degree of equality and uncertainty as to results and to encourage the recruitment and training of young players. And in *Deliege*, an Art.49 case, the Court accepted that selection rules limited the number of participants in a tournament, but were "inherent" in the event's organisation. Such rules are not beyond the reach of the Treaty, but they are not incompatible with its requirements.⁶

1 Ruijsenaars P et al Manifesto: "stop the doping inquisition!" I.S.L.J. 2007, 3/4, 84-85

2 *Enderby Town Football Club Limited v The Football Association Ltd* [1971] Ch591

3 2001 WL 1135166

4 (C-519/04 P) [2006] E.C.R. I-6991; [2006] 5 C.M.L.R. 18.

5 Subiotto R. *The adoption and enforcement of anti-doping rules should not be subject to European competition law* E.C.L.R. 2010, 31(8), 323-330; Pijetlovic

K. *Paragraph 31 of C-519/04 Meca-Medina reversed* I.S.L.J. 2009, 1/2, 137-138; Subiotto R. *How a lack of analytical rigour has resulted in an overbroad application of EC competition law in the sports sector* I.S.L.R. 2009, 2, 21-29; Manville A. *European court vs sports organisations - who will win the antitrust competition?* I.S.L.J. 2008, 3/4, 19-26; Szyszczak E. *Competition and sport* E.L. Rev. 2007, 32(1), 95-110; Baily D. *Taking the governance of sport out of court* S.L.A. & P. 2007, Jun, 5-6.

It is also important to note the growing status of WADA and its code, inter alia, through its acknowledgement by supra-national government organisations such as UNESCO. The UNESCO International Convention Against Doping in Sport⁷ states its purpose 'within the framework of the strategy and programme of activities of UNESCO in the area of physical education and sport, is to promote the prevention of and the fight against doping in sport, with a view to its elimination'⁸. The convention is interesting because it adopts, overtly, the WADA Code whilst asserting the primacy of the Convention where there is conflict⁹. Such conflict is inevitable as the Convention stands, referring as it does to the repealed 2003 Code. It also emphasises how little distinction there is between law and regulation. Article 3 of the convention confirms that state parties agree to adopt appropriate anti-doping measures, encourage cooperation and foster links 'in the fight against doping in sport, in particular with the world anti-doping agency'.

The need for anti-doping regulation

Long before the rise of WADA and its Code, the International Olympic Committee (IOC), was in the vanguard of the 'war' against dopers. The unyielding philosophy, and rhetoric, adopted by the IOC and the governing bodies was and is based on the premise that doping is contrary to the very essence of sporting competition. This philosophy which underpins all anti-doping regulation been adopted almost axiomatically by those who run sport. In 1999 the IOC reiterated 'its total commitment to the 'fight' against doping, with the aim of protecting athletes' health and preserving fair play in sport. Any declarations which go against these principles are both wrong and misplaced'.¹⁰

Although the IOC has long held these principles sacred, its influence over governing bodies was ineffective. As Beloff explains '... in my experience, rules of domestic or international federations tend to resemble the architecture of an ancient building: a wing added here; a loft there; a buttress elsewhere, without adequate consideration of whether the additional parts affect adversely the symmetry of the whole'.¹¹

The history of doping regulation in sport is littered with examples of governing bodies failing to draft their doping codes competently. Little thought was given to the compatibility of doping rules between sports. Also, governing bodies seemed unaware of how previous doping rules of their own sport interacted with new provisions. The danger was that a successful legal challenge could not only call into question the reliability of the testing procedure and encourage other athletes to initiate court action, but could also prove disastrously expensive for the domestic federation.¹² What was required was a effective international standard that could transcend such problems as athlete mobility because 'the problems of undertaking testing among an elite group of athletes who were increasingly mobile and who were likely to be in their native country, and therefore accessible by their national doping control officers, for only part of each year. Indeed there was a growing number of athletes who spent most of their elite career outside their home coun-

try. For example, world class Australian road cyclists spent most, if not all, of their time in Europe where the major events and teams were located. Much the same could be said for the increasing number of South American and African track and field athletes who followed the American and European calendar of competitions. Such a high level of athlete mobility required a set of anti-doping regulations that would prevent athletes exploiting the loopholes and inconsistencies found in the anti-doping regulations of various countries and domestic affiliates of international federations'.¹³

As a result of this, sport has harmonised the doping regulations of the various national and international governing bodies. The rise of the World Anti-Doping Agency (WADA) can be seen as a response to the inadequacies of earlier regimes and a realisation that successful anti-doping policies come at a price. From a jurisprudential perspective WADA might be viewed as one of many quasi-judicial global administrators and 'the extent that they develop a law-like quality, they do so after-the-fact, consequential upon the administrative tasks in which they are engaged. They develop substantive rules of conduct, and also procedural rules for decision-making and decision-accounting, but they lack any constitutive co-ordinates to underpin these substantive and procedural rules. In other words, they are non-autochthonous - unrooted in any state or other stable site of public authority or even at the contested boundaries between different sites of public authority, and instead generate such authority as they have purely out of the regulatory purposes that they pursue and practices that they develop'¹⁴.

The World Anti-Doping Code was first adopted in 2003 and became effective in 2004. The current World Anti-Doping Code became effective as of January 1, 2009. Article 23.1.1 states 'The following entities shall be Signatories accepting the Code: WADA, The International Olympic Committee, International Federations, The International Paralympic Committee, National Olympic Committees, National Paralympic Committees, Major Event Organizations, and National Anti-Doping Organizations. These entities shall accept the Code by signing a declaration of acceptance upon approval by each of their respective governing bodies'. Such is the influence exerted by WADA and the IOC, that participation by a sport at international level is virtually impossible unless that governing body is a signatory to the Code¹⁵.

The Code consists of a set of model regulations that aims to ensure consistency in the application of anti-doping regulation¹⁶. In its introduction it explains that 'The Code does not, however, replace or eliminate the need for comprehensive anti-doping rules adopted by each Anti-Doping Organization'¹⁷. While some provisions of the Code must be incorporated without substantive change by each Anti-Doping Organization in its own anti-doping rules, other provisions of the Code establish mandatory guiding principles that allow flexibility in the formulation of rules by each Anti-Doping Organization or establish requirements that must be followed by each Anti-Doping Organization but need not be repeated in its own anti-doping rules'. Article 23.2.2 clarifies which sections of the code must be incorporated 'without substantive change' into the regulations of the governing bodies. They include Art.1 (definition of doping), Art.2 (anti-doping rule violations), Art.3 (proof of doing) and Art.4.2.2 (specified substances). The 2009 Code differs from the 2003 Code in many respects but the key elements remain: out of competition testing, strict liability, proof of doping, banned substances and sanctions. The remainder of this chapter will focus on evaluating the 2009 code under these heads.

Out of Competition Testing

The 2009 code restates the position on out of competition testing introduced by the 2003 Code. Out of competition testing is an important element of anti-doping policy as doping substances and methods used in training may not be detectable at an event. Article 2.4 of the 2009 Code states that 'Any combination of three missed tests and/or filing failures within an eighteen-month period as determined by Anti-Doping Organizations with jurisdiction over the Athlete shall constitute an anti-doping rule violation'.

800 meter runner Christine Ohuruogu missed three out of competi-

6 *Bradley v Jockey Club* [2004] EWHC 2164 (QB); *Nagle v Fielden* [1966] 2 QB 633; *McInnes v Onslow-Fane* [1978] 1 WLR 1520; R. (on the application of Mullins) v Jockey Club Appeal Board (No.1) [2005] EWHC 2197 (Admin); Times, October 24, 2005 (QBD (Admin)); R. v Disciplinary Committee of the Jockey Club Ex p. Aga Khan [1993] 1 W.L.R. 909 (CA (Civ Div)); *Law v National Greyhound Racing Club* [1983] 1 W.L.R. 1302 (CA (Civ Div)); *Wilander and Another v Tobin and Another* [1997] 2 C.M.L.R. 346

7 Paris, 19 October 2005

8 Article 1

9 Article 2

10 Lausanne, 8 July 1999.

11 Beloff, M, 'Drugs, laws and versapaks', in O'Leary, J (ed), *Drugs and Doping in Sport* (2000), London: Cavendish, 40.

12 Houlihan, B, 'The World Anti-Doping

Agency: prospects for success', in O'Leary, J (ed), *Drugs and Doping in Sport* (2000), London: Cavendish Publishing, 128

13 *ibid*

14 Walker N. Out of place and out of time: law's fading co-ordinates Edin. L.R. 2010, 14(1), 13-46; Casini L. Global hybrid public-private bodies: the World Anti-Doping Agency (WADA) I.O.L.R. 2009, 6(2), 421-446.

15 For an interesting examination or non-compliance see CAS opinion CAS 2005/C/976 & 986, FIFA & WADA

16 The notion of one-size-fits-all is by no means universally popular. See Bailey D. The specificity of sport S.L.A. & P. 2009, Dec, 5-9; Farrow S. Team sports' issues with the WADA Code W.S.L.R. 2009, 7(6), 14-16

17 Charlish P. Cricket pair "not out" in doping row I.S.L.R. 2007, 4(Nov), 57-66



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tion test and was suspended for 12 months by a UK Athletics disciplinary committee. The impact of the suspension was greater still as another consequence was a lifetime Olympic ban. Her appeal was upheld on the basis of 'significant mitigating circumstances'. It was held that it was irrelevant that Ohuruogu had no intention to engage in doping activities or that no notice was given of the test (indeed the Committee upheld the surprise element is an important weapon against dopers). They did however concede that there was insufficient training and instruction available to athletes at the time (now rectified by the UK Anti-doping Advice Card 2010¹⁸). The Committee, conscious of opening the floodgates, did add that with improved education for athletes, such a ground of appeal would be likely to fail in future. Strong and logical arguments are put forward for the necessity of such a regime, however important issues remain around the validity of a draconian out-of-competition testing regime not least the right to privacy and a family life. With all due respect to sports' anti-doping aspirations, these rights, enshrined in the European Convention on Human Rights, are of rather greater importance. It remains the task of sports regulators to ensure that out-of-competition test regulations exhibit due deference to such principles¹⁹.

Strict Liability

The WADA Code 2009 retains the system of strict liability introduced in 2003. This means a positive test remains sufficient in itself to establish liability. The governing body would not have to show that the competitor or another person transmitted into the competitor's body a banned substance with the aim of achieving an increase in performance nor that the substance did actually increase performance.

A rule that a positive test leads to an automatic ban is attractive in its clarity and simplicity but denies what many would view as the fundamental right of an opportunity to show a lack of fault, knowledge or intent. In practice this means that even if an athlete could prove that the consumption of the drug was accidental or a result of malice on the part of another, she would still be in breach. Strict liability may appear to be a draconian provision but as the Court of Arbitration for Sport stated in their decision in *Quigley v UIT*:

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

Furthermore, it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently. Moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations - particularly those run on modest budgets - in their fight against doping²⁰.

The maintenance of the strict liability standard in the 2009 Code is clearly a pragmatic decision. The only problem arises when sport is faced with a set of circumstances where to find fault would be unconscionable; how strict then would strict liability be? Greg Rusedski tested positive for nandrolone that, it was established, derived from supplements given to him by his governing body, the Association of Tennis Professionals (ATP). In the light of these exceptional circumstances, Rusedski was exonerated. Although this appears a humane decision but as Charlish comments:

'However, what this decision has done is add an unnecessary layer of

uncertainty to an already difficult area. There must be clarity when dealing with this issue, and the principle of strict liability brought such clarity. The decision of the tribunal, in disregarding the principle of strict liability, and erring on the side of morality and justice rather than clarity and certainty may well have been a satisfactory result for Greg Rusedski, but it is one which individuals such as Dwain Chambers will look upon with a certain amount of anger. Tennis has, by this verdict, left itself open to charges of incompetence at best or cover-up and corruption at worst. It is a course of action that they may come to regret.'²¹

Proof of Doping

The standards of proof in establishing a doping infraction are prescribed in Article 3.1. of the 2009 Code. This appears to mirror the provisions contained in the 2003 Code:

'The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Articles 10.4 and 10.6 where the Athlete must satisfy a higher burden of proof.'

This Article needs to be read in conjunction with Art 3.2.1, which establishes a rebuttable presumption that the accredited laboratory conducted the analysis correctly. The effect is that once a positive finding had been made by the laboratory, the athlete faces an uphill task to disprove the allegations. The idea that the standard of proof is pitched somewhere between balance of probability and reasonable doubt might seem like a reasonable position in that the standard on governing bodies is higher than that required in a civil case but lower than the criminal standard of proof. In practice, however this definition may prove difficult to apply: does the balance lie exactly in the middle of the two standards? How, in practical terms, is this concept to be elucidated?

In addition to what are commonly known as the 'analytical findings' provision contained in the 2003 Code, the 2009 code also enhances important non-analytical methods by which a doping violation might be established²². Irrebuttable proof of doping may be 'established by a decision of a court or professional disciplinary tribunal of competent jurisdiction'²³ and that an adverse inference may be drawn from 'the Athlete's or other Person's refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel) and to answer questions from the hearing panel or the Anti-Doping Organization asserting the anti-doping rule violation'²⁴. Non-analytical methods move away from a scientifically verifiable standard. This would allow use of such evidence that emerged from a 2002 US Federal Government's investigation following the BALCO revelations.²⁵

18 To be found at the time of publishing at <http://www.ukad.org.uk/documents/uk-anti-doping-advice-card-2010/>

19 Editorial *BOA Appeals Panel: Christine Oburuogu v BOA* I.S.L.R. 2008, 2/3, SLR113. See also Soek J. *The athlete's right to respect for his private life and his home*. I.S.L.J. 2008, 3/4, 3-13. Horvath P. & Lording P. *WADA's International Standard for Testing: privacy issues* W.S.L.R. 2009, 7(2), 14-16.; Nicholson G. *Anti-doping and the World Anti-Doping Code: does one size fit all and is the whereabouts system fair, reasonable and efficient?* S.L.A. & P. 2009, Apr, 8-11.

20 This logic was affirmed by Blackburne J in *Gasser v Stinson* Lexisnexis, 15 June 1988

21 I.S.L.R. 2004, 3(Aug), 65-68; Taylor J. *The strict liability test in tennis after Rusedski*. W.S.L.R. 2004, 2(3), 3-7; Blackshaw I, *Why Strict Liability is Essential in Policing Doping* W.S.L.R. 2006, 4(11), 4-5. Ruskin B., Leader J & Sarinsky M. *NFL defends anti-doping policy against state employment law challenge* S.L.A. & P. 2009, Aug, 7-9

22 Roberts H. *BALCO and beyond: the changing landscape in the fight against doping in Sport* S.L.A. & P. 2007, Aug, 1-7.

23 Art.3.2.3

24 Art 3.2.4.; Morgan M. *Doping: sample collection - failure to submit to doping control* W.S.L.R. 2009, 7(11),

Banned substances

In order for a governing body to regulate doping in sport it is necessary that it is able to identify accurately those substances which are not permitted. The WADA banned list is exhaustive; giving not only a list of substances outlawed but also their metabolites (further substances present as a result of the body converting banned substances) and other 'related' substances. In most cases this prevents the athlete's representatives from distinguishing the substances discovered from those specified in the schedules.

The WADA Anti-Doping Code gives criteria for a substance's inclusion on the list. Although some may favour an attempt to justify logically why certain substances are on the list, others will see Art 4 as an attempt to justify the unjustifiable. Inclusion on the banned list is dependent on satisfying two of the three categories for inclusion. As the Code states:

WADA shall consider the following criteria in deciding whether to include a substance or method on the Prohibited List.

4.3.1 A substance or method shall be considered for inclusion on the Prohibited List if WADA determines that the substance or method meets any two of the following three criteria:

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. 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 described in the Introduction to the Code.

4.3.2 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.²⁶

It is very difficult to define the 'spirit of sport'; a concept that seems inherently subjective. Some cynics may conclude its violation encompasses any unacceptable conduct not caught by the other two categories. On the basis of Article 4.3, it is unlikely that the CAS will be of assistance in it clarifying its boundaries. Such nebulous phrases do little to enhance the credibility of the code. On the other hand, the concepts of unfair advantage and risk to health are well rehearsed.

Enhancing Sport Performance

On a philosophical level it is argued that taking drugs will give the taker an advantage over a competitor who has not taken drugs and therefore constitutes cheating.²⁷ Therefore, there are two grounds on which the prohibition of performance enhancing drugs may be justified. First, they give some athletes an unfair advantage over other athletes.²⁸ Secondly, they give the athlete an unfair advantage over the sport. Governing bodies run the risk that the image and validity of their sport would be undermined by a belief that their sport was conducted on an uneven playing field; this knowledge would lead to a damaging loss in popularity.

Whilst we may concur with these sentiments, eradicating all the unfair advantages that one participant may have over another may not only be impossible but also undesirable. Competitive sport is all about one athlete being better than another and therefore it is beneficial to have physiological and psychological differences between the participants²⁹.

There are many advantages inherent in, for example, the nationality of an athlete. The skier raised in Austria or Switzerland has an advantage over one raised in Belgium; the runner living at altitude over the runner at sea level; the height advantage of the average American basketball player over the average oriental player; or the technological, training and dietary advantages of the rich nation over the impoverished third world country. All of these factors are advantages and may be considered unfair in terms of sporting equality.

An alternative argument is that, rather than cheating fellow competitors, the drug taker is cheating 'the sport' itself. Clearly the essence of a sport would be compromised by certain breaches of the rules. It would be totally unacceptable for Usain Bolt to be beaten in an Olympic 100 metres final by a competitor riding a horse or for Tiger Woods to lose the Masters to a player with a radio controlled golf ball. As Gardner has questioned, 'would allowing unrestricted use of steroids in the 100 metres be somewhat like providing the participants with motorcycles?'³⁰

There are two problems with an affirmative answer. First, not all tactical or technical deviations from the norm are prohibited. Indeed there is a lack of uniformity in the equipment used in many sports (boots, racquets, bats etc). Secondly, the question presumes that performance enhancing drugs are an extrinsic aid unrelated to the skills and physical condition of the athlete. However, as their name would suggest, these drugs enhance performance, that is, they allow the athlete to reach their full potential; and so parallels with motorcyclists are difficult to sustain.

Can a competitor truly claim victory if it is achieved with the assistance of drugs? Victory is inextricably linked to rules. It is questionable whether the drug taking athlete has competed in the first place. Successful athletes are afforded a unique place in society. Sporting heroes are society's heroes. By heralding the success of a drugs-assisted athlete we are in danger of undermining society itself.³¹

Health Risks

There is no doubt that doping can damage your health³². To some sporting participants the side effects of these drugs outweigh the advantages of taking them. At the highest level, however, the competitive instincts of many participants may blind them to the dangers.

How justified are governing bodies in taking a paternalist approach to protect the welfare of sporting participants?³³ Traditional paternalist jurisprudence would argue that such approach is only valid if the effect of the prohibition is to protect those unable to make an informed and rational judgment for themselves or to prevent harm to others. An obvious example of the former would be a ban on the taking of performance enhancing drugs by children and junior athletes, yet the extension of the ban beyond this point is more difficult to justify. If the governing bodies genuinely wished to protect the health of sportsmen and women would they not introduce a provision which forbade a competitor competing whilst injured? Women's gymnastics would also need to be reviewed bearing in mind the incidence of arthritis and other diseases of the joints suffered by competitors in later life. There are also a number of contact sports which, by the nature of the activity, are likely to cause injury. No doubt the governing bodies of sport would argue that the risks of injury in certain sports are well known and that competitors are in some way consenting to the possibility of harm. The difficulty with this argument is that it could apply equally to doping.

It can be argued that drugs are not taken freely. Athletes are coerced into taking them by a belief that without them they would have little

25 See *USADA v Montgomery CAS* 2004/O/645,

26 Article 4.3

27 Simon, RL, *Fair Play: Sports, Values and Society* (1991), Boulder: Westview Press, Chapter 4.

28 Gardner, R, 'On performance enhancing substances and the unfair advantage argument' (1989) XVI *Journal of the Philosophy of Sport* 59; Brown, WM, 'Drugs, ethics and sport' (1980) VII *Journal of the Philosophy of Sport* 15; Brown, WM, 'Fraleigh performance enhancing drugs in sport' (1985) XI *Journal of the Philosophy of Sport* 23; Brown, WM, 'Comments on Simon and Fraleigh' (1984) XI *Journal of the Philosophy of Sport*, 14.

29 Oscar Pistorius, a disabled runner bidding to run against able-bodied athletes with the aid of prosthetic legs raised interesting issues of inclusivity and per-

formance enhancement. Wolbring G. *Oscar Pistorius and the future nature of Olympic, Paralympic and other sports*. SCRIPT-ed 2008, 5(1), Internet. FOR MORE ANALYSIS SEE PAGES XX-XX.

30 *Ibid*.

31 *Ibid*, p 68.

32 Although what is debatable is the quantities needed to do so.

33 Simon, RL, 'Good competition and drug-enhanced performance' (1984) XI *Journal of the Philosophy of Sport* 6; Brown, WM, 'Paternalism, drugs and the nature of sports' (1984) XI *Journal of the Philosophy of Sport* 14; Lavin, M, 'Sports and drugs: are the current bans justified?' (1987) XIV *Journal of the Philosophy of Sport* 34; and Fairchild, D, 'Sport abjection: steroids and the uglification of the athlete' (1987) XIV *Journal of the Philosophy of Sport* 74.

chance of sporting success.³⁴ However, there are many training regimes which athletes can and do reject on the basis that they may cause long term physiological damage: if injury is the mischief, it is difficult to understand why drug taking should be treated differently. On what basis then can society be justified in favouring the prohibition of performance enhancing drugs when intervention in an athlete's life can amount to a greater wrong than the risk of illness voluntarily accepted?

As the BALCO Enquiry has shown, no matter how comprehensive the list of banned substances, however, there is always the danger that the chemist will be one step ahead, altering the chemical structure of compounds so as to distinguish the drug from those encompassed by the regulations. An alternative to the ever-increasing list system would be to look generally for abnormalities in samples. This proposition, although clearly attractive in many ways, is fundamentally flawed. An athlete could argue that it becomes impossible to act within the rules of the governing body if it is unclear exactly what those rules are until they are broken. Whilst it is accepted that the introduction of such a system would enable WADA to ensnare the 'cheats', it may be at the expense of many innocent athletes.

Equally, the list contains some substances that would appear to have nothing but a negative effect on sporting performance - the so-called 'recreational drugs' typify this anomaly. For example, former Bath and England Rugby Union prop, Matt Stevens, can return to the game in 2011 following a two-year ban for testing positive for a substance alleged to be cocaine

Sanctions

It is in the area of sanctions that the 2009 Code has redeveloped anti-doping most significantly. Under Article 9 of the Code, a doping violation detected at a specific sport event results in the disqualification of the athlete from that event. However

If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's individual results in the other Competitions shall not be disqualified unless the Athlete's results in Competitions other than the Competition in which the antidoping rule violation occurred were likely to have been affected by the Athlete's antidoping rule violation.³⁵

Article 10 deals with sanctions above and beyond the immediate event disqualification. The regulations covering sanctions represent the most complex part of the WADA Code as they attempt to deal with a number of variables distinguishing between teams and individuals, different types of doping infractions and the various degrees of culpability. The 2009 Code has built greater flexibility into the system of sanctions, the compromise for which is an even greater degree of complexity: It states:

The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Prohibited Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:

First violation: Two (2) years Ineligibility.³⁶

The period of Ineligibility for anti-doping rule violations other than as provided in Article 10.2 shall be as follows:

10.3.1 For violations of Article 2.3 (Refusing or Failing to Submit to Sample Collection) or Article 2.5 (Tampering with Doping Control), the Ineligibility period shall be two (2) years unless the conditions provided in Article 10.5, or the conditions provided in Article 10.6, are met. 10.3.2 For violations of Articles 2.7 (Trafficking or Attempted Trafficking) or 2.8 (Administration or Attempted Administration of Prohibited Substance or Prohibited Method), the period of Ineligibility imposed shall be a minimum of four (4) years up to lifetime Ineligibility unless the conditions provided in Article 10.5 are met. An anti-doping rule violation involving a Minor shall be con-

sidered a particularly serious violation and, if committed by Athlete Support Personnel for violations other than Specified Substances referenced in Article 4.2.2, shall result in lifetime Ineligibility for Athlete Support Personnel. In addition, significant violations of Articles 2.7 or 2.8 which may also violate non-sporting laws and regulations, shall be reported to the competent administrative, professional or judicial authorities.

10.3.3 For violations of Article 2.4 (Whereabouts Filing Failures and/or Missed Tests), the period of Ineligibility shall be at a minimum one (1) year and at a maximum two (2) years based on the Athlete's degree of fault.³⁷

The Code allows athletes to argue mitigation in respect of the above sanctions depending on the degree of culpability. Sanctions can be reviewed on the grounds that: a specified substance gave the athlete no advantage³⁸; where there was no fault or negligence on the part of the athlete such as when an athlete's drinks bottle is contaminated by a rival competitor³⁹; or when there is no significant fault on the part of the athlete⁴⁰. The Code states specifically that the use of mislabelled or contaminated substances; the administration of banned substances by the athlete's trainer or doctor without the athlete's knowledge; or sabotage by one of the athlete's circle of associates (including the athlete's spouse) may not be invoked under Art.10.5.1. It is less clear whether these explanations will find favour under Art 10.5.2. as being a good explanation for departing from the expected standard of behaviour. Article 10.5.3 introduces more complex whistle-blowing mitigation:

An Anti-Doping Organization with results management responsibility for an anti-doping rule violation may, prior to a final appellate decision under Article 13 or the expiration of the time to appeal, suspend a part of the period of Ineligibility imposed in an individual case where the Athlete or other Person has provided Substantial Assistance to an Anti-Doping Organization, criminal authority or professional disciplinary body which results in the Anti-Doping Organization discovering or establishing an anti-doping rule violation by another Person or which results in a criminal or disciplinary body discovering or establishing a criminal offense or the breach of professional rules by another Person. After a final appellate decision under Article 13 or the expiration of time to appeal, an Anti-Doping Organization may only suspend a part of the otherwise applicable period of Ineligibility with the approval of WADA and the applicable International Federation. The extent to which the otherwise applicable period of Ineligibility may be suspended shall be based on the seriousness of the anti-doping rule violation committed by the Athlete or other Person and the significance of the Substantial Assistance provided by the Athlete or other Person to the effort to eliminate doping in sport. No more than three-quarters of the otherwise applicable period of Ineligibility may be suspended. If the otherwise applicable period of Ineligibility is a lifetime, the non-suspended period under this section must be no less than eight (8) years. If the Anti-Doping Organization suspends any part of the otherwise applicable period of Ineligibility under this Article, the Anti-Doping Organization shall promptly provide a written justification for its decision to each Anti-Doping Organization having a right to appeal the decision. If the Anti-Doping Organization subsequently reinstates any part of the suspended period of Ineligibility because the Athlete or other Person has failed to provide the Substantial Assistance which was anticipated, the Athlete or other Person may appeal the reinstatement pursuant to Article 13.2.⁴¹

Article 10.5.4 rewards co-operation:

Where an Athlete or other Person voluntarily admits the commission of an anti-doping rule violation before having received notice of a Sample collection which could establish an anti-doping rule viola-

34 Thomas, CE, *Sport in a Philosophic Context* (1983), Philadelphia: Lea & Febiger; Wertheimer, A, *Coercion* (1989), Princeton: Princeton UP.
35 ART.10.1.1
36 ART 10.2
37 Art 10.3
38 ART.10.4
39 ART 10.5.1
40 ART.10.5.2

tion (or, in the case of an anti-doping rule violation other than Article 2.1, before receiving first notice of the admitted violation pursuant to Article 7) and that admission is the only reliable evidence of the violation at the time of admission, then the period of Ineligibility may be reduced, but not below one-half of the period of Ineligibility otherwise applicable.⁴²

The sanctions above are also subject to increase on the grounds of aggravating circumstances⁴³. Overall, the system of sanction reflects more intelligently the range of circumstances that anti-doping institutions might face and gives those institutions greater flexibility in matching the appropriate violation with the appropriate sanction. WADA should be applauded for this development. Any system of regulation however must be clear and understandable in order that athletes and other parties might abide by them. The complexity in circumstances where there might be more than one offence either concurrently or consecutively or more than one head of mitigation is frightening. WADA deal with these scenarios with accompanying notes and tables but, no matter how erudite, they illustrate the difficulties in drafting law or regulations that are both just and simple⁴⁴.

The sanctions described above are drafted with the intention of ensuring a consistency of duration. They are not however, drafted to provide a consistency of sanction. A two year ban for athletes in some sports where the sporting career is short, gymnastics for example, is akin to a life ban. In other sports noted for the longevity of a competitor's career, equestrianism for example, the sanction merely interrupts a career. This is particularly so in individual competition where there is nothing to prevent the competitor from practicing and refining their skills during whilst banned:

During Ineligibility No Athlete or other Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any Signatory, Signatory's member organization, or a club or other member organization of a Signatory's member organization, or in Competitions authorized or organized by any professional league or any international- or national-level Event organization. An Athlete or other Person subject to a period of Ineligibility longer than four (4) years may, after completing four (4) years of the period of Ineligibility, participate in local sport events in a sport other than the sport in which the Athlete or other Person committed the anti-doping rule violation, but only so long as the local sport event is not at a level that could otherwise qualify such Athlete or other Person directly or indirectly to compete in (or accumulate points toward) a national championship or International Event.⁴⁵

The word 'activity' makes it clear that, as well as being banned for competing in competitions in that particular sport, the ban extends to other involvement such as coaching, and to other sports.⁴⁶ It is interesting to note that the 2009 Code acknowledges that to deprive an athlete banned for more than four years from undertaking another organised sport for recreational purpose is draconian beyond the point of necessity. Article 11.2 deals with team sanctions:

If more than two members of a team in a Team Sport are found to have committed an anti-doping rule violation during an Event Period, the ruling body of the Event shall impose an appropriate sanction on the team (e.g., loss of points, Disqualification from a Competition or Event, or other sanction) in addition to any Consequences imposed upon the individual Athletes committing the anti-doping rule violation.

The Future of Anti-Doping

It is clear from *Meca-Medina v Commission of the European Communities* that the law is prepared to play an active part in adjudicating on the lawfulness of anti-doping regulations. It is also clear however that the WADA code has been given the green light by the courts. Legal challenges by athletes on the basis of the codes substantive provisions are unlikely to succeed therefore. Challenges will remain possible

if the body or bodies charged with giving effect to the code fail to do so. These will be broadly procedural:

WADA's effort might be seen by some as the latest attempt of the sports world to immunise sports from state control. The situation is more complex, however. The adoption of a Code, which complies with the fundamental rights of athletes, was only made possible thanks to a broad consultation of all stakeholders. Indeed, as a result of such consultation, the concerns about fundamental rights were duly taken into account in the course of the drafting process. This represents a major step forward as opposed to an approach that ignores fundamental rights requirements and, thus, leaves the enforcement of such rights to the courts. In that situation, the only rights protected are those of the individual athlete who has access to a court willing to interfere in sports matters and who can afford legal proceedings. By contrast, all the athletes will benefit from the fundamental rights protection incorporated into the Code.⁴⁷

It is difficult to understand why it appears that only 'fundamental rights' are at issue. Why shouldn't a broader raft of rights, such as the right to be treated reasonably, fairly and equitably, be considered? The above authors claim that the code is not designed to immunise against the intervention of law but then justify the Code only in terms of identifiable legal rights. Certainly, in its preamble WADA does not attempt to promote the Code as a document protecting athletes' rights. Indeed, the only 'fundamental right' that the Code acknowledges athletes deserve is to 'participate in doping-free sport and thus promote health, fairness and equality for 'Athletes worldwide'.

Nevertheless, on balance, the 2009 Code is an improvement on the 2003 model, although there may be some interesting legal issues surrounding the imposition of a sanctions regime the complexity of which is daunting. Athletes may still seek legal redress as a matter of principle because an athlete who tests positive but is shown to be entirely without fault has still committed a doping violation (no fault does not vindicate the athlete - it merely goes to the severity of sanction). In any anti-doping code there will always be a degree of irreconcilability between the rights of athletes to compete freely and the rights of sport to regulate competition. The 2009 Code makes a much better attempt at balancing these tensions than the Code of 2003.

Anti-doping is far from a settled legal landscape however. New unresolved legal issues will emerge to ensure anti-doping remains a vibrant and interesting legal area. Some of these issues revolve around the ambit of anti-doping regulation; others relate to the increasing political influence over anti-doping matters. There is still some ambiguity about the culpability of trainers, doctors and other support staff and the degree to which the Code is lawfully binding on their activities⁴⁸ There may well be further judicial activity surrounding the termination of a contract of employment following a positive test and the quantum of damages owed by the athlete to the employer as a consequence. The CAS confirmed Chelsea Football Club's right to claim compensation from Adrian Mutu who was dismissed by the club following a positive test for cocaine in 2004.⁴⁹ There are also interesting legal issues surrounding privacy⁵⁰, free speech and a right to a home life. Given the nature of out-of competition testing which requires athletes to notify the relevant doping control of their whereabouts there are legal questions as to whether the Code complies with the right to privacy in the European Convention on Human Rights 1950 art.8⁵¹ There might also be judicial

41 10.5.3

42 Art 4.5.4

43 ART.10.6

44 Celli A., Valloni L., & Pentsov D.

Sanctions for anti-doping rule violations in the revised version of the World Anti-Doping Code I.S.L.J. 2008, 3/4, 36-42

45 10.10.1

46 As long as that other sport is a signatory to the Code.

47 Antonio Rigozzi, A, Kaufmann-Kohler, G, Malinverni, 'Doping and fundamental rights of athletes: comments in the wake of the adoption of the World Anti-

Doping Code' ISLR 2003, 3(AUG), 39-67.

48 Finlay A. Trainers, negligence and anti-doping rules W.S.L.R. 2010, 8(1), 6-7; O'Leary J & Wood R. Doping, doctors and athletes: the evolving legal paradigm I.S.L.J. 2006, 3/4, 62-66

49 Mutu v Chelsea Football Club Ltd Unreported July 31, 2009 (CAS) I.S.L.R. 2009, 4, 138-158

50 Verroken M. WADA's International Standard for the Protection of Privacy D.P.L. & P. 2008, 5(6), 9-11

activity relating to the retrospective impact of revelations of doping impropriety by retired athletes such as in autobiographies⁵² Such is the negative public profile of athletes involved in doping such an allegation is likely to lower them in the eyes of right-thinking people. Actions for defamation may well result on a more regular bases as athletes attempt to defend their reputation (and indeed their future commercial prospects)

- 51 Horvath P. & Lording P. WADA's International Standard for Testing: privacy issues W.S.L.R. 2009, 7(2), 14-16; Soek J. The athlete's right to respect for his private life and his home I.S.L.J. 2008, 3/4, 3-13; Nicholson G. Anti-doping and the World Anti-Doping Code: does one size fit all and is the whereabouts system fair, reasonable and efficient? S.L.A. & P. 2009, Apr, 8-11
- 52 Grove S. & Parks J. Sanctioning ex-athletes for autobiographical revelations W.S.L.R. 2010, 8(1), 4-5
- 53 See Reynolds v Times Newspapers Ltd [2001] 2 AC 127; Chapman v Lord

- Ellesmere and Others [1932] 2 K.B. 431; Cooke J. Doping and free speech E. & S.L.J. 2007, 5(2)
- 54 Lance Armstrong v Times Newspapers Ltd, David Walsh, Alan English [2005] EWCA Civ 1007
- 55 See for example Halgreen L. The Danish Elite Sports Act I.S.L.R. 2005, 3(Aug), 74-75; Hufschmid D. & Giesser T. Switzerland: Stricter rules against doping abuse in Swiss legislation project I.S.L.R. 2010, 1, 25-27; Ndlovu P. Anti-doping law in South Africa - the challenges of the World Anti-Doping Code I.S.L.J. 2006, 1/2, 60-63

in the face of media allegations reported on the basis of public interest⁵³. Such an action was brought successfully by Lance Armstrong in the Court of Appeal against the Times Newspaper following allegations that Armstrong had used doping substances⁵⁴.

Perhaps the most significant anticipated development however is the continued politicisation of doping activities. Symbolised by the Helsinki Report on Sport, one might expect greater political engagement with anti-doping which will result in calls for greater criminalisation of doping. The result to date is that many nations have enacted laws which specifically criminalise doping in sport⁵⁵. There are obvious difficulties in reconciling the WADA code with principles of criminal law at a national level not least the differing standards and burdens of proof and the notion of criminalising activities carried out in sport which would not necessarily be criminal in the non-sporting context. Nevertheless, the movement has already resulted in the increased involvement in anti-doping of international policing bodies such as Interpol and cross-border cooperation on anti-doping. This development, which on the face of it might seem to enhance the harmonisation of anti-doping policies might prove to be divisive in the long-term as countries with more liberal drug laws resist the establishment of global anti-doping crimes.

The International Sports Law Journal

Criminalization of trade and trafficking in doping substances in the European Union

by **Magdalena Kedzior**

Introduction

Although the answer to the question whether criminal or administrative sanctions shall be applied against trade and trafficking in doping substances, especially for personal use, remains a matter of political and personal approach¹, there have been clear regulatory steps taken on European level towards criminalization.² In the White Book on Sport (2007), under point 2.2., the European Commission clearly called member states to treat trade and trafficking in doping substances as illegal, same like trade and trafficking in illicit drugs.³ When holding EU presidency Slovenian sport Minister *Miran Zver* announced very clearly: "We need to develop one rule for the whole of the EU, so every country treats the issue the same. It cannot be illegal in one country and then not in another because the offenders are clever and exploit this". On the European Council summit in Athens in May 2009 the Commission once again called member states (which have not done it so far) to criminalize trade and trafficking in doping substances. What is more, the Commission urged member states to criminalize the possession of doping substances with the intention to spread them on the market.⁴ Such intention raises crucial questions about EU competence in the field of harmonization and criminalization of trade and trafficking in doping as well as regards the possible legal grounds for common action of the European Union in this field.

These abstract attempts to deliver answers to the question whether

the process of criminalization of trade and trafficking in doping substances on the EU level is legally feasible and if so, to what extent. It depicts reasons for the EU involvement in the area of trade and trafficking in doping and analyses the position of the EU Commission on the problem of trade and trafficking in doping substances. Moreover, it shows the outline of legal situation in the different member states of the EU. Finally respective Treaty provisions will be shortly analyzed in order to find possible legal grounds for criminalization of trade and trafficking in doping on the EU level. It is argued that such a common approach is currently possible only in certain aspects of the aforementioned problem.

Reasons for the EU interference

One may wonder why the EU shall interfere with the question of trade and trafficking in doping substances if some international organizations such as Council of Europe or UNESCO have already been involved. Numerous overlaps between the problem of drug trafficking for doping purposes and EU policies shall be mentioned in this context.

The general use and accessibility of drugs enhancing performance in recreational sports create a serious public health threat, especially to younger sportsmen (a subject of the EU policy laid down in article 168 of the Treaty on the Functioning of the EU - consolidated version). Anabolic steroids and other doping substances are relatively easy and

1 More on this subject Chr. McKenzie, The use of criminal justice mechanisms to combat doping in sport, Bond University, Faculty of Law, Sports Law eJournal, August 2007, available at <http://publications.bond.edu.au/slej/4>, [Accessed: 12.9.2011]; Further on the use of criminal law and approach to enforcement of anti-doping and anti-drug policy A. Ammos, Anti-Doping Policy: Rationale or Rationalization? The development of Anti-Doping Policy since the 1920s,

Lambert Academic Publishing 2009, pp. 124 et seq.

2 This happens after the years of denial of the EU competence in the field of anti-doping, see An Vermeersch, The European Union and the fight against doping in sport: on the field or on the sidelines?, Entertainment and Sports Law Journal [online], April 2006, available at <http://go.warwick.ac.uk/eslj/issues/volume4/number1/vermeersch/>, [Accessed: 13.10.2011].

3 In the area of general drug abuse the European Pact on international drug trafficking adopted by the Council on 3 June 2010, and the European Pact against synthetic drugs initiated by the Polish Presidency constitute the recent initiatives launched to clamp down on drug trafficking. European Commission, Brussels, COM(2011) 689/2, Communication from the Commission to the European Parliament and the Council, Towards a stronger European response to drugs

http://ec.europa.eu/justice/anti-drugs/files/com2011-6892_en.pdf, [Accessed: 11.10.2011]

4 EU Conference on Anti-Doping, Organized by the European Commission, Athens, Greece, 13 - 15 May 2009 Conclusions of the Conference, available at http://ec.europa.eu/sport/news/doc/athens_conf_conclusions_final_version_en.pdf, [Accessed: 11.10.2011].

cheap to obtain. In this context, the following figures are more than expressive: As much as 51% of Polish 17 years-olds claim that it is easy to purchase anabolic steroids (the most frequently used doping substance) and 39 % of them think, they could buy them if they only wished so. In France the same is claimed by 10% of teenagers and in Italy by 16 %. Once on the market, performance enhancing drugs are used in both professional and recreational sport.⁵ The 2011 Eurobarometer shows that young people can easily obtain even most harmful drugs within 24 hours.⁶

Moreover, trade, production and trafficking of illicit drugs represent (in some countries) forms of organized crime (also a subject of EU policy - article 67 TFEU), which the international community doesn't seem to have under control. The past few years have brought significant changes: the rapid emergence of new drugs as well as innovative distribution channels. Interpol believes that the traffic in performance-enhancing drugs, such as anabolic steroids, is bigger than that of marijuana, heroin and cocaine combined.⁷ Interestingly the routes doping substances are being trafficked from seem to follow these of "normal" drugs.⁸ Already in its Hardop (*Harmonization of Methods and Measurements in the Fight against Doping*) research project, in 1999, the European Commission identified these challenges in the combat of doping; one of them explicitly, was the lack of cooperation between different bodies: e.g. medical/laboratorial and prosecutorial.⁹ Such need for cooperation was confirmed, meanwhile, in the Commission's Communication to the European Parliament and the Council (2011).

Finally trade and trafficking in doping affects the common market of the European Union where the principle of free movement of goods and services is applied. Goods once placed on the market can circulate freely between all 27 member states of the EU. And in spite of the fact that the EU as a whole must be seen on a worldwide scale as an importer and consumer rather than as an exporter of doping substances it has apparently not developed - until now - a common strategy on the limitation of imports of substances that have a performance enhancing effect in sport.

The other overlaps between anti-doping policy and the EU law - like the fact that doping contravenes the principle of fairness in sport (another subject of the EU policy), will not be analyzed further here, as it goes beyond the scope of this abstract.

Position of the EU Commission on trade and trafficking in doping substances

In the light of the described phenomena, the EC Commission, urged by the European Parliament, published on the 11th July, 2007 a White Book on Sport,¹⁰ and its accompanying document, Pierre du Coubertin Action Plan,¹¹ setting more concrete goals in EU anti-doping policy.

The Commission proposed - under Sec. 2.2 - to join forces in the fight against doping, precising the role of the EU itself in this process and the means to be undertaken on the EU level.

First of all it must be stressed that the European Commission is not striving for criminalization of the use of doping by an athlete himself/herself. Also the problem of possession for the personal use is not the subject of interest for the Commission. Therefore the Commission focuses on the criminalization of acts prevailing to the doping use, like production, distribution and the widely understood traffic.

What is more, the European Commission assumes that the problem of doping in sport must be treated in a way similar to regular drug abuse.¹² Limitation of supply in forbidden substances can be achieved through several means. One of them is, according to the White Book provisions, strengthening of collaboration between law enforcement agencies: border guards, customs, national and local police etc. on national and international level for the purpose of exchanging information on trade and trafficking in doping.¹³ This kind of collaboration is legally regulated only in some countries, like Spain, Italy, and France but on international level there is a significant lack of any kind of such regulation. In the Communication published in October 2011 the European Commission pointed out that drug trafficking was one of the biggest cross-border law enforcement challenges in the EU.¹⁴

In order to fill this gap, the EC Commission proposed to involve Interpol for cross-border doping cases. Such involvement should rely on the collection and analysis of existing information on anabolic agents abuse and trafficking. Interpol, the oldest International Police Office, has signed, already 2006, an agreement of cooperation with WADA (World Anti Doping Agency) in this regard.¹⁵ There is also an agreement signed between Europol and Interpol on November 5, 2001. The European Parliament in its Resolution on the White Paper on Sport of 14.4.2008 mentioned Europol's proposed involvement in the fight against illicit-drugs trafficking. The European Parliament stressed, quite rightly, that before developing new partnerships (between Interpol and the EU) in the fight against doping, already existing networks (EU - Europol) should be reinforced.¹⁶ The legal possibilities of the Europol involvement will be depicted further in the abstract.

The demand for substances having enhancing effects in sport may be adequately diminished on the EU level by several means. One of them is better education and information for athletes, delivered in the form of special preventive programs, on the health risks connected with the use of doping (White Paper on Sport Accompanying Document to 2.2).¹⁷ Not every athlete is conscious that the use of certain drugs may even lead to death. There is a need to increase the accessibility and effectiveness of such preventive campaigns. In particular special attention should be paid to young athletes who are most at risk. Also better train-

5 The EU and Sport - Matching expectations, Consultation Conference of the European Commission with the European Sport Movement, Workshop Reports, Brussels 14/15 June 2005 available at http://ec.europa.eu/sport/library/doc/c5/doc322_en.pdf [Accessed: 5.10.2011], O. Berezowski, Sterydy - u ywka grzeźnych chłopców, available at <http://pozn.naszemiasto.pl/wydarzenia/785923.html>, [Accessed: 12.10.2011].

6 European Commission, Flash Eurobarometer Nr. 330, Youth Attitudes on Drugs.

7 J. Goodbody, Drugs in sport: War against doping to be boosted by Interpol, The Times October 04, 2006, [online], available at www.ergogenics.org/465.html, [Accessed: 18.10.2011].

8 A. Donati, *World traffic in doping substances* [online], available at http://www.wada-ama.org/rtecontent/document/Donati_Report_Trafficking_2007-03_06.pdf, [Accessed: 5.10.2011], p. 98.

9 A. De Merode, P. Schamasch, European

Commission Directorate General XII, *Harmonization of Methods and Measurements in the Fight against Doping*, (Hardop) - Final Report [online], Project SME4-1998-65-30, available at <http://ec.europa.eu/research/smt/hardop-en.pdf>, [Accessed: 15.10.2011].

10 European Commission, Brussels, 11.7.2007, COM(2007) 391 final, White Paper on Sport, available at http://ec.europa.eu/sport/white-paper/white-paper_en.htm, [Accessed: 12.10.2011].

11 European Commission, Brussels, 11.7.2007, COM(2007) 934 Commission Staff Working Document, Action Plan "Pierre de Coubertin" Accompanying document to the White Paper on Sport SEC(2007) 934 [online], available at http://ec.europa.eu/sport/white-paper/doc/sec934_en.pdf, [Accessed: 13.10.2011].

12 European Commission's new approach in anti-drug strategy available at ec.europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1236&type=HTML, [Accessed: 3.11.2011]

13 World Anti-Doping Agency (WADA) indicates that The Australian Anti-Doping Agency (ASADA) - functioning since 2006 - is an example of a well-working network. This organization is authorized to be informed by other public agencies that seize illegal substances. With the delivery of relevant information - e.g. the details of the intended recipient - the ASADA is able to identify athletes suspected of doping and then can concentrate its resources on them (so called targeted testing). Australian Model, available at <http://www.wada-ama.org/en/World-Anti-Doping-Program/Governments/Investigation-Trafficking/Investigations/Australian-Model/>, [Accessed: 10.10.2011].

14 European Commission, Brussels, COM(2011) 689/2, Communication from the Commission to the European Parliament and the Council, Towards a stronger European response to drugs http://ec.europa.eu/justice/anti-drugs/files/com2011-6892_en.pdf, [Accessed: 11.10.2011].

15 Andersen E.M., WADA and Interpol join

forces to combat doping, [online] available at http://playthegame.org/News/Up_To_Date/WADA_and_Interpol_join_forces_to_combat_doping.aspx [Accessed: 11.10.2011]

16 European Parliament, Report on White Paper on Sport of 14.4.2008, 2007/2261(INI), [online] available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2008-0149+0+DOC+XML+Vo//EN> [Accessed: 15.10.2011], in 2010 around a third of operational support provided by Europol to national law enforcement agencies was related to illicit drug trafficking. Europol, General Report on Europol Activities 2010.

17 European Commission, Brussels, 11.7.2007, COM(2007) 935 Commission Staff Working Document, The EU and Sport: Background and context, Accompanying document to the White Paper on Sport SEC(2007) 935 [online], available at http://ec.europa.eu/sport/white-paper/staff-working-document_en.htm, [Accessed: 11.10.2011].



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Sports Betting: Law and Policy

Edited by

Paul Anderson, Ian Blackshaw, Robert Siekmann and Janwillem Soek

With a Foreword by Tjeerd Veenstra, Director of the Dutch De Lotto and Second Vice-President of The European Lotteries.

Betting and sport have been – to some extent – uneasy bedfellows probably since the dawn of time. After all, the essence of sport is *fair play* and illegal and unfair betting arrangements and the manipulation of the outcomes of sporting events are completely anathema and contrary to this fundamental concept and principle. Of course, with preventive measures in place, sport and betting can – and do, in fact – co-exist for their mutual benefit. National lotteries raise substantial sums of money for “good causes”, which include the funding of sports events and sports persons. In the last decade sports betting has changed quite fundamentally with the advent of modern technology – not least the omnipresence of the Internet and the rise of on-line sports betting.

This book looks at the law and the policy on betting and sport in more than forty countries around the world. Several chapters deal with the United States of America. In addition, several contributions deal with the way national legislation on sports betting is scrutinized in the jurisprudence of the European Court of Justice.

Sports Betting: Law and Policy, a publication in which a mine of useful information on an important subject of national and international sports law is assembled, is heartily commended to sports lawyers and all others with a particular professional, academic and policy interest in the subject, including those who are involved in the organisation and administration of national lottery schemes benefitting sport.

The editing team consisted of Prof. **Paul Anderson**, Associate Director, National Sports Law Institute, Marquette University Law School, Milwaukee, United States of America, Prof. **Ian Blackshaw**, Member of the Court of Arbitration for Sport, Prof. **Robert Siekmann** and Dr **Janwillem Soek**, both of the ASSER International Sports Law Centre, The Hague, The Netherlands.

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Sports Marketing Agreements: Legal, Fiscal and Practical Aspects

by

Ian S. Blackshaw

With a Foreword by Prof. Paul Anderson, Associate Director, National Sports Law Institute, Marquette University Law School, Milwaukee, Wisconsin, USA

Sports marketing is not only a global phenomenon, but also a major industry in its own right. This book breaks new ground in that it combines the theory and the practice of sports marketing agreements, which are at the heart of the commercialisation and marketing of sport. A particular feature of this book is the wide-ranging collection of precedents of sports marketing agreements, including, *inter alia*, sponsorship, merchandising, TV rights and new media, sports image rights and endorsements, event management and corporate hospitality, that are included and are explained and commented on in the text of the book. The book also covers the EU aspects, which are particularly important in this context, especially collective selling, of Sports TV rights and the drafting of the corresponding agreements; as well as the fiscal aspects of sports marketing agreements in general and sports image rights agreements in particular, which need to be taken into account in order to reduce the tax burden on the resulting revenues. The book also deals with the important topic of dispute resolution and, again, provides the reader with some useful corresponding clauses for settling disputes by ADR, particularly through the Court of Arbitration for Sport (CAS).

Prof. **Ian S. Blackshaw** is a Member of the Court of Arbitration for Sport in Lausanne, Switzerland.

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CAS and Football: Landmark Cases

Edited by

Alexander Wild

With a Foreword by Prof. dr. Amaresh Kumar, Advocate, Supreme Court of India, New Delhi, and Secretary General of the Asian Council of Arbitration for Sport (ACAS)

This book deals with the most important decisions of The Court of Arbitration for Sport (CAS) in football disputes. These awards are analyzed by experts, practicing all over the world. Most of the authors were directly involved in the proceedings before the CAS. The commentaries cover a broad spectrum of disputes, such as contractual stability, protection of young football players, doping, football hooliganism, match fixing, players release, multiple club ownership, player agents and the stays of execution.

It fills a gap in the international sports law literature and provides an invaluable resource for all those involved in the legal aspects of the 'beautiful game', particularly extra-judicial dispute resolution, including administrators, regulators, football agents and their legal advisers. The book will also prove very useful to students and researchers in this particular field.

Alexander Wild is an Attorney-at-law at the Law Firm of Dr. Falkenstein & Partner, Stuttgart, Germany and a former research fellow of the ASSER international Sports Law Centre, The Hague, The Netherlands.

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ing for doctors on doping substances and methods is necessary, so that they may better understand the effects of doping on the human body. In this context the educational strategies of the EU may, and should be coordinated on the legal basis, which will be discussed later.

Other means the European Commission declares in the White Book on Sport that should be undertaken is support to the network of National Anti Doping Organizations (NADOs). Such support may surely have the form of financial and organizational help. It should be stressed that NADOs have been established in the EU member states after year 2000, as it turned out that the combat of doping within the private club system cannot succeed.¹⁸ The declared goal of building up the network was, in particular, to improve information-sharing and the coordination of the NADOs regarding EU-related issues. Coordination measures shall concern activities such as EU-wide campaigns in the field of anti-doping during European championships, and other preventive measures, such as educational campaigns in the Member States, and research.

The building up of the network of National Anti Doping Organizations shall serve one more goal indicated in the White Book. It will enable to develop a more coordinated approach to anti-doping policy on the EU level and therefore strengthen the role of the EU within World Anti Doping Agency structures.

The problem of trade and trafficking in doping in national legislations

Over the past two decades a number of West European countries have criminalized and penalized trade and traffic in doping substances and introduced - separate from narcotics and pharmaceutical laws - special legal acts which take into account the specificity of doping in sport.¹⁹

Already a superficial analysis of national legislations depicts that criminalization trends refer to actions such as: illegal production and distribution of doping substances (Sweden, Denmark) administration of doping substances to an athlete by athlete's related personnel (Spain), possession of doping substances in significant amounts (Germany, Spain). It must be stressed however, that there are remarkable regulatory differences within European national legal systems as far as the scope of criminalized acts and the severity of sanctions are concerned.

On the one hand there are Nordic countries with traditionally severe and detailed laws on trade and trafficking with doping. Legally forbidden acts are there i.a.: production (Denmark and Finland), import and export (Denmark), storage (Norway), offering for sale (Sweden), distribution, purchase and even simple possession of doping substances (Denmark and Sweden). In this aspect Danish and Swedish anti-doping laws have been since the 1990-ties comparable to antinarcotics law.

Traditionally strict criminal laws on trade and traffic in doping are in force in Italy and France as well. Both systems sanction the illegal trade and traffic with doping products with the imprisonment (Italy: from 3 months to 3 years, France: up to five years) or with a relevant penal fine, however for aggravating circumstances - as the participation in an organized crime group for the purpose of doping trade more severe sanctions are foreseen.

The tendency to criminalize trade and trafficking in doping sub-

stances has recently been confirmed e.g. though changes in Spanish and German legislations. Spanish law of 2005²⁰ prohibits e.g. the possession of doping substances in order to release them to the market. In 2006 article 361 bis of the Spanish Penal Code introduced the criminal liability of athlete's related personnel for facilitation to use, offering for use and administration of doping substance to an athlete. The time of imprisonment ranges from 6 months to 2 years.²¹ German anti-doping law²² prohibits, in article 2.3, the possession of *not small* amounts of doping substances with the purpose to apply it to humans. The doping offences are subject to sanctions ranging from one to three years of imprisonment.²³ Additionally, similarly to French and Italian systems, Spanish law introduced developed rules for the collaboration of different law enforcement agencies in doping cases.

The Polish Sports Law Act (2010)²⁴ does not set any special criminal rules on manufacturing of doping products.²⁵ According to art. 43 possession of a doping substance (art. 43 sec. 3) and administration of it to an athlete in the context of sporting competition (art. 43.sec. 4.) as well as placing a doping product on the market and participation in trafficking of prohibited doping substances (art. 43. sec. 6) constitute a doping offence subject to administrative sanction only. The Polish *liberal* legislator limited the criminalization of trade and trafficking in doping just to two cases: when doping is applied - in the context of a sporting competition or in the process of preparing to it - to minors (art. 50 sec. 1) and to those who are unconscious of the fact of being doped (art. 50 sec. 2). Sanctions to be imposed range from penal fine to limitation of freedom and imprisonment up to two years. Still in comparison to the other European countries the envisaged criminalization of trade and trafficking in doping in Poland must be evaluated as partial and limited.

The application of Lisbon Treaty provisions on trade and trafficking in doping substances

Different areas of the EU law provide legal grounds for the Union's action in the area covered by the White Book on Sport in the field of anti-doping. The study should be started with the Lisbon Treaty provisions on Sport. Article 165 (ex article 149 EC Treaty) of the Treaty on the Functioning of the European Union (TFEU), precised the role of the EU in the fight against doping in sports.²⁶ In Section 2 it stipulates that "*Union action (in sport policy) shall be aimed at: (...) - developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen...*". Notwithstanding the acknowledgement of EU competence as regards to anti-doping policy, art. 165 of the Treaty does not provide the EU with a mandate to act in any binding way towards the member states. In other words, the role of the EU stays clearly supportive and coordinative, completing measures taken on national or international level. Moreover, any harmonization of laws and regulations of a member state is explicitly excluded as the only legal instrument stipulated by art. 165 is the Council's recommendation. Consequently it cannot be treated as a possible legal basis for future criminalization of trade and trafficking with doping.

In spite of its general nature, art. 165 TFEU may have some practical

18 NADA Germany was founded in 2002; Spanish AEA (Agencia Estatal de Antidopaje) in 2006. NADOs are independent bodies, responsible in general for anti-doping preventive policies, out of competition controls, and representative functions on international level. Though in some countries - like Poland - there are still governmental authorities designated to perform these tasks.

19 K. Vieweg, R. Siekmann, Legal Comparison and Harmonization of Doping Rules, Pilot Study for the European Commission, Berlin 2007, pp. 108 et seq.

20 Public General Act on the protection of health and the fight against doping in sport 2006/7, of 21st November, available

at <http://www.boe.es/boe/dias/2006/11/22/pdfs/A40859-40879.pdf>, [Accessed: 30.10.2011] provides an area of criminal protection for public health in activities related to doping in sport. A new section 361 bis has also been introduced into the Spanish Penal Code, Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal [available at: http://noticias.juridicas.com/base_datos/Penal/1010-1995.l217.html, Accessed: 30.10.2011] whose aim is to punish the environment of the sports person and preserve public health, seriously threatened by the uncontrolled selling and dispensing, without any guarantee, of products that are harmful to health.

21 Higher penalties are foreseen for the

application of doping to minors or to the sportsmen who are unconscious of the fact of being doped. Apart from criminal sanctions Spanish law provides professional bans for persons employed in a public health sector, in case of being accused of the doping use in sport.

22 Gesetz zur Verbesserung der Bekämpfung des Dopings im Sport of Oktober 24, 2007 is applied strictly to doping use in sport. Before the general provisions of medicines law were used in this context. See Bundesgesetzblatt 2007, Teil I, Nr 54, p. 2510.

23 Higher penalties may be imposed when trading activity is aimed at achieving a significant economic profit, creates threat to life/health of significant amount of peo-

ple, involves an action within an organized, criminal group etc.

24 Official Journal, DzU nr. 127, poz. 857.

25 In this aspect provisions of the Bill on the Combat of the Drugs Misuse (2005) and the Bill on Pharmaceuticals (2001) apply, however they do not refer explicitly to the drugs misused for doping purposes.

26 The Treaty establishing the European Community (TEC, Rome), has been renamed by the Treaty of Lisbon - signed 13.12.2007 - into Treaty on the Functioning of the European Union (TFEU). The European Union Treaty (EUT) stayed in force as the second legal basis for the functioning of the EU.

importance for the development of EU anti-doping policy. It constitutes a legal basis for the subsidiary role which the EU should play in this area. Accordingly, recommendations issued on the basis of art. 165 may suggest to law enforcement agencies operating in the member states a desired course of action in anti-doping policy. Programs aimed at networking, training courses for law enforcement officers, and EU-wide anti-doping preventive-measures campaigns, may coordinate efforts taken by the member states. It seems that the sharing of information, the exchange of resources and best practices between different bodies involved in anti-doping, may be achieved by legally non-binding acts like recommendations or resolutions. For instance, also in the field of general drug abuse, the cooperation between customs and police is regulated on EU level by the Council Resolution of 29 November 1996.²⁷

Another legal basis which must be analyzed as regards criminalization of trade and trafficking in doping is article 168 TFEU (former article 152 EC Treaty), according to which Community action is directed towards improving public health and obviating sources of danger to health. According to article 168 TFEU a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities. The Community complements member states' action in reducing drugs-related health damage, including information and prevention as well as by adopting incentive measures for cooperation between member states. It should be noted in this context that Union's legislative competence set out in art. 168 sec. 4 c excludes for now any harmonization of national laws in the member states. The legal measures introduced on this basis include mostly decisions aimed at establishing programs on protection and improvement of human health.²⁸ The establishment of liability for actions such as possession of doping substance or administration of it to an athlete, in a legally binding act (decision) issued on the basis of art. 168 cannot be excluded entirely, however, it remains questionable as no such action has been performed so far. Moreover, in the field of public health the Council may also adopt recommendations for the purposes set like the sharing of information between relevant law enforcement agencies and sports entities on doping. As doping in sport poses a threat to public health, special programs may also be included in the Union's Public Health protection policy.

As next, provisions which regulate the functioning of the internal market in the EU should be taken into account as future legal basis for the regulation on trade and trafficking in doping. According to article 114 TFEU (former Art. 95 EC Treaty) the Council adopts measures for the approximation of provisions laid down by law, regulation or administrative action in member states which have as their object the establishment and functioning of the internal market. Like in the field of narcotics, trade and trafficking in doping substances affect the internal market. The harmonization of measures for controlling the manufacturing and placing on the market of certain chemical substances frequently used in the production of illicit doping drugs is therefore possible on the basis of article 114 of the Treaty. As for secondary EC law, relevant

questions are raised by the narcotics Council Regulation 273/2004 of 11.02.2004.²⁹ It contains rules on licensing, labelling and customer declaration on the use of the purchased substances which are listed in the annex. Similarly, external aspects of the imports of the drug precursors are covered by Council Regulation 111/2005 of 22.12.2004, laying down rules for the monitoring of trade between the Community and third countries.³⁰ The Regulation requires all importers of drug precursors to be licensed and to label and properly document the import of these substances. The member states have been committed to bring legal proceedings against anyone infringing rules laid down in the Councils regulation. Relevant legal action in relation to substances having a performance-enhancing effect in sport, which may conditionally be found in legal trade but do not belong to the group covered by the afore mentioned regulations of the Council, seems possible and desired.

Regarding criminal aspects of drug trafficking, attention should be paid to art. 83 et seq. of the European Union Treaty. According to the Treaty (art. 29) one of the EU objectives is the combat of illicit drug trafficking through approximation, where necessary, of rules on criminal matters in the member states. The Lisbon Treaty defines drug trafficking as one of the "particularly serious crimes with a cross border dimension", which justify the adoption of directives establishing minimum rules.³¹ The currently applicable secondary legal act is the Council Framework Decision 2004/757/JAI³² of 25th October 2004, on the establishment of minimum rules relating to drug trafficking.³³ The purpose of this Framework Decision was to combat drug trafficking so as to limit the supply and consumption of drugs. It laid down minimum rules to be observed by member states. The text begins with a list of punishable acts relating to drug trafficking. It obliged member states to take measures against natural persons involved in such trafficking. Finally, it laid down minimum penalties for acts linked to drug trafficking, including production, manufacture, extraction, sale, transport, importation and exportation. Possession and purchase with a view to engage in activities linked with drug trafficking were also taken into account. Nevertheless the Commission's assessment of the implementation of the Framework Decision has shown that this instrument has scarcely led to any approximation of national measures in the fight against drug trafficking.³⁴

With regard to the subject of this paper it should be noted that the Commission's Communication proposing the Framework Decision 2004/757/JAI made a clear distinction between the transfer of drugs for profit which would constitute drug trafficking, and the transfer of drugs other than for profit, which would be treated in the same way as action deemed to constitute personal consumption.³⁵ The scope of the framework decision should exclude (i) simple users who illegally produce, acquire and/or possess narcotics for personal use and (ii) users who sell narcotics without the intention of making a profit (for example, someone who passes on narcotics to their friends without making a profit). It can be assumed that the new EU legislation on this subject shall maintain the aforementioned principles.

Coming back to the question of fighting doping in sport, the next step is to decide whether legally binding action in this field - similar to the action taken by the EU in relation to narcotics - is possible on the basis of the reformed TFEU. Trade with substances having a doping effect is, however, not mentioned in article 83 TFEU - just general illicit drugs trafficking. In order to include trafficking in doping substances into the scope of EU legal responsibility, the Council would apparently have to adopt a decision identifying those areas of crime. It shall, according to art. 83, act unanimously after obtaining the consent of the European Parliament. If so, on a European level, the trading and trafficking in forbidden doping substances might be combated by issuing binding acts harmonizing criminal sanctions.

The changes introduced by the TFEU (new Title V - Article 67) may facilitate the combat of trade and trafficking of doping substances by giving the European police greater competence in this area. According to Art. 88 TFEU Europol's mission has been to facilitate the cooperation between police forces from different member states in combating particular serious crime. For now however, as we may assume, trade and trafficking in doping is explicitly not included in the list of serious crimes

27 Official Journal C 375 of 12.12.1996.

28 P. Saganek, *Ochrona zdrowia* (in:) J. Barcz (edit.), *Prawo Unii Europejskiej. Zagadnienia systemowe, prawo materialne i polityki*, Warszawa 2005, pp. 292 et seq.; M. Kondrat, *Zdrowie Publiczne* (in:) K. Kowalik-Banczyk i M. Szwarc-Kuczer (edit.), *Traktat ustanawiający Wspólnoty Europejskie*, Warszawa 2009, pp. 1130 et seq.

29 Official Journal L 074 of 18.02.2004.

30 Official Journal L 22 of 26.01.2005.

31 According to art. 83 TFEU "The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime.

32 Council's Framework decision laying

down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking OJ L 335 of 11.11.04.

33 Already in the Resolution 97/C 10/02 of 20 December 1996 on sentencing for serious drug-trafficking the Council called member states to ensure that their national laws provide for the possibility of custodial sentences for serious illicit trafficking in drugs that are within the range of the most severe custodial penalties imposed by their respective criminal law for crimes of comparable gravity.

34 COM (2009), 669 and SEC (2009) 1661.

35 Commission's Proposal for the Framework Decision 2004/757/JAI Com/2001/0259 final - CNS2001/0114, Official Journal C 304E of 30 October 2001, pp. 0172-0175.

falling into the competence of Europol. Only trade with narcotics is mentioned. So only if the Council adopts unanimously an appropriate regulation extending the competence of Europol relevant action would be possible.

Conclusions

As shown, the increased problem of trade and trafficking in doping substances has entailed the criminalization trends in some member states of the EU and lead to emergence of the political will to tackle this phenomenon on a common basis within the EU. The commitments laid down in the White Book on Sport by European Commission; seem to show the direction taken by the EU. However, as the already cited Slovenian Minister of Sport stated: "a lot more work had to be done". The approximation of laws in the member states can be, in the context of the trade and trafficking in doping substances, achieved in several aspects. Bearing in mind that there are no legal instruments in European Union law enabling criminalization of doping act as such, what exactly, on the basis of the commitments made by the European Commission, and within the available legal framework of the treaty, can be expected?

In the areas concerning internal market - like production, trade and trafficking with doping substances and its precursors which can be available in controlled trade - member states can be obliged by a EU legal act to provide internal administrative provisions regulating the market (e.g. by licensing) and to adequately establish sanctions for infringe-

ment of the domestic law, as it has been done in relation to narcotics.

Furthermore the EU may take advantage of its competences in the field of protection of public health and issue legally binding act obligating its member states to prohibit and sanction trafficking offences and acts preparatory to the illicit drug use in sport. If countries are allowed to determine the type of penalty the approximation of laws has only a partial character, so that the prohibition to issue harmonization measures on the basis of article 168 TFEU could be avoided.

Establishment of minimum rules (sanctions) relating to offences in trafficking of doping substances on EU level within the Chapter VI of the European Union Treaty (art. 83 TFEU) seems to be much more complex, as it would require the legal acknowledgement of trafficking in doping as criminal offence on EU level. This would further enable the criminalization and harmonization of laws proposed by the European Commission and cause the existing differences between member states to diminish.

Much more likely for the time being is that the European Commission, using the opportunities provided by the Lisbon Treaty, will present stronger and more effective legislative proposals referring to general illicit drug trafficking. This would apply to significant amount of illicit drugs which are in the same time banned as substances having performance enhancing effect in sport.

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What Role for the International Olympic Committee?

The Unrepresentative and Discriminatory Governance Structure Of Cycling

by Lloyd Freeburn

1. Introduction

The Union Cycliste Internationale (UCI) is the international sporting federation (IF) recognised by the International Olympic Committee (IOC) for the sport of cycling.¹ The UCI governs world cycling and will administer the four forms of cycling that will feature in the 2012 London Olympics - track, road, mountain bike and BMX.² It is contended that in doing so, the UCI will be operating under a structure that is flawed in being both unrepresentative and discriminatory in that it favours its European members to the prejudice of all other members of the organisation. These arrangements lack any objective justification and are in conflict with anti-discrimination provisions in the UCI's *Constitution*³ and *Rules of good governance*.⁴ The UCI's organisational structure is also unlike the arrangements made by any of the other IFs involved in the 2012 London Olympic Games or those of other major world sports. Significantly, it is also in conflict with the provisions of the *Olympic Charter*.⁵

This article examines the UCI's organisational arrangements beginning with a description of the anti-discrimination provisions that apply. It then examines the justifications for those arrangements, compares the arrangements of the UCI with those of other IFs and explores possible avenues for challenges to the provisions of the UCI *Constitution* that are argued to be discriminatory. Finally, it is suggested that the IOC has a significant role to play in addressing the situation in cycling as part of its role in securing compliance with the *Olympic Charter*.

2. ANTI-DISCRIMINATION REQUIREMENTS

2.1 Olympic Charter

The *Olympic Charter* sets out the *Fundamental Principles of Olympism*.⁶ In addition to codifying the *Fundamental Principles*, the *Olympic Charter* also establishes the other rules that together are to 'govern the organisation, action and operation of the Olympic Movement'.⁷ As one of the three main constituents of the Olympic Movement, International Sports Federations (IFs)⁸ such as the UCI are required to comply with the Olympic Charter and with decisions of the IOC.⁹

One of the *Fundamental Principles of Olympism* is that 'Any form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic Movement'.¹⁰

Another of the *Fundamental Principles of Olympism* provides a level of autonomy to IF:

'Recognising that sport occurs within the framework of society, sports organisations within the Olympic Movement shall have the rights

and obligations of autonomy, which include freely establishing and controlling the rules of sport, determining the structure and governance of their organisations, enjoying the right of elections free from any outside influence and the responsibility for ensuring that principles of good governance be applied'.¹¹

This autonomy for the constituents of the Olympic Movement in determining their structure and governance is limited. It is confined by the requirement of the *Charter* for 'the statutes, practice and activities of the IFs within the Olympic Movement [to] be in conformity with the Olympic Charter'.¹² When read together, the *Olympic Charter* allows the UCI, as an IF recognised by the IOC, the freedom to determine its own structure and constitutional arrangements. It must however ensure that its structure and Constitution are not discriminatory.

2.2 The Uci Constitution

Similar to the requirements of Principle 6 of the *Fundamental Principles of Olympism*, Article 3 of the UCI *Constitution* requires the UCI to carry out its activities in compliance with the principle of 'equality between all the members ... without racial, political, religious, or other discrimination'.¹³ The UCI also claims to elect 'its bodies with the strictest respect for the principle of democracy, enabling equal representation of all those involved in the cycling world'.¹⁴ As will be seen, this claim is not reflected in the organisation's arrangements.

3. Organisational Arrangements of the UCI

3.1 Structure Of UCI

In common with other major IFs,¹⁵ the UCI Constitution establishes a tiered structure for the administration and governance of the organisation. The members of the UCI are the national cycling federations from each country admitted as members.¹⁶ One federation per country may be admitted¹⁷ with the UCI comprising approximately 180 members.¹⁸ The highest authority within the UCI is the Congress which is the general meeting of members.¹⁹ Congresses are held annually.²⁰ Its principal functions are to elect the members of the UCI Management Committee, to receive reports from the Management Committee, to admit and expel Members, and to amend the Constitution.²¹

An annual meeting is obviously inadequate to manage an international sporting federation. Accordingly, the UCI is actually managed by its Management Committee, 'under the authority of the Congress'.²² The powers of the Management Committee include organising and executing the decisions of the Congress, making up the budgets of the

1 International Olympic Committee, <http://www.olympic.org/uci-cycling-bmx> accessed 24 February 2012.

2 London 2012, <http://www.london2012.com/sport> accessed at 21 February 2012.

3 UCI, UCI Constitution, 1 October 2010, <http://www.uci.ch/Modules/BUILTIN/getObject.asp?MenuId=MTkzNg&ObjTypeCode=FILE&type=FILE&id=34040&LangId=1> accessed 7 March 2012.

4 UCI, *UCI Rules of good governance* <http://www.uci.ch/Modules/BUILTIN/getObject.asp?MenuId=MTkzNg&ObjTypeCode=FILE&type=FILE&id=MzQxMDk&LangId=1>, accessed 28 February 2012.

5 International Olympic Committee, *Olympic Charter*, 8 July 2011,

http://www.olympic.org/Documents/CACHE_DUVIE=397c96170ber6dd88ef6a95624602a4c/olympic_charter_en.pdf accessed 24 February 2012.

6 Ibid, at 10-1.

7 Ibid, Introduction to the Olympic Charter, page 8.

8 The other two are the International Olympic Committee (IOC) and National Olympic Committees (NOCs): Ibid, Rule 1.2..

9 Ibid, Rule 1.4. Principle 7 of the *Fundamental Principles of Olympism* also provides that 'belonging to the Olympic Movement requires compliance with the Olympic Charter'.

10 Ibid, Principle 6.

11 Ibid, Principle 5.

12 Ibid, Rule 25.

13 UCI *Constitution*, Note 3 above.

14 UCI, *UCI Rules of good governance*, Note 4 above, Rule 3. A principle of equality between members could reasonably be presumed to require equal voting rights for the member National Federations within the UCI. Further support for this proposition is found in Rule 2 in which the UCI claims to guarantee 'to respect the equality of all parties placed under its authority, without racial, political, religious, or any other discrimination'.

15 The UCI's tiered structure is generally consistent with structure adopted by the IFs listed in Appendix A although it differs in significant other respects.

16 Article 4, *UCI Constitution*, Note 3 above.

17 Article 5, *UCI Constitution*, *ibid*.

18 The precise number varies as Member Federations are added under Article 10 and removed under Articles 19 and 21 of the *UCI Constitution*. Different sources have been accessed to determine the number of UCI Members and these sources may vary according to the timeframe to which they relate. The slight differences in numbers from time to time are not material for the purposes of the discussion in this paper.

19 Article 27, *UCI Constitution*, Note 3 above.

20 Article 28.1. *ibid*. Extraordinary Congresses may also be convened: Article 28.2.

21 Article 29, *ibid*.

22 Article 45, *ibid*.

Column 1	Column 2	Column 3	Column 4
UCI Continental Confederation	Member Federations	UCI Congress Votes	'One vote, one value' voting entitlement
Asian Cycling Confederation	41 nations ³⁴	9 delegates	10 delegates
European Cycling Union	48 nations ³⁵	14 delegates	11 delegates
Oceania Cycling Confederation	4 nations ³⁶	3 delegates	1 delegate
Pan American Cycling Confederation	45 nations ³⁷	9 delegates	10 delegates
African Cycling Confederation	43 nations ³⁸	7 delegates	10 delegates
Total	181³⁹	42	42

Table 1

organisation for submission to Congress, contracting with third parties, engaging staff, establishing regulations for cycling and establishing subcommittees necessary for the functioning of the UCI.²³ There is also a smaller Executive Committee which is responsible for managing the 'routine and/or urgent business of the UCI'.²⁴

The other significant internal bodies of note within the UCI are the five Continental Confederations. Federations from the same continent are grouped together in a Continental Confederation as 'an administrative unit and integral part of the UCI'.²⁵ The role of Continental Confederations is to 'promote the development of cycling in their respective continents'.²⁶ While responsible for submitting proposals for cycling activities to the Management Committee,²⁷ they are not required to meet more than once every four years.²⁸

3.2 The Allocation of Voting Power Within the UCI

The UCI inaccurately claims that its Congress is 'made up of delegations from National Federations, who vote through their voting delegates'.²⁹ In fact, the members of the UCI are not provided with voting rights - equal or otherwise.

It is true that the UCI is an association of NFs.³⁰ These NFs are legal entities that are separate from the UCI.³¹ But unlike the NFs', the UCI's Continental Confederations have no independent existence. They are merely the collection of UCI members located in each relevant geographic area for the administrative purposes of the UCI.³² The role of the organisation is to represent the NFs, not the Continental Confederations. Yet, none of the members get the right to directly vote on any matter. Voting is allocated to the Continental Confederations instead of each member of the UCI.³³ There are only 42 Congress votes and these votes are allocated to the Continental Confederations as shown in Table 1.

If each member of the UCI is to be regarded as equal, then through a 'one member, one vote/value' approach, the distribution of votes

between Continental Confederations would proportionally reflect the number of UCI members within that Confederation. A comparison of the actual number of votes allocated to Confederations (Column 3) with what they should be according to equal voting rights for members (Column 4) shows that the Asian, Pan American and African Confederations all receive less votes that they should on this approach. On the other hand, the European and Oceania Confederations receive more votes than they should.

Perhaps more significantly, under this arrangement, a member of the UCI is never guaranteed that its view will be reflected in any vote within the UCI - unless those views are in line with the votes cast by its Continental Confederation. This is because for the purpose of voting, the voting delegates from the Continental Confederations are the Confederation's delegates, not the delegates of the NF to whom the delegate belongs. For example, the 14 Delegates to the UCI Congress from the European Continental Confederation (UEC) are the delegates of the UEC, not the particular NF that they represent within the UEC. As such, these delegates are required to 'respect the decisions of the UEC General Assembly'.⁴⁰ These delegates would therefore be required to vote as directed by the UEC General Assembly regardless of their own views or the views of any other member of the UEC.

The inequality and disenfranchisement of members established by the method of allocation of voting power to Continental Confederations within the UCI is then compounded by the way in which the Management Committee is selected.

3.3 The Uci Management Committee

The principal decisions within cycling are made by the UCI Management Committee. Congress meets only once a year and largely determines membership issues, elects the President and the Management Committee and otherwise receives reports from the Management Committee.⁴¹ It is the Management Committee that makes

23 Article 46, *ibid.*

24 Article 58, *ibid.*

25 Article 23, *ibid.*

26 Article 24, *ibid.*

27 Article 24.2, *ibid.*

28 Article 25.2(a), *ibid.*

29 UCI, *UCI Rules of good governance*, Rule 3, Note 4 above. The *Rules of good governance* are further misleading in claiming that its members 'have the right to vote': Rule 4.

30 UCI Constitution, Article 1.1, Note 3 above; UCI, *UCI Rules of good governance*, Rule 1, Note 4 above.

31 They are required to apply for membership of the organisation and detailed regulations regarding the recognition of NFs are established by the *UCI Constitution*, Chapter II, *ibid.*

32 Chapter III, *UCI Constitution*, Note 3 above.

33 *Ibid.*, Article 36. The Continental Confederations are required to establish a procedure for the allocation of the votes exercisable by the Confederation at the UCI Congress: Article 25.2(c).

34 Asian Cycling Confederation, <http://asiancycling.com/> accessed at 7

February 2012.

35 The European Cycling Union, <http://uec-federation.eu/> accessed at 7 February 2012.

36 Alain Siegrist, Financial Director, *UCI Financial Report 2010*, <http://www.uci.ch/Modules/BUILTIN/getObject.asp?MenuId=&ObjTypeCode=FILE&type=FILE&id=NzMrMDE&LangId=1>, page 2, accessed at 7 February 2012. This report indicates that at 31 December 2010 there were 176 UCI Member Federations.

37 Pan American Cycling Confederation,

http://www.copaci.co.cu/index.php?option=com_content&view=article&id=24&Itemid=75 accessed at 7 February 2012.

This number varies from the 40 Members ascribed to the Americas in the *UCI Financial Report 2010* in Note 34 above and may apply to a different timeframe.

38 Alain Siegrist, *UCI Financial Report 2010*, Note 36 above.

39 See Note 18 above.

40 Article 13.1 of the *Statutes of the UEC*, http://uec-federation.eu/img/2/Statutes_of_the_European_Cycling_Union.pdf accessed 29 February 2012.

decisions such as determining race calendars, determining anti-doping regulations, regulating rider agents, allocating the location of world championships, establishing an athletes' commission, appointing the staff of the UCI, and the organisation of the Congress itself.⁴² In addition to not providing for voting rights for members at the Congress, the UCI Constitution explicitly requires the control of the Management Committee to be exercised by its European members.

There are 15 members on the Management Committee: the President and nine others who are all elected by the Congress, and the five Presidents of the five Continental Confederations, one of whom will, of course, be European.⁴³ The *Constitution* of the UCI requires that at least seven of the 10 Management Committee members who are elected by Congress to be European.⁴⁴ Accordingly, a controlling majority of at least eight of the 15 Management Committee members will be European.⁴⁵

The Constitution goes further and entrenches this preferential status for European nations. While the UCI Congress is given power to amend the Constitution,⁴⁶ unlike other amendments that can be passed with a two thirds majority, the pro-European bias can only be removed by a majority of three quarters of Congress votes cast.⁴⁷ As there are 42 total votes within the Congress and the UEC controls one third of these (14), an amendment to remove the privileged status of the European nations could only succeed in the unlikely event that the delegates of the European Continental Confederation voted in favour of reducing their own power. Because of the way that the Continental Confederations operate, this means that a majority of the members of the UEC would need to support an amendment.⁴⁸ The three quarter majority prerequisite is an effective requirement for unanimity.

4. JUSTIFICATION

4.1 The UCI's Justification of its Pro-European Constitution

Despite these structural inequities, the President of the UCI, Pat McQuaid maintains that the organisation does recognise 'a principle of equality between its members'.⁴⁹

The UCI argues that the operation of its Constitution 'is not discriminatory in favour of European nations as the allocation and balance of powers within the association reflects the consensus within the cycling family and the global situation of cycling'. The UCI's position is that all 'continents were represented' in the process leading to the drafting of the Constitution in 1992.⁵⁰ These stakeholders recognised that Europe was the most important continent for cycling and that cycling had a different position in each of the other continents.' Broadly, the UCI argues that the Constitution reflects a structure that the members of the UCI have chosen for themselves. Significantly, in the view of Pat McQuaid, the strength of cycling in Europe as compared with other continents justifies the privileged position of the European nations. To illustrate this, the UCI notes that in 2010, 82 percent of international cycling events were held in Europe.⁵¹

As a further justification of its structure, the UCI also points to the

importance of Congress as the most powerful body within the UCI. It claims that the Congress, where the non-European continents have a two thirds majority, could 'revoke the Management Committee'.⁵²

4.2 UCI Constitution History

It first needs to be noted that the current structure of the UCI is not the legacy of a long history or tradition. From its foundation in 1900, voting power within the organisation was not distributed on the basis of continental location but instead according to the number of cycling velodromes claimed by each member nation.⁵³ A different structure was adopted in 1965 with separate subsidiary amateur and professional federations being established by the UCI.⁵⁴ These separate organisations were merged in 1992 when the current Constitution was adopted with its Continental Confederation basis.⁵⁵ This history shows that the structure of the UCI in allocating voting power amongst continental groupings and conferring greater status upon its European Members has not been considered necessary for the sport of cycling until relatively recently.

4.3 No Objective Criteria

Pat McQuaid's justification of the differential treatment of nations under the UCI Constitution relies upon the 'cycling strength of Europe'. Ever if this was the original rationale for preferential treatment of Europe, in fact, the Constitution is completely silent on how the allocation of the voting power within the UCI is determined. The *Constitution* does not make voting power dependent upon the relative importance of cycling amongst the continents, or indeed by reference to any other objective factor.

4.3.1 The cycling strength of 'Europe'

It can be readily conceded that particular European countries are pre-eminent in international cycling.⁵⁶ Despite this being the justification for the unequal distribution of organisational status within the UCI, the distribution of votes amongst the UCI Continental Confederations is not actually reflective of any particular metric of cycling strength. The UCI President in effect concedes this by claiming that Europeans are in fact under-represented within the UCI.⁵⁷ It is also clear that the provision of the *Constitution*, which guarantees European control of the UCI Management Committee, is unrelated to cycling strength and has no purpose other than to provide for European control. It is completely silent on the relative position of the UCI's Continental Confederations.

Nor does it follow from the cycling strength of some European countries that the UCI is therefore justified in treating all European NFs as a more privileged class than the rest of its members. There is substantial variance in cycling strength as between the 48 national federations who form the UEC.⁵⁸ 'European cycling strength' is not a universal characteristic shared by all European nations. Yet, under the UCI Constitution, all European members, regardless of the importance or strength of cycling in the relevant country and, by virtue only of being

41 Article 29, *UCI Constitution*, Note 3 above.

42 Ibid, Article 46.1.

43 Ibid, Article 47.

44 Ibid, Article 47.1. Under this arrangement, the European UCI members receive 70% of the Management Committee representatives while having only 48 of the 181 national federations (less than 27%) that make up the UCI Congress.

45 Decisions are made by a simple majority vote within the Management Committee, with the President having a casting vote in the case of a tie: Article 55.5.

46 Ibid, Article 29.1(a).

47 Ibid, Article 38.3.

48 See Note 40 above and accompanying text.

49 Pat McQuaid, UCI President, 9 January 2012, correspondence to Lloyd Freeburn. This correspondence was sent in response to a number of questions put to the UCI

regarding the operation of its Constitution as discussed in this article.

50 Ibid. For reasons discussed below (see Note 70 and accompanying text), it is significant that the 'continents' and not the 'members' were represented.

51 Ibid.

52 Ibid.

53 Bill Mills, *The Bicycle*, 1942, p6.

54 UCI, History, www.uci.ch/ accessed at 14 February 2012.

55 Pat McQuaid, Note 49 above. The provisions of the Constitution which are argued to be discriminatory date from this time. The recognition of the UCI as an IF by the IOC predates the current Constitution. Accordingly, it would appear that the IOC has not been called upon to consider the application of the *Fundamental Principles of Olympism* (Note 6 above) to the *UCI Constitution*.

56 To evidence this, the UCI notes that 82

percent of international events are held in Europe: see Note 49 above and accompanying text. Other statistics support this: across all disciplines of cycling in 2010, 1,052 of 1,369 events were staged in Europe. At a distant second place, the continent with the next highest number was the Americas with 177 events: Alain Siegrist, *UCI Financial Report 2010*, Note 36 above; Similarly, a significant majority of the 18 'World Tour' teams, those professional teams that compete at the highest level of road cycling, and the riders of those teams, are of European nationality: UCI, UCI World Tour, www.ucirotour.com/templates/UCI/UCI2/layout.asp?MenuId=MTYzMDc&LangId=1 accessed 1 March 2012.

57 Pat McQuaid, Note 49 above: President McQuaid states that 'Europe has only one third of the votes [at Congress] although cycling is predominantly European'; and

the European majority on the Management Committee 'is smaller than could be justified by the importance of cycling in Europe'.

58 The UCI's national ranking systems for cycling both individual riders and nations illustrates this: UCI, *Results and Rankings*, <http://www.uci.ch/templates/UCI/UCI2/layout.asp?MenuId=MTI1ODU&LangId=1> accessed at 8 February 2012. A country's ranking is determined by the performance of riders of that nationality in a particular year: See UCI, *Points Scale - UCI World Tour Ranking*, <http://www.uci-worldtour.com/Modules/BUILTIN/getObject.asp?MenuId=MTYwNzk&ObjTypeCode=FILE&type=FILE&id=NjY0NTM&LangId=1> accessed at 8 February 2012. These rankings determine how many riders a nation may enter in Olympics: UCI, *Qualification System - Games of the XXX*

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European, secure a privileged position within the UCI when compared with members from the rest of the world.

The inequity in the UCI's structure for strong cycling UCI members such as Australia and the United States is obvious. But it is also equally inequitable for all other, non-European members. Why for example should a 'cycling weak' European nation enjoy a higher status within the UCI than a similar performing member from Africa, Asia or any other Continental Confederation? Further, in an apparently cynical application of a double standard, within Europe, UCI members are treated equally regardless of cycling strength.⁵⁹

Finally, it is nonsensical for the UCI to rely upon the power of the Congress to 'revoke the Management Committee' as a justification for the constitutionally entrenched European dominance.⁶⁰ Even if a 'revocation' was legally defensible, the revoked European dominated Management Committee would merely be replaced by another European dominated Committee.

4.4 Should 'Cycling Strength' Determine Voting Rights Within the UCI?

It could be argued that within the scope of its independence under the *Olympic Charter*, the UCI should be free to allocate the distribution of power within the organisation in whatever manner it chooses subject to the proviso that this is done according to an objective criterion such as the relative strength of its membership. It has already been noted that the UCI *Constitution* contains no such criterion and that 'cycling strength' is not reflected in the UCI's organisational structure. But even if it did, there is then a fundamental policy question for the UCI: should 'cycling strength' be a determining factor in the allocation of representative rights and power within the IF?

Even if a metric for measuring relative strength between members could be determined,⁶¹ the appropriateness of using such a criterion needs to be considered in light of the role of the UCI as an IF. The purposes of the UCI include 'to direct, develop, regulate, control and discipline cycling under all forms worldwide', 'to promote cycling in all the countries of the world at all levels' and 'to encourage friendship between all members of the cycling world'. In addition, its role is 'to represent the sport of cycling and defend its interests before the International Olympic Committee and all national and international authorities'.⁶² None of these purposes, or any of the UCI's other purposes, provide support for the proposition that 'strength in cycling' should be a basis for preferring one group of members over any other within the structure of the organisation.

To the contrary, it could reasonably be argued that the role of the UCI as an IF is to govern its sport for the benefit of all of its members; regardless of their relative strength in the sport and that a governance structure that favours those who are strong in the sport is inconsistent with the purposes of the organisation.

5. A COMPARISON OF THE UCI WITH OTHER INTERNATIONAL SPORTING FEDERATIONS

A comparison has been made of the organisational arrangements of the UCI with those of the international federations representing all 26 sports on the event calendar for the 2012 London Olympics.⁶³ This comparison was also extended to include the IFs of six other major international sports - baseball, cricket, golf, motorsports, rugby and skiing.⁶⁴ Specifically, a comparison was made of three things: whether these 32 IFs apply the equivalent of the principle of 'one vote, one value' in allocating voting rights amongst members; whether any differential treatment of the voting power of continental or regional groupings of members is applied; and the extent of any constitutional entrenchment of the power to amend each organisations' constitution.

This examination has shown that in comparison with every one of the 31 other IFs, the organisational structure of the UCI is unique. None of the other organisations are structured so as to confer privileged status upon the members of one continent over the members from the rest of the world.

5.1 One Member, One Value

In 22 of the 32 IFs, a one member, one vote or one value system is applied as between members. In eight of the remaining 10 IFs, votes are allocated according to specified objective criteria such as the number of affiliated players or clubs of the sport in the relevant country,⁶⁵ the relative status of the sport,⁶⁶ or length of membership of the IF.⁶⁷ The sport of rugby allocates greater voting rights to its eight founding members.⁶⁸ The UCI is the only organisation that does not provide for its members to vote directly and directs all of its members' rights to vote through continental groupings.

Because of this, it may also be the case that if the UCI members from rest of the world are required to pay the same membership fees as European members, they effectively financially subsidise the privileged position of the European members. To coin a slogan, there may be equal taxation, but unequal representation.⁶⁹

The distinctions between the rules of the UCI and other IFs continue in how the IFs treat continental or regional groupings within their governance structures.

Olympiad, <http://www.uci.ch/Modules/BUILTIN/getObject.asp?MenuId=&ObjTypeCode=FILE&type=FILE&id=NjgzODE&LangId=1> accessed at 8 February 2012, and World Championships: See UCI, *Qualification System for the 2011 World Championships Men Elite Road Race*, <http://www.uci.ch/Modules/BUILTIN/getObject.asp?MenuId=MTkzNg&ObjTypeCode=FILE&type=FILE&id=NjY2OTc&LangId=1> accessed at 8 February 2012. In 2011, riders from 37 countries scored rankings points. Of the top 20 nations, 17 were European. The others were Australia (4th with 1082 points), the United States (8th with 551 points) and Kazakhstan (15th with 234 points). The 20th nation, the Czech Republic, scored 136 points, less than one tenth of the points of the top ranked nation, Spain (1427 points): Cycling Coverage, *UCI World Tour Ranking 2011*, <http://www.cyclingcoverage.com/rankings/world.php?year=2011> accessed 29 February 2012. However, at least 18 European nations scored no points. The number of European nations that scored no points may have been higher. This minimum number is derived from a brief and non-exhaustive analysis in which it has been assumed that all of

the 35 nations that scored points other than Australia, the United States, Kazakhstan, New Zealand, Japan, Argentina and Colombia (who all had riders that scored some points) were European and subtracting this from the number of European UCI members (48).⁵⁹ Within the European Continental Confederation, each member of the UEC has equal rights under the *Statutes of the European Cycling Union (UEC)*, Article 8.7, Note 40 above. Unlike the UCI, the UEC gives full effect to the requirement in its constitution to base its activities on the principle of 'respect for the equality of all member federations': Article 3.1(a), *Statutes of the European Cycling Union (UEC)*.

⁶⁰ This justification was advanced by Pat McQuaid: Note 49 above.

⁶¹ How is relative strength in the sport to be measured? What factors are taken into account - is it one or a combination the number of a nation's of registered riders or races, the performance of a nation's cyclists in international events, revenue generated by cycling events or historical factors? Is only road racing considered? What about other disciplines of the sport? What of women's racing? How is a metric

of relative strength or importance to be derived?

⁶² Article 2, *UCI Constitution*, Note 3 above.

⁶³ London 2012, <http://www.london2012.com/sport> accessed at 21 February 2012.

⁶⁴ Appendix A lists all of the IFs involved in the comparison.

⁶⁵ See for example in Badminton World Federation, *Constitution of the World Badminton Federation*, 28 May 2011, http://www.bwfbadminton.org/file_download.aspx?id=41039 accessed at 21 February 2012, Article 17.18; Federation Internationale de Ski, *Federation Internationale de Ski Statutes*, 2008, <http://www.fis-ski.com/data/document/fis-statutes-2008.pdf> accessed 28 February 2012, Article 17; and International Taekwon-do Federation, *International Taekwon-do Federation By Laws*, 24 October 2003, http://www.itf.org/pub_web/ver_eng/index.html accessed 28 February 2012, By Law 4.1.

⁶⁶ See for example International Cricket Council, *Constitution of ICC*, 27 August 1997, http://static.icc-cricket.yahoo.net/ugc/documents/CACHE_DUVIE=65fbee0ea17c06f54d5f2cc0a02061b/DOC_oDE4A511BFC4D86810C33

[3CA12DBECFE_1288260213828_45.pdf](http://www.fifa.com/pressroom/pressreleases/3CA12DBECFE_1288260213828_45.pdf) accessed 28 February 2012, Article 2.2; Federation Internationale de Gymnastique, *Federation Internationale de Gymnastique Statutes*, 1 January 2011, <http://www.fig-gymnastics.com/vsite/vnavsite/page/directory/0,10853,5187-188050-205272-navlist,00.html> accessed 28 February 2012, Article 11.17.2; Federation Internationale de L'Automobile, *FIA Statutes*, <http://www.fia.com/en-GB/the-fia/statutes/Pages/FIAStatutesContents.aspx> accessed 28 February 2012, Article 11; and International Federation of Rowing Associations, *FISA Statutes and Related Bye-Laws*, <http://www.worldrowing-magazine.com/fisarulebook/2011#pg6> accessed at 22 February 2012, Article 35.

⁶⁷ See for example International Tennis Federation, *The Constitution of ITF Limited 2012*, http://beta.itftennis.com/media/108826/CACHE_DUVIE=6a3bc7809a6dc2d4ea4d15970393bdab/108826.pdf accessed 28 February 2012, Articles 11, 3(c) and 3(f).

⁶⁸ See International Rugby Board, *IRB Bye-Laws*, <http://www.irb.com/aboutirb/constitution/index.html> accessed 28 February 2012, Article 9.

5.2 Continental Or Regional Groupings

All but two of the 32 IFs establish continental or regional groupings of members for particular purposes.⁷⁰ While many IFs require these geographic groupings to be treated equally,⁷¹ some make differential allowances or establish quotas for the election of members to the equivalent of management committees.⁷² In some cases the objective criteria for this quota allocation is specified.⁷³

Again, the Continental Confederation structure within the UCI is unique. No other IF channels all voting of members through continental or regional groupings or allocates quotas in such a way as to create a controlling interest in any one group. No other IF requires any particular continental or regional group to receive a majority on any internal body.

5.3 Constitutional Amendments

The final subject compared between the UCI and other IFs was the process adopted within each IF for amendments to be made to the organisations' constitutions. Most of the IFs provide for a special majority (usually two thirds) rather than a mere absolute majority for the approval of constitutional amendments. However, apart from the UCI, the governing body of rugby, the IRB, is the only other organisation in which one group of members can exercise control over the constitutional amendment process.⁷⁴ In that case, the eight founding members of the IRB is not a class defined by mere geography.

It is also unusual for different levels of support to be required for particular constitutional amendments as in the UCI *Constitution*.⁷⁵ What is additionally comparatively striking about the UCI's arrangements is the importance allocated by the *Constitution* to different types of constitutional amendments. The only decisions that are required to secure a majority of three quarters are decisions that would alter the provisions that guarantee European control over the organisation.⁷⁶ In contrast, other arguably more significant issues such as the expulsion of a member⁷⁷ and even the dissolution of the organisation⁷⁸ only require a two third majority approval.

6. DISCRIMINATION

Turning now to the possible recourse available to a disadvantaged non-European member of the UCI, potential complaints could be made about the unrepresentative nature of the organisation and in relation to

its discriminatory structure. While a lack of democracy does not generally give rise to legal causes of action, discrimination does.

There are three possible nationality based discriminatory aspects to the *Constitution*. The most obvious and significant is the requirement for at least 8 of the members of the Management Committee to be European. This appears to be directly discriminatory against the non-European members of the Federation and without objective justification. Second, the allocation of votes to Continental Confederations by Article 36.2 which is unique to the UCI could be regarded as indirectly discriminatory. It generally has the effect of imposing a lower value on the votes of non-European members as compared with European members of the organisation and is also lacking in objective justification. Third, particular decisions of the Management Committee could be open to challenge as evidencing a discriminatory bias in favour of Europeans as compared with the rest of the world if unable to be explained by objective reasons.⁷⁹

6.1 Pursuing the Issue Within the UCI

The recent position of the UCI in defending the European dominance of its structure indicates that a complaint about the issue from a member would be unfavourably received by the organisation.⁸⁰ Regardless, there is limited scope for any formal mechanism within the UCI itself to be utilised.⁸¹ If the internal dispute processes are exhausted,⁸² what should a non-European member do to seek to remedy the discriminatory constitutional provisions?

6.2 Bringing a Complaint of Discrimination Against the UCI

The jurisdictional difficulties associated with bringing an international sports body before a domestic court are well known,⁸³ even in the case of decisions that are discriminatory under the relevant domestic law.⁸⁴ The rules of the UCI raise some particular complicating factors when considering how the organisation could be brought within the legal regulation of an external body.

6.2.1 CAS

The UCI *Constitution* grants 'the Court of Arbitration for Sport in Lausanne, Switzerland' jurisdiction over two types of dispute. First, it 'is the sole competent authority to deal with and judge appeals, in cases stipulated by the Management Committee, against sporting, discipli-

69 While not clear, it does not appear that the UCI's income is derived principally from Europe. In 2010, the UCI's principal income sources were income from World Championships and World Cup events and 'Affiliations and calendar'. Presumably 73% of the Affiliation income comes from non-European nations. In addition, in 2010, the largest World Championship event, the World Road Cycling Championships, was held in, and therefore the income associated with this event derived from, Australia: Alain Siegrist, Note 34 above.

70 The IFs of tennis and skiing do not establish continental or regional groupings.

71 See for example the IFs of athletics, baseball, equestrian, handball, hockey, judo, modern pentathlon, rowing, shooting, triathlon, volleyball, weightlifting and wrestling.

72 See for example the IFs of basketball, boxing, canoeing, gymnastics, swimming, and volleyball.

73 See for example the IFs of gymnastics, skiing, table tennis all of whose quotas are determined according to the number of members in each continent.

74 See *IRB Bye-Laws*, Article 9.9, Note 68 above.

75 Apart from the UCI, the gymnastics IF provides for different majorities for different types of decision: Article 11.17.6, Note 66 above.

76 UCI, *Constitution*, Article 38.3, Note 3 above.

77 Ibid, Article 38.3(a).

78 Ibid, Articles 38.3(b) and 86.4.

79 For example, it could be alleged that the Management Committee has adopted a practice of favouring the appointment of Europeans to bodies established by the UCI. Europeans comprise the majority in 14 of the 18 Commissions; they make up 50% of the members in three others and are in minority on only 1 of the 18 Commissions. On a global basis, over 81% of UCI Management Committee appointments to the 18 UCI Commissions have been Europeans. UCI, *Commissions*, http://www.uci.ch/templates/UCI/UCI1/la_yout.asp?MenuId=MTI2ODU&LangId=1 accessed at 10 January 2012. Similarly, every member of the UCI ProTour Council/Professional Cycling Council appointed by the UCI Management Committee (5 of 5) is European. Another example that may be open to challenge as evidencing a discriminatory practice is the allocation by the UCI Management Committee of world road cycling championships outside Europe no more than once every 5 to 7 years. The Championships have only been held outside Europe in 1986 (USA), 2003 (Canada), and 2010 (Australia) with the 2015 Championships to be held in the United States in 2015. The practice

appears to be that non-European nations wishing to host a World Road Cycling Championships must compete in the UCI bidding process with each other for the event in the year that the UCI allows the Championships to be held outside Europe. The allocation of all other World Road Cycling Championships is competed for only by European nations.

80 Indeed, the UCI has indicated that the status of its European Members under its Constitution in both the Congress and the Executive Committee is in fact less than what it should be: Pat McQuaid, UCI President, Notes 49 and 57 above.

81 The UCI's Arbitral Board may have jurisdiction over a dispute between a member of the UCI and the UCI Management Committee or even the organisation itself. However, this jurisdiction is limited to disputes over the application and interpretation of the *Constitution*, not objections to the terms of the statute itself on the basis that it is discriminatory: UCI, *UCI Cycling Regulations* 12.3.001 and 12.3.008. The *UCI Rules of good governance* also state that 'Disputes concerning the application and interpretation of the UCI Constitution and Regulations are submitted to the Disciplinary Commission'. Appeals may be made to the Appeals Board: UCI, *UCI Rules of good governance*, Note 4 above. A complaint about the nature of the *Constitution* would not

fall within this process as it would be a complaint about the terms of the *Constitution*, not its application or interpretation. The Congress is the only body with power to amend the *Constitution*. The difficulty in securing a constitutional amendment to remove the pro-European provisions from Congress has already been noted.

82 Which must be done before a remedy is sought from a court: UCI, *UCI Cycling Regulation* 12.3.006.

83 *Reynolds v. IAAF*, 968 F.2d 1216 (6th Cir.1992). For commentary on this issue see for example: Migai Akech, "The Maurice Odumbe Investigation and Judicial Review of the Power of International Sport Organizations," *Entertainment Sport Law Journal*, 6, no. 2: <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume6/number2/akech/akech.pdf>; Alec Van Vaerenbergh, "Regulatory features and administrative law dimensions of the Olympic Movement's anti-doping regime," IILJ Working Paper 11/2005, 1-42 at 22: <http://www.iilj.org/papers/documents/2005.11vaerenbergh.pdf>; Andrej Lang, Global Administrative Law in Domestic Courts: Holding Global Administrative Bodies Accountable, (2008), 1: www.iilj.org/GAL/documents/Lang.pdf.

84 *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic*

nary and administrative decisions taken in accordance with UCI rules.⁸⁵ This conferral of power is limited by its terms to cases stipulated by the Management Committee and to disputes over decisions taken in accordance with UCI rules, not challenges to the rules themselves.

The second head of power granted to CAS makes it the 'sole competent authority, with the exclusion of state courts, to deal with and judge disputes between UCI bodies, including continental confederations, and disputes between Federations'.⁸⁶ Arguably, this provision makes CAS the relevant tribunal and perhaps the sole tribunal, to which a dispute about the nature of the UCI *Constitution* could be brought by a UCI member.

In proceedings before CAS it would be open to a UCI member to argue that CAS should bring the statute of the UCI into conformity with the *Olympic Charter*. The UCI's *Constitution* provides some support for this approach as it requires the organisation to carry out its activities in compliance not only with the principle of equality, but also in 'compliance with the Olympic Charter in everything to do with the participation of cyclists in the Olympic Games'.⁸⁷ CAS has affirmed the supremacy of the *Olympic Charter* in a number of cases.⁸⁸

However, the likely approach of CAS to its jurisdiction in a dispute concerning the discriminatory aspects of the UCI *Constitution* is difficult to predict.⁸⁹ On the one hand, CAS has held that it will intervene to ensure decisions of sports bodies are made in good faith and meet minimum standards of fairness.⁹⁰ On the other hand, CAS has expressed reluctance to rewrite or amend the rules of a sports body seeing this role as inconsistent with its role as an arbitrator.⁹¹ In the case of the UCI, this is exactly what CAS would be called upon to do.

6.2.2 Swiss law

Complicating an assessment of the possible approach by CAS is a provision of the UCI Constitution which may be interpreted as limiting the scope of CAS's authority to review the terms of the Constitution. Under the *Constitution*, in the absence of a choice of applicable law by the parties, the CAS is to apply Swiss law.⁹² Accordingly, the extent of CAS's jurisdiction may be limited to remedies relating to discriminatory treatment that may be available under Swiss law.

Unfortunately for a would-be complainant, Swiss law provides no protection against discrimination on the basis of nationality that would be applicable in the case of a dispute between the UCI and a non-resident, non-European member of the UCI. Article 8 of the *Constitution* of the Swiss Federation requires equality of treatment and prohibits discrimination. It does not apply in disputes between individuals but only against the State.⁹³ Article 2 of the *Bilateral Agreements* which harmonise some law as between the Swiss state and the European Community (EC) protects against discrimination on grounds of nationality but it applies only in relation to EC citizens resident in Switzerland.⁹⁴ No other remedy appears available under Swiss law.⁹⁵

7. THE ROLE OF THE IOC AND SECURING COMPLIANCE WITH THE OLYMPIC CHARTER

This then leads to a consideration of the role of the IOC and the *Olympic Charter*. If the UCI *Constitution* is viewed as being undemocratic and discriminatory by one of the members of the organisation, what can be done under the *Charter*?

Under the *Charter*, part of the role of the IOC⁹⁶ is 'to encourage and support the promotion of ethics and good governance in sport'.⁹⁷ More relevantly, it is the role of the IOC 'to act against any form of discrimination affecting the Olympic Movement'.⁹⁸ Accordingly, there is a strong argument that the IOC's role requires it to inquire into and act upon the breach of the *Charter* of the Olympic Movement posed by the discrimination inherent in the UCI *Constitution*.

There is an established process for this: the IOC may conduct an inquiry into possible violations of the *Olympic Charter*.⁹⁹ Prior to applying any measure or sanction, a warning may be issued.¹⁰⁰ If a breach is found, sanctions available to the IOC for violations by IFs include withdrawal of a sport, a discipline or an event from the programme of the Olympic Games and withdrawal of the recognition of the IF.¹⁰¹

There has been limited exercise of this jurisdiction by the IOC.¹⁰² Nevertheless, the case of the UCI *Constitution* does possess all of the characteristics of an appropriate case for the IOC to pursue. A failure by the IOC to act would raise questions as to how 'fundamental' the

Winter Games, 2009 BCSC 942; *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCCA 552.

85 UCI *Constitution*, Article 74, Note 3 above.

86 Ibid, Article 75. Article 76 provides that 'The Court of Arbitration for Sport makes a ruling in the last instance.' See also UCI Regulation 12.3.004, Note 79 above, which provides: 'Disputes between National Federations shall be submitted to CAS in accordance with article 75 b of the UCI Constitution'. It is noted that notwithstanding this regulation, there is no Article 75 b in the UCI Constitution.

87 Ibid, Article 3(a) and (c). In the case of the UCI *Constitution*, it would be difficult to rely upon these requirements as the foundation for a claim under the UCI's dispute resolution processes. They could be used in a challenge to particular decisions by UCI bodies but would not appear to be conditions for the validity of the *Constitution*, notwithstanding that they are inconsistent with other terms of the *Constitution*.

88 See *Chiba v. Japan Amateur Swimming Federation*, CAS 2000/A/278, award of 24 October 2000; *Nabokov & Russian Olympic Committee & Russian Ice Hockey Federation v International Ice Hockey Federation*, CAS 2001/A/357, award of 31 January 2002; *Baumann v. IOC, National Olympic Committee of Germany & International Amateur Athletic Federation*, CAS ad hoc Division 00/OG/006, award of 22 September 2000; *Gibraltar*

Badminton Association v. International Badminton Federation, CAS 2001/A/329, award of 25 May 2001; *Swedish National Olympic Committee & Abrahamian v. Fédération Internationale des Luttes Associées & others*, CAS ad hoc Division 08/OG/007, award of 23 August 2008. See also Marcus F. Mazzucco and Hilary A. Findlay, Re-Thinking the Legal Regulation of the Olympic Regime: Envisioning a Broader Role for the Court of Arbitration for Sport, 2010, *Tenth International Symposium for Olympic Research in London, Canada*, at 19.

89 Marcus F. Mazzucco and Hilary A. Findlay, *ibid*, at 17-21.

90 See for example CAS OG 04/009, H.O.C. & N. Kaaklamanakis / I.S.S.F., 24 August 2004; *AEK Athens & Slavia Prague v UEFA*, CAS 98/200, 22 August 1999; *Arbitration CAS 2000/A/281 H. / Fédération Internationale de Motocyclisme (FIM)*, award of 22 December 2000 at para. 18; See also Allan Erbsen, 'The Substance and Illusion of Lex Sportiva' in Ian Stewart Blackshaw, Robert C. R. Siekmann & Janwillem Soek, eds., *The Court of Arbitration for Sport, 1984-2004* (The Hague: T.M.C. Asser Press, 2006) 441-254 at 442; Ken Foster, 'Lex Sportiva and Lex Ludica: The Court of Arbitration for Sport's Jurisprudence' in Ian Stewart Blackshaw, Robert C.R. Siekmann & Janwillem Soek, eds., *The Court of Arbitration for Sport, 1984-2004* (The Hague, Netherlands: T.M.C. Asser Press 2006) 420-40.

91 See for example *Spanish Basketball*

Federation v. International Basketball Federation, CAS 98/209 in Matthieu Reeb, ed., *Digest of CAS Awards II 1998-2000* (Kluwer Law International, 2002) xxviii-xxix at 500. See also Michael Lenard, 'The Future of Sports Dispute Resolution,' *Pepp. Disp. Resol. L.J.*, 10 no. 1 (2009), 173 at 180.

92 UCI *Constitution*, Article 78, Note 3 above.

93 Constitution of the Swiss Confederation, <http://www.admin.ch/ch/e/rs/101/a8.html> accessed 2 March 2012.

94 Switzerland is not a member of the European Community. It recognises and applies some European laws through what are known as the 'Bilateral Agreements': *Agreement between the European Community and its Member States and the Swiss Confederation on the free movement of persons*, [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22002A0430\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22002A0430(01):EN:HTML) accessed 2 March 2012. European residents in Switzerland may have legal recourse against nationality discrimination: see *CEP Cortailod v Swiss Athletics* [2008] Causa Sport 3/2008 332. Within the European Community (EC), discrimination on the basis of nationality as between citizens of EC countries is generally prohibited: see for example Article 18 of the *Consolidated Version of the Treaty on the Functioning of the European Union*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF>,

accessed 2 March 2012. The jurisdictional difficulties that have troubled the legal regulation of international sporting bodies would also be less of an issue as the European Court of Justice has in the past found that it has jurisdiction to consider a challenge to rules of the IOC and an IF: *Case C-519/04P, Meca-Medina and Majcen v. Commission* (2006) ECR I-6991: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0519:EN:HTML>.

95 For commentary on the status of discrimination law in the Swiss Confederation see European Commission against Racism and Intolerance, *ECRI Report on Switzerland*, 15 September 2009.

96 International Olympic Committee, *Olympic Charter*, Note 5 above, Rule 15.3.

97 Ibid, Rule 2.1.

98 Ibid, Rule 2.6.

99 Ibid, Bye-law to Rule 59.

100 Ibid, Rule 59.3.

101 Ibid, Rule 59.1.2.

102 Only one complaint against an IF has been investigated by the IOC: IOC Ethics Commission, Case No D/03/03, *The Pan-American Sports Organization v The International Volleyball Federation*, 21 October 2003; See Marcus F. Mazzucco and Hilary A. Findlay, *The Supervisory Role of the Court of Arbitration for Sport in Regulating the International Sport System*, *International Journal of Sport and Society*, 1:2, pp. 131-144, who suggest that NFs may be uninformed of their right to

Fundamental Principles actually are within the Olympic Movement. Of course, all of this would be dependent upon a member of the UCI actually making a complaint to the IOC in the first place.

8. CONCLUSION

There are significant issues of representative democracy and nationality discrimination within an IF recognised by the IOC. These are fundamental issues of principle for the governance arrangements of the sport of cycling. They affect the credibility of the UCI to advocate on behalf of its sport and pose real questions as to its legitimacy as a world governing body.¹⁰³

It is also a fundamental issue of principle for the Olympic Movement. The legal recourses outside the Olympic Movement that are available to members of the IOC who may wish to take issue with the structure of the organisation appear limited. This factor should increase the imperative on the IOC to act to ensure that the *Constitution* of the UCI com-

plies with the *Olympic Charter*. At a time when the UCI is purporting to be pursuing the globalisation of its sport,¹⁰⁴ when the structure of professional road cycling is being challenged by potential 'breakaway leagues',¹⁰⁵ and on the eve of the biggest international sporting event in the world in London 2012, a failure to address these issues would be an opportunity missed.

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APPENDIX A

Archery	World Archery Federation (WAF) ¹⁰⁶ ;
Athletics	International Association of Athletics Federations (IAAF) ¹⁰⁷
Badminton	Badminton World Federation (BWF) ¹⁰⁸
Baseball	International Baseball Federation (IBF) ¹⁰⁹
Basketball	Federation Internationale de Basketball (FIBA) ¹¹⁰
Boxing	International Boxing Association (AIBA) ¹¹¹
Canoeing	International Canoe Federation (ICF) ¹¹²
Cricket	International Cricket Council (ICC) ¹¹³
Cycling	Union Cycliste Internationale (UCI) ¹¹⁴
Equestrian	Fédération Equestre Internationale ¹¹⁵
Fencing	Federation Internationale D'Esime (FIE) ¹¹⁶
Football	Federation Internationale de Football Association (FIFA) ¹¹⁷
Golf	International Golf Federation (IGF) ¹¹⁸
Gymnastics	Federation Internationale de Gymnastique (FIG) ¹¹⁹
Handball	International Handball Federation (IHF) ¹²⁰
Hockey	International Hockey Federation (IHF) ¹²¹
Judo	International Judo Federation (IJF) ¹²²

file a complaint with the Commission against their respective IFs.
 103 The UCI claims to be the sole body 'competent to represent the interests' of its NFs: UCI, *UCI Rules of good governance*, Rule 1 and Rule 7, Note 4 above.
 104 See for example: Cycling News, 'Tour of Beijing joins the UCI World Tour', 10 November 2011,

<http://www.cyclingnews.com/news/tour-of-beijing-joins-the-uci-worldtour> accessed 10 March 2012.
 105 Richard Moore, 'Cycling Breakaway League: A Brave New World', 3 February 2012, <http://www.cyclingnews.com/features/cycling-breakaway-league-a-brave-new-world> accessed 10 March 2012.

Modern Pentathlon	International Union of the Modern Pentathlon (UIPM) ¹²³
Motorsports	Federation Internationale de L'Automobile (FIA) ¹²⁴
Rowing	International Federation of Rowing Associations (FISA) ¹²⁵
Rugby	International Rugby Board (IRB) ¹²⁶
Sailing	International Sailing Federation (ISAF) ¹²⁷
Skiing	Federation Internationale de Ski (FIS) ¹²⁸
Shooting	International Shooting Sport Federation (ISSF) ¹²⁹
Swimming and other water sports	Fédération Internationale de Natation (FINA) ¹³⁰
Table Tennis	International Table Tennis Federation (ITTF) ¹³¹
Taekwondo	International Taekwon-do Federation (ITF) ¹³²
Tennis	International Tennis Federation (ITF) ¹³³
Triathlon	International Triathlon Union (ITU) ¹³⁴
Volleyball	Federation Internationale de Volleyball (FIV) ¹³⁵
Weightlifting	International Weightlifting Federation (IWF) ¹³⁶
Wrestling	International Federation of Associated Wrestling Styles (FILA) ¹³⁷

106 World Archery Federation, *Constitution and Procedures*, 1 April 2012, http://www.archery.org/UserFiles/Document/FITA%20website/05%20Rules/01%20C&R%20Book/Book_2012/EN-Book1.pdf accessed at 21 February 2012.
 107 International Association of Athletics Federations, *Constitution*, 1 November 2011, http://www.iaaf.org/mm/Document/06/28/25/CACHE_DUVIE=96c080420bde73fa49a4363e04423e34/ded17e35-fb04-4a83-801f-a3dcf4ec5f38_PDF_English.pdf accessed 7 March 2012.
 108 Badminton World Federation, *Constitution of the World Badminton Federation*, 28 May 2011, http://www.bwfbadminton.org/file_download.aspx?id=41039 accessed at 21 February 2012.
 109 International Baseball Federation, *Statutes*, 2 November 1999, <http://www.ibaf.org/en/infopage-detail.aspx?id=e7a35439-e3af-431a-aaec-91dafo7f4bdc> accessed 28 February 2012.
 110 Federation Internationale de Basketball, *FIBA General Statutes 2010*, 7 September 2010, <http://www.fiba.com/downloads/Regulations/2011/FIBABookGSAG.pdf> accessed 28 February 2012.
 111 International Boxing Association, *AIBA Statutes*, 24 September 2011, http://www.aiba.org/documents/site1/docs/CACHE_DUVIE=ea7f8728a2300b

[b2d8ea7aboa622a78a/Statutes_English%20Version_20110924.pdf](http://www.fifa.com/mm/document/affederation/generic/01/29/85/71/fifastatuten2010_e.pdf) accessed at 21 February 2012.
 112 International Canoe Federation, *ICF Statutes 2011*, November 2010, <http://www.canoeicf.com/icf/AboutICF/Rules-and-Statutes.html> accessed at 21 February 2012.
 113 International Cricket Council, *Constitution of ICC*, 27 August 1997, http://static.icc-cricket.yahoo.net/ugc/documents/CACHE_DUVIE=65f8e0e17c06f54df2cc0a02061b/DOC_oDE4A511BFC4D86810C333CA12DBECFE_1288260213828_45.pdf accessed 28 February 2012.
 114 Union Cycliste Internationale, *Constitution*, 1 October 2010, <http://www.uci.ch/Modules/BUILTIN/getObject.asp?MenuId=&ObjTypeCode=FILE&type=FILE&id=34040&LangId=1> accessed 28 February 2012.
 115 Fédération Equestre Internationale, *Statutes, 23rd Edition*, 6 May 2011, http://www.fei.org/sites/default/files/Statutes%2023rd%20Edition%20effective%2006%20May%202011_1.pdf accessed at 21 February 2012.
 116 Federation Internationale D'Esime, *Statutes*, December 2011, <http://www.fie.ch/download/status/en/FIE%20Statutes%20oang.pdf> accessed at 21 February 2012.
 117 Federation Internationale de Football

Association, *FIFA Statutes*, August 2010, http://www.fifa.com/mm/document/affederation/generic/01/29/85/71/fifastatuten2010_e.pdf accessed 28 February 2012.
 118 International Golf Federation, *Articles of International Golf Federation*, <http://www.internationalgolffederation.org/about/articles.html> accessed 28 February 2012.
 119 Federation Internationale de Gymnastique, *Federation Internationale de Gymnastique Statutes*, 1 January 2011, <http://www.fig-gymnastics.com/vsite/vnavsite/page/diretory/0,10853,5187-188050-205272-navlist,00.html> accessed 28 February 2012.
 120 International Handball Federation, *Statutes*, 1 August 2011, http://www.ihf.info/files/Uploads/NewsAttachments/0_01_-_Statutes_GB.pdf accessed at 22 February 2012.
 121 International Hockey Federation, *Statutes and Bye-Laws*, 13 November 2010, <http://www.fih.ch/files/Sport/Coaching/FIH%20Statutes%20and%20Bylaws.pdf> accessed at 22 February 2012.
 122 International Judo Federation, *IJF Statutes*, 20 August 2011, <http://www.ijf.org/> accessed at 22 February 2012.
 123 International Union of the Modern Pentathlon, *Statutes*, [\[tathlon.org/images/Rules/i%20constitution%20rules%2017%201%202012fina1.pdf\]\(http://www.fifa.com/mm/document/affederation/generic/01/29/85/71/fifastatuten2010_e.pdf\) accessed at 22 February 2012.
 124 Federation Internationale de L'Automobile, *FIA Statutes*, <http://www.fia.com/en-GB/the-fia/statutes/Pages/FIAStatutesContents.aspx> accessed 28 February 2012.
 125 International Federation of Rowing Associations, *FISA Statutes and Related Bye-Laws*, <http://www.worldrowing-magazine.com/fisarulebook/2011#pg6> accessed at 22 February 2012.
 126 International Rugby Board, *IRB Bye-Laws*, <http://www.irb.com/aboutirb/constitution/index.html> accessed 28 February 2012.
 127 International Sailing Federation, *Articles of Association of the International Sailing Federation*, \[http://www.sailing.org/downloads/committees/2012_Constitution_Website.pdf\]\(http://www.sailing.org/downloads/committees/2012_Constitution_Website.pdf\) accessed at 22 February 2012.
 128 Federation Internationale de Ski, *Federation Internationale de Ski Statutes*, 2008, <http://www.fis-ski.com/data/document/fis-statutes-2008.pdf> accessed 28 February 2012.
 129 International Shooting Sport Association, *Official Statutes Rules and*](http://www.pen-</p>
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Regulations, 1 January 2009, http://www.issf-sports.org/theissf/rules/english_rule-book.ashx accessed at 22 February 2012.
130 Federation Internationale de Natation, *Constitution*, http://www.fina.org/H2O/index.php?option=com_content&view=category&id=79:constitution&Itemid=184&layout=default accessed 28 February 2012.
131 International Table Tennis Federation, *Constitution*, <http://www.itf.com/>

itf_handbook/2011/2011_EN_HBK_CH_PT_1.pdf, accessed at 22 February 2012.
132 International Taekwon-do Federation, International Taekwon-do Federation by Laws, 24 October 2003, http://tkd-itf.org/pub_web/ver_eng/index.html accessed 28 February 2012.
133 International Tennis Federation, *The Constitution of ITF Limited 2012*, http://beta.itfennis.com/media/108826/CACHE_DUVIE=6a3bc7809a6dc2d4ea4

d15970393bdab/108826.pdf accessed 28 February 2012.
134 International Triathlon Union, *International Triathlon Union Constitution*, 7 September 2011, www.triathlon.org/images/uploads/itu-constitution-approved-congress2011.pdf accessed 22 February 2012.
135 Federation Internationale de Volleyball, *Constitution*
136 International Weightlifting Federation,

Constitution, http://www.iwf.net/wp-content/uploads/downloads/2012/01/Handbook2009_Constitution.pdf accessed 22 February 2012.
137 International Federation of Associated Wrestling Styles, *FILA Constitution*, September 2011, www.fila-official.com/images/FILA/documents/statuts/FILA_CONSTITUTION_2011_-_approved_by_2011_Congress_Eng.pdf access 22 February 2012.

Legal regulation of organization and holding of the Olympic Games in the Russian Federation

By **M.A.Prokopets*** and **D.M.Zhubrin****

The issues of legal regulation of the Olympic Games are currently of extreme importance and urgency for the Russian Federation, since the XXII Winter Olympic Games and the XI Paralympic Games will be held in the city of Sochi in 2014.

1. General provisions on the Olympic Movement in the Russian Federation

The Federal Law No. 329-FZ "On physical culture and sports in the Russian Federation" dated 04.12.2007 (hereinafter - the Sports Law) is the fundamental legal act, which governs the civil relations in the area of professional and amateur sports in the Russian Federation.

The Sports Law fixes the basis for the Russian Olympic movement.

According to part 1 of Article 11 of the Sports Law, the Russian Olympic movement is an integral part of the international Olympic movement. The latter is aimed at the popularization and implementation of the Olympic movement principles, promotion of physical culture and sports, consolidation of international sports cooperation, participation in the Olympic Games and other international sports events held under the auspices of the International Olympic Committee.

Pursuant to part 2 of Article 11 of the Sports Law, the Olympic movement of Russia is headed by the Olympic Committee of Russia - an all-Russian public institution acting in accordance with the legislation of the Russian Federation, with the Olympic Charter and on the basis of recognition by the International Olympic Committee, and also - with its own charter. The State acknowledges and supports the Olympic movement of Russia and renders full support to the Olympic Committee of Russia in the realization of its charter objectives.

The Olympic Committee of Russia:

- Popularizes the principles of Olympic movement in Russia, promotes the development of sports of the highest achievements and mass sports;
- Represents the Russian Federation at the Olympic Games in accordance with the Olympic Charter;
- Approves the composition of the Olympic delegation of the Russian Federation and sends it to participate in the Olympic Games;
- Provides the sports equipment, passage, residence and insurance of the members of the Olympic delegation of the Russian Federation at the Olympic Games;
- Approves the official sportswear and sports equipment of the Olympic delegation of the Russian Federation;
- Takes part in the development and execution of measures aimed at ensuring the level of training of the Russian sportsmen necessary for participation in the Olympic Games;
- Determines the city of the Russian Federation which is entitled to file with the International Olympic Committee the application to stage the Olympic Games;
- Helps to prevent and to combat doping in sports and to counteract any forms of discrimination and violence in sports;
- Exercises other rights in accordance with the Olympic Charter and its own charter, including the right to take part in the preparation of the Russian sportsmen for participation in the Olympic Games.

The Olympic Committee of Russia owns the exclusive right to use its own brand and the official brand "The Olympic team of Russia". The Olympic Committee of Russia takes steps to protect the rights to use the Olympic symbol, device, flag and hymn, brands "the Olympic Games", "the Olympics", which are owned by the International Olympic Committee, within the Russian Federation. The Olympic Committee

of Russia owns the exclusive right to the Olympic emblem, device, flag of the Olympic Committee of Russia and other Russian Olympic symbols.

2. Special legal regulation of the organization and holding of XXII Winter Olympic Games of 2014 in Sochi

The international experience of staging the Olympic Games has shown that such a huge event cannot be held without a good legal base, which would provide for resolution, within the legal framework, of the tasks set before the receiving party and for the existence of a necessary balance between the regulation norms and the directive of the International Olympic Committee and the national legislation.

When the Russian Federation received the right to host the XXII Winter Olympic Games of 2014 in Sochi, it became necessary to introduce numerous changes to the laws and by-laws in order to adapt the Russian legal system to the staging of the Olympic Games.

The discussions resulted in the adoption of the Federal Law No. 310-FZ "On the organization and holding of the XXII Winter Olympic Games and the XI Paralympic Games of 2014 in the city of Sochi, on the development of the mountain climatic resort of the city of Sochi and on introduction of amendments to certain legal acts of the Russian Federation" dated 01.12.2007 (hereinafter - the Olympic Law). The Olympic Law regulates an extensive range of issues directly or indirectly related to the Olympic Games "Sochi 2014".

A number of by-laws were adopted pursuant to the Olympic Law on the procedure of conducting by foreign citizens of labour activity connected with the Olympic objects and on the issues of safeguarding security during the Olympic Games.

The Olympic Law has introduced several new concepts not known to the Russian sports law before. This was mainly caused by the requirements of the International Sports Committee and by the necessity to resolve the tasks which have never arisen before the organizers of the sports events until now.

The structure of the Olympic Law is quite simple:

- General provisions which define the structure of the institutions responsible for preparation and staging of the Olympic Games "Sochi 2014", the procedure of interaction and coordination of their activity;
- Peculiarities of regulation of protection of competition and certain types of activity during the staging of the Olympic Games "Sochi 2014", such types including advertising, distribution of goods (execution of works, rendering of services) connected with the Olympic Games "Sochi 2014", labour activity (including volunteering), transportation of cargo;
- Dealing with security issues;
- Peculiarities of regulating city construction and land issues during the preparation and staging of the Olympic Games "Sochi 2014";
- Amending the legislation of the Russian Federation. When the Olympic Law was adopted, amendments were made to the tax, customs, land, city construction, residence, procedural, advertisement, migration and intellectual property law.

Since no Olympic objects were ready in Russia as of the moment when the right to host the Olympic Games "Sochi 2014" was received, it was decided to create an organization which would exercise centralized control and management over all processes connected with the planning, construction, reconstruction and use of Olympic objects.

Thus the State Corporation of Olympic objects construction and development of the mountain climatic resort of the city of Sochi (hereinafter - the Corporation) was created, its legal status and authority defined by a special federal law¹.

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The creation of the Corporation raised many questions within the legal community and the public, as the organizational and legal form of the Corporation does not allow for an efficient control over the spending of funds granted by the State for the Olympic objects construction. Moreover, the Corporation's activity is not subject to control by the Accounts Chamber of the Russian Federation.

3. Peculiarities of the Olympic Law

For the sake of simplicity and to avoid any repetitions, we will only speak of the peculiarities of legal regulation of the Olympic Games "Sochi 2014". However, it should be noted that the below provisions of the Olympic Law also apply to the Paralympic Games "Sochi 2014" in equal measure.

Advertising and marketing

The Olympic treats the relationships connected with advertising, marketing and intellectual property with special care. This is explained by the fact that the income received by the organizers from the sale of exclusive rights to the use of the Olympic symbols, to TV broadcasts, to the placement of the sponsors' advertisements is huge. That is why the protection of those rights is among the foremost tasks during the holding of any Olympic Games.

For example, the placing of advertising on the Olympic objects and within 1000 meters of them, as well as on the sports equipment, is only allowed upon execution of a respective agreement with the International Olympic Committee, which excludes the possibility of advertising by third parties (the so-called "parasitic marketing").

Advertising which contains non-veridical information on the advertiser's involvement in the Olympic Games is ruled false and brings administrative responsibility.

Also, the Olympic Law has introduced a new, and heretofore unknown to the Russian legislation, term "*marketing partners of the International Olympic Committee*". This term includes all Russian and foreign organizations which are official sponsors, suppliers, licensees of the International Olympic Committee within the framework of organization and holding the Olympic Games "Sochi 2014" and the official broadcasting companies.

Unfair competition

The Olympic Law forbids the use of the terms "Олимпийский", "Олимпиада", "Сочи 2014", "Olympic", "Olympian", "Olympiad", "Olympic Winter Games", "Olympic Games", "Sochi 2014" and words and phrases derived from them, Olympic symbol, fire, torch, flag, hymn, device, as well as the emblems, symbols and similar signs of the Olympic Games and the preceding and subsequent Olympic games.

The use of Olympic symbols for designation of legal entities and individual entrepreneurs, products of their fabrication, works done, services rendered by them (in brand names, commercial names, trademarks, service marks, designations of the goods' origins), as elements of domain names and other use, if such use creates the impression that said persons are involved in the Olympic Games, is only allowed upon execution of a respective agreement with the International Olympic Committee or organizations authorized by it.

The use of Olympic symbols with violation of the requirements listed above is illegal and brings civil and administrative responsibility, which also reduces the opportunities for "parasitic marketing".

The Olympic Law also introduces additional grounds for classification of a person's actions as unfair competition.

The Federal Law No. 135-FZ "On protection of competition" dated 26.07.2006 defines unfair competition as any actions by subjects of economy aimed at gaining advantages during the business activity, which contradict the legislation of the Russian Federation, business circula-

tion customs, requirements of good faith, reason and fairness, and cause or may cause losses to the competitors or damage or may damage their business reputation.

The Olympic Law expands the number of actions classified as unfair competition and includes among them:

- Sale, exchange or other way of introduction into circulation of a product with the illegal use of Olympic symbols;
- Misleading, including creation of false impression that the producer of the goods, the advertiser are involved in the Olympic Games.

The Board of the Supreme Court of Arbitration of the Russian Federation in its Resolution states that such actions are classified as unfair competition even if they do not cause losses or damages to the competitors².

Therefore, placement of Olympic symbols on the products, their introduction into circulation, indication of support of the Olympic Games "Sochi 2014" when there is no agreement with the International Olympic Committee is illegal and may cause bringing of the organization and its officers to administrative responsibility, whether or not any losses or damage have been caused. Such position of the highest court instance undoubtedly improves the quality of protection of the International Olympic Committee's exclusive rights.

Pursuant to a direct provision of the Olympic Law, the unfair competition norms do not apply to the organizers of the Olympic Games "Sochi 2014", sponsors and partners.

Ticket prices

The Olympic Law provides for state regulation of the prices of the entrance tickets to sports events and ceremonies of the Olympic Games "Sochi 2014" and of the value of hotel services.

Migration register, employment of foreign nationals

The Olympic Law fixes a preferential regime of attraction of the foreign workforce for conducting the works related to the preparation and staging of the Olympic Games. Volunteers may conduct their activity without employment permission.

During the Olympic Games "Sochi 2014", foreign citizens who take part in the preparation and staging of the Olympic Games "Sochi 2014" or are competitors in the Olympic Games "Sochi 2014" enter the Russian Federation without visas on the basis of identification documents and Olympic identification and accreditation.

Security measures

The Olympic Law gives serious attention to the issues of security. Pursuant to the decision of the President of the Russian Federation, reinforced security measures may be adopted for the period of hosting the Olympic Games "Sochi 2014". Such measures will include:

1. Implementation of controlled and/or no admittance areas;
2. Restrictions imposed on the entrance and/or temporary permanence and residence of citizens;
3. Restrictions on transport circulation;
4. Restrictions on aerial transport flights;
5. Restrictions on navigation;
6. Reinforced security of public order and objects;
7. Restrictions on holding public events not connected with the Olympic Games;
8. Suspension of dangerous industries' activity;
9. Inspection of individuals and means of transport entering and leaving the controlled areas;
10. Limitation or prohibition of sale of weapons, ammunition, explosives, special devices and poisonous substances;
11. Imposition of a special regime of circulation of medicines, narcotics and alcohol.

When reinforced security measures are implemented, certain categories of citizens, to whom such restrictions do not apply, may be defined.

Regulation of city construction and land relationships

A large portion of the Olympic Law provisions is dedicated to the details

1 The Federal Law No. 238-FZ "On the State Corporation of Olympic objects construction and development of the mountain climatic resort of the city of Sochi" dated 30.10.2007.

2 Resolution No. 3255/11, dated 19.07.2011, by the Board of the SCA of Russia on the case 05-8003/2010

of construction of Olympic objects, alienation and allotment of land for construction.

The problem of alienation of privately owned land plots was quite serious, since some Olympic objects, according to the project, were to be erected on the territories built over with residential quarters. Thus, the lawmakers had to develop an efficient legal mechanism of alienation of land plots, which would ensure the land owners' rights to receive an equivalent compensation, or another land plot, and which would permit to complete the procedure within a short period of time, so that construction could begin as soon as possible.

Tax benefits

Foreign organizers of the Olympic Games "Sochi 2014", foreign marketing partners and official broadcasting companies enjoy a number of tax benefits. In particular, they are not recognized as payers of VAT, income tax and organizations' property tax.

This allows the organizers and their partners to receive larger profits due to decreased tax expenses.

4. Court practice

The Russian courts in 2010 considered an interesting case connected with the protection of exclusive rights to what was probably the most famous talisman of the Olympic Games - the Olympic Bear³. Viktor Chizhikov, the author of the sketch of the bear destined to become the symbol of the XXII Summer Olympic Games of 1980 in Moscow, filed with a court a claim to exact compensation from the TV Company for demonstration of the Olympic Bear in a TV program without his permission. The court dismissed the claim. One of the motives for such dismissal was that the bear appearing in the TV program had a belt emblazoned with Olympic rings, the rings being the Olympic symbol and thus the exclusive property of the International Olympic Committee. Therefore, the claimant had no exclusive rights to the Olympic Bear, and there were no grounds for upholding the compensation claim. The other motive for the dismissal was that the artist had drawn the bear in two dimensions, and the TV program used a 3D image created by another author by redrawing the claimant's 2D sketch. Redrawing of initial designs without the respective author's consent was allowed by the legislation in effect as of the time of creation of the Bear (1977), and the author of the original work received no exclusive rights to the second, redrawn, one.

In 2009, a court of arbitration considered the claim by "Abrau Durso" CJSC, manufacturer of alcoholic beverages, to contest the resolution according to which it had been brought to administrative responsibility for unfair competition⁴. The court found out that "Abrau Durso" CJSC had solemnly initiated a brand of champagne with the use of Olympic symbols' elements: five rings device, a snowflake image, words and phrase "Sochi 2014", "Olimpiyskoe" champagne. The company placed the information on the initiation of the "Olimpiyskoe" champagne brand on its website, the solemn ceremony was widely covered by the mass media, photos and articles were published. Having consid-

ered the submitted evidence, the Court ruled that the company had been legally brought to administrative responsibility for unfair competition, said unfair competition being the forming of false impression of the Company's involvement with the Olympic Games by the use of Olympic symbols.

Yet another case. A court of arbitration ruled that an organization had been legally brought to administrative responsibility for sale of clothes (T-shirts) bearing the inscription "Sochi 2014"⁵. The Court pointed out that the sale of goods bearing Olympic symbols without the respective agreement with the International Olympic Committee or with an organization authorized by it was unfair competition.

The courts of the Russian Federation have currently adopted many court acts on protection of intellectual property of the International Olympic Committee from unfair competition and illegal use of trademarks. The absolute majority of said acts confirm the facts of violation of laws and the legality of bringing the guilty persons to responsibility.

5. Main conclusions

The results of the analysis allow concluding that the Russian legislation regulates the legal foundations of the Olympic movement in sufficient detail, as well as the status of the Olympic Committee of Russia and the peculiarities of protection of the intellectual property of the title holders to the Olympic symbols. A court practice has formed on many issues, especially on those related to the intellectual property protection.

For the purposes of hosting Olympic and Paralympic Games "Sochi 2014" separate laws and by-laws were adopted regulating the peculiarities of organization and holding said event only.

Even though there are some gaps in the legal regulation, one can say that the Russian Olympic legislation is adequately formed and corresponds to the modern reality.

Furthermore, adoption of legal acts aimed at the holding of the Olympic Games is extremely useful for the development of the sports law in general, because the lawmaker, by regulating relationships that are completely new to the Russian sports, improves the implements of the entire sector. Moreover, many top international sports events will be held in the Russian Federation, like, for example, the Student Games of 2013, or the FIFA World Football Championship of 2018, and in this regard the Olympic Law experience is extremely important and indispensable. Many provisions of the Law, for example, the ones on protection of the organizer's rights and on combating the "parasitic marketing", were employed during the preparation of the law on the World Football Championship of 2018.

3 Ruling, dated 26.08.2010, by the Moscow City Court on the case No. 33-26881

4 Resolution by the Federal Antimonopoly Service of the North Caucasus District on the case 32-20249/2008-19/322-32 dated 29.07.2009

5 Resolution by the Federal Antimonopoly Service of the North Caucasus District on the case 32-13457/2008-66/228-54 - 45/224-44 dated 16.06.2009



The Asser International Sports Law Centre is accepting articles for its worldwide publication, The International Sports Law Journal (ISLJ). The fall 2012 special issue will focus on articles relating to sports fraud (betting, corruption, doping, match-fixing, money-laundering, etc.) Articles with other topics are also welcome. Please see author submission guidelines located on our website at www.sportslaw.nl, and for more information, contact the Editor,

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Treaty on the Functioning of the European Union - State Aid and Sporting Legacy Facilities Within the European Union

By Steve Lawrence

State subsidy of private companies is incompatible with the common market

The debacle over the legacy use of the London Olympic Stadium has highlighted the difficulties which arise in respect of legacy use of large scale publicly funded sports facilities following major international sports events.

An issue arises for bidders and organisers because, beyond the life of the events themselves, the facilities created will have a continuing function. That continuing function will, in some cases, involve use by private undertakings in the context of their day-to-day operations in direct competition with other European undertakings.

In particular, difficulties are now arising in respect of sporting events organised by the IOC and FIFA within the European Union and especially in respect of the continuing use of stadia for football. Professional football clubs are private undertakings.

In essence any legacy framework must be constructed in such a way as to ensure that illegal state aid does not accrue to private businesses in competition with other such businesses within the EU.

The Treaty on the Functioning of the European Union is clear on the issue of state aid:

Under Article 107 it states:

'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

Exceptions

There are exceptions and clear guidance is given particularly to do with infrastructure as follows:

'Under certain conditions, support for infrastructure might not constitute State aid within the meaning of Article 107 (1) TFEU.'

General measures which do not favour certain undertakings or productions, but benefit the economy as a whole, are not considered State aid. For the constructions of multifunctional stadiums etc. it would have to be inter alia assessed whether the site is open to all users on non discriminatory conditions. Sports infrastructures dedicated to or benefitting certain undertakings would not constitute a general measure. There might not be an advantage in the meaning of Article 107 (1) TFEU if the user of the infrastructure pays the market price for its use.'

Powers of redress

There is no mechanism for the imposition of punitive fines in cases where illegal state aid does arise, instead the usual course of action would be for the EU to request that the Member State ceases the subsidy and institutes a process to recover all illegal aid paid along with accumulated interest.

There is a limitation period of 10 years for the recovery¹.

THE LONDON OLYMPIC STADIUM

The case of the London Olympic Games has highlighted the importance of understanding and planning for the requirements of European competition law when it comes to major publicly funded sports facilities. The particular case of the bidding process for the legacy use of Olympic Stadium in London has become an interesting example.

The scale of the stadium project is large with a capital cost circa 0.5bn euro. The financial framework chosen by the organisers, prior to the bid to the IOC, was for publicly funded construction of the infrastructure. The proposal also envisaged subsequent deconstruction and capacity reduction to prioritise use for athletics in legacy.

The intention at the time of the bid in 2005 was to proceed without a major tenant in the form of a football club. A continuing use of the stadium for athletics, funded by the state, would raise no concern in respect of 'illegal state aid' because such use would be expected to fall within the category of *'General measures which do not favour certain undertakings or productions, but benefits the economy as a whole.'*

To encompass a spectrum of legacy outcomes an Act of Parliament was passed in 2006 for the Olympic Games. Wide ranging powers were enacted to cover most eventualities². Amongst other things the authorities were empowered to:

4 (2) (b) dispose of land (and the Authority may, in particular, with the consent of the Secretary of State, dispose of land for a consideration less than that which might be expected in a commercial transaction at armslength);

4 (2) (c) enter into other transactions relating to land, premises or facilities;

The Emergence of the State Aid Issue In Respect of the London Stadium

A potential difficulty in the case of the London Olympic Stadium arose because of the re-introduction, at a late stage, of a possible legacy use for football by a top tier club.

Premier League and Football League football clubs are in competition with other European football clubs and any framework which would allow a state resourced asset to be used to the benefit of such a football club would run the risk of constituting 'illegal state aid' unless the user of the asset were to *'pay the market price for its use'*.

The UK authorities began a bidding procedure for the Olympic Stadium on 23 March 2010 by advertising a 'soft market testing' exercise in the Official Journal of the European Union (OJEU). Thereafter, no invitations to bid for the lease or sale of the stadium were advertised in the OJEU, instead a negotiation in respect of a 'bespoke' agreement with one of the interested parties was progressed to the point at which it was possible to place an advertisement in the OJEU in 8 April 2011 for a £100m construction contract for the conversion of the stadium for football.

The author's concerns, communicated to the UK Department of Culture Media and Sport and the Greater London Authority between March and August 2011, in respect of the risk of illegal state aid arising, culminated in the author's complaint to the European Competition Commissioner on 23 September 2011 on grounds as follows:

1. *The stadium lease contract has not been advertised on a fair and open market basis throughout the European Union.*
2. *There is the possibility of state subsidy accruing to private undertakings as a result of beneficial terms for the stadium lease.*
3. *There is the possibility of state subsidy arising as a result of financial support on preferential terms by state actors to private undertakings.*

The Commissioner communicated the complaint to the UK Authorities on 4 October 2011 and a decision to abandon the tendering process was announced by the UK Secretary of State for Sport on 11 October 2011.

Subsequently an explanation by the UK Authorities of their position, along with the abandoning of the project in its proposed form, consti-

1 Details of the procedure can be found in Articles 10-15 of Regulation (EC) No 659/1999 (OJ L 83 of 27.3.1999, p 1). <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:083:0001:0009:EN:PDF>

2 London Olympic Games and Paralympic Games Act 2006, (Act of Parliament, United Kingdom of Great Britain and Northern Ireland).

tuted a basis for the Commissioner to confirm closure of the file on the case on 3 November 2011.

A new bidding process

The UK Authorities have since instigated a revised tender process³ on the basis of continuing public ownership of the Olympic Stadium with open invitations being made to bid for certain concessions to provide sporting, entertainment and/or cultural content citing minimum terms of 5 years and maximum terms of 99 years.

It seems clear that such a basis will not constitute illegal state aid provided, of course, that each concessionaire, in so far as it is a private undertaking in competition with other such undertakings in Europe, 'pays the market price for its use'.

IMPLICATIONS FOR FUTURE EUROPEAN BIDDERS FOR MAJOR SPORTS PROJECTS

It is apparent that EU competition law is having an important bearing on the way in which the legacy use of the London Olympic Stadium is organised and the UK experience perhaps provides important guidance for other European nations contemplating construction of large-scale infrastructure, using state resources, as part of a bid for a major sporting event.

Whilst a spectrum of possible procurement vehicles exists there are four main generic categories for consideration with the state aid issue in mind:

1. State financed and owned facilities retained for the sporting event and subsequently sold or leased on a transparent open market basis.
2. State financed and owned facilities retained for the sporting event and subsequently state managed with concessionary arrangements monitored to ensure market prices.
3. Construction funded from private sources with funding predicated on long-term legacy use and with temporary occupation rights for the particular state sponsored event.

4. Public/private partnership with closely monitored and carefully agreed risks and benefits.

(The initial London stadium proposals fell into category 1 whilst the present proposals fall into category 2.)

The cost of these major sports projects has increased dramatically in recent years, more than 10bn euro has been expended on the London Olympics. In addition there are very long lead times with the Netherlands, for example, presently contemplating a bid for the 2028 Olympics (16 years hence). It is therefore crucial that adequate resolution of the state aid issue, explicitly incorporating essential EU open market characteristics, is woven into the fabric of any project from its conception.

Finally, beyond the issues of state aid and the need for transparency and fairness within the European Union, there is a question about transparency and fairness when EU nations are in competition with non-European nations. It could be argued that the stringencies of EU law on state aid may, in certain circumstances, be disadvantaging European bidders.

The FIFA decisions on both Russia and Qatar for the World Cup competitions in 2018 and 2022 along with the recent refusal of the Italian government to endorse Rome's bid for the 2020 Olympics have created a context for discussion on this subject.

It is important that European nations remain competitive on a global basis and some analysis of any asymmetries that may exist would seem worthwhile with the intention of identifying relevant political, economic, legal and sporting issues for debate both within the EU and perhaps with The World Trade Organisation.

The International Sports Law Journal

³ www.legacycompany.co.uk/stadium/

Doping And Olympic Games In Italy

A comparative analysis between sports regulations and Italian criminal law in the light of the events of Torino 2006

By **Lucio Colantuoni*** & **Elisa Brigandi**** with the cooperation of **Edoardo Revello*****

Introduction

The Olympic Games are nowadays of such a great importance that their politic, economic and juridical relevance is increasingly shown during the various editions (enough to think about the growing global attention from Barcelona '92 to Beijing '08).

Behind the idea of Pierre De Coubertin, there was the utopia of a perfect world without distinctions on racial, sexual or religious basis. A universe of equal opportunities, democracy and peace where the physical education could become a vehicle for the individual growth.

His vision was founded upon some crucial values such as respect, brotherhood, fair play and sacrifice.

The Olympic spirit would have pervaded the entire world with the ambition of making it better. Therefore, the reintroduction of the Games should have been the means by which ethics and sport could be joined in serving the community, beyond the motto "*mens sana in corpore sano*".

According to such an idea, the athlete should embody these fundamental values during the sporting performance¹.

In the light of the above, there is a general shared opinion that a severe fight against doping should be conducted with increasingly rigid measures not only from a sporting point of view but also with the interven-

tion of the criminal law. In fact, doping represents a plague which pollutes and oppresses those values at the bottom of the Olympic spirit itself. And some countries, like Italy, have enacted a specific anti doping criminal law.

Accordingly, this article has the aim of focusing and confronting the sporting regulations and the Italian criminal law on doping, by means also of the study of the disciplinary and judiciary cases on the matter during the XX edition of the Winter Olympic Games, held in Turin in 2006.

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Therefore, the present study shall analyze the peculiarities of the Italian fight against doping, which caused many concerns before the Games, due to the fact that the government had qualified doping as a criminal offence. As a matter of fact, it could have created some critical issues towards the sports legal order, as well as deterrent effects in choosing Italy as the host country of the Games.

Part I - Doping and Italian Regulations

1. The Regulatory Framework On Doping.

1.1 Introduction: the global evolution of the fight against doping.

Alongside the restless work for the assignment of the XX edition of the Games, the end of the 90s was characterized by the increasing diffusion of doping, which made the world of sport aware of the connected risks.

Such an awareness forced many countries to quickly develop the first global anti-doping program.

From the early 80s, the European Union (at that moment, the European Economic Community) had noticed the problem and, therefore, had started enacting some recommendations (not binding for the Member States) on the matter: particularly, the recommendation n.19, on 25 September 1984, adopted the "European Charter against doping in sports", as established by the Ministers for Sport.

Then, in 1989, the Council of Europe decided at last to settle a binding document: on 16 November, the Anti-Doping Convention of Strasbourg was signed and, then, ratified by Italy with Law n.522/1995.²

However, the real fulcrum of the global anti-doping regulations is constituted by the *World Anti-Doping Code* and by the policy of the *World Anti-Doping Agency* (WADA)³.

As a matter of fact, on 4 February 1999, the first World Conference of doping was held in Lausanne on the initiative of the IOC. The so-called Lausanne Declaration was approved, according to which doping violated the ethical principles of sport. All the parties agreed upon the creation of a sole World Anti-doping Code and of a body with monitoring and repressing powers against doping for all the sporting disciplines.

Thus, the World Anti-Doping Agency (WADA) was created with the aim of coordinating the global fight against doping and promoting the values of fairness and impartiality through the coordination of the national and international anti-doping programs⁴.

The Agency became fully operational in 2000, while the Code came into force in January 2004 (the final version was approved by the World Anti-Doping Conference of Copenhagen) in order to be effective for

the Olympic Games of Athens. It could be a mere coincidence, but that edition shall be remembered for the large number of positive athletes.

Therefore, the WADA Code represents the document which established in writing the set of rules to be respected by the athletes and the relative responsibilities in case of breach.

Meanwhile, in 2002, the Council of Europe of Warsaw allowed the Member States to ratify the Additional Protocol to the aforementioned Strasbourg Convention of 1989.

Finally, on 19 October 2005, the XXXIII UNESCO General Assembly in Paris unanimously adopted the *International Anti-doping Convention*, which was afterwards ratified by the Italian Government with Law n.230/2007⁵.

Accordingly, such a Convention, as well as the 2002 Warsaw Protocol and the WADA Program constitute the corner stone of the global fight against doping.

As said above, the WADA Code has been often modified and updated over the years due to the need for more effectiveness (in 2005, 2007 and, ultimately, in 2008 after the III World Anti-Doping Conference in Madrid). The last changes came into force in January 2009 and they represent the current version. Therefore, the *World Anti-Doping Program* is constituted by the *International Standards*⁶, the *Models of best praxis*⁷ and the *WADA Code*⁸.

In the light of the aforementioned regulations, it is clear how doping has become through the years a crucial issue to be fought at the international level⁹.

In this context, Italy took a strong position against such a phenomenon by approving Law n.376/2000 ("Regulation of health standards in sports activities and the fight against doping"¹⁰), according to which doping is considered as a criminal offence (punished with imprisonment).

1.2 The regulatory framework in Italy and the enactment of Law n. 376/2000.

Before the analysis of Law n.376/2000, we will now briefly analyze the former regulatory framework in Italy, which had mostly delegated to the sporting regulations the fight against doping until the end of the 90s.

In July 1988, the *Italian Olympic Committee* (CONI) enacted a circular providing with uniform rules and a list of prohibited substances as well. Accordingly, the National Sports Federations implemented them and regulated the controls and the relative sanctions.

As said, until the introduction of Law n.376/2000, there was a sort of legislative vacuum in Italy and doping was only countered by the set of rules as enacted by CONI¹¹.

All those theories endured within the sporting scenario until the year

1 A. Stelitano, "Il profilo di Pier de Coubertin", Centro Studi Coni, April 2009.

2 Published in Official Gazette n.287, 9 December 1995.

3 L. Colantuoni, "Il doping e la tutela sanitaria delle attività sportive", in *Diritto Sportivo*, Giappichelli 2009, p. 443 et seq.

4 Particularly, the WADA Statute provides that Agency's tasks are as follows: a) to promote and coordinate the fight against doping, at the international level, mainly through tests during and out of the competitions, with the full support of the entire sports system; b) to adopt, modify and update the list of prohibited methods and substances; c) to coordinate and sustain the surprise controls during the competitions with the cooperation of the private and public authorities involved; d) to elaborate, harmonize and unify the rules and the scientific procedures of the analysis methods.

5 Published in Official Gazette n. 290, 14 December 2007.

6 The *International Standards* clarify the provisions of the WADA Code by harmonizing some operative and technical

aspects of the World Anti-Doping Program and they are: a) the List of prohibited substances and methods; b) the standards on the *Therapeutic Use Exemption* (TUE); c) the standards on the anti-doping controls mode; d) the standards on the anti-doping laboratories; e) the standards on athletes' privacy and their personal data's protection.

7 The *Models of best praxis* develop proceeding models within several areas of doping. According to such guidelines, the anti-doping bodies, as well as the National Sports Federation, take innovative solutions on the matter (such as the whereabouts information regarding the athletes).

8 The *WADA Code* is worldwide applied in any sector of sport, providing more than a simple definition of doping. As a matter of fact, the Code harmonizes the rules and the procedures that previously were different depending on the country and the discipline. Some provisions are expressly considered as binding and, according to Art.23.2.2, they need a reproduction without any substantial change within the national regulations. On the contrary, the

others are more flexible and, notwithstanding their compulsoriness, they can be amended according to their general principles.

9 On the other hand, at the national level, we have to underline that the sporting disciplines have to deal with the policy of the *Italian Olympic Committee* (CONI). In fact, the WADA Code expressly provides that every sports legal order must have a national anti-doping organization (the so called *National Anti-Doping Organization* - NADO), as recognized by the WADA, with the aim of fighting doping in accordance with the WADA policy. In Italy, CONI has also the functions of NADO: consequently, its Statutes provides that CONI "establishes the fundamental principles on sporting activities and athletes' health in order to guarantee fair and regular competitions". Furthermore, CONI "settles the principles in order to prevent and fight the use of prohibited substances or methods, capable of modifying athletes' sporting performance". Therefore, CONI-NADO has the national body with the exclusive competence with regard to the enacting and adoption of the *Anti-Doping*

Sports Regulations, including athletes' tests, their results and the following disciplinary proceedings. The 2011 edition of such Regulations, as approved by CONI in March, represent the implementing document of the WADA World Anti-Doping Program.

10 Published in Official Gazette n. 294, 18 December 2000.

11 A) First attempt: Law n.1099/1971 ("Health care of the sporting activities") - published in Official Gazette n.234, 23 December 1971. Law n.1099/1971 represents the first attempt of the Italian Legislator to punish doping with criminal sanctions. As a matter of fact, such regulations provided that the assuming, the administering and the possession of doping substances ("capable of modifying athletes' natural energies") were considered as a criminal offence. b) Second attempt: Decree of the President of the Italian Republic n.309/1990 (*Consolidated text on drugs*) - published in Official Gazette n. 255, 31 October 1990. In such a vacuum caused by the decriminalization of the offence, some judges tried to fight doping with other legislative tools. The most

2000, when the Italian Legislator finally enacted a specific criminal law on doping.

Under the new regulations, doping is considered again as a criminal offence to be sanctioned with strong measures, namely imprisonment from 3 months to 3 years (and even to 6 years in the most serious cases).

In the aftermath of the enacting the law, the doctrine started analyzing the relation with the aforementioned Law n.401/1989 on sporting fraud. The mainstream deemed that there was a complementary relationship: as a matter of fact, those cases not covered by the new set of rules could be included within the previous law (such as, the use of a prohibited substance out of the list in order to alter a match)¹².

Particularly, from a structural point of view, the law is made by 10 articles in accordance with the principles and values set forth by the Convention of Strasburg in 1989.

Accordingly, Art. 1 par. 1 states that: “*the aim of sport is to promote individual and collective health and thus sporting activities must be governed by the ethical principles and educational values set forth in the Anti-Doping Convention, and relative appendix, opened in Strasbourg on 16 November 1989 and ratified pursuant to Law N° 522 of 29 November 1995. Sporting activity shall therefore be monitored according to the provisions established by the legislation in force regarding the protection of health and the legality of competitions and may not be undertaken using techniques, methodologies or substances of any type which could present a risk to the psycho-physical integrity of the athletes involved*”.

Therefore, not only does the law have the aim of prosecuting dangerous conducts, but also those behaviors capable of modifying the psycho-physical conditions of the organism, which are not actually harmful¹³.

Consequently, this new set of rules provides with an abstract crime of danger (“*reato di pericolo astratto*”): otherwise, it would have been nearly impossible for the judge to understand whether the result of the competition would have been different if the athlete had not assumed a doping substance (crime of damage - “*reato di danno*”)¹⁴.

The judge shall only evaluate whether the substance is capable of modifying the performance and such a characteristic is simply proven by its insertion within the list of prohibited substances as enacted by a Ministerial Decree.

With specific regard to the prohibited conducts, Art.1 par. 2 states that: “*doping consists in the administration or taking of drugs or substances which are biologically or pharmacologically active*” as well as “*the adoption of - or the participation in - medical practices which are not justified by pathological conditions and may change the psycho-physical or biological conditions of the organism and thus alter the performance of the athletes*”.

Furthermore, Art.1 par. 3 establishes that: “*For the purposes of this law, the administration of drugs or substances which are biologically or phar-*

macologically active, and the adoption of medical practices which are not justified by pathological conditions and which may - and indeed intend to - modify the results of monitoring of the use of the drugs, substances and practices mentioned in Subsection 2 here in above, shall also be deemed to constitute doping”.

Then, Article 2 is specifically dedicated to the so called “*classes of doping substances*” which are revised on a regular basis through Ministerial Decree: as a matter of fact, all drugs or substances (biologically or pharmacologically active), as well as any medical practice (deemed to constitute doping pursuant to Article 1), in accordance with the Convention of Strasburg and the indications of the IOC, are classified into classes of drugs, substances or medical practice.

The classification of drugs and substances is determined on the basis of their respective chemical and pharmacological characteristics, while the classification of medical practice on the basis of their physiological effects.

Such a classification is generally approved by the Ministry of Health, according to the proposal put forward by the Commission for the Monitoring and Control of Doping and the Protection of Health in Sports Activities of which in Article 3 (as distinct from the CONI Anti-doping Commission)¹⁵.

This Commission represents the “*watchdog*” of the entire system and the very first step in order to make the law operative.

Furthermore with regard to the controls, Article 4 specifically provides that the health controls on the sporting activities and competitions shall be performed by those laboratories accredited by the IOC or other international organization¹⁶.

Then, this brief analysis has to focus on articles 6 and 9, to be considered as the most remarkable.

In fact, Article 6 provides the so-called “*obligation for integration of sports entities’ regulations*”. Particularly, Par.1 states that: “*CONI, sports federations, affiliated sports clubs, sporting associations and public and private organizations for the promotion of sport shall adjust their regulations to encompass the provisions of this law. They shall provide sanctions and disciplinary procedures to regulate their members in the case of doping or refusal to submit to testing*”.

On the other side, Par. 2 adds that: “*being legally recognized as autonomous, the national sports federations may establish sanctions to discipline the administering or taking of drugs or of biologically or pharmacologically active substances and the adoption of - or participation in - medical practices which are not justified by pathological conditions and may change the psycho-physical or biological conditions of the organism and thus alter performance of the athletes, regardless of whether such practices are classified in the classes of which in Section 2, Subsection 1 or otherwise, on condition that such drugs, substances or practices are considered as to constitute doping by other international regulations in force*”.

resounding attempt was constituted by the application of the provisions of D.P.R. n.390/1990, which disciplined the use of prohibited substance. c) Third attempt: Law n.401/1989 (Sporting fraud) - published in Official Gazette n. 294, December 1989. A part of the doctrine believed that doping had to be fought with Law n.401/1989 on the so-called sporting fraud. In accordance with such regulations, not only was “*the offer of money or of another utility to modify the sporting result*” considered as a criminal offence, but also the generic performance of “*fraudulent acts aimed at the same purpose*” (Art.1). These authors deemed that doping could be considered as a fraudulent act aiming at modifying the sporting result.

¹² With the aim of showing the main differences amongst the two laws, we have to underline that: a) Law n.376 provides a criminal offence with a detailed analysis of the forbidden conduct, while on the contrary Law n.401 provides an offence with

an open structure; b) Law n.376 is applicable to all the sports competitions, while Law n.401 only to those activities organized by CONI and other Sports Bodies, as recognized by the State; c) Law n.376 aims at protecting athletes’ health as well as fighting doping, while Law n.401 has the purpose of guaranteeing the fairness of the sports competitions. Ultimately, we briefly point out a recent case law involving an Italian football team, FC Juventus, which clearly shows the difficulties in applying the correct provisions on the matter. In November 2004, the Court of Turin condemned the team doctor for the crime of sporting fraud due to the administering of drugs aiming at enhancing athletes’ performance by using their secondary effects (the so called “*off label doping*”). But the Court of Appeal overturned the first ruling because there was no case to answer. The judges could not use the provisions as set forth by Law n.376/2000 due to the fact that the proceeding started before its enacting.

¹³ A. Traversi, “*Il diritto penale dello sport*”, Giuffrè Milano 2001, pp. 109 et seq.

¹⁴ On the contrary, the judge has the only task of discovering whether the athlete has assumed doping, without paying attention to a concrete analysis on the fairness of the competition. It is not, thus, necessary that the competition has been effectively distorted, neither that the psycho-physical conditions have been really altered.

¹⁵ The Commission undertakes the following activities: a) establishing and revising the classes; b) determining the cases, criteria and methodologies for anti-doping control and identifying the competitions and sporting activities for which health checks shall be conducted by the laboratories of which in Section 4 (no more depending from CONI, but under the responsibility of the Minister of Health - cf. Article 3 of the French Anti-doping Law n.432/1989); c) performing anti-doping controls and checks on the health of the athletes during and outside competi-

tions, availing itself of the laboratories of which in Section 4; d) preparing research programs into drugs, substances and medical practices; e) promoting information campaigns for the protection of health in sporting activities and the prevention of doping.

¹⁶ The laboratories shall complete the following tasks: a) perform anti-doping controls according to the rules approved by the Commission; b) conduct research into drugs, substances and medical practices which may be used for the purpose of doping in sporting activities; c) cooperate with the Commission in defining the requisites of which in Art.4 Par.3. Furthermore, control of competitions and sporting activities other than those identified pursuant to Article 3 shall be performed by laboratories with the organizational and functional requisites set forth in a Decree of the Minister of Health, after consultancy with the Commission.



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Other Books of the author:

- (2009) Sports Law Code. [in: Greek, 8th edition], Nomiki Bibliothiki: Athens, pages 288.
- (2009ed), Sports Law: An Emerging Legal Order - Human Rights of Athletes, Nomiki Vivliothiki: Athens, pages 490.
- (2007), International Sports and Olympic Institutions. Sports Law International, [in: Greek], Nomiki Bibliothiki: Athens, pages 432.
- (2006), Sports Law, II. Sports Jurisdiction [in: Greek], Nomiki Bibliothiki: Athens, pages 355.
- (2005 ed.), Sports Law, I. A systematic foundation and application, [in: Greek], Nomiki Bibliothiki: Athens, pages 633.
- (2004), Sports Law [Lex Sportiva] in the World, Ant. N. Sakkoulas: Athens, pages 567.
- (2003), Sports Law: A European Dimension, Ant. N. Sakkoulas: Athens, pages 270. Employment relations of Sport [in: Greek], Nomiki Bibliothiki: Athens, pages 288.
- (2000 ed.), Ethics on Sports: Rights and Obligations in the Sports Process, Proceedings of the 2nd International Congress on Sports Law, International Association of Sports Law (IASL)/Olympia, Oct. 29-31, 1993, ELLIN: Athens, pages 303.
- (1998 ed.), Sports Activities- European Community Law and International Implications, Proceedings of the 5th IASL International Congress on Sports Law, International Association of Sports Law (IASL), Nafplio, July, 10-12, 1997, IASL/HELLIN: Athens, pages 259.
- (1993 ed.), The Institution of the Olympic Games: A Multidisciplinary Approach, Proceedings of International Congress in Olympia, Sept. 3-7 1991, Hellenic Centre of Research of Sports Law: Athens, pages 534.
- (1993 ed.), The Science of Sports Law, National - International Sports, Sports Justice, Proceedings of the First International Congress on Sports Law, Univ. of Athens, Athens Dec. 11 - 13, 1992, pages 475.

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Reversing Field

Examining Commercialization, Labor, Gender, and Race in 21st Century Sports Law



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Then, all the organizations involved “shall also prepare all the documentation necessary in order to comply with the rules governing the protection of health set forth in this law”.

Lastly, “athletes shall comply with the rules of which in Subsection 1 and shall confirm their full awareness and acceptance of the terms and conditions therein”.

On the other side, Article 9, as analyzed in the following paragraphs, introduces the relevant sanctions in case of the commission of the offence, as well as aggravating circumstances and specific additional punishments.

2. A Comparative Analysis Amongst Sports Regulations and Criminal Law.

2.1 The mutual autonomy of the Italian criminal proceeding and the anti-doping sporting proceeding.

The relations amongst the sports legal order and Italian legal order are regulated by Law n.280/2003¹⁷ establishing the so-called principle of autonomy. Autonomy is granted except for those subjective legal situations connected with the sports legal order, which could be relevant for the national legal order.

Accordingly, there is an issue every time a conduct violates the criminal law but not the sports regulations or vice versa. The sports provisions and the criminal law, notwithstanding their mutual autonomy, created over time coordination, according to which they reserve distinct areas of application. For example, the sporting entities have to conform their regulations to the anti-doping provisions, in accordance with the aforementioned Article 6 of Law n.376/2000.

On the other side, the disciplinary proceeding does not provide many of the principles characterizing the criminal proceeding.

Following these fundamental premises, we will now focus on the differing elements amongst the two proceedings concerned.

2.2 A critical, comparative analysis of the two systems: rules and sanctions.

With specific regard to their application, we have immediately to underline that the criminal law provides a close number of unlawful conducts, while the sporting regulations settle more general conducts¹⁸.

Accordingly, Law n.376/2000 describes in detail three types of offence and the relative conducts, specifically with regard to article 9 paragraphs 1, 2, 7. The first hypothesis is constituted by the obtaining, the administering, the assumption or the encouraging of the use of doping substances, which are not justified by pathological conditions and may alter the performance of the athletes (art. 9 par. 1). Then, the second hypothesis is constituted by the adoption or the participation in forbidden medical practices, which are not justified by pathological conditions and may alter the performance of the athletes or modify the monitoring of the use of such practices (art. 9 par. 2).

Both the conducts are punished, unless they constitute another and more serious offence (such as, manslaughter) with the imprisonment from 3 months to 3 years and with a sanction from €1.582 to €1.645.

Aggravating measures are, then, provided according to paragraph 3 when: a) the health of any party is harmed by the criminal act; b) the

criminal act is committed against a minor; c) the criminal act is committed by a member or employee of CONI or any national sports federation, club, association, or organization recognized by CONI. In case of the latter, the guilty party is permanently banned from his/her office as well. On the contrary, a professional figure in the health care sector will only receive a temporary suspension from his/her profession.

The subjective element for both the abovementioned conducts is the specific intent. As a matter of fact, in case of an involuntary assumption the responsibility only lies on the person who administered the substance.

The third, and last, hypothesis is provided by article 9 par. 7: “whosoever shall trade in the drugs and biologically or pharmacologically active substances included in the classes [...] other than through retail pharmacies [...] shall be punished with imprisonment of between two and six years and a fine of between Lit. 10 million and Lit. 150 million”. In this case, the aggravating measures of the above cannot be applied and the specific intent to alter the sporting performance is not necessary (in fact, the Legislator is willing to punish the economic value of such illegal trade).

On the other side, the WADA Code contains a list of prohibited conducts, that is more generic and not definite (as a matter of fact, some circumstances are, here, relevant from a disciplinary point of view, but not in the field of the criminal law: for example, the simple possession is punished without taking into account the use of the substance).

Article 2 of the WADA Code determines the single hypothesis of breach of the anti-doping regulations: a) Art. 2.1 - *Presence of a prohibited substance or its metabolites or markers in an athlete's sample*¹⁹; b) Art. 2.2 - *use or attempted use by an athlete of a prohibited substance or a prohibited method*²⁰; c) Art. 2.3 - *refusing or failing without compelling justification to submit to sample collection after notification as authorized in applicable anti-doping rules, or otherwise evading sample collection*²¹; d) Art. 2.4 - *violation of applicable requirements regarding athlete availability for out-of-competition testing, including failure to file required whereabouts information and missed tests which are declared based on rules which comply with the International Standard for Testing. Any combination of three missed tests and/or filing failures within an eighteen-month period as determined by Anti-Doping Organizations with jurisdiction over the athlete shall constitute an anti-doping rule violation*²²; e) Art. 2.5 - *tampering or attempted tampering with any part of doping control*²³; f) Art. 2.6 - *possession of prohibited substances and prohibited methods*²⁴; g) Art. 2.7 - *trafficking or attempted trafficking in any prohibited substance or prohibited method*; h) Art. 2.8 - *administration or attempted administration to any athlete in-competition, as well as out-of-competition, of any prohibited method or prohibited substance, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation (or any attempt)*.

As specifically to the sanctions, Article 10.2 (in case of a breach of the Code according to Articles 2.1, 2.2, 2.6) determines the ineligibility for 2 years for the first violation. In its new formulation, there is no reference to the second violation (which previously caused a permanent ban), while a subsidiarity clause for the application of articles 10.4, 10.5, 10.6 (specifically dedicated to aggravating and extenuating circumstances, capable of modifying the period of ineligibility²⁵) has been introduced.

17 Published in Official Gazette n. 243, October 2003.

18 L. Colantuoni, op. cit.; G. Manzi, op. cit.

19 The athlete has the duty to ensure “that no prohibited substance enters his/her body”. Accordingly, under the strict liability principle, an athlete is responsible whenever a prohibited substance is found in his/her sample. The violation occurs “whether or not the athlete intentionally or unintentionally used such substance or was negligent or otherwise at fault”. However, the athlete then has the possibility “to avoid or reduce sanctions” in accordance with Articles 10.4 and 10.5 (as analyzed below). Notwithstanding such general principle, the imposition of a fixed period of time is not automatic: as a matter of

fact, the strict liability principle set forth in the Code “has been consequently upheld in the decision of CAS”.

20 The use of the attempted use of a prohibited substance or method may be established “by any reliable means”, such as admission by the athlete, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, or other analytical information which “does not otherwise satisfy all the requirements to establish ‘presence’ under Art. 2.1”.

21 The article expands the typical pre-Code rule including “otherwise evading sample collection”, as a prohibited conduct (such as, if an athlete was hiding from a doping control). A violation of refusing or failing to submit to a sample collection may be

based on either intentional or negligent conduct of the athlete, while “evading” contemplates an intentional conduct.

22 In appropriate circumstances, missed tests or filing failures may also constitute an anti-doping rule violation under Articles 2.3 or 2.5.

23 This article prohibits conducts “which subverts the doping control process but which would not otherwise be included in the definition of Prohibited Methods”.

24 The article punishes the possession by an athlete or by an athlete support personnel in-competition, as well as out-of-competition, of any prohibited method or substance unless such a possession is pursuant to a therapeutic use exemption (according to Art. 4.4). See par. 3.4.

25 According to Art. 10.4, the period of ineligibility can be reduced from a reprimand to two years of suspension under specific circumstances (such as, whether the possession was not intended to enhance the sport performance or mask the use of a performance-enhancing substance). Then, Art. 10.5 provides that the period of ineligibility can be eliminated or reduced under exceptional circumstances (namely, when the athlete bears no fault or negligence or no significant fault or negligence). The following two paragraphs state that the athlete shall receive a reduction: a) in case of a substantial assistance in discovering or establishing an anti-doping rule violation or b) in case of the admission of the commission of the viola-

Furthermore, Article 10.3 provides that: “the period of ineligibility for anti-doping rule violations other than as provided in Article 10.2 shall be as follows: 10.3.1 - for violations of Article 2.3 or Article 2.5 the ineligibility period shall be 2 years unless the conditions provided in Article 10.5, or the conditions provided in Article 10.6, are met. 10.3.2 - for violations of Articles 2.7 or 2.8 the period of Ineligibility imposed shall be a minimum of 4 years up to lifetime ineligibility unless the conditions provided in Article 10.5 are met”.

Moreover, Article 10.7 introduces a table in case of multiple violation (“each anti-doping rule violation must take place within the same eight-year period in order to be considered multiple violations” - art. 10.7.5). In addition, we have to underline that: “a third anti-doping rule violation will always result in a lifetime period of ineligibility” (art. 10.7.3).

Lastly, Article 10.9.2 states that: “where the Athlete or other Person promptly admits the anti-doping rule violation after being confronted with the anti-doping rule violation by the Anti-Doping Organization, the period of Ineligibility may start as early as the date of sample collection or the date on which another anti-doping rule violation last occurred”.

2.3 The classification of the doping substances: requirements for the application of Law n.376/2000 and the disciplinary provisions.

After this brief analysis of the two regulatory systems, some crucial differences immediately arise: firstly, under the Italian criminal law, the doping substances are relevant only whether they are drugs and they fall within the list of prohibited substances in accordance with the aforementioned Article 2 of Law n.376/2000. There has been a long debate on the nature of such a list, particularly on whether the classification was exhaustive or, on the contrary, any substance capable of modifying the sporting results could be considered doping as well (in accordance with Art. 9)²⁶.

In 2006, the Joined Chambers of the Italian Court of Cassation²⁷ dealt with the matter stating that those criminal offences, as set forth by Art. 9 of Law n.376/2000, had to be applied even to those facts occurred before the enacting of the Ministerial Decree (15 October 2002), which had approved the list of prohibited substances and methods. As a matter of fact, such a Decree only had to classify the substances and methods concerned, without the task of identifying them from the outset.

On the other side, we observe that in a sports disciplinary proceeding not only are those substances (as prohibited by the criminal law) considered doping, but also some specific substances and/or medical practices (not included within the Decrees of the Ministry of Health) capable of modifying the sporting performance (for example, the so called “off label” assumption of some substances, like caffeine).

2.4 The subjective and objective aspects on doping under the criminal law and the disciplinary regulations.

According to Article 27 of the Italian Constitution, “criminal liability is individual”: therefore, the Italian legal order shuns all the forms of subjective imputation, since the material element of the crime (namely, the conduct, the offensive event and a causal link amongst them) and the subjective element (namely, negligence or criminal intent) are necessary as well.

tion if such an admission is the only reliable evidence. On the other side, Art. 10.6 provides that under some aggravating circumstances (for example, when the violation is part of a doping plan or scheme) the period of ineligibility shall be increased up to a maximum of four years.
26 A broad interpretation would reduce the risk of regulatory gaps, since there would be a constant updating process made by the jurisprudence. Accordingly, the Law would have a stricter application, but, taking into consideration the wording of the provision, the majority of the doctrine deems that only those substances within the list should be considered under the criminal law. Within the sporting scenario, CONI asked the CAS (the Court of

Arbitration for Sport) for an advisory opinion on the matter in April 2004. The response was that “the assumption of doping is punished under the sports regulations only if the substance is prohibited by the anti-doping rules or, in any case, if such a substance is associated with those expressly prohibited”.

27 Sentence n.3089, 26 January 2006, in *Diritto Penale e Processo*, n. 2/2007.

28 The criminal responsibility shall only lie on the person(s) who administered the substance (such as, trainers, coaches and sports doctors).

29 According to Art. 42 of the Italian Criminal Code, every criminal offence requires the intent, as subjective element, unless otherwise specified. Accordingly, every anti-dop-

ing rule violation needs the intent by the person who commits the relevant fact.

30 M. Vigna, “Le condotte dell’articolo 2,8 del codice WADA e la valutazione dell’elemento soggettivo: ignorantia legis excusat?” (nota a Lodo Tas 2010/A/2184 Lazzaro e lodo TAS 2010/A/ 2194 Giaggio - non pubblicate), in *Giustiziasportiva.it* n. 2/2011; “L’elemento soggettivo nell’illecito antidoping e la giurisprudenza del TAS”, report to the Conference “I° seminario di aggiornamento sull’arbitrato nello sport: il TAS/CAS di Losanna”, Milan - 11 October 2011, as organized by the Sports Law Research Center based in Milan, with the cooperation of the Swiss Chamber of Commerce.

Under this light should Law n.376/2000 be read, providing different types of intent (specific intent according to article 9 paragraphs 1 and 2, and generic intent according to article 9 par.7). In such cases, once the material element has been proven, the authorities have also to demonstrate the subjective element.

Therefore, every time such subjective element is not proven, the athlete shall not be considered responsible under the criminal law (for example, in case of the administration of a substance unknown to him/her²⁸ or in case of a negligent assumption²⁹).

On the contrary, with regard to the imputation, the WADA Code has a heterogeneous nature³⁰. As a matter of fact, Article 2 of the Code generally specifies that athletes shall be responsible for “knowing what constitutes an anti-doping rule violation and the substances and methods which have been included” in the list.

Given the above, we have to underline a significant award issued by the CAS in 2009 with regard to the so called “kissing theory”³¹. The Panel considered without fault the tennis player Richard Gasquet, tested positive for cocaine, since his defense demonstrated the alleged assumption had occurred after some effusions with a girl who had previously taken such a drug. Therefore, the decision was based upon a concrete balance of probabilities on the “route of ingestion” of the prohibited substance³².

2.5 The disciplinary relevance of the refusal to submit to doping controls and the absence of contradictory.

Furthermore, another remarkable difference is represented by the different consequences arising from the refusal to submit to a doping control.

In origin, Law n.1099/1971 expressly provided that those doctors designated for the visits were allowed to take samples of substances and the refusal was equated with a positive result (with the same sanction, namely a fine). Law n.376/2000 does not currently provide any sanction against this kind of refusal. Since such controls are not mandatory, they can be conducted by surprise but the athlete’s consent is always necessary.

On the contrary, the WADA Code, according to the aforementioned article 2.3, clearly states that such refusal consists in an anti doping rule violation.

Ultimately, we have to underline another difference regarding the methods of control. In fact, the criminal law does not allow the athlete nor his/her defense to participate in the analysis of the sample by a regular contradictory. Furthermore, in case of a positive result, a re-examination is not provided. On the other side, the sports regulation expressly allows a second analysis on the sample, therefore ensuring the rights of defense³³.

PART II - Doping and Olympic Games in Italy: the cases during Torino 2006

3. The Suspension Request of Law N.376/2000 in Occasion of Torino 2006: The Position of the Italian Government and the so Called “Storace” Decree.

The comparative analysis in the previous section enables us to under-

& CAS 2009/A/1930 WADA v. ITF & Richard Gasquet. For a closer examination see M. Vigna “Nuova linfa per l’individual case management in ambito antidoping: la ‘kissing theory’ non ha colpe”, in *Giustiziasportiva.it* n. 3/2010.

32 This Award clearly represents a point break within the CAS jurisprudence, since no Panel had previously granted a reduction of the suspension by taking into account an unintentional assumption (such as, contaminated cigarettes or drinks, passive smoking, food using hormones, manipulated drugs or supplements). Once the Panel had verified the factual elements, the presence of any element of fault or negligence on the part of the athlete were, then, analyzed.

31 CAS 2009/A/1926 ITF v. Richard Gasquet

stand all the concerns following the enactment of Law n.376/2000 and its impact on the Winter Olympics in Italy (*Torino 2006*). As a matter of fact, when the *Host City Contract*³⁴ was signed in 1999, the Italian legal framework was different, since doping was only considered as a sporting fraud, in accordance with the CONI Anti-doping Regulations.

As a direct consequence, such new set of rules caused a lot of reactions from foreign sports federations, which were worried about the fact that doping had to be punished with imprisonment (as well as with the sanctions provided by the sports justice) and that a specific Monitoring Committee had to coordinate the doping controls in order to verify any offence.

Furthermore, not only was imprisonment provided for the athletes, but also for any other person who had supported the anti doping rule violation (trainers, coaches, managers, etc.).

On the contrary, the Olympic Charter stated that the national sports federations had only to adopt sporting sanctions, in accordance with the supervening WADA Regulations.

Therefore, from one side the International sports federations were concerned about the possibility that some police officers could have licitly entered for inspections into the Olympic Village and about the consequences for those athletes tested positive. On the other, the IOC was afraid of the fact that many teams could have decided not to sign up for the Winter Games, due to the concrete fear of the criminal sanctions provided by the Italian law.

In such a tense atmosphere, the Italian Government refused the hypothesis of decriminalizing the offence taking into strict consideration the agreements previously signed at the international level³⁵. Therefore, on January 5th 2006, the so-called "*Storace*" Decree was enacted, establishing the aforementioned Monitoring Committee, in accordance with Law n.376/2000³⁶.

Consequently, CONI appealed against such a Decree before the Administrative Court of Lazio, claiming for its suspension. The common desire to avoid diplomatic clashes led to the enactment of the Decree of 27 January 2006 of the Ministry of Health. Such a provision solved the controversy, by suspending the effectiveness of the "*Storace*" Decree from February 1st to March 31st 2006 (i.e. when the Olympic Games were scheduled to be held).

Ultimately, the Ministerial Decree of 20 April 2006 revoked the controversial "*Storace*" Decree and determined the participation of the President of the Monitoring Committee in the proceedings of those structures in charge of the anti doping controls during the international sporting events in Italy. By means of such a provision, the Italian Government tried to coordinate the functions provided by Law n.376/2000 with the powers of the IOC and the International Sports Federations.

Under this agreement, not only was the Italian law correctly observed (being binding the criminal sanctions against those athletes tested positive), but also the WADA Code (with regard to the list of prohibited substances).

4. The Anti Doping Controls During *Torino 2006*.

In such a context, the TOROC (*Torino Organizing Committee*) developed an Anti Doping Action Plan aiming at protecting athletes' health as well as ensuring the fairness of competitions, according to the indication of the IOC, the WADA regulations and Law n.376/2000.

33 See Art. 18 of the *Anti doping Sports Regulations* of the Italian Olympic Committee.

34 Once the City has been appointed as the Host, the *Host City Contract* is duly signed. Particularly, it consists in a non-negotiable contract document prepared by the IOC to be signed by the successful candidate city.

35 See Par. 1.1.

36 The Commission was instituted at the Ministry of Health with the specific competence of implementing the controls during the international sporting events in Italy: accordingly, *Torino 2006* represented the first occasion to test the entire system.

37 In practical terms, according to the Plan, there were two kinds of control: a) tests on the athletes by a random selection and b) tests at the end of any competition on the top five plus two other chosen at random.

38 During the house search, the Italian Authorities found a lot of suspicious material (needles, used and new syringes, vials of distilled water, drugs for asthma even if none of them suffered of such an illness, a small blood-testing machine, and other equipment for preparing drips), but no prohibited substance was found. Furthermore, ten athletes were subjected to doping controls by surprise, but the results were all negative.

Furthermore, the Plan dealt with the modalities and the proceedings to be followed for the collection of samples, their transfers and the relative analysis.

By a comparison with the previous edition of the Winter Olympic Games in Salt Lake City, we notice that the analysis of blood samples was introduced for the first time in the history of the Games and that the number of urine controls increased by the 48%.

In fact, almost 1200 tests were conducted over the entire period of Games, covering the four weeks from the opening of the Athlete Village until the Closing Ceremony on 26 February 2006³⁷.

All phases of the controls (namely, athlete's selection, custody and transportation of samples, analysis) were organized in order to guarantee athletes' privacy, as well as the integrity of samples and the confidentiality of the relative results.

The anti doping regulations were included within the *Rules and Regulations Governing Doping Controls at the XX Olympic Winter Games, Turin*, expressly stating in the preamble that "*the IOC has established these IOC Anti-Doping Rules (Rules) in accordance with the Code, expecting that, in the spirit of sport, it will contribute to the fight against doping in the Olympic Movement. The Rules are complemented by other IOC documents and International Standards addressed throughout the Rules. Anti-doping rules, like Competition rules, are sport rules governing the conditions under which sport is played. All Participants (Athletes and Athlete Support Personnel) accept these Rules as a condition of participation and are presumed to have agreed to comply with the Rules*".

5. The Judicial and Disciplinary Cases on Doping During *Torino 2006*.

5.1 *The facts.*

Having completed a brief analysis on the general regulatory framework on doping, as well as on the Italian criminal law and its relations with the sports regulations, we can now review the major cases that occurred during *Torino 2006* in order to highlight differences and similarities amongst the judicial and the disciplinary cases.

During the Games, the aforementioned set of strict rules produced significant results in terms of athletes testing positive: the most important cases concerned female biathlon and cross-country skiing.

With regard to biathlon, the Russian athlete Olga Pyleva, found positive after a control, represented the first case of doping during the Games, thus being subject to a disciplinary and criminal proceedings as well. On the other side, in the same days, twelve cross-country skiers were suspended for five days due to incongruous blood levels. Nine of them were later declared "clear" and, therefore, readmitted to the Games, while the Belarus Sergei Dolidovich and the Russians Natalia Matveeva and Nikolai Pankratov were suspended for other five days due to persistent high level of hemoglobin.

However, the major doping case, due to the media hype that ensued at the international level, involved the blitz conducted at late night by the Italian police in the premises of the Austrian Cross Country and Biathlon National Team³⁸.

The entire operation originated from a warning by the IOC (as previously informed by WADA) to the Public Prosecutor of Turin, reporting that Mr. Walter Mayer (former trainer of the Austrian Cross-Country National Team) was a member of the athlete support personnel, notwithstanding the permanent ban he had received during the Salt Lake City edition of the Games, due to a case of blood transfusions.

5.2 *The disciplinary proceedings: current status.*

5.2.1 The case of Olga Pyleva.

The athlete was found positive to a stimulating substance for military and aerospace purposes, i.e. the *Carfedon*, which was prohibited by the IOC in 1998.

The IOC Medical Director, once he had verified the accuracy of the procedure in accordance with articles 7.2.2 and 7.2.3 of the IOC Anti-doping Regulations as applicable to the Winter Games, informed the IOC President on the positive result.

On 15 February 2006, a Disciplinary Commission³⁹ was estab-

lished and the athlete was temporarily suspended pending the proceedings.

During the hearing of the following day, the athlete stated that she took a medicine (*Fenotrofil*) to relieve the pain as a consequence of an injury occurred in January 2006, according to the prescription of her doctor. Moreover, the doctor of the Russian Olympic Committee noticed that *Fenotrofil* was a legal drug not mentioning the presence of *Carfedon*. However, the Russian Olympic Committee, being aware of it, had asked the producer to mention that substance in vain. Subsequently, the Committee released a communication to all its athletes informing of the presence of *Carfedon*. Even though the athlete had declared her unawareness of such an official note, the Disciplinary Commission ordered two years of suspension for the violation of Art. 2.1 of the anti doping regulations, as well as the return of the Silver Medal and the subsequent change of results of the competition.

5.2.2 The case of the Austrian Cross Country and Biathlon National Team.

The disciplinary proceedings regarding the Austrian athletes are of great interest since they concluded before the CAS, after a judgment by the Austrian Ski Federation at first instance.

a) *Eder vs Austrian Ski Federation & WADA vs Eder and Austrian Ski Federation*⁴⁰

The Austrian athlete Johannes Eder was subject to a disciplinary proceedings since the Italian police had found some suspicious material in the occasion of late night blitz of the above.

On 18 February 2006, the day before the relay competition in the discipline of cross-country skiing at the 2006 Winter Olympic Games in Turin, the Austrian athlete Johannes Eder suffered from severe diarrhoea. Therefore, he tried to consult the responsible medical doctor of his team but, due to some logistic problems, he could not show up at the Austrian lodging.

Accordingly, Eder contacted his private medical doctor, who recommended him to inject himself a saline solution by infusion.

Shortly after the athlete had started the infusion, the Italian Police arrived at the premises of the Austrian team with a search warrant, searched the house and carried out body checks as well as doping tests on the athletes.

In Eder's bedroom, hidden under the bed, they found a used infusion bottle with rests of a saline solution and a used infusion needle. The doping test on Eder did provide no adverse analytical finding.

On 12 May 2006, Ski Austria's Disciplinary Committee decided for the sanction of one year of ineligibility for Eder for violation of article 2 of the FIS (the International Ski Federation) Anti-Doping Rule Violations⁴¹ and Rule M2.b of the relevant Prohibited List⁴².

Accordingly, Eder and the WADA filed a Statement of Appeal against such a decision: from one side, Eder said that Ski Austria wrongly assessed the applied Anti-Doping Rules. As a matter of fact, he submitted that the intravenous infusion was a "legitimate acute medical treatment" and, therefore, not prohibited. Furthermore, if the administration of the infusion should have been regarded as a prohibited method, he bore no fault or negligence. Finally, he claimed

that such regulations were in contrast with some human rights of the athletes (i.e. the right to choose the kind of therapy and to choose the most effective treatment of an illness), as well as the principle of proportionality under the Austrian Law.

On the other side, WADA appealed the decision claiming that the athlete had to be suspended for at least 2 years, in accordance with article 10.2⁴³ of FIS Antidoping Regulations.

Moreover, supporting the decision of the Disciplinary Committee, the WADA contended that the behaviour of the athlete did not fall within the scope of the exception provided for in Rule M2b, as a "legitimate acute medical treatment" demands the supervision by qualified medical personnel.

Indeed, WADA took the position that the mere fact that the Athlete performed on himself an intravenous infusion excluded the existence of a "legitimate acute medical treatment". Such infusion had to be performed by nurses or physicians in well-codified condition, mainly in emergency situation and reanimation. It submitted that the Athlete was not in an emergency situation: otherwise he should have visited the policlinic in the Olympic village or called a doctor.

In this case the Panel had to decide if the Rule M2.b of the Prohibited List 2006 was valid.

Taking into consideration Eder's claims, the Panel saw no reason why rule M2.b should have been incompatible with the mentioned provisions of the Austrian Law. As a matter of fact, by voluntarily acceding to the association, the athlete had accepted the application of the disciplinary rules and its sanctions as well. Consequently, the athlete's personal right to choose the kind of therapy and to choose a most effective treatment was not violated by Rule M2.b.

Afterwards, once the Panel was of the opinion that this Rule did not contradict the principle of proportionality and was, therefore, in compliance with *bona mores* according to Austrian Code⁴⁴, it also had to establish whether a doping offence had been committed.

For resolving this issue, the Panel used the criteria⁴⁵ identified in the case "Walter Mayer et al. versus IOC"⁴⁶, by which the legitimacy of a medical treatment would be judged.

The Panel accepted that a saline solution was not a substance capable to enhance an athlete's performance. However, the Panel found that in this case the other elements of legitimate medical treatment had not been met: a) the intravenous infusion was administered by the Athlete himself, in his bedroom; b) the Athlete was not examined by a medical doctor prior to the administering of the infusion; c) there were no medical personnel present when the Athlete set himself the infusion and finally; d) no records of any kind were drawn.

The Panel concluded that the infusion of a saline solution administered by the Athlete on himself did not comply with the requirements for legitimate medical treatment and therefore had to be considered as a doping offence.

Regarding the sanction, the Panel had to examine whether the proven circumstances were such that either "no fault or negligence" or "no significant fault or negligence".

Ski Austria said that the Athlete was not without any fault or negligence when using the prohibited method. One might expect that he had doubts whether he was allowed to do what he did. However,

39 According to article 7.1.2 of the IOC Anti-doping Regulations as applicable to the Winter Games, "any anti-doping rule violation arising upon the occasion of the Olympic Games will be subject to the measures and sanctions set forth in Rule 23 of the Olympic Charter and its Bye-law, and/or Articles 10-12 of the Code". Particularly, art. 7.1.4 stated that "pursuant to Rule 23.2.2.4 of the Olympic Charter, the IOC Executive Board has delegated to a Disciplinary Commission, as established pursuant to Article 7.2.4 below (the "Disciplinary Commission") all its powers". Therefore, the institution of such a committee was regulated by the Olympic Charter, according to art.

23.2.2.4 ("In the case of any violation of the Olympic Charter, the World Anti-Doping Code, or any other regulation, as the case may be, the measures or sanctions which may be taken by the Session, the IOC Executive Board or the disciplinary commission referred to under 2.4 below are: (omissis) the IOC Executive Board may delegate its power to a disciplinary commission").

40 CAS Awards 2006/A/1102 & 2006/A/1146 - not published.

41 That says: "The following constitute anti-doping rule violations: [...] 2.2 Use or Attempted Use of a prohibited substance or a prohibited method".

42 That provides under the heading

"Chemical and Physical Manipulation": "Intravenous are prohibited, except as a legitimate acute medical treatment".

43 "The period of ineligibility imposed for a violation of art. 2.2 [...] shall be: first violation - 2 years".

44 The athlete, referring to Article 10.5.1 (burden of proof) and Article 10.5.2 of the FIS Anti-Doping Rules said that: a) they were disproportional with respect to practice bans in other areas of the Austrian Law; b) they violate the presumption of innocence; c) they provided an excessive penalty; d) they were *contra bonos mores* according to the Austrian Law.

45 A) the medical treatment must be necessary to cure an illness or injury of the par-

ticular athlete; b) under the given circumstances, there is no valid alternative treatment available, which would not fall under the definition of doping; c) the medical treatment is not capable of enhancing the athlete's performance; d) the medical treatment is preceded by a medical diagnosis of the athlete; e) the medical treatment is diligently applied by qualified medical personnel in an appropriate medical setting; f) adequate records of the medical treatment are kept and are available for inspection.

46 CAS Awards 2002/A/389/390/391/392/393.

Ski Austria, taking into account the circumstances of the case, found that the Athlete behaviour was only slightly negligent, since the subjective elements of the doping offence were missing to a large extent. Therefore, Ski Austria concluded that it had the disciplinary powers of the exceptional circumstances provision in Article 10.5.2 of the FIS Anti-Doping Rules.

The Panel agreed with Ski Austria's assessment, taking into consideration elements such as: a) the athlete tried in vain to get medical assistance by his team doctor; b) he knew that the team doctor considered to treat him by performing an infusion of a saline solution; c) the athlete could assume that the performing of such infusion by the team doctor would not have been a doping offence; d) his private medical doctor likewise was of the opinion that in his case the infusion of a saline solution was indicated and recommended him to perform on himself the solution.

The Panel, therefore, found it difficult to see a significant fault in the athlete's behaviour. In fact, it understood that the Athlete was in distress and inclined to take the infusion as a "*legitimate acute medical treatment*".

Ultimately, with regard to the period of ineligibility, having Ski Austria imposed the minimum sanction (one year), the Panel decided not to dissent and to confirm such a suspension.

In fact, the Athlete did not have the intention to wrongfully enhance his performance or to mask prohibited substances or methods. He did not seek to gain advantage over his competitors and he cooperated with the authorities since the beginning of the proceedings.

*b) Johannes Eder, Martin Tauber and Jürgen Pinter, vs IOC*⁴⁷

The second remarkable case concerned three Austrian athletes (Tauber, Pinter and Eder again) in a dispute against the IOC with regard to some suspicious material found during the late night blitz of the Italian police.

Accordingly, on 25 April 2007, the IOC Executive Board, having considered the recommendations of the IOC Disciplinary Committee that the three Austrian Olympic athletes were in violation of Articles 2.2 (only Eder), 2.6.1, 2.6.3 and 2.8 (all of them) of the IOC Anti-Doping Rules applicable to the XX Olympic Winter Games in Torino in 2006⁴⁸, decided to accept those recommendations: accordingly, the athletes were ordered to be permanently ineligible for all future Olympic Games in any capacity.

Such decision relied on the house search conducted by the Italian Police on 18 February 2006 within the premises of the Austrian Cross-Country Ski Team during the Winter Olympic Games in Turin, when several suspicious items were found.

This case is very interesting since Tauber and Pinter submitted that on proper construction, "*possession of a Prohibited Method*" means that "*an athlete possesses all and any devices, materials, substances etc necessary to carry out, administer or use a Prohibited Method*" and that they did not possess, physically or constructively, the items found with their fellow athletes or the support staff, and that in any event no one possessed blood of any of them.

Furthermore, Tauber submitted that the use of the haemoglobinmeter did not qualify as Possession of a Prohibited Method within the meaning of Article 2.6.1 because, in light of his high hemoglobin levels, he used the haemoglobinmeter to protect his health rather than to enhance his performance.

Similarly, Pinter submits that his use of the haemoglobinmeter does not qualify as Possession of a Prohibited Method within the meaning of Article 2.6.1 because he used the haemoglobinmeter out of "curiosity" rather than to enhance his performance.

Ultimately, Eder submitted that there is insufficient evidence to demonstrate a violation of Article 2.2 and that in any event, it could not be breached unless the athlete had a subjective intent to achieve increased performance. Eder asserted that he had no intention to achieve increased performance, but rather that he administered the saline infusion because: a) he had been suffering from diarrhea and abdominal pain, which he feared might result in dehydration and cause a circulatory collapse in the competition; b) he had naturally high haemoglobin levels and feared that a protective ban might be imposed on him by FIS, causing him to be excluded from competition.

The respondent submitted that Eder's saline infusion does not qualify as "legitimate acute medical treatment," particularly because one of the conditions of this exemption is that the athlete be physically examined by a doctor⁴⁹.

On the other side, the IOC - as the respondent - submitted also that the evidence demonstrates that each of the appellants knew of the existence of the items in the others' possession and intended to exercise control over those items to the extent required. The respondent also submitted that the related materials and substances found with the support staff were also within the appellants' constructive possession.

Consequently, the IOC submitted that each of the appellants violated Article 2.8 as a result of: a) his active participation in, and facilitation of, the blood doping practices of his fellow Appellants; b) his utilization of the services of team support staff members in order to commit his own doping violations; c) his facilitation of the breach of the ban imposed against Walter Mayer through his continued involvement with Mayer during the Torino Olympic Games⁵⁰.

Further to the above, the respondent submitted that there was a high level of coordination within the cross-country ski team.

The Panel made a number of observations regarding the frequency of the coincidences upon which the appellants relied in support of their respective cases. Other than the haemoglobinmeter, the appellants had each claimed to have no knowledge of the items possessed by his fellows or found with their trainer. The Panel had been asked to view as mere coincidence the fact that the appellants each arrived at the Torino Olympic Games with different part of a complete kit for the manipulation of hemoglobin levels.

Furthermore, the athletes were unable to explain satisfactorily why the Austrian cross-country team had chosen to stay in another lodging, rather than in the Athletes' Village, where they would have been subject to bag searches and a controlled environment that would have made infusions or transfusions virtually impossible. In this respect, the Panel noted that Mayer was credited with having chosen the accommodations for the Austrian cross-country team and that he was also accommodated in the same premises (a further coincidence that the Panel was asked to accept).

And more, the appellants had each provided a different medical justification for the items found in their physical possession during the house search conducted by the Italian Police in February 2006.

Ultimately, the Panel found the combination of all such coincidences highly unlikely in the circumstances of the case and was also

47 CAS Awards 2007/A/1286 ; 2007/A/1288 ; 2007/A/1289.

48 Art. 2.2: "Use or attempted use of a prohibited substance or method constitutes an anti-doping violation"; Art. 2.6.1: "The following constitute anti-doping violations: [...] possession by an athlete at any time or place of any prohibited substance or prohibited method, referred to in Article 2.6.3 below, unless the athlete establishes that the possession is pursuant to a TUE (Therapeutic Use Exemption) granted in accordance with Article 4.3 or other accept-

able justification"; Art. 2.6.3: "In relation to possession, the following categories of substances and methods are prohibited (for the full list of prohibited substances and methods, see the List of Prohibited Substances and Prohibited Methods) [...] Categories of prohibited methods: M1 - Enhancement of oxygen transfer; M2 - Chemical and physical manipulation"; Art. 2.8: "The following constitutes an anti-doping rule violation: administration or attempted administration of a prohibited substance or prohibited method to any ath-

lete, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any attempted violation".

49 For further details see the CAS case as previously analyzed in this paragraph.

50 In 2002 the IOC Board had sanctioned Walter Mayer, as the trained and manager for the Austrian Couss-Country Ski Team, for his role in performing blood transfusions on two Austrian skiers at the Salt Lake City Winter Olympic Games. Therefore, the Board had declared him to

be ineligible to participate in future Olympic Games up to and including the 2010 Edition (the decision had been upheld by a CAS arbitration panel in 2003). Despite the imposition of such a sanction and in apparently wanton disregard of it, during the 2006 Torino Olympic Games, Mayer had decided to accommodate in close vicinity to the premises occupied by the appellants.

disturbed by the level of inconsistency that was evident both within the appellants' own pleadings and also against the evidence before the Panel.

After these general considerations, the Panel started to analyze the possible use of a prohibited method by Eder. In light of his admission that he had been concerned about high hemoglobin levels and the risks that he would have been subject to a FIS protective ban, it was unnecessary for the Panel to make a finding on whether or not Eder suffered from diarrhea. The administration by the athlete of saline infusion in order to ensure that his hemoglobin levels were within the FIS range was not "*legitimate acute medical treatment*". Therefore, the Panel found that Eder had committed a violation of Article 2.2.

Subsequently, the Panel posed the question whether a breach of Article 2.6.1 (with regard to prohibited methods) had been committed by the three athletes.

Firstly, the Panel agreed that "possession of a Prohibited Method" was a difficult concept, requiring some interpretive guidance. Tauber and Pinter argued that the term "possession of a Prohibited Method" was unclear and that it had to be interpreted as requiring an athlete to possess all of the materials necessary in order to perform that prohibited method. In the case of intravenous infusions, this would have required a butterfly needle, infusion tube and a liquid for infusion, at a minimum. In the case of blood doping, this would have additionally required the possession of blood to be transfused.

The Panel was also of the view that it would not have been sufficient to justify a charge under Article 2.6.1 if an athlete had been merely in possession of, for example, one single syringe - even though such an item would have been viewed suspiciously in the absence of a reasonable explanation or a recognized therapeutic use exemption ("TUE").

At the other extreme, the Panel considered Tauber and Pinter's interpretation of "possession" to be unworkable and counter-productive to the fight against doping. The Panel was of the view that possession of a prohibited method was proved where it could be shown to the comfortable satisfaction of the Panel that, in all the circumstances, an athlete was in possession, either physical or constructive, of items which would enable that athlete to engage in a prohibited method. Accordingly, the Panel found that the appellants were indeed each in possession of a prohibited method: namely, "intravenous infusions" as specified in Article M(2)(b) of the WADA 2006 Prohibited List.

Accordingly, the Panel rejected the argument that in addition to establishing actual or constructive possession it was also necessary to establish the intent to use the Prohibited Method. First, this anti-doping violation was proved simply by possession. Secondly, the necessity of proving intent would have rendered Article 2.6 nugatory. In addition, the Panel believed that it was likely that the Appellants were also in possession of an additional prohibited method: namely, "blood doping" as specified in Article M(1)(a) of the WADA 2006 Prohibited List.

Although it was not necessary for the Panel to make a definitive finding on this point, the Panel noted that the only element of "blood doping" that was not found within the appellants' physical or constructive possession was blood or blood bags containing their own blood.

Then, bags containing blood of Austrian biathletes were found in trainer's quarters, along with blood-typing equipment. Moreover, traces of blood were found in Pinter's syringes, which could only be properly explained by the injection of blood using those vessels.

Then, the next question to be determined was whether or not any of the appellants fell within either of the two exceptions outlined in Article 2.6.1: i.e. the possession of the prohibited method pursuant to a TUE or some "*other acceptable justification*". Generally, the Panel was of the view that any items related to a prohibited method that were prescribed on the advice of a medical doctor should have been the subject of a TUE and the other acceptable justification was intended to cover situations in which emergency medical treatment was required (so that there was no opportunity to apply for a TUE).

Since none of the appellants applied in the case for such an exemption in relation to the medical equipment that was found in their possession, the first exception could be immediately excluded. Regarding the second one, the Panel found that none of the appellants had an "acceptable justification" for the possession of a Prohibited Method. Being unconvinced by the submission of the athletes, Panel found that the appellants were in violation of Article 2.6.1.

Further, while the Panel was comfortably satisfied that it was sufficient to show that each of the appellants had violated Article 2.8 by his active of psychological assistance in his fellows' possession violations, it had to be noted that the evidence in the case strongly indicated that the athletes were not only in possession of a prohibited method (i.e. intravenous infusion), but had also been engaging in that method during the Torino Olympic Games.

The Panel was also of the view that there was a strong likelihood that the appellants were in possession of an additional prohibited method (blood doping). In this regard, the Panel found the following facts particularly interesting: a) the saline infusion by Eder; b) the traces of blood in the syringes and tubing of Pinter; c) the usage of Tauber's haemoglobinmeter; d) the involvement of Walter Mayer in the training and his accommodation in close vicinity to appellants' lodging; e) the blood-testing device found with athletes' trainers.

Moreover, with regard to the complicity in anti-doping regulations violation, as sanctioned by Article 2.8, the Panel had to consider whether or not each of the appellants assisted, encouraged, aided, abetted or covered up the possession violations of his fellows in such a way as to contribute to causing his fellows' possession violations. The IOC had proven to the Panel's comfortable satisfaction that each of the athletes had met these standards. In fact, taking into account some objective facts (as outlined in the award), a broad pattern of cooperation and common activity with the other athletes and with the coaches in the possession of prohibited method of blood doping had been demonstrated.

Then, the athletes contended that there was "*no significant fault of negligence*" in their possession of a prohibited method, according to Article 10.5.1 of the WADA Code. Therefore, the period of ineligibility had to be reduced by half, as provided by Article 10.5.2.

Due to a considerable CAS jurisprudence, the Panel found clear that these exemptions were intended to protect an athlete who innocently ingests a prohibited substance, while the circumstances of the case clearly did not fall within this meaning. In fact, the fault shown by all of the appellants in possessing the materials, and likely also by engaging in a prohibited method, was substantial. Therefore, the athletes could not qualify for a reduction in sanction.

Finally, with regard to the proportion of the sanctions applied, the Panel found that the offences committed by the appellants were extremely serious in the case. They could not pretend to be "*merely innocent bystanders*" in this pattern of conduct within their team, being responsible for their active complicity in the offences committed.

Elite athletes are constantly subject to intense pressure to succeed in their disciplines. However, even in the face of such a pressure, they must bear the responsibility of their choices and must understand that their actions have a direct effect on their fellows.

Moreover, taking into consideration that the appellants had shown an apparent lack of understanding of the wrongfulness of their conduct (as shown by their continued denials), the Panel found that the athletes should not be afforded the possibility of participating in future Olympic Games in any capacity (neither as coaches nor support staff).

On these grounds, the Panel ruled that: a) the appeals filed by the athletes against the decisions rendered on 25 April 2007 by the IOC Executive Board were dismissed; b) the decisions of the IOC Executive Board of 25 April 2007 declaring each of the Appellants to be ineligible permanently for all future Olympic Games in any capacity were affirmed.

5.3 *The criminal proceedings: current status.*

As to the criminal proceedings carried out by the Prosecutor's Office in Turin regarding the doping cases occurred during the Winter Olympic

Games, their specular nature, in comparison with the sports disciplinary proceedings, can be outlined.

Accordingly, the Italian authorities instituted legal proceedings towards the Russian athlete Olga Pyleva, as well as towards some athletes and support personnel of the Austrian National Team.

a) The case of Olga Pyleva

The Prosecutor Office of Turin, simultaneously to the sports proceeding, initiated an investigation regarding the case of Olga Pyleva, afterwards pronouncing a writ of summons before the Criminal Court of Turin.

The athlete, judged in her absence because in the meantime she had gone back to Russia, was accused of the infringement of article 9 par. 1 and par. 2 of Law n.376/2000 (assumption of a prohibited substance - *Carfedone* - during the Winter Olympic Games of Turin 2006, not justified by pathological conditions and capable of modifying the athlete's conditions with the aim to alter her sporting performance).

Based on the results of the preliminary investigation, the Court found the athlete responsible for the facts as charged. In fact, the athlete assumed the substance without asking for the exception for therapeutic purposes and in the absence of any traumatic episode. On the contrary, she had admitted the assumption only after the positive result of the doping control.

The defendant tried to demonstrate her good faith and the awareness of the presence of the prohibited substance in the drug she took, but the Court stated that any athlete has a duty of self-information on the kind of medicine assumed.

Therefore, the Court of Turin with ruling n.211 of December 14th 2009⁵¹ (exactly 9 years after the entry into force of Law n.376/2000!) sentenced Olga Pyleva to 1 year imprisonment and a €4.000 fine (together with the litigation costs)⁵².

Due to the fact that the punishment was within the time limit of 2 years and the athlete had no previous convictions, the Court suspended the sentence.

b) The case of the Austrian Cross Country and Biathlon National Team.

Following the aforementioned blitz by night of the police authorities, the Prosecutor Office of Turin, in December 2008, pronounced a writ of summons towards the President of the Austrian Ski Federation, Peter Schroecksnel, the coaches of men's team Markus Gandler e Hoch Emile, the notorious Walter Mayer (banned from the Olympic Games for a precedent episode of doping), the responsible of the medical staff of the Austrian team Baumgartl Peter, the former biathlon athletes Wolfgang Rottmann, Wolfgang Perner, the former cross-country skiers Martin Tauber, Johannes Eder e Jürgen Pinter.

The Prosecutor's Office supported the following charge: violation of article 9 paragraphs 1, 2 of Law n.376/2000 with the decisive contribution of the aforementioned support personnel, according to the same clues as follows: a) the athletes chose to stay out of the Olympic Village (and, consequently, away from the other athletes and the Olympic personnel). Moreover, the athletes were accommodated in buildings other than the ones for the medical staff, in order to distinguish their responsibility in case of doping offences committed by the athletes; b) the personnel gave directions to deny access to athlete's buildings to doping control officials; c) they adopted a specific waste collection system for all the tools aimed at doping practices; d) they allowed Mr. Mayer to participate in the Winter Olympic Games, notwithstanding his ban; e) they allowed the athletes to assume prohibited substances and adopt prohibited medical practices in accordance with Law n.376/2000.

At the time of publication, the proceeding is still in progress and, therefore, we have to wait for the sentence for further comments.

Ultimately, the Prosecutor Office is currently acquiring more information after the sensational statements by Arne Ljunqvist as President of the IOC Medical Commission. In fact, he would have stated that there would be some evidence on the assumption of *Cera* (a prohibited substance, become notorious after the positive results of some Italian cyclists - i.e. Riccò, Sella, Piepoli - during the 2008 edition of the *Tour de France*) already during *Torino 2006*. Therefore, the President announced that the IOC would start further analysis on some samples taken during the Winter Olympic Games.

Such a decision is now possible due to a Protocol (since *Athens 2004*), which allows the blood-samples to be frozen and stored at the IOC laboratories for further and following controls (taking into account the advancement of scientific techniques).

Even if this new analysis after more than 6 years from *Torino 2006* (and 4 years after the discovery of *Cera*) could be seen as anachronistic, we have to remark that the WADA Code expressly provides a statute of limitation of 8 years for the doping violations concerned.

Conclusions

In the light of the above, the fight against doping requires a long and intense undertaking in order to protect the ethical and social values of sport as well as the athletes' health. Therefore, all the people involved shall be actively committed without any compromise.

The present article has shown a changing reality, where the regulatory and organizing framework is taking steps forward over the years.

The establishment of WADA, and consequently of the relative Anti Doping Code, clearly represents the turning point in the fight against doping. As a matter of fact, such a Code has been implemented by all the International Sports Federations, finally leading to a harmonization of the single anti doping policies as carried out by the States.

Furthermore, this new set of rules has been effective since its enactment, since it is based upon strict principles and fair rules. Then, even the CAS is duly playing its role, giving a solid interpretation of the anti doping regulations.

As seen, in Italy the situation is quite peculiar and somewhat concerning.

Concerns regarding the rules by those operators within the sporting scenario who are afraid of possible criminal proceedings against athletes who test positive in Italy (this does not, however, represent a unique case in the global framework), are absolutely reasonable. However, taking into account the aim of such rules (i.e. the protection of athletes' health), this can be deemed an imperative duty.

The first results of the criminal proceedings for the facts occurred during *Torino 2006* can be seen as a starting point for a progressive harmonization with the sports disciplinary regulations.

Of course, the outcomes are not yet established and definitive.

To this purpose, it will be of great interest to analyze the final decision (once issued by the Court) arising from of the criminal proceeding involving the Austrian athletes, especially whether the so called "constructive" doping shall be deemed as a violation of the Law.

In such a case, the converging results would clearly demonstrate that cohabitation amongst the two proceedings is possible, notwithstanding their peculiarities in the fight against doping.

⁵¹ Exactly 9 years after the entry into force of Law n.376/2000.
⁵² The Court deemed that, according to the elements gathered during the investigations, the athlete had clearly shown the

willingness of increasing her sporting performance in the occasion of the Olympic competition, therefore proving the subjective element.

Specific Tax Exemption Regulations for Major Sports Events : Example of London Olympic and Paralympic Games

By Alara E. Yazicioglu*

I. Introduction

Major sports events are not only about gold medals, champions, world records and unforgettable sporting competition. They are also about enormous numbers of contracts concluded between service providers, substantial tourism income, broadcasting rights that generate large amounts of money and other important sources of revenue like sponsoring fees. In other words, major sports events are also a considerable source of income. For this reason, the taxation of sports events is of the utmost importance.

Taxation of international sports events has always been an important and problematic issue of international tax law. Participants to those events come from different jurisdictions. Application of double taxation treaties (hereinafter DTT) can prevent excessive taxation to a certain extent. However, even if countries take particular care of having a large network of DTT, host country may not have concluded such agreement with all participant States. Therefore, especially for a major sports event, it is inevitable to be confronted with situations where there are no specific international rules governing the taxation of the sports-person / entity participating to the event.

Moreover, even if a DTT exists between two States, it is not always sufficient to eliminate double taxation or heavy tax burden. This is especially the case for sportspersons¹. In accordance with Article 17 of the OECD Model Tax Convention on Income and on Capital (hereinafter OECD Model)², each country can tax income of a sportsperson deriving directly or indirectly from a sports performance that takes place on its territory. In most cases, application of this rule results in an excessive tax burden³, as Contracting States tend to interpret "income indirectly related" to a performance quite extensively. Some countries, especially the United Kingdom, are known to tax sportspersons rather heavily. In certain cases, taxation can even discourage sportspersons from competing in a country. A recent example is Usain Bolt who declared that he refuses to participate in tournaments, except the Olympic Games, taking place in the United Kingdom, because of the tax burden.

Taxation may also represent a problem for organising associations, service providers and other participating entities. With regards to corporate tax, in most cases, a permanent establishment is created in the Source State and income generated by it is taxed.⁴ Depending on the case and the DTT -if any- concluded, this taxation can constitute a considerable charge.

Another important aspect is the value-added tax (hereinafter VAT). The foreign entities need to take several measures in accordance with the domestic law of the Host State. Finally, custom duties may also form an important expenditure especially for import of sporting equipment. It is important to underline that, taxes covered by a DTT is limited -in general income and capital tax-. Therefore, DTTs governing VAT or custom duties are very rare.

Therefore, the only way to prevent double taxation and / or give tax relief to a certain extent is to make sure that the domestic law of the State hosting the event provides for tax exemptions. For this reason, specific tax exemptions are more and more frequently a part of bidding contracts. When a State officially becomes the Host State, it takes necessary steps to fulfil this obligation. The measures taken can vary from country to country. In most cases, a specific Act or Amendment will be adopted.

Exemption regulations are mostly similar. However, as they depend on the domestic law of host States, they have some discrepancies. In this contribution, tax exemptions put in place for the London Olympic and Paralympic Games will be examined.

II. Obligations imposed by the Host City Contract

During the bidding procedure or when the final decision on the host city is taken, a contract is signed between the international sports fed-

eration organising the tournament and the Host State.⁵ This contract enumerates the Host State's obligations related to the sports event. These requirements also include tax exemptions. It is important to bear in mind that the scope of tax exemptions is thus determined by the contract and the Host State does not have to provide any further tax relief. During the Sydney 2000 Summer Olympic Games, the only guarantee given by Australia was the International Olympic Committee's (IOC) tax exemption.⁶ Therefore, even if Australian government's decision to tax the Olympic athletes was taken as a bad surprise, there were no international legal restrictions put in place to prevent it.

The final decision on the host city of 2012 Summer Olympic Games was taken during the 117th International Olympic Committee Session in Singapore on July 6, 2005. On the same day, the City of London and the British Olympic Association⁷ signed the non-negotiable Host City Contract (hereinafter HCC) prepared by the IOC.

Articles 13 and 49 of the HCC provide for tax exemptions.⁸ According to Article 13, all animals, equipment and supplies necessary for the Olympic Games can enter the Host Country for this purpose, without any duties, customs, taxes or similar charges.⁹ Article 49 provides for tax exemptions on payments to be received / made by the IOC or any third party owned and/or controlled by it, on any financial or other rewards received by the competitors as a result of their performance at the Games and on revenues of all other persons who are temporarily in the Host Country carrying out their Olympic-related business.¹⁰ If necessary exemptions are not put in place, the City and/or The London Organising Committee of the Olympic Games Ltd (LOCOG) should bear the tax burden.¹¹

The UK has entered into DTTs, which are based on the OECD Model, with more than 100 countries.¹² Application of these treaties will allow exempting some of the income resulting from the Games. However, it is not possible to attain the objective set in Articles 13 and 49 HCC by merely applying DTTs. Thus, in order to fulfill the UK's commitments on tax policy and to ensure that taxation has only minimal distortion effect on the Games, two major measures were taken. The first measure is the adoption of Chapter 6 of the Finance Act 2006 (FA 2006).¹³ Clauses 65 to 68 contained in this Chapter regulate tax exemptions granted to LOCOG, IOC, as well as competitors and staff.¹⁴ Those provisions satisfy the requirements of Article 49 of the HCC. The second important measure is the Temporary Admission Procedure

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Artiste and Sportsman Taxation" and "Deduction of Expenses".

- 1 For the purposes of this contribution, "athlete", "sportspersons" and "competitors" are used as synonyms.
- 2 OECD Model Tax Convention on Income and on Capital's aim is to provide a uniform basis of settlement of the most common problems arising in the field of international double taxation. Member countries should confirm to the Model when concluding or revising bilateral conventions (OECD Commentary, July 2010, p. 7). Therefore, most of bilateral treaties are based on the OECD Model. It is important to underline that The United States, an OECD member, has its own Model Income Tax Convention. However, US Model Convention is also largely based on the OECD Model.
- 3 D. Molenaar illustrates this excessive tax burden in its publications. See especially "Taxation of International Performing Artists", "The Illusions of International
- 4 Article 5 OECD Model.
- 5 "Host City Contract" for Olympic Games, "Organising Association Agreement" for FIFA World Cup.
- 6 http://fulltext.ausport.gov.au/fulltext/2001/pmc/sydney_2000_games.asp#_Toc515091136, Taxation.
- 7 UK's National Olympic Committee.
- 8 Article 13 Host City Contract "Entry Formalities for Certain Personnel, Goods and Animals", Article 49 Host City Contract "Taxes". Both of the articles provide for tax exemptions.
- 9 Article 13 Host City Contract.
- 10 Article 49 Host City Contract.
- 11 Article 49 Host City Contract.
- 12 www.hmrc.gov.uk/taxtreaties/dta.htm.
- 13 Finance Act 2006, Part 3 "Income tax, corporation tax and capital gains tax", Chapter 6 "The London Olympic Games and Paralympic Games".
- 14 Chapter 6 of Part 3, Finance Act 2006.

that provides relief from customs charges on goods temporarily imported for use from countries outside the EU. With this procedure, the requirements set in Article 13 of the HCC are fulfilled.

First, the exemption of the LOCOG and IOC will be briefly described. Second, taxation of athletes and other persons earning Games-related income will be examined. Since the ordinary tax regime in the UK can have a significant impact on taxation of competitors and staff, before analyzing the relevant tax Regulation for each category of person, the important aspects of the UK domestic tax regime will be briefly laid out. Third, the Olympic Games' impact on customs duties and value-added tax (VAT) will be considered. To conclude, a way of improving the existent practice of sports events tax exemptions will be briefly described.

III. Exemption of LOCOG

In general, local organising committees are tax-exempt¹⁵ and no specific problem arises from their status. An interesting complication took place during the Sydney 2010 Summer Olympic Games. Sydney Organising Committee for the Olympic Games (SOCOG) was tax-exempt. However, due to a decision rendered by the High Court, which did not involve SOCOG, Australian Taxation Office considered that the definition of "public authority" was modified and removed SOCOG's sales and income tax exemptions. As a remedy, the Australian Government decided to reimburse SOCOG for its potential taxation costs. However, this resulted in administrative difficulties and additional costs. Finally, a separate bill was adopted to restore SOCOG's tax-exempt status.¹⁶

Concerning the London Olympics, no problem has arisen so far. LOCOG is a private company limited by guarantee that was incorporated on October 22, 2004. As per Clause 65 (2) of the FA 2006 it is exempt from corporation tax.¹⁷ By virtue of the same clause, withholding tax will not be levied on royalties and other annual payments made to LOCOG. However, there is no exemption from VAT. As a trading body, LOCOG is registered for VAT and will charge it on ticket and merchandise sales. Like other VAT registered entities, it can recover the input tax.

IV. Exemption of IOC

IOC is based in Lausanne, Switzerland. According to a circular letter of the Swiss Federal Tax Administration¹⁸, IOC is exempt from corporate tax in Switzerland. IOC's tax exemption in the Host State of Olympics has never caused any controversies so far. Each Host State grants an extensive tax relief for the international committee. As a result, IOC has a rather insignificant overall tax burden.

With regards to the London Olympics, article 49 (a) and (b) of the HCC provides for IOC tax exemptions.¹⁹ UK issued a specific tax rule in order to respect that requirement.²⁰ According to Clause 67 of the FA 2006, the IOC and any non-United Kingdom resident person owned or controlled by it: (i) would not become liable to UK tax because of their presence in the UK for the purpose of the London Olympic Games and Paralympic Games, and (ii) no withholding tax would be levied on interest, royalties and other annual payments made to them.²¹ No further specific provisions or regulations had been put in place concerning the IOC's tax exemption.

V. Income and Corporation Tax Exemptions of London 2012 competitors and staff

According to Article 49 (c) and (d) of the HCC, a tax exemption must be provided for the period of the Games to non-resident competitors and persons temporarily entering the UK to carry out Olympic-relat-

ed business.²² Clause 68 of the FA 2006 empowers the Treasury to make necessary regulations on this matter.²³ Correspondingly, the London Olympic Games and Paralympic Games Tax Regulations 2010 (hereinafter "the 2010 Regulations"), which are providing exemptions of income tax and corporation tax, were adopted. These Regulations came into force on January 1st, 2011.

The 2010 Regulations provide for a temporary exemption. They apply to all of the United Kingdom -and not just London-. The individuals exempted are non-UK-resident individuals carrying out activities that constitute "Olympic-related" business.²⁴

Thus, in order to benefit from the exemption, the person should not be resident or ordinarily resident in the UK in the tax year during which the London 2012 activity is carried out. This means the 2012/2013 tax year, or the 2011/2012 tax year, for the exemptions that apply after April 2011. The definition of "resident" in the UK domestic law is rather unclear. This does not constitute a problem for individuals residing in countries that have concluded a DTT with the UK, as these agreements contain an article (in general article 4) dealing with residence matters. However, it might be an issue for persons coming from non-treaty countries. These individuals must take particular care especially if they have spent significant time in the build-up to the Games training in the UK or making preparations for the Games.²⁵

In most cases, the exemption is limited to "accredited individuals."²⁶ As per Regulation 5, accredited individuals include those who:

1. have one or more of the London 2012 functions; and
2. have an accreditation card.

The first condition is having a London 2012 function. These functions, listed and defined in Regulation 5, are; competitor, media worker, representative of an Official Body, service technician, team official and technical official.²⁷

The second condition is holding an Olympic / Paralympic Identity & Accreditation Card issued and validated by the LOCOG. The "accreditation" process, which is conducted by the Home Office and LOCOG, consists of background checks and issuance of a pass that enables the individual to access the Olympic Venues and to attend the Games in an official capacity.²⁸

In some cases, the individuals will not work on the site of the Games and will not receive an accreditation card. They can still qualify for the tax exemption because of the nature of the service they provide.

It is important to emphasize that the 2010 Regulations provide only for a UK tax exemption and not an overall tax exemption of the income earned from the Games. Thus, the taxation of the income will be determined by domestic laws of countries of residence of the participants. Clearly, in certain circumstances, an overall tax exemption can arise. This will be the case when a DTT concluded between the UK and the individual's state of residence prevents the country of residence from taxing the income and grants exclusive taxing rights to the UK.

The exemptions' scope is limited. Each case that does not fall within the 2010 Regulations will be examined in the light of the UK domestic tax regime. Therefore, before analyzing each London function and its exemption in details, the ordinary UK tax regime applicable to that group of persons will be briefly summarized.

A. Competitors / Ceremony Performers

1. Ordinary UK tax regime for non-resident entertainers²⁹ and sportspersons

The first specific tax rules concerning the taxation of non-resident entertainers and sportsmen were introduced by the 1986 Finance Act, Section 44 and Schedule 11. These provisions were replaced by sections 555 to

15 In some countries local organising associations are not granted any tax relief. A recent example is South African Football Association that did not benefit from any exemptions during the 2010 FIFA World Cup.

16 <http://www.parliament.nsw.gov.au/prod/parliament/hansart.nsf/V3Key/LC19971119005>.

17 Clause 65 "London Organising Committee", Finance Act 2006.

18 Circular Letter of 12 December 2008, "Exonération des fédérations internationales sportives".

19 Article 49 Host City Contract.

20 Article 67 "International Olympic Committee", Finance Act 2006.

21 Article 67 "International Olympic

Committee", Finance Act 2006.

22 Article 49 Host City Contract.

23 Clause 68 "Competitors and staff", Finance Act 2006.

24 Explanatory Memorandum to the London Olympic Games and Paralympic Games Tax Regulations 2010, § 4.5.

25 ANDERSEN D./ PERRY G., London 2010- Olympic Income and Corporation

Tax Exemptions in: Global Sports Law and Taxation Reports, Issue 1, p. 27.

26 Explanatory Memorandum to the London Olympic Games and Paralympic Games Tax Regulations 2010, § 4.6.

27 Regulation 5, the 2010 Regulations.

28 http://www.direct.gov.uk/en/GovernmentCitizensandRights/LivingintheUK/DG_199478.

558 of the 1988 Income and Corporation Taxes Act (ICTA 1988).³⁰ Currently, taxation of this category of person is regulated by ICTA 1988 and the Entertainers and Sportsmen Regulations 1987.³¹ The 1987 Regulations were made under the Finance Act 1986. However, they continue to have effect as if made under ICTA 1988.

In a nutshell, under these provisions any payer,

- who makes a payment exceeding £ 1000;
- to any person;
- in connection with any activity performed by a non-UK resident sportsman in the UK in his character as sportsman or in connection with a commercial occasion or event;

Must deduct tax at the basic rate from that payment (20% since 6 April 2008) and account for that tax to HM Revenue & Customs (HMRC).

Most countries have similar provisions. There are two fundamental aspects of the UK's regime that need to be pointed out. The first one is the look-through approach regulated in 556 (2) ICTA 1988. According to this clause, when the requirements listed in Article 7(2) of the 1987 Regulations are met³², even if the payment is not received by the sportsman but by another person, it will still be attributed to the sportsman and will be taxed accordingly.

The second important aspect is the revenue covered by these provisions. Any income directly linked to the performance (e.g. prize monies), sponsorship or endorsement income and payments received for other activities that are related to the performance (e.g. TV appearances), fall within the scope of application of these specific rules.

As illustrated by the Agassi Case,³³ the UK's taxation of sponsorship and endorsement income is rather far-reaching. According to this decision, a proportion of the worldwide sponsorship / endorsement income of sportsmen is taxed in the UK, even if sponsors neither reside nor carry on any trade in the United Kingdom. The taxable proportion is calculated by applying a ratio of UK performance days to worldwide performance days. For example, a golfer who earns £ 5 million in sponsorship income spends in total 10 weeks competing worldwide. If he spends one of those weeks in the UK, the taxable amount will be calculated as follows: $1/10 \times £5 \text{ million} = £0.5 \text{ million}$.

If a DTT has been concluded between the UK and the country of residence of the athlete, UK provisions on sportsmen will only be applicable if the double tax treaty grants the right to tax to the UK. As DTTs concluded by the UK are based on the OECD Model, it will generally be the case. In fact, according to Article 17 of the OECD Model, performances of sportsmen are taxed in the country of performance. Thus, the performances of athletes competing during the Olympic Games are covered by the provisions of ICTA 1988 and the 1987 Regulations.

For the purposes of the Olympic Games, these domestic law provisions will be applicable to each case that is not covered by the specific exemptions regulated in the London Olympic Games and Paralympic Games Tax Regulations.

2. The 2010 Regulations

i. Competitors

According to Regulation 5 (3) a competitor is an individual who has been entered by a National Olympic or Paralympic Committee to perform in a sporting event that forms part of London 2012.³⁴ The exemption will apply to a competitor performing in a sporting event or taking part in an activity primarily to support or promote London 2012, the Olympic and Paralympic Movement.³⁵ There is no clear definition of an "activity primarily to support or promote" the Olympics. Therefore, the exact scope of this type of activity depends on the interpretation of authorities. In our opinion, given the UK's tax policy, the activities falling into the scope of the exemption will be defined rather narrowly.

To benefit from the exemption, the contract of the competitor must have been concluded before July 25, 2012 (two days before the beginning of the Games). Income received on the basis of any contract entered or any amendments done to an existing contract after this date will not be tax exempt.

The exemption covers any financial or other reward earned by the competitor between March 30, 2012, and November 8, 2012, "wholly and exclusively" as a result of one of the above-mentioned activities.³⁶ Payments made to a third party instead of the competitor are also covered. The obligation on the payer to withhold the tax is lifted during the exemption period for payments covered by the exemption.³⁷

The extent of exemptions will depend on the individual's contract. HMRC enumerates the following examples of exempt income:

1. Any payment or bonus, from an existing endorsement / sponsoring contract that is specifically related to the Games. The exemption takes place by excluding both the number of UK and worldwide performance days when calculating the ratio (see Section V A 1).
2. Trackside interviews that does not cover any commercial issues. If an athlete is eliminated from competition and joins a media body as a commentator, the income received for commenting on the Games would be exempt.
3. Appearance in an advertisement or personal appearances in order to promote London 2012.³⁸

In contrast, payments or bonuses from an existing endorsement / sponsoring contract that is not specifically related to the Games, income received for participation to a radio or television show that the content is not related to the Games, payments to endorse a commercial product as an Olympic and Paralympic Games winner and advertisement of products are not considered as Games-related. Therefore, those incomes will not be exempt. Consequently, activities conducted by Olympic athletes are not completely free from tax. The scope of activities "not specifically related" to the Games remains to be interpreted by the authorities. Thus, to a certain extent, taxable income will be determined according to UK's domestic law. In the author's opinion, the most significant exception is income derived from an existing endorsement and sponsoring contract not related to the Games. As mentioned above,³⁹ sponsorship and endorsement income linked to sports events are interpreted largely by the United Kingdom.⁴⁰ Moreover, according to the ratio used, the more time spent in the UK the greater is the amount of tax due on the endorsement and sponsorship income. For these reasons, the exception made for income "not specifically related to the Games" can result in a rather heavy tax burden for athletes. In the author's opinion, it would have been preferable to simply exempt athletes' income during the Games.

ii. Critical Analysis of Competitors' Tax Exemptions

In the author's opinion, even if it is highly important to exempt entities providing services, organising committees and participating associations; it is more crucial to make clear regulations concerning sportsmen. Due to rather ambiguous international rules⁴¹ and high rates of

29 The regime applicable to entertainers and sportsmen is identical. In this section, in order to avoid repetition, the reference will only be made to "sportsmen".

30 Income and Corporation Taxes Act 1988, Part XIII "Miscellaneous Special Provisions", Chapter III "Entertainers and Sportsmen".

31 The Income Tax (Entertainers and Sportsmen) Regulations 1987.

32 For the look-through approach to be applicable, the following conditions should be fulfilled: the person receiving the payment must be (a) under the control of the sportsman, (b) non-UK resident and not subject to tax outside the UK on such income at a rate exceeding 25% (c) the trustee of a trust of which the sportsman is the settlor, or (d) any person who receives any connected payment whether directly or indirectly, in respect of a time when there is in force between that person and the athlete concerned a contract or an arrangement under which it is reasonable to suppose that the

sportsman is, will or may become, entitled to receive amounts, whether by way of cash or other value not substantially less than the appropriate amount of profits or gains arising from the connected payment. (The 1987 Regulations, Article 7 (2)).

33 *Andre Agassi v. Robinson House of Lords* [2006] UKHL 23.

34 Regulation 5 (3), the 2010 Regulations.

35 Regulation 4 (2)(a), the 2010 Regulations.

36 Regulation 4 (3), the 2010 Regulations.

37 <http://www.hmrc.gov.uk/2012games/tax-exemptions/competitors.htm>.

38 <http://www.hmrc.gov.uk/2012games/tax-exemptions/competitors.htm>.

39 Section V A 1.

40 The interpretation of "income linked" to a sports event varies from country to country. For example, in contrast to the United Kingdom, Switzerland has a narrow approach as illustrated in the recent Federal Supreme Court Decision 2C_276/2007.

withholding tax in Source States, sportspersons are the most vulnerable and heavily taxed participants to major sports events.

The United Kingdom's exemptions regarding competitors have the merit of being quite clear and extensive compared to other Host State's tax exemptions. For example, China's tax exemption rule for athletes participating to the Beijing 2008 Summer Olympics consisted of one sentence: "The income of reward in the 29th Olympic Games and other matches of athletes shall be exempt from individual income tax according to existing laws and regulations".⁴² Another intriguing example is South Africa that did not exempt revenue earned by "members of a team" during the 2010 FIFA World Cup.⁴³ Sportspersons clearly fell in this notion; however, tax treatment of support staff (such as coaches, medical staff, trainers etc.) was rather unclear.

Even if London regulations are much clearer compared to other Host States, as analysed above, they still have ambiguous aspects concerning sportsperson taxation. First, athletes resident in non-treaty countries should take particular care of not being considered as UK residents. As "residence" is not a clearly defined notion in the UK Tax Law, athletes spending a rather long time in London, should seek legal advice. Second, "activity primarily to support or promote" the Games is not clearly defined. Therefore, the scope of exemption of competitors is for the moment not exactly determined. Last but not least, endorsement and sponsoring income is not wholly exempt. This non-exemption can result in a heavy tax burden given UK's tax policy. As a result, sportspersons participating to Olympic Games may find themselves with a considerable amount of tax.

iii. Ceremony performers

According to Regulation 6, a ceremony performer is a person making a performance at, or at rehearsal of, an opening or closing ceremony of London 2012.⁴⁴ The exemption covers income earned from both public and closed rehearsals.⁴⁵ Like competitors, in order to be exempt, the activity of ceremony performers must be "wholly and exclusively" connected to London 2012.

B. Income from employment / self-employment

1. Ordinary UK tax regime for non-resident employees

As mentioned above, UK has a large network of DTT that are generally based on the OECD Model Convention. Therefore, most of the treaties contain a clause similar to Article 15 of the OECD Model. According to paragraph 2 of this article, if the employee's presence in the source state does not exceed 183 days and the remuneration is not paid by an employer or a permanent establishment resident in the source state, the income is not taxable in that source state.⁴⁶ In other words, individuals who spend less than 183 days and who are paid by a non-UK employer (and not by a UK permanent establishment of a non-UK employer) will not be taxed in the UK. This does not mean that the income they earn from the Olympic Games is tax exempt. It simply means that their revenue will be taxed in their state of residence according to applicable domestic laws.

This "UK-tax-exemption" concerns only individuals resident in treaty countries. Still, there are many "non-treaty" jurisdictions participating in the Olympic Games. Workers resident in these jurisdictions will rely on the 2010 Regulations for an exemption from UK tax.

2. Ordinary UK tax regime for non-resident self-employed individuals

The income derived by a non-resident's independent personal services is dealt in the same way as the business profits of a permanent establishment. UK legislation on that point is very similar to Article 7 of the OECD Model and its Commentary. Taxation of permanent establishments will be analyzed in detail in Section V C.

3. The 2010 Regulations

i. RHB and OBS workers

RHB means a "Rights Holding Broadcaster." It is an organisation to which the IOC or LOCOG has granted the exclusive television, Internet or radio rights to broadcast the Games in a particular state or country.⁴⁷

OBS stands for "the Olympic Broadcasting Service." It is "the organisation responsible for producing international television and radio signals and providing broadcasters with the facilities and services necessary for broadcasting London 2012."⁴⁸

As per Regulation 7, individuals that are: (i) employed by a RHB or OBS, (ii) directly connected to RHB or OBS as self-employed, or (iii) employed by a person or a business that is directly contracted to work for a RHB or OBS; qualify for the tax exemption. In order to benefit from the exemption, these individuals should earn a "wholly and exclusively" Game-related income between April 6, 2011, and April 5, 2013.

If a person carries out both Games-related and non-Games related work and receives one payment that covers both, the tax exemption can only be claimed on the part of the payment that relates to the income from the part of the work necessary for the broadcast of the Games. HMRC gives an example of this split: "Stefan receives one payment of £1500 for 80 hours work from his employer. Of those 80 hours, he spent 60 hours editing footage of the Games to be broadcast and 20 hours editing footage of news items that were unrelated to the Games. The payment must be divided as follows: £1500 x 60/80 = £1125 qualifies as exempt income."⁴⁹

ii. London 2012 Partner workers

For the purpose of the 2010 Regulations, a London 2012 Partner is a Commercial Delivery Partner or a person connected to a Commercial Delivery Partner.⁵⁰ A Commercial Delivery Partner is a person who has been authorised to use the London Olympics Association Right⁵¹ by LOCOG and who provides services to LOCOG in return.⁵²

Regulation 8 (2) provides that, individuals;

1. employed by a London 2012 Partner; or
2. holding an accreditation card or are providing timing, scoring or on-venue result services and are
 1. directly contracted to work for a London 2012 Partner; or
 2. employed by a person that is directly contracted to work for a London 2012 Partner;

Fall within the scope of the exemption.⁵³

The exemption is restricted to income earned from activities exercised specifically for the purpose of the Games. "This means the activity the London 2012 partner undertakes in return for the right to market and advertise themselves or their products for commercial purposes by reference to their association with the Games."⁵⁴ Activities must be carried out during the period of March 30, 2012, to November 8, 2012. If exempt and non-exempt activities are carried out by the same person, the splitting method illustrated above (see Section V B 3 i) will be applied.

iii. Other accredited individuals

The first category of accredited individuals is "competitors" that has been analyzed above (Section V A 2 i). Other categories of accredited individuals are media workers (e.g. media managers, producers, radio/

⁴¹ Article 17 has been severely criticized by many authors for its lack of clarity and for resulting excessive tax burden by its application (on this point see especially Sandler, Molenaar and Grams). In 2010, OECD launched a Discussion Draft on the application of article 17 in order to clarify some points by making amendments to the OECD Commentary.

⁴² Circular of State Administration of Taxation and General Administration of Customs on Issues Relating to 29th Olympics Taxation Policy, CS [2003] NO. 10, Clause 2 (3).

⁴³ Revenue Laws Amendment Act 2006, Schedule I "Special Tax Measures Relating to 2010 FIFA World Cup South Africa", Paragraph 9.

⁴⁴ Regulation 6, the 2010 Regulations.

⁴⁵ www.hmrc.gov.uk/2012games/

tax-exemptions/ceremony-performers.htm.

⁴⁶ Article 15 par. 2 of the OECD Model.

⁴⁷ Regulation 7 (4), <http://www.hmrc.gov.uk/2012games/tax-exemptions/uk-income-tax-exempt.htm>.

⁴⁸ Regulation 7 (4).

⁴⁹ <http://www.hmrc.gov.uk/2012games/tax-exemptions/uk-income-tax-exempt.htm>.

⁵⁰ Regulation 8 (3), the 2010 Regulations.

⁵¹ Exclusive right in relation to the use of any representation (of any kind) in a manner likely to suggest to the public that there is an association between the London Olympics and goods or services / a person providing goods or services. Schedule 4 of London Olympic Games and Paralympic Games Act 2006.

⁵² Regulation 8 (4), the 2010 Regulations.

⁵³ Regulation 8 (2), the 2010 Regulations.

television workers, journalists), representatives of an Official Body, service technicians, team officials, and technical officials.⁵⁵

The income earned by these categories of workers during the period of March 30, 2012, to November 8, 2012, from carrying out the official function for which they have been accredited for, is tax exempt. If they also exercise activities that are not covered by the official functions, the splitting method described above applies (Section V B 3 i) to determine the exemption's extent.

iv. Workers of the Olympic site construction

The 2010 Regulations do not apply to the employees working on construction of the Olympic venues. UK income tax will be due on the income earned by those individuals.⁵⁶

4. PAYE⁵⁷ and National Insurance Exemptions

PAYE is the system put in place to collect Income Tax and National Insurance Contributions (NIC) from employees' pay. Employers who do not have a permanent establishment in the UK (see below Section V C) do not need to deduct UK Income Tax and National Insurance from employees' earnings. If there is a permanent establishment in the UK, the deduction will only be made with regards to non-exempt payments to non-resident individuals. No deduction will be made on income exempt by the application of the 2010 Regulations.

In case of the existence of necessary deductions, the employer can apply for Short Term Business Visitor Arrangement. This arrangement provides that PAYE can be disregarded in certain circumstances. For this arrangement to apply individuals must; (i) be resident in a DTT country, (ii) come to work in the UK for a UK company or the UK branch of an overseas company (iii) be expected to stay in the UK for 183 days or less in any twelve month period. Moreover, it should be proven that the UK company or branch would not ultimately bear the specified remuneration.⁵⁸

C. Permanent Establishments

1. Ordinary UK tax regime for permanent establishments

The meaning of "permanent establishment" under the UK domestic law, which is defined in Article 148 of the Finance Act 2003 (FA 2003), is largely similar to Article 5 of the OECD Model. As per article 148, when the business of an enterprise is wholly or partly carried on from a distinct fixed place in the UK (such as an office, a workshop or a branch), a permanent establishment is created and is chargeable to UK Corporation Tax.⁵⁹

In order to constitute a permanent establishment, the place of business must have a certain degree of permanency. In other words, it must not be of a purely temporary nature. Most of the OECD member countries consider that a permanent establishment exists in situations where a business has been carried on in a country through a fixed place that was maintained for a period longer than six months.⁶⁰ The UK follows the same approach. If the business is conducted in the UK for less than six months, no permanent establishment will be formed.

2. The 2010 Regulations

According to Regulation 10, activities performed by accredited individuals, RHB and OBS workers (including residents and ordinarily residents in the UK for the purposes of Regulation 10), and London 2012 Partner workers, will not create a permanent establishment of the employer of the individual carrying out the activity.⁶¹ This Regulation will thus prevent companies from falling within UK Corporation Tax and VAT charges.

HMRC will simply ignore the presence of the employees during the relevant period. Therefore, the days spent for the exercise of Olympic activities will not add up to other days spent in the UK for the calculation of six months. The relevant period corresponds to from March 30, to November 8, 2012.

A longer period is provided for London 2012 Partners and their direct contractors that provide timing, scoring, or on-venue result services,⁶² as the period of preparation prior to the Games requires them to be pres-

ent much longer than other London 2012 Partners. The period runs from January 1, 2011, to December 31, 2012.

It should be noted that only the Games-related activities are ignored for the purpose of determining whether there is a permanent establishment or not. If a non-resident company carries on both Games-related and non-Games related activities at the same location, the exemption for permanent establishments may not apply. In that case, all of the income earned by that permanent establishment will be subject to corporation tax.

D. Tax Avoidance

According to Regulation 11 tax exemptions will not apply where the arrangements have as their main purpose, or one of their main purposes, the obtaining of the exemption or benefit.⁶³

VI. Customs Duties

In order to fulfill the requirements of Article 13 of the HCC, a temporary admission (TA) procedure is put in place. Accordingly, goods and sporting equipment temporarily brought to the UK for use at, or in connection with, the 2012 Olympic and Paralympic Games will be exempt from custom charges. This procedure concerns especially non-EU countries, since, in general, goods brought into the UK from another EU Member State do not need to be declared.

The TA procedure applies to Olympic and Paralympic Family members (IOC/IPC; NOC/NPC; accredited individuals; a member or employee of the IOC/IPC, NOC/NPC or an International Sport Federation; or LOCOG-approved Official sponsors and Rights Holding Broadcasters).⁶⁴ Examples of goods that can be temporarily imported for use at London 2012 under the TA procedure are; any sports equipment necessary for training or competition at the London 2012 Games, any new or used personal effects, any professional equipment and computer equipment.⁶⁵ The exemption applies regardless the value of the goods. In other words, there is no maximum value limit.⁶⁶

As the name of the procedure indicates, goods need to be re-exported outside the EU after use. The maximum period of use is fixed at 24 months. If the goods are not re-exported, custom charges will be due. The only exception made to this general rule is for "give-away goods."⁶⁷ Those are the goods such as sponsor t-shirts, commemorative pins and badges, and caps that are distributed free of charge to the public during the London 2012 Games. The public may include Games volunteers and other Olympic and Paralympic Family members. Alcoholic drinks, tobacco goods, or fuels are not considered as give-away goods.⁶⁸

Goods that are intended to be sold for commercial gain in the UK cannot be brought under the TA procedure. They will be subject to customs duties at the time of importation into the EU.⁶⁹ Large quantities of food and drink for consumption during the London 2012 Games are classified as "commercial import."⁷⁰

Custom Procedure Codes (CPC) specifically agreed by HMRC for the purpose of the Olympic and Paralympic Games, have the effect of exempting from customs duties (and in some circumstances Import VAT) some goods that cannot benefit from the TA Procedure.⁷¹ Types of the goods that are covered by these agreements are; Legacy Goods (Olympic and Paralympic "heritage" items), goods donated after the

54 <http://www.hmrc.gov.uk/2012games/tax-exemptions/partner-workers.htm>.

55 Regulation 5 (2) and (3).

56 <http://www.hmrc.gov.uk/2012games/tax-exemption-regs.htm>.

57 Pay As You Earn.

58 <http://www.hmrc.gov.uk/manuals/pom-manual/PAYE82000.htm>.

59 Article 148 "Meaning of Permanent Establishment", Finance Act 2003.

60 OECD Commentary on Article 5, § 6.

61 Regulation 10, the 2010 Regulations.

62 Employees can be residents or ordinarily residents in the UK for the purpose of Regulation 10.

63 Regulation 11, the 2010 Regulations.

64 TA Procedure does not apply to spectators of the Games.

65 LOCOG Customs and Freight Forwarding Guide, p. 6. Appendix 6 of the Guide gives further examples.

66 LOCOG Customs and Freight Forwarding Guide, p. 6.

67 LOCOG Customs and Freight Forwarding Guide, p. 5.

68 LOCOG Customs and Freight Forwarding Guide, p. 6.

69 LOCOG Customs and Freight Forwarding Guide, p. 6.

70 LOCOG Customs and Freight Forwarding Guide, p. 22.

71 <http://www.hmrc.gov.uk/2012games/importing-goods.htm>.

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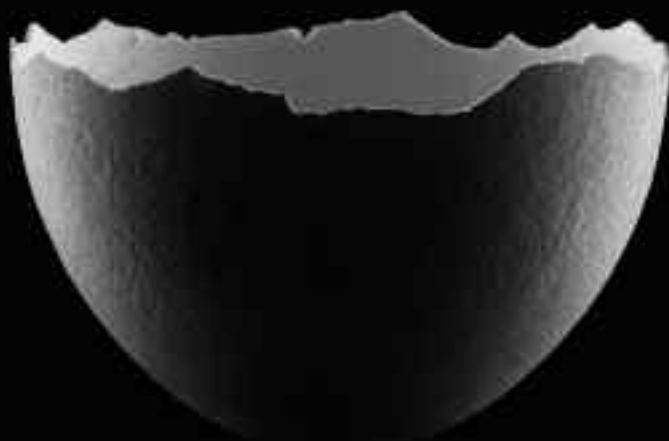
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**ALBANIAN CHEMIST
MERITA URUCI OF SAMI
FRASHERI STREET HAD
TWO EGGS ON BROWN
TOAST FOR BREAKFAST
THIS MORNING**



WOLF THEISS

ALBANIA, ARMENIA, AUSTRIA, BOSNIA & HERZEGOVINA, BELGIUM, BRAZIL, CANADA, CZECH REPUBLIC,
FRANCE, GERMANY, HUNGARY, ITALY, JAPAN, KAZAKHSTAN, LITHUANIA, MALAYSIA, MEXICO, NETHERLANDS,
POLAND, PORTUGAL, ROMANIA, RUSSIA, SLOVAKIA, SLOVENE REPUBLIC, SLOVENIA, SWITZERLAND,
UKRAINE, USA

games, give-away goods including small food items and non-alcoholic beverage samples, pharmaceutical goods, and tourist literature that will be given away for free.⁷²

VII. Value-Added Tax

There are no specific VAT exemptions for the Games. Therefore, the UK's domestic VAT legislation will be applicable. The rate of the VAT depends on the nature of the goods or services being supplied. The standard rate is currently 20%.⁷³

There is a general requirement for an organisation to register for UK VAT when the value of its taxable turnover (the value of any goods or services, unless they are exempt from VAT) in the UK exceeds £ 77,000 within a 12-month period. An organisation is also required to register for VAT if it expects that the value of its taxable turnover will exceed £ 77,000 in the next 30 days.⁷⁴ A VAT registered company must charge VAT on its taxable sales, maintain the required VAT records, and periodically declare the amount of VAT through a UK VAT Return. It can recover input tax. Organisations that are not VAT registered in the UK may still be able to recover UK VAT via the Cross-Border Refund Scheme that is available to EU and non-EU organisations.

The absence of VAT exemption obliges the concerned persons to comply with domestic VAT legislation. Undoubtedly, the compliance to VAT rules is burdensome and incurs extra costs. The burden is heavier for non-EU organisations. In the author's opinion, providing a VAT exemption is preferable. "Tax-free bubble" put in place by South Africa during the 2010 FIFA World Cup, had the merit of providing a comprehensive VAT exemption. The system consisted of exempting profits on goods sold or services rendered in the designated sites for the specified periods from any form of income tax and applying VAT at the zero rate.⁷⁵ In order to increase efficiency and avoid any impracticability, tax relief within the tax-free bubble applied to both residents and non-residents.⁷⁶ In our opinion, regarding VAT exemptions, example of South Africa can be followed by other Host States.

VIII. How to improve sports events tax exemptions

The most challenging part of sports events tax exemptions is their unpredictability. Governments give guarantees to organising sports federations and make amendments to their domestic law in order to respect their agreement. However, the exact scope of the exemptions depends heavily on the authorities' interpretation and the domestic law. For this reason, their ambit is not precisely known until the beginning of the sports event. Moreover, as the regulation is specifically prepared for a particular event, it is impossible to rely on a developed practice.

In the author's opinion, adoption of "Sports Events Tax Exemptions Acts", which applies generally to all sports events taking place in a State, can significantly prevent the problem. States can develop a certain practice and a more precise interpretation of the law. Consequently, participants to sports events will have a better understanding of the tax system. Besides, "Sports Events Tax Exemptions Acts" will make countries more attractive for international federations organising these events.

This approach was followed by two countries, namely South Africa and New Zealand, in another important legal aspect of major sports events: protection of trademarks. First country to adopt special legal provisions on that matter was Austria, for 2000 Sydney Olympic Games.⁷⁷ South Africa took one step further by creating special rights that can be invoked for any "major event".⁷⁸ South Africa's special legislation was voted in November 2002 in anticipation of the 2003 Cricket World Cup. Alec Erwin, Trade and Industry Minister at that date, told legislators the Merchandise Marks Amendment Bill was vital to protect South Africa's small but growing position in the world sports and entertainment market.⁷⁹ "Such 'major event' laws inevitably increase the attractiveness of a country [...] and South Africa's law was presumably one factor which persuaded FIFA to award the 2010 FIFA World Cup to South Africa".⁸⁰ New Zealand followed this example and adopted the Major Events Management Bill, which entered into force on 29 August 2007.

In our opinion, following a similar path in taxation can bring more clarity and significantly prevent heavy tax burdens. As analyzed above the important aspects that need to be covered by these regulations are exemption of organising associations / federations and their subsidiaries, exemption of corporate tax that is achievable by not creating permanent establishments in the Source State during the sports event, exemption of income tax for individuals such as sportsmen and support staff, exemption from customs and excise duties and finally VAT relief to the possible extent.

72 <http://www.hmrc.gov.uk/2012games/importing-goods.htm>.

73 LOCOG will charge UK VAT at the standard rate on tickets.

74 <http://www.hmrc.gov.uk/vat/start/introduction.htm>.

75 Explanatory Memorandum on the Revenue Laws Amendment Bill, 2006, p. 46.

76 Explanatory Memorandum on the Revenue Laws Amendment Bill, 2006, p. 46.

77 LEONE L., *Ambush Marketing: Criminal Offence or Free Enterprise?*, in *The International Sports Law Journal*, 2008/3-4, p. 76.

78 LEWIS A. / TAYLOR J., *Sport: Law and Practice*, 2nd Edition, Tottel Publishing, 2008, p. 1396.

79 GARDINER S., *Sports Law*, 4th Edition, Routledge, 2011, p. 340.

80 LEWIS A. / TAYLOR J., *Sport: Law and Practice*, 2nd Edition, Tottel Publishing, 2008, p. 1396.

Legal Problems of the Olympic Movement

By Renata Kopczyk*

1. Introduction

Olympic Games are the greatest sports event in the world, in which thousands of athletes take part. At the turn of July and September¹ 2012 there will be held the XXX Summer Olympic Games in London. Contemporary nature of Olympic Games has departed from the assumptions of the knight-gentleman² game, which possessed the idea of fair-play launched by the baron Pierre de Coubertin.

History of the Olympic Games (OG)³, which dates back to ancient times, obviously influenced its modern character. However the early modern period is the time that had the biggest impact on the formation of contemporary law regulations forced in Olympic Movement. It affects also the problems that appeared in relation to social and economic development. Olympic Games bring quantifiable financial benefits. It should be remembered that since the revival of Olympic Games by the baron Pierre de Coubertin in 1986 sports rivalry, as the sport itself has undergone sweeping changes and actually appears to be complicated and multivariate phenomenon⁴, that entails legal problems. The basic

legal act of a constitutional nature, enacting the activity of International Olympic Committee (IOC) and affiliated with it National Olympic Committees (NOC) is the Olympic Charter⁵. This document is approved by the International Olympic Committee and is a set of fundamental principles of Olympism. It regulates the organization, activities and functioning of Olympic Movement. It also establishes the rights

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1 27.07.2012 till 12.08.2012.

2 Tyszcza A., *Olimpia i Akademia*, Warszawa 1970, *Sport i turystyka*, p. 127.

3 See more about history of the Olympic Games: Miller D., *Athens to Athens. The*

official history of the Olympic Games and the IOC, 1896-2004, Mainstream Publishing 2003, *passim*.

4 Garcia B., *The European Union and Sports, rescuing the nation-state?*, Paper presented at the Workshop 'Sport, Politics and Public Policy'. ECPR Joint Sessions of Workshops, Nicosia (Cyprus), 25-30 April 2006, p.20., available at: <http://www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/nicosia/wst16/garcia.pdf>

and responsibilities of its members⁶. At this point it has to be noted that international sports organizations, which include the IOC, should be counted as a separate doctrine of international law in the category of international nongovernmental organizations (NGO). International sports organizations are not legal entities in international law, but they are corporate bodies operating on the basis of the law of the country of the seat. In terms of formal and legal issues it means that regulations established by them are not part of the international legal order. They have the character of norms only within the organizations. However taking into account their specialized character in an efficient way they affect legislation of individual countries⁷. We have to remember that sporting activities is connected with social and political aspects, which correlates with increasingly deeper relations between entities occurring in the sports market.

The aim of this paper is to show legal problems of the modern Olympic Movement, which follows the actually social and economic position of sport. From such point of view there will be analyzed regulations of Olympic Charter touching issues connected with qualifications to OG, and also regulations of international law that directly or indirectly influence issues related to participation in OG. Implementing the concerning assumption there will be addressed the topic of age limits, and also the issue connected with sex and its change.

2. Membership in the Olympic Movement

Determination of subject scope of Olympic Movement is the starting point for considering qualifications for participation in the OG. The Olympic Movement means coordination, organization, universal and sustained efforts, implemented under the main authority of the IOC, all natural persons and legal personalities inspired by the values of olympism⁸. It also has significant meaning relating to the problem of polarization of modern Olympics⁹. According to the content of the Olympic Charter, the condition of membership in the Olympic Movement is by the approval of the IOC¹⁰. In accordance with its regulations the IOC may assent as National Olympic Committee, as such national sports organization, that is the activity linked with the direct mission and the role of the IOC¹¹. Moreover pursuant to the relevant regulations, they may also be accepted as the associations of National Olympic Committees, International Sports Federations and their associations¹². It should be remembered that only National Olympic Committees approved by IOC are able to apply for their athletes to participation in the OG¹³.

Regulations of Olympic Committee do not determine strict borders of recognition. Such decision is entirely in the hands of IOC, who can work in this field with considerable flexibility. From the beginning of its activity, the International Olympic Committee has had a policy that assumes recognition of only such National Olympic Committees in countries/territories, to which there is approval as to their status by the world's main law entities¹⁴. Such politics of IOC on the one hand allows for participation in Olympic competition of athletes representing independent countries, and also not independent territories and territories

with complex legal and international status (as ex. Taiwan), on the other hand it creates certain restrictions connected with participation in OG countries that recently have become independent. An example of confirmation of accepted IOC reference lines of approval of NOC according to the legal and international status of the country is found in Kosovo. *Mario Pescante*, former president of the committee on international relations IOC stated that acceptance of independence of Kosovo by IOC will take place automatically after behaving in such a way by the United Nations (UN). However the lack of acceptance of the country internationally does not automatically affect the exclusion of representatives of such country from the sport competition. In such situations athletes may participate in OG as individual sportsman under the Olympic flag, as it was in 2000 in relation to athletes from East Timor that became independent in 2002. Athletes from these countries had similar status during the OG in Barcelona, due to the inclusion of Yugoslavia in international sanctions¹⁵.

Matters involving the NOC will still be in the sphere of political decisions, and the lack of substantial regulations in this area will always create legal hesitation as to the possibilities of participation and representation of ones country by its athletes.

3. Participation in the Olympic Games

Principles of qualification to the OG were determined in disposition of art.40 of the Olympic Charter, which is called "Olympic key"¹⁶. In accordance with its content an athlete, a coach or an activist, to be eligible to participate in Olympics must behave in accordance with regulations contained in the Olympic Charter and regulations of certain international sport federations, accepted by IOC, and also must be submitted by its own Olympic committee¹⁷. This regulation imposes an obligation on the mentioned group of respecting fair-play and non-violence rules, and obeying provisions of the World Anti-doping Code.

The first paragraph of the implementing rules to art.40 of the Olympic Charter, according to which each international sport federation implements its own criteria of qualification in certain sport in pursuance of an Olympic Charter that have to be submitted for approval by the Executive Committee of IOC, is the personification of one of the most important characteristics of Olympic system¹⁸. Usage of qualification criteria is by the international sports federations, associated by the national federations and national Olympic committees, which is under their responsibility¹⁹. In practice the procedure of gaining the Olympic qualification and participation on OG is organized as such: international federations set the criteria allowing to obtain the nomination to OG, but the main role in this area is the National Olympic Committees that allows for participating in the IOG²⁰, but leaving the final decision to the discretion of IOC as the main authority of Olympic Movement.

3.1 Age limit

The issue of age limit is an element that raises many emotions in the sports world. Most of the international sports federations in their inner regulations determine the age brackets and set the minimum age that enables them to participate in a certain class of competition (e.g. World Championships, Olympic Games)²¹. International Olympic Committee through the years has changed its approach a few times regarding this subject. Art.42 of the Olympic Charter proclaims that age limit is set by regulations of international sports federations, appropriate for certain disciplines, that have been approved by Executive Committee of IOC. Such content of the article prejudice the approach of IOC to this issue, while pointing out that it is a common project of IOC and international federations established on the basis of condominium. In practice the IOC reserves full control, but has left the decision on age limits to many federations. While setting such limits, they should consider the good of the athlete and in particular the health point.

There is no hesitation that regulations simulating age limits can be important in saving the rights of young sportsmen and for complying with fair-play rules. Age brackets are perceived as one of the methods for protection of minors. The doctrine emphasizes that participating of minors in commercialized and highly professionalized sport can expose them to the violation of personal rights²². On the one hand there is a

5 *Olympic Charter*, in force as from 8 July 2011, available at: http://www.olympic.org/Documents/olympic_charter_en.pdf

6 Introduction to the *Olympic Charter*.

7 Piechota R., *Reguly Antydopingowe w Polsce* [in: Pokrywka A. (ed.) *Antydoping w Polsce*, Instytut Sportu, Warszawa 2009, p. 7.

8 *Olympic Charter*, Fundamental Principles of Olympism.

9 See more about that: Józefczyk M., *Upolitycznienie nowo wzniesionych igrzysk olimpijskich* [in: Polus A. (ed.) *Sport w stosunkach Mi dzynarodowych*, Toru 2009, p.50-72.

10 *Olympic Charter*, art.3 par. 1.

11 *Ibidem*, par. 2.

12 *Ibidem*, par. 3.

13 *Ibidem*, art. 44 par. 2.

14 Foks J., *Ruch olimpijski a polityka*

mi dzynarodowa, Sport Wyczynowy, 2008 nr 4-6/520-522, p.18. What is interesting, Macau Sports and Olympic Committee founded in 1987, but still not officially recognized and thus no athlete has participated in the Olympic Games under the flag Macau.

15 Foks J., *Ruch olimpijski a ...* p.18.

16 Mestre A.M., *The law of the Olympic Games*, T.M.C. ASSER Instituut 2010, p. 71.

17 *Olympic Charter*, art. 40.

18 Mestre A.M., *The law of the ...* p. 71.

19 *Olympic Charter*, Bye-law to Rule 40 par. 2.

20 *Ibidem*, art. 44 par.2.

21 David P., *Human Rights in Youth Sports: A Critical Review of Children's Rights in Competitive Sport*, London: Routledge, 2005, p. 41.

common acceptance of applying limits, but on the other hand sport is the right of human and participation in sport competition that should be open and without discrimination points²³. This basis the question is raised as to whether age limits can be sanctioned for the protection of children.

Proponents of the implementation age limits emphasize that such regulations are consistent with Conventions on the Rights of the Child²⁴ and the principle of proportionality. According to the substance of art.31 paragraph 1 of the Convention, countries parties consider the rights of children with the rest and spare time, to taking part in games and recreation activities, appropriate to the age of children, and to unfettered involvement in cultural and artistic life, which clearly should point to appropriate distribution of competitor training system and in the long term avoid abuses in this area. The Convention includes regulations imposing an obligation on signatories to establish minimal age limit²⁵, however these provisions do not relate strictly to sports area. However opponents of age brackets claim that contemporary paternalism connected with the division of the world of children and adults is unjustifiable and leads to discrimination that is the violation of human rights²⁶. There is invoked in this context the content of the Universal Declaration of Human Rights²⁷ that clearly emphasizes protection against discrimination²⁸.

It is significant to pay attention that the matter of age limits concerns minimum limit, upper border is not controversial both in doctrine and in practice. It is an argument for the proponents of the conception of introduction of minimum age limits pointing at the aim of protection the health of minors.

3.2 Participation of transsexuals in the Olympic Games

The case of transsexuals in sport is not a new topic. For a long time this problem has been the subject discussed by the greatest world sport events²⁹. However lately according to the fight for the rights of the individual it took boarder and more universal assessment. Identification of sex in sport is a very complex problem, where medical and legal aspects have to be taken into consideration. Since the mid-sixties we have dealt with so-called gender tests that assume to preserve fair-play competition³⁰. In 2000, the International Olympic Committee endured a performance as a result of the lack of criteria that could allow them to clearly prejudice the sex of the athlete³¹. However it should be established during OG in London, to which lead to the example of representative RPA Caster Semenya. Semenya won golden medal in 2009 in Berlin during World Athletic Championships in the race for 800m. It is also worth mentioning the case of Renee Richards³², Maria Jose Martinez Patino³³ and Mianne Bagger³⁴. Spanish hurdler Maria Jose Martinez Patino before Universiade in Kobe 1985 did not pass the test of gender and automatically was excluded from the competition. At the same time it resulted in loss of scholarship at the university. As the first one in the history she opposed the official decision proving that the so-called androgen insensitivity syndrome could not affect the results achieved by her. Athlete status was re-established to her before the OG in Barcelona, after the statement of the Medical Commission of the IOC that the chromosomal criterion cannot decide on one hundred percent of the gender.

The IOC commented on the trend of anti-discrimination and protection of the rights of the individual, by an announcement on 17th of May 2004 that permits participation in Olympic Games by athletes that changed their gender³⁵. However this decision had some reservations. According to the guidelines of the IOC persons that changed their gender before puberty should be considered as: a man, in case of change from female to male; a woman, in case of change from male to female. Persons that changed their gender after puberty there is applicable grace period, which lasts two years. Furthermore, it must be complete surgical removal of both gonads and external sexual organs³⁶. The change of the gender must be legally recognized, which can encourage abuse³⁷ as there are varied regulations in different countries. History of the sport shows that manipulation of sex with great results and benefits has no limits.

As the practice shows the topic of admission of people after change of gender to the sport competition is highly complicated and requires individual consideration each time. Moreover in the age where human rights are affirmed and at every turn the equality, the right to equal legal protection and the right to the protection against discrimination are emphasized, the decision of IOC in 2004 seems to be appropriate and compatible with the content of the Olympic Charter, that points to the meaning of fair-play rules³⁸ based on respect for human dignity. What is more imperative of non-discrimination is one of the fundamental principles of the Olympic Movement that underlies the Olympic legal order. Olympic Charter *expressis verbis* shows that doing sport is a human right. It should be remembered that the introduction of a ban on transsexuals in sport events may be considered a branch of legislation, for example Universal Declaration of Human Rights. According to its art.7 all the people are equal before the law and have the right to legal protection with no distinctions. Furthermore each person has the right to protection against any discrimination and exposure to it³⁹.

3.3 Individual law to participate in Olympic Games

It is also relevant to pay attention to the controversial issue in the doctrine, which applies to the right to participate in OG. In pursuance of part of the doctrine we cannot talk about the right of the athlete or the right of the coach or activist to participate in OG, only about the possibility, privilege, that in reality is dependent on the will of different entities- international sports federations or National Olympic Committees. In opposition to this theorem are authors that show existence of individual rights of sportsmen to participate in OG⁴⁰.

Olympic Charter in art.44 paragraph 2 predicts that only NOC that are regarded by IOC have the right to submit athletes for participation in the Olympics and no one else has the right to participate in the OG. Additionally, the NOC can submit athletes only after the recommendation of national federations. If the NOC confirms such sportsmen they then send it to the Organizing Committee of the Olympic Games. Organizing Committee of Olympic Games has to approve receipt of it. The NOC has to check the validity of applications that were proposed by national federations and make sure that nobody was omitted for reasons of religion, politics, race or any other form of discrimination⁴¹. At first glance, such formulation of the content of art.44 prejudice the lack

22 Farstad S., *Protecting Children's Rights in Sport: The Use of Minimum Age*, University of Fribourg 2006, p.1. See also: Weber R., *Protection of Children in Competitive Sport, Some Critical Questions for London 2012*, International Review for the Sociology of Sport, March 2009 Volume 44, p. 55-69.
23 *Olympic Charter*, Fundamental Principles of Olympism.
24 *Conventions on the Rights of the Child*, Dz. U. 1991 No. 120, item 526.
25 *Ibidem*, art. 32.
26 Archard D., *Children, Rights and Childhood*, 2nd edn , Routledge, 2004, p. 70-85.

27 Declaration of Human Rights, available at: <http://www.unesco.pl/filead->

min/user_upload/pdf/Powszechna_Deklaracja_Praw_Czlowieka.pdf

28 *Ibidem*, art. 9.
29 See Chrostowski K., *Ple a sport*, Sport Wyczynowy 2005, nr 3-4/483-483, p. 61-66; J. Pilgrim, Martin D., Binder W., *Far from the Finish Line: Transsexualism and Athletic Competition*, Fordham Intellectual Property, Media & Entertainment Law Journal, Vol. XIII , 2003, p.495-549.
30 See more: Fastiff P. B., *Gender Verification Testing: Balancing the Rights of Female Athletes with a Scandal-Free Olympic Games*, 19 HASTINGS CONST. L.Q., 1992, p. 938 -939.
31 See Ritchie I., *Sex tested, gender verified: controlling female sexuality in the age of*

containment, Sport History Review 2003, p.80-98.
32 Case *Richards v USTA*, 400 N.Y.S. 2d.at 268.
33 Peel R., *Maria's Story. In Eve's Rib - Searching for the Biological Roots of Sex Differences*. New York Crown Publishers 1994.
34 Bialowas A. M., *Swinging from the ladies' tee: Gendered discourses of golf*, UMI Dissertation Publishing 2011.
35 See *IOC approves consensus with regard to athletes who have changed sex*, available at: <http://www.olympic.org/news?articleid=56230>.
36 *Ibidem*.
37 See also Shy Yael Lee Aura , *Like Any Other Girl: Make-to-Female Transsexuals*

and Professional Sports, Sports, Sports Law Journal 2007, p.95-111.
38 Dryden N., *For Power and Glory: State-Sponsored Doping and Athletes' Human Rights*, Sports Lawyers Journal, Volume 13, Spring 2006, Number 1, p. 7.
39 More, L. C. Cunha Lima, *Participation of transsexuals in sport competitions - an issue of human rights* [in:] D. P. Panagiotopoulos (ed.) *Sports Law. An Emerging Legal Order Human Rights of Athletes*, 2009 p. 331-335.
40 See Engelbrecht G., *The individual right to participate in the Olympic Games*, The International Sports Law Journal 2004/1-2, p. 8-13.
41 *Olympic Charter*, art. 44 par.3.
42 *Ibidem*.

of possibilities of the individual approach to the athlete. However decisions of the CAS chamber ad hoc indicates the possibility that the IOC can take into consideration such decision, with nothing required by the regulations of previous application by the NOC⁴² relating to examples of sportsmen representing countries where wars, or countries that haven't had time to organize their inner structures after conflicts, or sportsmen connected with NOC that boycott Olympics (in such a situation that the IOC can admit "wild card"⁴³). Similarly the IOC can behave, in case of defective application to OG, without any fault on the athlete side⁴⁴. Individual approach to the sportsman and allowing participation in competition may also be done in case of discrimination- reasons not connected strictly with sport.

5. Conclusions

Sport is a multifaceted phenomenon and nowadays plays an important part in social and economic life of certain countries. Olympic Games as the biggest sport event in the world that creates great economical possibilities attracts the attention of different backgrounds, what at the same time influences on the increase in number of sports conflicts that very often are subject to the decision of international courts.

International Olympic Committee still implements the amendments to the regulations contained in the Olympic Charter adjusting them to the requirements of the changing reality. That aim of such activity is posing difficulties that are inevitable in terms of internationalization of sport. Contemporary problems of Olympic Movement are related to

many aspects, which are impossible to define in the closed catalog. They concern for example the participation of professionals in sport rivalry, nationality, gender, age, media rights, protection of personal goods or provisions of the World Anti-doping Code and its compliance with human rights. This paper concentrated on only a few of them. The arguments presented tends to arrive at the conclusion that there is indispensable acceptance by IOC and other sports organizations official criteria that would avoid problems connected with the identification of sex. Moreover it can be stated that regulations concerning age limits creates a lot of controversy and is far from the Olympic ideal. Attention should also be paid to politicization of the IOC, which decisions more often deviate from the antic idea of pure fight and concentrate on the political interests of the association.

It seems to be a significant restriction that although art.44 of the Olympic Charter, that clearly says that only NOC can submit athletes to participation in competitions during OG, yet in certain cases the sportsman can be allowed to compete by the decision of IOC.

There is no question that these problems are complex and create challenges for sports bodies, but they should aim to ensure the security and fair competitions in agreement with basic rights of the individual.

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⁴³ CAS ad hoc (IO Salt Lake City 2002) 02/003 - *Gaia Bassani-Antivari v IOC* 12.02.2002.

⁴⁴ CAS ad hoc (IO Sydney 2000) 00/004 - *Jesus Kibunde v AIBA* 18.09.2000.



Lex Olympica: From the Inter-State Ancient Greek Law to the Rules of Participation in the Modern Olympic Games

By **Dimitrios P. Panagiotopoulos***

Introduction

The Olympic Games is a major international event featuring summer and winter sports, in which thousands of athletes participate in a variety of competitions.

The Olympic Games have come to be regarded as the world's foremost sports competition where more than 200 nations participate.

The Ancient Olympic Games were a series of competitions held between representatives of several city-states and kingdoms from Ancient Greece.

A. Olympic Interstate Ancient Greek law

In ancient Greece, the Olympic Games followed a parallel path to other institutions such as the State and the Law. It can be said that during the mentioned period, they included the Law as a new concept in the City-State, where the Law was not defined by one person, the king, but was shaped by the idea of justice for the masses. It was subject to the people and was protected by Divine Justice, particularly by Zeus, the God-Protector of justice.

In the classical period, the elementary unit in the City-State was the citizen; that is the individual who forms the functions and sets the institutions, who establishes the State. This was a democratic State under the rule of a Law which had passed from the temples of the sacred sites to the temples of the State. The People's Assembly was the body in which citizens participated and where the concept of justice was beginning to take form¹. It seems that the Greek Customary Law, dating from pre-historic and historic times, exerted a strong influence on this new concept.

Plato deals with the citizen in whom the idea of justice prevails, not only in relation to himself but also in relation to others. This was competition in the social arena, where the citizen should be fair. This model was displayed in competition and particularly in the morals of the Olympic Games through the athletic virtue of modesty. That means the individual's internal disposition, allowing him to realize the fair and the

unfair in competitive effort in the stadium and, by extension, on the social level. The lack of a measure of modesty and of the limits set by the Gods was viewed as an insult and contempt of common feeling. Justice punishes this insult, satisfying the gods and re-establishing the order of things².

Thus, the "common standards of Greeks" and the "legitimate standards of all humans" were understood as sources of interstate and inter-Hellenic - international law in the sacred places of ancient Greece, such as Delphi, Olympia, Nemea and the Isthmus³. At that time, an athlete was no more than the figure of the citizen of the City-State trying to prove this modesty through athletic competition on the difficult road to victory in the Olympic Stadium and seeking the favour of gods. This victory in noble Olympic competition was rewarded as a virtue and sanctioned by an olive branch. The concept of justice serving this idea of the members of the "city" in relation to Law became the example of virtue, the aim of every citizen in order to be "good and virtuous" on which a well-governed City-State could rely.

According to this verse, the notion of justice was highly developed among members of a society that was organised into a State during the particular period, while the building of the new classical civilization of the ancient world was erected on this foundation of the common notion

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1 ARISTOTLE, *Athenaion Politeia* 40, 3, 2.
2 HESIOD, *Works and Days*, 217-218.

DEMOCRITUS, frg. 264, in: H. DIELS / W. KRANZ, *Die Fragmente der Vorsokratiker*, Bd. 2, Darmstadt 1960, S. 199.

3 PINDAR, *Isthmian Odes* 2, 23; STRABO 7, 343; see also D. Konstantopoulos, *Public International Law*, Athens 1974, p. 22; S. Favre, "The Philosophy of the Olympic Movement", in: *Report of the Ninth Session of the International Olympic Academy at Olympia*, August - September 1969, Athens 1970, p. 35.

of justice in the sense of individual virtue. Law incorporated the entire set of the rules of behaviour based on the customs and habits and the notion of justice that were instituted by the State authorities. "Law is the king of all, both mortal and immortal"⁴.

This notion of Law in the Olympic Games in the course of their evolution and in particular during the development phase of interstate relations in Ancient Greece, established an interstate system of Law which affected the games on the basis of the interstate-international characteristics of Hellenic Law in classical antiquity.

This interstate Law of Olympic Games established Olympia as the island of peace in Greek antiquity.

Important was also the institution of armistice⁵ in antiquity. It was an act of peace, signifying the cessation of hostilities, in the context of a significant and unanimously accepted event as were athletic contests. Supreme examples of such contests were the Olympic Games which were held within the framework of a ritual sacred by the custom of the holy places⁶. As a custom of interstate law, armistice appears as a form of law with universal character since, in order to be enforced in its letter and substance, the existence of a contract, from which this form of contemporary interstate law would emanate, was necessary. It is also found under the name of truce⁷.

The convention on the Olympic armistice later seems to have attracted the interest of other city-states, who were bound by its rules. Thus the opportunity of peaceful competition was created in the Greek sanctuaries of the city-states at a pan Hellenic level, not only between their athletes, but also between the states by their presence at the occasion, by the erection of monuments and by votive offerings, while every athlete's victory was considered as a victory of his home city-state⁸. The participation of athletes in chariot races such as: of the Ilians in quadriga racing in 672 B.C., of the Argeians in horseback racing in 480 B.C. and in quadriga racing in 472 B.C. etc., shows that the competition was also associated with their particular city-state and therefore victory or defeat is also attributed to it.

As a source of interstate-international law, the convention on the Olympic truce mainly ensured the arrival of city-state delegations in Olympia where the Olympic Games were being held. The area of Olympia is declared sacred throughout the duration of the Olympic truce⁹. According to the law of the armistice, applicable to all-states, any violation of the area of Olympia during the period of truce was considered to be a sacrilege.

In order for the Olympic truce to be enforceable as a rule of interstate international law, it had to be widely publicized and be given a ceremonial character. That is to say, it had to become known so as to enable "the cities" on one hand to send "observers" to the Olympic festivities and on the other hand to comply with the letter and spirit of the Olympic truce, which was the armistice between belligerents and the establishment of peace. In order words, publicity and grandeur as well as the imposition of penalties by the Olympic congress in case of violation of the Olympic truce were necessary to the validity of the Olympic truce, in order to secure compliance by the states. The element of publicity was satisfied by the obligation of the Ilians to announce the beginning of the armistice as well as to announce its termination¹⁰.

Thus the Olympic truce became a fundamental rule of law, expressing the notion of interstate contract and the forging of a relationship between the city-states and their members, on the grounds of justice in their great Olympic Games festival, the latter, express the ultimate purpose of their great aspiration in peace between all the members of the ancient society.

B. The Modern Olympic Games via Lex Olympica

a. Principles and participation in the Olympic Games

In our era, the organizing authority of the Olympic Games, in the form we all know, is the International Olympic Committee (IOC), an international committee of individuals which has gained international authority and moral weight with its activities over a long period of time and has been tacitly accepted by the international community¹¹. Recently it was invested with the form of a Non-Governmental Organization operating in accordance with the terms of the Olympic Charter. As expressly stating in the Olympic Charter¹² IOC, seated in Lausanne Switzerland¹³ is "an international non-governmental not-for-profit organisation, of unlimited duration, in the form of an association with the status of a legal person, recognised by the Swiss Federal Council in accordance with an agreement entered into on 1 November 2000". The activity of the IOC is defined by the Olympic Charter, which defines the Committee's authority over the Olympic Activities organizational and ceremonial matters.

The International Olympic Committee is the supreme authority of the Olympic Movement¹⁴. Acting as a catalyst for collaboration between all parties of the Olympic family, from the National Olympic Committees (NOCs), the International Sports Federations (IFs), the athletes, the Organising Committees for the Olympic Games (OCOGs), to the TOP partners, broadcast partners and United Nations agencies, the International Olympic Committee (IOC) shepherds success through a wide range of programmes and projects. On this basis it ensures the regular celebration of the Olympic Games, supports all affiliated member organisations of the Olympic Movement and strongly encourages, by appropriate means, the promotion of the Olympic values.

According to the Olympic Charter, some of the basic roles of the IOC are: to encourage and support the promotion of ethics in sport as well as education of youth through sport and to dedicate its efforts to ensuring that, in sport, the spirit of fair play prevails and violence is banned; to encourage and support the organisation, development and coordination of sport and sports competitions; to ensure the regular celebration of the Olympic Games; to take action in order to strengthen the unity and to protect the independence of the Olympic Movement; to act against any form of discrimination affecting the Olympic Movement; to lead the fight against doping in sport; to encourage and support measures protecting the health of athletes; to promote a positive legacy from the Olympic Games to the host cities and host countries; to encourage and support the activities of the International Olympic Academy (IOA) and other institutions which dedicate themselves to Olympic education etc¹⁵.

Under the Olympic Charter in force till 1993 "the meaning of a country refers to every country, State, dominion or section of a dominion which is considered by the IOC as being subject to the jurisdiction of a National Olympic Committee (NOC) recognized by the IOC"¹⁶. Certainly this happened only if the Charter of the National Olympic Committee was in compliance with the Olympic Charter¹⁷.

Given this provision, the criterion of participation of a people in the Olympic Games should not reside in the nature of its State, but in the fact that this people living in a particular dominion or in a section of a dominion, had a National Olympic Committee recognized by the International one; this means that this nation was complying with the provisions of the Olympic Charter and that it had the right to participate in this international event - by the intermediary of the NOC - as a peoples entity and not as a State.

4 PLATO, Gorgias 44 b., Nomoi 714 e. See also PINDAR R, Fragment 169. Isthmian Odes, 2, 38.

5 The word armistice is derived from the Latin "arma"(arms) + stare, statum", (to stand still). In both languages it means to hold the hands (away from arms). See Webster's *New Collegiate Dictionary*, second edition (in English). See I.

Stamatikos, (1949), *Dictionary of the Ancient Language*, Athens, p. 316 a. i.e.

the word armistice is synonymous to the word "truce". See Ch. Sakellariou, *Dictionary of Modern Greek*, 2nd ed., Athens: I. Sideris, p.74.

6 Pausanias mentions the truce observed by the Corinthians in order to hold the Isthmian Games. See Pausanias, *Iliaka*, Chapt. 2.1.

7 Delphic Sibyl Inscription (1688), 49. See also Plutarch, Lycurgus, 1 & 23 and Esychius and Pausanias, *Iliaka* 5, 15, 7.

8 PAUSANIAS, *Iliaka*, 1, 10, 2, 2, 2, XXII, 2, XXII, 2, 22.

9 PINDAR, 2, 23; STRAVON, 8, 343; M. Croiset, *The Civilization of Ancient Greek*, (origin in French), Greek transl. Govotsis, p.40).

10 PAUSANIAS, *Iliaka*, 1, 20, 1, and Philostratus, *Gymnasticus*, Chapt. 1, p.264 & foll.

11 D.P. Panagiotopoulos, Op. cit., page 137.

12 Olympic Charter, I.O.C. 2010, Rule 15 par. 1.

13 Characterised in the Olympic Charter as "the Olympic capital", Olympic Charter, I.O.C. 2010, Article 15 par. 2.

14 International Olympic Committee's site : <http://www.olympic.org/about-ioc-institution>

15 Ibid, International Olympic Committee's site.

16 I.O.C. *Olympic Charter* Article 31.

17 Ibid, Op.cit., provisions of the Articles 31 and 32.

In terms of the Olympic Charter only the International Olympic Committee, for matters regarding the Olympic Competition, and the International Sports Federations, for technical matters, can lay down conditions of participation in the Olympic Games¹⁸. The rules elaborated by the International Sports Federations commit not only the sports authorities of each country, but also its administration and its legislator. If the national legislator does not comply with them, the National Federation of its country will not be able to participate in the games governed by the rules decided by the International Federations¹⁹. Namely, the states are committed to comply with the rules deriving from the International Olympic Committee and the International Federations as rules that are generally «accepted»²⁰. For special Olympic matters, for which the Olympic Charter makes provision, such as the Olympic Symbols and their protection, the IOC elaborated an international Treaty (Nairobi, 1981), open to the signature by States. This treaty has been ratified by the Greek Legislator and is in force as a rule of national law²¹. It prevails over any other rule related to the same matter. According to this treaty, the exclusive right of using the Olympic symbol belongs to the International Olympic Committee and to the Greek Committee of the Olympic Games for the Greek territory.

b. Olympic Recognition

As it is clear, the recognition of the National Olympic Committee of any country is the first and most important step for it, to enter the Olympic games and gain the benefit to participate in them. Today according to the official data, uploaded in the International Olympic Committee's site²², there are 204 recognized NOC.

The Olympic Charter provides specialized organizations (such as the National Olympic Committees, non - governmental organizations dealing with sports, the International Federations etc) and committees with concrete competence recognized by the IOC.

In the past, the International Olympic Committee recognized organizations directly or indirectly²³. The decision on recognition was based on specific formalities or criteria that the IOC had defined. In terms of the Olympic Charter of 1921 «every National Olympic Movement established by one or more members of the IOC for their own country, and in accordance with the provisions of the Olympic Charter, is recognized. The recognition stops existing «Ipso - Facto»²⁴.

According to the article 25 of the statute of 1949, the National Olympic Committees could be recognized provided that the majority of their members were representatives of Federations dealing with sports contained in the Olympic program. They should be subject to the international federation's members of the International Olympic Committee.

The National Olympic Committees should have recognized only one federation, which should be an official independent organization dealing with all the Olympic matters.

Those elements provide the basis of today's Olympic Charter²⁵. At the end of the 1960 decade, the IOC charged the organizing committee with the task of forming the criteria of the Olympic recognition, which the IOC approved, and to begin examining the applications for recognition of sports organizations²⁶.

The Olympic Charter is interested in the development and the protection of the Olympic Movement. In order to ensure the supremacy of the IOC the Olympic Charter defines criteria, which a National Olympic Committee should fulfil in order to be recognized by the International Olympic Committee and become a part of the Olympic Movement.

According to the Olympic Charter, a National Olympic Committee may be recognized by the International one, provided that it submits for approval «an application with the IOC demonstrating that the applicant fulfils all conditions prescribed by the Olympic Charter, in particular in Rule 29 and BLR 28 and 29»²⁷.

Proof must be adduced that the national federations which are members of the NOC exercise a specific and real on-going sports activity in their country and internationally, in particular by organizing and participating in competitions and implementing training programs for athletes²⁸.

The Olympic recognition of the National Olympic Committees is a procedure aiming at the expansion of the Olympic space internationally within the boundaries of the state, of its territory, or part of its territory²⁹. According to the Olympic Charter the state, as a territory which belongs to the jurisdiction of the respective NOC recognized by the IOC, should correspond to the territory and to the traditions of its country³⁰. The Olympic recognition appears as the recognition of «a right», which is the right of participation of a country in the Olympic Games, according to the terms of the International Olympic Committee, that exercises supreme authority on the Olympic Movement and the Olympic Games³⁰. According to one of these terms, the criterion for participation in the Olympic Movement is the recognition of the National Olympic Committee by the International Olympic Committee³¹.

Only the recognized National Olympic Committees, as the representatives of the people of the respective country, can declare the participation of athletes in the Olympic Games. The final decision about this declaration will be taken by the executive committee of the IOC.

The Olympic Recognition of the International Federations of Sports widens the subjective borders of the Olympic Movement. It creates a movement which is organizationally expanded to the whole space of universal sports. Objectively considered, the Olympic recognition of the I.F.s, places at the service of the Olympic Games and of their Doctrine many international organizations, the I.F.s of sports with specific technical duties and authority.

With the approval of the statutes of an International Federation by the executive committee and the confirmation of the observance of the norms of the Olympic Charter, recognition has some effects on the International Federation. These effects can be classified into: legalizing and transmissive. On the basis of the first effect, every I.F. have the right³² to formulate proposals addressed to the IOC concerning the Olympic Charter and the Olympic Movement; to collaborate in the preparation of Olympic Congresses; to participate, on request from the IOC, in the activities of the IOC commissions.

Moreover, the sports of the recognized International Federation are contained in the Olympic program and in the program of the Continental and Regional Games supported by the IOC. With the Olympic

18 Silance L., (1971), op. cit., p.148.

19 Nafziger J., (1980), op. cit., pp. 78-79.

The same author comments on the intervention of the United States President Carter, who violated the usual practice of the international sports competitions by refusing to accept the full executive power of the IOC or at least that of the United States Olympic Committee, putting the NOC of the USA in an emparasing situation», wherever pursuant to 1978 Amateur Sports Law he had no authority and power whatsoever to intervene in settlements and arrangements such as «The participation and representation of the United States in the Olympic Games».

20 Greek Law nos. 1347/1983 and 1808/1951, prior to this reference , see sports Code by Panagiotopoulos D., (1991) , 3rd edition ,

Athens -Comotini: Sakoulas , p.244. On Nairobi Treaty (or pact) of Sept. 26, 1881, see «Olympic Symbols», in: *Olympic Review* , no 170, 1981, p.704, further see Olympic Charter 1991, article 12 and the explanatory provisions of the rules 12-17, pp.13-14

21 See court decision (or arbitration award), EOC no 36/74-12/12/1974, on the Waltrave and Koch case, 1974 Library (Collection) p.1405, 2nd verdict no. 13/76-14/7/1976 se Dona C/Mantero, 1976, Library (or Collection),p.1333, in: Documents de Seance, 1984-1985, Parlement European Communautes Europeennes, document 1-53/84/B, Apr.2, 1984 pp.23-24.prior to this reference see Nafziger J., (1980) op. cit., p.76, Ibid., (1988), International Sports Law, New

York, Traditional Publishers , pp.101-136 by Panagiotopoulos D., (1991), The Olympic Games Law: in Ancient and Modern Times , Athens - Comotini: Sakoulas, pp.179-186

22 International Olympic Committee's site : <http://www.olympic.org/national-olympic-committees>

23 Fleuridas G., (1974). *L'Administration et l'organisation des Jeux Olympiques, le probleme du gigantisme de Jeux*, Doctoral Thesis. University of Paris XIII: Paris, p. 68.

24 Bulletin Olympique (de 1921), du Comité International, Archives Olympiques de C.I.O., Chateau de Vidy: Lausanne. Further see Panagiotopoulos D., (1991), *The Olympic Games Law*. A.Sakoulas: Athens - Comotini, pp 187-188.

25 Olympic Charter, I.O.C. 2010, Rule 3
26 Csanadi A., (1982), La reconnaissance du Comité International Olympique, in: *Revue Olympique*, No 174, I.O.C. p.167.

27 Olympic Charter, I.O.C. 2011, Bye Law to Rule 28 and 29 par. 1.1.

28 Olympic Charter, I.O.C. 2011, Bye Law to Rule 28 and 29 par. 1.2.

29 Schroeder J., (1976) ,*Symbolik der Olympische Bewegung, Grundlagen und Möglichkeiten eines Rechtlichen Schutzes*, Doctoral Thesis, Mainz, p. 80.

30 The Commission for the Olympic Games, (1979), Informative Bulletin, No 10, Greece, p.41. Also see Panagiotopoulos D., (1991), Op. Cit., p.188.

31 Olympic Charter, I.O.C. 2011, Rule 41

32 Olympic Charter, I.O.C. 2011, Rule 27 par. 2.

Recognition of the I.F.s, according to the letter and spirit of the provisions of the Olympic Charter, the IOC transfers power for matters of technical nature to the I.F.s. In other words, recognition effects for technical matters, for the organization of the Olympic sports and the performance of the Olympic Games. To that end, every IF have the mission and the role³³ to establish and enforce, in accordance with the Olympic spirit, the rules concerning the practice of their respective sports and to ensure their application; to ensure the development of their sports throughout the world; to contribute to the achievement of the goals set out in the Olympic Charter, in particular by way of the spread of Olympism and Olympic education; to express their opinions on the candidatures for organizing the Olympic Games, in particular as far as the technical aspects of venues for their respective sports are concerned; to establish their criteria of eligibility for the competitions of the Olympic Games in conformity with the Olympic Charter, and to submit these to the IOC for approval; to assume the responsibility for the technical control and direction of their sports at the Olympic Games and at the Games held under the patronage of the IOC; to provide technical assistance in the practical implementation of the Olympic Solidarity programs.

An element of major importance on the basis of which Olympic recognition is granted to National Olympic Committees, International Federations and other international organizations dealing with sports, is compliance of their statute with the provisions of the Olympic Charter.

The Olympic Recognition exists so far as the conditions required are fulfilled by the sports organizations belonging to the Olympic Movement. If these conditions stop being fulfilled the IOC recalls the recognition.

According to an explicit provision of the Olympic Charter³⁴ in case of any violation of the Olympic Charter, the World Anti-Doping Code, or any other regulation, as the case may be, the IOC Executive Board or the disciplinary commission³⁵ may take the relevant measures or sanctions depending the severity of the violation and the person committed it. With regard to the NOC the IOC Executive Board or the disciplinary commission the measures or sanctions could be³⁶ "a) suspension (IOC Executive Board); in such event, the IOC Executive Board determines in each case the consequences for the NOC concerned and its athletes; b) withdrawal of provisional recognition (IOC Executive Board); c) withdrawal of full recognition (Session); in such a case, the NOC forfeits all rights conferred upon it in accordance with the Olympic Charter; d) withdrawal of the right to organize a Session or an Olympic Congress (Session)"

A National Olympic Committee, the Olympic recognition of which has been suspended or recalled, is, in fact, put out of the Olympic world, which means that for the IOC, the Supreme Authority of the Olympic Movement, this Committee does not exist. This applies also to the case of an International Federation, from which the IOC withdraws its recognition, when the required conditions stop being fulfilled.

The consequence of the cessation of the recognition of an International Sports Federation is the loss of the right to appear on the official program and on the program of the Continental and Regional Games under the auspices of the IOC. In addition, the aforementioned legalizing effects of the recognition of the I.F. are withdrawn.

Conclusion

The goal of the Olympic Movement is clearly defined in the Olympic Charter: "The goal of the Olympic Movement is to contribute to building a peaceful and better world by educating youth people through sport practised in accordance with Olympism and its values³⁷."

In ancient Greece the institution of the Olympic Games was subject to a severe law supreme to that of the Cities and accepted by the "international" society of the time; the issue of the Games, was an issue of the Cities, which were committed to respect the truce or be excluded from the Games. So, the idea of truce is of major importance, in the era of ancient Greece.

But from these days until today, many rules are held, for a country to be able to participate in the modern Olympic Games. The Olympic recognition is a procedural act of connecting the IOC with National Olympic Committees, International Federations and international organizations dealing with sports and desiring to belong to the world of the sports movement governed by the rules of the Olympic Charter. The Olympic Charter should be accepted and observed by the recognized National Olympic Committees, the International Federations and the international organizations. The fulfilment of this condition will enable them to exercise their rights within the Olympic Movement and participate in the Olympic Games.

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33 Op.cit, Rule 27 par. 1.

34 Ibid, I.O.C. 2011, Rule 23.

35 If the IOC Executive Board delegates its power to it (the disciplinary commission). Olympic Charter, I.O.C. 2011, Rule 23 par. 2.4

36 Olympic Charter, I.O.C. 2011, Rule 23 par. 1.4.

37 See Olympic Charter, 2011, Rule 1

Guilty Until Proven Innocent: The 'Olympic' element of the Advertising Regulations for the London 2012 Olympic Games

By Kaman Kala*

1. Introduction

New regulations governing the use of advertising and trading in the vicinity of the Olympic 'event zones' was introduced in December 2011. The London Olympic Games and Paralympic Games (Advertising and Trading) (England) Regulations 2011 (the regulations) have been made under the authority of sections 19 and 25 of the London Olympic Games and Paralympic Games Act 2006, as amended by the London Olympic Games and Paralympic Games (Amendment) Act 2011, which received Royal Assent on 14th December 2011 (the Act).

One can assume that the principle objective of the advertising regulations will be to reinforce the protection against the phenomenon of ambush marketing. Ambush marketing involves a business organisation's attempt to capitalise on the goodwill, reputation and popularity of an event, by creat-

ing an association with the event, without the authorisation or consent of the organisers (Scaria 2008, 29).¹ The privilege of affiliating the name of a business to a prestigious event is normally done so via sponsorship. The consequences of unauthorised association leads to consumer confusion, where an official sponsor is often deprived of the benefits that sponsorship agreements are designed to generate. Furthermore, the organisers also retain a duty to ensure that they protect the official sponsors, as a lack of protection can potentially lead to business organisations abstaining from providing sponsorship funding in the future. It has also transpired that sui generis legislation must be utilised for ambush marketing purposes, as intellectual property actions in the context of ambush marketing are often rendered futile. This is because successful actions often require factual evidence of infringement, which ambush marketers have become exceptionally astute at circumventing. For example, rarely will one see an ambush marketer utilise the five interlocked rings in any of their marketing campaigns. This paper will briefly outline the key advertising restrictions that have been introduced and will evaluate the legislature's 'gold-plating' element of the regulations - the introduction of a reversed presumption of guilt.²

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1 Arul George Scaria, *Ambush Marketing: Game within a Game*, (Oxford University Press, New Delhi, 2008) pg 29

2. Event Zones

The event zones are now clearly identified utilising maps and coloured boundary lines³. Such zones can be classified as the area within the immediate vicinity of the major Olympic venues. With regards to spectacles such as the marathon route, the regulations will apply to the various parks, roads and other land that the marathon passes. The regulations will prohibit advertisers from advertising on the tube and rail stations that are above ground and within the event zone and will also prevent advertisers from accessing the airspace immediately above an event zone for unauthorised advertising purposes.

2.1 Event Period

It is also clear that the restrictions will only apply during the appropriate event period(s)⁴. Such periods will generically revolve around the day prior to an event taking place, until the final day of events taking place in the event zone. Naturally, the event period for the Olympic Park will have the longest protection period, which will be protected for twenty two days, and a further thirteen for the Paralympics.

2.1.1 Advertising Activity

The Regulations will interdict any advertising activity within the event zones, both on public and private land, that has not been prior authorised by the London Organising Committee of the Olympic and Paralympic Games (LOCOG).⁵ Advertising activity includes the displaying, projecting, emitting, screening or exhibiting any kind of advertisement whether it is of a commercial or non-commercial nature. It also prevents the carrying or holding of an advertisement or any apparatus, on which the advertisement is displayed. The distribution of documents or articles for the purposes of promotion, advertisement, announcement or direction is also prohibited. Utilising an animal for advertisement purposes is also forbidden. Finally, and explicitly reserved for ambush marketing, one who carries any personal property that that displays an advertisement, or wears a costume that is an advertisement or clothing on which advertisement is displayed, or displaying an advertisement on a person's body will be strictly prohibited.⁶

2.1.2 Contravention

In terms of liability, any contravention of the regulations will be an offence, which could see the perpetrator incur an unlimited fine on indictment or £20,000 on summary judgment.⁷ Extraordinarily, as a defence, the potential transgressor of an ambush activity has to prove, on the balance of probabilities, that such an activity took place without their knowledge or occurred despite them taking all reasonable steps to prevent it. In other words, there is a reversal of the presumption of guilt.⁸

3. Comment

The stringent advertising regulations were expected. The organisers have maintained that such regulations were due in 2011 ever since Royal Assent was given to the original 2006 Act. However, the reversal of the presumption of guilt is the biggest cause for concern. This astonishing derogation from the normal position stipulated under the Article 6(2) of the European Convention on Human Rights (ECHR) is something that could determine liability on not just the senior staff of ambush marketers, but also directors of the official sponsors whose staff surpass the strict letter of their sponsorship rights. Furthermore, what does this

mean for small businesses that operate within the vicinity of the event venues on a day-to-day basis?

It is also apparent that the regulations will be utilized in conjunction with Schedule 4 of the London Olympic Association Right (LOAR), which aims to prohibit any association with the Olympics by controlling the use of certain 'listed expressions'.⁹ Therefore, if certain words are used in combination with other words, this would give effect to an evidential burden that the LOAR has been infringed. Column A of the expressions include: Games; 2012; Two-Thousand and Twelve and Twenty-Twelve. Column B includes: Gold; Silver; Bronze; London; Medals; Sponsor and Summer. With the presumption of guilt now reversed for advertising, this seems to imply that the use of such expressions would lead to an automatic infringement. Thus, an advertisement such as 'Get your bronze on this Summer' by a local sunbed business (situated in an event zone), would lead to automatic infringement, unless they provide that such an advertisement took place without their knowledge or did everything that they could to prevent it.

A reversal of the presumption of guilt was previously proposed in the initial Bill for the 2006 London Act. It was at the House of Lords where such a notion was rendered disproportionate. Justification of the reversal was done so by the government, claiming that it was of an evidential nature as opposed to an actual presumption of guilt. Lord Clement-Jones struck such a proposition out of the legislation citing '...the reversal of the burden of proof is entirely disproportionate in legislation that is designed essentially to protect the commercial interests of the International Olympic Committee and LOCOG. The burden should be on LOCOG to prove the guilt of an alleged transgressor, not the other way round...'¹⁰

Despite the initial rejection of such a presumption, why derogate from the previous position now? The right to be presumed innocent has been justified on the grounds that interference with Article 6(2) ECHR is possible "within reasonable limits, which take into account the importance of what is at stake and maintain the rights of the defence."¹¹ In other words, interference can be justified when it furthers a legitimate aim, and when it is proportionate to that aim. It is quite understandable that stringent protection is required, especially at an event that is regularly ambushed, and where sponsors have paid in excess of £700 million for exclusive rights. Nevertheless, how can an interference with a fundamental freedom be realistically justified when the legitimate aim is to protect the commercial interests of the organisers? More interestingly, the IOC does not have any requirements that anti-ambush legislation prerequisite a reversal of the presumption of guilt. Furthermore, the purpose of the regulations is to protect against ambush marketing and it seems utterly ludicrous that one, who would have absolutely no intention to breach the law, would probably have to collate evidence in advance with the expectation that they might have to prove their innocence under these regulations at some point in the future. To put such a burden upon an alleged transgressor seems unfair, causes clear legal uncertainty, in addition to being entirely disproportionate and draconian. Needless to say, the regulations are undeniably unprecedented and are contrary to the very basic principles of the English legal system.

4. Conclusion

The advertising regulations are designed to regulate and control as much of the unauthorised marketing as possible and will provide for an interesting Olympics. Such stringent regulations are unique, especially now that the presumption of guilt has been reversed. Furthermore, sui generis legislation in relation to ambush marketing comprises the balancing of interests between the event organisers, the official sponsors and the Article 10 ECHR freedom of expression rights of non-sponsors. Despite the current regulations being against this measure and rather disproportionate, ambush marketing evolves naturally and marketers are increasingly becoming more astute at circumventing the legal provisions designed to protect an event. Thus, despite the severe restrictions in place, history depicts that the impulse to 'gain something from nothing' will be difficult to diminish from the ingenious marketers.

2 See sections 21(1) and 27(1) of the Act and Regulation (6)

3 Schedule 1, Advertising Regulations

4 Schedule 2, Advertising Regulations

5 Regulation 6(1)

6 *Ibid*

7 Section 39, London Olympic Games and Paralympic (Amendment) Act 2011

8 See 'The London Olympic Games and Paralympic Games (Advertising and Trading) (England) Regulations 2011: Guidance on Reverse Burden Defences. http://www.culture.gov.uk/images/publications/Guidance_Reverse_Burden_Defences.pdf accessed 12/02/12

9 London Olympic Games and Paralympic Games Act, sch.4 para.2

10 Lords Hansard text for 15th February 2006 (60215-31) 2012

11 Department for Culture, Media and Sport: Regulations on Advertising Activity and Trading around London 2012, A Consultation, March 2011, accessed at http://www.culture.gov.uk/images/consultations/ConsDoc_Regulations_on_Advertising_and_Trading_London_2012.pdf accessed 01/09/2011

The FIFA Player Release Rule: critical evaluation and possible legal challenges

By Francesco Taricone*

1. Introduction

For athletes, there is nothing like representing their country in events like the Olympic Games or the World Cup. Sometimes their dreams become true and they are picked to represent their national team. But there is a problem: in professional sports those athletes are none other than employees, with their employers (the clubs) that pay for their work performance.

The club is basically the job market. If an employer pays his employees, he expects that they are available to do their job without any interference from the outside, in order to maximise the club profits. In this scenario, it is evident that losing a player for a period of time could damage the club outcome (in this case, the possibility to achieve sporting targets).

The increasing commercialisation of the sports world has led, in the last decades, to a massive conflict between domestic and international football.

Clubs complain that FIFA rules that force them to release their players are “draconian”¹, with an abuse of dominant position, because FIFA does not serve the general interest of football (as it should do), but only the interest of federations. On the other hand, FIFA holds that the Player Release rule is “indispensable for ensuring the organisation of international competitions and maintaining the integrity of our sport.”².

In this essay, after a short historical panoramic, there will be made a deep analysis on the legitimacy of the FIFA Player Release rule in the light of the “Wouters Test” adopted in Meca-Medina, with an in-depth examination of the injury compensation problem.

2. The Player Release Rule

The FIFA player release rule is established in article 1, paragraph 4 of the Regulations for the Status and Transfer of Players, in conjunction with annex 1 of the same regulations.

According to this rules, “clubs are obliged to release their registered players to the representative teams of the country for which the player is eligible to play (...) if they are called up by the associated concerned”³, and they are “not entitled to financial compensation”⁴.

Furthermore, “the club with which the player concerned is registered shall be responsible for insurance against illness and accident during the entire period of his release”⁵.

The discipline consists, as Tannler correctly pointed out, of three elements:

- The duty to release players
- FIFA’s International match calendar
- The no-compensation principle⁶.

Regarding the first point, it is glaringly obvious how important is this rule for the existence of International Football.

The absence of a similar rule “*would weaken international sport*”⁷, with consequences also for clubs, considering that they “*benefit from the player’s appearances for the national team as the player has the opportunity to promote and show himself on the international stage*”⁸.

It is important to remind that any divergent agreement between a player and a club is prohibited (Annex 1, Article 1).

As far as the International match calendar is concerned, the guidelines are set by the “Release of players for national association representative matches” document⁹.

There are some differences between qualifying matches and friendly matches, regarding the release period and the priority over club matches.

For example, clubs are not obliged to release a player for friendly matches on dates outside the coordinated international match calendar.¹⁰

This problem has been encountered in 2008 Olympic Games with the dispute between Ronaldinho and FC Barcelona¹¹. This is, however, a critical point in the relationship between clubs and players, considering the enormous appeal and importance that International events such as the Olympics have for some players (especially for those who have a strong national pride). A modification in the rule should be considered, with the participation of players in this process.

3. The No-Compensation Principle: Problems And Case Law

The critical point in the FIFA Player Release rule is, without any doubt, the no-compensation principle. Basically, the problem is that clubs pay players who cannot be used. It is like if an employer pays employees whom he is forced to release to another employer: it does not sound logical!

In the past, the supremacy of national teams was not contrived. In the last years, however, the increased importance of commercial aspects in sport forced clubs to have all the players available and at their best, in order to gain more money from broadcasting rights and commercial revenues.

The first conflicts happened towards the end of the 1980s, when European clubs “no longer regulated the release of players in employment contracts and refused to make them available, against the players’ wishes, for international duty.”¹²

The situation, however, did not reach moments of high crisis until 1998 with the case of the Italian Alessandro Nesta, who broke his leg during the World Cup. His club, SS Lazio, asked for a £ 6 million compensation to be paid from the Italian Football Federation, starting a deep debate in the public opinion.¹³

Another critical point was reached in 2005 with the case of Eric Abidal. Lyon Chairman Jean-Michel Aulas sued FIFA for £ 675,000 with the support of G14 (which represented Europe’s top 18 clubs, including Lyon).¹⁴ The biggest challenge against the FIFA Player Release rule started in the same year.

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1 DUPONT J.L., “Club Compensation: G-14: Why FIFA regulations violate EC law”,

World Sports Law Report, 2006, Volume 4, Issue 4.

2 TANNLER H., “Club Compensation: FIFA: Why the player release rule is indispensable”, World Sports Law Report, 2006, Volume 4, Issue 4.

3 FIFA Regulations for the Status and Transfer of Players, Annex 1, Article 1.

4 FIFA Regulations for the Status and Transfer of Players, Annex 1, Article 2.1.

5 FIFA Regulations for the Status and Transfer of Players, Annex 1, Article 2.3.

6 TANNLER H., “Club Compensation: FIFA: Why the player release rule is indispensable”, World Sports Law Report, 2006, Volume 4, Issue 4.

7 HORNSBY S., “Opinion: Legality of player release rule: G-14’s deal with FIFA”, World Sports Law Report, 2008, Volume 6, Issue 5.

8 LIMBERT P., “Injury Compensation: Compensating clubs for players injured during international duty”, World Sports Law Report, 2007, Volume 5, Issue 3.

9 Available online at http://www.fifa.com/mm/document/affederation/administration/ps_792_en-annex_ii_74.pdf (last access: 23 May 2011).

10 FIFA Release of players for national association representative matches in accordance with the Coordinated International

Match Calendar, point E.

11 Mumbai Mirror, July 12, 2008, available online at www.mumbaiirror.com/index.aspx?Page=article§name=News%20-%20Sports§id=8&contentid=20080712200807120219539051e47434a (last access: 23 May 2011).

12 TANNLER H., “Club Compensation: FIFA: Why the player release rule is indispensable”, World Sports Law Report, 2006, Volume 4 Issue 4.

13 Corriere della Sera, Caso Nesta: Cragnotti frena ma Nizzola allerta gli avvocati. Available online at http://archivio.corriere.it/1998/settembre/10/Caso_Nesta_Cragnotti

A Moroccan player, Abdelmajid Oulmers, was injured during an international match. Immediately his club, Charleroi FC, asked for a compensation and the Charleroi Tribunal of Commerce referred to the European Court of Justice (ECJ).

For the first time the ECJ was asked to consider “whether the obligations on clubs and football players having employment contracts with those clubs imposed by the provision of FIFA’s statutes and regulations providing for the obligatory release of players to National Federations without compensation and the unilateral and binding determination of the co-ordinated International match calendar constitute unlawful restrictions of competition or abuses of a dominant position or obstacles to the exercise of fundamental freedoms”¹⁵ (Articles 101 and 102 of the Treaty on the Functioning of the European Union - TFEU).

The G-14 used again this case, as they did in Abidal, to claim a huge €860m in damages and compensation¹⁶. This could be considered a “wider attempt by G14 to gain a greater say over the way governing bodies, such as Fifa and Uefa, run the professional side of the game.”¹⁷

However, In January 2008, as a result of negotiation between UEFA, FIFA and the G14, the G14 clubs agreed to disband the organisation, replacing it with a new association called the European Club Association (ECA). At the same time, all the outstanding lawsuits (including Oulmers) were brought to an end before the final decision.

In exchange, clubs were entitled to obtain a compensation for their players’ participation in international tournaments, such as Euro 2008 (up to £ 3,000 per player per day) and South Africa 2010 (a total of € 26 million, according to the FIFA circular no. 1191/2009).

Sadly, the early definition of the Charleroi case, even if it meant a positive agreement concerning the compensation for international tournaments (but not for injuries), could be considered as a missed chance to clearly define the legitimacy of the FIFA Player Release Rule and its compatibility with the European principles.

In the next paragraph there will be a critical evaluation about this rule and the possibility of a legal challenge, in the eye of the jurisprudence of the European Courts, with particular regard to the Wouters Test.

4. The Legitimacy Of The Fifa Player Release Rule

The claim made by Charleroi FC had at its heart the idea that the Fifa Player Release Rule represented a contravention of the abuse of dominant position, operating a restraint of trade, in accordance with Articles 101 and 102 TFEU (ex 81 and 82 of the EC Treaty).

The G-14 clubs based their assumption on two elements:

- FIFA generates substantial revenues from International events because of the presence of top players;
- Players are not available to their employers during this time, even if they continue to receive their salaries from clubs.¹⁸

Following the European Court of Justice in *Motoe*¹⁹, National and International Governing Bodies act a dual role when they organise international events: they act as regulatory body, but they also act as commercial entities “by organising the World Cup and other officially sanctioned championships”,²⁰ being forced to respect the European economic principles.

The obligation to release players, using this approach, has the potential to impede player’s ability “to perform their contractual obligations”.

In addition, as Weatherill correctly underlined, “International football tournaments are to some extent in the same market as club competitions when one considers potential interest from broadcasters and sponsors. So clubs are required to provide a free resource, the players, to an undertaking that is at least in part seeking to make profits from exactly the same sources on which the clubs would wish to draw.”²¹

The European Courts has shown so far a consistent orientation to which professional players should be considered workers. Consequently, in the last decades the European Court of Justice has modified important “rules of the game”, considering them incompatible with the European Law.

For example, in *Bosman*²², the ECJ considered the Football Transfer System “to be outside the purely sporting exception and, therefore, in breach of the rules on freedom of movement”.²³ In *Kolpak*²⁴ and *Simutenkov*²⁵, the ECJ extended the effects of *Bosman*, declaring that citizens of certain countries, which have signed agreements with the European Union, have the same right to freedom of work and movement within the EU as EU citizens.

However, there is another crucial aspect to consider: the so-called “specificity of sport”. This principle has now gained official recognition in the EU Treaty, after the modifications introduced by the Lisbon Treaty²⁶.

In fact, the new art. 165 of the Treaty on the Functioning of the European Union (ex article 149 TEC), states that “The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport”²⁷.

This important principle, introduced in the Nice Declaration on Sport of December 2000²⁸, was consecrated in the European White Paper on Sport of 2007²⁹, which indicated two prisms of specificity:

1. The specificity of sporting activities and rules
2. The specificity of the sport structure³⁰.

Consequently, it is not wrong to consider the supremacy position of FIFA as a consequence of the “specificity of the sport structure”.

At the same time, the organisation of International fixtures is undoubtedly an aspect of the “specificity of sporting activities and rules”.

Moreover, as the European Commission confirmed in *Mouscron*³¹, a rule of a purely sporting nature, which is legitimate from a sporting perspective, could be considered respectful of the European law.

Furthermore, according to the principles established in *Nordenfelt v. Maxim Nordenfelt Guns*³², the restraint of trade doctrine allows three exceptions:

- An interest meriting protection
- A reasonable restraint
- The restraint is not contrary to the public interest³³

Not only do international fixtures receive an incomparable appreciation by fans, but they also are a job opportunity for thousands of people, and their end would have significant consequences around the world, so they could be considered “an interest meriting protection”, capable of receiving an exception.

¹⁵ [frena_Nizzola_co_o_9809109356.shtml](#) (Last access: 24 May 2011) (ITALIAN)
¹⁴ BBC Sport, G14 joins Lyon over Fifa action, 7 December 2005, available online at <http://news.bbc.co.uk/1/hi/sport/4506564.stm> (last access: 24 May 2011).
¹⁵ HORNSBY S., “Opinion: Legality of player release rules: G-14’s deal with FIFA”, World Sports Law Report, 2008, Volume 6, Issue 5.
¹⁶ GEEY D., “The World Cup, Injuries and Compensation”, The UK Sports Network, 2010, available online at <http://www.theuksportsnetwork.com/the-world-cup-injuries-and-compensation> (last access: 23 May 2011).

¹⁷ Telegraph, Charleroi court row with Fifa kicks off, 21 March 2006, available online at <http://www.telegraph.co.uk/sport/football/european/2334049/Charleroi-court-row-with-Fifa-kicks-off.html> (last access: 23 May 2011).
¹⁸ TANNLER H., “Club Compensation: FIFA: Why the player release rule is indispensable”, World Sports Law Report, 2006, Volume 4, Issue 4.
¹⁹ *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Greece*, (C-49/07) [2008] ECR I-4863.
²⁰ JAMES M., “Sports Law”, 2010, page 62.
²¹ WEATHERILL S., “Is the Pyramid Compatible with EC Law?”, International Sports Law Journal, 2005, Volume 3-4, page 6.

²² *Union Royal Belge des Societe de Football Association ASBL v Jean-Marc Bosman*, (C-415/93) [1995] ECR I-4921.
²³ BLACKSHAW I., *Doping: Meca-Medina: ECJ ruling redefines “sporting exception”*, World Sports Law Report, 2006, Volume 4 Issue 8.
²⁴ *Deutscher Handballbund eV v Maros Kolpak*, (C-146/5) [2003], ECR I-4135.
²⁵ *Simutenkov v Ministerio de Educacion y Cultura*, (C-265/03) [2005] ECR I-2579.
²⁶ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, art. 2, available online at <http://eurlex.europa.eu/JOhtml.do?uri=OJ:C:2007:306:SOM:EN:HTML> (last access: 24 May 2011).

²⁷ Treaty on the Functioning of the European Union, consolidated version, available at <http://eurlex.europa.eu/JOhtml.do?uri=OJ:C:2010:083:SOM:EN:HTML> (last access: 24 May 2011)
²⁸ European Commission, “The Nice Declaration on Sport”, December 2000.
²⁹ Commission of the European Communities, *White Paper On Sport*, COM(2007) 391 final.
³⁰ White Paper On Sport, paragraph 4.1.
³¹ *Royal Excelsior Mouscron IP/99/965* 9 December 1999 (Commission Decision).
³² *Nordenfelt v. Maxim Nordenfelt Guns*, [1894] AC 535.
³³ GARDINER S., *Sports Law*, 2004, page 210.

5. A Legitimacy Test: The Application of the Wouters Test

The analysis made so far has shown that this is a border-line case.

It is crucial, in order to determine the legitimacy of this rule, to view it in the light of the principles explained in *Wouters*³⁴ (the so-called Wouters Test), which were used by the ECJ in *Meca-Medina*³⁵ as the leading criterion to scrutinise the compatibility of a rule with the European rules.

According to the Wouters test (para 97 of *Wouters*, as reminded in para 42 of *Meca-Medina*), it is important to analyse:

1. The overall context and targets of the rule
2. If the restrictions imposed by the rule are necessary and proportionate to pursue its targets.

At this time, it could be useful to apply the Wouters Test to the Fifa Release Rule.

Considering the first point, the overall context and the targets of the rule have been fully analysed so far, with the background and the different positions.

About the necessity of the rule to pursue its targets, there are few doubts that a Player Release clause is necessary in order to preserve the high level of the International Football.

Without a release rule, clubs would not give their players to the National Team. This consequence is especially true concerning top players, who are essential for clubs in order to achieve their sporting targets.

The result would realistically be a World Cup with middle-level players, with Messi, Ronaldo, Rooney and others forced by their clubs to stay at home training for their clubs. This is unacceptable for every fan and for the whole sports world.

The answer is quite different analysing the proportionality of this rule.

In fact, it is not necessary and proportionate to unilaterally set a rule without consultations between FIFA and clubs.

If a Release clause should be considered as proportionate, it is totally not proportionate to deny a compensation for the release of players and, what is more, for their injuries.

Fifa has too much "carte blanche" in imposing the rules of football while, according to the Declaration attached to the Nice Treaty, sports federations are expected to operate "on the basis of a democratic and transparent method of operation".

As a consequence, a democratic process between all the parts should be promoted and adopted.

In addition, to use Weatherill's words, "it is doubtless necessary that a system of player release to which clubs are bound be put in place (...) but it does not follow that these rules, as currently constituted, are necessary elements of sports governance".³⁶

As a consequence, this rule is likely to be considered as illegitimate applying the Wouters Test. The *Charleroi* case could have been a good test in this sense.

6. International Fixtures - Who Pays for the Injuries?

Having analysed the legitimacy of this rules, it is important to spend some words for the most important related problem, the possibility for a player to get injured during an international match.

In fact, there is "no comprehensive mechanism currently in place for compensation if a player gets injured on international duty".³⁷

As a result, there is a chaotic situation according to which a possible

refund would only depend on whether the national association has an insurance policy to cover such eventualities.

For example, the Italian Football Federation (FIGC) and the English FA have a private insurance for injuries that happened on international duty, as showed in Grosso³⁸ and Owen³⁹ cases.

The Achilles' heel of this system is the impossibility for poorest federations to pay for insurance to cover the huge salaries received by their top players from European clubs, as happened for Essien's injury.

The level of conflict is increasing: the Dutch Federation (KNVB) is under attack from Bayern Munich and Arsenal FC for Robben⁴⁰ and Van Persie's injuries.

KNVB rejects any responsibility for the loss and is not willing to pay. Karl-Heinz Rummenigge, the Bayern Munich Chairman announced that they were convinced to sue the KNVB.⁴¹ For the same reason, Arsene Wenger was adamant that he "expected financial compensation".⁴², accusing that "there is something completely wrong with the system".⁴³

Clubs are asking for financial help directly from FIFA, demanding to "take a certain part of the big cake"⁴⁴ generated by International events such as the World Cup, as an act of solidarity.

Apparently, a solution which could ensure a compensation for clubs in case their players got injured would be a compulsory insurance for players when they are on international duty, from the moment they are picked up until they return available for their clubs.

But who has to pay for this insurance?

Clubs, obviously, do not want to pay. They have their private insurance which cover training, matches and other club events. FIFA does not want to pay too, believing that National Associations should reimburse the clubs. Therefore, it seems to be a National Federations responsibility to stipulate the insurance. This is acceptable considering that FIFA returns about 75% of its profits gained from major tournaments to National Associations.

In addition, "they are the ones who use the players in the own interest and financially benefit from the use of players by FIFA's distribution (...) and they are responsible for the health of the players as long the players are on national duty".⁴⁵

For the poorest National Federations, a welcomed approach would be the establishment of a "revenue pool" into which "a slice of profits from international competitions could be paid before distribution to individual countries, and from which clubs could be compensated".⁴⁶

In this way, poorest countries would be subsidised by rich countries from profits made through international football. It is important to remember that, to have a "World" Cup, rich countries need poor countries to get victories and financial revenues.

A further option may be the introduction of "an entirely new system of insurance relating to international fixtures (...) with the requirement of each National Association to pay a contribution to a central insurance pool, administered by FIFA". In this system, "each individual contribution could be based on a system which grades professional leagues, similar to that currently employed in the FIFA provisions relating to training compensation".⁴⁷

This possibility would leave to FIFA the responsibility to administer the insurance system, guaranteeing enough funds to support poorest Federations in case of top players injuries with the compulsory contribution.

Last but not least, it is possible to define a role also for Continental Confederations, especially in case of players injured during Continental

34 *Wouters and Others*, Case C-309/99, [2002] ECR I-1577, para 97.

35 *Meca-Medina and Majcen v Commission of the European Communities*, (C-519/04 P) [2006] ECR I-6991, para 42.

36 WEATHERILL S., "Is the Pyramid Compatible with EC Law?", International Sports Law Report, 2005, Volume 3-4, page 6.

37 GEEY D., "The World Cup, Injuries and Compensation", 2010, available online at <http://www.theuksportsnetwork.com/the-world-cup-injuries-and-compensation> (last access: 23 May 2011).

38 For details: qn.quotidiano.net/sport/2008/09/08/116717-risarcimenti_milan_fiorentina_lione.shtml (last access: 24 May 2011) ITALIAN

39 For details: <http://www.guardian.co.uk/football/2007/jun/26/newsstory.sport8> (last access: 24 May 2011).

40 For details: <http://news.bbc.co.uk/sport2/mobile/football/europe/8882453.stm> (last access: 23 May 2011).

41 SPOONER A., "Player injured on National duty - and who pays the bill?", Sport and the Law, Edinburgh Law School, 2010, available online at <http://www.law.ed.ac.uk/courses/blogs/sportandthelaw/blogentry.aspx?blogentryref=8436> (last access: 23 May 2011).

42 GEEY D., "The World Cup, Injuries and Compensation", 2010, available online at <http://www.theuksportsnetwork.com/the-world-cup-injuries-and-compensation> (last access: 23 May 2011).

43 SPOONER A., "Player injured on National duty - and who pays the bill?", Sport and the Law, Edinburgh Law School, 2010, available online at <http://www.law.ed.ac.uk/courses/blogs/sportandthelaw/blogentry.aspx?blogentryref=8436> (last access: 23 May 2011).

44 SPOONER A., "Player injured on National duty - and who pays the bill?", Sport and the Law, Edinburgh Law

School, 2010, available online at <http://www.law.ed.ac.uk/courses/blogs/sportandthelaw/blogentry.aspx?blogentryref=8436> (last access: 23 May 2011).

45 SPOONER A., "Player injured on National duty - and who pays the bill?", Sport and the Law, Edinburgh Law School, 2010, available online at <http://www.law.ed.ac.uk/courses/blogs/sportandthelaw/blogentry.aspx?blogentryref=8436> (last access: 23 May 2011).

46 WEATHERILL S., "Is the Pyramid Compatible with EC Law?", International Sports Law Journal, 2005, Volume 3-4, page 7.

Tournaments and Qualification. They can supply the role of National Federations with a part of the revenues generated by that tournaments.

Undoubtedly, it is time to set down and rewrite the injury compensation system.

7. Conclusion

The FIFA Player Release rule, after decades of pacific respect, is no longer considered acceptable by clubs. Football is, in all evidence, no longer the same as 40 years ago. The increased commercialisation of the sports world modified the role of clubs, which now are commercial entities with a commercial attitude more than a sports one.

In this view, it is vital to rewrite the rule ensuring a workable co-existence between domestic football and international football, taking into account the commercial development of sport and the legitimate requests made by clubs, which cannot accept a diminution of their rights of employers.

The actual rule, as explained in the previous paragraphs, should be considered unlawful, following the application of the Wouters Test.

Probably, a new player release rule should be considered as a first step in a lengthier process in which “*international friendlies could be curtailed or even abolished and the international calendar fully harmonised.*”⁴⁸

Honestly, the signals arrived in the last years from FIFA are not positive (as seen in Robben and Van Persie). Certainly, the end of the Charleroi case would have been a perfect chance to force FIFA to change that rule via a democratic process. For this reason, a new case in front of the ECJ could be seen as positive, for two reasons: it could end with a definitive judgement about the legitimacy of the current rule, but more important it could force FIFA to disband its conservative position, opening a desk to reach a workable agreement for the football of the 21st century.

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⁴⁷ LIMBERT P., “*Injury Compensation: Compensating clubs for players injured during international duty*”, World Sports Law Report, 2007, Volume 5, Issue 3.

⁴⁸ HORNSBY S., “*Opinion: Legality of player release rules: G-14’s deal with FIFA*”, World Sports Law Report, 2008, Volume 6, Issue 5.

Will the International Olympic Committee Pass the Torch to Women or Let it Burn Out?

By Nikki Dryden*

1. Introduction

There is a growing global critique of the Olympic Movement that accuses The International Olympic Committee (IOC) of practicing ‘*amoral universalism*’ and widening the ‘*say-do gap*’ between the idealist human rights language of the Olympic Charter and the reality of the Olympic Movement.¹ This summer will not improve this image as Great Britain plays host to the world’s greatest athletes for the 2012 Olympic Games in London. This will be the third time that the Olympic Games come to London, unfortunately for women, little has changed since they last hosted in 1908 and 1948².

At the Olympics this summer men will have the opportunity to win 108 more Olympic medals in London than women. That is 108 more local male sporting heroes; 108 more men with the potential to generate economic benefit from their Olympic glory; and 108 more men than women who will have the public and private support of the IOC.

Men will also still run, swim, and bike further distances and compete in a sporting event, canoeing, that is not open to women. Women will continue to be left behind, as several countries may send men only teams to London, and all of this will happen in Great Britain, a country that generally promotes the rule of law and women’s rights, and it will happen with potential impunity from international law under the mandate of IOC. Any attempt to question the British Government

about the unequal policies regarding women’s participation in the Olympics will be faced with a familiar argument: ‘*The IOC made me do it*,’³ which was made in 2010 in Vancouver, Canada during the Winter Olympics when a group of fifteen women’s ski jumpers attempted unsuccessfully, to enforce their right to participate in the Olympics by relying on Canadian law.

This article will outline the IOC’s duties to promote and protect women’s human rights in sport, including, non-discrimination of women at the Olympics and in the Olympic Movement. Despite their human rights discourse, the IOC still violates the rights of women athletes around the world, fails to uphold its own Olympic Charter, and through its actions, allows (if not forces) nations to violate international law. The goal of this article is to create a blueprint for real transformation at the IOC to conform to its own rules and international law. The IOC must become a transparent, gender equitable organization with a reality that matches its ideals, supports and promotes international law and the human rights of women in sports. To be truly transformative, it must mandate also the same changes of the Olympic Family as a condition of remaining in the Olympic Movement.

This article will outline the legal mechanisms available to spur change from outside of the IOC, although it is clear that thus far such legal challenges have been largely unsuccessful. But the consequences of inaction for the IOC are grim: It risks its recently acquired United Nations Observer Status, losing corporate sponsor dollars, of further alienating athletes, and at worst, the complete erosion of the Olympic Movement. As Olympic scholar Bruce Kidd states, ‘*It is time for a new paradigm of Olympism and human rights.*’⁴

2. Human Rights and the Olympic Movement

The Olympic Movement encompasses all manner of sports organizations, including the IOC (the self-proclaimed ‘*supreme authority*’ of the Movement), International Sports Federations (IFs), National Olympic Committees (NOCs), Organizing Committees of the Olympic Games (OCOGs), national sports organizations (NSOs), and the athletes, coaches, fans, administrators, and officials who participate in these organizations. The Olympic Charter guides the Olympic Movement and all persons in the Movement, whether they know it or not, agree to be bound by it.⁵ Thus the IOC holds tremendous power in world sport as all Olympic sports report up the ladder to the supreme author-

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¹ Bruce Kidd, *Human Rights and the Olympic Movement After Beijing*, 13 SPORT IN SOCIETY 901-910 (2010).

² At the 1908 Olympics 37 women competed and 1,971 men and at the 1948 Olympics 390 women competed and 3,714 men. International Olympic Committee, LONDON 1908 SUMMER OLYMPICS | OLYMPIC VIDEOS, PHOTOS, NEWS, <http://www.olympic.org/london-1908-summer-olympics> (last visited Mar 25, 2012), International Olympic

Committee, LONDON 1948 SUMMER OLYMPICS | OLYMPIC VIDEOS, PHOTOS, NEWS, <http://www.olympic.org/london-1948-summer-olympics> (last visited Mar 25, 2012).

³ Margot E. Young, *The IOC Made Me Do it: Women’s Ski Jumping, VANOC and the 2010 Winter Olympics*, http://ejournals.library.ualberta.ca/index.php/constitutional_forum/article/view/12129/9278.

⁴ Bruce Kidd, *supra* note ____.

⁵ INTERNATIONAL OLYMPIC COMMITTEE, *supra* note ____, Chapter 1: The Olympic Movement and Its Action, 1: Composition and General Organisation of the Olympic Movement

ity, the IOC. This means that the IOC in effect, touches every person associated with an Olympic sport from the top Olympic athletes and officials down to volunteer parent coaches of the local soccer club.

The plethora of issues at the nexus of human rights and sports has been addressed by many scholars.⁶ Individual freedoms and collectivist rights include concerns over slavery and race, the promotion of peace and development, athlete's rights around health, labor and disability⁷, and the right to participate in sport and physical education. There are also specific issues around the hosting of the Olympic Games, including environmental rights, housing rights, labor rights, and freedom of expression for both citizens and journalists.⁸

Can sport really bring the world together and change lives for the better? Former UN Secretary-General Kofi Annan says, '[Sport] has an almost unmatched role to play in promoting understanding, healing wounds, mobilizing support for social causes, and breaking down barriers', and believes that sport has the power to breakdown 'myths and prejudices...[and] that athletes as well as sports organizations are critical in...breaking down gender inequality.'⁹ Or are lofty statements such as this merely a smoke-screen for a dark reality?

As the history of women and the Olympic Movement has shown, sport does not always make women's lives better. In fact, the women who have succeeded in the Olympic Movement have done so despite the IOC. As Hargreaves wrote in 1984, 'The history of the Olympics could be rewritten as a history of power and elitism, obsessions and excesses, divisions and exploitation. Certainly the modern Olympic Movement has been imbued with male chauvinism and domination over women.'¹⁰ Can the torch of the Olympic Movement be saved or is it too late for radical change to keep it burning for another 100 years?

2.1. Women and Olympic Movement

When the modern Olympic Games began in 1896, women athletes were not welcome. Pierre de Coubertin, the founder of the modern Olympics said,

*'...no matter how toughened a sportswoman may be, her organism is not cut out to sustain certain shocks. Her nerves rule her muscles, nature wanted it that way...Would...sports practiced by women constitute an edifying sight before crowds assembled for an Olympiad...Such is not our idea of the Olympic Games in which we have tried...to achieve the solemn and periodic exaltation of male athleticism with internationalism as a base, loyalty as a means, arts for its setting, and female applause as its reward.'*¹¹

American Avery Brundage's time at the helm of the IOC focused on women's participation in "feminized sports" like swimming, tennis, figure skating, and gymnastics, where women's "natural" attributes like grace, rhythm and artistry were an important component of the sport. In fact, 'Female athletes who did not meet these standards of beauty or feminine grace were accused of being mannish, lesbians, or of being unnatural.'¹² While women's participation increased over the next few decades, in 1954 the IOC voted to limit events for women to those 'particularly appropriate to the female sex.'¹³

Several decades after the global women's rights movement began, the First World Conference on Women and Sport was held in 1994. Organized by the British Sports Council and supported by the IOC, the resulting Brighton Declaration, was at the time, a benchmark for action and change. The principles of the Brighton Declaration were to establish equity and equality for women in society and sport, increase the involvement of women in sport at all levels and in all functions and roles, and to make every effort to ensure that governments and institutions complied with international law.¹⁴ The subsequent conferences have gotten bigger, but largely address similar issues.¹⁵

In 1996, a Working Group on Women in sport was created within the IOC. The same year, the first IOC World Conference on Women in Sport was held in Lausanne, Switzerland. The first conference resolutions called for multiple initiatives to promote the role of women in sport, including calling on the IOC to 'attain[] an equal number of events for women and men on the Olympic Programme,' that IFs and NOCs 'create special committees or working groups' with at least 10% women to create plans to promote women in sport, and for the IOC to end gender testing.¹⁶ Subsequent conferences held every four years in Paris, Marrakech, at the Dead Sea, and in 2012 in Los Angeles, have issued similar resolutions.¹⁷

2.2. Women and the IOC

The IOC is made up of individual members who do not represent their countries. They are voted into the IOC by secret ballot¹⁸ of the all-powerful IOC Executive Board, who themselves are voted in by secret ballot.¹⁹ Together the IOC forms a non-governmental organization with legal status in Switzerland whose purpose is to 'fulfill the mission, role and responsibilities as assigned to it by the Olympic Charter.'

In 1981 the IOC started to 'work on women's involvement at leadership level...' and the first two women entered the IOC: Flor Isava Fonseca of Venezuela and Pirjo Haggman of Finland, a three-time Olympian²⁰ who later stepped down in disgrace under the Salt Lake Bribery Scandal.²¹ Despite then IOC President Samarach's supposed commitment to women's leadership, during the 1990s 40 new men were added to the IOC, but just two women.²²

In 2012, just 20 of 107 IOC members are women (less than 19%), three of whom are princesses. Add in the 32 honorary members, only four of whom are women, and women's power is further diluted. Of the twenty women, 10 have been put on the IOC in the last 5 years, meaning most IOC women members have no seniority and thus very little real power. In fact, only one woman sits on the powerful Executive Committee (Nawal El Moutawakel of Morocco²³). According to the IOC, the Executive Committee is responsible for, among other things: monitoring the observance of the Olympic Charter, approving the internal organization and internal regulations, submission to the IOC of the names of the persons whom it recommends for election to the IOC and enacting 'all regulations necessary to ensure the proper implementation of the Olympic Charter and the organization of the Olympic Games.'²⁴ Despite this clearly powerful and important role, and the IOC's stated commitment to equity, Nafziger's description of the IOC membership in 1988 as 'wealthy, male, elitist, aging and Western European' has not changed in twenty years.²⁵

6 See SPORT, CIVIL LIBERTIES AND HUMAN RIGHTS, (Richard Giulianotti & David McArdle eds., 2006).

7 This article will not discuss parasport generally or the Paralympic movement specifically, although the issues raised as they relate to women's rights in the Olympic Movement apply similarly to those women in the Paralympic Movement.

8 Bruce Kidd, *Human Rights and the Olympic Movement After Beijing*, 13 SPORT IN SOCIETY 901-910 (2010).

9 Id.

10 JENNIFER HARGREAVES, FIVE RING CIRCUS: MONEY, POWER AND POLITICS AT THE OLYMPIC GAMES, 53 (Alan Tomlinson & Garry Whannel eds., 1984).

11 Joanna Davenport, *The Role of Women in*

the IOC and IOA, 59 JOURNAL OF PHYSICAL EDUCATION, RECREATION & DANCE 42 (1988), quoting Gerber et al., 1974

12 KEVIN B. WAMSLEY, SOCIAL SCIENCE LITERATURE ON SPORT AND TRANSITIONING/TRANSITIONED ATHLETES (2008), http://www.caaws.ca/e/resources/pdfs/Wamsley_lit_review%0282%029.pdf.

13 Davenport, Joanna, *Breaking into the Rings: Women on the IOC*, 67 JOURNAL OF PHYSICAL EDUCATION, RECREATION & DANCE 26 (1996).

14 THE BRIGHTON DECLARATION ON WOMEN AND SPORT, .

15 See Past Conferences and Legacies - International Working Group on Women and Sport, <http://www.iwg-gti.org/conference-legacies/> (last visited Mar 25, 2012).

16 International Olympic Committee, RESOLUTION OF THE 1ST IOC WORLD CONFERENCE ON WOMEN AND SPORT (1996).

17 See Resolution from 3rd IOC World Conference on Women and Sport, (2004), and International Olympic Committee, RESOLUTION FROM THE 4TH IOC WORLD CONFERENCE ON WOMEN IN SPORT.

18 International Olympic Committee, *The Organisation*, available at www.olympic.org/about-ioc-institution?tab=Members (last visited Mar 23, 2012).

19 International Olympic Committee, *IOC Executive Board Composition and History*, available at <http://www.olympic.org/executive-board?tab=role-and-history> (last

visited Mar 23, 2012).

20 Joanna Davenport, *The Role of Women in the IOC and IOA*, 59 JOURNAL OF PHYSICAL EDUCATION, RECREATION & DANCE 42 (1988).

21 HELEN JEFFERSON LENSKEY, INSIDE THE OLYMPIC INDUSTRY: POWER, POLITICS, AND ACTIVISM 15 (2000).

22 Joanna Davenport, *Breaking into the Rings: Women on the IOC*, 67 JOURNAL OF PHYSICAL EDUCATION, RECREATION & DANCE 26 (1996).

23 International Olympic Committee, IOC EXECUTIVE BOARD, <http://www.olympic.org/executive-board?tab=composition> (last visited Mar 25, 2012).

24 Id.

3. Issue: The International Olympic Committee's duty to promote and protect women's rights in sport

While international law, including human rights law, usually concerns states, the IOC (an NGO) commands a certain legal status under international treaties and in other international relationships.²⁶ In particular, the IOC's ability to enter into commercial contracts with sponsors and broadcasters (for profit), enforce its legal rights around trademark and licensing, create supranational law with nations as Olympic host cities and participate in the United Nations with Observer status evidences the IOC's role as international actor.

The Universal Declaration of Human Rights (UDHR) is based on human dignity and Article 2 creates a right of non-discrimination protecting sex.²⁷ The Olympic Charter also accepts this universal norm, the goal of Olympism is to place 'sport at the service of the harmonious development of man, with a view to promoting a peaceful society concerned with the preservation of human dignity.'²⁸

As international actor, the IOC is still accountable to the international community. Traditionally, the rise of International Organizations (IOs) has aided international human rights regimes by developing creative human rights enforcement mechanisms.²⁹ According to Alvarez, IOs make up for lack of global police force or court with compulsory jurisdiction in the international human rights system.³⁰ While a rights framework exists in the Olympic Charter, the IOC has in fact impeded international human rights regimes.

Realizing the rights inherent in the IOC Charter are important for the larger human rights movement because women have been traditionally excluded from sport.³¹ The Olympic Games provides the perfect opportunity to mobilize the world around the rights of women. As international law moves beyond tradition notions of state sovereignty, 'towards a different paradigm whereby respect for sovereignty is contingent upon respect for human rights.'³² As Kidd argues, the IOC 'should become more interventionist, not less.'³³

3.1. Olympic Charter and International Law Violations

In 2007, the Olympic Charter was modernized to include anti-discrimination and gender equality clauses. The mission of the IOC now includes acting 'against any form of discrimination affecting the Olympic Movement...and to encourage and support the promotion of women in sport at all levels and in all structures with a view to implementing the principle of equality of men and women.'³⁴ These revisions now put the IOC in line with international law and provide a set of internal rules for how the IOC and the Olympic Movement should conduct themselves.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has been ratified by 187 countries out of 193.³⁵ At issue here are three articles: Article 2 mandates states to eliminate discrimination against women by any person or organization through the creation of measures to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; Article 4 states that the creation of affirmative action measures that accelerate 'de facto equality between men and women' are not discrimination; and Article 5 mandates measures to modify the social and cultural patterns of conduct of men and women to achieve the elimination of prejudices and customary practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.³⁶

3.1.1. *Unequal Sporting Opportunities for Women at the Olympic Games*
Despite the continuous rise of women's participation in sport, two law suits filed prior to the 1984 and 2010 Olympic Games, show how the IOC program and structure for selecting sports continues to perpetuate a legacy of historical discrimination against women at the Olympic Games. In 1984, 82 women runners from 27 countries, including Norway's Grete Waitz and American Mary Decker filed suit in Los Angeles stating that the offering of certain men's distance track events without the corresponding women's races was discriminatory, (Associated Press, 1984). The District Court affirmed that the Olympics had a history 'marred by blatant discrimination against women,'³⁷ however women runners were denied their chance at Olympic glory when the court ruled, 'the final decision...rested solely with the IOC.'³⁸

In 2009, a coalition of international women's ski jumpers filed suit in Vancouver on similar grounds: That the Vancouver Olympic Games Organizing Committee's (VANOC) failure to hold a ski jump competition for women at the 2010 Winter Olympics while holding the same event for men, violated the Canadian Charter of Human Rights and Freedoms. Despite finding that VANOC was discriminatory, an adverse decision was entered against the women because it was determined that VANOC had no power to set the Olympic program. The judge stated, 'The IOC made a decision that discriminates against the plaintiffs. Only the IOC can alleviate that discrimination by including an Olympic ski jumping event for women in the 2010 Games.'³⁹

The IOC's argument for not putting ski jumping on the program was that women's ski jumping did not meet the technical standards set out in the Olympic Charter. While the criteria for adding new events to the Olympic program are not *per se* discriminatory, the judge in Canada found that the IOC's actions stem from historical discrimination against women in ski jumping due to the fact that in 1949, men's ski jumping was "grandfathered" into the Olympic Games 'for the sake of the Olympic Tradition.' At the 2014 Winter Olympics, women's ski jumping will finally be added, however the sport of Nordic Combined, which combines ski jumping and cross country skiing, will only be available for men.

At this summer's Olympic Games in London canoeing will not be available for women.⁴⁰ The IOC considers the sport of Canoe/Kayak, (called canoeing by the IOC) to contain two paddling disciplines: Kayak and Canoe, which use completely different boats, paddles and athletes, however only kayak is offered to both men and women (although men get more events).⁴¹ Women will be excluded from canoe, despite the fact that canoeing is practiced by women in over 35 countries and women's canoe is included at the World Championships and all major international events.⁴²

In London there will be a total of six team sports: Basketball, beach volleyball, football, hockey, volleyball, and water polo. Neither football nor water polo has an equal amount of men and women teams. Football has 16 teams to women's 12 teams, while water polo has 12 men teams and 8 women teams.⁴³

3.1.2. *Unequal Numbers of Women Athletes and Delegation Members at the Olympic Games*

At the 2006 Winter Olympics in Torino and the 2008 Summer Olympics in Beijing, just 38% and 42% of the athletes competing were women. At those same Summer Games four countries: Brunei, Saudi Arabia,

25 JAMES NAFZIGER, INTERNATIONAL SPORTS LAW 32 (1988)

26 David J. Ettinger, *The Legal Status of the International Olympic Committee*, PACE INTERNATIONAL LAW REVIEW, quoting Louis Henkin et al. International Law (2d ed. 1987) at 319.

27 Universal Declaration of Human Rights, G.A. Res. 217A art. 27(1), U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A1810 (Dec. 12, 1948).

28 THE CHARTER, *supra* note 1, fundamental princs., para. 2

29 JOSE E. ALVAREZ, INTERNATIONAL

ORGANIZATIONS AS LAWMAKER (2005).

30 Id.

31 UNITED NATIONS DIVISION FOR THE ADVANCEMENT OF WOMEN, WOMEN, GENDER EQUALITY AND SPORT (2007).

32 Bruce Kidd, *supra* note 31.

33 Id.

34 INTERNATIONAL OLYMPIC COMMITTEE, THE OLYMPIC CHARTER (2007).

35 United Nations, *Convention on the Elimination of All Forms of*

Discrimination against Women, 1249 U.N.T.S. 13 (1979), <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (last visited Mar 25, 2012).

36 Id.

37 Chantalle Forgues, *supra* note 36, quoting Martin v. IOC, 740 F.2d 670, 681 (9th Cir. 1984) (Pregerson, J., dissenting) at 673-674.

38 Id.

39 Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, 2009 BCSC 942

40 Women CAN International, LONDON

2012 - NO WOMEN'S CANOE,

<http://womencanintl.com/wordpress/2012/03/22/london-2012-no-womens-canoe/> (last visited Mar 26, 2012).

41 Id.

42 Women CAN International, LONDON 2012 - NO WOMEN'S CANOE, <http://womencanintl.com/wordpress/2012/03/22/london-2012-no-womens-canoe/> (last visited Mar 26, 2012).

43 London Olympic Games Organising Committee, OLYMPIC SPORTS | LONDON 2012,



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Qatar, and Kuwait did not send women to compete at all. Brunei and Saudi Arabia said it was for “cultural and religious reasons” and do not allow women to participate in the Olympics despite sending teams of men⁴⁴ At the Torino Games there were 22 countries that sent men only teams to compete. At the Vancouver 2010 Winter Olympics 19 countries did not send women (the percentage of participants is not readily available). In addition, there are thousands of support staff who attend the Olympics, from coaches to administrators, doctors to trainers that are predominately men as well.

Three of the four main gender discriminating countries have princes on the IOC: Kuwait, Saudi Arabia, and Qatar. In February 2012, Human Rights Watch released, “Steps of the Devil” Saudi Women in Sports’ a report on the government of Saudi Arabia’s policy that forbids physical education for girls in state-run schools and promotes discrimination in the private sector. In particular, the report notes that there are no sports clubs for women (only “health clubs” which prohibit team sports) and women cannot join licensed gyms. The report further describes how there is a ban on women’s participation in competitive sports, and at the elite level, the Saudi National Olympic Committee has no women’s section, and only has one female board member out of the 29 national sports federations.⁴⁵ In Saudi Arabia women are not just treated unequally in sports as the Saudi government perpetuates a system called guardianship that is in effect a form of gender apartheid.⁴⁶

It appears possible that 18-year old equestrienne Dalma Rushdi Malhas who won a bronze medal in the 2010 Singapore Youth Olympics, will be their token female athlete. It is important to note that Ms. Malhas paid her own way and did not officially represent Saudi Arabia at the Youth Olympic Games.⁴⁷

3.1.3. Unenforceable Sexual Harassment and Abuse Policy at the Olympic Games

Currently there is no sexual harassment or abuse protection for athletes competing at the Olympics, yet sexual abuse and harassment is prevalent in elite sporting society. Several studies have found startling statistics. One study in Canada found that 40-50 percent of female athletes surveyed reported harassment, while 27 percent of athletes in Australia and 45 percent in the Czech Republic reported harassment.⁴⁸

Although the IOC acknowledges the problem in their consensus statement on sexual harassment and abuse in sport, the IOC does not have a straightforward set of guidelines, laws, or rules in this area. Instead, they have a list of recommendations of the actions states should take in order to prevent and minimize sexual harassment in sports.⁴⁹ Without a set of rules that countries are obligated to follow (or the IOC and IFs for that matter), or laws that provide an incentive to regulate countries’ conformity to these suggestions, little can be done to protect and prevent the sexual harassment and abuse of athletes on and off the field. Further, country specific rules will not protect athletes from sexual abuse or harassment from people from different countries.

3.1.4. Gender Discrimination in Gender Identity

Gender verification testing was introduced to the Olympics in 1968 in

Mexico City alongside drug testing, the former only for women. Using chromosome testing, the IOC test was mandatory for female athletes, and if the test was negative, the female had to undergo further testing. Wamsley notes that while drug testing was focused on ensuring an equal playing field for all athletes, the reasoning behind gender testing involved deeper concerns about the femininity, or lack thereof, for certain female athletes.⁵⁰

At the 1976 Olympics, all women had to be gender tested except for, now current IOC Member, Princess Anne, as the test was considered “too demeaning” for a member of the royal family.⁵¹ At the 1992, the IOC had replaced chromosome testing with DNA-based tests, while results from tests conducted at the Atlanta Olympics in 1996 led to seven women being found to have partial or complete androgen insensitivity. Individuals with androgen insensitivity are identical to females with XX chromosomes at birth but in fact have XY chromosomes. All the athletes were allowed to compete, however, due to concerns about widespread testing, led by Olympic gold medalist speedskater, doctor, and IOC athlete member Johan Olav Koss, the IOC ended gender verification tests before the 2000 Sydney Olympic Games.

In 2009, the case of an 18-year-old runner from South Africa raised concerns about the importance of being feminine, and the issue of gender testing was back in the spotlight. Caster Semenya was tested for androgen insensitivity after winning a gold medal in the 800 meter track event at the Berlin World Championships. The tests run on Semenya were not only an invasion of her privacy, but highlight the discriminatory policies of the IOC and International Association of Athletics Federation (IAAF) on gender verification. These tests are often times degrading and lack the principles of full information, informed consent, and autonomy. Semenya received no genetic counseling, and neither did they inform her of the nature of these tests beforehand.⁵²

In 2010, new rules give the IOC the power to carry out women’s gender testing on a ‘case by case’ basis when gender is ‘ambiguous,’ including the involvement of women athletes in ‘pre-participation examinations,’ and the creation of medical centers to ‘diagnose and treat athletes with disorders of sex development.’⁵³ Yet, tender testing is questionable because not only there is a plethora of genetic abnormalities that highlight the variability of gender,⁵⁴ but gender testing can also further psychological issues of female athletes who undergo such testing, and may unfairly bar athletes who may not know that they have a Disorder of Sexual Development.⁵⁵ Further, the IOC’s own doctor stated at a recent conference that androgen insensitivity causes no more benefit to an athlete than any genetic anomaly such as big feet.⁵⁶

4. Passing the Torch to the Women

4.1. Enforcing Gender Equity at the Olympic Games

In order to achieve gender equity at the Olympic Games, the IOC must ensure the number of women athletes competing at both Winter and Summer Olympics is equal to the number of men. In order to do this, the IOC must change the Olympic program to include all events and sports for both women and men. If this will not achieve gender equity,

<http://www.london2012.com/sport> (last visited Mar 27, 2012).

44 Ali Al-Ahmed, *Bar countries that ban women athletes*, NEW YORK TIMES, 2010, <http://www.nytimes.com/2008/05/19/opinion/19iht-edahmed.3.13017836.html> (last visited Mar 26, 2012).

45 HUMAN RIGHTS WATCH, “STEPS OF THE DEVIL” DENIAL OF WOMEN’S AND GIRL’S RIGHTS TO SPORT IN SAUDI ARABIA (2012).

46 HUMAN RIGHTS WATCH, PERPETUAL MINORS HUMAN RIGHTS ABUSES STEMMG FROM MALE GUARDIANSHIP AND SEX SEGREGATION IN SAUDI ARABIA.

47 Dorsey, James M., SAUDI ARABIA TO SEND TOKEN WOMAN TO

OLYMPICS TO EVADE SANCTIONS - YOUR MIDDLE EAST YOUR MIDDLE EAST (2011), http://www.yourmiddleeast.com/columns/article/saudi-arabia-to-send-token-woman-to-olympics-to-evade-sanctions_3105 (last visited Jan 2, 2012), Ferris-Lay, Claire, SAUDI TO SEND FIRST FEMALE TO COMPETE IN OLYMPICS - SPORT - ARABIAN-BUSINESS.COM ARABIAN BUSINESS NEWS (2011), <http://www.arabianbusiness.com/saudi-send-first-female-compete-in-olympics-432998.html> (last visited Jan 2, 2012).

48 UNITED NATIONS DIVISION FOR THE ADVANCEMENT OF WOMEN, *supra* note ____.

49 International Olympic Committee, CONSENSUS STATEMENT SEXUAL

HARASSEMMENT AND ABUSE IN SPORT (2007).

50 KEVIN B. WAMSLEY, *supra* note ____.

51 John Lanchester, *Short Cuts*, 31 LONDON REVIEW OF BOOKS 28 (2009).

52 Wonkam, Ambroise et al., “Beyond the Caster Semenya Controversy: The Case of the Use of Genetics for Gender Testing in Sport.” National Society of Genetic Counselors, 8 September 2010.

53 Nikki Dowling, *IOC Recommends Olympic Gender Testing Centers*, NBC 5 DALLAS-FORT WORTH, January 20, 2010, <http://www.nbcdfw.com/news/sports/The-International-Olympic-Committee-Recommend-Gender-Testing-Centers-82203382.html> (last visited Jan 31, 2012).

54 Lee, P. A., Houk, C. P., Ahmed, S. F.,

Hughes, I. A., & in collaboration with the participants in the International consensus conference on intersex organized by the Lawson Wilkins pediatric endocrine society and the European society for paediatric endocrinology. (2006). Consensus statement on management of intersex disorders. *Pediatrics*, 118, e488-e500.

55 Simpson, J. L., Ljungqvist, A., Ferguson-Smith, M. A., De la Chapelle, A., Elsas, L. J., 2nd, Ehrhardt, A. A., et al. (2000). Gender verification in the Olympics. *Journal of the American Medical Association*, 284(12), 1568-9.

56 Dr. Eric Vilain, Address at the 5th IOC Conference on Women and Sport (Feb. 17, 2012).

the IOC can also include more events or teams in sports that have large numbers of women athletes such as netball or softball.

The IOC must also mandate countries to send teams of both men and women if they want to compete at the Olympic Games. There is precedent for the IOC to mandate action by member states. The IOC has banned countries that discriminate against race and gender, the “aggressor nations” during World War I, and has issued political declarations about communism and codes about doping, all the while drawing upon international law and the international legal systems, including the UN General Assembly to promote these human rights.

In 1964, the IOC withdrew its invitation to South Africa to participate in the Summer Olympic Games in Tokyo. In 1968, when 40 nations threatened to boycott the Olympics unless the invitation to South Africa was rescinded the IOC withdrew South Africa’s invitation to compete in the Mexico City Games. Also, in 1999, during the Taliban rule, the IOC banned Afghanistan in part because of their systematic discrimination against women.⁵⁷

Starting at the 2014 Winter Olympics and the 2016 Summer Olympics, the IOC must also mandate that all countries must send gender equal support staff. This provides countries sufficient time to put support teams in place that include qualified women coaches, managers, administrators, support staff, medical staff etc.

Finally, the IOC must enforce their sexual abuse sexual harassment policy at the Olympics and end gender testing of women athletes at the Olympics.

4.2. Enforcing Gender Equity in the Olympic Movement

The IOC’s reach is broad and deep. However, by continuing to discriminate against women’s participation at the Olympics, nations are forced to fund women’s sport at lower levels as countries often prioritize money for Olympic sports. From 2005 to 2008, the IOC generated \$545 million in marketing revenue. Ninety percent is disbursed back to stage the Olympic Games and directly to NOCs and IFs.⁵⁸ That means if there are less women participating in the Olympics and the Olympic Movement, they are also getting less share of the profits. This economic dis-empowerment is one more way women are discriminated against in elite sport. The IOC has the power to change this by making the offered events, sports, and participants in the Olympics equitable.

Second, the IOC must mandate that all nations who wish to participate in the Olympics implement a sexual abuse and harassment policy within their NOC. The IOC policy provides a minimum standard that all nations must have implemented. Also, all IFs who wish to participate in the Olympics, must also implement sexual abuse and harassment policy within their federations. The IOC must also mandate that all IFs and NSOs end gender testing for women athletes within their sports.

Finally, the IOC must mandate that NOCs, IFs and NSOs create gender equity within the administration of their organizations should they want to participate in the Olympics. All of these actions can occur prior to the 2014 and 2016 Olympics and can be a precursor to inclusion.

4.3. Additional Steps to Create Change

4.3.1. Term Limits, Open Elections, Membership Qualifications, and Good Governance

Gender equity cannot be achieved with the current makeup of the IOC. The IOC needs women in leadership positions, especially the IOC Executive Committee, and it must increase the number of women IOC members from 17% up to 50% in both the Executive Committee and the general membership.

In order to achieve internal gender equity, the IOC must implement term limits for all members and implement open elections in lieu of secret ballots. The number of IOC members is currently limited to 115, with a maximum number of 15 active athletes. There is no term limit of members elected before 1966. An age limit has been set at 80 for the members elected between 1967 and 1999, and at 70 for those whose election took place after 1999.⁵⁹ Active athletes, who are the only members voted onto the IOC and done so by athletes at the Olympic Games, are limited to terms of 8 years.

A merit-based, open and transparent system must be put in place at the IOC. For example, there could be 100 positions, 50 each for men and women. Olympic athletes could hold all positions and cover all sports. Term limits of 6 years could be put in place, and athletes with work and academic experience in sports management, marketing, media, law, and medicine could be encouraged to run for election. Positions on the IOC could be paid, \$100,000 per year and members could be encouraged to make their IOC membership a full time position. Committees could be regionally diverse and gender equal.

There are qualified women who can act as IOC leaders today, including those with knowledge of women’s rights, the law, health, medicine, administration, sports management, marketing, and media expertise. Women in the top leadership positions of world Olympic sport can help change stereotypical attitudes towards women and girls in sport, as well as traditional gender roles that are ‘...prevalent in the organizational cultures of sporting bodies—the norms, values, power dynamics and practices that underlie the way such bodies and institutions do their work.’⁶⁰ With transparency will come a merit-based system, and the top-down effect of these types of changes will have an enormous impact on women in sport. With women leaders in place at the IOC and gender equity at the highest level of sport, the opportunities for women to gain employment through sport as coaches, administrators, media persons, journalists, and in marketing will grow.

At the 2011 Play the Game conference delegates called on the IOC to organize a world conference on governance in sport with a goal of drafting a code and setting international standards for good governance in sport that are based on equity, inclusiveness, non-discrimination and minority protection. The IOC should not only organize this conference, but adopt the Cologne Consensus, which invites the IOC to adopt governance documents and practices, and democratic procedures as well as transparency and accountability, both operational and financial.⁶¹ Without seeing how much money the IOC spends on Solidarity Funding and other programming for women as compared to funding for men, gender equity cannot be measured. Full transparency of all IOC policy development, planning processes, budget procedures, research and funding is necessary.

4.3.2. Adding Human Rights Values to the Olympic Movement

In 2009, Human Rights Watch (HRW) made an official submission under Theme 3.2, “good governance and ethics” to the Olympic Congress outlining a proposal for the IOC to establish “a permanent mechanism integrating human rights in the Olympic process.” This followed a January 2008 plan submitted to the IOC for the creation of a standing committee on human rights, or similar mechanism to monitor human rights in host countries.

While the HRW submission focused on the committee’s role on setting and applying human rights standards for Olympic host cities, this committee could also consider other human rights issues such as gender inequity. As outlined by HRW, ‘This committee could also serve a vital function as a liaison between the IOC and rights organizations or individuals on human rights issues.’⁶²

4.3.3. Creation of An Independent Athlete’s union

An Athlete’s Commission was created in 1981 at the IOC. In 2012, there are twelve athletes on the Commission who are elected for eight year terms by the athletes participating in the Olympic Games. Seven more athletes are appointed by the IOC president and there are two ex-offi-

57 HUMAN RIGHTS WATCH, *supra* note ____.

58 INTERNATIONAL OLYMPIC COMMITTEE, OLYMPIC MARKETING FACT FILE (2012).

59 International Olympic Committee, THE ORGANISATION, www.olympic.org/about-ioc-institution?tab=members (last visited Mar 26, 2012).

60 UNITED NATIONS DIVISION FOR THE ADVANCEMENT OF WOMEN, *supra* note ____.

61 Play the Game, COLOGNE CONSENSUS (2011), www.playthegame.org/fileadmin/documents/Cologne_Consensus.pdf.

62 Human Rights Watch Submission to the 2009 Olympic Congress, HUMAN RIGHTS WATCH (2009), www.hrw.org/en/news/2009/02/23/human-rights-watch-submission-2009-olympic-congress (last visited Jan 27, 2012).

cio members: one representative from the World Olympians Association and one from the International Paralympic Committee. However, athletes have little say in the development of sport policy and they are rarely if ever consulted. Athlete commissions and committees *i.e.* athlete representation is ‘*invariably paternalistic, tokenistic, fulfills purposes associated more with legitimization of National Governing Body decisions than with empowerment and involvement in decision-making processes.*’ They are selected, not elected and ‘*lack the capacity to speak authoritatively on behalf of their fellow athletes and have no obligation to act in an accountable manner.*’⁶³

Therefore, an independent athlete’s union is essential. Athlete rights in professional sports have been protected not by their governing bodies, but the rise of athlete unions. The first attempt at an Olympic athlete union was created to oppose the Olympic bribery scandals in 1999. OATH (Olympic Athletes Together Honorably) only lasted several years, but the creation of an athlete’s union, separate to the IOC, that focuses on athlete rights, supported by international law, could finally begin to challenge a century of human rights violations.

Scholars have written about the ‘*myth of the pure athlete,*’⁶⁴ and how athletes and sport are used to distinguish the Olympics from the ‘*dirty*’ side of sports (in particular around the ‘*bad apples*’ of the host-city bidding scandals.⁶⁵ The rise of ‘*Olympic education*’ including the Youth Olympic Games will only further condition athletes to take the Olympic ideals at face value. Athletes can and must challenge this notion; rather than regurgitating the Olympic ideals as truths, athletes should hold the IOC to task for making these ideals into the reality.

4.3.4. Gender Equitable Media Contracts

At the 1998 Winter Olympic Games, American host broadcaster CBS refused to broadcast the women’s ice hockey gold medal game, despite covering the men’s game.⁶⁶ The IOC can mandate that all media sponsorship contracts, including the most lucrative American television contracts, clauses contain that not only will women’s and men’s sports be broadcast equally, but be broadcast at equally opportune times such as Friday and Saturday evenings and other prime time hours.

*‘Media coverage of women’s sport continues to be influenced by gender stereotypes, which reinforce traditional images of men and women. . . . women are frequently portrayed as “girls” no matter their age, and described in terms of their physical attributes and emotional responses, often in ways that stress their weakness, passivity and insignificance.’*⁶⁷

Under the guise of the Ethics Commission, whose mission includes ‘*advising the whole Olympic Movement in order to assist with the application of the ethical principles and rules,*’ the IOC could also create and promote gender training for sports journalists to educate them about gendered language and images that reinforce gender stereotypes about women athletes. A European initiative entitled ‘*Sport media and stereotypes-women and men in sport and media,*’ conducted in 2005, worked to do just that. The project’s aim, to promote change in gender stereotypes, targeted influential actors, such as the media.⁶⁸

4.4. And if the Flame Burns Out?

4.4.1. Liability of IOC Membership

New IOC members take an Oath that includes a responsibility to fight against discrimination in all its forms, yet IOC members consistently violate that oath when they allow for the continued discrimination against women in sport. These IOC members are in direct conflict with their mandate and must be held accountable.

Further, the IOC Ethics Commission, created in 1999 by the Executive Board in the wake of the Salt Lake City bribery scandal, ‘*is the guardian of the ethical principles of the Olympic Movement.*’ Governed by the Olympic Charter and the Code of Ethics, the Ethics Commission is supposed to conduct investigations into ethical breaches submitted to it by the IOC President and make confidential recommendations for “measures or sanctions” to the Executive Board and/or the IOC Session who then makes a final decision which in turn becomes public.

Should change not occur, the international community can file open complaints to the IOC President for submission to the Ethics

Commission, outlining the IOC’s violations of the Olympic Charter and international human rights law. Individual IOC members will be targeted, including those who continue to perpetuate discrimination against women.

4.4.2. Regional and External Action

The Council of Europe and the Commonwealth Games Federation (CGF) have both passed recommendations and regulations addressing gender discrimination against women in sport as have other bodies in Africa and Asia.⁶⁹ In 2005, the Council of Europe passed a recommendation, which among other issues, called on the Committee of Ministers to ‘*support women’s participation in top level sport...ensure equality in terms of pay, prize money and bonuses...ensure that women play a greater role in ruling bodies of sports organisation...combating of sexual abuse in sport.*’⁷⁰ The CGF in 2006 issued a regulation, which states, ‘*future programmes in sports will have a balanced participation and profile for males and females.*’⁷¹

If the IOC continues to violate human rights and forces nations to violate international law as a condition of membership, these regional bodies, who embrace human rights and international law, will grow in importance. In particular, as countries bid for international sporting events, public monies and the citizenry will be spent on events that enhance their nation’s values and promote the rule of law, not those which do not.

4.4.3. Increased Domestic Litigation

Foster describes the two types of legal intervention in sport: commercial (focusing on the economic aspects of sport) and cultural (focusing on the social value of sport).⁷² In the former, the monopolistic power system of the IOC may only be broken if elite athletes or an international federation breaks away from the Olympic Movement.⁷³ However, in the latter, it is state action that is relevant.

This summer if Great Britain hosts male athletes from Saudi Arabia, Brunei, Qatar, and Kuwait, but these countries do not send women; Great Britain will violate its international duty to end discrimination against women. Furthermore, they will be doing nothing to mandate action by these governments to change the cultural patterns and stereotypes that prohibit women from participating in sport in these countries. If this summer, Great Britain hosts male canoeing events and the 108 other medal opportunities for men at the Olympics, but not the same canoeing or medal events for women, they will be violating their international obligations under CEDAW.

Under Article 18 of the Vienna Convention on the Law of Treaties a state cannot act in ways that would defeat the purpose of the treaty. Canada’s failure to hold a women’s ski jumping competition at the Vancouver Winter Olympic Games in 2010 contravened CEDAW, and if Great Britain holds an Olympic Games in the same manner as Canada, it too will violate the object and purpose of CEDAW.

Lincoln asks, ‘*...will there be the sort of challenge from the state which so far has been wholly absent from the agenda?*’⁷⁴ The IOC needs states to exist; it cannot function without countries and their athletes. At some point, what the IOC has to offer states will not be worth the erosion of the rule of law. No government wants to be hauled into court like Canada was in 2010 to be accused they are violating both domestic and international law. As Young states, ‘*sanctioned sex discrimination in a*

63 Barrie Houlihan, SPORT, CIVIL LIBERTIES AND HUMAN RIGHTS, 131 (Richard Giulianotti & David McArdle eds., 2006).

64 HELEN JEFFERSON LENSKEY, INSIDE THE OLYMPIC INDUSTRY: POWER, POLITICS, AND ACTIVISM (2000).

65 *Id.*

66 Chantalle Forgues, *supra* note ___ from Canadian Association for the Advancement of Women in Sports, Action-Winter 1998: Quotables (last modified Jan. 23, 2000) <http://www.caaws.ca/Action/>

winter98/quotes/win98.htm.

67 UNITED NATIONS DIVISION FOR THE ADVANCEMENT OF WOMEN, *supra* note ___, 26

68 *Id.*

69 UNITED NATIONS DIVISION FOR THE ADVANCEMENT OF WOMEN, *supra* note ___, 8

70 *Id.*

71 *Id.*

72 Ken Foster, The Global Politics of Sport: The Role of Global Institutions in Sport, *supra* note ___, 63

73 *Id.*

74 *Id.*

publicly funded exercise on the scale of the Olympics is no small issue. It reinforces and perpetuates a troubling but traditional discriminatory message about women, athletes, and social citizenship.⁷⁵ Public backlash against the final outcome of the women ski jump trial in Canada was huge, with polls showing 73 percent of Canadians in favor of the women ski jumpers.⁷⁶ Further, as ‘the outpouring of public opinion during 2008 amply demonstrated, the world expects a higher standard,’ from the IOC.⁷⁷

Should domestic courts fail to identify and uphold human rights, international law does not stop there and the IOC will begin to see cases brought to International Human Rights tribunals such as the European Court of Human Rights and the Inter-American Court of Human Rights. As transnational entities, they will reach the IOC.

4.4.4. Court of Arbitration for Sport

Why does the International Canoe Federation allow the IOC to threaten the Olympic Movement by violating the Olympic Charter and discriminate against women canoeists and how can those women get their day in court?

During the early 1980s there was a noticeable increase in the number of international sports-related disputes being brought before domestic courts, so then IOC President, Juan Samaranch, instigated the process of establishing a legal forum that would become the Court of Arbitration for Sport (CAS). From the outset, it was established that the jurisdiction of the CAS would not be imposed on athletes or federations but would remain freely available to the parties as a means of settling disputes.⁷⁸

The jurisdiction of the CAS for matters involving the Olympics is outlined in a document published by the CAS entitled “Arbitration Rules for the Olympic Games.”⁷⁹ Generally speaking, in order for any dispute to be submitted to the CAS for arbitration the parties to the dispute *must agree*. Such agreement may be on a “one off” basis or could be mandated through a statute or regulations of a sports organization.⁸⁰ Most international sports federations have provisions in their founding statutes that recognize the jurisdiction of the CAS as having competent jurisdiction to resolve disputes. However, international sport federations also generally have internal procedures that must be exhausted first.

For example, in the case of the International Canoe Federation (ICF), their guiding statute provides that in any dispute regarding ICF Competition Rules, a Court of Arbitration of the IFC will be appointed. The IFC also clearly provides that ‘no matter what the difference between the disputed parties, no case may be taken to a court of law. The ICF would only recognize and accept the decisions of the Court of Arbitration for Sport (CAS) in Lausanne (Switzerland) should the necessity of an appeal against an ICF decision arise.’⁸¹

The statute also states at Article 47 ‘A party to a dispute has the right to appeal against a decision of the Court of Arbitration of the ICF. Any appeal to a body outside the ICF shall be made only to the Court of Arbitration for Sport (CAS) in Lausanne (Switzerland).’ Based on this model, an athlete would have to exhaust its internal appeals with the international sport federation before bringing a case before the CAS. If the language of the founding statute of the international sports federation is permissive (such as “has the right to” above) an athlete could appeal to the CAS without having to worry about the federation consenting, as the consent exists in the founding statute.

75 MARGOT E. YOUNG, *supra* note ____.
76 *Id.*

77 Bruce Kidd, *supra* note ____.

78 Court of Arbitration for Sport, HISTORY OF THE COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/history> (last visited Mar 26, 2012).

79 Court of Arbitration for Sport, COURT OF ARBITRATION FOR SPORT ARBITRATION RULES FOR THE OLYMPIC GAMES.

80 Court of Arbitration for Sport, ORDINARY ARBITRATION PROCEDURE COURT OF ARBITRATION FOR

SPORT, <http://www.tas-cas.org/clause-templates> (last visited Mar 26, 2012),
Court of Arbitration for Sport, 20 QUESTIONS ABOUT THE COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/20question> (last visited Mar 26, 2012).

81 International Canoe Federation, INTERNATIONAL CANOE FEDERATION RULES AND STATUTES, <http://www.canoeicf.com/icf/AboutICF/Rules-and-Statutes.html> (last visited Mar 26, 2012).

82 United Nations, PERMANENT

4.4.5. Removal From the United Nations

In 2009, the IOC was granted UN observer status by the UN General Assembly. When the UN grants observer status to non-member states and entities, it means that an entity such as the IOC has ‘received a standing invitation to participate as observers in the sessions and the work of the General Assembly and are maintaining permanent offices at Headquarters.’⁸² States and entities granted UN observer status do not receive a vote at meetings, but they can speak and take part of dialogue at UN meetings, and have access to related documentation.⁸³ The IOC was granted IOC status because of its ‘efforts to contribute to the achievement of the UN Millennium Development Goals,’⁸⁴ which include gender equality goals. However, the IOC has quickly shown that it is not abiding by international law when it comes to women’s rights.

In 1980, the United Nations began compiling a Register of Sports Contacts with South Africa that contained 2,500 athletes who participated in sports events in South Africa during Apartheid. ‘This register of athletes... puts pressure on that country’s government to eliminate apartheid,’ said Sotirios Mousouris of Greece, at that time. ‘Convincing athletes to boycott South African sporting events has proved an effective tool since 1981.’⁸⁵ Perhaps the United Nations will start another registry, this time for those countries, athletes, and sporting organizations that support gender apartheid? If the IOC does not bring the benefits of sport equally to women, they may find they no longer have a seat at the United Nations.

4.4.6. Loss of Corporate Sponsors

One of the ‘Fundamental Objectives’ of the Olympic Marketing Plan, is ‘To protect and promote the equity that is inherent in the Olympic image and ideals.’⁸⁶ Financing for the Olympic Movement’s activities comes from five main sources: television broadcasting, TOP sponsors, national sponsors, ticketing and licensing.⁸⁷

In 2008, Human Rights Watch (HRW) encouraged the IOC’s TOP (The Olympic Partner) sponsors to speak out on the human rights abuses occurring in China prior to the Olympics. They particularly focused on two companies, Coca-Cola and General Electric (both still TOP Sponsors), who ‘remained largely silent... despite their widely publicized commitments to the principles of corporate social responsibility and human rights.’ Both Coke and GE are members of the Business Leaders Initiative on Human Rights, a group of companies that have pledged to apply human rights principles in their businesses and urge other companies to do the same. General Electric’s own human rights policy states, ‘GE seeks to advance human rights by leading by example - through our interactions with customers and suppliers, the products we offer and our relationships with communities and governments.’⁸⁸

HRW Director of Business and Human Rights Arvind Ganesan said ‘... when abuses are a direct result of the Olympics, companies should never stay silent or try to dismiss the abuses as peripheral. The payment of tens of millions of dollars to sponsor the Olympic should increase the duty to speak out, rather than provide an excuse for cowardly silence... Shareholders and consumers who care about human rights should not let Olympic corporate sponsors off the hook.’⁸⁹

Surely the boards of these organizations would like to know that the organizations they sponsor discriminate against women and violate international human rights principles? If they do, sponsoring the Olympics may no longer make good business sense.

OBSERVERS: NON-MEMBER STATES AND ENTITIES, <http://www.un.org/en/members/non-members.shtml> (last visited Mar 25, 2012).

83 *Id.*

84 Association of IOC Recognised International Sports Federations, IOC OBSERVER STATUS AT UN (2009), <http://www.arisf.org/news/news-arisf/44-ioc-observer-status-at-un> (last visited Mar 25, 2012).

85 Thomas Rogers, *U.N. Reports Contacts With South Africa*, NEW YORK TIMES,

<http://www.nytimes.com/1988/04/15/sports/un-reports-contacts-with-south-africa.html> (last visited Mar 26, 2012).

86 The International Olympic Committee, Olympic Marketing Fact File (2012) 5.

87 *Id.*

88 Human Rights Watch, CHINA: OLYMPIC FLAME TURNS UP HEAT ON SPONSORS, <http://www.hrw.org/news/2008/04/15/china-olympic-flame-turns-heat-sponsors> (last visited Mar 26, 2012).

89 *Id.*

4.4.7. *The End of the Olympics?*

Each year athletes are subject to higher levels of scrutiny, more rules and ever increasing regulation. Yet the IOC violates its own rules and international law. This summer athletes who want to compete in London will have to sign contracts curtailing their freedom of speech, dictating their choice of clothing, and where they must go. In Britain, the focus is on what they call 'Athlete Attributes.' Magnay reports these to include the 'athlete's name, nickname, signature, image, and performance at the Games, as well as voice recording and even hand and foot prints,' which are taken without payment and apply 'indefinitely.'⁹⁰ Add in the Whereabouts Rule⁹¹ and athletes must soon reach their breaking point. All it takes is one Michael Phelps or Paula Radcliff to demand accountability, change or an end to the current reality and the Olympics will be done. Lenskyj writes that athletes in democratized countries could 'take the form of withdrawal from all Olympic competition and the development of alternative kinds of international sport.'⁹²

There are too many people, activists, academics, and athletes who

know what is going on to allow a nation to contract around their legal obligations, to allow the IOC to continue to violate women's rights. The resistance is organized and as waves of change sweep from Wall Street to Tahrir Square, the IOC may not be left standing.

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⁹⁰ Jacquelin Magnay, LONDON 2012 OLYMPICS: ATHLETES BANNED FROM SELLING GREAT BRITAIN KIT ON EBAY - TELEGRAPH (2012), <http://www.telegraph.co.uk/sport/olympics/9083078/London-2012-Olympics-Athletes-banned-from-selling-Great-Britain-kit-on-eBay.html> (last visited Mar 19, 2012).

⁹¹ One's "Whereabouts" are provided by top athletes about their location to their (IF) or National Anti-Doping

Organization that included them in their registered anti-doping testing pool, see World Anti-Doping Agency at <http://www.wada-ama.org/en/Resources/Q-and-A/Whereabouts/> (last visited 3/23/12), however many top level athletes protested its implementation, cf. WADA: We'll Discuss Whereabouts Rule at <http://sports.espn.go.com/oly/news/story?id=3869624> (last visited 3/23/12).

⁹² HELEN JEFFERSON LENSKYJ, supra note ____.

Rings of Controversy: An Analysis of the 2016 Rio Olympic Games Logo Controversy

By Elise M. Harris

I. Introduction

The honor of being selected to host the Olympic Games is the highest honor that a National Olympic Committee (NOC) can receive. With this honor, though, comes great responsibility. An Organizing Committee for the Olympic Games (OCOG) is responsible for constructing necessary venues and stadiums; providing food and lodging for hundreds of athletes and officials; and ensuring adequate security; not to mention staging the largest competition in sports.¹ An OCOG also has the responsibility of designing a novel logo for the Olympic Games that will be held in its country. This logo will be used to promote the Games across the globe. Because of its important purpose, the logo should represent the Games and be readily identifiable as being connected to the particular Olympic Games organized by the OCOG. As such, it should be distinct and not confused with the logo of any other event or organization. If an OCOG falls short on this responsibility and fails to design a unique logo, problems can occur.

This is the particular problem that the Rio OCOG was faced with last year after unveiling its logo for the 2016 Olympics. Shortly after the logo was unveiled, it became apparent that the logo slightly resembled a logo that was already being used in the United States (U.S.) by the Telluride Foundation. As allegations of copying arose, one could not help but wonder what types of legal ramifications the Rio OCOG might face.

This paper will analyze the potential claims that a U.S. company might have against the use of its logo by an Olympic Organizing Committee. Part II will describe the specific controversy between the Telluride Foundation logo and the 2016 Olympic Games logo. Part III will discuss the general protections of trademark law. Part IV will consider how these trademark laws should be taken into account in choos-

ing a forum to bring suit. Part V will discuss the trademark issues unique to Olympic marks. Part VI will then use these laws and rules to analyze the controversy over the 2016 Olympic Games logo. Finally, Part VII will consider this analysis in determining what U.S. companies can do in the future to further protect themselves from situations like this.

II. A TRADITION OF OLYMPIC LOGO CONTROVERSIES

Every lawsuit begins with some form of controversy. This section will explain the specific controversy over the 2016 Rio Olympic Games logo. This is not the first time that the legality of Olympic logos and marks has been called into question.

A. *The Controversy Over the 2016 Olympic Games Logo*

The Organizing Committee for the Rio 2016 Olympic Games was established shortly after Brazil was selected to host the 2016 Olympic Games.² The Rio OCOG is a nonprofit, private company, located in Rio de Janeiro, Brazil.³ Moreover, the Rio OCOG is the body responsible for planning and hosting the 2016 Olympic Games.⁴ One of the first organizing responsibilities that the Rio OCOG sought to accomplish after being established was to develop a logo for the 2016 Olympics. To fulfill this duty, the Rio OCOG organized a competition among Brazilian design agencies to design and submit prospective logos for the Games.⁵ In total, 139 designs were submitted for the Rio OCOG to choose from.⁶ In the end, after a five-month selection process, the Rio OCOG selected the design submitted by the Tátil Agency.⁷

The Tátil Agency design depicts three multicolored figures holding hands and dancing above the phrase "Rio 2016" and the five interlaced Olympic rings.⁸ The Rio OCOG stated several reasons for choosing this design: (1) the fact that the figures are holding hands represents one of the ideals of the Olympic movement, namely "togetherness in diversity;" (2) the fact that the figures are dancing communicates Rio's joie de vivre; (3) the three colors used in the design—green, yellow and blue—mimic the colors of the Brazilian flag; and (4) the outer shape of the design traces the shape of Rio's most famous natural landmark, the Pão d'Açúcar, or Sugarloaf Mountain.⁹

The Rio OCOG unveiled this logo on December 31, 2010 at an extravagant New Year's Eve party in Rio de Janeiro.¹⁰ Initially, when the logo was unveiled it received high praise for reflecting Rio's culture, natural wonders, and joyful residents.¹¹ However, only a few hours after the unveiling, the Brazilian media began to note that the Rio Games logo

¹ MATTHEW MITTEN, ET AL, SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 281 (2nd ed. 2009).

² Rio Organizing Committee, Games' Makers, RIO2016.COM, <http://www.rio2016.com/en/games-makers> (last visited Mar. 31, 2012).

³ *Id.*

⁴ *Id.*

⁵ *Rio Denies Olympic Logo Plagiarism*,

MERCURY (S. AFR.), Jan. 6, 2011, at Sport 26.

⁶ *Id.*

⁷ *Id.*

⁸ *Rio Channels its Passion for Sport and Celebration in Olympic Logo*, SAN DIEGO UNION-TRIB., Jan. 1, 2011, at D2.

⁹ Justin McGuirk, *The Rio Brand: Why Olympic Logos Aren't What they Were*, GUARDIAN UNLIMITED, Jan. 10, 2011.

shared certain similarities with another logo that was already in use—the Telluride Foundation logo.¹²

The Telluride Foundation is a charitable organization, based in Telluride Colorado.¹³ The Foundation collects and administers charitable funds with the goal of “improving the quality of life in the Telluride region.”¹⁴ Among other things, the Foundation sponsors winter and summer amateur athletic events, sports camps, championship sports races, and sports tournaments.¹⁵ The Telluride Foundation also has a registered service mark in the name “Telluride Foundation” along with the logo that is at the center of this controversy.¹⁶

The Telluride Foundation logo, like the logo for the Rio Games, depicts multicolored people holding hands and appearing to be dancing between the words “Telluride” and “Foundation.”¹⁷ Also like the Rio Games logo, the Telluride Foundation logo uses the colors green, yellow, and blue.¹⁸ In addition, the Telluride Foundation logo uses a fourth color of red.¹⁹ Unlike the Rio Games logo, which depicts three people, the Telluride Foundation logo has four people.²⁰ Moreover, the people in the Telluride Foundation logo have distinctive legs, whereas the people in the Rio Games logo are more amorphous, without distinctive legs.²¹

Despite the differences between the two logos, the media still speculated that the overall impression of these two logos was very similar.²² Shortly after these similarities were reported, the Internet was abuzz with allegations that the Rio OCOG stole the idea for its logo from the Telluride Foundation.²³ The director of the Tátil Agency acknowledged that there were some similarities between the two logos, and admitted “[f]or some reason, we missed that one.”²⁴ However, the designers of the Rio Games logo adamantly denied the allegations that their logo was a copy of the Telluride Foundation logo.²⁵ The Tátil Agency argued that prior to even submitting the design to the Rio OCOG, they ran rigorous tests to make sure that the design was original.²⁶ Moreover, during the selection process, the International Olympic Committee (IOC) conducted its own tests on each continent to determine if any sort of conflict could arise between their logo and any other marks already in use.²⁷ Had the IOC discovered any conflicts, it would not have allowed the Rio OCOG to adopt the design as the logo for the Games.²⁸ Finally, the Rio OCOG defended its logo by asserting that human figures dancing in a circle are a universal symbol and not something unique to the Telluride Foundation.²⁹

While this particular controversy between the Rio OCOG and the Telluride Foundation is new, controversies surrounding Olympic marks are not. As the next section will show, controversies over Olympic marks have almost come to be a sort of tradition associated with the Olympic Games, as much as the Opening Ceremonies to the Olympic Games themselves.

B. Other Controversies Over Olympic Logos and Marks

Prior to the 2008 Beijing Olympic Games, rumors circulated that the Dancing Beijing logo for the 2008 Games was already registered by another Chinese company.³⁰ The media speculated that the Beijing OCOG would not be able to register its logo to receive trademark protection, as required by Olympic Rules.³¹ In the end, this rumor turned out to be false. The State Intellectual Property Rights Office in China

had not issued trademark protection to any marks similar to Dancing Beijing; therefore, the Beijing OCOG had no trouble registering its logo, as it was not infringing on anyone else’s marks.³²

Another example of a slightly different controversy arose concerning the upcoming 2014 Sochi Olympic Games. Last year, the Sochi OCOG released the design of its four mascots for the Sochi Olympic Games.³³ One of these mascots, a polar bear, was described as being a “blatant rip-off” of Misha, the bear mascot used for the 1980 Moscow Olympic Games.³⁴ The resemblance between the two bears was brought to light when Misha’s designer accused the Sochi OCOG of copying his design, stating “[t]his polar bear, everything is taken from mine, the eyes, nose, mouth, smile. I don’t like being robbed.”³⁵ Based on these statements, it was speculated that Misha’s designer would seek legal recourse against the Sochi OCOG and the new mascot’s designer under copyright law. However, Misha’s designer was ultimately prevented from suing for copyright infringement because he no longer held the copyright to the 1980 mascot, which he would have assigned to the IOC when his mascot was initially selected for the 1980 Olympic Games.³⁶ In the end, not only did the Sochi OCOG and the new mascot’s designer manage to avoid the serious consequences of copyright infringement, but they also managed to put a positive spin on the controversy by joking that the new mascot is the “grandson of Misha the Bear.”³⁷

C. What is Next for the Telluride Foundation?

While there have been legal many controversies surrounding Olympic marks in the past, so far, there have been no lawsuits filed against Olympic marks claiming trademark infringement. However, as this paper will point out, in certain circumstances, there could be legal recourse for trademark infringement.

To this point in time, the Telluride Foundation has followed the trend of not taking a trademark dispute to court. The Foundation appears to have done nothing yet to try to protect its rights. Perhaps this is because the Foundation is taking its time to come up with a game plan and develop its case. On the other hand, maybe the Foundation has examined its potential case and determined that the odds of winning are not that great. This paper intends to analyze whether the Telluride Foundation would potentially have any successful claims against the Rio OCOG. Moreover, for reasons that will be explained in this paper, the Telluride Foundation may have held off on filing suit against the Rio OCOG because such a lawsuit may well be futile.

III. TRADEMARK LAW

A trademark is a “word, phrase, logo, or other graphic symbol used by a manufacturer or seller to distinguish its product or products from those of others.”³⁸ In its broadest sense, the term *trademark* also includes service marks,³⁹ which are marks “used to identify and distinguish the services of one person, including a unique service, from the services of others.”⁴⁰ Trademark laws generally apply the same to both trade and service marks.⁴¹

The use of marks to identify the source of a product dates back at least 3500 years ago when potters scratched marks on the bottom of their creations to identify the product as their own handiwork.⁴² However, the idea of legal protection of trademarks has only existed since the late

¹⁰ *Rio Channels its Passion for Sport and Celebration in Olympic Logo*, *supra* note 8.

¹¹ *Id.*

¹² *Rio Creators Dismiss Logo Similarity*, DAILY MERCURY (MACAY, AUSTL.), Jan. 4, 2011.

¹³ Telluride Foundation, *The Foundation*, <http://www.telluridefoundation.org/index.php?page=the-foundation> (last visited Mar. 31, 2012).

¹⁴ *Id.*

¹⁵ United States Patent and Trademark Office, *Telluride Foundation Service Mark Registration*, USPTO.GOV, <http://tess2.uspto.gov/bin/gate.exe?f=search&state=4001:c278ie.1.1> (search for “Telluride Foundation”; then

follow “Telluride Foundation” hyperlink) (last visited Mar. 31, 2012).

¹⁶ *Id.*

¹⁷ See Andrew Moran, *Rio 2016 Olympic Logo Unveiling Follows Plagiarism Controversy*, DIGITALJOURNAL.COM, Jan. 4, 2011, www.digitaljournal.com/article/302140.

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See id.*

²² *See id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Rio Denies Olympic Logo Plagiarism*, *supra* note 5.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Beijing Olympic Logo Dances out of Controversy*, BUSINESS DAILY UPDATE, Dec. 11, 2003, at 10.

³¹ *Id.*

³² *Id.*

³³ Nick Carbone, *Is Russia’s 2014 Olympic Mascot a Copycat of the 1980 Logo?*, TIMENEWSFEED.COM, Feb. 28, 2011, <http://newsfeed.time.com/2011/02/28/russias-2014-olympic-mascot-a-copycat-of-the-1980-logo/>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Ksenia Obratsova, *The Olympic Bear of Discord*, PRAVDA.RU, Mar. 1, 2011, http://english.pravda.ru/society/stories/01-03-2011/117048-winter_olympics_sochi_mascot-ol/.

³⁷ Tom Degun, *Sochi 2014 Polar Bear is “Grandson of Misha” Says Chernysbenko*, Mar. 11, 2011, <http://www.insidethegames.biz/olympics/winter-olympics/2014/12209-sochi-2014-president-laughs-off-mascot-row>.

³⁸ BLACK’S LAW DICTIONARY 1630 (9th ed. 2009).

³⁹ *Id.*

⁴⁰ *First Sav. Bank v. First Bank Sys.*, 101 F.3d 645, 651 n.7 (10th Cir. 1996).

⁴¹ *Id.*

1500s.⁴³ Moreover, trademark protection has not fully developed until more recently with the passing of specific statutes to protect trademark interests.⁴⁴ Most countries have developed their own trademark protection laws to protect domestic trademarks. Additionally, international laws have been developed to protect trademarks internationally.

Trademark law is essentially “territorial” in that a mark is exclusively owned within the registrant’s territory.⁴⁵ Thus, two parties may have legitimate, national trademark rights, but these rights may conflict when one or both parties seek to operate in the international marketplace.⁴⁶ However, a plaintiff will not have a valid claim for trademark infringement in any nation, unless that trademark is registered or protected under that nation’s trademark laws.⁴⁷ For these reasons, this section will examine the different trademark laws that could potentially govern a dispute between the Telluride Foundation and the Rio OCOG.

A. United States Trademark Law

Because the Telluride Foundation is located in Colorado, U.S. law may be applicable to a dispute involving the Foundation. In the U.S., the main law that provides protection to trademarks is the Lanham Act.⁴⁸ The Lanham Act prohibits the unauthorized use of any copy or colorable imitation of a registered mark in connection with the advertising of goods or services, which is likely to cause consumer confusion as to the source of different products.⁴⁹ If a mark owner believes his or her rights are being infringed, then the mark owner can bring a claim for trademark infringement against the alleged infringer.⁵⁰

For a trademark to receive protection under the Lanham Act, a mark must be registered with the U.S. Patent and Trademark Office.⁵¹ A registered mark will receive nationwide protection regardless of where the registrant actually uses the mark.⁵² Thus, registration will constitute constructive notice to any potential competing users that a mark is in use.⁵³ However, if a mark is not registered, it will not receive protection under the Lanham Act.

Furthermore, for use of a mark to be infringing, the use of the mark must be without the consent of the mark owner.⁵⁴ Once a mark has been registered, the registrant will have the exclusive right to use that mark in connection with the goods or services specified in the certificate of registration.⁵⁵ However, a mark owner can allow others to use his mark through licensing the rights to use the mark.⁵⁶ If this is the case, the mark owner will have given consent to the use of the mark, and therefore, will have no claim for infringement.⁵⁷

Finally, before a court will find that use of another mark is infringing, the use of the mark must be likely to cause confusion among consumers as to the source, affiliation, or sponsorship of different products or services.⁵⁸ In determining whether there is a likelihood of confusion, the court will look at several factors: the degree of similarity between the two marks; the relation in use and the manner of marketing between the goods or services marketed by the competing parties; the strength or weakness of each of the marks; whether the alleged infringing mark is being used in a market that would be a natural area of expansion for the original trademark owner; and whether there is evidence of actual confusion.⁵⁹

The abovementioned factors are not an exhaustive list. Each court seems to apply slightly differing standards; however, these factors are some of the most common factors courts use in determining whether there is a likelihood of confusion. Additionally, no single factor will be dispositive of showing a likelihood of confusion between two marks.⁶⁰

However, if several factors indicate that the unauthorized use of a registered mark in connection with the advertising of goods or services is likely to cause consumer confusion, then a trademark owner may be successful on a claim for trademark infringement under the Lanham Act.

If a trademark owner is successful on a claim for infringement, the mark owner could have several different remedies. First, and probably most importantly, the owner will be able to enjoin the defendant from further using the infringing mark.⁶¹ Additionally, if it can be proven that the defendant intentionally infringed the mark, a mark owner will be entitled to recover (1) the profits the defendant gained by using the mark, (2) any damages sustained by the mark owner, and (3) the costs of the action.⁶² Finally, even though the Lanham Act prohibits punitive damages, in extreme cases of willful and wanton infringement, a court does have the discretion to award damages up to three times greater than the plaintiff’s actual damages.⁶³ These treble damages, however, will only be awarded in the most extreme cases.⁶⁴ Thus, in cases of trademark infringement, the penalties under the Lanham Act can be very severe.

Furthermore, while the Lanham Act is the main source of trademark protection available to trademark owners in the U.S., it is not the only source of trademark protection. U.S. courts may also provide common law trademark protection for unregistered marks.⁶⁵ However, such a claim will not be analyzed in this paper because it is unnecessary for the analysis of this controversy, namely because the Telluride Foundation mark is a registered mark.

Moreover, in disputes involving parties from different countries, additional laws may apply, including another country’s domestic laws and international laws. The next two sections will examine each of these sources of potential trademark protection in turn.

B. Brazil Trademark Law

Another source of law that may be applicable to a dispute over the Rio Games logo would be Brazil trademark law, as the Rio OCOG is a Brazilian company. In Brazil, trademarks are regulated by Industrial Property Law No. 9.279.⁶⁶ In general, regulation of trademarks under Brazil’s trademark law is similar to trademark regulation under the Lanham Act. Distinctive marks can be registered in Brazil for the purpose of distinguishing a particular product or service from other products and services.⁶⁷ Once a mark is registered with and approved by Brazil’s National Institute of Industrial Property, the registrant will have the exclusive right to use the mark “throughout the national territory,” (i.e., Brazil).⁶⁸ Moreover, once a mark is registered it will be protected from being reproduced or imitated to identify similar products or services.⁶⁹ If anyone commits a crime against mark registration by reproducing “a registered mark, in whole or in part, without the authorization from the titleholder, or imitates it in a way that may induce . . . confusion,” such crime may be punishable by a fine or imprisonment.⁷⁰

In short, similar to U.S. trademark protection, Brazil trademark law protects nationally registered marks against trademark infringement. These provisions, however, only apply to marks registered in Brazil. Thus, Brazil trademark law alone does not protect foreign registered marks. To determine what kind of protection foreign registered trademarks will receive in Brazil, it is necessary to look at international treaties and agreements that Brazil is a party to.

42 Ramesh Bikram Karky, *Trademark Under the Nepalese Legal System: A Comparative Study with the TRIPS Agreement*, 9 ANN. SURV. INT’L & COMP. L. 111, 118 (2003).

43 See generally Keith M. Stolte, *How Early did Anglo-American Trademark Law Begin? An Answer to Schechter’s Conundrum*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 505 (1998).

44 *Id.*
45 Yelena Simonyuk, *Copyrights & Trademarks: Recent Article: The*

Extraterritorial Reach of Trademarks on the Internet, 2002 DUKE L. & TECH. REV. 9 (2002).

46 Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought*, 49 AM. J. COMP. L. 429, 447 (2001).

47 Simonyuk, *supra* note 45.
48 15 U.S.C. § 1114(i)(a) (2011).

49 *Id.*
50 See *id.*
51 *Id.*
52 First Sav. Bank v. First Bank Sys., 101 F.3d

645, 651 (10th Cir. 1996).

53 *Id.*

54 See § 1114(i)(a).

55 § 1057(b).

56 See e.g., *FreecycleSunnyvale v. Freecycle Network*, 626 F.3d 509, 511 (9th Cir. 2010).

57 § 1114(i)(a).

58 MITTEN, *supra* note 1, at 1029.

59 First Sav. Bank v. First Bank Sys., 101 F.3d

645, 652 (10th Cir. 1996).

60 *Id.*

61 15 U.S.C. § 1116 (2011).

62 § 1117 (a).

63 PBM Prods. v. Mead Johnson & Co., 174 F. Supp. 2d 424, 429 (E.D. Va. 2001).

64 *Id.*

65 See *Donchez v. Coors Brewing Co.*, 392 F.3d 1211, 1219 (10th Cir. 2004).

66 See generally Law No. 9.279, May 14, 1996, C.P.I. (Brazil), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=125397.

67 *Id.* at art. 122.

68 *Id.* at art. 129.

69 *Id.* at art. 189.

C. International Intellectual Property Treaties and Agreements

Absent an agreement between countries, one country does not have an obligation to protect trademarks registered in another country.⁷¹ Thus, in evaluating a potential lawsuit between the Telluride Foundation and the Rio OCOG, it is important to take into account the various international agreements that both the U.S. and Brazil are parties to. In this case, the international agreements applicable to this dispute would be the Paris Convention for the Protection of Industrial Property (Paris Convention)⁷² and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).⁷³

The Paris Convention, which was adopted in 1883, was the first major international treaty aimed at protecting intellectual property rights.⁷⁴ While it has been amended several times over the years, it still remains as one of the most important treaties covering the protection of trademarks. Since 1887, both the U.S. and Brazil have been parties to the Paris Convention.⁷⁵

Because the Paris Convention only protected individuals from countries that were signatories to the treaty, the World Trade Organization (WTO) determined that further protection was needed for WTO members that were not parties to the Paris Convention.⁷⁶ As such, in 1995, the WTO developed the TRIPS Agreement, which incorporated the same intellectual property protections guaranteed by the Paris Convention.⁷⁷ The only difference between the two agreements was that the TRIPS Agreement applies to all WTO member countries, regardless of whether they are signatories to the Paris Convention.⁷⁸ Thus, as members of the WTO, both the U.S. and Brazil are also bound by the TRIPS Agreement. Because both the Paris Convention and the TRIPS Agreement contain the same major provisions for the protection of trademark rights, these agreements will be considered simultaneously in this paper.

Both the Paris Convention and the TRIPS Agreement provide protection for trade and service marks.⁷⁹ Additionally, both agreements require member countries to give the same industrial protections to citizens of other countries that are parties to the agreement that it gives to its own citizens.⁸⁰ Thus, an individual that owns a registered trademark in country A must receive the same trademark protection in country B that citizens of country B receive, as long as both countries are parties to either the Paris Convention or the TRIPS Agreement.

Both agreements provide trademark protection similar to the protection under the Lanham Act and Brazil's Industrial Property Law No. 9.279. For example, the TRIPS Agreement reads as follows:

The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion.⁸¹

Furthermore, both the Paris Convention and the TRIPS Agreement provide additional protection to a mark that is well known outside of the country where it is registered.⁸² Under these provisions, member countries are prohibited from registering marks in their own country that may conflict with marks that are already well known, regardless of whether the well-known mark is registered in that country.⁸³ Thus, if a foreign registered mark is already well known within a member country, that member country cannot register any marks that would infringe on that mark, even if that foreign registered mark is not yet registered in that country.⁸⁴

These agreements do not require special enforcement of intellectual property rights distinct from the usual enforcement within a member country.⁸⁵ Instead, these agreements ensure only that a trademark owner from a foreign member country will have the same remedies available to him as he would if the trademark was registered in the member country itself.⁸⁶ These remedies may include damages and injunctive relief from further infringement, or whatever other remedies a country normally provides to its own citizens.⁸⁷ In short, these agreements serve to create a level playing field among domestic and foreign individuals.

Accordingly, because both the U.S. and Brazil are parties to the Paris Convention and the TRIPS Agreement, these agreements could govern a dispute between the Telluride Foundation and the Rio OCOG. As such, Brazil would have an obligation to protect trademarks registered in the U.S. to the same extent that it protects trademarks registered in Brazil. Consequently, the Telluride Foundation would possibly have a claim for trademark infringement in Brazil if the use of the Rio Games logo would be likely to cause confusion in Brazil.

Having considered which laws could apply to a dispute between the Telluride Foundation and the Rio OCOG, this paper will next consider which courts can apply these laws (i.e., where the Telluride Foundation could bring its suit).

IV. CHOICE OF FORUM

A unique problem that results when the parties to a dispute are from different countries, is determining which country's courts can adjudicate a dispute. This choice of forum can have very serious implications. For example, the choice of forum can determine which laws will apply to a dispute because one country may not enforce the laws of another country. Therefore, the Telluride Foundation's choice of forum would likely hinge upon which law is most favorable to its case. However, a plaintiff does not have unlimited choices of forums; the choice will be limited to courts that have jurisdiction to adjudicate a particular dispute. Thus, the first aspect to consider in evaluating a possible lawsuit between the Telluride Foundation and the Rio OCOG is which courts will have jurisdiction over the dispute.

A. Jurisdiction

For a court of any country to exercise jurisdiction over a dispute, the court must have jurisdiction over the parties to the dispute and the subject matter of the controversy. Jurisdiction over the parties can be gained in several different ways. A court will have jurisdiction over parties that are domiciled in that forum.⁸⁸ Thus, a U.S. court will have jurisdiction over the Telluride Foundation as a U.S. company, and a Brazil court will have jurisdiction over the Rio OCOG as a Brazil company. However, jurisdiction will have to be established some other way for one of the courts to exercise jurisdiction over a noncitizen.

For example, parties can consent to jurisdiction in a particular forum.⁸⁹ Thus, if the Telluride Foundation were to bring suit in Brazil, the Foundation would necessarily consent to the jurisdiction in the Brazil court.

Conversely, establishing personal jurisdiction over the Rio OCOG in a U.S. court will not be as straightforward, as it will not likely consent to jurisdiction. However, personal jurisdiction may be established by showing that the Rio OCOG has sufficient minimum contacts with the forum state.⁹⁰ For the purposes of trademark infringement, a defendant will be found to have sufficient contacts if the defendant purpose-

⁷⁰ *Id.*

⁷¹ Simonyuk, *supra* note 45.

⁷² See generally Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 (revised July 14, 1967), available at http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html#P147_20484 [hereinafter Paris Convention].

⁷³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 81 (1994), available at www.wipo.int/wipolex/

[en/other_treaties/text.jsp?doc_id=133258&file_id=190790](http://www.wipo.int/wipolex/en/other_treaties/text.jsp?doc_id=133258&file_id=190790) [hereinafter TRIPS Agreement].

⁷⁴ Peggy B. Sherman & Ellwood F. Oakley, III, *Pandemics and Panaceas: The World Trade Organization's Efforts to Balance Pharmaceutical Patents and Access to AIDS Drugs*, 41 AM. BUS. L.J. 353, 364 n.47 (2004).

⁷⁵ *Contracting Parties/Signatories>Paris Convention*, WIPO.INT, http://www.wipo.int/wipolex/en/wipo_treaties/parties.jsp?treaty_id=2&gro

[up_id=1](http://www.wipo.int/wipolex/en/other_treaties/text.jsp?doc_id=133258&file_id=190790) (last visited Mar. 30, 2012).

⁷⁶ Karky, *supra* note 42, at 119.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ TRIPS Agreement, *supra* note 73, at art. 15.

⁸⁰ *Id.* at art. 1.

⁸¹ *Id.* at art. 16.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Paris Convention, *supra* note 72, at art. 6bis.

⁸⁵ TRIPS Agreement, *supra* note 73, at art. 41.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Ray August, *International Cyber-Jurisdiction: A Comparative Analysis*, 39 AM BUS. L.J. 531, 547 (2002).

⁸⁹ See e.g., Royal Bed & Spring Co. v. Famosul Industria e Comercio de Moveis Ltda., 906 E.2d 45, 48 (1st Cir. 1990).

⁹⁰ Richard L. Garnett, *Intellectual Property Online: The Challenge of Multi-Territorial Disputes*, 30 BROOKLYN J. INT'L L. 925, 930 (2005).

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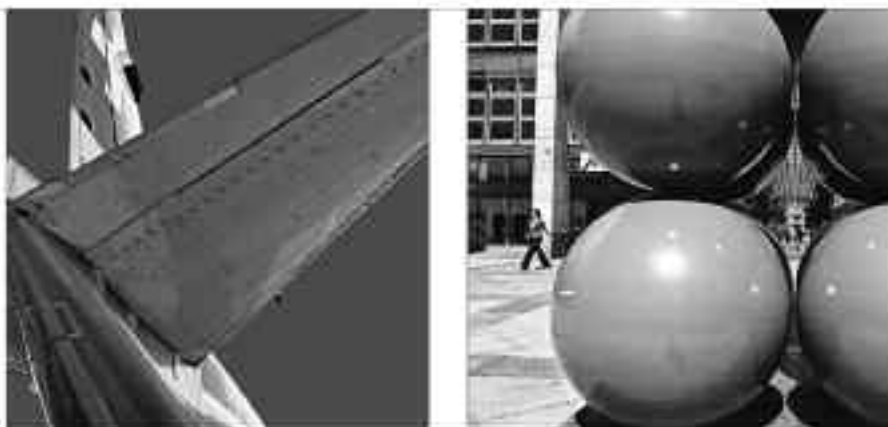
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fully directs its business activity into the state with the intent of engaging in business with residents of the forum state.⁹¹ The mere possibility that the product will reach the forum state is insufficient.⁹² Thus, more is required than simply placing a product into the stream of commerce.⁹³

For example, in *Steele v. Bulova Watch Co.*, the U.S. Supreme Court held that the Lanham Act could be applied against the defendant who made watches in Mexico under a local trademark that was identical to the plaintiff's U.S. registered trademark.⁹⁴ The Court held that the defendant's subsequent sale of these watches in the U.S. infringed upon the plaintiff's mark.⁹⁵ Moreover, the Court ruled that it could exercise jurisdiction over the defendant, even though the defendant was located outside of the U.S., because the defendant was intentionally selling its watches in the U.S.—directing its business toward the forum state.⁹⁶ Similarly, if the Telluride Foundation could establish that the Rio OCOG purposefully directed business activity into the U.S., it might be possible for the Rio OCOG to be subject to U.S. jurisdiction.

In addition to having personal jurisdiction over the parties to a dispute, a court must also have jurisdiction over the subject matter of a dispute. Subject matter jurisdiction is generally given by statute. In the case of trademark infringement, use of a trademark must fall within the jurisdictional scope of the trademark act that the plaintiff is relying on.⁹⁷ For example, if a plaintiff brings a trademark infringement case in a U.S. court, the court will have jurisdiction only if the trademark falls within the jurisdictional scope of the Lanham Act. The Lanham Act encompasses trademarks used in commerce that may be lawfully regulated by Congress (i.e. trademark use that has a substantial effect on interstate commerce within the U.S. or commerce between the U.S. and a foreign nation).⁹⁸ Thus, even though the Lanham Act does not explicitly state that it has extraterritorial powers, it can control infringing acts that occur outside of the U.S. if the effects of those infringing acts occur within the U.S.⁹⁹

For example, in *Cable News Network v. CNNews.com*, a Chinese company that registered a domain name for a website was subject to the Lanham Act, despite the fact that the site was entirely in the Chinese language, most of its users were located in Chinese cities, and it transacted no business within the U.S.¹⁰⁰ The court held that the Lanham Act applied because the global nature of the Internet made it likely that the site would be accessed in the U.S., where it was likely to cause confusion.¹⁰¹ Because the use would create an effect on U.S. commerce, the Chinese company was liable for trademark infringement in the U.S.¹⁰² Similarly, if the Telluride Foundation could prove that the Rio Games logo would be likely to cause confusion within the U.S., the Rio OCOG might be liable for trademark infringement under the Lanham Act.

B. Choice of Law

Normally, once a forum is chosen and suit has been filed, it will be up to the court to determine which laws it will apply—domestic laws, foreign laws, or international laws.¹⁰³ Generally, in trademark disputes, a court will apply its own domestic laws unless it determines that a different set of laws is more applicable.¹⁰⁴ For instance, this might occur where a party does not have a protectable interest under a nation's domestic laws, but is guaranteed protection under an international treaty.¹⁰⁵ Many courts will be reluctant to apply foreign trademark laws because if a dispute requires that another nation's laws be applied, that other nation will likely have a stronger interest in resolving that dispute.¹⁰⁶

In those cases, a court will often dismiss the dispute under the theory of forum non conveniens.¹⁰⁷ For this reason, it would be in the Telluride Foundation's best interest to determine which laws would be most applicable to its case and choose to file suit in that forum if possible.

Whatever forum the Telluride Foundation chooses, there is one final set of rules that will need to be taken into account before determining whether the Foundation's trademark infringement case could be successful. Because the case involves an Olympic mark, international sports rules will also have to be considered. These rules will be discussed in the next section.

V. INTERNATIONAL SPORTS RULES

One issue unique to the area of sports law is that in addition to the laws of the state or country, rules specific to a sport will also govern a dispute within that sport. Thus, in a dispute involving an Olympic trademark, Olympic rules will also apply.

The International Olympic Committee (IOC) is the central governing body for Olympic sport.¹⁰⁸ As the "supreme authority" of the Olympic Movement, the IOC has many responsibilities, which include the following: ensuring the regular celebration of the Olympic Games; selecting countries to host the Olympic Games; encouraging the development of sport for all; encouraging and supporting initiatives blending sport with culture and education; encouraging the promotion of ethics in sport and ensuring that, in sport, the spirit of fair play prevails; taking action to protect the Olympic Movement; and opposing any political or commercial abuse of sport and athletes.¹⁰⁹ To achieve these responsibilities, the IOC has established the Olympic Charter as the official rules of the Olympic Games.¹¹⁰

Because the IOC is a non-governmental not-for-profit organization, the Olympic Charter is not law.¹¹¹ However, "[a]ny person or organisation belonging in any capacity whatsoever to the Olympic Movement is bound by the provisions of the Olympic Charter."¹¹² Among these entities that must comply with the Olympic Charter are the various NOCs and OCOGs.¹¹³ These entities must comply with the Olympic Charter because they agree to abide by the Charter bylaws in exchange for recognition by the IOC to serve as Olympic representatives for their respective countries.¹¹⁴ Failure to abide by the Olympic Charter bylaws can result in the IOC withdrawing its recognition of the entity as an Olympic representative, a sanction that has proven to be very persuasive in compelling compliance with the Olympic Charter.¹¹⁵

As the exclusive proprietor of the Olympic Games, all rights to Olympic marks belong exclusively to the IOC.¹¹⁶ As such, the IOC has the right to control the use of Olympic marks. Pursuant to the Olympic Charter, the IOC has granted the various NOCs and OCOGs the right to use Olympic marks, as long as they receive the IOC's approval.¹¹⁷ In exchange for that right, the NOCs and OCOGs have certain responsibilities under the Olympic Charter.

For example, under the Olympic Charter bylaws, an OCOG has the responsibility of designing a novel logo for the Olympic Games that will be held in its country.¹¹⁸ Any Olympic emblem created by an OCOG is subject to IOC approval.¹¹⁹ The IOC will carefully scrutinize any emblem to make sure that it conforms to the Olympic Movement.¹²⁰ As such, any emblem must be "susceptible of registration" (i.e. it must be able to be registered for trademark protection by the OCOG in its country whenever and wherever possible).¹²¹ Moreover, any mark that infringes on another's mark will not be able to be registered for trademark protection.¹²²

91 *Id.*
 92 Louis U. Gasparini, *The Internet and Personal Jurisdiction: Traditional Jurisprudence for the Twenty-First Century under the New York CPLR*, 12 ALB. L.J. SCI. & TECH. 191, 204 (2001).
 93 *Id.*
 94 Steele v. Bulova Watch Co., 344 U.S. 280, 284 (1952).
 95 *Id.* at 289.
 96 *Id.* at 286.
 97 Simonyuk, *supra* note 45.
 98 *Id.* See also 15 U.S.C. § 6a (2011).

99 Simonyuk, *supra* note 45.
 100 Cable News Network L.P. v. CNNews.com, 177 F. Supp. 2d 506, 510 (E.D. Va. 2001).
 101 *Id.* at 517, 520.
 102 *Id.* at 528.
 103 Dinwoodie, *supra* note 46, at 450.
 104 Simonyuk, *supra* note 45.
 105 *Id.*
 106 See, e.g., *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 645 (2nd Cir. 1956).
 107 *Id.*

108 MITTEN, *supra* note 1, at 278-79.
 109 *The Organisation*, OLYMPIC.ORG, <http://www.olympic.org/about-ioc-institution> (last visited Mar. 30, 2012).
 110 Nancy K. Raber, *Dispute Resolution in Olympic Sport: The Court of Arbitration for Sport*, 8 SETON HALL J. SPORTS L. 75, 80 (1998).
 111 OLYMPIC CHARTER, CHAPTER II, RULE 15 at 29, available at www.olympic.org/Documents/olympic_charter_en.pdf (last visited Apr. 1, 2012).

112 *Id.* at 14.
 113 *Id.* at 13.
 114 Raber, *supra* note 110, at 81.
 115 *Id.*
 116 OLYMPIC CHARTER, *supra* note 111, at 19.
 117 *Id.* at 22.
 118 *Id.* at 25.
 119 *Id.* at 24.
 120 *Id.*
 121 *Id.* at 25.
 122 See discussion *supra* pp. 9-10.

Finally, the Olympic Charter requires that “an Olympic emblem must contribute to the development of the Olympic Movement and must not detract from its dignity.”¹²³ Among the goals of the Olympic Movement are building a better and more peaceful world, and creating international goodwill.¹²⁴ Thus, if the IOC deems that an Olympic logo, in some way, detracts from the dignity of the Olympic Movement, it can order that an emblem be changed.

In short, the IOC is responsible for ensuring that the NOCs and OCOGs comply with the Olympic Charter when designing Olympic logos. An NOC’s or OCOG’s failure to abide by the Olympic Charter bylaws can result in severe sanctions from the IOC. Finally, a third party, such as the Telluride Foundation, may also be able to compel Olympic entities to comply with the Olympic Charter through the use of private association laws, which require private organizations to comply with their own rules.¹²⁵ Thus, a court can order the IOC to comply with the Olympic Charter because it is the IOC’s own rules. Moreover, a court can order an NOC or OCOG to comply with the Olympic Charter because they have agreed to abide by the Charter bylaws.

VI. ANALYSIS OF 2016 OLYMPIC LOGO

With all of the abovementioned laws and rules in mind, it is now possible to analyze whether the Telluride Foundation would have any successful claims against the Rio OCOG for the similarity between their respective logos. For the following reasons, the Telluride Foundation would likely have very little legal recourse against the Rio OCOG.

A. Choice of Forum Analysis

As explained in Part IV, any potential lawsuit between the Telluride Foundation and the Rio OCOG will be limited to whichever court has jurisdiction over the dispute. As explained above, a Brazil court will have jurisdiction over the Rio OCOG as a Brazil company. Additionally, if the Telluride Foundation were to bring suit in Brazil, it would necessarily consent to the jurisdiction of the Brazil court. Therefore, if a lawsuit were filed in Brazil, the court would have jurisdiction over the parties.

Establishing personal jurisdiction in a U.S. court would not be as straightforward, but it may still be possible. First, a U.S. court will have jurisdiction over the Telluride Foundation, as it is a U.S. company. The Rio OCOG, though, is not a U.S. domiciliary, and there is no evidence that the Rio OCOG has consented to U.S. jurisdiction. Thus, if the Telluride Foundation would want to file suit in the U.S., personal jurisdiction would have to be established by showing that the Rio OCOG has sufficient minimum contacts with the U.S. The Foundation would have to show that the Rio OCOG’s contacts with the forum specifically led to the cause of action at issue.¹²⁶ Moreover, the Foundation would have to establish that the Rio OCOG is doing more than simply placing the logo into the stream of commerce.¹²⁷

The Telluride Foundation could likely establish these minimum contacts by showing that the Rio OCOG purposefully directs some of its business activities into the U.S. when it advertises the 2016 Olympic Games in the U.S. By purposefully marketing the Games in the U.S., while using the Rio Games logo, the Rio OCOG is directing its business at the U.S. with intent to engage in business with U.S. residents. Moreover, this intent to engage in business with U.S. residents would specifically lead to the cause of action at issue (i.e., trademark infringement) if use of the mark in the U.S. is likely to cause confusion with

the Telluride Foundation logo. In short, the contacts between the Rio OCOG and the U.S. might be sufficient for a U.S. court to exercise personal jurisdiction over the Rio OCOG.

Because both countries could potentially have jurisdiction over the parties to the dispute between the Telluride Foundation and the Rio OCOG, the Foundation would have the benefit of filing suit in whichever forum has laws most favorable to its case. Of course, whatever forum the Foundation chooses must also have jurisdiction over the subject matter of the dispute. Thus, the use of the mark must fall within the protectable scope of the trademark laws that the Foundation relies upon. This aspect will be considered more in the next section.

B. Analysis of Applicable of Law

Before determining where the Telluride Foundation should file suit, it would have to determine which set of laws is most beneficial to its case. The next three sections will analyze the Foundation’s potential claims under the different trademark laws.

1. United States Trademark Law

The Telluride Foundation could potentially have a valid claim for trademark infringement under the Lanham Act. As mentioned above, the Lanham Act prohibits the unauthorized use of any copy or colorable imitation of a registered mark in connection with the advertising of goods or services, which is likely to cause consumer confusion as to the source of different products.¹²⁸

The Telluride Foundation’s service mark is registered. Moreover, there is no evidence that the Telluride Foundation has authorized the Rio OCOG to use its trademark. However, the Telluride Foundation’s claim under the Lanham Act would likely fail the requirement that use of the allegedly infringing mark must be likely to cause confusion among consumers as to the source, affiliation, endorsement, or sponsorship of the different products or services.¹²⁹

For example, the marks are only slightly similar in appearance. In comparing the similarity of the marks, a court will consider the general impression of the two marks, and determine whether the differences between the marks are memorable enough to avoid confusion.¹³⁰ It could be argued that the Rio Games logo is a colorable imitation of the Telluride Foundation logo because both marks depict multicolored people holding hands and appearing to dance. However, one logo depicts three people, while the other depicts four. The Foundation logo uses the color red, which the Rio Games logo does not. The overall shape of each logo is different. Finally, the Rio Games logo is used in connection with the words “Rio 2016” and the Olympic rings. Meanwhile the Telluride Foundation logo uses the words “Telluride” and “Foundation.” As such, the overall impression of each logo is probably not similar enough to create a likelihood of confusion.

Another factor that may lead a court to determine that there is little likelihood of confusion would be the relation in use and the manner of marketing between the goods or services marketed by the competing parties.¹³¹ “The greater the similarity between the products and services, the greater the likelihood of confusion.”¹³² In this case, one mark represents the Olympic Games, and the other mark represents a charitable foundation. It could be argued that the Telluride Foundation uses its mark to advertise amateur athletic events and sports tournaments, a service that is very similar to the Olympic Games. However, the scale and market of both services is very different. The Telluride Foundation is running recreational events,¹³³ while the Rio OCOG is running one of the largest sporting competitions on the planet.¹³⁴ Additionally, the Foundation primarily conducts its activities in Telluride, Colorado. Conversely, the Rio OCOG is conducting its activities across the globe. Accordingly, it would not be likely for consumers to perceive that a small organization like the Telluride Foundation would likely be expanding its business activities to sponsor such a global event.

Finally, the factor that may deliver the knockout blow to the Telluride Foundation’s trademark infringement claim would be the relative weakness of the Foundation’s mark. A mark that is often used by other parties is a weak mark.¹³⁵ The likelihood of confusion between any two specific uses of a weak mark will be less, if there are already similar marks in use.¹³⁶ The idea of people holding hands to promote the ideal of

123 OLYMPIC CHARTER, *supra* note 111, at 25.

124 San Francisco Arts & Athletics v. United States Olympic Comm., 483 U.S. 522, 537 (1987).

125 See, e.g., *Federation Internationale de Football Association (FIFA) v. World Anti-Doping Agency (WADA)*, CAS 2005/C1976 & 986.

126 Gasparini, *supra* note 92, at 198.

127 *Id.* at 204.

128 15 U.S.C. § 1114(i)(1) (2011).

129 MITTEN, *supra* note 1, at 1029.

130 *Malletier v. Burlington Coat Factory Warehouse Corp.*, 426 F.3d 532, 538 (2nd Cir. 2005).

131 *Universal Money Ctrs. v. AT&T*, 22 F.3d 1527, 1532 (10th Cir. 1994).

132 *Id.*

133 See generally Telluride Foundation, *supra* note 13.

134 See generally Rio Organizing Committee, *supra* note 2.

135 *Universal Money Ctrs.*, 22 F.3d at 1532.

136 *Id.* at 1533.

togetherness is not a novel idea. In fact the idea has been used many times before as a logo for other organizations and events.¹³⁷ Therefore, because the Telluride Foundation's mark is already weak to begin with, the minor variations between the two marks may reduce the likelihood of confusion to zero.

For these reasons, the Telluride Foundation would not likely have a successful claim against the Rio OCOG for trademark infringement under the Lanham Act.

2. Brazil Trademark Law

The next source of possible relief for the Telluride Foundation would be under Brazil trademark law. As mentioned above, Brazil's Industrial Property Law No. 9.279 protects trademarks registered in Brazil from being reproduced or imitated to identify similar products or services.¹³⁸ However, the problem for the Telluride Foundation would be that the Foundation's logo is not registered in Brazil. Thus, Brazil trademark law alone will not protect the Telluride Foundation mark, which is registered outside of Brazil. Therefore, in order for the Telluride Foundation mark to receive trademark protection in Brazil, it must be covered by an international agreement, such as the Paris Convention or the TRIPS Agreement.

3. International Trademark Law

Under both the Paris Convention and the TRIPS Agreement, Brazil would be required to give the same industrial protections to U.S. citizens as it gives to its own citizens because both countries are parties to both agreements.¹³⁹ Thus, the Telluride Foundation would be protected from having its logo used in Brazil in a manner that may induce confusion. However, as stated above, there is little likelihood of confusion between the two marks. Furthermore, the likelihood of confusion would be even less in Brazil because the Telluride Foundation logo is not well known outside of the U.S. As a result, the Foundation's logo would not be entitled to trademark protection under the Paris Convention or the TRIPS Agreement.

C. Special Olympic Considerations

The Telluride Foundation's best chance for a remedy may be under the Olympic Charter. First, as mentioned above, the IOC must approve all Olympic logos before they can be used by an OCOG as the logo for an Olympic Games. Moreover, the IOC will carefully scrutinize a logo to make sure that it complies with the Olympic Charter, specifically that it does not conflict with any other marks already in use anywhere in the world. Thus, if the Telluride Foundation could prove that the Rio Games logo is infringing on the Foundation's logo, the Foundation would have a strong case for the IOC to refuse to approve the Rio Games logo. However, it has already been shown that the Rio Games logo does not infringe on the Telluride Foundation's mark. Moreover, the IOC has already approved the Rio Games logo.¹⁴⁰ Thus, this provision of the Olympic Charter will not help the Telluride Foundation.

Another possible provision that could provide relief to the Telluride Foundation could be that an Olympic emblem must be able to be registered for trademark protection by an OCOG in its country whenever and wherever possible.¹⁴¹ As mentioned above, a country cannot register a mark that infringes on a mark that is already in use. Thus, a logo for an Olympic Games cannot infringe on another's mark because that mark will not be capable of complying with Olympic rules. Again, it

has already been shown that the Rio Games logo does not infringe on the Telluride Foundation logo; therefore, this line of argument will also not help the Telluride Foundation. However, the Foundation may still have a remedy under another Olympic Charter provision.

The provision that may prove to be the saving grace for the Telluride Foundation would be the provision that requires that an Olympic emblem must not detract from the dignity of the Olympic Movement.¹⁴² Among the goals of the Olympic Movement are building a better and more peaceful world, and creating international goodwill.¹⁴³ A logo that creates conflict between individuals from different countries (i.e., allegations of trademark infringement and copying another's logo) does not build a more peaceful world or create international goodwill. Therefore, the IOC may conclude that a mark that is alleged to have been copied from another's mark detracts from the dignity of the Olympic Movement, whether the allegations are true or not. Consequently, if the Telluride Foundation were to present its argument to the IOC, the IOC may choose to withdraw its approval of the Rio Games logo and force the Rio OCOG to change the logo.

In conclusion, these reasons may explain why the Telluride Foundation has held off on filing a trademark infringement suit against the Rio OCOG. Such a lawsuit would likely be futile. However, if the Telluride Foundation thought it was being harmed by the use of the Rio Games logo and wanted some sort of relief, the Olympic Charter could at least provide some hope. Under the Charter the Telluride Foundation might at least be able to stop the Rio OCOG from using its logo. The Olympic Charter does not, however, allow for a trademark owner to recover any money damages.¹⁴⁴

VII. What U.S. Companies can do in the Future to Protect Themselves

The analysis of this controversy should serve as a cautionary tale to remind companies to do everything they can do to protect themselves from trademark infringement, because if they do not, the legal remedies available to them may not be successful.

One possible step that companies could take to protect their interests in their trademarks is to register their marks in other countries or internationally. However, even this may not be a valid solution in many cases. As illustrated by Brazil's industrial property law, a registration of a mark will be forfeited if a certain amount of time passes without the mark being used within that country.¹⁴⁵ Thus, unless a trademark is going to be used in a certain territory, registering it in that territory will still not provide adequate protection to a U.S. company.

Another step that companies should take to protect their trademarks is to carefully monitor whether there are potentially infringing marks being used and seek out legal advice if any marks appear to be infringing. Because Olympic marks are used in commerce like any other mark, Olympic marks are subject to the same trademark laws as regular marks. Thus, if an infringing mark is discovered, a company could get legal relief. It will be important for the company to be diligent in its monitoring though, because if a company unreasonably delays in objecting to an infringing use of its mark, that company may be barred from bringing any claim at all.¹⁴⁶ As shown by the analysis of the Rio Games logo, even careful monitoring, however, cannot prevent marks from being used that appear to be minimally infringing.

In the end, IOC regulation of Olympic marks may be the best protection against minimal infringement. The IOC already carefully regulates the use of Olympic marks, including scrutinizing new marks to make sure that they do not infringe on existing marks. Thus, it could be argued that everything that can be done to protect existing companies is being done. However, despite all of the precautions taken by the IOC, controversies over Olympic trademarks and logos continue to arise—controversies such as the Rio Games logo, the Beijing Games logo, and the Sochi Games mascot. If this tradition of Olympic logo controversies continues, the IOC may be forced to increase its regulation of Olympic marks to protect the intellectual property interests of others. After all, the IOC is charged with the obligation of ensuring fair play, and as such should prevent an OCOG from committing a foul like using another's mark as its own.

137 See e.g., Paul Gonzalez, *2016 Olympic Games Logo: Creativity Burning on Damp Fuel*, Jan. 19, 2011, <http://www.fuelyourcreativity.com/2016-olympic-games-logo-creativity-burning-on-damp-fuel/>.

138 See generally Law No. 9.279, May 14, 1996, C.P.I. (Brazil), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=125397.

139 See TRIPS Agreement, *supra* note 73, at art. 1.

140 *Rio Denies Olympic Logo Plagiarism*, *supra* note 5.

141 OLYMPIC CHARTER, *supra* note III, at 25.

142 *Id.* at 26.

143 *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522, 537 (1987).

144 See generally OLYMPIC CHARTER, *supra* note III.

145 Law No. 9.279, May 14, 1996, C.P.I. (Brazil), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=125397.

146 See *Elvis Presley Enters. v. Capece*, 141 F.3d 188, 205 (5th Cir. 1998).

IX. Conclusion

Olympic marks, like all other marks used in commerce, are subject to trademark laws. As such, those marks cannot infringe on others' marks. In determining whether an Olympic mark actually infringes on another's mark, it will be important to consider the laws of the country where the infringement is alleged. It will also be important to consider whether the courts of that country can exercise jurisdiction over the alleged infringer. Finally, it may be important to consider the specific rules governing Olympic marks. In the end, each case will require an intensive analysis of the particular set of facts. If a plaintiff is successful in showing that an Olympic Organizing Committee copied the plaintiff's logo, that Organizing Committee could face serious legal ramifications for trademark infringement.

In the case of the controversy over the 2016 Rio Olympic Games logo, there was not sufficient similarity between the Rio Games logo and the Telluride Foundation logo to warrant legal intervention. This may explain why the Telluride Foundation never initiated any legal action against the Rio OCOG. However, the similarities between the two logos may still be too close for comfort. Inevitably, when new marks are unveiled, there will be similarities to existing marks. Nonetheless, a logo that is chosen to represent the biggest sporting event on the planet should at least be original and not imitate major elements of existing marks. If such originality could be achieved, the tradition of Olympic logo controversies could once and for all be put to an end.

The International Sports Law Journal

2014 FIFA World Cup and 2016 Olympics in Brazil - A Real blessing for the Brazilian people?

By Gabriel do Valle Rocha e Silva

"We do not know when the construction begins, who is going to be actually affected, to where the families are being removed. We want to have a say on our future. We support the staging of the World Cup, but with respect for the rights of the people." (Mr. José Renato Maia, dweller of the 'Comunidade do Cristal', in Porto Alegre, forcibly removed due to construction projects for the FIFA 2014 World Cup venues¹)

Introduction

One might say that Brazil is simply too big to ignore. It is the fifth-largest country in the world with a population of around 190 million people, Latin America's largest and most influential market and has been recently ranked by a leading economic research group² as the 6th largest economy in the world (overtaking the United Kingdom). However, if the world will closely lay eyes on Brazil during the following years this is certainly not because of its size or economy, but rather due to its position as the host of the major sports events: The 2014 FIFA World Cup and the 2016 Summer Olympic Games in Rio de Janeiro.

Known for its music, beautiful cities and friendly people, Brazil has also proved to be a sportive nation. It enjoys a good record on sports in general, such as volleyball³, tennis⁴, motor racing⁵, martial arts⁶ and others⁷. But undoubtedly it is on football that Brazil's excellence has become a source of great national pride. Besides being the only nation to have participated in every FIFA World Cup and a five-time winner of the competition⁸, Brazil has also been a production line for prodigiously talented footballers for decades.

With such a background, one could easily assert that sports are a big thing in Brazil and the fact that the biggest sports events on Earth are tak-

ing place there is a blessing that must have been very much celebrated by its people. Unfortunately, however, this has not been the case so far.

No one can fight the fact that the Olympic Games represents a moment of athletic achievements, patriotism, world peace and collaboration which can bring emotional victories, world records and memories of a lifetime to all involved⁹. The same works to the World Cup which provides an unparalleled opportunity to promote the host country and highlight its people, culture, industry and tourism. Yet, it is also undeniable that the staging of the mega-events has proved to have permanent economic and social impacts on the host country which, sometimes, are able to surpass all the beauty of the games.

In the pursuit of sporting and entertainment excellence, the increasing in both scale and scope of these mega-events demands vast amounts of multiple scarce resources¹⁰ which sometimes the host is not ready, or its people not willing, to cope - despite of its commitments during the bidding process. As we shall see on the following pages, this is exactly what is going on in Brazil right now.

In striving to comply with all the organizational requirements and fearing a humiliating failure before the international community, Brazil is currently facing a situation where measures, some of a legally debat-

1 See article available at negrinha.wordpress.com/2011/02/12/copa-sim-despejo-nao/

2 The Centre for Economics and Business Research (CEBR) Report released on 28 December 2011. Available at <http://www.cebr.com/brazil-has-overtaken-the-uk%e2%80%99s-gdp/>

3 Volleyball is the second most popular sport in Brazil. The women's national team has eight titles of the FIVB World Grand Prix and won the gold medal at the 2008 Summer Olympics in Beijing. The men's national team currently hold the titles of the World League, World Grand Champions Cup, World Championship

and the World Cup, and won the gold medal at the 2004 Athens Olympic Games. The team currently ranks first on the FIVB World Rankings (www.fivb.org/EN/FIVB/index.asp)

4 Tennis was given a boost in the late 1990s with the success enjoyed by Gustavo Kuerten, who won sixteen international men's singles competitions, including three victories in the French Open, before retiring in 2008. (http://pt.wikipedia.org/wiki/Gustavo_Kuerten)

5 There have been a number of excellent Brazilian drivers, such as Nelson Piquet, world champion in 1981, 1983 and 1987,

and Ayrton Senna, world champion in 1988, 1990 and 1991. (pt.wikipedia.org/wiki/Anexo:Lista_de_campe%C3%B5es_da_F%C3%B3rmula_1)

6 Brazilians have a strong record in martial arts, with consistent success in jiu-jitsu and also judo in which, for example, Brazilians won ten medals in the international 'Grand Slam' competition in 2009. (<http://www.ijf.org/>)

7 Other sports in which Brazilians have distinguished themselves include rowing, sailing, swimming and gymnastics, while the country's extensive coastline and warm climate have encouraged ever-increasing participation in relatively new sports such

as surfing, windsurfing and hang-gliding

8 Brazil have won the World Cup more than any other country. Victories in 1958, 1962, 1970, 1994 and more recently in 2002. (www.fifa.com/worldcup/index.html)

9 LIU, Julie H. *Lighting the Torch of Human Rights: the Olympic Games as a Vehicle for Human Rights Reform*. Northwest Journal of International Human Rights, Vol 5, Issue 2, 2007.

10 STUART, Stephen A. & SCASSA, Teresa. *Legal Guarantees for Olympic Legacy*. ESLJ, Volume 9, Number 1 (see at http://go.warwick.ac.uk/eslj/issues/volumes9/number1/stuart_scassa)

able nature, are being taken under the pressure of the organizations responsible for the events, namely the International Olympic Committee (IOC) and the *Fédération Internationale de Football Association* (FIFA), which are disturbing the Brazilian's most valuable rights and even putting the country's sovereignty at stake.

As also witnessed in previous editions of the games¹¹, violations are being felt mainly by the most disadvantaged sectors of society which have been excessively affected by trends such as forced evictions, displacements, decreased availability of social housing, homelessness, dislocation from existing community and social networks, restriction of civil liberties and criminalization of homelessness and marginalized activities.

This scenario arouses questions as to how far an international sports organization can go in the pursuit of its economic interest, to what extent a sovereign - and democratic - country can commit itself to projects demanding so much of its economic¹² and legal resources and how devastating can be the impacts of the staging of these mega-events on a country's people. Simply saying that sports has been turned to business would certainly lack accuracy and carefulness. Thus, the present article aims to address this issue by evaluating Brazil's position as the host of the 2014 FIFA World Cup and the 2016 Olympic Games focusing specially on the interwoven relationship between the international organizations behind the games and their economic interests, the commitments made and legal measures taken by Brazil to guarantee the success of the events and the impact that the staging of the events can create on the Brazilian people and legislation.

To this end, first (1) we are going to demonstrate the role of FIFA and the IOC in the world of sports, focusing on their scope, aims and authority. Then (2) a reassessment of the bidding process cumulating to the awarding of the events to Brazil will be carried out, followed by (3) an analysis of the organizational requirements made by both institutions. Finally, (4) an overview of the arrangements and preparations currently being undertaken in Brazil for the games and their impact on the Brazilian people will be provided.

1. FIFA and IOC

The International Olympic Committee ("IOC") is an international, nongovernmental, non-profit organization headquartered in Lausanne, Switzerland, which was founded by the French educator Baron Pierre de Coubertin on June 23, 1894 to revive the Olympic Games of Ancient Greece.¹³

Since its inception, the IOC's primary responsibility is to coordinate and supervise the Olympic Movement, whose mission is to "build a peaceful and better world by educating youth through sport practiced in accordance with Olympism¹⁴ and its values"¹⁵. Any organization or institution, and the individual members thereof, which has agreed to be bound by the Charter is deemed to be part of the Movement.

The Olympic Charter ("Charter") defines the Movement's governing structure and creates its three main constituents: the IOC¹⁶, the International Federations ("IFs")¹⁷, and the National Olympic Committees ("NOCs")¹⁸. In addition, the Charter outlines the role of the Organizing Committee for the Games ("OCOG"), which is formed each time a new host city is selected and is charged with the responsibility of preparing for and carrying out its assigned Games. In summa-

ry, the general purpose of the IOC is to regulate domestic Olympic governing bodies to ensure compliance with the Charter and application of the Olympic rules, to determine qualification requirements for Olympic participation, to select sites for each Olympic Games and most importantly, to promote Olympic ideals.

As to the *Fédération Internationale de Football Association* ("FIFA"), the organization based in Zürich, Switzerland is responsible for overseeing football worldwide, including the six confederations representing each continent, and, of course, the World Cup event. The core values of FIFA are defined as authenticity, unity, performance and integrity. In 2005, the FIFA Congress introduced a new pillar to the institution's mission, summarized now as: "Develop the game, touch the world, and build a better future" Understanding football as an "integrated part of society"¹⁹, FIFA has also decided to play a socially responsible role by committing itself to making a major contribution to the achievement of the Millennium Development Goals.

2. World Cup and Olympic bidding process

As the FIFA World Cup and the Olympics are events that "cost millions of dollars to bid on, and range into the billions of dollars to stage"²⁰, the bidding process to host these international events is a key step for a further successful staging of the games and should be looked at carefully by all parties involved.

Olympics

Concerning the Olympics, the IOC's ultimate goal during the selection of the host city is to identify a city that is both capable of hosting the Games (economically, legally and infrastructurally speaking), and located in a country where the national government is amenable to the rules and Principles of the Charter²¹. This is done in a two-fold procedure.

In the first phase, local NOCs select applicant cities²² and submits the cities applications to the IOC working group. In their application, applicant cities must submit a short questionnaire with an overview of their planning project and letters of guarantee from their national government "by which said government undertakes and guarantees that the country and its public authorities will comply with and respect the Olympic Charter"²³. Once reached the IOC working group, a technical evaluation of the city's "potential to stage high level, international, multi-sports events and their potential to organize successfully the Olympic Games" is undertaken²⁴. If the city meets the working group's eleven criteria points²⁵, it is designated a "Candidate City."²⁶

In the second phase, the IOC Evaluation Commission reviews the Candidate City file, which addresses various issues - ranging from plans for the development and use of sporting and accommodation venues, to binding international legal obligations affecting the organization of the event. Amongst them, however, the city's financial guarantees are probably the ones which IOC pays a more particular attention. Further, the IOC Evaluation Commission performs a site visit to the city in question, with special attention to the proposed event venues²⁷. Following the evaluations, the Commission submits a written report for each Candidate City²⁸, which will be reviewed by the IOC Executive Board before establishing the final list of candidate cities²⁹. Finally, the IOC members vote to select the host city.

11 Annual UN Report on *adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, presented to the Human Rights Council, in Geneva. Available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-20.pdf>

12 Brazil expects to employ 10 billion euros from the public funds on construction sites for the World Cup in the 12 cities hosting the event: Fortaleza, Recife, Natal, Salvador, Manaus, Cuiabá, Rio de Janeiro, São Paulo, Curitiba, Belo Horizonte, Brasília and Porto Alegre. (www.portal2014.org.br/noticias/9357/GOVERNO+VAI+REVER+OBRAS+DA

+COPA+POR+CONTA+DE+ATRASOS.html)

13 See *supra* note 9

14 The Games are the public manifestation of Olympism, a notion defined by the IOC as being 'a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind'. (http://www.olympic.org/Documents/Olympic%20Charter/Charter_en_2010.pdf)

15 International Olympic Committee Olympic Charter, page 13, first paragraph, available at: http://www.olympic.org/Documents/Olympic%20Charter/Charter_en_2010.pdf

16 Olympic Charter, *supra* note 15, r. 2, pp. 14-15

17 *Ibid.*, rr. 26-27, pp. 57-58

18 *Ibid.*, r. 28, pp. 61-63

19 FIFA's mission at www.fifa.com/aboutfifa/organisation/mission.html

20 GAUTHIER, Ryan. *Improving the Bidding Process for International Sporting Events*. The international sports law journal, 2011, issue 1-2, page 3-14.

21 DAHILL, Elizabeth Hart. *Hosting the Bidding Process for International Adequate Housing in Olympic host cities*. In: Brooklyn Journal of International Law (2011), Vol. 36, Issue 03, pp. 1111-1151

22 Olympic Charter, *supra* note 15, Bye-law r. 34, sec. 1, pp. 72-73

23 *Ibid.*, r. 34, para. 3, p. 72.

24 *Ibid.*

25 The eleven criteria are: government support, legal issues, and public opinion; general infrastructure; sports venues; Olympic village; environmental conditions and impact; accommodation; transport concept; safety and security; experience from past sports events; finance; and overall project and legacy.

26 See *supra* note 24

27 *Ibid.*, Bye-law r. 34, sec. 2, paras. 2.2-2.3, pp. 73-74

28 *Ibid.*

29 *Ibid.*

30 GAUTHIER, Ryan. *Improving the Bidding Process for International Sporting*

The most recent selection made by the IOC was the election of Rio de Janeiro as the host city of the 2016 Olympic Games. Rio's election caught a lot of people by surprise since the city received the lowest technical evaluation score compared to both the other Candidate Cities (Madrid, Chicago, and Tokyo); and Doha, a city that did not even make it to the Candidate City stage.³⁰

The actual reasons why Rio was elected in despite of its lower scores are not very clear, but most people rely on the fact that since the Olympics has never been hosted by a South American country and the IOC strives for universality in its selection of new host cities, Rio was the perfect choice. However, it must be stressed that although IOC's aspirations to spread the Olympics and its ideals as far as possible is laudable, these aspirations can be tempered by the realities of hosting a mega-event, which requires significant economic reserves and infrastructural investment.

World Cup

Unfortunately, the process undertaken by FIFA to select a host country is not very clearly laid out in FIFA governing documents, which do not seem to give much guidance on the bidding process³¹. However, taking the last bidding process leading to the selection of the host countries for 2018 (Russia) and 2022 (Qatar) World Cup as a model, we can say that the FIFA bidding process works basically like the following: At different stages of the candidature, applicant member associations must complete and submit to FIFA an expression of interest form, a bid registration form, a bidding agreement, a bid book, a hosting agreement and other documents. In view of the bid proposals received, FIFA conduct site visits and then let its Executive Committee to appoint the host country³².

As to the election of Brazil as the host of the 2014 World Cup, this was made on the basis of the rotation system formally implemented by FIFA in 2003. It was established that FIFA would rotate the hosting of the World Cup by Continental Confederation, accepting bids from the African Confederation for the 2010 World Cup, which counted with Egypt, Morocco and South Africa as bidders and was finally awarded to the latter, and to the South American Confederation for the 2014 World Cup, which was awarded to Brazil as its only bidder³³. In 2007, the rotation policy was ended.

Due to the lack of competing bids, the nature of the 2014 bid was particularly different as the bid Local Organizing Committee's strategy did not focus on beating opposing bids, but rather centered on successfully securing universal approval and support from all parties in Brazil.

3. Coping with FIFA and IOC requirements

The main purpose of the IOC's requirement for various legal guarantees from candidate cities bidding to host a Games edition is threefold: firstly as a metric for evaluating each city's candidature; secondly to protect the IOC and the OCOG by ensuring that the Games commence on schedule and proceed in accordance with the successful bid proposal and the established principles of Olympism; and thirdly to protect the IOC's extremely valuable brand equity, which mostly resides in the rights to various elements of Olympic intellectual property (e.g. the 'five rings' logo and other such indicia).³⁴

Legal guarantees protect the substantial revenues generated by licensing those intellectual property rights and also protect the significant financial investments made by the IOC's Olympic Partner (TOP) sponsorship program and other commercial partners associated with the staging of the Games. The requirement for such guarantees and the sponsorship structure enjoined by the IOC have been mirrored by the organizers of other sporting mega events, such as the FIFA World Cup³⁵.

In order to give effect to such guarantees, on October 1ST 2009 the Brazilian Federal Government enacted Law No. 12,035 (the "Olympic Act")³⁶, which provides for special rules applicable to the 2016 Olympics and Paralympics in Rio. In addition, a bill for the General Cup Law (PL No. 2330/2011)³⁷, which sets forth measures relating to the 2013 Confederations Cup and the 2014 World Cup was sent to the Brazilian National Congress in 2011. Although coping with FIFA and IOC requirements, these acts also create a framework for exceptions, with legal and administrative changes that are out of the ordinary and frontally con-

front national interests. The Government is exerting great pressure to pass the bill for the General Cup Law in the Senate within this month of March, 2012. We analyze below the principal provisions and controversies of both acts.

Protection and exploitation of commercial rights

Sport is now big business accounting for more than 3% of world trade.³⁸ Licensing and merchandising rights in relation to major sporting events, such as the FIFA World Cup and the Olympic Games, are 'hot properties', commanding high returns for the rights owners (licensors) and concessionaires (licensees) alike.

Accordingly, only official partners are able to use official symbols as part of their marketing campaigns and to associate themselves directly with the Olympics or World Cup events. The maximization of the commercial value of being associated officially with the events represents a key source of income to the official sponsors, which in turn have to pay a substantial premium to the organizing committees for the ability to do so.

Therefore, anti-ambush marketing strategies are essential in order to protect the commercial value of a sponsor being associated exclusively with the events from dilution by those who seek to be associated with them for free. Ambush marketing is understood as an often highly sophisticated marketing strategy³⁹ designed to undermine the exclusive arrangements that have been entered into between the primary rights holder (event organizer) and its official sponsors.

According to the guarantees provided during the bidding process, hosts have to demonstrate that all necessary legal measures have been, or will be, taken to protect, in the name of the IOC or FIFA, all registered official symbols, emblems, logos and marks related to the events. However, considering all the Brazilian legislation already protecting intellectual rights related to the use of official symbols and expressions in general⁴⁰, it would be fair to assume that the adoption of the new provisions required by FIFA and the IOC to protect the 2014 World Cup and 2016 Olympics, respectively, is not necessary. Notwithstanding, in order to cope with the FIFA and IOC requirements and comply with the hosting contracts, the Brazilian government enacted the Olympic Act and are about to approve the bill for the General Cup Law.

Article 6, II of the Olympic Act defines the symbols of the 2016 Games as "all graphically distinctive signs, flags, slogans, emblems used by the International Olympic Committee" ("IOC"), as well as "the expressions Olympic Games, Paralympic Games, 2016 Rio Olympic Games, 2016 Rio Paralympic Games, XXXI Olympic Games, Rio 2016, Rio Olympics, 2016 Rio Olympics, Rio Paralympics, 2016 Rio Paralympics

³⁰ *Events*. The international sports law journal, 2011, issue 1-2, page 3-14.

³¹ *Ibid.*,

³² Bidding process for the 2018 FIFA World Cup and the 2022 FIFA World Cup, Zurich, 2009. (<http://www.fifa.com/mm/document/affederation/administration/99/74/80/20182022invitationtobidcirculare.pdf>)

³³ See *supra* note 30

³⁴ See *supra* note 10

³⁵ *Ibid.*,

³⁶ Available at http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/lei/l12035.htm

³⁷ Available at <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=520245>

³⁸ BLACKSHAW, Ian. *Protecting Major Sporting Events with Particular Reference to the 2012 London Olympic Games*. Entertainment and Sports Law Journal, ISSN 1748-944X, January 2010, <http://go.warwick.ac.uk/eslj/issues/volume7/number2/blackshaw/>

³⁹ For example, "at the time of the Barcelona Olympics in 1992, American Express ran a campaign based around the

slogan, 'You don't need a visa to go to Spain' in opposition to Visa's position as an official Olympic Partner", on JAMES, Mark & OSBORN, Guy. *London 2012 and the Impact of the UK's Olympic and Paralympic Legislation: Protecting Commerce or Preserving Culture?*. The Modern Law Review, Volume 74, Issue 3, pages 410-429, May 2011.

⁴⁰ For instance, the "Pelé Act" (Law n. 9615 of 1998) grants to the Brazilian Olympic Committee ("BOC") the exclusive right to use flags, slogans, anthems, and olympic and paralympic symbols, as well as the expressions Olympic Games, Olympics, Paralympic Games and Paralympics. The Pelé Act prohibits the registration and use, for any purpose, of components of the Olympic symbol (the five interlaced rings) or signs that contains that symbol, as well as the Olympic anthem and slogans, except if previously and expressly authorized by the BOC. Also, Brazil has ratified (in 1984) the Nairobi Treaty on the Olympic Symbol Protection of 1981 under which the IOC has been recognized exclusive rights to use and register the Olympic symbol.

and any other abbreviation and variation thereof, as well as such related expressions that may be created in connection therewith, in any language, including those for domain names in the internet”.

Article 7 of the Olympic Act prohibits the use of any of the symbols related to the 2016 Rio Olympic Games, whether for commercial purposes or otherwise, except if previously and expressly authorized by the OCOG or the IOC. Article 8 of the Olympic Act also prohibits the use of terms and expressions similar to those officially adopted in the Games, which may cause any undue association of products, services, companies, transactions or events with the Games or with the Olympic Games in general.

As to the World Cup, the General Cup Law aims to create a special procedure within the National Institute of Intellectual Property (INPI) for the registration of trademarks considered to be “official symbols” that are owned by FIFA - thus guaranteeing FIFA’s exclusivity over their use and taking the decision-making power away from INPI with respect to the nature of trademark registration. In the bill’s text, there is no restriction whatsoever on the meaning of the term “official symbols”; therefore, such term may include anything that FIFA deems to be so.

Obviously, if anyone could use the official symbols for free, or otherwise create an association with the events, sponsors and merchandise licensees would not want to invest in them. However, considering all the aforementioned, it would be reasonable to assert that the official symbols are being overprotected in detriment to Brazilian national interests and legislation.

Commercial restrictions and points of entry

The General Cup Law prohibits the sale or display of any merchandise at the “Official Competition Venues, in their immediate vicinities or in their main points of entry” (art. 11), without FIFA’s express permission. Such a measure will strongly impact local commerce, and street peddlers will be penalized if they work in the so-called “areas of exclusivity” (exclusionary zones) which will be demarcated by the municipalities, “in light of the requirements of FIFA or of third parties indicated thereby.” This measure allows for an monopoly, over the exercise of commercial activities, by FIFA and the companies associated therewith.

Ticket sales and pricing

Violating the Code of Consumer Defense, the terms of the General Cup Law give FIFA ample powers to set ticket prices and to determine the rules surrounding their purchase, sale, alteration and cancellation. FIFA has also put pressure on the Brazilian government to suspend the policy of allowing students and the elderly to purchase tickets at half-price⁴¹, thus negating a Brazilian social advancement consolidated on the Elderly Act⁴² and, on what concerns the students, on state laws.⁴³

Selling of alcoholic beverages

FIFA demands the selling of alcoholic beverages in stadiums due to its sponsorship agreement with Budweiser (one of FIFA’s biggest sponsors). Alcohol is prohibited in Brazilian stadiums due to concerns over violence and illegal sales to minors⁴⁴.

41 One of the most contentious issue concerning the General Cup Law involves half price tickets for students and senior citizens; FIFA calculates that these discounts would amount to a \$100 million loss for the organization. See: blogs.estadao.com.br/robson-morelli/a-fifa-nao-vai-ceder-a-meia-entrada-na-copa-de-2014/

42 Article 23, Federal Law n. 10.741 of 2003.

43 State of São Paulo Decree n. 35.066 of 03 September 1992.

44 Article 13-A of the Supporter Act (Law n. 10.671 of 2003)

45 Available at www.planalto.gov.br/ccivil_03/_ato2007-2010/2010/Lei/L12350.htm

46 Available at www.planalto.gov.br/

ccivil_03/_Ato2011-2014/2011/Lei/L12462.htm

47 See *supra* note 11

48 A human rights concern most directly related to the 2008 Olympic Games was the forced eviction of the floating population, homeowners and tenants fueled by urban development in preparation for the Games. Beijing has also been accused on past occasions of clearing the streets of the homeless during showcase international events. See *supra* note 57.

49 Available at www.cidades.gov.br/images/stories/ArquivosSNH/ArquivosPDF/DHB_2008_Final_2011.pdf.

50 For example, on the construction of the “Via Parque” avenue in Sao Paulo, which will link the Guarulhos International

New crimes and civil sanctions

The proposed legislation also establishes crimes of an exceptional nature. Such crimes include the following: “Undue Utilization of Official Symbols,” “Ambush Marketing by Association” and “Ambush Marketing by Intrusion.” Accompanying these new crimes are sentences involving detention, fines and a collection of civil sanctions related to the sale of publicity products and activities. Such devices penalize even the bars that intend to televise the games, thus affecting the popular commerce and fraternization that is so representative of Brazilian sports culture.

Responsibility of the Federal Government

the General Cup Law seeks to have the Federal Government assume responsibility for “any or all harms resulting from or that have arisen as a result of any security incident or accident relating to the Events” caused to FIFA. By the terms of the proposed law, Brazil would become a guarantor of FIFA in its private business dealings.

Other provisions

The General Cup Law, if passed, will not be the first law that attempts to counteract Brazilian legal order. Other examples include Law No. 12.350/2010⁴⁵, which exempts products and services related to the games from federal taxes, and Law No. 12.462/2011⁴⁶, which, in order to undermine the general Brazilian bidding law, established a Differentiated Contracting Regime (RDC) for the construction projects of the 2013 Confederations Cup, the 2014 World Cup and the 2016 Olympic and Paralympic Games.

4. Impact on Brazilians

Hosting Olympic and football events has positive implications for the availability of sports facilities for the local population once the event concludes. A range of stadiums, training centers, sports fields and other amenities are constructed during this period to respond to the demands of the events. However, while analysis of the impact of these events usually focuses on the economic benefits for the host country, less attention goes into evaluating the effect on the lives of the residents, especially the most disadvantaged sectors of society (e.g. low-income populations, ethnic minorities, migrants, the elderly, persons with disabilities, and marginalized groups).⁴⁷

Past experiences⁴⁸ have shown that such redevelopment projects often result in extensive violation of rights such as housing, labor and environmental protection. Allegations of mass forced evictions and displacement for infrastructural development and city renewal, reduced affordability of housing, sweeping operations against the homeless, criminalization and discrimination of marginalized groups, excessive working hours and poor wages to workers involved in the projects and negative environmental impacts are frequent features in cities staging the events. As we shall see below, all these features became present during the ongoing preparation works for the hosting of the 2014 World Cup and 2016 Olympics in Brazil.

Housing rights

The growing of the Brazilian cities and the fragile housing policies in prac-

Airport to the New Corinthians Stadium (where the 2014 World Cup opening game will take place), more than 4.000 families were removed without prior consultation and without knowing where they were going to be transferred. Another 6.000 families are facing the same situation on that area. Article available at: <http://noticias.uol.com.br/cotidiano/2010/10/11/orca-dos-em-r-44-bilhoes-parques-lineares-removerao-mais-de-20-mil-familias-em-sp.jhtm>

51 Measures such as marks painted on the front door to notify residents of upcoming demolition, invasion of households without legal authorization, damages to properties, and assaults were verified during forced evictions. See National Articulation

of the People’s Cup Committee Report, available at: <http://comitepopularcopa-poa2014.blogspot.com/2011/12/comites-populares-da-copa-lancam-dossie.html>

52 In Rio de Janeiro, judicial notifications providing the absurd term of zero days to clear out areas at Vila Mariana and Metrô Mangueira were received by dwellers and local traders. Available at http://fotos.midiaticca.info/gallery/main.php?g2_view=core.DownloadItem&g2_it emId=2389&g2_GALLERYSID=932d1bd6916asb78c39fe474628a3c5c

53 According to local residents, a wall was built around the “Da Maré” slum in Rio de Janeiro to cover the ghetto from tourists and visitors coming to the 2014 World Cup and 2016 Olympic Games.

tice during the 20th century resulted in a deficit of 5.5 million of units and in the inadequacy of more than 15 million durable urban households, according to official estimates in 2008⁴⁹. As if the housing issue in Brazil were not severe enough, the hosting of the 2014 World Cup in 12 cities and of the 2016 Olympics in Rio adds a new element: massive urban projects with substantial economic, social and environmental impacts.

Due to the heightened demand for space to construct sports venues, accommodation and other facilities, displacement and forced evictions are common features of preparations for mega-events. Redevelopment projects often require the demolition of existing dwellings and the opening of space for new construction.

However, we can observe that, in most cases, alternatives to evictions are not sufficiently explored, displacement is not accompanied by prior consultation with the affected communities, and adequate compensation or alternative housing is not provided to victims⁵⁰. Actually, in many occasions evictions were carried out in a context of violence, harassment and assaults against the inhabitants⁵¹. Time constraints were usually cited as the reason for disruptive and violent evictions and disregard for the rights of affected communities. It could be observed that even restrictions of rights and standards of due process are allowed, if considered necessary, to ensure the realization of the event⁵².

The importance given to the creation of a new international image for the cities, as an integral part of the preparations for the games, often implies the removal of signs of poverty and underdevelopment through re-urbanization projects that prioritize city beautification over the needs of local residents⁵³. Moreover, specific legislation is introduced, criminalizing acts such as sleeping in the street and begging.

During the bidding process, authorities of candidate cities and countries expose their strategy for the organization of the event and make all sorts of commitments to the IOC or FIFA, the local population and the international community as a whole but housing concerns and commitments, however, are often neglected in the planning and bidding process, which can lead to violations of human rights.

Brazil must accept that the challenge of hosting the mega events includes reassessing its policies of the destruction and relocation of homes. Then, with the eyes of the world peering in during the events, it must correctly and adequately respond to this human rights abuse. One cannot accept that rights recognized in the Universal Declaration of Human Rights ("UDHR")⁵⁴ the International Covenant on Economic, Social and Cultural Rights ("ICESCR")⁵⁵, as well as in domestic law and policy, are often violated in the name of "the Games"⁵⁶. Not only the national government, but also FIFA and the IOC should be more proactive in preventing housing rights from being violated⁵⁷.

Labor rights

In 2007, when the official awarding of the 2014 World Cup to Brazil was made, all the cities that further would be chosen to host the games had at least one stadium capable to accommodate more than 35,000 people. However, due to FIFA requirements, virtually all stadia for the World Cup will be redeveloped, generating a huge demand for works to be concluded in a few years. FIFA determined that all the work must have been started on the 31ST of January 2010, at the latest, and concluded

before the 31ST of December 2012, on time to the staging of the 2013 Confederation Cup.

Throughout the whole process of elaboration of projects and implementation of the works, FIFA put a lot of pressure on Brazil to keep the schedule. Several times, at different occasions, FIFA general secretary Jerome Valcke made pronouncements alerting to delays in works and requiring from Brazil a faster pace on the preparations for the World Cup.⁵⁸

Since before being officially selected as host country, pessimists were of the opinion that Brazil would not be capable to conform to the FIFA and IOC infrastructural requirements on time for the games. Actually, it was created, specially by the media, a buzz around a possible vexatious failure of the World Cup in Brazil (or that FIFA could, as last resort, transfer the event to another country) that disturbed, and still does, all the works in preparation for the events in 2014 and 2016.

Such pressure opened room for legal abuses, irregularities in the licensing process and inconsistencies and incompleteness on projects for the construction of new venues. The combination between the magnitude of the work and tight schedules to accomplish the projects resulted in poor working conditions and over-exploitation of workers⁵⁹, in despite of the million-dollar figures estimate for the works.

In a short time, as one would expect, mobilizations, work stoppages and strikes began to take place at work sites for the arenas and other infrastructural projects related to the events. Until November 2011 it was recorded at least 10 work stoppages and strikes in 6 of the 12 stadia that will be used during the World Cup (Belo Horizonte, Brasilia, Cuiaba, Fortaleza, Recife e Rio de Janeiro). In all the mobilizations, the list of demands included at least some of the following: salary increase, better work conditions (especially concerning security, health and nutrition), increase on overtime payment, end of the accumulation of tasks and inhumanly long working hours, as well as granting of benefits, such as health insurance, increase in the value of the basic food hamper and ways of transport.

5. Conclusion

Cities and countries bid on the right to host sport mega-events with the expectation that tourists, money, and prestige will follow. However, as shown above, there are a lot more to consider before accepting the task to host the events.

Although staging the Olympics and FIFA World Cup events is a risky undertaking, we can observe that such risk is not proportionally shared with the international organizations behind these events. In fact, FIFA and IOC award them to a host country with little risk and much benefit to themselves.

Once the decision to conduct a bid has been made, governments do not follow risk evaluation and management procedures, evidenced by a wholesale acceptance of ballooning budgets, reduced time for construction of venues and significant changes on legislation. We can see that once the decision to bid is made, government focus crystallizes on the on-time delivery of the events and the ways to get them done and the post-games phase is either conveniently overlooked or deliberately ignored.

Available at: www.redesdamare.org.br/noticias/pesquisa-revela-que-moradores-da-mare-acham-que-muro-foi-construido-para-%E2%80%99cesconder-favela%E2%80%99D/

⁵⁴ Art. 25(1) of the Universal Declaration of Human Rights, U.N. Doc. A/RES/217(III) (Dec. 10, 1948)

⁵⁵ Forced evictions are prima facie incompatible with the requirements of the ICESCR and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law. The obligation of States to refrain from forced evictions also applies in the context of mega-events. See International Covenant on Economic, Social and Cultural Rights, G.A. Res.

2200A (XXI), 21 U.N.GAOR Supp. (No. 16), p. 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, art. 11.

⁵⁶ DAHILL, Elizabeth Hart. *Hosting the Games for all and by all: The right to adequate Housing in Olympic host cities*. In: Brooklyn Journal of International Law (2011), Vol. 36, Issue 03, pp. 1111-1151

⁵⁷ "Under the terms of the Charter, the IOC is bound to protect the integrity of the Games and to maintain its status as a symbol of the Movement and its Principles. In addition, upon accepting the U.N. Observer Status and adopting Agenda 21, the IOC expressly committed itself to actively assist the U.N. in protecting and promoting human rights.

Therefore, as long as the Games are the impetus for large-scale housing rights violations, the IOC is in breach of both its internal duties and external commitments". See *ibid.*, p. 1147.

⁵⁸ One of the most polemic declarations made by Valcke took place when the FIFA general secretary, in England for the International FA Board, claimed in a press conference that Brazil needs a "kick up the a** (backside)" to be ready in time for the 2014 World Cup. As a result, the Brazilian minister of Sport Aldo Rebelo sent an official notice to FIFA president Sepp Blatter requiring the removal of Valcke from the position as intermediary between FIFA and the Brazilian government during the works for the World

Cup. Available at: edition.cnn.com/2012/03/06/sport/brazil-fifa/index.html

⁵⁹ On the 1st of July 2010, workers reported excessive working hours and the cancellation of day-offs. Rogério Leite, member of the Trade Union of the Heavy Construction and Industrial Assembly Industries of the State of Pernambuco - Sintepav-PE, stated that "there are workers who work every single day from 7:00 to 22:00. This is not right because it violates the laws and good sense. Moreover, the wages are not enough". See news report "Insatisfação na arena da Copa" at http://jc3.uol.com.br/blogs/blogdotorcedor/canais/copa2014/2011/07/01/insatisfacao_na_arena_da_copa_105365.php;

No one doubts that with such passion to sports in general, and to football in particular, Brazil and its people greatly desire to materialize the long awaited dream to host a World Cup and an Olympic Games in their own soil. But certainly not at any price. After all, the events last one month each, but their impacts, if things remain as they stand today, will definitely stand for many years after the games leave town.

We are not concerned only with the works to receive tourists, we are trying to guarantee good conditions to workers and to Ceará before, during and after the World Cup. The tournament goes and we from the class that struggles every day will stay. Thus, we must unite to not remain for us just the cleaning up of the mess after the party” - (Raimundo Nonato Gomes, President of Sintepav-CE Trade Union⁶⁰)

60 Article “Parts of the works at Castelão and Metrofor will stop this Monday”, pub-

lished on June 12, 2011 on “Ceará Agora” Newspaper. Available at:

<http://www.cearaagora.com.br/noticias/cidade/trechos-de-obras-no-castelao->

[e-metrofor-serao-paralisados-nesta-segunda-feira](http://www.cearaagora.com.br/noticias/cidade/trechos-de-obras-no-castelao-)



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The Nature of Broadcasting Rights in U.S. and Europe

By Andrea Cattaneo*

1. Introduction

One of the main utilities among those that can be obtained from the organization of a sport event is the right to commercially exploit it. The organizer is usually awarded with the opportunity to conclude several agreements for the sale of image rights, sponsoring licenses, marketing and broadcasting rights, referred to the manifestation itself. The latter in particular entitles the holder to economically exploit the images related to the event.

In the light of an Americanization of the European sport system, always addressed as a probable future, it is important to analyze the nature of broadcasting rights, as it is perceived within the U.S. system, and in the European system. It is in fact relevant to establish whether the differences existing between the two sport systems, one business oriented and the other one more faithful to its social and cultural role, are reflected on this legal matter. This article aims to provide an analysis of this topic, focusing on the U.S. and Europe. Where it is not possible to refer to the E.U., the author will provide examples of national systems.

Broadcasting rights have gained in importance in the field of sports, especially with the evolution of the technology used by the media: the progress of pay-tv system can be considered as one of the main keystones in this perspective.¹ The right to broadcast live important sports events is indeed one of the main factors for the success of a media platform, especially in the private sector, since sport is the most attractive product in the television market.²

The corollary of the previous assumption is the exponential increase in the commercial value of sports broadcasting rights:³ The consequences are the insurgence of problems and disputes at different stages, and an higher pressure at a political - legislative level to have specific regulation in this field. The main issues are the ones related to the nature of these rights, the identification of the person or the body entitled to exploit them, and the way they can be protected.

The U.S. legislator was the first to intervene in the field of sports broadcasting rights, in order to provide an express discipline of the system, with a regulation that dates back to the early 1960s.⁴ However, this law did not include any reference to the nature of broadcasting rights, leaving the topic to the academic doctrine and the jurisprudence.

It is relevant to notice that in the E.U. legal system the topic of the ownership of broadcasting rights is left to the national legislators. The issues related to the nature and ownership of broadcasting rights are not regulated under E.U. law,⁵ but they have to be decided according to the law of the Member States,⁶ and therefore we will take in consideration few national systems as examples, within a E.U. general framework.

We will hence try to examine the different solutions adopted or suggested in both continents, in order to ensure the event organizer adequate protection, so that the work, sacrifice and responsibility borne by the latter are effectively rewarded. It has to be noted, anyway, that even in most of the national legal systems there is no specific legislation on the nature of broadcasting rights, and therefore legal doctrine and case law have great importance.

The final and common goal is to provide a strong and complete protection to the rights holders, enforceable against a variety of different subjects. The implicit assumption is the identification of the event organizer with the legitimate holder of the exploitation rights arising from the event itself, mainly because of the economic activities carried out. The organizer should be the responsible for most of the organizational work and the one who bears the most risk.⁷ This definition is especially relevant for events like championships or tournaments in team sports, for which it could be difficult to identify a single entity organizing the whole manifestation.⁸ Depending on the perspective one wants to embrace, the ownership will be awarded to the club hosting the event, the championship governing body (if the competition as a whole is protected rather than a single game) or even the sport federation (if its activity is essential for the event).⁹

It is quite easy to realize that the choice over the ownership of exploitation rights has consequences on the type and on the level of protection granted to the right owner. For example, if one thinks that the organizer should be awarded with a right of property related to all the utilities arising from the event, he should be entitled to use all the means of defense related to the property right itself.

Moreover, the acknowledgement of the right's ownership to an individual rather than to another entity affects the commercialization of such rights. If the organizing body, which usually includes all the teams taking part in the event, is entitled to sell or anyway exploit those right in a collective way, many problems can arise from an antitrust perspective, because this kind of conduct can represent an unlawful restriction of the competition within the market. Finally, the protection established for broadcasting rights' holders has to be balanced with inviolable rights, which may be even included in the National Constitution. The right to receive information about a relevant sporting event can be claimed by every person interested, and the law must provide for a regulation that takes into consideration this inviolable right.¹⁰ The extent of this right, however, does not necessarily include the right to see the whole match, but can be limited to news or highlights.

Those are the main issues related to sports broadcasting rights addressed in this article.

2. Nature of Broadcasting Rights

In the analysis over the nature of broadcasting rights it is necessary to examine different theories, since the U.S. and the E.U. legal systems do not provide for a specific legislation on the topic. The courts that have considered the question have thus tried to apply existing disciplines.

In this perspective, the attempt to assimilate the sporting spectacle to a work protected by copyright has been made several times and in different circumstances: this theory seeks to protect the organizer of the event, as if this constitutes its intellectual creation. However, due to the difficulties encountered in the endeavor to assimilate a sporting event to an original intellectual creation, other doctrinal or jurisprudential theories have emerged. One of these identifies the nature of sports broadcasting rights through the application of the principles of commercial law. Sports clubs are undoubtedly commercial enterprises, because they support costs and make investments in order to obtain some revenues, and the production of a sporting event is the service they perform.¹¹ In this sense, therefore, the ability to leverage this event, mainly through the commercialization of broadcasting rights, could be related to the activity in question, as a right to enjoy the fruits of the company's labor.

Another theory, maybe the most effective one, refers to the power

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1 Harrison & Wood, *Broadcasting Law and Policy*, Cambridge, 2007.

2 Nicita - Ramello, *Exclusivity and media markets. The case of pay Tv in Europe*, in *International journal of the economics of business*, 2005.

3 The 2010 FIFA South Africa World Cup had a commercial value estimated of EUR 3,5 Billions, and it had generated an increasing of 2% of the turnovers in advertising at a global level (Sportsconomy.it).

4 Sports Broadcasting Act, Title 15 USC Chapter 32. It provides an Antitrust exemption to the four Major sports League, which are therefore allowed to sell broadcasting rights at a collective level.

5 See Article 345 TFEU (ex Art. 295 EC).

6 Halgreen, *European Sports Law - A comparative analysis of the European and American Models of Sport*, 2005.

7 I. Blackshaw, *TV rights and sport legal aspects*, TMC Asser Press, 2008.

8 Meanwhile in international one off events it is easier to identify a single organizing body.

9 See the German Supreme Court decision on the selling of UEFA broadcasting rights by the German Football Association (BGH, Beschluss v.II.12.97 - KVR 7.96).

10 In the EU this right is enforced by the Directive 89/552/CEE "Television without frontier" and its amendment. It establishes that every citizen has a right to see freely an event considered of major relevance within the state, and thus specifically included by the Member State in a list of "protected" event.

11 Since the *Walrave* Case, it is clear that E.U. law applies to sport, as long as it is considered an economic activity: if this premise is respected, those who carry out a commercial activity within this sector, essentially sport clubs, have to be recognized as economic enterprises.

that the organizer of the event can exercise by virtue of his entitlement to use the area in which the event itself takes place, because he is the owner of the stadium or the arena, or in any case he has it at disposal. Thanks to these domain powers, the organizer has the right to regulate and control the access of others, and therefore, their ability to exploit the event.¹² However, the organizer is allowed to claim this kind of protection only when he is able to manage and physically limit the access to the said area, when the event does not take place in a public space, but rather in a structure closed to the public. When the organizer wants to control the access of the spectators, he sells tickets, thus establishing a contractual relationship with the buyer, who commits to behave in compliance with the conditions set.

If the protection is limited to the activities of the other contracting party, it will not cover conducts carried out by a third person: only the counterpart is obliged to honor the agreement of the contract and therefore can be considered liable in case of breach. The contractual model would anyway allow the organizer to commercialize the exploitation's rights of these events, namely the exclusive right to broadcast the competition, through the stipulation of formal agreements with the companies interested.

Finally, another theory uses the same principles adopted by the rules of unfair competition. The right holder is protected against the actions of people who want to exploit the rights related to the event, but are not entitled to do so. Even this theory has gaps: in fact it is applicable only in case of unauthorized conduct by a direct commercial competitor of the right holder.

Yet all the different theories have the same goal, to protect the right owner, and they are also linked. The decision of embracing one model over another affects the identification of the right holder, the extent of these rights, the way they can be exploited and the actions the owner is able to carry out to protect his investment.

2.1. Property Rights

The first theory that has to be taken into consideration labels the exploitation right of the utilities arising from the event as part of a property right, entitled to the organizer of the "show". Property provides the right to the enjoyment of things of economic value, whether exclusive or shared, present or prospective. Their rightful possession is called ownership, and it is necessarily supported by correlative rights to exclude others from enjoyment.¹³

In the U.S., the entity that organizes the event, who owns the stadium or the arena, pays a salary to athletes and technicians for their sporting performance and finally sets up the match, is entitled to enjoy a *property right*, according to the Misappropriation theory.¹⁴ In fact, no one should be allowed to deprive the organizer of the fruits of labor and expenses incurred with the specific purpose of obtaining some commercial benefits. Anyone who interferes in the management of the rights of

others, or takes advantage in an unauthorized manner to gain an economic return, carries out a conduct qualified as unfair competition. This is also to be seen in a utilitarian perspective, aimed to constitute a proper incentive for the future production of the service, for the benefit of the final consumer.¹⁵ The subject matter of the property right is the event itself, considered fully with its constitutive elements, and without any reference to the possible copyright on related images.¹⁶

The situation is quite similar in Europe. For example, in the U.K. the organizer of the sports event is entitled to a property right, following a perspective aimed to reward the entity for the economic effort borne. In particular, it is believed that the competition is organized by the different teams working all together to arrange it,¹⁷ and that they should thus be entitled to a collective property right.¹⁸

In Germany a property right arises from the right on the site where the competition is held. The broadcasting right, in this case, is represented by the transfer of a license which authorizes the media company to access the stadium. This theory, while it uses some reference to the property right, is in fact more related to the domain right on the site where the event is held.¹⁹

In Italy, the acknowledgment of a property right arising from a sporting event is connected with a business perspective. As an economic enterprise, the entity organizing the competition should be entitled to exercise all the exploitation rights related to the event.²⁰ Since it bears costs and risks of organizing an event, it has to be legitimate to claim an exclusive right on the goods, and this right has to be flanked with the one preventing third parties from the illegal use of the activity's results.

2.2. Copyright

The application of copyright rules to sporting events has always been disputed. It is in fact difficult to extend the protection of copyright to events that have no sign of originality, and are completely different from the pieces of work which are traditionally protected by copyright regulations.

The protection offered by copyright laws is probably the most complete among those that will be taken into consideration. Copyright is a complex of exclusive rights granted to the author or creator of an original work, including the right to make a copy out of it and distribute it for economic purposes.

The exclusive rights in question, however, are balanced against requirements of a public nature. The use of work by third parties is possible only with the permission of the owner, unless the exploitation is in the public interest. Usually, copyright is not intended to protect mere ideas, but only their expressions, and as long as they are fixed on a physical medium. The owner of such rights is able to exercise control over any copies produced, and he can leverage his work for a particular period of time, after which the same becomes public.²¹

In 1976, the U.S. Congress enacted the Copyright Act, aimed to offer protection to the author of an original piece of work, as long as it is fixed in any tangible medium, and its possibility to broadcast the images related to it, even if it is a sporting event. The originality of the work is the prerequisite for copyright protection.²²

With the Copyright Act, the U.S. Congress enlarged the protection originally provided within the system, in order to include new pieces of work, not considered before, representing the product of science and technological innovation. Therefore the law offers protection also to athletic events, and sporting competitions, as long as their pictures are fixed on specific tools, such as filming devices, or anyway a concrete medium of expression that can allow future reproduction.²³

U.S. Copyright law grants exclusive rights, but it must be guaranteed that users have access to the copyrighted work on a "fair use" basis,²⁴ as long as they do not exploit it for commercial reasons. Broadcasters are not capable of applying the fair use doctrine, because most of them are in business and stand to gain money from the use of copyright work.²⁵

However, the application of the Copyright Act can be troublesome. To be protected, a piece of work needs to have 3 elements: it has to be fixed in a concrete and tangible medium of expression, it has to be original, and it has to belong to the group of objects protected by the copyright. In the *Motorola* case,²⁶ the U.S. Court of Appeals stated that it was not possible to award a copyright protection to the event itself, con-

12 Wise - Meyer, *International sports law and business*, vol.3, 1997.

13 The Columbia Electronic Encyclopedia, 2007.

14 Wong, *Essentials of Sports law*, 2010.

15 Supreme Court, 1918 Case *Int'l News Serv. Vs Associated Press*. 248 U.S. 215, 39 S.Ct. 68.

16 Wise - Meyer, *International sports law and business*, vol.3, p.1715, 1997.

17 Since 1992 the Football Association Premier League, constituted by the clubs of the first division, sells collectively broadcasting rights, on behalf of the teams.

18 Slack, *The commercialisation of Sport*, 2004.

19 Troiano, *Il "Diritto" sullo spettacolo sportivo*, in *AIDA*, 2003.

20 Nivarra, *I "Diritti esclusivi di trasmissione di eventi"*, in *AIDA*, 2008.

21 The Columbia Electronic Encyclopaedia, 2007.

22 Halgreen, *European Sports Law - A com-*

parative analysis of the European and American Models of Sport, 2005.

23 Some think that through the enactment of this law it was officially guaranteed the existence of a property right, awarded to the organizer of the competition, namely the team that host the event. See Wong, *Essential of sports law*, 2010, p.710.

24 In the U.S. the *fair use* exemption allows to reproduce and retransmit the images of a sporting event without authorization. In this regard, it has to be evaluated the purpose and the character of the transmission, the nature of the copyrighted work, the amount of images used in relation to the work as a whole, and their effect on the potential market of copyrighted works. See Wise - Meyer, *International sports law and business*, 1997.

25 *New Boston Television, Inc. v. Entertainment Sports Programming Network, Inc.*, 1981 WL 1374 at 2 (D.Mass.1981), 215 U.S.P.Q. 755, 1981.

sidered merely as the set of interaction between athletes, coaches and public, and not referring e.g. to the schemes book or the video footage of the match.²⁷

It seems obvious then that a sporting event in itself does not include these features, since it is not possible to reproduce the exact development of a match, or even identify the creativity contribution provided by the author. These characteristics may only be present in events like gymnastic, diving or acrobatic games, where the athletes have to show some creativity, and be able to reproduce the original movements, that can be thus protected.²⁸

Briefly, it could be possible to award the copyright protection only for the footage of the event, since the existence of a fixed medium of expression is required. This perspective will in the end lead us to identify the creator of the work with the director or the producer of the footage, which is not part of the entity organizer.²⁹ In the same way as a documentary constitutes something different from the mere footage of a natural event, the filming of a football match would in fact represent an independent piece of work, autonomous from the event and its organizer, and it could deserve a protection on its own.

In E.U. there is no legislation on the topic, except for the Copyright Directive,³⁰ which is not directed to offer protection to organizer of sporting events, but rather to the broadcasters, as authors of original works.

Within the U.K. broadcasting rights are granted to the teams organizing the competition, as recognition for the economic effort borne by these enterprises. However, according to the law, those sports teams working to organize a competition are not entitled to enjoy the Copyright protection. A spectacle like a sporting event cannot be owned by someone, because it cannot be included among those kind of dramatic art protected by the *UK Copyright Designs and Patents Act*, due to its features of spontaneity and its lack of artistic direction of any kind.³¹ This has been recently confirmed by the CJ in the "Murphy Case".³² Sporting events cannot be regarded as intellectual creations³³ classifiable as works within the meaning of the Copyright Directive, either. The only copyright works are those elements belonging to the rights owner, in particular the opening video sequence, the Premier League anthem, pre-recorded films showing highlights of recent Premier League matches, or various graphics.³⁴

In Italy, instead, the application of the copyright law to sporting events has received more recognition. A specific law aimed to offer a regulation for sports broadcasting rights has been enacted only in 2008, and before that copyright law was used to regulate the subject.³⁵ In fact, without a complex of rules governing the topic, many authors associated the sports spectacle with theatre or artistic shows. This was particularly useful, because through the application of copyright the event organizer

was effectively protected towards any kind of unlawful interference: Article 78 *ter* and 79 of the Law n.633/1941 granted the author an exclusive right to exploit its work, enforceable against anyone.³⁶ However, as it has been said before, the application of copyright rules to a sporting event, whose features do not coincide with those of a work of art, is troublesome, especially if the protection has to be given to the event itself, and not only to its filming footage. To resolve the question, the Italian Legislator has included in the Legislative Decree n.9/2008, expressly enacted to regulate sports broadcasting rights, a definition of the nature of such rights. Article 28 states that sports broadcasting rights are rights *connected* to the copyright,³⁷ or rather they are a form of expression of the cultural and show business, subject to the Copyright law, if applicable.

However, it is believed that the inclusion of those cases into the copyright legal framework is more useful and instrumental for the protection of the right holder, than the expression of a development of the legal system.³⁸

2.3 Domain Right

As mentioned before, the most effective theory on the nature of broadcasting rights in sports refers to the powers that the organizer of the event should be able to exercise in the stadium in which the competition is held, due to the fact that he owns the site, or can control access to it. The organizer can therefore exploit the event as he prefers, simply by choosing which company or individual is entitled to access the stadium and obtain the filming footage of the competition.

This theory is deeply and intimately connected with the contractual protection, whose existence is essential for the domain right. In order to exercise the exploitation rights referred to the event, the organizer has to regulate the possible behavior of the audience, identifying the people entitled to access and the conducts that must be kept within the structure. The ideal way to achieve this result is the stipulation of a contract: when we look at a football match's ticket, we will find in the back a series of provisions. Through its purchasing, the member of the audience commits to comply with these rules, and otherwise he will be held liable by the right's owner.

In most of the cases these requirements are embodied in a ban from operating in competition with the rights owner, or its assignee. Non fulfillment of these provisions implies the liability of the defaulting party, if its conduct has exceeded the limits of fair use. Within the agreement, the two parties may choose to regulate every aspect of their relationship, and the more it is provided with details, the more the contract will be efficient.

However, this theory shows a big gap: the organizer is able to discipline the conducts of the audience only if the event is held in a private site, or anyway in a structure where it is possible to limit and control the public's access. Otherwise, the organizer cannot determine the conduct of the people that are not party of any contract. If the event is held in a public space, the organizer has no right to demand a certain behavior from the audience, whose conduct cannot be relevant in a contractual perspective.³⁹ Indeed, being a contractual protection, this is not enforceable outside the parties of the agreement in question.

As it has been said before, in the U.K. sports broadcasting rights are entitled to the teams that organize the competition, as a reward for the economic effort borne, but, in order to recognize these rights to the organizer, two elements have to be present. It is required that the organizer has the control on the site where the event takes place, and it has effectively limited access to it, through specific provision addressed to the audience.⁴⁰

In Germany broadcasting rights are connected with the sale of the license of entrance to the playground. The ownership does not depend on an actual purchasing of the right to shoot the images and exploit them, but rather on the corresponding renunciation by the organizer, whose sale of the entrance license legitimates the licensee's conduct. This theory can present some limits in those cases in which the organization is more complex, and it involves more than just one entity: in this regard, restricting the concept of organizer entitled to sell the license could be useful. Indeed, it is considered to be the organizer only that entity whose activity is fundamental within the making of the competition, exclud-

26 *National Basket Association vs Motorola Inc.* United States Court of Appeals, Second Circuit 105 F3d 841, 1997.

27 Andriychuk, *The legal nature of premium sports events: 'IP or not IP? that is the question'*, in *International Sports Law Journal*, 2008.

28 Weber, *Something in the way she moves*, in *Columbia - VLA Journal of Law*, 2000.

29 In fact the rights owner should be the Broadcasting Company which produces the show, and not the clubs that organize the event.

30 Directive 2001/29/EC.

31 Blackshaw, *The importance of IP rights in sport: global IP & patents meeting London 2008*, in *International Sports Law Journal*, 2008.

32 Judgment in Cases C-403/08 and C-429/08. *Football Association Premier League and Others v QC Leisure and Others Karen Murphy v Media Protection Services Ltd.*

33 Nonetheless the court stated that sporting events, as such, have a unique and original character which can make them worthy of protection comparable to the

protection of works, and that protection can be granted, where appropriate, by the various domestic legal orders, in compliance with European law.

34 See also the judgment given by The Royal Court of Justice, on the *Murphy Case*.

35 Legge 22 aprile 1941 n. 633 (Legge sul diritto d'autore).

36 A. Piscini, *Sul fronte sportivo qualcosa di nuovo (ma non troppo): spunti di riflessione e note preventive sulla riforma in materia di diritti di trasmissione e comunicazione degli eventi sportivi*, in *RDES*, 2007, I III, p. 27.

37 Sarti, *Gestione individuale e collettiva dei diritti su eventi sportivi in AIDA*, 2008.

38 Ferorelli, *L'evento sportivo come bene in senso giuridico alla luce del D. Lgs. n° 9/2008*, in *Diritto dell'informazione e dell'informatica*, 2009.

39 *WCVB-TV v. Boston Athletic Ass'n.*, 926 F.2d 42 (1st Cir. 1991).

40 Blackshaw, *The importance of IP rights in sport: global IP & patents meeting London 2008*, in *International Sports Law Journal*, 2008.



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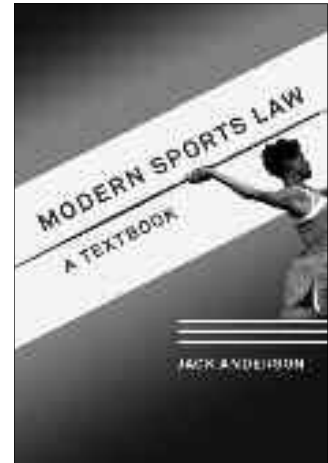


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ing e.g. those that provide only an external framework for the championship.⁴¹

The domain theory has been followed also in Italy: in this perspective, the exploitation right awarded to the organizer does not come from a specific provision of the Civil Code or from other laws, but from the correct use of the contractual freedom of two or more parties.⁴²

The already identified limits of this theory, referred to the contractual protection and the necessity of a structure close to the public, have to be seriously evaluated. In many instances the organizer is not allowed to choose the site where an event takes place (i.e. a cycling race), and he could be forced to have the competition held in a public area. If the domain theory would then be strictly applied, he should not be entitled to any exploitation rights descending from the event. This conclusion cannot be accepted and therefore the application of this theory has to be limited and controlled, because the entity that organizes the event deserves to be entitled to an exploitation right for the economic effort borne, regardless of the site where the manifestation takes place.

This is the main reason why it is common to refer to the competition law theory. In fact, even in the case in which the competitor is not part of a contract with the organizer, if its conduct is contrary to the principles of fair competition, it can be sanctioned.

Conclusion

To resume what we have tried to underline in this article, we should probably say that there is not a common and shared vision about the nature of broadcasting rights in sports, and neither about the forms of protection in force into the various legal systems. The only common ground is the final goal, the safeguard for the rights of the event's organizer. Its pursuit follows different ways.

While the most effective theory refers to the domain right of the organizer of the event, it is interesting to conclude our analysis with a final reference to the copyright law. As broadcasting rights are considered to be part of the image right complex, there have been attempts to extend the typical protection of image's rights to them. The copyright protection, at least as it is built in the systems we took in consideration, is not effective in regard of sporting events, but it is only good to protect the broadcaster, as original author of the show. Therefore it is possible to imagine that in the future the role of the producer or director of the game's shooting could be assumed by the league itself, or in any case by the organizer of the event. In this way, the association would definitely become the creator of the work subject to copyright, and thus

it would be entitled to be the right's owner, avoiding the separation between organizer of the event and producer of the filming.

Bibliography

- Andreff - Szymansky, *Handbook on the economics of sport*, 2006.
Andriychuk, *The legal nature of premium sports events: IP or not IP? that is the question*, in *International Sports Law Journal*, 2008.
Blackshaw, *TV rights and sport legal aspects*, TMC Asser Press, 2008.
Blackshaw, *The importance of IP rights in sport: global IP & patents meeting London 2008*, in *International Sports Law Journal*, 2008.
Bork, *The Antitrust Paradox: a policy at war with itself*, 1993.
Cave - Crandall, *Sports Rights and the Broadcast industry*, in *The Economic Journal*, 2001.
Cantamessa, *Lineamenti di diritto sportivo*, Giuffrè, 2008.
Coccia, *Diritto dello Sport*, 2008.
Colantuoni, *Diritto Sportivo*, Torino, 2009.
Diaz - Forti, *La disciplina antitrust nella nuova legislazione sui diritti di trasmissione: quid novi sub sole?*, in *Riv. Dir. ed economia dello sport*, 2008.
Ferorelli, *L'evento sportivo come bene in senso giuridico alla luce del D. Lgs. n° 9/2008*, in *Diritto dell'informazione e dell'informatica*, 2009.
Geey, *Collectivity v. Exclusivity: Conflict in the broadcasting Arena*, in *Entertainment Law Review*, 2004.
Halgreen, *European Sports Law - A comparative analysis of the European and American Models of Sport*, 2005.
Harrison & Wood, *Broadcasting Law and Policy*, Cambridge, 2007.
Heubeck, *The collective selling of Broadcasting Rights in Team Sports*, in *German working papers in law and economics*, 2004.
McCann, *The NBA and the Single Entity Defense: A Better Case?*, in *Journal of Sports and Entertainment Law*, Harvard Law School, 2010.
Nivarra, *I "Diritti esclusivi di trasmissione di eventi"*, in *AIDA*, 2008.
Nicita - Ramello, *Exclusivity and media markets. The case of pay Tv in Europe*, in *International journal of the economics of business*, 2005.
Piscini, *Sul fronte sportivo qualcosa di nuovo (ma non troppo): spunti di riflessione e note preventive sulla riforma in materia di diritti di trasmissione e comunicazione degli eventi sportivi*, in *RDES*, 2007, I III.
Sarti, *Gestione individuale e collettiva dei diritti su eventi sportivi* in *AIDA*, 2008.
Slack, *The commercialisation of Sport*, 2004.
Szymanski, *Collective selling of broadcast rights to sporting event*, 2002.
Troiano, *Il "Diritto" sullo spettacolo sportivo*, in *AIDA*, 2003.
Van Der Wolk, *Sports broadcasting: fair play from a EU competition perspective*, in *International Sports Law Journal*, 2006.
Weatherill, *The sale of rights to broadcasts sporting events under EC law*, in *The International Sports Law Journal*, 2006.
Weber, *Something in the way she moves*, in *Columbia - VLA Journal of Law*, 2000.
Wise - Meyer, *International sports law and business*, vol.3, 1997.
Wolohan, *Sports Broadcasting Rights in the United States*, in *International Sports Law Journal*, 2007.
Wong, *Essentials of Sports law*, 2010.

41 Case No IV/37.214 - DFB - Central marketing of TV and radio broadcasting rights for certain football competitions in Germany.

42 Ferorelli, *L'evento sportivo come bene in senso giuridico alla luce del D. Lgs. n° 9/2008*, in *Diritto dell'informazione e dell'informatica*, 2009.

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Football Club held Liable in Dutch Court for failing to take Measures against Racist Chanting

By Rosmarijn van Kleef LL.M

1. Introduction

The phenomenon of supporters' misconduct is usually connected to violent outbursts between football fans, such as in Heysel in 1985 and Nancy in 2005. A different kind of misconduct, namely acts of racist or discriminatory nature, has become more frequent in and around the football arenas. Some recent examples are the racial remarks from Luis Suarez towards a fellow football player after which he was banned for eight matches and fined £40'000 by the FA and the monkey chants expressed by Bulgarian supporters directed at England players during the Euro 2012 qualifier match between England and Bulgaria in Sofia. The Bulgarian Football Union was fined €40'000 by UEFA for its fans' abuse.¹ Usually these affairs are researched and dealt with by the respective associations, such as FIFA, UEFA or the national governing bodies. However, this practice does not exclude individuals or organisations from bringing a case before the civil judge.

In August of last year, it were anti-Semitic slogans which were the subject of a summary proceedings court case brought by the *Stichting Bestrijding Antisemitisme* (hereafter: BAN), a foundation fighting anti-Semitism, against the Dutch top league football club ADO Den Haag. On the 20th of March 2011, the club from The Hague won a match against A.F.C. Ajax from Amsterdam. During the confrontation ADO supporters frequently chanted anti-Semitic slogans such as "*Kutkankerjoden*", "*Hamas, Hamas, alle joden aan het gas*" and "*Vriend van de joden*".² The Dutch judge held ADO liable for not having reacted to the anti-Semitic chanting of its supporters and decided that it is ADO's responsibility to prevent and react to similar outbursts at future games. This paper covers and comments on this decision, in which for the first time a Dutch court had to address the issue of supporters' misconduct.

2. Case Review

The Facts

According to its statutes, *Stichting BAN* was established to combat anti-Semitism in the broadest sense, which includes conducting legal proceedings, and to perform all further actions which relate or may be conducive to this purpose. Since March 2010, BAN has been in contact with the KNVB (the Dutch football association) and various football clubs to address the issue. However, no attempts were made to fight the chants and offensive banners.³ In a letter dated 16 March 2011, BAN requested ADO to take its responsibility against any abusive, anti-Semitic statements that might occur during the upcoming match between ADO Den Haag and Ajax, referring to the applicable regulations of the KNVB. Unfortunately, anti-Semitic slogans were chanted during the match. In a letter dated 6 June 2011, which was partly in response to the events that took place during the aforementioned competition, BAN requested ADO Den Haag to formulate and publish a policy stating that: (1) Anti-Semitism cannot be tolerated; (2) a stadium ban will be imposed on persons who are within the ADO Den Haag stadium and express anti-Semitic statements; and (3) in case of anti-Semitic chants at future home games the match will be stopped. This request was more or less repeated in another letter from BAN to ADO dated 20 June 2011.

Unsatisfied with the reaction to its letters, BAN demands the court to order ADO to immediately interrupt football matches when anti-

Semitic chants are sung in which the word "Jew" occurs in any composition, or when chants are started with the words "*Kutkankerjoden*", "*Wij gaan op jodenjacht*", "*Wie niet springt die is een jood*", or "*Hamas, Hamas alle joden aan het gas*", under compensation of costs.⁴ At the hearing BAN has nuanced this statement and now reasons that a warning should be issued before a match is stopped.

The foundation argues that the repeated and offensive anti-Semitic chants generated by the public during the match are totally unacceptable in a civilised society. According to the applicable law and regulations of the KNVB, ADO was required to act promptly against the chanting by stopping the match, which was within its power, and acted unlawfully by failing to do so. In reaction to the letters from BAN it appears that ADO is not prepared to immediately stop a match should a similar situation occur in the future. According to BAN it is thus imperative that it is established that a professional club must take immediate action against anti-Semitic chants. Moreover, upholding the claim will create clarity for BAN, the spectators and the clubs and send a clear signal. ADO defends itself by arguing that the chants were not massive and only short-lived and, furthermore, that it did not notice the chants.

Legal Framework

At first glance this case does not seem very complex. However, the amount of different rules and regulations that are applicable their coherence requires some examination. First of all, it is important to note that there is no formal relationship between the two parties, which means that ADO has no obligations, contractual or otherwise, towards BAN. Consequently, BAN has to turn to tort law and found its claim on the general provision⁵. The foundation's main argument is that ADO has breached KNVB regulations as well as its own. This is an interesting argument since these regulations, internal rules of the KNVB and ADO, are not set out to have external effect. The relationship between ADO and the KNVB is regulated by Book 2 of the Dutch Civil Code (Corporations). The KNVB is an association and ADO is one of its members. Members' obligations ought to have a basis in the statutes of the association.⁶ Dutch association law is quite liberal in the sense that an association can set the internal rules and regulations it wishes. Herein, the association is only limited by its own statutes and the general provisions of Book 2, most notably the possibility of non-application of a rule if it is unreasonable or unfair.⁷ Thus, associations are free to create a regulatory system and apply and enforce it. In case a member does not comply with the rules, a disciplinary sanction can be imposed. In this case the KNVB did not react to ADO's lack of response to the chants, which might have been a reason for BAN to take the matter to a state court.

In its decision the court discusses the numerous internal rules and regulations in great detail starting with the KNVB standard conditions. Starting point of this document, drawn up by the national football association, is that everyone involved in football in the Netherlands, not least the audience, has an interest in football events taking place in an orderly manner. Behaviour of individuals (alone or in groups) that disrupt public order and/or safety at football events, harm the prestige and interests of Dutch football and can be a hazard to persons. The KNVB has drafted these rules to ensure orderly development in the broadest sense and to curb such disorderly and unsafe behaviour at football events.⁸ In addition, football matches are played under the statutes, regulations and other applicable regulations of the KNVB and/or organisations to which the KNVB is adhered or has become a subject to.⁹ One of the key regulations involves safety and states that "the clubs that are involved in a match are responsible for the preparation and implementation of the security" and that "they also have the task to take immediate action to prevent or eliminate disturbances before, during and

1 <http://www.uefa.com/uefa/footballfirst/matchorganisation/disciplinary/news/newsid=1717610.html>.

2 Freely translated as "Horrible Cancer Jews", "Hamas, Hamas, Jews to the Gas" and "Friend of the Jews".

3 Homepage website BAN: stichtingban.com/index.html.

4 Pres. Rb. 's-Gravenhage, 9 August 2011,

LJN: BR4406, www.rechtspraak.nl, § 2.1.

5 Article 6:162 of the Dutch Civil Code.

6 Article 2:27 of the Dutch Civil Code.

7 Article 2:8 (2) of the Dutch Civil Code.

8 *Koninklijke Nederlandse Voetbalbond Standaardvoorwaarden*, Inleiding.

9 Article 6 of the *Koninklijke Nederlandse Voetbalbond Standaardvoorwaarden*.

after a match”.¹⁰ Furthermore, this regulation includes the obligation of clubs to take measures against verbal abuse and refers to yet another directive, which contains the following policy principles:

- a) In principle, BVOs¹¹ and fan clubs are responsible for the conduct of their supporters or members;
- b) BVOs and fan clubs are responsible for laying down tolerance limits regarding unwanted chants or verbal abuse. These limits are published in the by-laws; and
- c) BVOs and fan clubs make every effort to counter unwanted verbal abuse or chanting, which includes both prevention as well as taking repressive measures. This means that instigators and perpetrators are to be held accountable for their behaviour.¹²

In addition, this directive includes the responsibility of the clubs to set rules on taking immediate action against unwanted chanting. In order to meet this obligation, ADO has implemented the following rule: “It is prohibited to behave in a way that may be experienced as provocative, threatening, abusive or discriminatory by others, or to act as a nuisance or to disturb the peace and order in the ADO Den Haag stadium in any way. This includes the chanting of slogans that others may perceive as discriminatory”.¹³

Considerations of the Court

The court presupposes that it is the primary responsibility of a professional club to act against unwanted chants as this follows clearly from the applicable internal regulations. “ADO is and remains thus primarily accountable and will not be able to hide behind the KNVB and/or the arbitration quartet (being the referee, assistant referees and the fourth official)”.¹⁴ The chants sung during the match between ADO Den Haag and A.F.C. Ajax are considered to be anti-Semitic and offensive, and therefore undesirable and unacceptable. ADO’s statement that it has not noticed the chants is deemed unbelievable. In addition, around 150 stewards were in attendance in the stadium, which were all connected with the ‘command centre’. According to the court, it cannot be assumed that none of them noticed any of the chants observed in the footage. Insofar as the stewards saw no reason to mention anything, this at ADO’s risk.

The court then considers in § 3.5 that under the circumstances, based on social decency (*maatschappelijke betamelijkheid*), the KNVB regulations and its own by-laws, ADO had the duty to take immediate action against the anti-Semitic chanting. ADO’s defence, that the chants were short-lived and not massive enough, cannot detract from this duty since the only criterion in this respect is the inadmissibility of the chants, i.e. the verbal violence. Before concluding that ADO did indeed act unlawfully by not immediately taking measures against the anti-Semitic chanting of its supporters, the court makes the following remarks. In case of

a single and short undesirable chant a club is not expected to take outwardly expressed action right away since the purpose of such action is to prevent or terminate the chant, which has then already happened. However, taking outwardly expressed action is required when unacceptable chants occur regularly or repeatedly. The requirement to react immediately does not entail that the match should be stopped straightaway. A club is at liberty to first try and get a hold of the situation through less intrusive measures, increasing in severity. If these measures do not produce the desired results, eventually the match will have to be stopped. ADO’s existing action plan, which was explained at the hearing, seems to meet these requirements. However, ADO is expected to act in accordance with said plan. The fact that interrupting or stopping a match can lead to organisational problems and/or risks the maintenance of public order does not relieve ADO from its obligation, as this entails that abusive chants could be tolerated. This situation should be excluded. It is ADO’s responsibility to anticipate the possibility that a match is interrupted and eventually abandoned, so that it can act fast and adequately, for instance by closely cooperating with the relevant authorities. Ultimately the summary proceedings judge commands ADO to take immediate action if, during the football matches it organises prolonged or repeated anti-Semitic chants take place, in which the word “Jew” in any composition occurs, in order to terminate these chants and to prevent new chants from happening. If necessary these measures should culminate in the abandonment of the competition.

3. Analysis

Ajax’s Jewish identity?

In order to understand the complex social setting of this case, it is important to explain the particularity of the word ‘Jew’ in relation to Ajax. While the Dutch public has grown somewhat accustomed to this practice, further explanation is needed in order to grasp the complicated circumstances of the discussed case. The club became identified in the public mind with Jews in the 1950s and by the 1970s fans of opposing teams began to call Ajax supporters Jews, who adopted this identity in a spirit of defiance. There is no clear reason why Ajax, which was founded in 1900, became known as a Jewish club. Amsterdam has always had the largest Jewish population in the Netherlands and the club had two Jewish presidents in the 1960s and 1970s and has had Jewish players at various times. The club also has some Jews among its members, but no greater a percentage than their representation in the city’s general population.¹⁵ Nonetheless, for over 30 years Ajax supporters have been identifying themselves with Jews, a practice which now appears difficult to change, and adopted the word Jew as a so-called *geuzennaam*. A ‘*geuzennaam*’ is an insulting name that the injured has come to regard as an honorary title.¹⁶ Fanatic supporters of other football teams considered Ajax’s adopted name a provocation and started with the hate chants. Gradually the use of the anti-Semitic chants spread elsewhere also aiming at real Jews.¹⁷ Nowadays the chants, which originated in the stadiums, are expressed at anti-Israel demonstrations, at schools and on the street.¹⁸ As this spreading of the chants is being regretted, supporters have been addressed. Former President of Ajax, Uri Coronel, stated that he has tried to call upon the supporters to quit using the word Jew as a *geuzennaam* but did not succeed and is apprehensive about ever succeeding. Realising that the use of this name evokes unacceptable chants from supporters of opposing teams, Coronel advocates that clubs and the KNVB can interrupt matches or in the worst case even deduct three points in case of serious offensive chants.¹⁹ In May 2011, after Ajax became league champions, Amsterdam Mayor Eberhard van der Laan requested fans stop using the name Jews as well. He observed: “*It is a matter of changing this behaviour, which may take 10 years.*”²⁰ It remains to be seen if Ajax fans will ever let go of their adopted name, but at least the decision sends a signal to clubs that tolerating the chants is unacceptable and can entail legal consequences.

Rules of self-regulation as a basis for liability

Besides the social complexity of this case, it is the court’s clear and direct application of the rules drawn up by the KNVB and the football club itself that is interesting from a legal point of view. In the football world

¹⁰ Art. 1 *Handboek Veiligheid* (Handbook Safety) 2010¹¹: “*De basis die bij een wedstrijd zijn betrokken, zijn tevens verantwoordelijk voor de voorbereiding en uitvoering van de veiligheidsmaatregelen. Zij hebben ook de taak vóór, tijdens en na een wedstrijd onmiddellijk maatregelen te nemen om ongewenst gedrag te voorkomen of te beïnvloeden.*”

¹¹ BVO translates as Professional Football Organization.

¹² *Richtlijn bestrijding verbaal geweld* (Directive against verbal abuse).

¹³ Art. 4.4 Huisregels (by-laws): “Het is verboden zich in het stadion van ADO Den Haag te gedragen op een wijze die door anderen als provocerend, bedreigend, beledigend of discriminerend kan worden ervaren, dan wel als hinderlijk of als enigerlei wijze de orde en rust verstorend. Hieronder valt ook het scanderen van leuzen die door anderen als discriminerend kunnen worden ervaren”.
<http://adoddenhaag.nl/tickets/huisregels>.

¹⁴ Pres. Rb. ‘s-Gravenhage, 9 August 2011,

LJN: BR4406, www.rechtspraak.nl, § 3.3.

¹⁵ <http://www.nytimes.com/2005/03/28/world/europe/28iht-jews.html>.

¹⁶ The word ‘*geuzen*’ derives from the French ‘*gueux*’, which means pauper or beggar, but gained a positive meaning when it was assumed by those who opposed the Spanish rule in the Netherlands during the Eighty Years’ War. <http://www.etymologiebank.nl/trefwoord/geuzennaam>.

¹⁷ Peter R. Rodrigues and Jaap van Donselaar (eds.), *Monitor Racisme & Extremisme. Negende Rapportage*, Anne Frank Stichting / Amsterdam University Press, Amsterdam 2010, p. 142-143.

¹⁸ Peter R. Rodrigues and Jaap van Donselaar (eds.), *Monitor Racisme & Extremisme. Negende Rapportage*, Anne Frank Stichting / Amsterdam University Press, Amsterdam 2010, p.143.

¹⁹ nrc.nl, 13-4-2011, <http://www.nrc.nl/nieuws/2011/04/13/coronel-puntenaftrek-voor-ajax-bij-scanderen-joden/>.

²⁰ *Het Parool*, 14-5-2011 p. 17.

it is common practice to hold clubs liable for their supporters' misconduct. The disciplinary regulations of both the FIFA and the UEFA contain provisions regarding the obligations put on the member associations and clubs that organise matches. As to the liability of clubs for the behaviour of their supporters, this is established based on the sole fact that the misconduct has taken place, regardless of the question of culpable conduct or culpable oversight.²¹ Several clubs have disputed the legality of these provisions after being sanctioned following supporters' violence or other misbehaviour and appealed at the Court of Arbitration for Sport (CAS). The CAS accepted the application of this rule without hesitation in the PSV Eindhoven case²², in which the club was held liable for racist chanting by its fans in 2002 and reaffirmed this line in the Feyenoord case²³, which followed one of the bigger riots in European football to date. The extensive measures that Feyenoord had taken in order to try and avoid problems with its hard-core fan base could not exonerate the club from this liability.

While the 'Directive against verbal abuse' contains a liability clause similar to the ones in the FIFA and UEFA regulations - "In principle, football clubs and fan clubs are responsible for the conduct of their supporters or members" - ADO was not held liable for the behaviour of its supporters, but merely for the fact that it remained passive and took no action whatsoever in order to end the chanting. With this approach, the court has taken an interesting direction by basing its decision in part on rules of self-regulation or private regulations.

Increasingly, private regulation has been accepted and sometimes even deliberately promoted by the Dutch legislature.²⁴ However, the *Hoge Raad*, the Dutch Supreme Court, has been apprehensive to base liability on rules of self-regulation.²⁵ Still, it has taken this approach before. A doctor omits, against hospital protocol, to provide his patient medication to inhibit thrombosis after a knee operation. The patient develops thrombosis and seeks compensation. The *Hoge Raad* considered that "since the protocol is based on the consensus between the hospital and doctors, they must adhere to the rules established by themselves".²⁶ The liability of the doctor was based exclusively on the violation of the protocol and thus on a private regulation. Unfortunately, the *Hoge Raad* has not yet been this straight forward in other fields. The precariousness of the concept of private regulation can be illustrated by the uncertain position of the Corporate Governance Code. This Code contains

principles and best practice provisions that regulate relations between the management board, the supervisory board and the shareholders of all listed companies registered in The Netherlands.²⁷ The legal status of the Code has been discussed in various cases.²⁸ On one occasion the *Hoge Raad* ruled that the Code expresses the prevailing legal opinion in the Netherlands, on another it agreed with the provisional arrangement of a lower court, which forbade the company to deviate from principle III.6 of the Code.²⁹ Thus, in the first case the court tentatively implies that legal opinions expressed in the Code have to be considered when interpreting open norms, such as 'reasonableness and fairness' and social decency. In the second case, however, the court accepts the direct application of the Code. Since the application was a provisional measure, it is unclear if deviation from the Code is generally forbidden or if it was just forbidden in this case.³⁰ Nevertheless, it appears that the *Hoge Raad* is at least open to the possibility of direct application of private regulations.

Regarding the enforcement of rules of self-regulation it is important to note that non-compliance does not always evoke a reaction. The case at hand is a perfect example of this issue: the KNVB did not intervene in order to force ADO to comply with the applicable regulations. Had the KNVB reacted, perhaps the case would not have been brought before the court. Since it is the infringement of private regulations which is at hand, one has to turn to general rules of civil law in order to force ADO to adhere to these rules. According to Giesen, the non-compliance with certain standards of private regulation *can* cause liability in tort of those who ignored the rules. The rules of private regulation can hereby act as an indication for the judge in the interpretation of the open standard of article 6:162 (tort) of the Dutch civil code.³¹ It is exactly this approach that the court seems to have taken in *BAN/ADO Den Haag*. All applicable rules are examined carefully before the club's actions, or rather the lack thereof, is being qualified as unlawful. Considering the fact that the position of rules of private regulation has not yet been clearly established, this firm stand is to be applauded and indeed sends a strong signal that compliance to self-regulation is not optional. In its concise decision, the court has made it perfectly clear that a club is expected to abide by its own rules.

4. CONCLUDING REMARKS

The decision taken by the summary proceedings court in The Hague is one of the first of its kind. Never before has a Dutch football club been held liable in a state court for failing to take measures against supporters' misconduct. Since BAN did not demand any form of compensation, the position defended by this organisation carries even more weight. In the continuing fight against supporters' violence this case is a step in the right direction. After all, fans come to the stadium in order to see their team play, and hopefully win, a match. When the game is being stopped or even abandoned because of unacceptable behaviour in the stadium, the supporters will hopefully learn to adjust and comply with the regulations. Nevertheless, the extent of the responsibility of clubs to control the behaviour of its fans continues to be opaque and in case measures are taken against supporters' misconduct, the question remains whether the club will be held liable despite its efforts.

21 See: art. 67 FIFA Disciplinary Code and art. 6 UEFA Disciplinary Regulations.
 22 CAS 2002/A/423 PSV Eindhoven/UEFA.
 23 CAS 2007/A/1217 Feyenoord Rotterdam/UEFA.
 24 J.B.M. Vranken, *Asser-Algemeen deel****, 2005, § 78.
 25 J.B.M. Vranken, 'Niets in het recht is blijvend, behalve verandering', in: *WPNR* 2004, p. 6560 ff.
 26 HR 2 March 2001, NJ 2001, 649 (Trombose).
 27 Article 2-3 of the Preamble of the Corporate Governance Code. The full text of the Code can be found on: <http://commissiecorporategovernance.nl>.

28 For an overview see: P. Memelink, 'De invloed van de Corporate Governance Code op het vermogensrecht', in: *Maandblad voor Vermogensrecht* 2010, nr. 3, p. 42-49.
 29 HR 13 July 2007, NJ 2007, 434 (ABN AMRO) and HR 14 September 2007, NJ 2007, nr. 611 and 612 (Versatel).
 30 P. Memelink, 'De invloed van de Corporate Governance Code op het vermogensrecht', in: *Maandblad voor Vermogensrecht* 2010, nr. 3, p. 42-49, p. 48.
 31 I. Giesen, *Alternatieve regelgeving in privaatrechtelijke verboudingen*, preadvies NJV, *Handelingen Nederlandse Juristen-Vereniging* 2007, p. 140-141.



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Norms adopted by international sports organizations (ISO) as a special type of international custom

By Elena Volstrikova

Understanding of legal nature of ISO norms is a complicated problem. Therefore, not much research has been done on this question. In Russian scientific literature this issue has not been raised. In foreign scientific literature devoted to international sport law this question was not illustrated enough for having possibility to derive main concepts of legal nature of ISO norms.

Some foreign legal scholars outline this existing problem. In particular, Greek scientist D. Panagiotopoulos states: 'Internationally, the sports legal order - its nature being in doubt - is limited to contractual freedom. The sources and processes for generating this order do not coincide with traditional sources and processes of law where the dominant element is the state. In order to surpass the difficulties raised by the doubtful nature and effect of the law generated within the context of the sports system, the Court of Arbitration for Sport (CAS)...has been established and operates within the context of the system'.¹

Some authors point out only the character of norms which regulate international sports movement. For example, B. Simma claims that Olympic movement is regulated by transnational norms (adopted by IOC) which are not included into national legal order.²

There is a point of view according to which the norms of ISO are of customary nature. J. Nafziger, a well-known American specialist in the field of international sport law, indicates that some norms of Olympic Charter have the nature of international custom: 'Rules such as these in the Olympic Charter define international custom today... Rules of the Olympic Charter are the best evidence international custom pertaining to sports competitions; many have only an internal organizational function. Several, however, are definitive'.³

J. Nafziger underlines that international custom and general principles of international law play an important role in the development of international sport law. He also claims that the elements of international custom such as frequency, duration of application and strict adherence are common to sport law either.⁴

The abovementioned point of view is supported by other American authors. In particular, A. Vaerenbergh declares that doping regulations can not be defined as technical decisions, standards or norms within the bounds of the game...this group of regulations is seem to be an international custom.⁵

Thereby, we may claim, that foreign scholars (the American legal scholars in particular) share the opinion that norms of ISO are a kind of international custom. We may agree that this position is well-grounded.

In order to estimate the legal nature of ISO norms we will analyse whether they constitute a part of hard law or soft law.

There are different approaches to define soft law in literature, but no unified approach has been accepted. As M. Y. Velizhanina states in her thesis, some scientists apply the definition "soft law" to international treaties which do not contain precise norms and obligations. The majority defines soft law as not legally binding acts which have high moral and political power. According to third approach, soft law is a combination of both abovementioned definitions.⁶

Further, in order to outline the main features of soft law, we will provide few definitions.

In this regard Lukashuk's statement about soft law is well-known: "The analysis of literature and practical materials shows that the term "soft law" is used to define two different legal phenomena. In the first case we are talking about special kind of international law norms, in the second one about international non-legal norms"⁷. The author supposes that the first category of norms are the international treaty norms (policy or declarative) which are not binding in strictly legal sense, but the subjects of legal relations must follow its general instructions (even if these norms do not state concrete rights and obligations). The norms of second category are contained in resolutions of international organizations, declarations and joint communiqué which are not legally binding but the states fulfill them because of moral and political weight of these norms.

Velizhanina M. Y. defines soft law as the scope of non-legally binding international norms created by states and international organizations which do not contradict basic principles and norms of international law and which are aimed at regulation of international relations. These norms do not contain international legal obligations and are prescribed in recommendations of international organizations, multilateral, bilateral and unilateral political acts of states.⁸

Foreign scholar Chinkin S. gives the further definition of soft law. It is a scope of international documents from treaties, including only flexible obligations, not obligatory or voluntary resolutions and standards of conduct created by international or regional organizations, to statements prepared by individuals in non-governmental manner but which are pretended to establish international norms.⁹

To compare, we provide the definition of soft law according to Oxford Law dictionary: 'Soft law (in international law) is a complex of maxims as, for example, international treaties not having come into force, resolutions of UNO or international conferences, which are not binding by their nature but appear to be more than nothing but declarations about political aspirations'.¹⁰

Despite the existence of different points of view, almost all authors agree on the main point that formally soft law is not obligatory, it is a kind of recommendation with which state parties often comply because of its high moral and political value. Soft law norms are usually passed by authoritative international organizations what makes these norms even more influential.

It occurs that the majority of ISO norms does not constitute soft law as they are legally binding. The ISO norms in their nature have more common with international law norms (hard law) as both of them are repetitive, they include international legal obligations and the possibility to constrain a party in case of violation of these norms.

The main difference between soft law and hard law is lack of coercion, as parties can not use enforcement measures. Recommendations do not include sanctions which are an indispensable element of hard law norms. In case of violations of soft law norms the party to a legal relationship does not bear international legal responsibility. As Bezborodov Y. S. pointed out that soft law acts had one shortcoming what is lack of legal effect.¹¹

Let us consider ISO norms in terms of features common to rule of law. According to Russian doctrine¹², rule of law as a special kind of social rule meets the further criteria: compulsory execution, formal deter-

1 D.Panagiotopoulos 'International sports rules implementation - decisions executability: the Bliamou case'// *Marquette sports law review*, 2004-2005, Vol. 15:1, p. 3
2 Bruno Simma 'The Court of arbitration for sport'// *The Court of Arbitration for sport, 1984-2004*, The Hague, T.C.M.Asser Instituut, Asser International Sports Law Center, ed. by Ian S.Blackshaw, Robert C.R.Siekman and Janwillem Soek, 2006, p. 23
3 James A.R.Nafziger 'International Sports law', New York, 1988, p.6, 32
4 James A.R.Nafziger, *ibid*, p. 35
5 Alec Van Vaerenbergh 'Regulatory features and administrative law dimensions of the Olympic movements anti-doping regime'//*IIILJ Working paper*, 2005/11, p.13
6 Velizhanina M.Y., thesis of candidate of science "Soft law, its nature and role in regulation of international relations",

Moscow, 2007.
7 I. I. Lukashuk "Soft law norms in international regulatory system". M., 1997.
8 Velizhanina M.Y, *ibid* p. 31
9 Chinkin C. "The challenge of soft law: development and change in international law"//*ICLQ*, 1989, vol.38, p. 850-866
10 Oxford dictionary of law, 6th ed.Ed. by E.A.Martin,Oxford, 2006, p.502
11 Bezborodov Y. S. "Role of soft law in international legal regulation"//*International Public and Private Law*, 2004, 6 (21), p.6
12 See: S. S. Alekseev "General theory of law". M., 2009; A. B. Vengerov "Theory of State and Law", Vol. 1 "Theory of law", M., 1996; N. I. Matuzov, A. V. Malko "Theory of state and law", M.,2004; L. A. Morozova "Theory of state and law", M.,2003; Chervoniyuck "Theory of state and law", M., 2009.

minacy, state-imperious dictates, legally binding character, three-term structure (hypothesis, dispositions and sanctions). Morozova L. A. points out that generally there is a uniform approach to determine rule of law with small peculiarities in doctrine of law. For example, Goyman V. I. defines rule of law as legally binding, formally determined prescriptions and principles which set the limits of probable and proper conduct of parties to legal relationship and which indicate the legality of such conduct.¹³

ISO norms do not meet all abovementioned criteria. In particular, due to its international character these norms are not secured by state compulsion. As it was already mentioned above, the compulsion is ensured not by state power, but by incontestable authority of ISO.

All other criteria of rule of law are common for ISO norms. They regulate a group of social relations settled in the field of international sport. They are expected to be applied in numerous cases. All Olympic Games and other international contests organized by IOC are carried out in accordance with Olympic Charter and rules of international federations (IF).

Art.27 and art. 30 of Olympic Charter may serve as an example of providing-binding character of ISO norms. IF have right to set rules of certain sports (it is an obligation at the same time). According to Rule 30 the corresponding obligation to this rule is the obligation of National Sports Federations to follow the rules settled by IF.

A lot of norms contained in the Olympic Charter have the structure common to rule of law. Rule 28 (p. 6) stipulates that NOCs must preserve their autonomy and resist all pressures of any kind which may prevent them from complying with the Olympic Charter. This element can be considered as disposition of rule of law. Paragraph 9 contains sanction for noncompliance with abovementioned obligation: the IOC Executive Board may suspend such NOC or withdraw NOC's recognition by IOC, what is an obligatory condition for functioning of NOCs in international sport. We may also find hypothesis in Rule 28 where the mission, the role and rights of NOC as participant of Olympic movement are described.

Surely, not all IOCs' norms have three-term structure. However, S. S. Alekseev states that it is hard to find an example of regulatory act which would correspond to abovementioned theoretical scheme (*hypothesis, disposition, sanction in consecutive order -Vostrikova's note*)...the structure of rule of law just refers to these three elements regardless of where and how they are presented.¹⁴

Hence, we can resume that ISO norms have the main features of rule of law and they can be classified as a kind of social norms (hard law).

Further we will define to what group of social norms ISO norms can be referred and therefore analyze the nature of ISO norms as customary norms. At first we will compare ISO norms with usage (for being sure that ISO norms are not usage) and then examine the elements of international custom and try to find all those characteristics in ISO norms.

Danilenko G. M. points out that usage is not a rule of law, it is not legally binding common rule of conduct which is a result of uniform practice¹⁵.

This point of view is shared by some scholars. For example, Zumbulidze R.-M. Z. claims that the difference between custom and usage is that former is a rule of conduct formed as a rule of law and it exists independently of the will of subjects of legal relations, while usage does not acquire the status of binding legal rules and can only be used in case of expressed mutual consent of parties to a treaty.¹⁶

ISO norms are binding, they are applied by all subjects of international sport movement and sanctions are imposed on violators of these norms. Thus, there are no grounds to attribute ISO norms to usages.

The basic definition of custom is provided in p. "b" of art. 38 of the Statute of the International Court of Justice. It is stated that the Court should apply "international custom as evidence of a general practice accepted as law". According to this definition, at first general practice appears in particular field and then it crystallizes in custom.

There are many discussions concerning elements and legal nature of international custom, conditions of its appearance and application in theory of international law. The main points of view, which help to deduce the inalienable elements of international custom and their occurrence in ISO norms, will be presented in this article.

G. M. Danilenko indicates two elements of international custom: long, constant, uniform, universal practice and recognition of such practice as a rule of law. Later on he cites judge of the ICJ J. Read: 'International customary law is a generalization of state practice. It can not be derived from cases when states announced far-reaching claims but did not support their claims by factual exercise of sovereignty'.¹⁷ Therefore, the proof of existence of the first element of custom is factual state action.

Moreover, the absolute conformity is not required. To support this position Tostykh V. L. cites the ICJ decision of case concerning Military and Paramilitary Activities in and Against Nicaragua: "The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule... (p. 186)."¹⁸

State acts in the sphere of international sports competitions are characterized by the following features. If all states delegate to the Olympic Games national teams which participate in the contests according to the rules set by the ISO, it means that states by their real actions establish a uniform practice of compliance with ISO norms. This practice is spread over the world and many sovereign states from different geographical regions, while participating in international sports competitions organized by IOC, have stuck to this practice since renaissance of the Olympic Games by Pierre de Coubertin.

Zykin I. S. claims that custom should be unique in concrete sphere of relations and it should be a common rule.¹⁹ It is hard to imagine a situation when at the international championship would be applied the rules of specific sports organization instead of rules of international sports federation. There are no signs of such cases in history.

Concerning the second element of custom *opinio juris*²⁰ which means recognition of set rules as customary law rules (in our case, it is a recognition of well-established practice by participants of international sport movement), we should state the following.

The state recognition of rules as customary law norms may be expressed in different ways. In scientific literature tacit recognition by means of observance of custom in acts of state authorities and agencies is mentioned among modes of sanctioning custom by state.²¹

It means that a mere practice proves the state recognition of such norms as binding. The Olympic Games Australia in 1956 may serve as an example. Even though Australia did not recognize USSR in 1956 and was against USSR's intervention in Hungary, it had to permit the participation of soviet sportsmen in the Olympic Games in Melbourne as Australia did not have any grounds to refuse USSR to participate according to the Olympic Charter and other Olympic movement regulations.

In North Sea Continental Shelf case the ICJ in its decision (dated 20.02.1969) stated: "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i. e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amount to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough..."²²

There is another point of view concerning the second element of custom express, for example, in the Final report of the Committee on the

13 L. A. Morozova "Theory of state and law", M., 2003, p. 204.

14 S. S. Alekseev; *ibid*, p. 306

15 G. M. Danilenko "Custom in modern international law", M., 1988, p. 9.

16 R.-M. Z. Zumbulidze "Custom as a source of civil law", St. Petersburg, 2004, p. 176.

17 I.C.J. Reports.1951, p.191

18 V. L. Tolstykh "Course of international law", M., 2010, p. 172-173.

19 I. S. Zykin "Custom and usage in international trade", Moscow, 1983, p. 12.

20 G. M. Danilenko, *ibid*, p. 65.

21 See: G. I. Tunkin "Forty years of coexistence and international law" // Soviet Yearbook of International Law, M., 1959.

22 www.icj-cij.org/docket/files/51/5535.pdf

formation of customary (general) international law. It states that if the practice meets all criteria of an element of international custom, then there is no need to mention the second element unless it is an exceptional case when there are grounds to suppose that the *opinio juris* is absent. The second element could be easily deduced from practice, but then raises a question if there is a need for it.²³

Regardless of the position, we can confidently state that the majority of ISO norms fit the criteria of international custom.

One more characteristic of first element of custom is common for the ISO norms. They are characterized by regular and steady repetition and stability. Zykin I. S. presumes that these are the most characteristic features of a custom.²⁴

It is also noted in scientific literature that the custom is characterized by vagueness of normative content and the problems with defining the scope of application of customary rules.²⁵ In contrast, these drawbacks are not typical for ISO norms, they have clear contents and well-defined scope of application. Moreover, ISO norms do not meet such criterion of custom, like impossibility of being a source of legal coordination of international relations which need detailed regulation (this criterion is pointed out by Danilenko G. M.). Private international sports relations require precise regulation, this is the main function of ISO norms.

23 Final report of the Committee on the formation of customary (general) international law. International law association, Report of the 69th conference, London, 2000

24 I. S. Zykin, *ibid.*, p. 11.

25 See.: Monograph of I. B. Lomakina, A. V. Dashin "Common law and custom: from social mononorm to legal regulation", St. Petersburg, 2005; V. V. Naumkina "Custom as a source of law", Krasnoyarsk, 2006; O. V. Malova "Custom as a source of law of major modern legal systems", Irkutsk, 2006.

26 We are talking about inter-governmental

international organizations - see G. M. Danilenko "Custom in modern international law", M., 1988, p. 67.

27 This position is enshrined in the thesis of candidate of science L. R. Shammassova "International custom in modern international law", Kazan, 2006.

28 Bazedov Y. "Revival of the process of unification of law: European contract law and its elements" // Russian Yearbook of International Law. St. Petersburg, 1998-1999, p. 67-68.

29 T. N. Neshataeva "International organizations and law. New tendencies in international-legal regulating". M., 1999, p. 68.

The customary nature of ISO norms is proved by application of custom in case of lack of treaty norms. There are only few cases when international sports relations are regulated by treaty norms. We can not constitute the existence of complex and detailed scope of treaty law regulating international sport movement.

Previously, the doctrine of international law accepted only states and international organizations as subjects which actions could create a custom.²⁶ Other subjects were not estimated as creators of international custom. According to the dominant position in doctrine the international non-governmental organizations can slightly influence on subjects of international law practice and can only participate in the creation of international custom in the following forms: to carry out research, favour resolution of contentious issues (by means of organization of conferences), control the implementation of international law etc.²⁷

There is also another point of view. Its representatives support the idea that the law cannot be only created by states any more.²⁸ The following words of Neshataeva T. N. are quite appropriate here: "Strict dogmatic postulate of the special role of the state in international relations does not allow scientific thought to respond to the events of a rapidly changing global reality".²⁹

Now with the increasing need to regulate specific areas of human activity and development of rule-making function of a number of subjects of international affairs, it is reasonable to recognize international non-governmental sports organizations as subjects which have the right to establish customary rules because of their specific field of regulation. Due to the fact that ISO norms have particular features, the process of creation of customary norms by ISO cannot and should not be in the same order as international customary lawmaking process.

Taking everything into consideration, we can give the further definition of ISO rules. The rules of International sports organizations are a special kind of international custom, which appeared as a result of particular activity of non-governmental international sports organizations and received the tacit approval of the States and other subjects of international sports movement.

The International Sports Law Journal

Case Law of the Croatian Supreme Court in the Fields of Sports Law - Emphasis on Labour Relations

By Vanja Smokvina*

Abstract

In the text the author analyses the case law of the Croatian Supreme Court regarding labour law, sport law and insolvency law. Sport's legal framework in Croatia in given in the introduction of the article accompanied with the analysis of the legal status of professional sportspeople in Croatia at the material time of the judgement and *de lege lata*. In the conclusion, the author opens questions and gives the reader an opportunity to form his own ideas of the way professional Croatian football is run and organised.

Key words: Croatia, case law, Supreme Court, legal status, football club, professional sportspeople

1. Introduction

The Republic of Croatia is at the moment still a candidate member to the European Union (further: EU), and it will probably become the 28th member state in July 2013.¹ This actually means that the Croatian legal system is fully or almost completely harmonised with the EU *acquis*. In the Croatian government structure there is a ministry with the sports field of competence: Ministry of science, education and sports.² The Ministry runs a register of professional sports clubs in Croatia. The register of professional sportspeople that runs their professional sports activity as self-employed persons is run by the Offices of public administration in the local county. The register of professional team sportspeople is run by the national sport's association for a single sport.

2. The Sport's Legal Framework in Croatia *De Lege Lata*

The Croatian sport is governed by the Sport's Act, the latest version entered in force in 2006, and has had three amendments.³ This puts Croatia in a group of countries with an interventionist system of sport regulation where the sport governing bodies are autonomous, but their autonomy is based on these laws.⁴ According to Siekmann and Soek criteria of sport governance⁵, Croatia has an interventionist model of sport

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1 On the 30th June 2011 the EU member states decided to close accession negotiations with Croatia: European Commission Press release, IP/11/824, 30/06/2011

2 Government structure of the Republic of Croatia, available: www.vlada.hr/en/naslovnica/o_vladi_rh

3 Sport's Act (Zakon o športu), Official Gazette No. 71/06, 150/08, 124/10 and 124/11 (Narodne novine br. 71/06, 150/08, 124/10, 124/11); Before the Sport's Act in force, at the material time of the case concerned in this article there was in force the Sport's Act (Zakon o športu), Official Gazette No. 111/97, 13/98 and 24/01 (Narodne novine br. 111/97, 13/98, 24/01)

4 See Martins, Roberto Branco: A European Legal Football Match Heading for Extra Time, Vol. 3 (2004) no. 3/4, International Sports Law Journal p. 17-30., p. 23.

5 Siekmann, Robert, Soek, Janwillem: Model of Sport Governance in the

since, as regulated by the Croatian Sport's Act, there are some essential elements which place Croatia in a interventionist group of countries. There is a National programme of sport, financed by the State, as a document issued by the Croatian Parliament on a Croatian Government proposal for a period of 8 years, regulating the aims and scope of the sport development, activities essential for the fulfilment of those aims, subjects of development and control of fulfilment of the programme.⁶ There is also a National Committee for sport as a major professional sport body with the competences in the development and safeguard of quality of sport in Croatia, and which members are appointed and dismissed by the Croatian Parliament.⁷ It should be emphasised that there is a National Olympic Committee (HOO)⁸ as a major sports association in which all national sports associations for an individual sport are members and that is autonomous in its work⁹, but on the other hand it should be highlighted that sport in Croatia is financed to a large degree by the State and local administration (cities and counties) - even the HOO on a yearly basis gives report to the Croatian Parliament and the Ministry on the spending of public funds for the public sport's needs.¹⁰ Furthermore, even the supervision of the legality of work of the legal persons in sport and their general acts is in the competence of the Ministry, along with the inspection supervision.¹¹

Finally, it should be pointed out, that the legal status of professional sportspeople in Croatia is governed by two acts: Obligation Act¹² and Labour Act¹³. The Obligation Act is applied in a relationship between a Club and a self-employed professional sportsmen/women, and infra it will be shown that they represent a great majority of all professional players in individual and team sports.

3. The Croatian Supreme Court Decision

On the 4th September 2008 the Croatian Supreme Court¹⁴ delivered one of its most interesting decisions in the fields of labour, commercial and sports law, not because it is a revolutionary legal judgement, but because it reveals how professional football is run and organized in Croatia.

The Croatian Supreme Court is a judicial instance in the third and the last grade of judicial control. Before the judgement of the Supreme Court, there was a judgement in the first instance (before the Municipal Court in Zagreb) and in the second instance (before the County Court in Zagreb).

The case concerned one former Croatian football player I.C. and his club NK Dinamo Zagreb. With the judgement of the first grade the player's action was rejected. The first grade judgement was confirmed by the second grade judgement. Since the player was not satisfied with the outcome of his legal dispute, he brought an action before the Supreme Court.

The player and his club (NK Croatia sports Ltd) signed a labour law contract (a professional player's contract) on 09/11/1999. In the art.1 it was stated that the player was employed as a professional player, with relevance of the Labour Act, the Statute of the Croatian Football Federation (CFF) and the CFF Regulation on the Status of players. The contract was signed for a period of two competition seasons with the

expiry on 31/07/2001. Art. 6 of the contract stipulated that among other issues, the player will take part in all competitions and club training sessions, and furthermore, all activities that have the aim of promoting the Club, especially activities on the TV, radio, newspapers, public manifestations, autograph sessions etc. The art. 8 stated that the player will get monthly salary in 83,000 DEM (payable in Croatian currency - kn), and the Club has the obligation to pay all the contributions and taxes.

After the signing of the contract the Club on 14/02/2000 changed its name from NK Croatia sport's Ltd in NK Dinamo sport's Ltd. The club manager of NK Dinamo sport's Ltd was also a Club manager in NK Croatia sport's Ltd, at the material time of the signing of the labour law contract, and his function ceased on 10/07/2000. The Club NK Dinamo sport's Ltd paid two monthly salaries and after that they stopped paying the players' salaries. The same Club made all the formalities with the registration of the employment contract before the Croatian Institutes for Health and Pension Insurance.

Because the Club NK Dinamo Zagreb sport's Ltd ceased to pay its obligations to the players (I.C. as one of them) and to all their creditors, the bankruptcy procedure was opened on the Club with the formal settlement of the Commercial tribunal in Zagreb No. St-685/02 of 07/05/2002. The player's (I.C.) financial demand on behalf of his salary was fulfilled in the bankruptcy procedure by only 1/9. At the end of the procedure, NK Dinamo Zagreb sport's Ltd was removed from the Croatian register of commercial companies and ceased to exist.

What is important to emphasise is that the defendant in the legal dispute was a private citizens' association (NK Dinamo Zagreb PCA)¹⁵, since the Club continued to take part in all competitions as a private citizen's association, and it seemed that it is a legal continuation of the NK Dinamo Zagreb sport's Ltd. But the tribunals were not of the same opinion. Because of that, the tribunals made a decision that NK Dinamo Zagreb PCA was not a party to the contract and that there is no passive legitimation to be a defendant in the dispute. The Court stated that there is no legal continuity between NK Dinamo Zagreb sport's Ltd and NK Dinamo Zagreb PCA, that it is of no importance that the same person was a general manager in the NK Dinamo Zagreb sport's Ltd (previously called NK Croatia Zagreb sport's Ltd) and NK Dinamo Zagreb PCA, and that it is of no importance that the contract of employment had the stamp of the CFF. The contract party NK Dinamo (Croatia) sport Ltd does not exist any more since it was withdrawn from the commercial registry after the bankruptcy and liquidation procedure.

In summary, the Supreme Court stated that the fact that NK Dinamo Zagreb PCA continued to compete in national and international competitions, after NK Dinamo Zagreb (sport's Ltd) is of no relevance to the case, since it is not the same legal person and the player has stipulated his contract with NK Croatia (Dinamo) Zagreb sport's Ltd.

4. Is This Outcome A Surprise?

From the legal point of view it is all clear. There is no legal continuity between the NK Dinamo (Croatia) Zagreb sport's Ltd and NK Dinamo Zagreb PCA since they are not the same legal person. The contracting party NK Dinamo Zagreb sport's Ltd does not exist any more as a legal person.

But what is interesting from the sports law point of view is that the NK Dinamo Zagreb PCA continued to compete in all national and international competitions even after NK Dinamo Zagreb sport's Ltd was made bankrupt, and actually took the position of the NK Dinamo sport's Ltd. According to the FIFA regulations and national sports association regulations the club that was made bankrupt and liquidated have to start from the last professional league.¹⁶ That was not a case here. NK Dinamo Zagreb PCA in the season 2002/03, the year after the bankruptcy and liquidation of NK Dinamo Zagreb sport's Ltd, was a Croatian champion.¹⁷ They compete in UEFA competitions: Champions league preliminary rounds (2003, 2006, 2007 and 2008) and UEFA Cup (later UEFA League - 2004, 2007, 2008, 2009 and 2010). In the season 2011/12 NK Dinamo Zagreb PCA entered the Champions league group stage competition.¹⁸

There was no reaction on behalf of the CFF, UEFA or FIFA. Everything continued so smoothly, like nothing happened. From the

European Union: The Relationship between State and Sport Authorities, *International Sports Law Journal*, Vol. 9 (2010) no. 3/4, p. 93.-102.

6 Sport's Act, op. cit., art. 2.

7 Sport's Act, op. cit., art. 3, 4

8 Hrvatski olimpijski odbor (National Olympic Committee)

9 Sport's Act, op. cit., art. 49.

10 Sport's Act, op. cit., art. 75.

11 Sport's Act, op. cit., art. 84, 85.

12 Obligation Act (Zakon o obveznim odnosima), Official gazette No. 35/05, 41/08 (Narodne novine br. 35/05 i 41/08)

13 Labour Act (Zakon o radu), Official gazette No. 149/09 and 61/11 (Narodne novine br. 149/09, 61/11)

14 Croatian Supreme Court, Decision No. Revr 631/06, of 4-09-2008, (Odluka

Vrhovnog suda Republike Hrvatske, Revr 631/06) available at the official web page of the Supreme Court: <http://sud-skapraksa.vsrh.hr/>

15 The same legal form is present at the moment.

16 In 2002 Italian football club Fiorentina because of its financial problems was liquidated and had to start from the Italian C2 league.

17 They were Croatian Champions for six more times after that (with only 2003/04 and 2004/05 season when the Champions were HNK Hajduk Split).

18 And took a part of football history with the worst result in the UEFA Champions League score, 0 points with goal difference 3:22 (in a group with Real Madrid CF, Olympique Lyonnais and AFC AJAX).

legal and from the sports law point of view, actually a big thing happened.

Furthermore, it should be highlighted that because of enormous tax debts of Croatian professional football clubs to the state in the period 1990-2000, because the clubs didn't pay all the contribution for player they should (since, in that period sportspeople had the status of workers, even a special one - *sui generis*), the football Clubs became PCA. Legally organised in that way, they didn't have to sign players as workers but as self-employed persons so the mandatory health and pensions contribution along with tax, became players problem.

5. The Legal Status of Professional Sportspeople in Croatia *De Lege Lata*

As previously stated, in Croatia there is a Sports Act in force. In Croatia the legal relationship between a professional sportsman or sportswoman and the club, is regulated by civil law - the law of obligations or labour law. According to the art. 6(2) of the Sport's Act sportspeople can perform their activity as professionals or amateurs. The activity of sportsmen is defined as a professional activity if there is a contract of professional play or a contract of employment with a club, or the sportsman takes part in sports competition as an individual in an individual sports discipline.¹⁹ Furthermore, it is stated that a sportsman who professionally takes part in sports activity is a person to whom the professional sport activity is a main activity and to whom on that regard the benefits are being paid for mandatory assurance, and their legal status, along with their rights and duties, are governed by the regulations of the national sport organizations.²⁰

To continue with football, the CFF's autonomous act regulates the

legal status of football players in Croatia. According to the CFF's Regulation on the status of players, a professional football player with Croatian citizenship, that had concluded with the Club a contract on professional play, if he is older than 16 years, autonomously takes part in sports competitions (with a status of self-employed persons), while the foreign player (with the citizenship other than Croatian) could conclude a contract of employment and have the status of workers in a status of subordination.²¹ In the formulary contract (contract of professional play) issued by the CFF, in art. 2. it states that the player has to be registered as a self-employed person (closer to the status of craftsmen) according to Croatian Sport's Act and the Act on personal income tax.²²

As an outcome of the legal regulation of the status of sportspeople it is not a surprise that there are only a few regular court judgements on questions of the legal status of sportspeople. One other very interesting Judgement of the Supreme Court from 1997 stated that "a contract between a professional sportsman and a sports organization because of its contents that do not demonstrate that it is a contract of employment, should be defined as an *sui generis contract*".²³

6. Conclusion

To conclude it should be emphasised that the legal status of professional sportspeople in Croatian sports law is very complex. At the moment there are big problems with football players playing for clubs in Croatian premier league and not receiving their remuneration for 6 to 12 months.²⁴ To someone looking at this from an organised sports legal system standpoint, this would seem quite unrealistic. Since professional footballers are not workers, only foreign players would have the status of workers, they have the legal status of self-employed persons. According to Croatian law they could not be organised in a union, there could be no collective agreement, and they are not protected by labour and social law provisions applicable to workers. At the moment, that is the Croatian reality in sport's sector.

As it was demonstrated in this article, law is law, but (Croatian) sport has its specificity. Since from the legal point of view, regarding the contract's party legal continuity it is all clear. But from the sports law point of view something is missing. One could ask, how come nothing happened after the NK Dinamo Zagreb sport's Ltd ceased to exist? Well, I leave it to the reader to try and answer that question; however, based on the law, I am of the opinion that the answer is quite easy.

19 Sports Act, op. cit., art. 8(1)

20 Sports Act, op. cit., art. 8(2,3)

21 CFF's Regulation on the status of players (Pravilnik HNS-a o statusu igra a), available: http://www.hns-cff.hr/upl/products/Pravilnik_o_statusu_igraca.pdf

22 CFF's formulary contract of professional play (Obrazac HNS-a Ugovora o profesionalnom igranju), dostupno na: http://www.hns-cff.hr/upl/products/Ugovor_o_profesionalnom_igranju.doc

23 Croatian Supreme Court, Decision No. Rev 1120/95, of 26-11-1997, (Odluka Vrhovnog suda Republike Hrvatske, Rev 1120/95) available at the official web page of the Supreme Court: <http://sudskapraksa.vsrh.hr/>

24 FIFPro backs Croatian players who refused to play, available: www.fifpro.org/news/news_details/1773



The T.M.C. Asser Instituut is proud to announce that staff at its International Sports Law Center will intensify collaboration with staff at the School of Law of the University of Stirling. Both organisations are internationally recognised for their pioneering initiatives and research activities in the area of International and European Sports Law. By actively seeking synergy in activities and acknowledging complementarity in the respective areas of intervention both organisations intend to further strengthen their individual and collective expertise and impact on the European and International 'sports law' world.

T.M.C. Asser Instituut intensifies collaboration with the University of Stirling

As per September 1, 2012 Dr. David McArdle, Senior Lecturer at the University of Stirling, will also become a senior member of the Asser International Sports Law Center.

Interest is welcomed from other organisations keen to join and expand this inter-university network particularly in the area of tendering for relevant research projects, with the primary purpose of furthering the knowledge of International and European Sports Law.

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The Battle over the Osaka Rule

By Daniel Gandert*

1. Introduction

A world-class swimmer is advised by her coach to take a nutritional supplement. In order to ensure that the supplement does not contain any banned substances, the swimmer exercises the due diligence of contacting the manufacturer, the distributor, and the national governing body for her sport. The supplement becomes contaminated and the swimmer loses the opportunity to participate in the upcoming Olympic Games that will be held within the next couple of months. Nonetheless, the swimmer is also prohibited in participating in the following Olympic Games which will be held four years later. In another case, an elite track athlete purchases a product at a convenience store, which ends up containing a prohibited substance. The athlete cooperates in the hearing process regarding his doping offense, even making an embarrassing admission about the substance that he has taken. While this athlete's suspension is reduced from that of the standard two-year suspension and it is determined that he acted with *No Significant Fault or Negligence*, the athlete is still required to miss the next Olympic Games that will take place after he has completed his suspension. These are two examples of athletes whose inadvertent acts of doping would have caused them to miss out on their Olympic dreams had the IOC's Osaka Rule been applied to their situation. The Osaka Rule prohibited any athlete with a doping suspension of greater than six months from competing in the next Olympic Games, even for cases where the athlete's suspension has already been completed.¹ In October of 2011, the Court of Arbitration for Sport (CAS) invalidated the Osaka Rule which prevented athletes who committed a doping offence inadvertently from receiving disproportionately harsh consequences relative to their violation.

The first part of this article will describe the background relating to the Osaka Rule. The second part of the article will describe the system in place to prevent doping. The third part will discuss the principle of proportionality. First, the history of the principle in CAS jurisprudence will be discussed through a description of important cases. Second, the importance of proportionality will be explained. The fourth part will describe the three cases dealing with the Osaka rule as well as the impact of these cases on the Olympic World.

2. Background Relating to the Osaka Rule

Rule 45 of the Olympic Charter was approved as the Athlete's Code in 1988 to replace Rule 26, the previous rule that defined Olympic eligibility.² As late as 2003, it was known as the Eligibility Code and only required athletes to follow the rules of their International Federation and the Olympic Charter, to respect and follow all areas of the World Anti-Doping Code (WADC), and to respect the spirit of non-violence and fair play, including on the athletic field.³ At the time, it did not provide the IOC with any ability to limit an athlete's participation as long as the athlete met the requirements of his or her respective International Federation and was entered by his or her National Olympic Committee.⁴

In December 2001, the bobsleigh athlete Sandis Prusis tested positive for the prohibited substance nandrolone.⁵ Prusis believed that his contamination came from a food supplement that, according to the sell-

er, did not contain any banned substances.⁶ After having the supplement tested, it was confirmed that the substance contained nandrolone metabolites.⁷ Following this, the Fédération Internationale de Bobsleigh et de Tobogganing (FIBT) suspended Prusis for three months, retroactively starting the suspension on November 9, 2001. This allowed for the suspension to be finished before the start of the 2002 Winter Olympic Games.⁸ The FIBT stated that this sanction, as well as its early start date, was 'fair and just' in light of the Olympic Movement Anti-Doping Code and the case's exceptional circumstances.⁹ Upon inquiring with the Organizing Committee for the XIX Olympic Winter Games in Salt Lake City, the Latvian Olympic Committee confirmed that it was okay for Prusis to move into the Olympic Village prior to the end of his suspension.¹⁰

The IOC believed that the retroactive start of the suspension was "carved out" so that the suspension would be finished in time for Prusis to compete in the Olympics.¹¹ Consequently, the IOC decided not to accept Prusis as an athlete in the Olympics, to withdraw his Accreditation Card, and to ask him to leave the Olympic Village.¹² Prusis took his case to the CAS ad hoc Division.¹³

The CAS panel hearing the case described the importance of providing International Federations with autonomy.¹⁴ Because neither the Olympic Charter nor the FIBT mentioned anything giving the IOC the authority to become involved with the FIBT's disciplinary proceedings, athletes had an expectation to be able to participate following the end of their punishment.¹⁵ The panel went on to explain that the IOC could amend the Olympic Charter to allow it to intervene.¹⁶ Additionally, the panel recommended a set-up where either the IOC or World Anti-Doping Agency (WADA) could appeal an International Federation's doping decision to an independent body, and mentioned that it believed that this type of a system would not harm an International Federation's autonomy.¹⁷ This type of system seems to exist under the current anti-doping rules; WADA can appeal all doping cases to CAS for organizations which have adopted the WADC.¹⁸

The IOC claimed that it had the right to become involved with Prusis's case based upon Rule 49 of the Olympic Charter.¹⁹ This rule gave the IOC Executive Board the 'right of final acceptance of entries.'²⁰ The panel did not find this to be a sufficient basis for the IOC's action.²¹ While the IOC classified its action as 'purely administrative,' the panel determined that any decision impacting an athlete's expectation that he or she was allowed to enter the Olympics would risk constituting double jeopardy.

In 2004, Rule 45 of the Olympic Charter was revised to include the phrasing 'any entry is subject to acceptance by the IOC, which may at its discretion, at any time, refuse any entry, without indication or grounds. Nobody is entitled to any right of any kind to participate in the Olympic Games.'²² This Charter revision addressed the Prusis panel's concern and gave the IOC the ability to prevent athletes from participating in the Olympic Games. This phrase has remained a part of the Olympic Charter.

During the 2007 world athletics championships in Osaka, Jacques Rogge, the President of the IOC, proposed the Osaka Rule.²³ The IOC

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1 Stephen Wilson, *IOC Ratifies New Anti-Doping Rule*, USA TODAY (June 5, 2008, 1:46 PM), www.usatoday.com/sports/olympics/2008-06-05-2589742160_x.htm.

2 Allen Guttmann, *THE OLYMPICS: A HISTORY OF THE MODERN GAMES* (2002) 2nd ed. at 178.

3 See 2003 Olympic Charter, at http://www.olympic.org/Documents/Olympic%20Charter/Olympic_Charter_

[through_time/2003-Olympic_Charter.pdf](http://www.olympic.org/Documents/Olympic_Charter.pdf).

4 *Id.*

5 *Prusis & the Latvian Olympic Committee/International Olympic Committee* (CAS OG 2/001) at 573.

6 *Id.*

7 *Id.* at 574.

8 *Id.*

9 *Id.*

10 *Id.*

11 IOC: *Prusis' Suspension Had Been 'Carved Out'*, <http://sports.espn.go.com/oly/winter02/gen/news?id=1321384>, Feb. 2, 2002.

12 *Prusis* at 574.

13 *Id.*

14 *Id.* at 576.

15 *Id.* at 577.

16 *Id.*

17 *Id.*

18 *Court of Arbitration for Sport (CAS)*, World Anti-Doping Agency, at <http://www.wada-ama.org/en/Anti-Doping-Community/Court-of-Arbitration-for-Sport-CAS/>, October 2009. Since all members of the Olympic movement have adopted the WADC, this means that WADA can

appeal all cases of doping related to Olympic sports to CAS.

19 *Id.* at 574.

20 2001 Olympic Charter, at http://www.olympic.org/Documents/Olympic%20Charter/Olympic_Charter_through_time/2001-Olympic_Charter.pdf.

21 *Prusis* at 578.

22 Rule 45, 2001 Olympic Charter, at http://www.olympic.org/Documents/Olympic%20Charter/Olympic_Charter_through_time/2004-Olympic_Charter.pdf.

23 Stephen Wilson, *IOC Ratifies New Anti-Doping Rule*, USA Today,

executive board introduced this rule at its meeting in June 2008 and issued a letter describing the rule to the National Olympic Committees.²⁴ Under this rule, any athlete receiving a suspension related to doping that lasted longer than six months was prohibited from participating in the next Olympic Games.²⁵

Since the organization has no disciplinary authority over athletes who might compete in the Olympic Games in the future, the IOC has claimed that the rule is not a sanction, but an eligibility rule.²⁶ According to supporters of the IOC's argument, the purpose of the rule was to protect the reputation, image, and prestige of the Olympics, not to penalize.²⁷ Additionally, the rule was placed under the 'Participation in the Olympic Games' section of the Olympic Charter, instead of the 'Sanctions and Measures' section.²⁸

While CAS precedent is inconsistent regarding the disciplinary nature of the rule, most cases appear to support the rule falls on the disciplinary side. In the case *Sport Lisboa e Benfica Futebol SAD v. UEFA & FC Porto Futebol SAD*, CAS determined that there was a disciplinary element in rules prohibiting clubs, who violated UEFA's values, from participating in the Champion's League.²⁹ Similarly, in the case *Advisory Opinion IAAF*, the European Athletics Association set up rules prohibiting athletes, who had received at least a two year suspension, from participating in the European Athletics Championships following the end of their suspension.³⁰ The International Association of Athletic Federations (IAAF) requested an advisory opinion and the CAS panel hearing the case determined that the rule was a penalty instead of an entry rule and that it violated the EAA's obligation to comply with the WADC.³¹ Additionally, in the case *RFEC & Alejandro Valverde v. UCI*, the panel mentioned that eligibility rules generally do not penalize athletes for their undesirable behavior.³² In contrast to the holdings of the other cases, CAS issued an advisory opinion, at the IOC's request, describing the Osaka Rule as an eligibility rule.³³

3. The Need for Strict, Uniform Anti-Doping Rules

Rule 45 was passed with the noble intention of strengthening the fight against doping. Strict, unilaterally implemented rules are necessary in the fight against doping, which will likely need to continue for as long as sport exists.³⁴ Without this type of anti-doping regime, Olympic sports could look like some American professional sports, where doping is common enough that the practice is almost expected by the public.³⁵ Historians believe that doping dates back to the ancient Olympic

Games in Greece where athletes would use ointments, teas, and anything else that might help their performance.³⁶ During the 1950s, doping became a major issue for the modern Olympic Games, which led to the establishment of the IOC Medical Commission.³⁷ Following this, a variety of organizations took on the role of regulating doping in international sport, with each organization having its own rules related to banned substances and penalties.³⁸ This brought about a period of chaos and confusion which illustrated the need to standardize the doping rules.³⁹ Widespread doping during the 1998 Tour de France further made the need for a new anti-doping regime clear.⁴⁰ In 1999, the IOC held the World Conference on Doping in Sport at which the need for an independent agency dealing with doping was identified.⁴¹ WADA was founded in November of 1999.⁴²

Upon its founding, one of WADA's main priorities was harmonizing the various anti-doping policies.⁴³ The organization held the World Conference on Doping in Sport in March of 2003 and the WADC went into effect in January 2004.⁴⁴ The WADC is important because it binds all signatories to the same penalties for doping, procedures, and prohibited substance lists. The IOC amended the Olympic Charter in 2003 to make a sport's continued participation in the Olympic Games contingent upon an international federation's ratification of the WADC.⁴⁵ Additionally, the Olympic Charter requires National Olympic Committees to abide by the WADC, makes compliance with the WADC a condition for the IOC's recognition of an International Federation, and states that 'The World Anti-Doping Code is mandatory for the whole Olympic Movement.'⁴⁶ The WADC was revised in 2009. However, it continues to act as a uniform set of rules for the entire Olympic movement.

4. The Prescribed Penalties for Doping Under the World Anti-Doping Code

The standard penalty for a first doping offence under the WADC is a two year suspension, while a lifetime ban serves as the standard penalty for an athlete's second offence.⁴⁷ An athlete engaged in inadvertent doping, can have his or her sentence reduced in some cases. . Article 10.5.1 of the WADC describes the category of *No Fault or Negligence*.⁴⁸ An athlete whose case falls into this category does not receive a suspension and does not have the case count as a first offence if the athlete commits a future doping offence.⁴⁹ An athlete whose case falls into this category is considered completely free from blame.⁵⁰ Cases fall into this

http://www.usatoday.com/sports/olympics/2008-06-05-2589742160_x.htm, June 5, 2008. The terms "Rule 45," the "Osaka Rule," and "the Unpublished Memorandum" are used interchangeably in the cases and articles addressing the rule. In order to prevent confusion from taking place, the rule will be referred to as the "Osaka Rule" in this article.

²⁴ Matt Lane, "Rule 45": Is LaShawn Merritt Banned from the London 2012 Olympics?, at <http://www.letsrun.com/2010/merritt-1021.php>, Oct. 10, 2010.

²⁵ *Id.* citing the IOC's letter describing the rule. An athlete whose suspension triggered this rule was prohibited from participating in the next Olympic Games that included the athlete's respective sport. For Winter Olympic sports, the athletes were prohibited from participating in the next Winter Olympic Games, while for Summer Olympic Sports, the athletes were prohibited from participating in the next Summer Olympic Games.

²⁶ *USOC v. IOC* (CAS 2011/O/24422) at 7-7.

²⁷ *IOC 'Osaka Rule': Prohibition of Dopers from the Olympics*, WORLD SPORTS LAW REPORT, May 2011 at 1-2.

²⁸ *Id.*

²⁹ *Id.* citing *Sport Lisboa e Benfica Futebol SAD v. UEFA & FC Porto Futebol SAD*

(CAS 2008/A/1583 and CAS 2008/A/1584).

³⁰ *USADA v. LaShawn Merritt* at (AAA No. 77190 00293 10) at 42 citing *Advisory Opinion IAAF* (CAS 2008/C/1619).

³¹ *Merritt* at 42.

³² *RFEC & Alejandro Valverde v. UCI* (TAS 2007/O/1381).

³³ *USOC v. IOC* (CAS 2011/O/2422) at 15.

³⁴ See Daniel Gandert and Fabian Ronisky, *American Sports is a Doper's Paradise: It's Time that We Make a Change*, Daniel Gandert & Fabian Ronisky, *American Professional Sports is a Doper's Paradise: It's Time We Make a Change*, 86 N.D. L. REV. 813 (2010) and Rogge: *Doping is Eternal*, at www.skysport.co.nz/article/olympics/headlines/rogge-doping-is-eternal-51884/, for IOC President Jacques Rogge's statement that because cheating is a part of human nature meaning that doping will always remain an issue.

³⁵ *Gandert and Ronisky, supra note 32.*

³⁶ See Sarah R. Heisler, *Steroid Regulation in Professional Sports: Sarbanes Oxley as a Guide*, 27 CARDOZO ARTS & ENT. L.J. 199, 205 (2009); Paul A. Fortenberry & Brian E. Hoffman, *Illegal Muscle: A Comparative Analysis of Proposed Steroid Legislation and the Policies in Professional Sports' CBAs that Led to the Steroid*

Controversy, 5 VA. SPORTS & ENT. L.J. 121, 136 (2006); Kristin Jo Custer, *From Mice to Men: Genetic Doping in International Sports*, 30 HASTINGS INT'L & COMP. L. REV. 181, 182 (2007).

³⁶ Gandert and Ronisky, *supra note 32.*

³⁷ Kathryn E. Henne, THE ORIGINS OF THE INTERNATIONAL OLYMPIC COMMITTEE MEDICAL COMMISSION AND ITS TECHNOCRATIC REGIME: AN HISTORIOGRAPHIC INVESTIGATION OF ANTI-DOPING REGULATION AND ENFORCEMENT IN INTERNATIONAL SPORT 2009), http://doc.ero.ch/lm.php?url=1000,44,38,20100301152359-AF/2009_-_The_Origins_of_the_International_Olympic_Committee_Medical_Commission_-_HENNE_K.pdf.

³⁸ Jessica K. Foschi, *A Constant Battle: The Evolving Challenges in the International Fight Against Doping in Sport*, 16 DUKE L.J. 457.

³⁹ See Daniel Gandert, *Gasquet and the Career-Killing Kiss: A Precedent for No Fault or Negligence*, in 2010 International Association of Sports Law World Congress of Sports Law proceedings.

⁴⁰ Jin-Kyung Park, *Governing Doped Bodies: The World Anti-Doping Agency and the Global Culture of Surveillance, Cultural*

Studies Critical Methodologies, 5, no. 2: 177 (2005).

⁴¹ Albert D. Fraser, *Doping Control from a Global and National Perspective*, THER DRUG MONIT, Volume 26, Number 2, April 2004: 172.

⁴² "WADA History," <http://wada-ama.org/en/About-WADA/History/WADA-History/>.

⁴³ John Mendoza, 2002. "The War on Drugs in Sport: A Perspective From the Front-Line." *Clinical Journal of Sports Medicine*, 12(4) (July): 254-58.

⁴⁴ *World Anti-Doping Agency: What is the Code*, at <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=267>.

⁴⁵ Ryan Connolly, *Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. the Protection of Rights of Accused Athletes*, 5 VA. SPORTS & ENT. L.J. 161.

⁴⁶ Olympic Charter, Articles 43, 25, and 27.

⁴⁷ 2009 World Anti-Doping Code, Articles 10.2 and 10.7.

⁴⁸ World Anti-Doping Code, Article 10.5.1.

⁴⁹ 2009 World Anti-Doping Code, Article 10.5.1.

⁵⁰ Gandert, *supra note 37.*

⁵¹ Connolly, *supra note 42.*

⁵² 2009 World Anti-Doping Code, rule 10.5.1

category when “the athlete could not, even with the exercise of the utmost caution, reasonably have suspected, that he had been administered a prohibited substance.”⁵¹ It is extremely difficult for athletes to demonstrate this. Athletes are required to establish how the prohibited substance entered their system in order for their case to fall into this category,⁵² e.g. as a result of sabotage by an opponent. However, sabotage by a member of the athlete’s inner circle is specifically excluded from this category.⁵³ Additionally, other common reasons for accidental doping, such as mislabeled or contaminated nutrition supplements, are also specifically listed as insufficient grounds for an athlete’s case to fall into this category.⁵⁴

From the start of the WADC until 2005, no athlete was successful in having his or her case established to fall into the *No Fault or Negligence* category.⁵⁵ The first case where an athlete received a reduced sentence under this category was the ATP Anti-Doping Tribunal case *Appeal of Todd Perry* in 2006.⁵⁶ In this case, a tournament doctor refilled the athlete’s inhaler without his knowledge.⁵⁷ Even though Perry was not found to be at fault, the panel hearing his case allowed a reprimand to remain in his record.⁵⁸ Other successful cases include *Pobyedonostev v./IIHF*, where an athlete who was unconscious in the hospital was given a prohibited substance, and *Adams v./ Canadian Centre for Ethics in Sport*, where an athlete was assaulted and forced to ingest a prohibited substance without providing his consent.⁵⁹ In *Adams*, the athlete used a catheter to urinate after he was forced to ingest the cocaine and used the same catheter to take a drug test, causing the athlete’s urine sample to include a prohibited substance.⁶⁰

It is likely a bit easier for an athlete’s case to fall into the *No Fault or Negligence* category following the case *ITF v./ Gasquet*.⁶¹ The professional tennis player Richard Gasquet went to Miami to play in the Sony Ericsson ATP tournament.⁶² After having an MRI scan of his injured shoulders and learning from his doctor about significant inflammation, Gasquet decided to withdraw from the tournament.⁶³ Because he was not scheduled to play right away, Gasquet decided to wait until the next day to formally withdraw from the tournament, which would include submitting to doping control.⁶⁴ That night, Gasquet met a woman at a restaurant.⁶⁵ The couple, along with others in their party, went to the night club “Set” later in the night, where the DJ invited them to his table and Gasquet drank apple juice that came from an open topped jug.⁶⁶ The couple kissed each other later that night and Gasquet formally withdrew from the tournament the next day.⁶⁷ Gasquet’s urine sample was found to contain benzoylcegonine, a metabolite of cocaine, which resulted in his being charged with a doping offence.⁶⁸

It was determined that kissing the woman was the most likely cause of Gasquet’s contamination. Because Gasquet’s test showed that he was only contaminated with a miniscule amount of cocaine, recreational use was determined to be unlikely.⁶⁹ This also ruled out the likelihood of his drink being deliberately spiked.⁷⁰ Additionally, the woman was a regular cocaine user in the past and it was noted that she had spent a lot of time that night in the restroom.⁷¹ Given these facts, the panel determined Gasquet was likely contaminated from kissing the woman. Because rule 3.1 of the WADC describes that “the standard of proof shall be by a balance of probability,”⁷² the panel was correct in assuming that this was Gasquet’s source of contamination.

Accordingly, the panel found that Gasquet’s case fell into the category

of *No Fault or Negligence*. The panel decided not to take account of the lack of caution that Gasquet exercised earlier during the evening, such as drinking apple juice from an open container, and determined that only the facts directly related to the kissing was relevant.⁷³ Had the panel looked at the entire situation when deciding whether Gasquet exercised the required amount of caution, it would have likely found that Gasquet did not act with *No Fault or Negligence*.⁷⁴ By narrowing the circumstances, however, the panel was able to find that Gasquet did not act with fault. This sets precedent for CAS to only consider the facts that directly relate to the cause of an athlete’s contamination when determining whether a case falls into the *No Fault or Negligence* category.⁷⁵

In determining whether Gasquet acted with the utmost caution, the panel cited the case *FIFA & WADA*. In this CAS advisory opinion, the tribunal stated that ‘the endeavours to defeat doping should not lead to unrealistic and impractical expectations the athletes have to come up with.’⁷⁶ The CAS panel hearing Gasquet’s case determined that he did not have any constructive knowledge that kissing the woman would contaminate him. The couple first met at a restaurant: he did not have any information about the woman’s history with the substance and did not see anyone using the substance during the night of his contamination.⁷⁷ As the panel needed to have experts conduct research to determine whether one could become contaminated of cocaine through kissing someone, it did not believe that Gasquet should have been aware of this possibility.⁷⁸ The panel determined that imposing ‘an obligation on an athlete not to go out to a restaurant where he might meet an attractive stranger whom he might later be tempted to kiss’ would be imposing the type of ‘unrealistic and impractical expectations’ that the panel in *FIFA & WADA* stated should not be placed on athletes.⁷⁹ This set forth the precedent of not allowing ‘unrealistic and impractical expectations’ to be placed on an athlete when determining whether he or she has acted with *No Fault or Negligence*.

An athlete whose case does not fall into the *No Fault or Negligence* category may argue that it falls into the *No Significant Fault or Negligence* category of the WADC. If applicable, the athlete can have his or her suspension reduced to up to half of the normal suspension period.⁸⁰ Athletes who would normally receive a lifetime ban for their offence can have their suspension reduced to no fewer than eight years under this category.⁸¹ As with cases of *No Fault or Negligence*, athletes are required to establish how the prohibited substance entered their body.⁸² An example of a case that was classified to fall into the *No Significant Fault or Negligence* category is *Squizzato v./FINA*, where the athlete received a cream to fight a skin infection that contained a prohibited substance.⁸³ While the panel hearing the case did not find that the athlete executed complete diligence, it was determined that she acted without significant fault.⁸⁴

Most cases do not fall into either the *No Fault or Negligence* or the *No Significant Fault or Negligence* category and result in the athlete receiving the regular suspension prescribed by the WADC.⁸⁵ Even in cases where the arbitrators acknowledged that the standard penalty is harsh for the athlete’s situation of accidental doping, it was nonetheless decided to apply the standard penalty.⁸⁶

53 2009 World Anti-Doping Code, Comment to 10.5.1 and 10.5.2.

54 *Id.*

55 Connolly, *supra* note 42.

56 Michael Hiltzik, *Presumed Guilty: Athletes See Doping Case Appeals as Futile Exercise*, L.A. TIMES, DEC. 11, 2006 AT A1 and *Appeal of Todd Perry*, ATP Tour Anti-Doping Tribunal, 2005.

57 *Id.*

58 *Id.*

59 Paul White, *Malicious Drugging and the Contaminated Catheter: Adams v Canadian Centre for Ethics in Sport*, BOND UNIVERSITY SPORTS LAW JOURNAL (2008), at

<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1007&context=slej> and *Pobyedonostev v./ IIHF* (CAS 2005/A/990) and *Adams v./ CCES* (CAS 2007/A/1312).

60 *Adams v./ CCES* (CAS 2007/A/1312).

61 *ITF v./ Gasquet*, (CAS 2009/A/1926)

62 *Id.* at ¶ 2.4.

63 *Id.* at ¶ 2.6.

64 *Id.* ¶ At 2.7.

65 *Id.* ¶ At 2.9

66 M. Richard Gasquet, International Tennis Federation Independent Anti-Doping Tribunal (July 15, 2009) (Kerr, Arb.) (hereinafter “ITF”).¶93.

67 *Id.* At ¶ 2.12-2.14.

68 *Id.* At ¶ 2.17-2.18.

69 *Id.* At ¶ 5.13.

70 *Id.* At ¶ 5.15.

71 *Id.* At ¶ 5.23

72 2009 World Anti-Doping Code, Article 3.1.

73 Gandert, *supra* note 70.

74 *Id.*

75 *Id.*

76 *FIFA & WADA* (CAS 2005/C/1976&986)

(available at http://www.rdes.it/RDES_2_06_fifa&cwa da.pdf), p. 220.

77 *ITF v./ Gasquet*, *supra* note 58 at ¶ 5.31.

78 *Id.*

79 *Id.* At ¶ 5.32.

80 2009 World Anti-Doping Code, article 10.5.2.

81 *Id.*

82 *Id.*

83 *Squizzato v./ FINA*, (CAS 2005/A/830).

84 *Id.*

85 Gandert, *supra* note 37 at 390.

86 See *USADA v./ Torri Edwards*, North American Court of Arbitration for Sport panel (2005) and *USADA v./ Torri Edwards* (CAS OG 04/300) and *WADA and USBSF v./ Zachery Lund* (CAS OG 06/001) for examples of cases where the standard penalty was given to athletes for cases of accidental doping.

5. CAS and the Principle of Proportionality

5.1 The History of Proportionality

CAS has a long history of using proportionality as one of the main principles for resolving disputes. The first case in which CAS applied this principle is *NWBA v./IPC*.⁸⁷ In this case, a wheelchair basketball athlete suffered an injury that aggravated his nerve pain and caused him difficulty in sleeping.⁸⁸ The athlete was given a drug that was not on the banned substance list, but did contain a banned component. It caused the athlete to test positive.⁸⁹ The CAS panel acknowledged that the proportionality principle should be considered. However, it found that the penalty for this case, the athlete's loss of a gold medal, was proportionate, thus not establishing a firm precedent.⁹⁰

In the case *C. v./FINA*, CAS established precedent for using the principle of proportionality to adjust a penalty from what was prescribed by the rules. In this case, a swimmer's coach admitted that he had mistakenly given her a capsule containing a banned substance.⁹¹ Under the FINA medical rules, which were the doping rules that applied at the time, a mandatory two-year suspension was required.⁹² The CAS panel deciding the case determined that although the athlete was at-fault, the two-year suspension did not fall in-line with the principle of proportionality.⁹³

The start of the new anti-doping regime under the WADC raised questions about how CAS would apply the principle of proportionality. Professor Richard McLaren wrote 'that the introduction of the WADA Code will eliminate the application of the doctrine of proportionality in future cases, except as provided for in the WADA Code itself.'⁹⁴ Similarly, in the case *IAAF v./ÖLV & Elmar Lichtenegger*, the panel hearing the case claimed that 'the doctrine of proportionality was incorporated into the WADA Code.'⁹⁵ This can be perceived as true in some instances as it is possible that under the WADC, the athlete in *C. v./FINA* might have had her case fall under the *No Significant Fault or Negligence* category. Nonetheless, there situations have come about for which the sanctions under the WADC have not been proportionate as applied to an athlete's case. One example is the case *Puerta v./ITF*, in which the panel set a precedent that the principles of proportionality can allow for a penalty outside of the WADC.

In *Puerta v./ITF*, the tennis player Mariano Puerta drank from a water cup that looked similar to his wife's water cup shortly before a match.⁹⁶ After Puerta left the cafeteria to get prepared to play, his wife moved to the place where Puerta had been sitting and put drops of Effortil, a medicine for menstrual issues that she was taking, into her glass and left to use the restroom.⁹⁷ Puerta returned after learning that his match's start was going to be delayed and accidentally drank water from his wife's cup.⁹⁸ After testing positive for a miniscule amount of efetine, he was able to establish that most likely, his wife's water cup was the source of his contamination.⁹⁹

Puerta's case was first heard by the ITF Anti-Doping Tribunal. Puerta tried to have his case fall into the *No Fault or Negligence* category, but the panel determined that he could have exercised more caution, especially since he was aware that his wife was using efetine.¹⁰⁰ The panel found that Puerta did meet the criteria for his case to fall into the *No Significant Fault or Negligence* category.¹⁰¹

In 2003, Puerta was suspended for nine months after using the prohibited substance clenbuterol for an asthma attack even though he had not received a therapeutic use exemption allowing him to use the sub-

stance.¹⁰² Because his doping was unintentional, Puerta's suspension was reduced from two years to nine months.¹⁰³ Because Puerta's 2005 case fell into the *No Significant Fault or Negligence* category, the ITF Tribunal hearing the case reduced his suspension from a lifetime ban to an eight year suspension.¹⁰⁴ Following this, Puerta appealed the case to CAS, which upheld the decision that his case fell into the *No Significant Fault or Negligence* category.¹⁰⁵ The panel took into account the fact that Puerta became contaminated through ingesting water instead of a nutritional supplement, the fact that he was unaware that his wife had taken efetine during the period that he was away, the fact that the amount of efetine that he ingested was small enough that it could not have provided him with any advantage, and the fact that in most instances, it would be reasonable for Puerta to believe that his glass was the one at the place where he had been sitting a few minutes earlier.¹⁰⁶ The CAS panel also agreed with the ITF Tribunal that violations that occurred prior to the introduction of the WADC were to count as violations, thus meaning that this offence counted as Gasquet's second doping violation.¹⁰⁷

Nevertheless, the panel stressed that because of Puerta's age, an eight-year suspension would effectively serve as a lifetime ban.¹⁰⁸ The panel found that at the age of 26, Puerta would likely be too old to play professional tennis at the end of his eight year suspension.¹⁰⁹ The panel determined that this punishment was inconsistent with the principle of proportionality and that it was not 'necessary for there to be undeserving victims in the war against doping.'¹¹⁰ The panel believed that there was a lacuna between the *No Fault or Negligence* and the *No Significant Fault or Negligence* categories which was to be filled by 'applying the overarching principle of justice and proportionality on which all systems of law, and the WADC itself, is based.'¹¹¹ Consequently, the panel reduced Puerta's suspension to two years following the date of his failed drug test.¹¹²

This provided precedential value for CAS to continuing applying the principle of proportionality following the introduction of the WADC. It is likely that most athletes whose case falls into the *No Significant Fault or Negligence* category close to their retirement will be able to cite *Puerta* as precedent to have their suspension reduced.¹¹³

In their opinion, the arbitrators deciding *Puerta* wrote that they hoped that the lacuna in *Puerta* would 'be filled when the WADC is revised in the light of experience in 2007.'¹¹⁴ Many of the arbitrators' wishes were fulfilled when the 2009 WADC was released.¹¹⁵ Some of the changes to the code brought it more in line with the principle of proportionality. Article 10.7 of the 2009 WADC makes the penalty for second doping offences vary based upon an athlete's first offence, which is illustrated by a rubric.¹¹⁶ Most of the categories listed in the rubric provide a range for suspensions, which give the arbitrators more discretion for what penalty to give an athlete.¹¹⁷

Additionally, the 2009 WADC allows more athletes to have their suspensions reduced for accidentally taking a Specified Substance. Athletes whose accidental doping results from taking a specified substance can have their penalty reduced. These substances 'are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents.'¹¹⁸ The 2003 WADC put Specified Substances into a narrow category, which excluded most ordinary doping offences.¹¹⁹ Under the 2009 WADC, the Specified Substances category includes all substances 'excluding substances in the classes of ana-

87 McLaren, *CAS Doping Jurisprudence: What Can We Learn*, 2006 INT'L SPORTS L. REV. 4 (Feb. 2006).

88 National Wheelchair Basketball Association (WNBA) v./ International Paralympic Committee (IPC) (CAS 95/122).

89 *Id.*
90 *Id.*

91 *C. v./ Federation Internationale de Nation Amateur (FINA)* (CAS 95/141).

92 *Id.*
93 *Id.*

94 McLaren, *supra* note 53 at 17.

95 *Id.* describing *IAAF v./ ÖLV & Elmar Lichtenegger* (CAS 2004/A/624).

96 *Mariano Puerta v./ International Tennis Federation* (CAS 2006/A/1025).

97 *Id.* at 4-5.

98 *Id.* at 4-6.

99 *Id.* at 5.1

100 *Id.* at ¶5.5.

101 *Decision in the Case of Mariano Puerta (International Tennis Federation Tribunal)*, ¶5.13.

102 *Puerta*, *supra* note 93 at 3.

103 *Id.*

104 *Id.* at 37.

105 *Puerta*, *supra* note 93 at 28.

106 *Id.*

107 *Id.* at 28.

108 *Id.* at 36-37.

109 *Id.* at 37.

110 Gandert, *supra* note 37 citing *Puerta*, *supra* note 93 at ¶ 11.7.14.

111 *Id.* at 39.

112 *Id.* at 43 and 41.

113 Daniel Gandert, *Puerta: Applying the Principles of Proportionality to the World*

Anti-Doping Code, SPORTS LAW: 15TH IASL CONGRESS PROCEEDINGS (2010) at 50, edited by Jacek Foks, Warsaw, 2010.

114 *Puerta*, *supra* note 93 at 39.

115 Gandert, *supra* note 113 at 51.

116 *Id.*

117 *Id.*

118 2003 World Anti-Doping Code, Article 10.3.

119 Gandert, *supra* note 113 at 51. According to Article 10.3 of the 2003 World Anti-Doping Code, only substances special-

bolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the “Prohibited List.”¹²⁰ This change makes the Specified Substances category the new default category for most cases of inadvertent doping.¹²¹ The minimum offence for athletes who have their suspension reduced based upon taking a Specified Substance is only a reprimand. This gives arbitrators a lot more flexibility for determining an athlete’s suspension for inadvertent doping.¹²² As a result, most athletes who receive suspensions under the WADC for inadvertent doping are now more likely to receive penalties that fit with the principle of proportionality.

When applying the principle of proportionality in *Puerta*, one of the factors that the CAS panel applied was the amount of time left in Puerta’s career. When the WADC was revised following the case, the drafters included a comment stating that neither calendar timing nor the amount of time left in an athlete’s career should be considered when reducing an athlete’s suspension under either the *No Fault or Negligence* or *No Significant Fault or Negligence* category.¹²³ It appears that the arbitrators disregarded this rule in the International Tennis Federation (ITF) Anti-Doping Tribunal Case *In the Matter of Richard Gasquet*.¹²⁴

The ITF Tribunal hearing this case determined that Gasquet’s offense fell into the *No Significant Fault or Negligence* category.¹²⁵ According to the 2009 WADC, an athlete whose first offence falls into this category should have his or her suspension reduced from two years to one year.¹²⁶ Instead of following the prescribed penalty, the panel explained that there was a lacuna in the rules, as there was in *Puerta*, and that an athlete in these circumstances would not have been envisioned by the WADC drafters.¹²⁷ The panel accepted ‘the player’s submission that if we were to impose a one year period if ineligibility, applying the rules rigidly, we would be penalizing a person whom the rule was not intended to catch.’¹²⁸ It determined that based upon the way rankings work in tennis, Gasquet’s being suspended for an entire year would likely prevent him from being able to move back into the top rankings of the sport.¹²⁹ The panel’s penalty for Gasquet ended up being a suspension for the time that he had already sat out, which allowed him to start playing again immediately.¹³⁰ Additionally, it determined that the miniscule amount of cocaine that Gasquet had ingested could not have helped his performance in the tournaments that he played in Rome and Barcelona prior to his learning that he had tested positive. Because of this, the panel decided that he would neither lose the ranking points nor have to pay back the prize money for those tournaments.¹³¹

This decision significantly strengthened the precedent of *Puerta*. It strengthens the doctrine of deviating from the prescribed penalty for doping based upon the proportionality. It also continues the doctrine of showing ‘that there does not need to be innocent victims in the war on doping.’¹³² Unlike in *Puerta*, where shortening the athlete’s sentence was the only thing that was done for proportionality, in *Gasquet*, the panel also allowed the athlete to keep his ranking points and prize money from other tournaments after his initial positive drug test.¹³³ This provides precedential value for adjusting any part of an athlete’s sanction when it is believed to be either unjust or disproportionate. Additionally, this case illustrates that there is still room for arbitrators to apply the principle of proportionality outside of the WADC.¹³⁴

In *Puerta*, the CAS panel carefully stated that ‘the circumstances

in which a tribunal might find that a gap or lacuna exists in the WADC in relation to sanctions for a breach of its provisions will arise only very rarely.’¹³⁵ One could easily interpret this language as providing a high burden for attorneys planning to cite *Puerta* as precedent.¹³⁶ However, *Gasquet* illustrates that attorneys can now cite *Puerta* as precedent whenever the anti-doping rules would not provide for a proportionate outcome. Although the CAS panel reached a different outcome for Gasquet’s case, from what the ITF Tribunal panel had decided, it left the ITF Tribunal’s decision untouched.¹³⁷ This means that the decision and its reasoning remain valid precedent.

5.2 The Legal Requirement for Proportionality

One reason that the tribunals hearing sports cases are concerned about proportionality is because of Swiss law. CAS, the IOC, and WADA are all seated in Switzerland and the Code of Sports-related Arbitration makes the Swiss Federal Tribunal the only judicial body that can review its CAS awards.¹³⁸ The Federal Code on Private International Law for Switzerland makes the use of Swiss law the default and states that parties are to use Swiss law unless there is another law that is applicable to their contract.¹³⁹ Additionally, it allows arbitration awards to be attacked when they are determined to be incompatible with Swiss public policy.¹⁴⁰ Based upon Articles 5 and 36 of the Swiss Federal Constitution, proportionality is one of the main principles that governs Swiss administrative law.¹⁴¹ This means that CAS awards can be attacked if arbitrators view them to go against the principle of proportionality. However, it is rare for parties to succeed at challenging CAS awards to the Swiss Federal Tribunal.¹⁴² Even when parties succeed at their challenge, their awards are remanded back to CAS.¹⁴³

6. Cases under the Osaka Rule

6.1 Jessica Hardy’s Case

Had the case not been resolved in a manner outside of the sports arbitration system, the precedents of *Gasquet* would have likely helped the case of the world-class swimmer Jessica Hardy. Hardy was advised by her coach to take the AdvoCare nutritional supplement.¹⁴⁴ She believed that between eighty-five and ninety percent of elite swimmers were taking supplements.¹⁴⁵ In order to exercise due diligence, she and her agent contacted the supplement company, AdvoCare, and verified that the supplements were uncontaminated.¹⁴⁶ She also went to the company’s website to make sure that the company was reputable, contacted other elite athletes that were taking the substance, and contacted the supplement’s distributor to further verify the safety of the product.¹⁴⁷ Additionally, Hardy made inquiries with her governing body, USA Swimming, as well as the United States Olympic Committee (USOC) and received additional assurances about AdvoCare’s being a safe company.¹⁴⁸ Despite all of these measures, Hardy tested positive for the prohibited substance. The AdvoCare supplements were determined to be the most likely cause of Hardy’s contamination.¹⁴⁹

The North American CAS panel initially hearing Hardy’s case classified it into the *No Significant Fault or Negligence* category.¹⁵⁰ As the supplements were tested to contain clenbuterol, the panel determined that Hardy had met the requisite burden of proof.¹⁵¹ Although Hardy

ly listed on the *Prohibited List* as Specified Substances can allow an athlete’s case to fall into this category.
 120 2009 World Anti-Doping Code, Article 4.2.2.
 121 Gandert, *supra* note 113 at 51.
 122 *Id.*
 123 2009 World Anti-Doping Code, Comment to 10.5.1 and 10.5.2.
 124 See *ITF*, *supra* note 63.
 125 *Id.* at ¶ 98-99. A description of the facts relating to Gasquet’s case is provided earlier in the article. Gasquet’s case, which is described earlier in the article, was the International Tennis Federation and WADA’s appeal of this decision.
 126 See 2009 World Anti-Doping Code,

Article 10.5.2.
 127 *Id.* at ¶ 114-116.
 128 *Id.* at ¶ 116.
 129 *Id.* at ¶ 119.
 130 *Id.* at ¶ 120.
 131 *Id.*
 132 Gandert, *supra* note 37.
 133 *Id.*
 134 *Id.* at 405.
 135 *Puerta*, *supra* note 93 at ¶ 11.7.26.
 136 Gandert, *supra* note 37 at 404.
 137 CAS Gasquet 5.4.3.
 138 *Statutes of the Bodies Working for the Settlement of Sports-related Disputes*, at <http://www.tas-cas.org/d2wfiles/document/281/5048/0/3.1%20CodeEngnov2004.pdf>, *About WADA*, [\[ama.org/en/About-WADA/\]\(http://www.wada-ama.org/en/About-WADA/\), Olympic Charter, Article 15, and Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 PEPP. DISP. RESOL. L. J. 51 \(2009\).
 139 *Switzerland’s Federal Code on Private International Law*, <http://www.tas-cas.org/usefultexts> at 173.
 140 *Id.* at 190.
 141 Dessemontet and T. Ansay, INRO-DUCTION TO SWISS LAW \(2004\) at 3, citing Articles 5 and 36 of Federal Constitution of Switzerland.
 142 Maureen A. Weston, *Simply a Dress Rehearsal? U.S. Olympic Sports Arbitration and De Novo Review at the*](http://www.wada-</p>
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Court of Arbitration for Sport, 38 GA. J. INT’L & COMP. L. 99 at 124.
 143 *Id.*
 144 *USADA v./ Jessica Hardy*, North American Court of Arbitration for Sport panel at 5.
 145 *Id.* at 6.
 146 *Id.* at 7.
 147 *Id.*
 148 *USADA v./ Jessica Hardy* (CAS 2009/A/1870) at 17.
 149 *Id.* at 3.
 150 *Hardy*, *supra* note 146 at ¶ 7.25.
 151 *Id.* at 9.

was warned about taking nutritional supplements, the panel decided to look at the totality of the situation, including the effort that Hardy put into making sure that the product was safe.¹⁵² While the panel determined that Hardy could have taken even more steps to ensure that the AdvoCare supplements were safe, it decided to reduce her suspension to one year.¹⁵³ This was the maximum reduction possible under the *No Significant Fault or Negligence* category of the WADC at the time.¹⁵⁴

The panel then went on to consider the Osaka Rule and its impact on Hardy's eligibility.¹⁵⁵ Because the rule would have prohibited anyone with a suspension of over six months from competing in the next Olympics, Hardy would not be eligible to compete in the 2012 Olympic Games. Since Hardy had already sat out of the 2008 Olympic Games because of her offence, she argued that this was 'shockingly disproportionate to her degree of fault'. The penalty would be excessive, abusive, and contrary to Swiss law. She cited the case *FIFA & WADA* in explaining that panels cannot impose penalties that are considered excessive under Swiss law.¹⁵⁶ Hardy further pointed out that the rule would also prohibit her from competing to qualify for the Olympic Games. The USA Swimming Standard Waiver and Release form requires athletes to sign that they are 'eligible and in good standing with the regulations laid down by USA Swimming, the International Federation for Amateur Swimming (FINA), and the International Olympic Committee.'¹⁵⁷ Furthermore, USOC policies do not allow athletes who are ineligible for competing in the Olympics to compete in the Olympic trials.¹⁵⁸

The panel explained that the rule appeared to contradict Article 20.1 of the WADC, which describe the IOC's rules and responsibilities. While the IOC was not at the proceeding to argue its position, the organization is a WADC signatory.¹⁵⁹ Additionally, it described how article 23.2.2 of the 2009 WADC specifically stated that 'No additional provision may be added to a Signatory's [such as the IOC] rules which change the effect of the Articles enumerated in this article.'¹⁶⁰

While the panel viewed the penalty with the Osaka Rule factored in as disproportionate, it decided to keep Hardy's suspension at one year and stated that it was not applying any rules other than the FINA Doping Code (FINA DC).¹⁶¹ It further stated that reducing suspensions so that they allow athletes to compete in the Olympics could bring about the problems of causing all doping violations to be reduced to six months.¹⁶² However, the panel decided to allow Hardy to apply for a waiver to the IOC regarding the Osaka Rule, with the IOC having the ability to appeal the case to CAS.¹⁶³

Following this, Hardy requested a waiver from the IOC which was subsequently denied.¹⁶⁴ Additionally, WADA appealed the North American CAS decision to CAS.¹⁶⁵ The CAS panel also found the case to fit into the *No Significant Fault or Negligence* category and left Hardy's suspension at one year.¹⁶⁶ The panel also stated that it could not further reduce Hardy's suspension to allow her to be eligible to compete in the 2012 Olympic Games. In a manner similar to that of the North American CAS panel that had previously heard the case, it stated that

it was bound by the FINA DC.¹⁶⁷ The panel stressed that disregarding the FINA DC provisions would be like rewriting the rules, for which the panel has no authority.¹⁶⁸ Also, the panel made the argument that the Osaka Rule was only intended to affect elite athletes who have a chance of qualifying for the Olympics.¹⁶⁹ Because of this, it believed that reducing the suspensions of elite athletes under the WADC, because of how proportionality would work when the Osaka Rule is factored in, would mean that these athletes would have lower sanctions than lower level athletes (who are not likely to qualify for the Olympics). This would effectively be unfair.¹⁷⁰

Hardy also requested a declaratory judgment from the panel that would allow her to compete in the 2012 Olympic Games.¹⁷¹ However, the panel determined that Hardy did not have a legal interest, which is needed for declaratory relief to be granted.¹⁷² Additionally, it stated that it did not believe Hardy would be helped by a declaratory judgment since neither the USOC nor the IOC would be bound by it.¹⁷³ The panel went on to explain its position that the lawfulness of the Osaka rule is more of an abstract question than an actual dispute concerning the parties.¹⁷⁴

The panel's refusal to provide declaratory judgment prevented Hardy from having a forum to take her dispute. Hardy would have been without a legal interest regarding the outcome of the Osaka Rule part of her case until she had qualified for the Olympic Games. However, she was unable to qualify for the Olympic Games because the rule made her ineligible to participate in the Olympic trials. This resulted in Hardy being caught in a "Catch 22" type situation for which there was no way for her to get relief. It is likely that many other athletes would have been caught in similar "Catch 22" situations had the Osaka Rule been allowed to stay in force.

If Hardy had asked for the panel to allow her to continue to participate in USA Swimming events, it would have given her the needed eligibility to qualify for the Olympics. Once Hardy was qualified for the Olympics, she would then have standing to request relief from the IOC regarding the Osaka Rule.¹⁷⁵ While this solution would have perhaps helped Hardy's case before CAS, it would have likely made things difficult for USA Swimming and the USOC. It would be problematic for these organizations to have an athlete qualify for the Olympics who might later be found ineligible to participate. Had Hardy qualified for the Olympics but been denied entry because of an Osaka Rule decision at the last minute, it would be too late for US Swimming to find a replacement to fill Hardy's spot.

In its explanation for why it did not allow proportionality to affect the length of Hardy's suspension, the panel cited *Puerta*. While the WADC has some flexibility to satisfy the proportionality principle, the flexibility is limited to avoid situations that are at odds with the purpose of applying a consistent anti-doping framework.¹⁷⁶ However, Hardy's situation was unique enough that providing a different suspension from what was prescribed by the WADC, in order to achieve proportionality, would not undermine with the anti-doping framework more than the adjustments made in *Puerta* and *Gasquet*. Despite Hardy's diligence in trying to make sure that her supplement was not contaminated, the rule would have required her to miss both the 2008 and the 2012 Olympic Games. A decision could be tailored specifically to cases holding this level of disproportionality, which would prevent the decision from going against the anti-doping framework. Requiring Hardy to receive the *No Fault or Negligence* penalty prescribed by the WADC would have been as disproportionate as the suspensions that arbitrators found to be problematic in *Gasquet* and *Puerta*.¹⁷⁷

One may also be able to apply *Gasquet* and factor in whether Hardy was the type of athlete who the drafters of the Osaka Rule were intending to catch.¹⁷⁸ However, one must be cautious in this approach. The drafters of the Osaka Rule likely did not envision someone in Hardy's situation being banned from two Olympic Games. However, the rule came from the IOC and it was the IOC who initially denied Hardy's waiver of the rule.

Additionally, there is the fact that Hardy became contaminated by taking a nutrition supplement. The WADC specifically warns athletes about the possibility of supplements being contaminated. Athletes are specifically warned about these supplements through other sources as

152 *Id.* at 13-14.

153 *Id.* at 14.

154 See 2003 World Anti-Doping Code. Also, while the case describes the FINA Doping Code (FINA DC), which is the doping code for swimming, it has the same substantive rules as the World Anti-Doping Code, as FINA is a signatory of the WADC.

155 *Hardy*, *supra* note 146 at 14.

156 *Hardy*, *supra* note 146 at 16.

157^{1/2}, *supra* note 150 at 14.

158 *Id.* at 14-15.

159 *Id.* at 15.

160 *Id.* at fn 6.

161 *Id.* at 16. As stated earlier, the FINA DC has the same provisions as the World Anti-Doping Code.

162 *Id.* at 16.

163 *Id.* at 17.

164 *Id.* at 9.

165 *Id.* at 14.

166 *Id.* at 32, 34.

167 *Hardy*, *supra* note 50 at 35.

168 *Id.* at 36-37.

169 *Id.* at 36.

170 *Id.* at 36.

171 *Id.* at 34.

172 *Id.* at 35.

173 *Id.*

174 *Id.*

175 The US Olympic Trials is a USA Swimming event, so a decision allowing Hardy to participate in all USA Swimming events should allow her to participate in the US Olympic Trials.

176 *Id.* at 37.

177 This is referring to the ITF Tribunal case where *Gasquet's* case fell into the *No Significant Fault or Negligence* category. Because the CAS panel left the decision "undisturbed," this is still valid precedent.

178 *Gandert*, *supra* note 37 at 416.

well.¹⁷⁹ Because of this, it is likely that the drafters of the rule might not have been as sympathetic to athletes who become contaminated through supplements as through other forms of inadvertent doping. Supplements provide for an interesting predicament for athletes. As elite athletes try to do everything possible to remain on top of their sport, they often feel that they need to take nutritional supplements.¹⁸⁰ Athletes can feel like they are at a disadvantage if they do not take a supplement when their competitors are taking supplements. Because the supplements are not banned, this forces athletes to make a decision regarding whether to take a substance which is needed to help one's performance and risk the possibility of contamination or to avoid taking the supplement and not have the advantage that other athletes have received.¹⁸¹

While the CAS panel did not provide Hardy with any relief, it mentioned that it was not preventing Hardy from getting judicial relief in the future.¹⁸² Hardy's situation would have been the perfect test case for finding the Osaka Rule to be disproportionate. The case never went any further, however. In April 2011, the IOC informed Hardy that it was going to allow her to compete.¹⁸³ The IOC decided that Hardy could compete because the Osaka Rule came into effect close to the time of Hardy's inadvertent doping.¹⁸⁴ Also, the IOC looked favorably at the way Hardy withdrew from the 2008 Olympics while her case was pending with the hope of being able to compete in the 2012 Olympics.¹⁸⁵ The IOC's reasoning makes sense. It rewards Hardy for voluntarily sitting out of the 2008 Olympics while her case was being heard and, prevents the injustice of her having to miss two Olympics from occurring. There has been criticism regarding the newness of the rule being the basis for this outcome. The international sports columnist Phillip Hersch described the reasoning as 'the IOC quietly decided likely ignorance of the new law at that point was an excuse, and it cleared Hardy to compete in London.'¹⁸⁶ However, the IOC's reasoning makes sense regarding the unique facts of her case. Hardy tested positive on July 4, 2008.¹⁸⁷ Since clenbuterol will stay in an athlete's system for up to 72 hours, Hardy's inadvertent use of the substance could have occurred at any point starting on July 1. This was the first day that the rule was to take effect and only 3 days after the rule was enacted.¹⁸⁸ Because of the strong consequences of the rule, it is fair that the IOC was lenient for an offence that happened during a brief period before it was clear that everyone involved in the Olympic movement was notified about the rule.

6.2 LaShawn Merritt's Case

After Hardy's case was resolved, there were still other cases of athletes who were unable to compete in the 2012 Olympics because of the Osaka Rule. Among these was LaShawn Merritt, another athlete for whom the panel hearing his case believed that it fell into the *No Significant Fault or Negligence* category. After seeing commercials about the enhancement product ExtenZe, Merritt decided to purchase the product at a 7 Eleven convenience store.¹⁸⁹ It never crossed his mind that ExtenZe might contain a steroid derivative and Merritt never looked at the label, although he stated that he would not have known that the ingredients were on the banned substance list had he looked at the label.¹⁹⁰ Merritt purchased the ExtenZe along with condoms and was not thinking about track when he purchased the product.¹⁹¹ The 7 Eleven representative who sold Merritt the condoms provided convincing testimony to support his statements and USADA agreed that ExtenZe was the cause for

Merritt's positive tests.¹⁹² With USADA's agreement upon the cause, the panel determined that there was no dispute that this doping was accidental.¹⁹³ The panel also considered the fact that Merritt purchased the ExtenZe from a 7 Eleven, instead of a vitamin supplement store, since athletes have been warned about the potential dangers of vitamin supplement stores, and the fact that the panel was not aware of specific warnings about the type of product by which Merritt was contaminated.¹⁹⁴ The panel also looked favourably upon Merritt's willingness to publicly confess to taking ExtenZe; the panel believed that this type of confession was humiliating.¹⁹⁵

USADA had requested a two year suspension since Merritt had made several purchases of ExtenZe.¹⁹⁶ However, Merritt took the product multiple times because USADA did not notify him when his first positive test occurred.¹⁹⁷ The panel determined USADA did nothing wrong by waiting to notify Merritt about his positive test. However, it stated that Merritt continued to take ExtenZe since he was not notified which delayed the start of his suspension.¹⁹⁸ After analyzing *No Significant Fault or Negligence* precedents for which the athlete failed to read the label of a product, Merritt's case was classified as falling into the *No Significant Fault or Negligence* category. The panel decided to give Merritt a 21 month suspension.¹⁹⁹

The panel went on to analyze the Osaka Rule's effect on Merritt's case. Merritt made several arguments relating to this issue. First, he argued that because the IOC was a signatory to the WADC, it could not make significant changes to the document.²⁰⁰ Second, he argued that his being required to sit out of the Olympics in 2012 would go against the principle of proportionality, since it would in effect make the penalty for his offence last longer than the two year maximum penalty for his offence under the WADC, and thus would be inconsistent with Swiss law.²⁰¹ Merritt cited the case *LG Munich Krabbe v. IAAF et al.* to make the argument that 'the maximum penalty applies to someone who intends to cheat, not an accidental case.'²⁰² Therefore, with respect to an accidental case, a three year period of ineligibility would obviously fail to comply with the principle of proportionality.²⁰³ Third, Merritt stated that if the Osaka Rule was applied to his case, the panel needed to either give him a suspension that lasted for six months or less or to allow Merritt to receive a waiver of the rule from the IOC while retaining jurisdiction for the case.²⁰⁴ While Merritt's points are correct, it is important to note that even if the Osaka Rule was applied to Merritt's case, it would not result in a three year suspension. A three year suspension would mean that Merritt could not compete in any event during those three years. The Osaka Rule would have only prevented Merritt from competing in the Olympics following the end of his suspension and would have allowed him to compete in other events in his sport.

Unlike the CAS *Hardy* panel, which did not believe that the IOC would be bound by its judgment, the panel hearing *Merritt* determined that it had jurisdiction to reach a decision regarding the Osaka Rule issue. The panel explained how Article 15.4.1 of the WADC required all signatories to recognize the panel's hearing results absent an appeal.²⁰⁵ Since the IOC and USOC are both signatories of the WADC, they are thus required to recognize the results of the North American CAS. This brings about questioning regarding the reason that the Hardy CAS panel did not believe that the IOC and USOC would have been bound by its decision. One can speculate that had WADA not appealed Hardy's case and the North American CAS retained jurisdiction over it following the

179 2009 World Anti-Doping Code, Comment to Rule 10.5.1 and 10.5.2 describes the dangers of nutritional supplements. See page 6 of *Hardy* (CAS) for mention of the warnings that Hardy had received from USADA regarding nutritional supplements.

180 Ron J. Maughan, Doug S. King and Trevor Lea, *Dietary Supplements*, 2004 *Journal of Sports Sciences* at 95.

181 The ATP may be part of a solution to this problem through its involvement in a system that provides nutritional supplements to athletes that are as "doping-free" as possible. Olivier de Hon and

Bart Coumans, *The Continuing Story of Nutritional Supplements and Doping Infractions*, 41 *BR J SPORTS MED* 800 at 802.

182 *Hardy*, *supra* note 150 at 36-37.

183 *IOC Declares Jessica Hardy Eligible*, ESPN, at <http://sports.espn.go.com/oly/news/story?id=6444781>, Apr. 28, 2011.

184 *Id.*

185 *Id.*

186 Phillip Hersch, *Reigning Champ Merritt Can Compete in 2012 Olympics*, *The Chicago Tribune*, at <http://www.chicagotribune.com/sports/globetrotting/>

chi-merritt-can-compete-in-2012-olympics-20111005,0,2660099.column, Oct. 6, 2011.

187 AAA *Hardy* at 9.

188 *Id.* at 9 describes the length of time for which clenbuterol will remain in an athlete's urine specimen. For information about the enactment of the Osaka rule, see *USOC v. IOC* (CAS 2011/0/2422) at ¶2.

189 *USADA*, *supra* note 28 at ¶7.9.

190 *Id.*

191 *Id.*

192 *Id.* at ¶ 1.2.

193 *Id.*

194 *Id.*

195 *Id.* at 35.

196 *USADA* *supra* note 28 at 31.

197 *Id.* at 32.

198 *Id.*

199 *Id.* at 33.

200 *Id.* at 36.

201 *Id.*

202 *Id.* at 137 citing *LG Munich Krabbe v. IAAF et al.* in SPURT 1995, May 17, 1995 p. 161, 167.

203 *Id.*

204 *Id.*

205 *Id.* at 39.

Law and Sports in India

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MEMORANDUM OF UNDERSTANDING FOR COOPERATION BETWEEN THE ASSER INTERNATIONAL SPORTS LAW CENTRE (THE HAGUE) AND THE SPORTS LAW RESEARCH CENTER (MILAN)

Considering the close, traditional ties between the Republic of Italy and the Kingdom of the Netherlands, both being founding members of the European Union,

Considering that close cooperation in the field of international sports law between our institutions would be conducive to strengthening these ties,

Considering that close cooperation in the field of education and research in international sports law between our institutions would be an important contribution to the promotion and development of international sports law –our institutions being seated in the western and eastern hemisphere of the world respectively,

We have decided –by signing this Agreement –to create a framework for cooperation, in particular focusing on the following forms of cooperation:

- the exchange of information and library services;
- the joint organization of specialized courses;
- the joint organization of conferences, seminars and workshops on topical issues of international sports law;
- the exchange of students and trainees in sports law;
- the joint undertaking of studies;
- the publication of books.

All decisions regarding this cooperation will be taken after mutual consultations between the institutions. The Agreement is valid for a period of four years, to be renewed by mutual agreement.

The Hague/Milan, 1 September 2011

Prof.Dr Robert C.R. Siekmann

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ASSER International Sports Law Centre

The Hague

Professor of International and European Sports Law

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The Netherlands

Prof.Awv. Lucio Colantuoni

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Milan

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IOC's denial of her request for an Osaka Rule waiver, the North American CAS might have determined that the IOC and USOC were required to allow her to compete. One can also speculate over how CAS would have handled a possible appeal of this issue. The *Merritt* panel described the scenario in *Hardy* as 'biased and one sided' since the IOC, was able to appeal rules related to Olympic eligibility while Hardy was unable to do so 'because AAA decision was decided under FINA rules the IOC Rule was not part of the AAA case and Hardy did not have the right to join the IOC to her appeal.'²⁰⁶ Since the panel believed that the lack of symmetry went against justice and that the panel was required to grant any relief within the scope of the parties' agreement, the panel believed that it had jurisdiction over all parties related to the Osaka Rule part of the case.²⁰⁷

The panel also explained how, if it did not provide Merritt with the opportunity to challenge the "Osaka Rule," he would likely have no forum for which to take the issue. It mentioned how a civil court would be the only other place to which Merritt could take his issue, and this was only if a civil court was willing to hear the case.²⁰⁸ Based upon the Ted Stevens Amateur and Olympic Sports Act, it is unlikely that a US Court would have jurisdiction over this case.²⁰⁹ Because of this, any appeals would likely need to be to the Swiss Federal Tribunal for issues relating to proportionality. The panel described how Article 8.1 of the WADC provided athletes with the 'right to respond to the asserted anti-doping rule violation and resulting consequences' and that the panel's not being able to hear the case would make this statement a lie.²¹⁰

The IOC refused to participate in the hearing after being invited by the panel.²¹¹ Because of this, the panel drew an adverse inference relating to the Osaka Rule, as prescribed by Article 3.2.4 of the WADC before analyzing the legality of the Osaka Rule as relating to Merritt's case.²¹² The panel then cited *Hardy* and its analysis to describe that as a signatory of the WADC, it could not add penalties that altered the effect of the WADC.²¹³ Since the Osaka Rule would greatly add to the penalties for many athletes beyond what was in the WADC, the rule was prohibited based upon this analysis.

The panel also determined that *Advisory Opinion IAAF* followed the same reasoning as *Hardy* and the facts of the case, in which the European Athletic Championships was prohibited from preventing people with doping offences that had expired prior to the event from entering, was analogous to the Osaka Rule issue.²¹⁴

Another issue addressed by *Merritt* is that of *ne bis in idem*, which is essentially that of double jeopardy. The panel determined that the case *Prusis* had already established that refusing to allow an athlete to enter an event because of a suspension after it has expired constitutes double jeopardy.²¹⁵ This is interesting as it appears that the IOC had done exactly what the *Prusis* panel had advised when it added to the Olympic Charter that athletes do not have any expectation of participation in the Olympics.

Double jeopardy is likely not the best argument against the Osaka Rule. In the case *Jessica Foschi v. FINA*, the swimmer Jessica Foschi tested positive for a metabolite of the prohibited substance mesterolone.²¹⁶ It remained a mystery how she was contaminated but the US Swimming National Board of Review hearing the case gave Foschi two years of probation, during which she would be required to receive additional drug tests, and stated that she would be banned from swimming for life if she received any future positive tests.²¹⁷ Foschi appealed her case to the US Swimming Board of Directors, as she was allowed to do under the organization's rules. The board changed Foschi's sanction from probation to a two year suspension. However, the board reduced Foschi's sanction following the CAS decision *Lehtinen v. FINA*, and changed her sanction back to those that the earlier panel had imposed.²¹⁸ Foschi appealed her case to the AAA which reversed her sanctions, claiming that she was innocent and that the sanctions were arbitrary and that they violated fundamental fairness since neither Foschi nor anyone connected to her had any knowledge of how she became contaminated.²¹⁹ Following this, FINA determined that Foschi's violation was not handled in accordance with FINA rules.²²⁰ Eventually, Foschi appealed the case to CAS. The panel hearing her case determined that while the FINA proceedings were for the same set of facts as the US Swimming and AAA panel's case, they are for dif-

ferent rules.²²¹ This panel went on to state that this situation did not constitute double jeopardy.²²²

Based upon the precedent of *Foschi*, it seems that an athlete can be sanctioned multiple times, but under different rules, for the same offence and not have it constitute double jeopardy. This falls in line with the way the principle works in US criminal law. While double jeopardy is prohibited by the US Constitution, both the state and the federal government can prosecute a criminal defendant for the same charge, since they are considered separate sovereigns.²²³ Based upon this theory, the IOC and the International Federation of every sport can be viewed as separate sovereigns, with each being able to bring about its own charges. In addition to a federation's doping rules which govern the athlete during the season, the IOC has its own doping rules for each Olympic Games.²²⁴ Because of this, these rules and the Olympic Charter can be considered a separate set of rules from those of International Federations just as the *Foschi* panel determined that FINA and US Swimming had separate sets of rules.

A counterargument against using *Foschi* as precedent that the Osaka Rule does not constitute double jeopardy is the fact that all of the institutions involved in Osaka Rule cases are in effect using the same rules, the WADC. While there may be differences in the labeling of the rules, such as one institution labeling the rules as the FINA DC, the fact that these institutions have ratified the WADC means that an argument cannot be made that an athlete is being prosecuted under two separate sets of rules. If the Osaka Rule makes the Olympic rules substantially different enough for there to be two separate rules, then it brings back the earlier argument that the rule is out of compliance with the WADC.

The *Merritt* panel also disagreed with the CAS advisory opinion that found that the Osaka Rule did not constitute a penalty since it was an eligibility rule.²²⁵ According to the panel, 'if it looks like a duck, walks like a duck and quacks like a duck, it's a duck.'²²⁶ The panel explained how it believed that the opinion went against CAS precedents of *Prusis* and *Advisory Opinion IAAF* and that *Prusis* was controlling precedent for describing the rule as constituting double jeopardy.²²⁷ The panel also explained how the *IOC Advisory Opinion* specifically stated that it did not constitute legal precedent, meaning that it did not need to be followed, and how the opinion made no reference to the WADC when listing the applicable law for the case.²²⁸ As the IOC is required to abide by the WADC, the panel determined that it prevents the IOC from implementing policies that do not conform to the code.²²⁹

As consequence of its findings, the *Merritt* panel stated that Merritt was allowed to compete in all competitions held by signatories of the WADC.²³⁰ Additionally, it prohibited the Osaka Rule from being used to prevent Merritt from competing in either the Olympic Trials or the Olympic Games. The panel concluded its case by explaining that the legality of the Osaka Rule needed to be resolved soon and that there would likely be many issues for other athletes until this was resolved.²³¹ This indicated that while the panel exercised its discretion to allow Merritt to compete in the Olympics, it did not believe that it would be the final word on the issue.

206 *Id.* at 39.

207 *Id.*

208 *Id.* at 40.

209 See 36 U.S.C. § 220501.

210 *USADA, supra* note 28 at 40.

211 *Id.*

212 *Id.* at 41.

213 *Id.* at 42.

214 *Id.* at 42 citing *Advisory Opinion IAAF*.

215 *Id.* at 42-43.

216 *Jessica Foschi v. FINA* (CAS 96/156) at 8-9.

217 *Id.* at 9. This case took place before the WADC was in place, so the sanctions and testing procedures were different from how they are today for the sport of swimming.

218 *Id.* at 13-14.

219 *Id.* at 14. The reasoning for this part of the decision is not valid following the introduction of the WADC.

220 *Id.* at 15.

221 *Id.* at 39.

222 *Id.* at 39-40.

223 See Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 *Wash. U. L. Rev.* 769.

224 See the International Olympic Committee Anti-Doping Rules Applicable to the Games of the XXIX Olympiad, Beijing 2008 for an example of the specific doping rules in-place for the 2008 Olympic Games.

225 *Merritt* at 43.

226 *Id.* at 44.

227 *Id.* at 44.

228 *Id.*

229 *Id.*

230 *Id.* at 50.

231 *Id.* at 48-49.

6.3 CAS Reaches Decision Regarding the Osaka Rule

The day before the IOC announced that it would allow Hardy to compete, the IOC and USOC agreed to have CAS reach a decision regarding the validity of the Osaka Rule.²³² The panel hearing the case was chaired by Richard McLaren, who was one of the arbitrators for the *Gasquet* decision expanding the principle of proportionality.²³³ In addition to the arguments raised by the parties, the panel received amicus briefs expressing support for the USOC's position from nine national anti-doping organizations, two national Olympic committees, three national governing bodies for sport, and the Valparaiso Sports Law Clinic.²³⁴ It is of interest that various national anti-doping agencies took a position against the Osaka Rule since many of them, including USADA, have a reputation for always taking a strict stance on doping. Additionally, WADA submitted a brief that did not support either of the parties but instead raised a couple of other issues with the rule.²³⁵ First, it brought up that there is belief that many tribunals have been looking for ways to reduce the suspensions of athletes to lesser than six months in order to avoid triggering the Osaka rule.²³⁶ For these instances, the rule would actually be unintentionally hurting the fight against doping since it leads to shorter suspensions for athletes than what they would have received if the rule was not in existence. WADA also mentioned that allowing athletes to have their suspension reduced by providing information that would assist WADA, through article 10.5.3 of the WADC, is not as successful as WADA had expected that it would be.²³⁷ WADA's belief was that this might be in part because athletes have chosen to litigate their case in hopes of receiving a sanction of six months or less instead of cooperating, which would only reduce the athlete's suspension to six months in the most extreme cases.²³⁸ An athlete who believes that his or her cooperation would only reduce his or her sanction to one year may feel that he or she has no incentive to cooperate if the athlete's sole aim is to compete in the next Olympic Games.

The panel hearing *USOC* determined that the Osaka Rule can be characterized as a disciplinary sanction, not merely an eligibility measure.²³⁹ The IOC argued that athletes who are prohibited from participating in the Olympics can still participate in other competitions.²⁴⁰ However, the panel described the Olympic Games as 'the pinnacle of success and the ultimate goal of athletic competition' for many athletes.²⁴¹ The panel decided that because of this, prohibiting athletes from participating in the Olympics after their suspension is complete would provide additional penalties to the suspended athlete.²⁴² Because the athlete's suspension comes from the WADC, this means that the additional penalty is one which is above that of the WADC. This statement can also be applied to the principle of proportionality. An athlete who is forced to sit out for the next Olympics following a one year *No Significant Fault or Negligence* suspension has an additional penalty that is disproportionate to the athlete's offence.

The IOC also argued that it did not have the jurisdiction to discipline athletes prior to the Olympics and that because of this, the Osaka Rule could not be of a disciplinary nature.²⁴³ However, the panel hearing the case determined that when the rule prohibits an athlete from participating in the Olympic Games, the rule becomes disciplinary and can then be classified as a sanction.²⁴⁴ This analysis can be applied to future instances related to other rules as it provides precedent that eligibility standards become disciplinary whenever they take the effect of

disciplining an athlete, whether they are intended to or not. The panel went further in determining that rules that operate as both an eligibility rule and a sanction have elements of both, thus meaning that they need to be treated as a disciplinary sanction.²⁴⁵

The panel then determined that the Osaka Rule was not in compliance with the WADC. In reaching its decision, the panel cited Article 23.2.2 of the WADC, which prohibits signatories from bringing about substantive changes to the WADC and states that 'no additional provision may be added to a Signatory's rules which change the effect of [...] the periods of Ineligibility provided for in Article 10 of the WADA Code.'²⁴⁶ Because the Osaka Rule provided for an additional ineligibility period, the panel determined that the rule was out of compliance with the WADC.²⁴⁷ The panel concluded that the Osaka Rule was invalid and thus unenforceable.²⁴⁸

While the panel found the Osaka Rule to be unenforceable, it mentioned that it could still be possible for the IOC to prevent athletes with doping offences from entering the Olympics if it could get the WADC amended.²⁴⁹ WADA had mentioned in its amicus brief that it will again be reviewing the WADC in the near future and that additional sanctions could be added to the code as long as they fall in-line with the principle of proportionality.²⁵⁰ The *USOC v. IOC* panel explained that if the WADC was amended to include the additional sanctions, the proportionality issue would likely be decided by the first case related to the amendment.²⁵¹ However, it stated that there would no longer be any double jeopardy issues if this were the case, since it would fall under a single set of rules.²⁵²

It was also brought to the panel's attention that the Osaka Rule may have gone against Article 23.6 of the WADC.²⁵³ This article describes how the WADC is amended and the requirement for signatories to incorporate the WADC into their rules.²⁵⁴ An argument could be made that since the Osaka Rule provided for an additional penalty beyond what is prescribed by the WADC, including it in an organization's rules means that the WADC is not adequately incorporated into the IOC's rules. The *USOC v. IOC* panel decided not to reach a finding regarding this issue since it had already found the Osaka Rule to be out of compliance with the WADC.²⁵⁵ The panel also decided not to explore any other issues related to Swiss law and the fundamental principles that it requires.²⁵⁶

6.4 The Effect of the CAS Decision on the Osaka Rule

The *USOC v. IOC* decision will allow a significant number of athletes to compete in the 2012 Olympics who would otherwise be prohibited from doing so. Just counting athletes from the US, this will remove the prohibition on competing for at least 33 athletes.²⁵⁷ Similarly, the International Association of Athletics Federations predicted that about 50 athletes for the sport of track and field will be affected by the verdict.²⁵⁸

Additionally, this precedent will likely help athletes with other doping bans. For example, in 2004, the Danish National Olympic Committee adopted a rule that prohibited any athlete with a doping suspension for greater than six months from participating in the next Olympic Games.²⁵⁹ The ban was repealed following the CAS decision regarding the Osaka Rule. There are plans to reinstate the rule if the IOC finds "loopholes, interpretations" in the CAS decision,²⁶⁰ which further indicates that this is related to the Osaka Rule decision.

232 ³⁴/₃ Declares Jessica Hardy Eligible, *supra* note 185.

233 *USOC v. IOC* (CAS 2011/o/2422) at 1 and *Gasquet, ITF*, *supra* note 63 at 1.

234 *USOC v. IOC* at 6-7.

235 *Id.* at 7.

236 *Id.*

237 *Id.*

238 *Id.*

239 *Id.* at 18.

240 *Id.*

241 *Id.*

242 *Id.*

243 *Id.*

244 *Id.* at 17.

245 *Id.* at 18.

246 *Id.* citing 2009 World Anti-Doping Code, article 23.2.2.

247 *Id.*

248 *Id.*

249 *Id.* at 19.

250 *Id.* at 7.

251 *Id.* at 19.

252 *Id.*

253 *See Id.* at 20.

254 2009 World Anti-Doping Code Article 23.6.

255 *USOC v. IOC* at 20.

256 *Id.* at 21.

257 Martyn Ziegler, *Merritt Victory Opens Door to Drug Cheats*, PA Newswire: Sports News October 6, 2011.

258 *Jobson Backs Olympic Ban Despite CAS Verdict*, Times of India, at articles.timesofindia.indiatimes.com/2011-11-02/london-olympics/30350032_1_olympic-ban-british-olympic-association-cas, Nov. 2, 2011.

259 *Doping: New Twist in Games Sanctions Saga as Danes Drop Ban*, at keirradnedge.com/2011/11/08/doping-new-twist-in-games-sanctions

saga-as-denmark-drops-ban/?utm_source=rss&utm_medium=rss&utm_campaign=doping-new-twist-in-games-sanctions-saga-as-denmark-drops-ban, and *Denmark Repeals Olympic Doping Ban Rule*, Nov. 8, 2011 and *The State*, at www.thestate.com/2011/11/08/2038848/denmark-repeals-olympic-doping.html, Nov. 8, 2011.

260 *Denmark drops rule that would ban athletes from Olympics for doping violations*, *The Washington Post*, at www.washingtonpost.com/sports/denmark-drops-rule-that-would-ban

Another organization with its own anti-doping rules that provides penalties beyond the scope of the WADC is the British Olympic Association (BOA). In 1992, the BOA introduced a rule prohibiting any athlete from participating in the Olympics for life if the athlete has been suspended for a doping offence.²⁶¹ Travis Tygart, the Chief Executive for the United States Anti-Doping Agency, found the rule to be problematic, stating that it does not work for one country to have increased sanctions when the rest of the world does not have them.²⁶² The BOA has claimed that the bylaw is supported by WADA.²⁶³ However, WADA has asked the BOA to review its rule following the *USOC v. IOC* decision.²⁶⁴ According to Frederic Donze, WADA's European director, a lifetime ban for an athlete's first doping offence would likely bring about legal challenges in court which would make things more difficult for those trying to fight doping.²⁶⁵ Additionally, the head of UK Anti-Doping has stated that the ban hinders athletes cooperating with anti-doping authorities, since it removes any incentive for athletes to cooperate.²⁶⁶

One difference between the Osaka Rule and that of the BOA is that under the BOA's rule, athletes have the ability to appeal their suspension.²⁶⁷ Twenty-nine out of the thirty-one athletes who have challenged their ban succeeded at doing so and the BOA has claimed that had Merritt been subject to its rules, the lifetime ban for his case would have likely been overturned.²⁶⁸ The BOA has at times labeled its bylaw as a selection policy instead of as a doping rule.²⁶⁹ BOA Chairman Colin Moynihan has stated that the big difference between the Osaka Rule and its bylaw is that 'the BOA rule is based on eligibility rather than being a sanction.'²⁷⁰ It appears that Moynihan's perspective comes from the view that the BOA can select whoever it wants as part of its Olympic team and that this bylaw is not in place to sanction athletes but instead, is part of its team's eligibility criteria. However, as mentioned earlier, the *USOC v. IOC* panel determined that eligibility criteria becomes disciplinary when it prohibits athletes from participating in the Olympic Games.²⁷¹ This logic should also apply to the BOA bylaw, meaning that as soon as it prevents athletes from being able to compete in the Olympics, the bylaw becomes a disciplinary sanction.

The *USOC v. IOC* panel's determination that the Osaka Rule goes against the WADC should serve as precedent that the BOA rule goes against the WADC. As a member of the Olympic movement, the BOA was required to sign the WADC.²⁷² As a WADC signatory, it is not permitted to make substantive changes to the WADC.²⁷³ Similarly, a lifetime ban will likely bring about issues regarding proportionality. It will be interesting to see what ends up developing regarding this rule.

7. Conclusion

The *USOC v. IOC* decision left proportionality in place, kept athletes engaged in inadvertent doping in separate categories from intentional

cheaters, and strengthened the uniformity of doping rules in the Olympic movement. This brought about the notion of fairness, which is central to trust in any system that imposes sanctions. Additionally, the decision demonstrated CAS's independence, as well as added to the legitimacy of its proceedings.

Near the conclusion of its *Prusis* decision, the panel wrote that it had considerable sympathy with the IOC's position.²⁷⁴ It is appropriate for one to continue to have sympathy for the position of the IOC following the *USOC v. IOC* decision. The IOC is trying to keep the Olympics clean in a world where new methods of doping continue to be developed.²⁷⁵ Cheaters have caused a lot of harm to the Olympic movement over the past few decades and it is reasonable for the IOC to wish for clean games where the main news stories are about the true athletic accomplishments instead of those of athletes who are caught for doping. Nonetheless, in the fight against doping, it is important to make sure that the athletes who are accidentally engaged in inadvertent doping are not placed into the same category as athletes involved in intentional doping. Keeping the two categories separate legitimizes the doping controls and provides a sense of fairness to everyone involved in sport.

- athletes-from-olympics-for-doping-violations/2011/11/08/glQAukjroM_story.html, Nov. 8, 2011.
- 261 Owen Gibson, *Olympic Games: British Olympic Drugs Ban May Face Challenge After US Appeal*, THE GUARDIAN, Sports Pg. 8, Aug. 18, 2011.
- 262 Matt Slater, *Team GB's Lifetime Ban for Doping 'Should be Scrapped'*, BBC Sport, at <http://news.bbc.co.uk/sport2/hi/olympics/15159806.stm>, Oct. 3, 2011.
- 263 BOA Vows to Stick to its Olympic Ban Rule, KKTv.Com, at www.kktv.com/sports/headlines/BOA_Vows_To_Stick_To_Its_Olympic_Ban_Rule_131222969.html, Oct. 6, 2011.
- 264 Rob Harris, *WADA Director Says Lifetime Bans Not Enforceable*, at <http://sports.yahoo.com/olympics/news?slug=ap-wada-doping>, Oct. 11, 2011.
- 265 *Id.*
- 266 Martyn Ziegler, *Anti-Doping Chief Concerned By Lack of Incentives*, PA Newswire: Sport News Dec. 15, 2010.
- 267 Jack Mollart-Solity, *BOA Right in Their Strong Stance on Doping*, The Mancunion, at <http://www.student-direct.co.uk/2011/11/03/boa-right-in-their-strong-stance-on-doping/>, Nov. 3, 2011.
- 268 *Id.*
- 269 Owen Gibson, *WADA Asks British Olympic Association to Review its Drugs-Ban Policy*, THE GUARDIAN, at <http://www.guardian.co.uk/sport/2011/oct/08/wada-boa-olympics-2012>, Oct. 8, 2011.
- 270 Paul Kelso, *London 2012 Olympics: BOA Defends Lifetime Ban on Drug Cheats After LaShawn Merritt Ruling*, The Telegraph, at <http://www.telegraph.co.uk/sport/olympics/8811273/London-2012-Olympics-BOA-defends-lifetime-ban-on-drug-cheats-after-LaShawn-Merritt-ruling.html>, 15 Nov. 2011.
- 271 *USOC v. IOC*, *supra* note 24 at 17.
- 272 See Olympic Charter, Article 43, stating "The World Anti-Doping Code is mandatory for the whole Olympic Movement."
- 273 2009 World Anti-Doping Code, Article 23.2.2.
- 274 *Prusis* at 7.
- 275 See Gandert and Ronisky, *supra* note 32.

A Right To Sport: Theory, Evidence And Implications

By Genevieve Lim*

The evolution of sport as unifying social tool and an international commercial force has caused many commentators to assert that participation in sport is a human right. This paper investigates this claim and reviews legal instruments and decisions to determine whether a right to sport can be considered to exist in law. This evidence is not conclusive and the rhetoric of the transformative power of sport is not matched by mainstream legal mechanisms to protect general access to sporting opportunities. A future right to participate in sport would be difficult to establish in mainstream law, but might be effectively progressed in a private system of international sports law established by the rules of international sporting organizations.

A Introduction

*I have always believed that sport is a right, not a privilege' Nelson Mandela*¹

It is the age of the ascendancy of sport, where through the visual power of mass media, sporting activities and events have developed unforeseen transformative powers and functions on the international stage. Global fans follow sport with religious zeal and enormous personal dedication. Behemoth sporting events such as the FIFA World Cup and the

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Olympic Games are staged at tremendous cost and may generate vast sums for event organizers and host countries. Hosting these events conveys enormous status and is passionately pursued; the award of these events is made by powerful sporting organisations, which, like governments, may make decisions based on equitable geographical distribution (for example, the award of the FIFA World Cup in 2010 to South Africa)² or promoting international relationships (for example, the award of the Olympic Games to Beijing in 2008).³

Sport occupies a vital role in the international community: the relationship between sport, national identity and the international relations is strong and complex. More nation-states are members of the Olympic Movement (205) than the United Nations (192).⁴

The popularity of professional sports generates huge financial gains for participants and organizers and may be transformative for elite athletes from impoverished backgrounds and their communities. Sport is also employed as a community building device and the social benefits of sport are considered to include not only the enhanced physical wellbeing of community members, but also improved social behaviours and progressive community values. Sport's improving influence has been utilized by the United Nations as a key means of achieving its Millennium Development Goals; organisations such as Right to Play arrange sporting programs in target countries as a tool for development and peace.⁵

These extraordinary developments in the rise of sport have led to increased rhetoric about the ability of sport to advance and unite human beings.⁶ It is argued that sport is an important activity to bridge gaps created by diversity of genders, religions and socio-economic differences.⁷ The qualities perceived to inhere in sport have caused some individuals to assert that 'access to sport and a healthy lifestyle is a fundamental human right'.⁸ A range of documents, including the *International Charter of Physical Education and Sport* and the *Olympic Charter*, state that 'the practice of sport is a human right'.¹⁰

Many framing documents for sport employ a discourse of rights, yet no solid or definable right seems identifiable. Does a 'right to sport' genuinely exist in law? What is generally understood as constituting a 'right' and what activities may be encompassed by the term 'sport'? How is the right to sport framed and by whom - is it a right to participate as an athlete or official, a right to be a spectator with unimpeded access to sporting spectacles (in person and through broadcast) or a right to invest in sport? Is it a right associated with expressing national identity and pride through the hosting or participation of athletes in major sporting events? If such a right does exist, how may it be infringed, enforced and what are its reasonable limitations?

Determining the answer to these questions requires an examination of legal sources, emerging legal systems and the application of a human rights discourse to sport. This paper will investigate whether a strong case exists for a legal right to participate in sport, considering the ques-

tion as it relates to three classes of sport: community participative sport, elite amateur sport and professional sport. These classes are broadly distinguishable on the basis of the skill level of participants, the sport's popularity, organisational structures and the commercial activities associated with sporting competitions. They may also be distinguished on the basis of the type of legal protection generally afforded to each class.

Certain national and international laws and treaties seek to establish protectable rights to participate in physical activity. As many disputes about elite sport have also progressed to a stage of arbitration or litigation, there is a significant body of evidence about when it may be considered reasonable to intervene in the decisions of sporting organisations and the accepted grounds for review of their decisions, both from the awards of the Court of Arbitration for Sport and from the decisions of national and international courts. The accessibility of these forums for adjudicating sports disputes is also relevant, because they provide a mechanism for the enforcement of such a right.

This paper seeks to determine whether a general right to sport can be woven out of threads of decisions, awards and instruments or whether a limited right is identifiable in relation to elite amateur athletes operating within structures established by the Olympic Movement. It will conclude with a brief consideration of the problems in formulating an explicit right to sport and the enduring problem of how, and whether, to regulate access to sporting activities through mainstream legal structures. Finally, it will investigate whether an alternative system of international sports law can be applied more generally to community participative sport.

B Defining sport

Sport may be defined narrowly to only include those highly organized games within a recognized sporting tradition or expansively to 'include[s] all forms of physical activity that contribute to physical fitness, mental well-being and social interaction, such as play, recreation, organized or competitive sport and indigenous sports and games'.¹¹

The ability of a person to participate in sport presupposes the existence of fundamental social, cultural and material structures: the existence of leisure time, adequate nutrition, acceptability of engaging in the pastime according to the prevailing social norms of the particular community (typically related to an individual's gender, age, disability, class or race) and enough land and infrastructure for such pastimes to take place. Millions of people across the globe do not participate in sport because of one or many of these factors prohibit such activity.

The right to sport is addressed here in the narrow context of Australian and international law (with minor reference to European and American law) where a majority of citizens are not constrained by these factors from participating in sport. This paper does not purport to undertake a comprehensive survey of cultures and their legal sources. A truly glob-

2 Until 2010 a FIFA World Cup had never been played in Africa and the bidding process for the event in that year was only open to African countries: Fédération Internationale de Football Association *Host nation of 2010 FIFA World Cup - South Africa* (15 May 2004). <http://www.fifa.com/worldcup/archive/gemany2006/news/newsid=25395.html>.

3 The award of the event to Beijing has been seen as important gesture in international relations and may be considered as a welcome to China into international society - see Xin Xu, 'Modernising China in the Olympic Spotlight: China's National Identity and the 2008 Beijing Olympiad' (2006), *The Editorial Board of the Sociological Review*. www.princeton.edu/cwp/publications/xu_xin_modernizing_china_in_olympic_spotlight_2006.pdf.

4 Matthew J Mitten and Hayden Opie, 'Sports Law: Implications for the Development of International, Comparative and National Law and

Global Dispute Resolution' (2010) 85 *Tulane Law Review* 269, 309.

5 Sport for Development and Peace International Working Group *Harnessing the Power of Sport for Development and Peace: Recommendations to Governments* (2008) Right to Play www.righttoplay.com/International/news-and-media/Pages/HarnessingthePowerofSports.aspx.

6 Anita DeFrantz (IOC) has stated: I believe that sport is a birthright. Other animals may play or learn to fight to protect their territory, but we are the only species that takes part in sport. I believe this is because sport requires a high level of thought. This is necessary to direct the body through the dimensions of time and space, which all sport requires. Sports belong to us all. Opportunity to take part in sport is a measure of human rights. There have been vicious acts of retaliation for taking part in sport. Exclusion from sport based on sex, skin color, economic or political statuses are all indicators that a

society has failed in providing human rights. It means that people have been denied access to a birthright.

(September 2006) *International Council of Sport Science and Physical Education*, <http://www.icsspe.org/bulletin/bulletin.php?v=381&kat=4&No=48&l=2&par=1>.

7 Rodney K. Smith "When Ignorance is Not Bliss: In Search of Racial and Gender Equity in Intercollegiate Athletics" 61 *Missouri Law Review* (Spring 1996) 329, 341: 'in our diverse culture characterized by a wide variety of ethnic, religious, socio-economic and other groups, there may well be no other force quite like sport, in terms of bringing people of diverse backgrounds together in pursuit of a common purpose.' See also Michael Beloff 'Fair play - is there still room for the Corinthian spirit in sport' (2009) 39 *International Sports Law Review* 34 - 50.

8 Hungarian President Pal Schmitt *Ban Ki-moon: Sports community and the UN need*

to be lasting allies (21 September 2010) SportsFeatures.com <http://www.sportsfeatures.com/olympicsnews/story/47451/ban-ki-moon-sports-community-and-un-need-to-be-lasting-allies>.

9 *International Charter of Physical Education and Sport* UNESCO/GC, 20th sess, Agenda item 23 (21 November 1978).

10 International Olympic Committee *Olympic Charter* (11 February 2010) Fundamental Principles, art. 4, 5.

11 Sport for Development and Peace International Working Group *Harnessing the Power of Sport for Development and Peace: Recommendations to Governments (Summary)* (2008) 1.

Another example of an expansive definition may be found in the European Sports Charter: 'Sport means all forms of physical activity which, through casual and organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all

al investigation of this question would potentially make different findings, taking into account the barriers to sporting participation experienced by poorer nations, differing cultural values and lack of prioritization of sport in the legal and governmental structures of some nations.

The universal application of a right to sport would have profound social and economic implications for many countries and would present unique cross-cultural challenges. The validity of sport as an activity and the suitability of a rights culture must be assessed within different worldviews to comprehensively consider the question.

Even within countries where a strong sports culture exists, not all sports are the same in terms of the standard at which they may be performed and the existent organisational linkages which may provide talented athletes with opportunities to seek advancement. Three 'classes' of sport seem to be naturally identifiable based on criteria which include the standard of skill of participants, organisational funding and control, the popular appeal of a sport for spectators and its capacity to attract commercial returns through the sale of broadcasting and marketing rights.

The first class of sport, which may be called 'community participative sport', is marked by accessibility to people of all ages and abilities and is generally available within local communities. Income is unlikely to be derived from sport at this level: coaches may receive remuneration, but cannot generally subsist on this income. Administration is typically provided on a voluntary basis or for basic remuneration. Participants normally pay for access to sport and do not seek to earn money from the pastime. This class covers all types of organized recreational activity from the informal game of soccer at a local park or school sport to state and national competitions in a majority of sports in many countries. It emphasizes participation over performance.

The next class of sport is 'elite amateur sport', which may be identified by highly skilled and trained participants who have the ability to capitalize on the profile they achieve as elite athletes to attract scholarships, sponsorships or endorsement contracts. These athletes can generally only seek remuneration for the time spent training and for sporting performances through these indirect channels as participation in their chosen sport does not generally provide employment or prize money. In some countries, such athletes are employed in a public service or defence force capacity and are paid a salary to perform modest duties in addition to representing their countries in competition. This class of sport covers everything from American Intercollegiate sport to Olympic representation and emphasizes elite sporting performances.

The final class of sport is professional sport, which may be clearly identified by participation by elite athletes, who may be paid salaries under contract with clubs or leagues, or be eligible to win substantial prize money. Sport can provide these financial benefits to elite participants due to its popularity and the ability of event organizers and controlling organisations to sell tickets, marketing, broadcast and sponsorship rights. Because professional athletes may be employed to train and compete, professional sport is also characterized by players' unions. Some philosophical perspectives maintain that professional sport is not sport at all - that the essence of sport is that it is not work.¹² For the purposes of this paper, however, professional sport is considered 'sport', in accordance with its common meaning. Notable examples of sports with high profile professional dimensions are football (of many codes), basketball, baseball, tennis, golf and motor racing.

The right to sport question is located centrally at debates about appro-

priate matters for regulation by public law and private law - public law reflecting values that should be prevalent throughout society and private law regulating agreements between private individuals based on their conduct and recognizable interests. Sport disputes may be found on a case by case basis to occur within the context of an enforceable legal interest or as the product of a private arrangement to which no individual is owed privileges beyond those negotiated.

Courts have typically held that sporting associations have the right to determine who will be a member and that individuals cannot assert property or contractual rights in their sporting memberships.¹³ For this reason, community participative sport disputes are generally not justiciable. Complaints about exclusion in relation to community participative sport are generally based in public law, in which the rules of sporting organisations limiting access to sporting opportunities can only be challenged on the basis of anti-discrimination or equal opportunity laws.

Courts have been more willing to find professional sporting complaints justiciable, where the significant material interests of parties may give rise to legally-protected rights. Elite amateur athletes have not been as fortunate and it is recognized that they often make enormous personal sacrifices in pursuit of athletic goals without legal protection. While commercial benefits may occasionally be available to high profile elite amateur athletes, their sporting participation occurs within the context of rules of private sporting organisations which are generally not subject to legal challenge. Disputes in elite amateur sport have primarily been related to exclusion from sporting opportunities or major sporting events, based on rules laid down by sporting organisations. Athlete selection disputes go to the heart of sports rights questions in that they tell us when there are grounds to intervene in the decisions of private sporting organisations, when it is considered reasonable to exclude participants and when it is necessary to admit them to a competition. The reluctance of courts to interfere in the decisions of these bodies, despite the material consequence of their decisions, does not tend to support an emerging right to sport. The establishment of the Court of Arbitration for Sport, however, as a specialized forum for considering sporting disputes, may provide support for an emerging legal system in which limited protection from arbitrary exclusion is provided to elite amateur athletes.

C Defining rights

In the modern western legal tradition a right is an essential normative rule establishing a privilege or freedom for an individual or group. Human rights may be understood as a social contract, enforceable through adjudication and are considered to apply to all human beings regardless of any innate characteristics of the individual person.¹⁴ Some human rights are revoked when an individual commits a transgression, for example, the right to freedom of movement is denied to convicted criminals required to serve jail terms.

The modern framework of human rights, incorporating national and international law, is founded on successive struggles to establish certain principles as defining global normative values; it reflects profound developments in what we think about ourselves and our communities. Moral rights are established on the basis of moral norms that may not always translate into legal norms and therefore a legal right. While there may be insufficient evidence to support the existence of a legal right to sport, rhetoric surrounding a right to sport may suggest the existence of moral grounds supporting a right. The normative basis for a right to sport will be considered later in this paper.

In order for legal rights to exist a society is required to have a system of law which recognizes and embraces a rights tradition. At the international level human rights have been enshrined in legal instruments, although problems with enforcement may cast doubt on the genuine legal nature of international human rights.¹⁵ A legal right may be argued to exist if enough groups (communities, courts, organisations) recognize it and if that recognition in some measure provides for the enforcement of the right.

In relation to the establishment of a general right to sport, the 1978 *Charter of Physical Education and Sport* (the Charter) states that 'access to physical education and sport should... be assured and guaranteed for all human beings'.¹⁶ Article one sets out the parameters of a universal

levels' Council of Europe *European Sports Charter* (2001) Brussels.

12 Sport according to the Corinthian ideal, for example, precluded the participation of individuals in sport that may have experienced an advantage from employment involving significant physical labour. See Beloff, above, n 8.

13 *Cameron v Hogan* (1934) 51 CLR 358.

14 Aryeh Neier 'Social and Economic Rights: A Critique' (2006) *Human Rights Brief* 13, No.2, 1.

I do not think that rights are an abstract concept. I think they are a contract

between a citizen and a state, or a citizen and her community, and that a citizen has to be able to enforce her side of that contract. Rights only have meaning if it is possible to enforce them. But there has to be some mechanism for that enforcement, and adjudication seems to be the mechanism that we have chosen. Therefore, from my standpoint, if one is to talk meaningfully of rights, one has to discuss what can be enforced through the judicial process.

15 Neier, above n 19.

16 *International Charter of Physical*

right to sport, emphasizing that every person is entitled to participate in sport, including women, children and youth, the elderly and people with disabilities.¹⁷ The right is framed as fundamental privilege necessary to provide for personal expression and development, which is connected to national and social traditions and facilitated through education. It is limited to access to sport as a participant.

The principles set out in article one of the Charter provide a useful framework for considering whether a general right to sport exists and what an enforceable right might look like in the future.

D Is there evidence to support the existence of a right?

It may be considered apparent at the outset of this investigation that declarations about a right to sport are not supported by a strong legal basis and are aspirational only. No clearly articulated and enforceable individual legal right to participate in sport exists in any domestic or international law.¹⁸ Evidence, therefore, has to be sought in principles of national legislation and international law that support access to sport and in the finding of justiciable issues and relevant general principles by courts.

This paper adopts an inclusive view of rights and is receptive to the argument that a matrix of influential documents and a body of precedent may give rise to an identifiable measure of legal protection in relation to sport. Sports disputes have been resolved conventionally on the basis of a relevant branch of law determined by the interest compromised (for example, equal opportunity, labour or contract law). There may, however, be instances where the principle of providing freedom to access a sporting pursuit is the overwhelming factor in determining a favorable finding for an individual; the outcome of the adjudication then supports a distinct right.

Indeed, some authors have argued that international sporting organisations may be creating a type of international sports law which is as effective as mainstream law and may constitute a developing legal system in its own right.¹⁹ The development of a consistent body of sports law by the Court of Arbitration for Sport,²⁰ for example, in parallel to the precedent of national courts, may support a distinct regulatory regime capable of defining a principle of access to sport.

The evidence for a right to sport will be considered as it applies to each class of sport identified: community participative sport, elite amateur sport and professional sport. Generally, the laws and principles applying in a community participative sport context will apply to elite amateur and professional sport. The inverse, however, does not apply. The legal avenues available to elite amateur and professional sportspersons are largely confined to each sporting context, such as the ability to refer a selection dispute to the Court of Arbitration for Sport or to apply to a court for relief on the grounds of breach of contract. These avenues are not commonly available to community sport participants.

The evidence has been separated according to these classifications to distinguish findings in relation to the nature and extent of a possible right to sport. For example, it seems unlikely that a universal right to participate in professional sport would exist. As professional sport relies on elite performance, providing general access to these opportunities would reduce the drama of the spectacle, its popular appeal and ability to generate profit and, correspondingly, its status as professional sport.

It is more likely that if a right to sport existed it would be founded at the most basic level of participation, where it may be applied universally without compromising standards of elite sporting competition. Separating the evidence according to the class of sport may also help determine whether claims have been successful on the basis of a particular area of law or whether they have been resolved on a ground that embraces a general principle of access to sport.

1 Community Participative Sport

Broad international and narrow domestic legal grounds exist to protect community participative sport. Rights to sport and physical activity are articulated in several United Nations (UN) treaties, but are not enforced in individual cases. Participants at this level may seek to challenge exclusion from sporting activities on the basis of human rights laws, anti-discrimination laws, breach of constitutional rights or denial of natural justice. Complainants whose circumstances are not encompassed by any of these heads of power have little ability to progress their dispute. Courts have generally concluded that community participative sport occurs in the context of private agreements between individuals and have been reluctant to intervene in these disputes.

(a) General Grounds

At the community level participative sport generally occurs within the context of clubs that are constituted by an informal collective or are incorporated associations. These legal structures (or their absence) limit the types of legal actions an individual can take to challenge his or her exclusion. Courts have traditionally declined to intervene in the affairs of private associations,²¹ unless their activities and decisions violate certain laws, such as equal opportunity legislation. Associations have a basic right to determine who will be a member and individuals have not been held to possess property in associations or to have established contractual relations generally. Individuals have been able to challenge the disciplinary or exclusionary decisions of incorporated associations that are made in contradiction to association rules, on the basis that those decisions have resulted in an unreasonable restraint on the individual's ability to trade or that they constitute a breach of contractual right between the individual and the association.

Athletes who have been disciplined and subsequently excluded from sporting opportunities (lacking legally-enforceable interests in those opportunities) have not sought to assert a right to sport, but rather have mounted challenges on the basis that the rules of natural justice have been contravened and that the athlete has a right to a fair hearing by an independent person.

Field of play decisions have invariably been determined not to be justiciable²² and assertions that such decisions have cost athletes further opportunities to participate in further sporting contests or finals are unlikely to succeed.

More remedies may be available to certain sporting participants depending on the nature of the sporting organisation seeking to exclude their participation from their sport. If the body is a public authority, such as the Australian Sports Anti-Doping Authority, administrative law remedies may be applied.

Education and Sport UNESCO/GC, 20th sess, Agenda item 23 (21 November 1978) preamble.

¹⁷ *Ibid*:

Article 1. The practice of physical education and sport is a fundamental right for all

1.1. Every human being has a fundamental right of access to physical education and sport, which are essential for the full development of his personality. The freedom to develop physical, intellectual and moral powers through physical education and sport must be guaranteed both within the educational system and in other aspects of social life.

1.2. Everyone must have full opportunities, in accordance with his national tradi-

tion of sport, for practicing physical education and sport, developing his physical fitness and attaining a level of achievement in sport which corresponds to his gifts.

1.3. Special opportunities must be made available for young people, including children of pre-school age, for the aged and for the handicapped to develop their personalities to the full through physical education and sport programmes suited to their requirements.

¹⁸ Mitten and Davis, above n 8, 73.

¹⁹ See Mitten and Opie, above n 4.

²⁰ In *Norwegian Olympic Committee and Confederation of Sports & others v International Olympic Committee* (CAS 2002/O/372) the panel stated at para 65 n.15:

CAS jurisprudence has notably refined and developed a number of principles of sports law, such as the concepts of strict liability (in doping cases) and fairness, which might be deemed as part of an emerging 'lex sportiva'. Since CAS jurisprudence is largely based on a variety of sports regulations, the parties' reliance on CAS precedents in their pleadings amounts to the choice of that specific body of case law encompassing certain general principles derived from and applicable to sports regulations.

Other commentators have equated *lex sportiva* with a global sports law, essentially functioning as a transnational autonomous private order. See Ken Foster 'Lex Sportiva and Lex Ludica: the Court

of Arbitration for Sport's Jurisprudence' in Ian S. Blackshaw, Robert C.R. Siekman, Janwillem Soek (eds.) *The Court of Arbitration for Sport 1984-2004* (T.M.C. Asser Press 2006) 420.

²¹ See *Cameron v Hogan* (1934) 51 CLR 358, 370 and 378; *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546 (CA(Vic)); *Smith v South Australian Hockey Association Inc* (1988) 48 SASR 263.

²² *Yang Tae Young v International Gymnastics Federation* CAS 2004/A/704, 21 October 2004: gymnastics judges awarded medals incorrectly due to error in points calculation, but CAS determined that this decision could not be reviewed or overturned.

On the whole, the range of legal actions that may be taken in relation to community participative sport are limited and do not suggest an underlying right to sport, as set out the Charter.²³ No general principle that individuals have a right to sporting and physical opportunities is in evidence in relation to the most basic forms of participation in sport.

(b) International Law

A number of UN conventions and other international instruments provide support for a general right to participate in sport.

The *Universal Declaration of Human Rights* establishes a broad framework of universal rights and duties and provides a foundation for modern human rights. Article one asserts that all human beings are born free and equal in dignity and rights. The second article prohibits discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property or birth in relation to the entitlements set out in the declaration. Article 24 enshrines a right to rest and leisure and article 27 provides the right to participate in the cultural life of the community.²⁴

Other UN human rights instruments refer to recreation rights for particular groups. Article 29 of the *Convention on the Rights of the Child* provides for the child's education to be directed to, among other things, the development of the child's physical abilities, while article 31 articulates the child's right to participate in leisure, play, recreation and cultural activities.²⁵

The *Convention on the Elimination of Discrimination Against Women* provides at article 10 that state parties will take steps to ensure that women have equal opportunities to participate actively in sports and physical education. Article 13 further articulates a right of women to participate in recreational activities, sports and all aspects of cultural life.²⁶

The *Convention on the Rights of Persons with Disabilities* also seeks to establish obligations on states to facilitate the participation of people with disabilities in mainstream sporting activities, including providing access to venues, school sporting activities and the ability to arrange disability specific sporting activities.²⁷

As previously mentioned, the 1978 *Charter on Physical Education and Sport* establishes the most detailed obligations in relation to providing access to sporting activities.

These instruments provide some guidance about the form of a general right, but do not provide measurable standards for determining whether the right to sport has been achieved. Nor do they operate in a regime where enforcement may be effectively provided. UN conven-

tions and charters may be referred to in court, in support of a legal argument, but do not in and of themselves establish legal causes of action in domestic law. They influence through initiating discussions and reviewing state behavior. For example, an Intergovernmental Committee for Physical Education and Sport was established in 1978 to promote the inclusion of sport in public policy and to encourage government action in providing opportunities to participate worldwide. The committee provides research, advice, a forum for discussion and exchange of ideas, and purports to make state members accountable by monitoring and evaluating their sport policies.²⁸

In addition to the activities of this committee, where allegations of human rights breaches against states are made the UN Human Rights Commission is authorized to 'examine information relevant to gross violations of human rights' and to 'make a thorough study of situations which reveal a consistent pattern of violations of human rights'.²⁹ A Working Group or Special Rapporteur is appointed to fulfil these purposes where a petition has been received³⁰ and submissions of non-governmental organisations may also be confidentially provided in relation to allegations of breaches of human rights.³¹ The commission generally undertakes these actions, however, in relation to civil and political rights: at no stage in its existence has it established a special rapporteur in relation to human rights pertaining to sport.

A number of other international laws and treaties supporting access to sport — either generally or in relation to a specific aspect — are relevant to constructing a general right to sport.³²

(c) Equal Opportunity Law

Excluding individuals from sport on the grounds of race, religion or politics violates international human rights law and article 3 of the Olympic Charter.³³ Discrimination on the basis of gender, age and disability is applied differently in relation to sport; discrimination on the basis of these characteristics may be legal in certain circumstances.

Laws asserting the rights of persons with a disability to participate in sport are prevalent in international law and the laws of Australia, the United States and European nations,³⁴ although enforcement may not always be comprehensively sought.³⁵ It is generally accepted that it is reasonable to discriminate on the basis of physical impairment where an individual is not physically able to execute movements necessary to participate in the sporting activity.³⁶ Disability is not restricted to impairments that limit mobility, but may also refer to diseases such as HIV³⁷ and mental illnesses.³⁸ Sport providers must make reasonable adjustments where possible to enable people with a disability to participate.³⁹

Gender discrimination in Australia is generally permitted where the

23 *International Charter of Physical Education and Sport* UNESCO/GC, 20th sess, Agenda item 23 (21 November 1978).

24 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

25 *Convention on the Rights of the Child*, opened for signature and adopted 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

26 *Convention on the Elimination of Discrimination Against Women* opened for signature 18 December 1979, 1 UNTS. Vol. 1249, 13, UN Doc A/RES/34/180 (entered into force 3 September 1981).

27 *Convention on the Rights of Persons with a Disability* opened for signature 30 March 2007, 189 UNTS 137 (entered into force 3 May 2008). Under the convention states members are bound to take appropriate steps:

1. To encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels;
2. To ensure that persons with disabilities have an opportunity to organize, develop and participate in disability-specific

sporting and recreational activities, and to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources;

3. To ensure that persons with disabilities have access to sporting and recreational and tourism venues;
4. To ensure that children with disabilities have equal access to participation in play, recreation, and leisure and sporting activities, including those activities in the school system;
5. To ensure that persons with disabilities have access to services from those involved in the organisation of recreational, tourism, leisure and sporting activities.

28 *Intergovernmental Committee for Physical Education and Sport (CIGEPS)* United Nations Educational, Scientific and Cultural Organisation www.unesco.org/new/en/social-and-human-sciences/themes/sport/physical-education-and-sport/cigeps/.

29 ECOSOC Resolution 1235, E.S.C.O.R., 42nd Sess., Supp.1 (1967).

30 ECOSOC Resolution 1503, E.S.C.O.R., 48th Sess., Supp. 1A (1970).

31 D J Harris *Cases and Materials on*

International Law (Sweet & Maxwell 1998) 629.

32 Such as the *United Nations Convention on Social and Economic Rights*, *International Convention Against Apartheid in Sports*, *International Convention against Doping in Sport*, *European Convention on Human Rights*, *European Union Charter of Human Rights* and the *European Sport for All Charter*.

33 James A R Nafziger *International Sports Law* (Transnational Publishers 1988) 159.

34 *Convention on the Rights of Persons with a Disability*, *International Charter of Physical Education and Sport*, *European Charter on Sport for All: Disabled Persons*, Recommendation No. R(86)18 (1986), *Disability Discrimination Act 1992* (Cth), *Equality Act 2010* (UK), *General Equal Treatment Act 2006* (Germany), *Americans with Disabilities Act 1990* (P.L. 108-23), various Acts and Charters of Human Rights of numerous countries.

35 'Citizens with disabilities' currently comprise around 10% of the total European population, whereas a recent Eurobarometer survey on discrimination shows that anti-discrimination legislation is still not sufficiently implemented in the

EU' *Policy Summary*. www.euractiv.com/en/sports/sport-disability/article-168119.

36 For example, section 28(3) of the *Disability Discrimination Act 1992* (Australia) provides that excluding a person from a sporting activity because of that person's disability is not unlawful if the person is not reasonably capable of performing the actions required by the sport. See *McInnes v Confederation of Australian Motor Sport* (1991) EOC 92-343; *Wells v Queensland Cyclists Association* (1999) EOC 93-031.

37 See *Hall v Victorian Amateur Football Association* (1999) EOC 92-997 in which an athlete could not be excluded from amateur football on the basis of his HIV positive status, due to the fact that the likelihood of his passing the disease to other participants was assessed as infinitesimal.

38 Disability may include 'a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour' *Disability Discrimination Act 1992* (Cth) section 4.

39 In *PGA Tour Inc v Martin* 532 U.S. 661 (2000) the United States Supreme Court

difference in the strength, speed and physique of female and male competitors is relevant to the sporting activity.⁴⁰ This discrimination does not apply to participants under 12 years of age, where the physical difference between the genders is not considerable.⁴¹ Discrimination against women in sport has been contested in relation to outright prohibitions on female sporting competitions,⁴² inequality of competitive opportunities⁴³ and inequality of prize money.⁴⁴

Discrimination in sport on the basis of race is widely prohibited under the Olympic Charter and numerous international and domestic laws, including the *International Convention against Apartheid in Sports*, which was developed in response to apartheid in South Africa.⁴⁵

While there are numerous instruments providing legal protection for individuals excluded from sporting opportunities on the basis of a prohibited attribute, these do not equate to support for a general universal right to sport.

2 Elite Amateur Sport

(a) The Olympic Movement

At the elite amateur level, sport is regulated through a structure with the International Olympic Committee (IOC) at its apex and a cascading pyramid of responsibility and authority involving host city organizing committees of the Games (OCOGs), international sport federations (IFs), national Olympic committees (NOCs), national sporting associations (NSOs), their member clubs and athletes, and a range of other organisations recognized by the IOC.⁴⁶ 205 NOCs participate in the Olympic Movement.⁴⁷ In addition to the sports contested in the summer and winter Olympics, a number of other sports achieve recognition through the affiliation of their IFs with the Association of IOC Recognised International Sports Federations.⁴⁸

In its Fundamental Principles of Olympism the Olympic Charter states:

The practice of sport is a human right. Every individual must have the possibility of practicing sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play... Any form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic Movement.⁴⁹

While the *Olympic Charter* provides a clear statement of sport as a right, its enforceability in mainstream law is non-existent. This does not necessarily mean that the *Charter* is without influence or effect. The Olympic Movement has been identified as a primary catalyser of inter-

national sport law⁵⁰ and the Court of Arbitration for Sport (CAS) and the World Anti-Doping Code have accelerated the development of a coherent international framework imposing requirements on sporting organisations and athletes alike, and establishing norms for sporting dispute resolution.⁵¹

Although sport is stated to be a human right, the Charter limits participation in the Olympic Movement in a range of ways, not least of all by requiring that a NOC (and its sanctioned athletes) be recognized by the IOC in order to belong to the Olympic Movement and participate in its Games.⁵² Reference to the practice of sport being a human right in the Olympic Charter does not create a right of participation for athletes - they must still satisfy selection criteria.⁵³ Nevertheless, the Charter serves to prohibit discrimination against non-selection on the basis of class or race and athletes may comment on eligibility rules through the IOC Athlete Commission.⁵⁴

(b) The Court of Arbitration for Sport

The great benefit of the Olympic Movement is that NOCs, IFs and the IOC do not have an unbridled ability to determine participation, as their rules are subject to independent review.⁵⁵ Participants in elite amateur sport have the facility to take their complaints to CAS.⁵⁶ The existence of CAS itself provides support for the argument that a right to at least amateur elite sport may exist to a limited extent for those athletes with sufficient ability to participate at these levels.

CAS was established in 1983 as private specialist sports tribunal with its seat in Lausanne, Switzerland. It receives complaints where the parties agree or where the referral of disputes to CAS is provided in IF rules or member agreements. The creation of CAS 'recognizes the need for international sports governance to be uniform and protective of the integrity of athletic competition, while also safeguarding all athletes' legitimate rights and adhering to fundamental principles of natural justice'.⁵⁷

CAS structure and procedures changed substantially in 1994, from an entity funded and supervised by the IOC to an independent body funded and administered by the International Council of Arbitration for Sport (ICAS).⁵⁸ CAS operates an Ordinary Arbitration Division for sports disputes in the first instance and an Appeals Arbitration Division which reviews the decisions of IFs and other sports organisations. Further, it provides ad hoc divisions to hear urgent disputes arising out of every Olympic Games. CAS may also issue advisory opinions.⁵⁹

Hearings of the tribunal are conducted 'de novo'⁶⁰ which ensures that athletes who did not receive a fair hearing from the governing body of their sport will have a full opportunity to have their dispute reviewed by CAS, which has stated that it may hold 'a completely fresh rehear-

found in favour of a golf player, who required the use of a golf cart between shots due to physical impairment. The PGA Tour sought to deny Casey Martin this option, but could not lawfully do so.

⁴⁰ *Sex Discrimination Act 1984* (Cth), section 42.

⁴¹ *Ibid*, section 42.

⁴² *Gulliver v City of Sydney* (1987) EOC 92-185; prohibition on staging a women's kickboxing competition in New South Wales.

⁴³ *Martin v International Olympic Committee* 740 F.2d 670 (9th Cir. 1984): an action was brought in a United State District Court under the fifth and fourteenth amendments and the Unruh Civil Rights Act (West 1982), seeking equality in the running races provided at the Los Angeles Olympics for women and men. The court found that the IOC, in consultation with IFs, is responsible for determining the events held in each sport at the Games. The laws of the host country did not apply in this circumstance. See also *Sagen & Ors v VANOC* 2009 BCA 522.

⁴⁴ In response to increasing pressure a number of premier tennis tournaments now

offer equal prize money for women and men, including the US Open, Australian Open and Wimbledon: *Prize Money at Wimbledon (1968 - 2011)* Wimbledon <http://www.wimbledon.com/heritage/history/prize-money>.

⁴⁵ Article 10 specifies that Olympic principles of non-discrimination, i.e. prohibition of discrimination on the basis of race, religion or political affiliation embodied in the Olympic Charter are to be upheld. *International Convention against Apartheid in Sports* opened for signature and adopted on 10 December 1984, GA Res 40/64, 40th sess, 1500 UNTS 161 (entered into force 3 April 1988).

⁴⁶ James A R Nafziger 'International Sports Law: A Replay of Characteristics and Trends' *The American Journal of International Law* (1992) 86:489, 491.

⁴⁷ Official Website of the Olympic Movement *National Olympic Committees* <http://www.olympic.org/national-olympic-committees>.

⁴⁸ ARISF is one of the pillars of the Olympic Movement, with all of its 32 Member International Sports Federations (IFs) committed to respect

and foster the values and principles set forth in the Olympic Charter. Through ARISF, the Member IFs maintain an ongoing dialogue with the IOC and the entire Olympic Movement on matters of common interest.

Association of IOC Recognised International Sports Federations *About Us* (2009) <http://www.arisf.org/about-us>

⁴⁹ International Olympic Committee *Olympic Charter* (11 February 2010) Fundamental Principles of Olympism, 4 and 5, page 12.

⁵⁰ James A.R. Nafziger *International Sports Law* (Transnational Publishers Inc, 1988) 2.

⁵¹ Nafziger, above n 62, 491.

⁵² International Olympic Committee *Olympic Charter* (11 February 2010) 'Olympic Movement and Its Action', 3, Recognition by the IOC, 16.

⁵³ Mitten and Davis, above n 8, 88-89: The Olympic Charter's explicit statement that "the practice of sport is a human right" protects an athlete's opportunity to participate in the Olympic Games and other international sports competitions *only if* several enumerated athlete eligibility requirements

and other conditions are satisfied". Significant requirements are: abide by the Olympic Charter and relevant rules of the IF (including selection policies) as approved by the IOC, to be entered by the relevant NOC, to respect the spirit of fair play and non-violence and behave accordingly and to comply fully with the World Anti-Doping Code.

⁵⁴ *Ibid* 73-74.

⁵⁵ *Ibid* 78.

⁵⁶ Court of Arbitration for Sport *Code of Sports Related Arbitration* (22 November 1994): S 20(b) provides that non-Olympic eligibility disputes from appeals of final IF decisions can be arbitrated.

⁵⁷ Mitten and Davis, above n 8, 79.

⁵⁸ *A and B v International Olympic Committee*, Swiss Federal Tribunal, 27 May 2003 (*Digest of CAS Awards III 2001-2003* 674).

⁵⁹ Amy Burchfield *International Sports Law GlobalLex* (February 2006). http://www.nyulawglobal.org/globallex/international_sports_law.htm#_Human_Rights_&_Anti-Discrimination%20.

⁶⁰ Mitten and Davis, above n 8, 82.

ing of the dispute and not one narrowly focused on finding error in the original decision'.⁶¹

CAS has established important principles in relation to athletes' rights and justifiable exclusion from competition, which have not been available to athletes in mainstream law. It found that IFs owe their athletes a 'duty of confidence' and that they must not act in 'bad faith' - that is, in a 'completely arbitrary, blatantly unsustainable, unreasonable or abusive manner'.⁶² This applies most particularly in relation to the rules of eligibility and disqualification (e.g. for doping) imposed by IFs, which must be clear and publicised before being enforced.⁶³ CAS will also interpret obscure eligibility rules in favour of athletes and will refuse to review cases where a sports' governing body uses discretion to waive an eligibility rule, thereby allowing an athlete to compete.⁶⁴

Nor are CAS awards vulnerable to the influence of its founding organisation. In *Sandis Prusis v IOC*⁶⁵ CAS found against the IOC and determined it was not able to set aside the decision of an IF in relation to the eligibility of the athlete to compete in the Olympic Games, on the grounds that it considered the length of the athlete's suspension for doping to be inadequate.⁶⁶ Additionally, the establishment of ICAS as a governing body of CAS was determined to be sufficient to establish its independence from the IOC.⁶⁷

Importantly, courts have determined that CAS decisions may not be reviewed under the laws of the jurisdiction in which a sporting dispute is heard, except on a very limited number of grounds.⁶⁸ The *New York Convention on the Enforcement of Foreign Arbitration Awards*⁶⁹ supports the legitimacy of CAS awards by enshrining the principle that parties to a sport dispute who are unsatisfied with the result provided by a validly constituted and conducted arbitration are not be entitled to re-litigate that dispute.⁷⁰

CAS awards may be challenged in the Swiss Federal Tribunal (SFT), however, under limited grounds, as the CAS is domiciled in Switzerland. The SFT will only vacate the award if 'the CAS panel was constituted irregularly, erroneously held that it did or did not have jurisdiction, ruled on matters beyond the submitted claims or failed to rule on a claim' or if 'if the parties are not treated equally by the CAS panel, if a party's right to be heard is not respected, or if the award is incompatible with Swiss public policy'.⁷¹ The SFT has been reluctant to review awards on the grounds of an incompatibility with Swiss public policy and this has never been successfully applied: 'even the manifestly wrong application of a rule of law or the obviously incorrect finding of a point of fact is still not sufficient to justify revocation for a breach of public policy of an award made in international arbitration proceedings'.⁷² Lack of proportionality in determining a CAS award has also been argued, but not successfully.⁷³ It has been suggested that the susceptibility of a CAS award to review on the grounds that it violates the principles of good faith and equal treatment, contrary to Swiss public policy, may require CAS panels to treat like cases alike, thus facilitating the development of a consistent body of international sports law.⁷⁴

It has been asserted that 'a developing *lex sportiva* is shaping the nature and scope of legal protection of an athlete's opportunity to participate in the Olympic Games and other international sports competitions'.⁷⁵ At the elite amateur level of sport, the dominance of the IOC's rules and the authority of CAS as a specialist sports arbitrator provide significant evidence for an alternative system of law in which athlete participation can be protected.

As demonstrated above, elite amateur athletes have better opportunities to challenge decisions which affect their ability to participate in sport than community sporting participants. Opportunities are created through the cascading series of obligations and contractual relationships owed by sporting organizations affiliated with the Olympic Movement, which provides CAS as an accessible and effective forum for review of decisions which affect athletes.

This structure does provide some evidence of a right to sport, as defined by the Charter, in that it supports 'everyone having full opportunities...for practicing physical education and sport, developing his physical fitness and attaining a level of achievement in sport which corresponds to his gifts'.⁷⁶

3 Professional Sport

What were once social sports clubs have now evolved into professional leagues, although they still retain their social character: many football clubs worldwide have strong working class and geographic affiliations and their fans would strongly deny that their team is simply a private corporation.⁷⁷

Professional athletes have the greatest ability to contest exclusion from or interference with professional sporting opportunities because courts have recognized justiciable issues and legally enforceable rights in relation to professional sports disputes, due to the significant material gains that may be made and employment structures that have emerged in professional sport.

(a) Employment Law

The type of sport practiced at the professional level has determined which legal structures are applicable: team sport players may be considered to operate under an employment contract to their clubs whereas individual sport athletes can be considered no more than independent contractors who may be entitled to a fee (prize money). Historically, courts have been reluctant to identify employment relations in the sporting context⁷⁸ and will consider a range of factors when determining whether an athlete is an employee or a contractor, the most important factor being the level of control an individual has over his or her work.⁷⁹ Employment structures are often found in sporting leagues because participating clubs dictate competition attendance, training schedule, require athletes to wear a uniform, pay a regular salary instead of a fee for service and demand exclusivity. In professional team sports players are often found to be employees, even if only part-time.

Professional team sport athletes have the most significant influence on eligibility for their sports because many have established players unions. Professional team sport athletes have significantly greater legal protections than individual sport athletes, including those under labour, anti-trust, civil rights and contract law.⁸⁰ These freedoms have been won through challenging labour market rules imposed in major team sports which significantly impaired the ability of players to change workplaces and increase their earnings.

Popular player controls in team sports are zoning, where clubs have exclusive rights to engage players within a locality, and the draft, where clubs are allocated players of certain skill in relation their ranking (the best players being assigned to the worst teams and the worst players to the best teams). Where leagues have suffered defeats in court in relation to controls imposed on players, they have sought to negotiate collective

61 *D'Arcy v AOC* (7 July 2008) CAS 2008/A/1539.

62 *L v FINA* (14 Feb 1996) CAS 95/142.

63 Mitten and Davis, above n 8, 83.

64 *Ibid* 84.

65 *Prusis v International Olympic Committee* (5 February 2002) CAS OG 02/001.

66 *Ibid* 84.

67 *A and B v International Olympic Committee* (27 May 2003) Swiss Federal Tribunal.

68 *Raguz v Sullivan* (2000) 50 NSWLR 236.

69 *New York Convention on the Enforcement of Foreign Arbitration Awards* adopted on

10 June 1958 9 U.S.C. § 201 (entered into force on 7 June 1959).

70 *Slaney v IAAF* (2001) 244 F.3d 580.

71 Mitten and Davis, above n 8, 86.

72 *N., J., Y., W. v FINA* 5P.83/1999 in Mitten and Davis, above n 8, 87.

73 *Ibid* 88.

74 *Ibid* 88.

75 *Ibid* 81.

76 *International Charter of Physical Education and Sport* UNESCO/GC, 20th sess, Agenda item 23 (21 November 1978) art. 1.2.

77 This process is described by Stephen J in

R v Federal Court of Australia; Ex parte Western Australian Football League (1979) 143 CLR 190, 217-8.

78 As provided by the decision in *Elford v Buckley* [1969] 2 NSWLR 170 in which a professional rugby league player was determined not to be an employee. It was not until *Buckley v Tutty* [1971] 125 CLR 353 that the High Court of Australia identified employment relations between players and clubs.

79 Other factors relevant to determining whether an athlete is an employee or a contractor include how the athlete is

remunerated, the supply of equipment to the athlete, the obligation to work and determination of working hours and holidays, whether remuneration is assessable for income tax and whether the athlete is able to delegate his or her functions. Hayden Opie and Graham Smith 'The Withering of Individualism: Professional Team Sports and Employment Law' (1992) 15 *University of New South Wales Law Journal* 319.

80 Mitten and Davis, above n 8, 74.

81 Braham Dabscheck 'Sport, Human Rights and Industrial Relations' (1999)

bargaining agreements with player unions to forestall anti-trust or common law actions.

Sporting leagues have argued that player controls in team sports are necessary to protect the integrity of those sports, as the success of a league depends on member clubs being competitive against one another, ensuring that the outcome of contests is largely uncertain. Without player restrictions leagues have argued that the wealthiest teams will attract the best players, leading to competitions in which the dominance of those teams is unchallenged and the spectacle is no longer interesting to spectators and no longer commercially viable. Some authors have challenged this argument, however, on the basis that the controls employed are disproportionate and their benefits illusory; other methods should be used to achieve a competitive balance in a sporting league, such as revenue sharing or the redistribution of income between clubs.⁸¹

Once players are assigned to a club they may be restrained from seeking employment at other clubs. The most repressive restrictions are the reserve or option system (North America) and the transfer system (United Kingdom, Western Europe and Australia), both of which seek to constrain athletes to employment with a single club for their sporting career by imposing excessive fees where players seek to 'transfer' or imposing options to re-employ players whose contracts have expired.⁸²

The 'involuntary servitude' experienced by professional league players has been upheld by courts in several instances on the reasoning that, while players are constricted in their freedom to move between employers within their sport, they have the option to seek alternative employment.⁸³ Additionally, courts in some jurisdictions have not determined that leagues are commercial bodies for the purposes of certain laws and, consequently, are not subject to anti-trust laws.⁸⁴

In 1995 the European Court of Justice found that FIFA's transfer rules and nationality restrictions breached the European Community Treaty by restricting the free movement of workers, and that players were entitled to freely negotiate new employment contracts.⁸⁵ The case had a substantial impact on football and other professional sport in Europe, and also affected the ability of leagues to impose quotas on non-national players within each team, to the extent that they discriminated against European Community nationals.

Challenges to exclusion from professional sporting opportunities have also been mounted on the basis of domestic and international laws relating to employment or contracts. Decisions from these disputes demonstrate that judges have sought to apply the relevant laws to the unique arrangements within sport, also seeking to interpret sporting structures in a manner that is consistent with other common entities.⁸⁶ Courts have not extracted an underlying right of access to these sporting opportunities; in some cases they have had no hesitation in finding that athletes should either accept the restrictions of the entity that provides the sporting opportunity or leave the sport and seek an alternative career.

Professional athletes generally cannot be considered to possess a more substantial right to sport than other classes of participant, rather, their rights in relation to sport are based in recognized legal interests and protected by common legal mechanisms.

E Conclusion about existence of right

Legal protection for participation in community sport is largely restricted to international and national instruments which proscribe discrimination on the basis of a prohibited attribute, such as race, gender or disability. Limited capacity also exists for individuals to challenge sporting organisations where they do not consistently and fairly apply their own rules. Beyond this, courts are unwilling to interfere in what are considered private agreements between individuals and sport as a protectable 'social good' is not widely acknowledged in mainstream law.

Convincing evidence does not seem to exist for a right to community participative sport, for all that there are strongly worded international documents such as the *International Charter for Physical Education and Sport*. Governments are not obliged to provide universal access to sporting facilities and programs. Private sporting organisations may arrange their activities with very little regulatory interference, provided that they do not discriminate against prospective members on a prohibited attribute and participants do not generally have the ability to

challenge eligibility rules relating to their participation. Courts have not recognized a legally protected interest in participation at this level of sport; generally, review is only granted where there has been a clear violation of civil rights or equal opportunity laws.⁸⁷

It seems unlikely that a freestanding right to sport at the grass roots level genuinely exists and has any weight in domestic or international customary law. Aspirational statements referring to a right to sport are simply that: aspirational.

Nor does a freestanding right to participate in professional sporting activities appear to exist. While professional sportspeople have successfully challenged exclusions from sporting competitions or unreasonable restrictions in utilizing those opportunities, these decisions have been determined through established legal principles and in accordance with legally enforceable interests.

The strongest case for a right to sport is provided by decisions emerging from the system of regulation established by the Olympic Movement, operationalised through IFs, NOCs, NSOs and affiliated clubs and athletes and mediated through CAS. This structure creates an autonomous system of sports law and through its rules, regulations and decisions it affects the practices of nation states and sporting organisations generally.⁸⁸ There may be a right to Olympic sport if an athlete fulfils the relevant eligibility requirements,⁸⁹ although this is not a guarantee that athletes will be accepted into the Games. The fundamental importance of being able to participate, however, is recognized and given weight, not because nation states are able to establish these structures to facilitate their representation at the Games,⁹⁰ but because the Olympic Movement values the effort and skill of its participants and enforces state compliance with its rules by threat of exclusion from the Olympic Movement. Because Olympic sport is deeply valued at the local level, this threat is effective and the 'system of law' established by the Olympic Movement achieves broad compliance. While courts have little participation in the resolution of disputes at this level, the available processes to protect the participation rights of athletes are independent and fair.⁹¹

Importantly, regulatory structures established by the Olympic Movement may transcend cultural boundaries. Although some countries are not strong sporting countries, a large majority of the world's nations participate in the Olympic Games and are therefore involved in the structures of the Olympic Movement. While not universal, elite amateur sport is certainly pervasive and the rules governing these sporting opportunities continue to permeate national boundaries.

F An Emerging Right?

Given the strength of feeling about sport globally and its much vaunted transformative power for individuals and groups, should legal protection be enshrined for sport more broadly? This question takes us to the heart of the value of sport as an activity, its significance for varying populations and the unique challenges it represents for traditional forms of regulation.

Sport is generated by the interactions of individuals to meet mutual interests and needs.⁹² The origin of these interests and needs is obscure and can be debated infinitely, but their existence is incontrovertible. Do we have a right, therefore, to their expression and satisfaction?

It is clear that existing mainstream legal structures protect economic benefits associated with professional sport and there may be a devel-

University of New South Wales
<http://fulltext.ausport.gov.au/fulltext/1999/nsw/p31-54.pdf> 3.

82 Ibid 2.

83 See *Flood v Kuhn*, 316 F. Supp. 271 (1970); Application No. 9322/81, *X v The Netherlands*, European Commission of Human Rights Decisions and Reports (3 May 1983) Vol. 32.

84 *Federal Baseball Club v. National League*, 259 U.S. 200 (1922).

85 *Union Royale Belge des Sociétés de Football Association ASBL & others v. Jean-Marc Bosman*; Case C-415/93, ECR I-4921.

86 *R v Federal Court of Australia; Ex parte Western Australian Football League* (1979) 143 CLR 190.

87 Mitten and Davis, above n 8, 74.

88 Nafziger, above n 62, 491.

89 Mitten and Davis, above n 8, 73.

90 After all, participants at the Games do so as individuals not representatives of their countries - International Olympic Committee *Olympic Charter* (11 February 2010) art 6.1.

91 Mitten and Davis, above n 8, 74.

92 JJ Coakley *Sport in Society: Issues and Controversies*, 4th ed. (1990 Times Mirror/Mosby) 4.

oping basis upon which to build legal structures to protect participation in elite amateur sport. The basis for establishing a right to sport at non-elite levels, such as that outlined in the Charter, is less clear. Do overwhelming philosophical justifications and corresponding legal structures exist to establish a general right to sport for community participants?

1 The Normative Basis for Protecting Access to Sport

The literature is divided on the origins of human rights and how they underpin current legal and political infrastructure. While norms relating to the essential value of a human life can be traced in the philosophies of many cultures and religions, the protection of human rights in international law only occurred last century. It is widely considered that this protection was established in response to the unimaginable scale of human tragedy resulting from the Second World War: human rights were promoted as 'tool[s] with sufficient power to stand against the brute realities of sheer power politics'.⁹³

If a right to sport is to be protected in a similar manner, the underlying normative basis must be equally compelling. Anthony Langlois argues that rights are ideas which have crystallized and become enshrined in law because they form part of a common body of moral knowledge.⁹⁴ Religious groups argue that this body of moral knowledge comes from an essential or divine source, other groups argue that the body of moral knowledge is established over long periods of time when community values have become entrenched.⁹⁵

Sporting norms are not straightforward. General arguments for the value of sport may relate to its facility to build character, discipline and self-knowledge in individuals, to provide socialization, a means of expression and a focal point for national pride and nation building. No compelling evidence exists, however, for participation in sport as forming part of a body of common moral knowledge; rather, its moral status is constantly shifting.

Sport has been simultaneously presented as a force for the advancement⁹⁶ and degeneration⁹⁷ of international relations. Subtle contradictions and inconsistencies also abound in the regulation of sport and in shifting ideas about its 'purity' - as borne out by the evolution of rules dividing professionals and amateurs⁹⁸ and the dramatic development of doping regulation in sport. Sport involves ever evolving distinctions about the corrupting force of money or substances on the integrity of the contest and its authenticity for spectators. Sporting organisations seek to preserve sport's wholesome reputation by requiring high profile athletes to perform role model functions, even where athletes staunchly resist or fail. It is evident from these activities that sport is not a fundamental precondition for the realization of human potential: it is an expression of that potential.⁹⁹

Further, widely held beliefs that sport promotes self-discipline, sports-

manship, a work ethic, competitive drive and a goal oriented attitude have not been borne out by research.¹⁰⁰ Investigations into the relationship between sport and character have concluded that sport is not a material factor in determining personality traits and value orientations.¹⁰¹ Rather, evidence suggests that those individuals who already possess or embrace the traits and values required by sports coaches will continue to participate in sport.¹⁰² Children remain involved in sport where support and perception of their participation are positive; sport provides the opportunity to socialize with significant others and sport ideals presented by the media are pursued.¹⁰³ Media products portraying sport ideals are not imposed but are popular because these ideals appeal to audiences.¹⁰⁴

Elite and professional sports, in comparison to community sport, have an even more complicated relationship with a common body of moral knowledge. It seems unlikely that a right to commercial gain from sport features as part of this body of knowledge, although arguments could be made that, in the same way that intellectual property is based on the idea that a creator should be able to earn from her or his creations and abilities, an athlete should be able to earn from her or his superior sporting prowess.

In addition, once sport is no longer play but constitutes work (as has been recognized by many courts) it may be considered that 'morality and ennoblement are replaced by spectacle and entertainment'.¹⁰⁵ Control of professional sport is primarily located with persons and entities who are not direct participants, e.g. clubs, leagues and event organisers. As a result, sport may be modified to suit imperatives unrelated to the game: ease of spectatorship, broadcasting time slots and sponsor's and advertiser's preferences. On this basis, professional sport is incompatible with commonly held values that venerate play for its own sake, for self-knowledge and freedom of expression.

The right for all people to be able to enjoy sporting pursuits is based on the widely accepted moral principle that it is unfair to exclude individuals on the basis of their features, which is a different principle to the promotion of a right to sport because of the primacy of the activity. This is linked to the concept that 'a human right is something of which no one may be deprived without a great affront to justice'.¹⁰⁶ There does seem to be a general principle related to freedom of expression and the right to health that supports a general right to sport, although it should be noted that sport in this context is essentially play, which is a narrower form of expression, and physical activity engages but one facet of the concept of health.

Sport from this perspective does not appear an appropriate subject upon which to base a human right. Even if the normative basis for a right to sport was compelling and uncomplicated, however, the translation of this imperative into a legal mechanism would not be simple.

93 A J Langlois 'The Elusive Ontology of Human Rights' (2004) 18(3) *Global Society* 248.

94 Human rights underpinning legal structures provide a space around the individual to allow expressions of will or providing an intermediary expression (linguistic, political, social) of something that goes beyond the self and which makes the self important in the first place - namely, that body of common moral knowledge which we all reach variously but which gives us all knowledge of what is important and how we should behave towards one another' Ibid 256.

95 Ibid 249.

96 Sport for Development and Peace International Working Group *Harnessing the Power of Sport for Development and Peace: Recommendations to Governments* (2008) Right to Play <http://www.righttoplay.com/> International/news-and-media/Pages/HarnessingthePowerofSports.aspx.

97 'At the international level sport is frankly mimic warfare... Serious sport has nothing to do with fair play. It is bound up with hatred, jealousy, boastfulness, disregard of all rules and sadistic pleasure in witnessing violence: in other words it is war minus the shooting.' George Orwell 'The Sporting Spirit' (December 1945) *Tribune*.

98 From the Olympic ideals in 1912 which saw Jim Thorpe stripped of track and field medals for having played semi-professional baseball, to the 2008 Olympics in which Venus and Serena Williams, two of the highest earning professional tennis players in the world, took part.

99 Human rights are said to be generated by human needs or the requirements for human flourishing. But how does this generation proceed? For rights and needs or flourishing are not the same thing. To put it another way, the language of rights and that of needs or flourishing are not interchangeable. Not every need that a human has

translates into a right; and it is manifestly not the case that any and every possible flourishing for which I have potential is mine as a matter of right. What is needed is some mechanism by which we are able to differentiate needs and flourishings, by which we may say that some are basic, some less so, some important, some optional. And in particular, this mechanism needs to provide us with a rationale for why some such basic and important needs or flourishings ought to be provided as a matter of right.

Langlois, above n 92, 259.

100 James H. Frey and D. Stanley Eitzen 'Sport and Society' (1991) 17 *Annual Review of Sociology* 506.

101 Studies comparing male athletes and male nonathletes (there are very few studies comparing women) yield little evidence to support the idea that sport is necessary for complete and adequate socialization, or that involvement in sport results in character building,

moral development, a competitive or team orientation, good citizenship or valued personality traits (Dubois 1986, Fine 1987, Coakley 1987, McPherson et al 1989, Rees et al 1990)

Ibid 506.

102 Ibid 506.

103 Ibid 507.

104 'The mass media socialize through image management, the manipulation of symbols, and commentary. The mediated sports product that reflects conservative, authoritarian and nationalistic values is warmly received by the audience; it is not forced upon them.'

Ibid 507.

105 Ibid 508.

106 Maurice Cranston argues that economic and social rights generally fail the test of paramount important, which demands that 'it is a paramount duty to relieve great distress, as it is not a paramount duty to give pleasure.' Maurice Cranston *What are Human Rights* (1973 Bodley Head) 68.

2 Providing a right through mainstream law

Two avenues could be used to establish an enforceable general right to sport in mainstream law: identification of a relevant legal interest in participating in sport or establishment of a relevant civil liberty. The former would be a difficult mechanism to establish, as such an interest would have to be based on having property in one's own physical and spiritual wellbeing (dubious grounds in many regards, not least of all because a case may be argued for certain sports or obsession with sports to cause physical and psychological harm).

While there are few common legal mechanisms for establishing a right to sport,¹⁰⁷ some protection could be established within an existing human rights framework, situated with other social, economic and cultural rights.

Much work would be required to determine what that right would seek to achieve. Would it set up an arbitration body for community sport with global subscription? Would such a right require governments to provide a minimum number of venues and programs? Would it rather act as a negative obligation, preventing governments from developing open spaces where it can be demonstrated that a community has a too little land for sport and recreation, per capita? Would such a right improve opportunities for under-represented sectors of the community, such as persons with a disability, women, and ethnic minorities? The elusiveness of social and economic rights has been widely criticized: they cannot be considered absolute because they are fundamentally dependent on the allocation of resources that may not be available, as opposed to civil and political rights which may be universally applied on the basis that they largely require governments to refrain from interfering with individuals in a range of ways.¹⁰⁸ As access to sporting opportunities requires the application of funds - not only for sporting infrastructure, but to allow community members leisure time to participate in sport - implementing a positive right to sport is a material impossibility for many governments.¹⁰⁹

Establishing a right to sport through mainstream legal structures is likely to result in a weak end product - as has arguably occurred with the development of the *International Charter for Physical Education and Sport*. Translation of this instrument into domestic law is either weak or unproven and the Charter has had little effect on court review in sports disputes or enabling legislation.

Additionally, as courts have discovered in attempting to adjudicate sports disputes, when play is legally prescribed it no longer performs the function of play; the development of a right to sport may corrode the very fascination with sporting activities which inspires speakers to assert that an entitlement to sport exists. The problem with sport, and the reason why courts have so frequently declined to adjudicate decisions of sporting organisations and on the field of play, is that regulation destroys the social contracts involved in sport, its element of play

and its ennoblement of participants who can demonstrate character precisely because there is no 'higher court' to review the game. A lack of review is what makes spectators feel that sport is 'real' and that it is a 'microcosm of life'.

While a right to sport may not translate well into mainstream law, it may also be important that it is not regulated in these structures where it is subject to the ultimate control of nation states. Playing of certain sports can represent resistance of a regime or invading culture (such as traditional games) or may be used to facilitate colonization by elegantly explaining the norms and values of an invading empire.¹¹⁰

If a right to sport was codified, it would require governments to legislate and assume control of sports, instruct and control sporting organisations and potentially politicize sport. Sport can suffer the degradations of poor player behavior and rampant commercialism and still provide an honest spectacle in which displays of skill and bravery are essentially uncorrupted. Sport cannot survive two types of dishonesty: cheating (whether by player use of artificial enhancements or by throwing any aspect of the game for money) and use by nation states as a political tool.

At the 2007 Asian Football Confederation Asian Cup the Iraqi team, composed of Shi'a, Sunni and Kurdish players, worked together to win the competition, despite cultural differences and significant barriers to training within Iraq. The win was profoundly uplifting for Iraqi people¹¹¹ and stands in sharp contradistinction to the control of football under the regime of Saddam Hussein in which players were imprisoned and tortured for missing training or penalties.¹¹² Here government control of the national football team had perverted the spectacle, but reclamation of the team by the Iraqi public allowed the competition to function as a genuinely unifying event for a nation suffering profound internal division. This exemplifies the potential of sport for misuse for political ends.

Sporting organisations have also recognised the illegitimacy of national governments seeking to control high profile sports, and FIFA has often threatened state members with expulsion where governments have sought to interfere with the operations of the national football body.¹¹³ It is clear that providing nation states with greater tools for regulating sport through mainstream legal structures may be damaging to sport, in that they may challenge and displace the authority of sporting organisations and spiritual ownership by a diverse public.

Ultimately, establishing a right to sport through mainstream law would be difficult, and would potentially compromise the unique nature of sport in unexpected ways.

3 Providing a right through international sports law

Taking an expansive view of rights there may be an alternative way for a general right to sport to emerge: through the international sports law system established by the Olympic Movement and its affiliated organisations. This way of promoting the right might not suffer the problems associated with regulation through the mainstream legal system, because it does not empower nation-state regulation. Conversely, it would not enjoy the same degree of enforceability.

As discussed above, this model of sport regulation is applied comprehensively to elite amateur sport. The Olympic Movement is increasingly influencing grass roots sport, however, in that the elite sport dream motivates sports administrators and budding athletes to seek local and national government assistance, in order to prepare athletes for talent identification and a sporting career path. Those grass roots sporting organisations are correspondingly subsumed into international sporting rules and structures:

This structure for transmitting the authority and legitimacy of the Olympic process influences even schoolyard and sandlot activities whenever participants receive support from sanctioned sports organisations that are ultimately assisted and governed by organisations within the Olympic Movement.¹¹⁴

In addition, the IOC has become an important international actor at a community level through intentional collaboration with the UN, UNESCO and WHO to use sport as a tool to achieve material development for impoverished and war torn communities, economic development projects, HIV/AIDS education, humanitarian assistance and peace activities.¹¹⁵ Now a formal UN observer, the IOC is a significant

107 An example of an attempt to locate a right in law may be found in the work of Susan Haslip, who argues that a treaty right to sport exists in relation to the indigenous peoples of Canada, under an early Treaty made by Her Majesty the Queen and the Plains and Wood Cree Indians and other tribes: 'A Treaty Right to Sport' 8(2) (June 2001) *Murdoch University Electronic Journal of Law* pt. 66.

108 Cranston, above n 117, 66.

109 Ibid 67.

110 As has been argued in relation to cricket. See Gerard Holden 'World Cricket as a Postcolonial International Society: International Relations Meets the Sociology of Sport' (paper prepared for presentation at the Turin Pan-European International Relations 12-15 September 2007).

111 'Iraq celebrates football victory' (29 July 2007) *BBC news* news.bbc.co.uk/2/hi/6921078.stm.

112 Suzanne Goldenberg 'Under Uday, soc-

cer was a game of life and death' (April 20 2003) *The Age* www.theage.com.au/articles/2003/04/19/1050172797737.

113 For example, in 2010 FIFA warned Nigeria with expulsion after President Goodluck Jonathon directed the dissolution of the Nigerian Football Federation and withdrawal of the national team for two years from competition after a poor FIFA World Cup performance: 'World Cup 2010: Fifa issues ban deadline to Nigeria' (2 July 2010) *BBC news*: news.bbc.co.uk/sport2/hi/football/world_cup_2010/8780028.stm.

114 Nafziger, above n 62, 492.

115 Carole Oglesby 'Paths for Women and Men Towards Human Rights in Sport: The Same, Delayed or Divergent?' *International Council of Sport Science and Physical Education* (September 2006) www.icsspe.org/bulletin/bulletin.php?v=363&kat=4&No=48&l=2&par=1.

partner in the UN's plan to achieve its Millennium Development Goals relating to international peace and development.¹¹⁶

This expanded role of the IOC can be interpreted as seeding a right to community level sport because it actively reinforces the idea that playing sport has benefits and creates the expectation of its availability at the community level. The increasing prevalence of these ideas and their connection with a force such as the Olympic Movement may propagate, over time, increasingly ingrained cultural norms about access to sport with their own inherent legitimacy. These norms may build into social and cultural beliefs that sport should be provided, even in communities where other basic rights may not be satisfied.

If a right to sport cannot be established in a universal body of common moral knowledge as a foundation for a mainstream human right, it may still be consciously articulated and protected in a modern setting as an emerging value. In this way, a right to sport that is not articulated within a human rights discourse will not suffer from the contradictions involved in human rights tests, or the vagaries of nation-state observance and enforcement.

In trying to articulate how expectations about sport might be generated and extended, it is useful to consider an analogy with music. The two pastimes bear profound similarities: both constitute a form of 'play' where the activity is conducted for the pleasure of participants or spectators and not for any external 'constructive' purpose and both exist in nearly all societies. Like sport, music may be pursued at an amateur level, where participants play at their own expense or at a professional level where musicians are paid to perform. The law treats aspects of music differently to sport (for example, it recognizes intellectual property rights in musical performances which it does not in relation to sporting performances),¹¹⁷ but would apply the same principles to individual participation, such as finding employment relationships in professional music. In the realm of human rights, neither activity has effective protection, although it is widely asserted that both are good tools for building individual discipline and character, and for uniting communities and facilitating social cohesion.

The key difference between music and sport in this context is that there is no equivalent to the Olympic Movement to unify musicians, spread participation and generate the expectation of participation. There is no equivalent structure to the network of national and international

sporting organisations in the realm of music, and the UN is not seeking to progress its Millennium Development Goals through music (*although it could*).

By virtue of this developing system the infrastructure potentially exists to enhance a right to sport at a community level, through a cascading series of obligations maintained by the desire of sporting organisations to remain within the Olympic Movement. This regulatory system could work in parallel with mainstream law, and might eventuate in normative changes which emphasise rights in respect of physical activity within other legal systems.

Mitten and Opie have suggested that the development of a *lex sportiva* through the Olympic regulatory system provides an important example of a global legal pluralism without states. They also suggest that this structure may provide an alternative for effectively addressing other public policy issues.¹¹⁸ In relation to progressing a general right to sport, the IOC could require affiliated sporting organisations to have seeding or community programs, to enter partnerships with education institutions, to comply with codes of conduct enhancing access to sporting opportunities or to establish selection or participation policies at a sub-elite level. All such measures would support a right to sport, as set out in the Charter, and could be enforced by a new branch of CAS. In this way responsibility for the promotion of sport would be assumed by structures external to the nation-state.

These developments may indicate that mainstream legal mechanisms, especially in relation to human rights, are not the final word on providing effective mechanisms for progressing certain values.

Whether by virtue of its inherent qualities or as an accident of history, sport has assumed a preminent status in human systems of organisation and regulation. The expanding influence of these structures may result in significant developments, including normative changes in how sport is regarded, from an activity accessed by some to an activity that should be and is available to all.

116 'Sport for All: Sport Belongs to Everyone' Official Website of the Olympic Movement
<http://www.olympic.org/sport-for-all>

117 Victoria Park Racing and Recreation Grounds Co Ltd v Taylor (1937) 58 CLR 479.

118 Mitten and Opie, above n 4, 299.

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Spanish football clubs' tax debt awakes storm

Spanish Secretary of State for Sport Miguel Cardenal sparked outrage in Europe when he suggested waiving the unpaid tax bills of the Spanish football clubs. The clubs in Spain's top two divisions collectively owe some 750 million euro to the tax authorities and another 600 million euro to the social security system. Among the clubs with the highest tax debt is Atlético Madrid (155 million euro), which bought top striker Falcao for a club record deal of 40 million in August 2011. At a time when Spain's debt problems continue to escalate, more than five million Spaniards are unemployed and suffering from the cutbacks, it would be unacceptable if football clubs were treated more favorably than normal taxpayers. Moreover, giving tax amnesty would constitute State aid, capable of significantly distorting competition, and go against UEFA's Financial Fair Play rules.

Faced with public outcry, Cardenal wisely dropped the consideration of forgiving the tax debt. The Spanish government started up discussions with the Spanish football league (LFP) to cut a deal. On April 25, 2012 both parties announced a plan for clubs to repay their tax debts. The most important measure is that, beginning in the 2014-2015 season, clubs will be obliged to set aside 35 percent of their revenues from the sale of audiovisual rights as a guarantee against tax obligations. The government will exercise administrative control over the LFP. It was stressed that economic control and sanctions will be strict. If clubs transgress the new rules, they can be barred from competition. Most controversially, if a club increases its tax liabilities, potential buyers could sub-

mit offers for the acquisition of federative rights of players that will be evaluated by a joint commission consisting of government, LFP, and club officials. If the LFP fails to enforce the rules, directors could be removed and income from the National Lotteries withheld. While the Spanish government is keen to emphasize that no special treatment is given, pointing to debt restructuring agreements signed in other economic sectors. Yet the roadmap does not seem to be that stringent. First, Spanish clubs are given until 2020 to settle their tax debts without the usual requirement to present a long-term viability plan. Second, the Liga only generates a third from its revenues from broadcasting rights. Individual negotiation of such rights has favored polarization of revenues within the league. There is a wide gap between the two top clubs, Barcelona and Real Madrid, representing more than 50 percent of total broadcast revenues, and the other clubs.

According to a recent study conducted at the University of Barcelona, the top 20 Spanish clubs accumulated a combined total of 3.53 billion euros debt at the end of the 2010-2011 season, up from 3.48 billion euros in comparison to the previous season. For the moment, it remains unclear how and when the financial situation of Spanish football will mirror its success on the pitch.

*Dr. Ben Van Rompuy, Senior researcher
Asser International Sports Law Centre*

Asser International Sports Law Centre (AISLC) Sports Fraud Roundtable Seminar

In response to increasing activity and daily reports involving incidences of sports fraud at the local, national, European Union (EU) and international levels, Asser International Sports Law Centre hosted the first in a series of Sports Fraud Roundtables to continue the discussion, dialogue and debate on the issue of sports fraud (sports related - illegal betting, match-fixing, money laundering, etc.) and the impact on the integrity of sports in the sports community. Asser ISLC will also host a follow-up Sports Fraud Roundtable Workshop in the Fall - focused on producing a position paper to help identify solutions for addressing sports fraud in the EU.

The Spring Sports Fraud Roundtable Seminar on Thursday April 26, 2012, was attended by an impressive group of attendees ranging from practitioners, academics, law enforcement, sports organizations and other interested individuals. Several members of the Dutch Parliament Health, Welfare and Sports - match-fixing committee, were also in attendance at this event. Those members included (Tjeerd Veenstra, Marjan Olfers, Ben Van Rompuy and Henriette Kievit). They will be meeting at a Dutch Parliament roundtable on match-fixing scheduled for May 24, 2012.

The first part of the program included presentations by Tjeerd Veenstra, 2nd VP, The European Lotteries - Towards a Sports Charter, which recognized the impact to sports integrity and outlined the necessary considerations of a sports charter including, regulations, education, data protection and prevention. Brigitte Slot, Sr. Economist with Ecorys - Findings from the 2009 FATF report and new issues, gave a detailed account of the findings from the 2009 study as well as insights into recent money laundering activities in the area of sports fraud. Wil van Megen of FIFPro - Black Book on Corruption, Financial Crime and Corruption in Sports (2012), provided great perspective particularly rel-

ative to the player's impact and involvement in sports fraud and how it affects those relationships. The information provided by the speakers set a good foundation for the current state of sports fraud and the specific elements of sports fraud in the EU, as well as some implications for sports fraud at the local, national and international levels. A Reader that contained related materials and relevant studies was distributed to attendees.

Some of the questions and responses relative to the presentations and materials included the following:

- **Question:** Is it possible to involve clubs to cooperate with FIFPRO in the fight against Corruption and Match Fixing in Football? **Wil van Megen responded:** It is difficult to involve clubs and their management. It is easier to approach players who feel to be vulnerable and victims of the situation.
- **Question:** Why didn't Platini accept the invitation to cooperate or to attend the presentation of the Black book on Corruption, financial Crime and Corruptions in sports? **Wil van Megen responded:** It is possible that Platini saw the Black Book as a menace, as something dangerous for the UEFA and its credibility.
- **Question:** Is it possible to establish a percentage of betting related to match fixing? **Wil van Megen responded:** It is not easy, because players didn't feel comfortable to reveal these details. It is very probable that organized crime is involved, and this scares the players.
- **Question:** Do you think that match fixing should be seen as a criminal offence? **Wil van Megen responded:** The main issue is that only players and referee are subject to the UEFA zero tolerance policy, while this approach is not applied to the management of the clubs.
- **Question:** How did the football world react to the Black Book? **Wil van Megen:** Players felt vulnerable and victims of the situation. There

- is a relationship between non-payment of the players and match fixing.
- **Question:** Is Football involved in money laundering at all level? **Brigitte Slot responded:** Football is one of the main mediums for money laundering, from the Amateur to the Professional Level.
 - **Question:** What do you expect from the EU Institutions? **Wil van Megen responded:** We expect their cooperation. In particular, the Commission should support the Awareness Program.
 - **Question:** Do you think that the Black book provides us with a big picture of the situation? **Wil van Megen:** No, there should be more that we don't know, but many players are afraid to speak up, they are afraid of possible violence, and of the system which does not encourage them to cooperate.

The second part of the Roundtable convened an impressive discussion panel that included the speakers, and was joined by Marjan Olfers and Rob Siekmann (Asser). This panel engaged in interesting discussion and debate, with questions and participation from the audience. The discussion was kicked off with the panelists addressing the questions: How can we resolve the issue of sports fraud? And, what can we do today to begin addressing sports fraud?

Some of the key issues, comments and debate by the panelists and audience members during this Asser Sports Fraud Roundtable seminar included:

- Marjan Olfers asked, "Do we think that we can solve these issues within the sports world itself?" She further commented, "...there has to be a relationship between bookmakers and sports institutions. They both have to seek the uncertainty of the outcome and as its consequence the integrity of Sport. The lacking of uncertainty and integrity would be detrimental both to the bookmakers and the sports institutions."
- R. Siekmann raised the question as to whether or not the development of a "WADA-like" entity for sports fraud is appropriate. R. Siekmann further stated, "In this regard it is essential the cooperation and direct involvement of sports federations and national government. It is necessary to test whether the political world has interest in tackling the issue. In order to tackle it efficiently we need some leverage at the political level." W. van Megen commented that UEFA is not behaving in the right way, it is not cooperating efficiently. Football organizations do not agree with the WADA model, there is no strict liability and proportionality in it." Further, he states, there should be "balance beforehand so you don't have to fight for it like with WADA". M. Olfers acknowledged that there are some similar experiences between doping and sports fraud. T. Veenstra commented that "The European Lotteries would be in favor of a WADA-like model but within the world of sport there is no such enthusiasm. We can say that doping is an inside job, it stays within the system. Match-fixing instead is part of a criminal chain, and sport is only instrumental." M. Olfers disagreed, stating, "...when we look at doping, we see criminal organization involved in drug trafficking. The main issue is that the focus is only on the members of football associations, and the problem in itself is not tackled, the criminal working outside of the world of sport is not punished... match-fixing/sports fraud occurs outside of the sport; if you focus on the players, you miss the main criminal actors."
- Addressing the question, "What is the difference between corruption in sport and corruption in all other types of business?" B. Slot responded, "The corruption and money laundering schemes are the same in football as in other sectors, but football has specific features more attractive for criminal organizations. Anyway we should apply to football the same measures used in other sectors."
- M. Olfers mentioned that within The Netherlands, institutions are working on a code of conduct. One of the issues is to be seen in clubs' structure; if it is allowed to purchase a club from outside of the country, there are not enough checks and balances measures applicable, and therefore, we cannot establish the legality of the money used to buy the club.
- Unique implications around match-fixing and the relationship between match-fixing and betting.

- In response to the question, "Do you have any tips for police and other organizations in this regard?" W. van Megen commented: "Authorities should take players more seriously, but at the same time be more flexible. It is necessary to leave the players a way out, otherwise they will not be encouraged to cooperate. Awareness is also very important, and in that regard authorities should be more active." M. Olfers stated, "Players and members of the sports world do not know where or how to approach the authority and therefore they feel alone and vulnerable."
- The complicated aspects of sports fraud in that it often involves a "network" of individuals and businesses which often is not easily discovered or fully re-dressed.
- Addressing sports fraud at the "player" level is not sufficient to resolve the problem. B. Slot noted that there is "too much focus on the players".
- In response to a question regarding punishment and sanctions, T. Veenstra commented: "The problem is that we are relying on very few individuals. Why does nobody from sports institutions, organizations, or government take a position on this topic?"
- The problem of sports fraud must be addressed cooperatively between all areas of the sports community including: legal, academic, players, fans, officials, legislators, etc.
- T. Veenstra commented: I think we can start to tackle the problem at a national level, but it cannot be only national though. In the U.S. every sports federation is against any type of sports betting. I think this is excessive, but they have a position on the matter. What is happening creates awareness, but sometimes I'm alarmed and pessimistic. So far it seems to be a lost cause.
- R. Siekmann recognized that "there is no structure of cooperation." There needs to be a coordinated and collaborative solution. T. Veenstra elaborated on this point stating, "...there needs to be more cooperation; and better participation between government". T. Veenstra also commented, that "we are fighting an uphill battle". There should be more focus on making sports fraud a criminal offense.

Some suggestions that were made include:

- The importance of coordination at the national and international levels, and identifying and engaging those stakeholders.
- The need for a governance body at the EU or international level to address sports fraud.
- T. Veenstra mentioned the Anti-money laundering regulation up for review in the European Commission. He believes anti-betting information should be included also.
- The need for additional governance measures such as a 'code' or 'charter' as well as the possibility of standard language in player contracts to more fully address sports fraud.
- Addressing player compensation and clubs that are not sufficiently financed is one aspect of addressing the issue of sports fraud.
- There should be a monitoring system that will share information with world associations, and arrangements also with UEFA, FIFA and other organizations.

Some final comments by the panel included: B. Slot commented on the fact that the problem consists of "interconnected illegal activity... quite complex" and there is a distinction between finding the root cause and (addressing) the political issue." W. van Megen pointed out the "need to focus on all individuals outside of football." T. Veenstra stated, "I'm quite optimistic... but recently at times pessimistic..." R. Siekmann acknowledged, "In my opinion, this is a global issue. It is a political problem, and the cooperation between private and public entities is essential if we want to tackle it efficiently. There needs to be good lobbyists at the international level." M. Olfers concluded, "We should do everything in our power to preserve the integrity of the game. It all starts with awareness."

The Roundtable Seminar concluded with the Chairperson, Karen Jones, recognizing that this type of forum contributes to raising awareness to the ongoing issue of sports fraud, and the importance of continued dialogue and focusing on solutions to this problem.

The Asser ISLC Roundtable series continues by following-up this

spring Sports Fraud Roundtable Seminar with a Fall Sports Fraud Roundtable Workshop. The goal of the workshop will be to identify specific solutions to the issue of match-fixing in the EU. The attendees of the Fall workshop will contribute to the development of a position paper on a key aspect of sports fraud; to be determined ahead of the Fall workshop.

If you would like to participate in the Fall workshop please contact the Programme Coordinator, Karen Jones at k.jones@asser.nl and check our website, www.sportslaw.nl or www.asser.nl.

The International Sports Law Journal

*Karen L. Jones, JD, MA, Programme Coordinator,
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The Days of Breakaway Leagues in India

By Vidushpat Singhania*

India is amidst an exciting time in sports. Indians are realizing the importance of sport as a healthy activity as well as a source of entertainment. This is leading to a growing popularity of sporting events and thus the influx of money. The corporate have started perceiving sports as an industry and have started investing substantial sums of money in sports in the form of license/right to conduct an event, broadcasting rights, and sponsorship rights amongst others.

As the supply of a particular sport event is limited that is a particular team/player can play a limited number of matches depending upon the international calendar, there is increasing competition to get a slice of the sporting pie. Thus stakeholders who fail to get a share of the sporting rights often encourage breakaway leagues and tournaments and try to lure star sportspersons to these leagues.

The success of the Indian Premiere League (IPL) in India has successfully demonstrated the commercial viability of franchisee and clubs based system in Indian sports. Besides cricket, leagues and independent events have begun to sprout up in kabaddi, hockey, motorsports, volleyball, boxing and chess. A pertinent question therefore arises; are the leagues and events held outside the aegis of the National Sport Federation (NSF) serving a beneficial purpose for sports?

Sports worldwide are organized in a pyramid structure, where a particular sport is governed and regulated by a single IF with various NSF affiliated to it. The IF governs the regulatory aspect i.e laying down the rules of the sport, eligibility criteria and playing conditions, the IF also makes the annual calendar for that sport and conducts the world championship and other international level events. A corollary at the national level would entail that the NSF would follow the regulations of the international federation as a condition of its membership and have exclusive powers to make the annual calendar, develop grass-root level of sport and conduct tournaments and training camps in the country.

The importance of the pyramid structure and the risk to the sports due to multiple sport federations has been recognized by IOC and has been addressed in the European Commission's Helsinki Report and the White Paper on sport. The risks are the integrity and uniformity of the sport would be affected if the structure is not maintained and the grass-root development of the sport will suffer. Integrity and uniformity would entail non-discriminatory uniform rules that are applied to the sport worldwide. It includes sporting sanctions like disciplinary action, suspensions, fines and bans for behavior contrary to the spirit of sports which lie at the core of the sport movement and can be applied only within the sporting structure.

The directions of the Delhi High Court directing the competition commission to undertake enquiry against the All India Chess Federation for preventing its players from taking part in a tournament outside its aegis, BCCI's sanctions on the Indian Cricket League and the conduct of the World Series Hockey by the Indian Hockey Federation alleged-

ly fall within the ambit of the IF/NSF trying to curb the advent of breakaway leagues through their rules.

The challenges to the IF/NSFs rules restricting rival tournaments and release of players for these tournaments (e.g India) have come under competition/anti-trust laws that is the abuse of dominant position and anti-competitive agreements leading to unreasonable restraint of trade. The sports industry is a unique industry because the pyramid structure which ensures monopoly is essential in maintaining the integrity of sport and unlike other industries, the sports industry strives on competition rather than from the lack of it. This reasoning gives birth to the exception of 'Specificity of Sport' i.e certain sporting activities are excluded from the purview of the competition laws. The European courts while creating this exception have divided the IF/NSF activities into two parts. The first being pure sporting functions whereas the second being activities having a substantial economic impact.

Pure sporting activities like laying down the rules of the sport, defining the size and weight of the ball and dimensions of the playing field are excluded from the ambit of competition laws. But activities of the IF/NSF having substantial economic impact are within the purview of the competition law. The regulatory power of the IF/NSF if used to gain commercial and financial advantage would fall within this ambit.

Therefore the IF/NSF to justify their rules having a substantial economic impact needs to satisfy two essential conditions:

1. That their agreements are not anti-competitive i.e they do not attempt/cause appreciable adverse effect on competition; and/or
2. That they are not abusing their dominant position and are not imposing unfair or discriminatory conditions.

The European courts have held that these conditions in the sporting sector are satisfied when a particular rule though restricting competition has a proper objective in mind, this objective cannot be obtained without the restrictive rule and the restriction is essential for the integrity, continuity, organization and conduct of the sport at national and international level, and the rule is applied uniformly and transparently.

The Competition Commission of India is faced with a similar task today to recognize the specificity of sport and carve out exceptions in the Indian scenario. The decision of the CCI will have a huge impact on the Indian sport industry as many corporate await a chance to start their own breakaway leagues and commercially gain from the revenues generated from these leagues.

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involved in drafting the National Sports Development Bill.

The European Court of Justice Upholds the Distinctiveness of the F1 Mark

By Ian Blackshaw

A saga, which began 8 years ago, as to whether the Formula One word mark 'F1' was distinctive or generic, ended with an affirmative judgment in the Court of Justice of the European Union (CJEU) rendered on 24 May, 2012 in **Case T-10/09 Formula One Licensing BV v OHIM**.

The background to this case and the intermediate proceedings are as follows:

On 13 April 2004 Racing-Live SAS filed an application for registration of a Community Trade Mark (CTM). The trade mark was subsequently transferred to Global Sports Media Ltd, and was applied for in respect of several goods and services 'relating to the field of formula 1' in classes 16, 38 and 41.

The figurative sign (the Global F1 Live Sign), the subject of the CTM application, is reproduced as follows:



The application was opposed by Formula One Licensing (Formula One) which claimed that the Global F1 Live Sign should be refused registration under Article 8(1)(b) and 8(5) of Regulation No 40/94 (now Regulation No 207/2009). The opposition was based on two of Formula One's earlier marks, namely:

- the word mark "F1" in respect of which Formula One had registrations in Germany, the UK and international registrations in Denmark, Germany, Spain, France, Italy and Hungary; and
- the figurative Community trade mark (the F1 Logotype), reproduced as follows:



The F1 Logotype was registered in respect of goods and services in Classes 16, 38 and 41 covering, *inter alia*, the goods and services covered by the F1 Live application, as were the

international registrations for the F1 word mark. The German registration was in class 41 (providing sporting activities) and the UK registration was for goods and services in class 16 (including paper and printed matter) and class 38 (including telecommunication services and electronic transmission of data).

Formula One also claimed that all its marks had enhanced distinctiveness on account of their use over many years in relation to various goods and services.

The Opposition Division of OHIM (Office for the Harmonisation of the Internal Market) (Community Trademark Office) rejected the F1 Live application, relying on the earlier international registrations for the F1 word mark. It found that the Global F1 Live Sign was similar - to a

medium degree - with the earlier mark; that the goods and services covered by the two marks were similar; and that there was a likelihood of confusion under Article 8(1)(b) of the CTM Regulation.

In an appeal to the First Board of Appeal (BoA), the BoA annulled the decision ruling that, despite the similarity between the goods and services, the marks in contention were not sufficiently similar and there was no likelihood of confusion. In reaching its decision the BoA held that the relevant public perceived the combination of 'F' with '1' as the generic designation of a category of racing car and, by extension, of races involving such cars and, consequently, that the reputation of Formula One's marks concerned only the figurative 'F1' element of the F1 Logotype. Similarly, regarding the Article 8(5) objection, the BoA found that few consumers attribute any distinctive character to the abbreviation 'F1' unless it is represented in the fanciful manner of the F1 Logotype. Since the BoA felt consumers regarded 'F1' as a generic term and that the Global F1 Live Sign would not remind the public of the F1 Logotype, the former would not tarnish the reputation of the latter.

In an appeal to the General Court of the European Union, the Court upheld the findings of the BoA and dismissed Formula One's objections on the following grounds:

Article 8(1)(b) of the CTM Regulation

The Court noted that the comparison must be between the marks as a whole, even though certain components of compound marks may be more dominant than others.

In the case of Formula One's earlier marks the Court agreed with the BoA that the relevant public would perceive the combination of the letter 'F' and the numeral '1' as an abbreviation of 'Formula One' which is the commonly used designation of a category of motor sport. Further, it supported the BoA's finding that, in fact, it was only the stylised 'F1' element of the F1 Logotype that was perceived by the public to be the opponent's trade mark in relation to its commercial activities in the field of Formula One motor racing.

In reaching this conclusion the Court noted that over the previous decade Formula One had consistently and exclusively used the F1 Logotype when granting licenses and had ensured strict compliance by licensees. Consequently, the public had only been exposed to the F1 Logotype and had grown to associate this mark (and this mark only) with the opponent's activities in Formula One. It was supported in its conclusion by survey evidence which suggested that the sign 'F1' was commonly perceived as a generic abbreviation for Formula One motor sport by the relevant public.

Having reached these conclusions the appropriate test for the purposes of Article 8(1)(b) was between the Global F1 Live Sign and the F1 Logotype. The Court found that there was little visual similarity between the relevant marks because of the presence of the word 'LIVE' in the Global F1 Live Sign. Also the type setting of the respective marks was different, and the particular style of the 'F1' element of the F1 Logotype was unique. There was some degree of conceptual similarity, although the addition of 'LIVE' made the Global F1 Live Sign "conceptually richer", suggesting the reporting of an event in 'real time'. Overall, the Court considered that the degree of similarity was weak and, consequently, there was no likelihood of confusion between the marks in contention.

Finally, the Court noted that the validity of Formula One's earlier word marks for 'F1' could not be put into question in the context of the opposition proceedings. However, its ruling left

little doubt that it regarded these marks as generic in relation to the relevant goods and services and lacking distinctiveness.

Article 8(5) of the CTM Regulation

Formula One's arguments Article 8(5) could only be made in respect of the F1 Logotype, since the Court agreed with the BoA that this was the only sign in respect of which Formula One had shown use and reputation. In order to succeed, Formula One needed to demonstrate that the marks in contention were identical or similar; that the F1 Logotype had reputation; and that there was a risk that the Global F1 Live Sign would take unfair advantage, or be detrimental to, the distinctive character or repute of the F1 Logotype.

The Court looked first at whether the respective marks were similar and, following its analysis of Article 8(1)(b), it concluded that they were not. The presence of the element 'F1' in the Global F1 Live Sign was not sufficient (in light of the Court's decision that the public regarded this as a generic abbreviation) to offset the visual contrast between the respective marks, and there was no risk of an association between the two.

Formula One appealed against this ruling to the Court of Justice of the European Union (CJEU) asking the Court to set aside the judgment of the General Court.

CJEU Judgement

In its Judgment handed down on 24 May, 2012, the CJEU noted, first, that that the Community trademark does not replace the national trademarks of Member States and that the two types of trademark co-exist in the economic life of the European Union. The Court stated that, in this dual system of trademarks, the registration of national trademarks is solely a matter for the Member States and that, therefore, OHIM and the General Court are not competent to deal with either the registration or the declaration of invalidity of those trade marks.

Accordingly, the Court noted that the validity of a national trade mark may not be called into question in proceedings opposing the registration of a Community trade mark, but only in cancellation proceedings brought in the Member State in which the national trade mark was registered.

Also, according to the Court, it cannot be found, in such opposition proceedings, that a sign identical to a national trade mark is devoid of distinctive character; that is, the ability to allow the public to associate the products and services designated by the sign with the company which applied for its registration. Such a finding would be likely to eliminate the protection which national trade marks are intended to provide.

The Court, therefore, noted that, in a situation such as that of the present case, OHIM and, consequently, the General Court, must verify the way in which the relevant public perceives the sign which is identical to the national trade mark, solely in relation to the mark applied for, and evaluate, if necessary, the degree of distinctiveness of that sign. In that respect, the Court pointed out that it is necessary to acknowledge a certain degree of distinctiveness of a national mark on which an opposition against the registration of a Community trade mark is based.

In those circumstances, the Court found that, in finding that the sign 'F1', identical to the national trademarks of Formula One, was devoid of distinctive character, the General Court called into question the validity of those trade marks in proceedings for registration of a Community trade mark and, therefore, infringed the Regulation on the Community Trade Mark.

Accordingly, the CJEU set aside the judgment of the General Court and, since the CJEU was not in a position to give final judgment in the matter, referred the case back to the General Court for the appropriate ruling.

Comments on the Case

The ruling of the CJEU, in the opinion of the author of this article, is clearly correct in principle, especially as it respects the well-known concept of the territoriality of trademarks. It seems surprising, therefore, that F1 trademark registrations were not taken into account by the BoA and the General Court in deciding the Formula One opposition to the F1 Live CTM application, but were summarily dismissed by them. These are existing trademark registrations and, as such, are valid until successfully legally challenged in the appropriate proceedings.

Furthermore, as a result of the F1 trademark registrations, by definition, the F1 mark is considered to be distinctive and not descriptive or generic and must be respected as such. Also, the name 'F1' is the essential component of the trademarks in contention and clearly there is confusion between the two of them. Indeed, the word 'Live' does not add any distinctiveness to the applicant's mark to prevent such confusion.

As the CJEU noted in its Judgement, Community trademarks and national registered trademarks co-exist and are not, therefore, mutually exclusive or superior, the basis on which the BoA and General Court had proceeded.

Property rights - and trademarks are a species of property (intangible) recognised by the Law - can only be taken away by a proper legal procedure and not at the will of the BoA and the General Court, who have no power to do so under the provisions of the CTM Regulation.

Again, it seems that this general legal principle is axiomatic and it is a pity that Formula One has had to endure the time and expense of tortuous legal proceedings for the distinctiveness and validity of their F1 trademark to be finally recognised and upheld by the European Court of Justice. But that is how the Law works and develops!

This ruling is not only of importance, of course, for Formula One, but also for the proprietors of other so-called famous sports marks and the consequent need to recognise and protect them legally.

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Match-Fixing in Sport: A Mapping of Criminal Law Provisions in EU 27 (March 2012)

By Karen L. Jones, JD, MA

In March 2012, the European Commission released a report on Match-Fixing in sport. The report is the first of its kind to look specifically at the issue of match-fixing and attempt to identify the criminal provisions of the 27 EU countries with specific application to this issue. The report defines the arena of match-fixing and provides an explanation of how match-fixing is a threat to the integrity of sport, and the impact to public order; which is referenced as the reason for the attention being placed on match-fixing.

The research takes the approach of employing surveys as a primary means of information and data gathering. As a result one research constraint is identified as receiving relatively small amounts of reliable information. A further research restraint is the lack of literature available on

the topic of manipulation of sports results in Europe. Further, it is stressed that little academic work has been done in this area.

The report shows that approaches taken in the EU to address match-fixing are not uniform. A major limitation of the research is the lack of data and lack of consistency by Member States in addressing this issue. Many of the criminal provisions reviewed did not contain specific reference to match-fixing, only general provisions around fraud or corruption. Are these types of provisions sufficient when attempting to apply this to the unique areas of "sports corruption" such as match-fixing? Perhaps additional research is necessary to clearly identify a legal framework that would be sufficient to address match-fixing in the EU.

Asser International Sports Law Centre

Originating from a series of roundtable sessions on the Bosman case in 1996, international sports law has developed into one of the main areas of research within the T.M.C. Asser Instituut. The research is interdisciplinary as well as comparative, covering all fields of law in which the Instituut specialises, i.e., private international law, public international law including the law of international organisations, international commercial arbitration and the law of the European Union.

Asser ISLC was officially launched on 1 January 2002 within the framework of the T.M.C. Asser Instituut for international law. The mission of the Asser ISLC is to provide a centre of excellence in particular by providing high quality research, services and products to the sporting world at large (sports ministries, international - intergovernmental - organisations, sports associations and federations, the professional sports industry, etc.) on both a national and an international basis.

The Centre's activities include:

- **Fundamental research, Applied (contract) research, Consultancy**
- **Seminars and Conferences, Education and Training**
- **Library, Documentation/Information, and Publications (Sports law book series, and The ISLJ)**

The International Sports Law Journal (ISLJ), the official journal of the Asser International Sports Law Centre, was started in 2000 with the main purpose of providing valuable legal commentary and informing those interested in sports and the law about legally relevant developments in the world of sport from a national and international perspective. Internationally, sports law is recognized as an emerging specialty area and the ISLJ is well known for providing important information to the international sports law community. The ISLJ is the only truly "international" sports law journal that experts, practitioners and academics rely on for providing interesting, necessary and valuable information regarding sports law related topics. The ISLJ has an international Editorial Board and is supported by an international Advisory Board of prominent sports lawyers representing all areas of sports law.

For more information on the ISLJ, Asser ISLC, sports law book series, and other activities, please visit our website at www.sportslaw.nl.

The Five sections of the study establish a methodological approach. First, attempting to produce a definition of match-fixing; then reviewing the main legal instruments that apply to match-fixing in Europe and internationally; next, mapping and analysis of the criminal provisions within the 27 EU Member States; then presentation of the main findings; and finally, in Section 5, a list of ten policy recommendations for the EU focused on better addressing the issue of match-fixing. The recommendations include:

1. EU's active involvement in the Council of Europe's initiatives
2. Adopt a definition of the manipulation of sport results, ensure that Member States have an effective legal framework to cope with match-fixing
3. Encourage disciplinary rules and proceedings as well as a closer collaboration of sport organizations with law enforcement agencies and betting operators
4. Encourage cooperation of the enforcement European agencies EUROPOL and EUROJUST

5. Reinforce international cooperation by promoting international agreements on mutual legal assistance in criminal matters and including a reference to integrity of sports in international agreements
6. Set-up a platform for exchange of information and best practices
7. Facilitate the coordination and cooperation between sport organizations, betting operators and law enforcement agencies
8. Raise awareness
9. Explore the link between betting related provisions and the integrity of sport
10. Further data

The European Commission report looks across the EU at criminal provisions that address match-fixing and allows insight and overview for comparison purposes. Since match-fixing tends to be a transnational sports issue, it will be interesting to see the next steps taken by the European Commission and the EU Member States in the on-going fight against match-fixing.

The International Sports Law Journal



Retraction/Corrections

With our sincere apologies, we make the following retractions and/or corrections.

Name	Article Title	ISLJ Vol (error)	ISLJ Vol (correction)	Retraction	Correction	Notes/Comments
Armout Geeraert, Jeroen Scheerder and Hans Bruyninckx	The Sport Governance Network of European Football: Towards a More Important Role for the EU and Football's Stakeholder Organizations	2011 (3/4)	2012 (1/2)	X	N/A	This article was published in the ISLJ in error. It should not have been published in the 2011 3-4 edition.
Matthijs Withagen and Adam Whyte	De Sanctis and the Article 17: the Last of the Saga?	2011 (3/4)	2012 (1/2)		X	Bio information is missing for M. Withagen. Should have read as follows: "Graduated from the LL.M. International Sports Law programme at ISDE in December 2011, and is currently working at Ruiz Huerta & Crespo Sports Lawyers in Valencia, Spain."
John T. Wendt	The FEI and the Continuing Fight against Doping in Equestrian Sport	2011 (3/4)	2012 (1/2)		X	Name on article spelled "Wend" should be "Wendt". Also should have included "*" with the following bio information: John T. Wendt, J.D., M.A., with the Department of Ethics and Business Law, Opus College of Business, University of St. Thomas; Member, Court of Arbitration for Sport; Member, PGA Special Anti-Doping Arbitration Panel.

'Cas and Football: Landmark Cases' Alexander Wild (Editor) 2012 TMC Asser Press The Hague The Netherlands Hardback Pages 272 + XIII ISBN 978-90-6704-807-1 Price: €05, 45

The Court of Arbitration for Sport (CAS) has established itself during its twenty-years of operations, which began in 1984, as its founders intended, as the 'Supreme Court of World Sport'. The CAS is based in Lausanne, Switzerland, and is the final Court of Appeal for almost all the International Sports Federations and also in doping cases pursuant to the provisions of the World Anti-Doping Agency Code. Its importance in the international sporting world, therefore, cannot be overstated. The CAS also deals with commercial disputes relating to sport, for example, disputes arising under sponsorship and merchandising agreements, especially those with an international dimension.

Football is not only the world's favourite sport; it is also the world's most lucrative one. The FIFA World Cup, which was last held in 2010 in South Africa, was, despite all the fears about security, highly successful. In fact, FIFA made a profit of US\$ 1.1 billion from the event!

It is interesting to note that FIFA, the World Governing Body of Football, only became a member of the CAS in 2002, but since then the workload of the CAS has increased exponentially each year (averaging now around 300 cases a year), due, in no small measure, to the number of football-related disputes being referred to the CAS as the final Court of Appeal in football cases. In fact, a special division of CAS Arbitrators, who are specialised in football legal matters, has been created to deal with these appeal cases, many of which relate to disputes under the FIFA Status of Players and Transfer Regulations. Many of these disputes involve millions of dollars in respect of the fees paid for the international transfer of players from one country club to another.

Not only is the CAS, through its cases, establishing a kind of 'Lex Sportiva' - a discrete body of Sports Law - in relation to sports disputes in general, but also in relation to football disputes in particular, despite the fact that CAS is not required to follow a 'stare decisis' principle - the doctrine of binding judicial precedent so beloved of Common Law jurisdictions. In other words, CAS Panels, who decide disputes brought before it, are not required to follow the decisions (known as 'Awards', CAS being an Arbitral Body) of previous Panels in similar cases. However, in practice, Panels do tend to follow earlier decisions as a matter of 'comity' and in the interests of legal certainty.

This Book - another first in the highly successful Asser International Sports Law Series (established by Professor Rob Siekmann) - is a welcome addition to the sports law literature, and Alexander Wild, the Editor, who is a practising Attorney in Stuttgart, Germany, and a former Research Fellow of the Asser International Sports Law Centre in The Hague, the so-called 'Legal Capital' of the World, is not only to be congratulated on conceiving the idea for such a work, but also on executing it so professionally.

Lex Sportiva: What is Sports Law? Robert C R Siekmann & Janwillem Soek Editors 2012 TMC Asser Press The Hague The Netherlands Hardback Pages 391 + XIX ISBN 978-90-6704-826-6 Price €47,65

This Book deals with a subject close to the heart of your reviewer, having been a pioneer of Sports Law, both as a practitioner and an academic, for more than twenty-five years. Is there such a thing as Sports Law - a kind of 'Lex Sportiva' - as a discrete/distinct body of Law? And, if so, what is it and which criteria should be used to identify it?

This is a vexed and continuing question and divides academics and practitioners alike. Certainly sport is important - this is not only recognised by the European Union in the so-called Sport Article 165 of the Lisbon Treaty, but also by the fact that sport is big business globally. As such, there is an important interface between Sport and the Law and the different ways in which they influence and engage with one another. In other words, there are more and more contentious and non-contentious issues all the time which fall to be determined by the Law around

This slim volume (in fact, a case of *multum in parvo*) is a veritable mine of useful information on leading CAS cases in the football field. The Book covers such matters as club ownership, including the famous ENIC (English National Investment Company) unsuccessful legal challenge against the UEFA rules limiting the common ownership of clubs playing in UEFA competitions as being anti-competitive in an economic sense (subsequently, the European Commission, advised by the Competition Directorate) came to the same conclusion as the CAS Advisory Opinion that these rules, which were, of course, restrictive in nature and effect) were justified on sporting competition grounds and not unduly restrictive - truly, therefore, a landmark CAS case); players' contracts, especially their breach, including the Andrew Webster case and the subsequent Matuzalem case on anticipatory breach and the quantum of damages payable as a result, and also the validity of unilateral options, which, to the surprise of many lawyers, were upheld in the Panathinaikos case on the particular facts and in the particular circumstances, the CAS finding that there was a contractual balance between the club and the player; football hooliganism (the so-called 'English Disease'); match fixing (the current concern of FIFA); and, of course, doping cases, the scourge of all sports and, which like the poor, are always, sadly, with us.

In relation to doping, the Book deals, amongst others, with the issue of whether a sanction should be imposed on an entire team, where one of its members is found guilty of a doping offence. This matter arose in the case of the *Football Association of Wales v UEFA*, and the CAS did not, in fact, impose any penalty on the entire team involved. The case concerned the Welsh and Russian teams in Euro 2004, in which a member of the Russian team tested positive and the Welsh team cried foul when they were knocked out of the Competition, claiming that the Russian team, through the use of performance enhancing drugs taken by one of their players, had gained an unfair sporting advantage and that the whole team should, therefore, be sanctioned and disqualified from the Competition and the Welsh team allowed to go further in the Competition.

All the contributors to this Book, including the Editor, are specialists in football-related sports disputes, and this gives the Book a certain authority and *cachet*.

In fact, the Book is one that your reviewer, despite contributing the Introductory Remarks, can, without any shred of bias on his part, wholeheartedly recommend; and one, therefore, that should, I would submit, be on the book shelves of every self-respecting sports lawyer, whether interested or involved in football or not! Remember, the legendary manager of Liverpool Football Club, Bill Shankly, when, on one occasion, was asked whether football was a matter of life and death, replied: "oh no, it's much more important than that!"

Professor Ian Blackshaw
International Sports Lawyer And Member Of Cas

the world. This phenomenon presents an on-going and fascinating challenge to general and sports lawyers alike.

The Book brings together contributions from a variety of authors from a variety of countries and also includes extended Papers presented at the 2010 Djakarta Conference on 'The Concept of *Lex Sportiva* Revisited' organised, amongst other bodies, by the Indonesia Lex Sportiva Instituta, whose Executive Director, Hinca I Pandjaitan, has written the Foreword to this Book, which he describes as "timely" and with which your reviewer would entirely agree!

Amongst the distinguished contributors to the Book are Ken Foster, of the Centre for Law, Society and Popular Culture of the University of Westminster, UK, who is widely considered to have coined the term '*Lex Sportiva*'; Professor James Nafziger, the Honorary President of the International Association of Sports Law; and Professor Stephen Weatherill of Oxford University, UK, an acknowledged expert on Sport and EU Law.

The Book ends with the text of the Inaugural Lecture of Professor

Robert Siekmann, entitled 'What is Sports Law? A Reassessment of Content and Terminology, which he delivered on 10 June, 2011, on accepting the newly-established Chair of International and European Sports Law of the Erasmus University of Rotterdam, The Netherlands. In this Lecture, he concludes that "sports law exists!" and goes on to nuance its public and private nature.

This Book is another first in its field for the highly acclaimed Asser International Sports Law Series and one which your reviewer can unreservedly recommend to all those involved in any way with Sport and its interaction with the Law; that is, nailing my colours firmly to the mast: Sports Law!

Professor Ian Blackshaw

'Sports Betting: Law and Policy' Paul M Anderson Ian S Blackshaw Robert C R Siekmann and Janwillem Soek (Editors) 2012 TMC Asser Press The Hague The Netherlands Hardback Pages 1029 + XV ISBN 978-90-6704-798-2 Price: €10, 95

This Book is another first for the highly successful Asser International Sports Law Series (established and developed by Professor Rob Siekmann, who is also one of the Editors of the Book) and deals with the controversial and important subject of Sports Betting. Indeed, the Asser Press are to be warmly congratulated on publishing this Book.

Betting and sport have been uneasy bedfellows since the dawn of time. Gambling is now a significant global industry, which is worth around 0.6% of world trade - that is, around US\$ 384 billion! In fact, certain sports, such as Horseracing, rely on betting in a sporting and also a financial sense for their popularity and survival.

Betting on the outcome of sporting events is a very popular pastime and well-established in the human psyche; but, like any other human activity, sports betting is open to corruption and improper influence from unscrupulous sports persons, bookmakers and others who are out

to make a quick buck - improperly and unfairly. Take, for example, the recent 'spot fixing' case in the Fourth Cricket Test Match between England and Pakistan at Lord's, which involved balling no balls at predetermined times during the Match and betting on them, and which resulted in jail terms for those involved! And rightly so, since who wants to watch a sports event, whose outcome is predetermined, or to use the jargon 'fixed'. That is just not cricket, to use an English colloquialism, and undermines the integrity of sport!

This Book deals - quite extensively and impressively - with the regulation of sports betting in 45 countries around the world, ranging from Argentina to the United States of America. All the contributors are specialists in this particular field of sports law, which makes the Book quite authoritative and well worth its price tag.

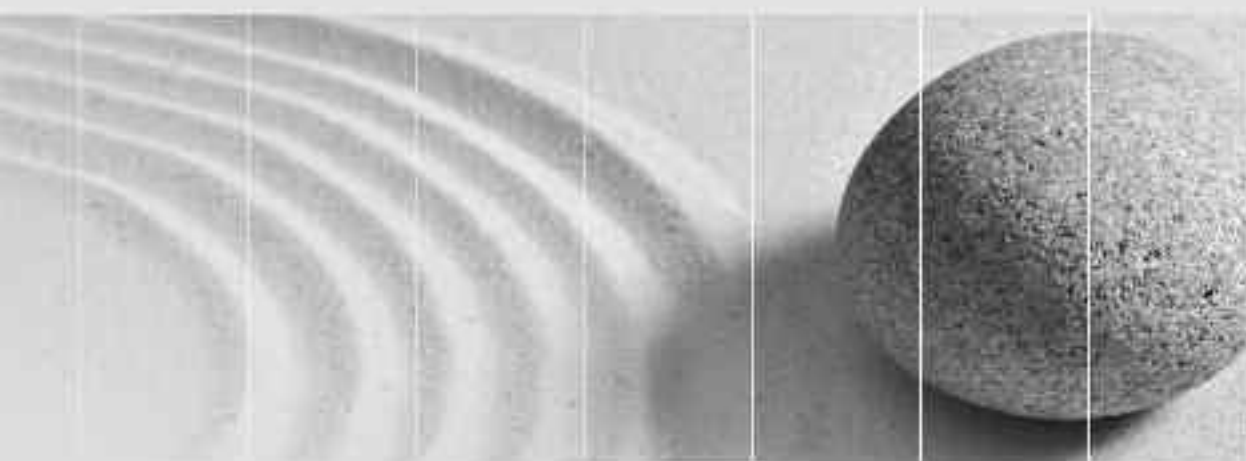
This veritable tome is a very welcome addition to the sports law literature and one that will, I am quite sure, prove to be an invaluable resource to all those concerned with sports betting in various capacities, including professional adviser and those who are involved in the organisation and administration of National Lottery Schemes, which provide significant financial benefits for sport as a 'good cause'!

*Professor Ian Blackshaw
International Sports Lawyer*

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We are proud to announce a new publishing and ground-breaking venture providing quarterly reports on the worldwide legal and tax aspects of sport and their practical implications, including EC legal and tax developments, which will be available in print and on line. The launch date for the first issue of *Global Sports Law and Taxation Reports* will be the end of November 2010. Next and subsequent year's issues will be published in March, June, September, and December.

The Editors

The new Journal *Global Sports Law and Taxation Reports* will be edited by Professor Ian Blackshaw and Dr Rijkele Betten, with specialist contributions from the world's leading practitioners and academics in the sports law and taxation fields.

Prof. Ian Blackshaw is a well-known and acknowledged leading international sports lawyer and academic, active in many sports law associations and a Member of the Court of Arbitration of Sport (CAS) in Lausanne, Switzerland. He is also a prolific author of Books and Articles and regular Speaker at International Seminars and Conferences on various aspects of Sports Law, including the business side of Sport, which is now a global industry worth more than 3% of world trade.

Dr Rijkele Betten is likewise involved in the field of international tax. Since 1985, he has been publishing and speaking on international tax law at many international events, and during the past 10 years has specialized in international tax issues impacting on the mega incomes to be derived by sports persons, sports event organisers, sports marketers and broadcasters from sports and associated activities.

Messrs. Blackshaw and Betten have each built up a prodigious personal and professional network of experts and contacts worldwide, and through these networks they are able to offer subscribers to *Global Sports Law and Taxation Reports* very valuable information and practical insights of a topical nature at the highest possible levels.

The Publishers

NOLOT publishes the International Guide to the Taxation of Sportsmen and Sportswomen (soon as a database on the internet). Also, NOLOT Seminars is organising high quality seminars in the Netherlands and abroad on these issues. A free newsletter on ongoing developments is distributed through www.sportsandtaxation.com.

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Global Sports Law and Taxation Reports will feature: articles; comparative surveys; commentaries on topical sports legal and tax issues; and documentation.

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