Harmonization of anti-doping policies within the international scenario: an impossible challenge?

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1. Introductory Remarks

In 1947 the General Assembly of the United Nations established the International Law Commission (ILC) to undertake the mandate of the Assembly, under article 13 (1) (a) of the Charter of the United Nations to "*initiate studies and make recommendations for the purpose of … encouraging the progressive development of international law and its codification*".[1] The first Statute of this Commission, which was attached to the respective General Assembly's Resolution, provided for fifteen members of this Commission who had to be persons of recognized competence in international law.[2]

There were topics on the Agenda of the ILC, which could be dealt with in a very short period of time, such as the Fundamental Rights and Duties of States or the Formulation of the Nürnberg Principles, both in 1949 – 1950.[3] But, whenever it came to substantial issues of public international law, the ILC needed nearly a decade or even well more than a decade for concluding a report and eventually draft articles as a basis for a later convention. Thus, for example, the codification of the law of international treaties stayed on the Agenda of the ILC from 1950 – 1966, treaties concluded between states and international organizations or between two or more international organizations were dealt with by the ILC from 1971 – 1982. The issue of diplomatic protection was discussed by the ILC from 1997 – 2006 and the same time was needed for unilateral acts of states.[4]

Harmonization of international rules obviously needs considerable time, in the experience of the ILC around a decade.

1 A/RES/174(II).

2 Art 2 para 1 Statute ILC.

3 See Periods during which topics were on the Agenda of the International Law Commission. Retrieved from: http://legal.un.org/ilc/guide/annex1.shtml. (22 April 2017).

4 1997 – 2006, see fn 3.

2. The Initial Harmonization of Anti-Doping Policies – A Success Story

2.1 The Lausanne Declaration on Doping in Sport 1999

Compared to general experience in public international law to harmonize anti-doping rules of international sports federations within a period of four years since the foundation of the World Anti-Doping Agency in 1999 was an impressive achievement. The famous Lausanne Declaration on Doping in Sport, adopted by the World Conference on Doping in Sport in Lausanne, Switzerland on 4 February 1999[5] had laid a rudimentary basis on the normative as well as institutional side for such harmonization. Number 2 of the Declaration made the Olympic Movement Anti-Doping Code to the basis for the fight against doping. At the same time this provision laid down a universal definition of doping "*as the use of an artifice, whether substance or method, potentially dangerous to athletes' health and/or capable of enhancing their performances, or the presence in the athlete's body of a substance, or the ascertainment of the use of a method on the list annexed to the Olympic Movement Anti-Doping Code.*"

The same number of the Declaration made clear that this Code should not only apply to athletes, but also to coaches, instructors, officials, and to all medical and paramedical staff working with athletes or treating athletes participating in or training for sports competitions organized within the framework of the Olympic Movement. Number 3 of the Declaration declared that sanctions would be applied following to controls, both during and out of competitions and that two years shall be the minimum sanction for a first time doping offence committed by an athlete. However, based on specific, exceptional circumstances to be evaluated in the first instance by the competent bodies of the respective international sports federation (IF) a reduction as well as more severe sanctions were allowed to be imposed. More severe sanctions should apply to coaches and officials guilty of anti-doping rule violations.

On the institutional side, the Lausanne Declaration 1999 provided for the establishment of an independent International Anti-Doping Agency, which was to be fully operational for the 2000 Olympic Games in Sydney. This institution, then called World Anti-Doping Agency (WADA), was mandated, notably, to coordinate anti-doping programmes, whereby consideration should be given in particular "*to expanding out-of-competition testing, coordinating research, promoting preventive and educational actions and harmonizing scientific and technical standards and procedures for*

5 Text retrieved from: http://www.sportunterricht.de/lksport/Declaration_e.html. (22 April 2017). The initiative of the IOC to convoke such conference resulted from a big doping scandal at the Tour de France in 1998. See Houlihan, B. (1999). "Anti-doping policy in sport: The politics of international policy co-ordination". *Public Administration*, 77: 311-334

analyses and equipment." The Olympic Movement committed to allocate a capital of US $25 million to the Agency.[6]

The International Olympic Committee (IOC), the IFs and the National Olympic Committees (NOCs), however, should maintain their respective competence and responsibility to apply doping rules in accordance with their own procedures, and in cooperation with WADA. With regard to last instance appeals, the IOC, the IFs and the NOCs recognized the authority of the Court of Arbitration for Sport (CAS), after their own procedures had been exhausted.[7] Athletes should be guaranteed due process, in particular the right to a hearing, the right to legal assistance, and the right to present evidence and call witnesses.

2.2 The Creation of the World Anti-Doping Agency

WADA was created as a foundation under Swiss law, with its legal seat in Lausanne, and was torn from the very beginning into a rivalry between the governments' sector and the Olympic Movement.[8] The WADA Statutes 1999[9] resulted in creating the WADA Foundation Board as the main WADA decision-making body based on a parity between the government sector and the Olympic Movement. However, for the first period until 2003, the IOC as the founder of WADA had the right to appoint the members of the first Foundation Board, including the first chairman. Thereafter, a maximum of 18 members was to be appointed by the government sector and a maximum of 18 members by the Olympic Movement. The Foundation Board could consist of 10 - 40 members.[10] Currently the WADA Foundation Board is composed of 38 members,[11] which means that also the rule for the appointment of other than government and Olympic Movement representatives had to be applied. These other members were to be appointed by the WADA Foundation Board itself, but upon joint proposal of the Olympic Movement and the government sector (public authorities). Also for these two members an agreement between the two sectors had to be achieved. The direct influence of the IOC has been reduced to the appointment

6 Lausanne Declaration 1999 (fn 5), number 4.

7 Lausanne Declaration 1999 (fn 5), number 5.

8 See Geeraert, A. "Compliance systems: WADA – Play the Game". Action for Good Governance in International Sports Organisations. Report: 56-66 (Retrieved from www.playthegame.org. under: file:///C:/Users/User/AppData/Local/Microsoft/Windows/INetCache/IE/96G5P9WH/AGGIS-report_-_7Compliance_systems_-_WADA__p_56-66_.pdf. (22 April 2017)

9 Constitutive Instrument of Foundation of the Agence Mondiale Antidopage – World Anti-Doping Agency. Retrieved from: https://www.wada-ama.org/en/resources/legal/revised-statutes. (22 April 2017).

10 (Fn 9), art 6.

11 See https://www.wada-ama.org/en/governance. (Retrieved 22 April 2017).

of four representatives. Also the past presidents of the WADA Foundation Board were and its current president, Sir Craig Reedie, is an IOC member. The Vice-President, Ms Linda Hofstad Helleland, is Minister of Culture of Norway and representing the government sector.

2.3 The World Anti-Doping Codes

A WADA, which could be called an out-sourced anti-doping branch of the IOC in the first three years of its existence, managed to adopt the first World Anti-Doping Code (WADC) rapidly, already in 2003.[12] Due to the requirement laid down by the Lausanne Declaration 1999 that the competence and responsibility for imposing sanctions in first instance should remain with the respective IF, the IOC or the International Paralympic Committee (IPC), as well as with National Anti-Doping Organizations, the WADC 2003 was set up as a global Guideline-type- Code which had to be implemented by the stakeholders, but which only exceptionally was directly applicable in an individual case of an anti-doping rule violation. In most cases provisions had to be applied based on rules of the IOC for Olympic Games, the IPC Code for Paralympic Games, an IF responsible for the respective sport, or national anti-doping rules on the national level and, as far as so allowed by the rules of the IF responsible for the respective sport. Both, international as well as national anti-doping rules, had to pay due respect, however, to art 23.2.1 WADC 2003, which obliged all signatories of the Code, to "*implement applicable Code provisions through policies, statutes, rules or regulations according to their authority and within their relevant spheres of responsibility.*" Art 23.2.2 WADC 2003 advised the signatories to make use of the Models of Best Practice developed and offered by WADA for the implementation of the Code. Compared to the next-following edition of the WADC, dating from 2009, still some discretion was left to the signatories, which were WADA, the IOC, the IFs, the IPC, National Paralympic Committees, Major Event Organizations, and National Anti-Doping Organizations. Accordingly, room was left for negotiations between WADA and the respective other signatories of the Code as to its implementation.

The WADC 2009, which entered into force on 1 January 2009, reduced this space for flexibility considerably by obliging all signatories to implement arts 1 (definition of doping), 2 (anti-doping rule violations), 3 (proof of doping), 4.2.2 (specified substances), 4.3.3 (WADA's determination of the Prohibited List), 7.6 (retirement from sport), 9 (automatic disqualification), 10 (sanctions on individuals), 11 (consequences to teams), 13 (appeals, however with some exceptions), 15.4 (mutual recognition), 17 (statute of limitations), 24 (interpretation of the Code) and

12 Retrieved from: wwww.wad-ama.org. Under: file:///C:/Users/User/AppData/Local/Microsoft/Windows/INetCache/IE/ASI5SUST/wada_code_2003_en.pdf. (22 April 2017).

appendix1 (definitions) without substantive change.[13] The provision also made clear that no "substantive change" meant in fact implementation word by word, with the exception of references to the respective organization's name, sport, section numbers, etc. It was also not allowed to add any additional provision to a signatory's rules, which would change the effect of one of the above mentioned articles.

The WADC 2003 implemented the Lausanne Declaration 1999, but clearly showed North-American handwriting most likely as a consequence of the administrative seat of WADA having been established in Montreal/Canada. Many IFs based in Switzerland and other European countries, but also CAS itself, had initially problems in accepting the strict liability concept as the basis for the sanction system of the Code. Article 10.2 WADC 2003 linked the sanction of a two years ineligibility period for the first time and a life-time ineligibility period for any further violation simply to the fact of presence of a prohibited substance or its metabolites or markers or of the use or attempted use of a prohibited substance or method or of the possession of a prohibited substance or method. A legal opinion of the professors Kaufmann-Kohler, Malinverni and Rigozzi helped WADA to defend this principle against the challenges of international human rights law. The three experts pointed at the possibility of considering the potential fault or negligence of an athlete through the possibility of reduced sanctions.[14] Indeed, also CAS accepted this argument and contributed to a harmonization of a North-American concept with Swiss and continental European approach towards disciplinary law.[15] Swiss and continental European disciplinary law required not only facts on the objective side, but also fault on the subjective side in order to have a disciplinary offence being sanctioned.

CAS jurisprudence advised WADA, however, to diversify the rules on elimination or reduction of the period of ineligibility, on the one hand, and aggravating circumstances for increasing the period of ineligibility on the other hand. This happened in the WADC 2009 by arts 10.4 – 10.6 and was substantially improved in the WADC 2015,[16] which is actually in force since 1 January 2015, by arts 10.3.3 – 10.6 in exchange, however, for increasing the regular sanction to four years through art 10.2.1. The role that art 10.2.1 WADC 2015 assigned to "intent" moves the whole Code much closer to the Swiss and continental European requirement of fault as precondition for the application of a disciplinary sanction. Art 10.2.1.1 WADC 2015 provides for a four years ineligibility, if the anti-doping rule violation does not involve

13 Art 23.2.2 WADC 2009.

14 See Friedman, S. (2012) "Contador, cows and strict liability".*Sports Law eJournal.* Retrieved from: http://epublications.bond.edu.au/slej/16. (22 April 2017): 1-9 (2) with further references.

15 See eg CAS 2006/A/1130 World Anti-Doping Agency (WADA) v Darko Stanic & Swiss Olympic. Award of 7 January 2007, at para 14.

16 Retrieved from: https://www.wada-ama.org/en/resources/the-code/world-anti-doping-code. (22 April 2017).

a specified substance unless the athlete or other person concerned can establish that the anti-doping rule violation was not intentional. Art 10.2.1.2 WADC 2015 provides for the same length of period of ineligibility in case of a specified substance, if the respective Ant-Doping Organization can establish that the anti-doping rule violation was intentional. According to art 4.2.2 WADC 2015 all prohibited substances are considered specified substances "*except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified in the Prohibited List.*" The WADA Prohibited List 2017 differentiates, for example, Non-Specified Stimulants (eg Cocaine) and Specified Stimulants (eg Heptaminol).[17]

2.4 The UNESCO Convention against Doping in Sport

The special set-up of the WADA Foundation Board which led from initial monopoly of the IOC to a shared responsibility of the Olympic Movement and the public authorities (government sector) allowed for a historic break-through in the harmonization of anti-doping rules and policies. The WADC became one of the rare examples of a codification developed within international private law by a legal person under Swiss private law in cooperation with the Olympic Movement, vastly consisting of international and national non-governmental organizations, and, nevertheless, respected and recognized on the inter-government level by nearly all states on earth. This happened through the adoption and ratification of the International Convention on Doping in Sport. The initiative for the elaboration of such a convention dates back to 1999 to the 3rd International Conference of Ministers and Senior Officials Responsible for Physical Education and Sport (MINEPS III) in Uruguay. UNESCO reports that concerns over doping in sport and an urge for concerted action had been expressed there. Following a Ministerial Round Table held at UNESCO in January 2003, a decision was made at the 32nd session of the UNESCO General Conference to tackle the question of doping in sport through an international convention. The Convention was adopted on 19 October 2005 and entered into force already on 1 February 2007. UNESCO calls it the most successful convention in its history in terms of speed of development and entry into force,[18] but it is certainly one of the most successful multilateral conventions that can be found also outside UNESCO. To date, 185 states have ratified the Convention.[19]

Even if Art 4 of the Convention does not formally bind the member states to

17 Class S6 a and b. Retrieved from: www.wada-ama.org/sites/default/files/resources/files/2016... (22 April 2017).

18 See http://www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/background/. (Retrieved on 22 April 2017).

19 See at fn 18 List of states by deposit.

the WADC and the International Standards and includes the Code, the International Standard for Testing and Investigations and the International Standard for Laboratories as appendices just for information purposes, it obliges the contracting parties for coordination of the fight against doping in sport on the national and international level to "*commit themselves to the principles of the Code as the basis for the measures*" to be adopted by them.[20] According to art 5 of the Convention such measures "*include legislation, regulation, policies or administrative practices.*" The WADA Prohibited List and the WADA International Standard for Therapeutic Use Exemptions are considered integral parts of the Convention according to its art 4.3. Art 4.1 of the Convention further rules that nothing in the Convention prevents the members from adopting additional measures complementary to the Code.

One has to admit, that the UNESCO Convention could have gone further by declaring the Code and all WADA International Standards as binding and by not allowing for complimentary national measures. The adoption of national anti-doping laws, mostly as part of the national criminal law, in fact, blocks the harmonization of anti-doping policies and anti-doping rules and sooner or later a further Convention will be needed in order to harmonize these laws. Even laws under very close criminal law traditions, like the Austrian and the German Anti-Doping Laws are quite different from each other.

The German Anti-Doping Law, for example, creates the term "Self-Doping" which widely corresponds to the use of prohibited substances or methods according to Art 2.1.1 WADC 2015, but is only subject to a criminal sanction, if the substances or methods have been used for the purpose of enhancing sports performance at an organized sports event.[21] Intent, fault, negligence or even knowing use and use at an organized sports event are not required for establishment of a violation of art 2.1.1 WADC 2015 on the other hand. Thus, under WADA law, whether a prohibited substance or method has been used for the purpose of enhancement of sport performance does not matter. Also the WADA system of out-of-competition testing would break down if a link to organized sports events would be required.

The Austrian Anti-Doping Law does not criminalize self-doping, but causes similar problems as does the German Anti-Doping Law with regard to a criminal sanction on persons applying a prohibited substance or prohibited method on athletes.[22]

Both, the German as well as the Austrian Anti-Doping Law, thus, cause issues as

20 Art 4.1 UNESCO Convention. Retrieved from: http://portal.unesco.org/en/ev.php-URL_ID=31037&URL_DO=DO_TOPIC&URL_SECTION=201.html. (22 April 2017).

21 Art 3 Gesetz gegen Doping im Sport (Anti-Doping-Gesetz - AntiDopG) of 10 December 2015, BGBl I S 2210, as amended on 13 April 2017, BGBl I 872. German text retrieved from: www.gesetze-im-internet.de/bundesrecht/antidopg/gesamt.pdf. (23 April 2017).

22 Bundesgesetz über die Bekämpfung von Doping im Sport (Anti-Doping-Bundesgesetz 2007 – ADBG 2007), BGBl I Nr 30/2007 as last amended BGBl I Nr 93/2014, § 22a.

to the definition of doping, as to different sanctions – under regular circumstances up to three years imprisonment in Germany, up to six months imprisonment in Austria – and both will instigate lawyers in procedures before CAS to argue a violation of art 4 of the VII Protocol to the European Convention on Human Rights (right not to be tried or punished twice), in particular in national anti-doping cases.[23] Even if CAS has stated repeatedly that anti-doping procedures are part of civil law,[24] it has also held that, nevertheless, due to the severity of sanctions imposed, partly principles of criminal law are applicable.[25]

But the UNESCO Convention demonstrates that it is possible for the non-governmental sector to find acceptance and recognition for its achievement on the inter-state level. This is encouraging and could lead to answering the question raised for this contribution in a positive manner, unless there would not happened two major issues in 2016, that need for further analysis and comments: the WADA meldonium issue and the McLaren Reports I and II.

3. The WADA Meldonium Issue

Meldonium is a drug used medically to treat ischemia, or lack of blood flow. It improves exercise capacity in patients with chronic heart failure. As the inventor of the drug, Prof. Dr. Ivars Kalvins from Latvia, explained to a CAS Panel at a hearing on 7 November 2016, "*meldonium is constructed as a drug, which prevents the lack of oxygen. The use of one gram per day protects against lesion. As for the excretion of meldonium, according to Prof. Kalvins, the peculiarity of meldonium is linked to the fact that it uses a natural substance for its transport. Two phases of elimination must be differentiated: a fast phase, depending on the amount of meldonium that has been taken; and a slow phase,*

23 Art 4 reads as follows: "*Right not to be tried or punished twice*

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. 3. No derogation from this Article shall be made under Article 15 of the Convention." Retrieved from: www.echr.int/Pages/home.aspx?p=basic.texts. (23 April 2017).

24 See eg CAS 2010/A/2311, 2312, Stichting Anti-Doping Autoriteit Nederland & The Koninklijke Nederlandsche Schaatsenrijders Bond vs. W., Award of 22 August 2011, at paras 7.5 ff with further references.

25 See eg CAS 2011/O/2422, United States Olympic Committee vs. International Olympic Committee, CAS 2011/O/2422, Award of 4 October 2011, at para 60, explicitly referring to the principle ne bis in idem.

which can last for many months due to the fact that the body tries to recapture it. The living and training conditions, the consumption of food, the loss of weight, the duration of its use, etc., have an influence on the wash-out period of meldonium from the human organism. Meldonium was the most sold medicine in the former Soviet Union."[26] According to Prof. Kalvins it is very safe and has very mild side effects. There were less than 90 serious events. In the opinion of Prof. Kalvin's knowledge, meldonium has been used by athletes in order to avoid damage to their heart after intense sport exercise.

WADA, obviously alarmed by the frequent use of this substance in Russia and the former Soviet hemisphere[27] included meldonium into its Monitoring program 2015[28]

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26 See CAS 2016/A/4708 Belarus Canoe Association & Belarusian Senior Men's Canoe and Kayak team members v. International Canoe Federation (ICF), Award of 23 January 2017, at para 52.

27 WADA itself did not specify which athletes used this substance, but stated simply in its Meldonium – Notice to the Stakeholders communicated on 13 April 2016: *"… the 2015 Monitoring Program, which revealed a high prevalence of the use of meldonium by athletes and teams of athletes …"*, chapter A para 1. Retrieved from: www.wada-ama.org/.../wada-2016-04-12-meldonium-notice-en.pdf. (23 April 2017). It is however interesting to compare USADA's information on meldonium which reads as follows: "*What is Mildronate and how does it work?*

Meldonium (Mildronate) is an anti-ischemic drug that was added to the World Anti-Doping Agency's (WADA) Prohibited List effective January 1, 2016. Not available in the United States as an FDA-approved drug, meldonium was originally developed in the late 1970's as a growth-promoting agent for animals by the Latvian Institute of Organic Synthesis. Meldonium is classified on the WADA Prohibited List as a Metabolic Modulator under Section Four, and is a non-specified substance. For athletes with a legitimate therapeutic need for a prohibited substance, a WADA Code-compliant Therapeutic Use Exemption process is available through National Anti-Doping Organizations or International Sport Federations.

Meldonium is reportedly capable of providing clinical benefit for those suffering from heart conditions, such as low blood flow to the heart and angina, as well as neurodegenerative disorders and bronchopulmonary diseases. It appears that the medical utility of meldonium stems mostly from its ability to modulate cellular energy metabolism. This may be due to the drug lowering the consumption of fatty acids, while increasing utilization of carbohydrates for the production of energy. In short, meldonium is advertised as an energy-efficiency catalyst. Mildronate is available in oral capsules or solution for injection.

In recent years, meldonium has been described as having performance-enhancing benefits in sport, including an increase in endurance, improved rehabilitation following exercise, and enhanced activations of the central nervous system. Meldonium has also been claimed to provide cognitive advantages." The most interesting in this information is that meldonium has not been approved in the US. Thus, it could have been only exceptionally a danger for US athletes. Retrieved from: http://www.usada.org/meldonium/. (23 April 2017).

28 WADA itself did not give any reason for inclusion, but simply referred to art 4.5 WADC 2015. See the text of the WADA 2015 Monitoring Program: "*THE 2015 MONITORING PROGRAM**

The following substances are placed on the 2015 Monitoring Program:

1. Stimulants: In-Competition only: Bupropion, caffeine, nicotine, phenylephrine, phenylpropanolamine, pipradrol and synephrine.

2. Narcotics: In-Competition only: Hydrocodone, mitragynine, morphine/codeine ratio, tapentadol and tramadol.

and added it to its Prohibited List 2016.[29] This list was published on 29 September 2015, but formally, this list entered into legal force only on 1 January 2016, which meant that any use after 1 January 2016 was prohibited, any use until and including 31 December 2015, however, was allowed. Due to an unknown excretion period of the substance from the human body, it soon turned out in many legal proceedings, that followed, that athletes argued having stopped using the substance end of October/ beginning of November 2015, nevertheless, the substance was found in their bodily specimen. And it became even worse, in some doping controls during early 2016, the substance was not found at an athlete, and at a later control was found.

i– Notice to its stakeholders communicated on 13 April 2016 tried to find an exit strategy, which, looking at the details, in fact meant simply to shift the responsibility to the stakeholders. WADA wrote as follows:

"*In the case of meldonium, there is currently a lack of clear scientific information on excretion times. For this reason, a hearing panel might justifiably find (unless there is specific evidence to the contrary) that an athlete who has established on the balance of probabilities that he or she ingested meldonium before 1 January 2016 could not reasonably have known or suspected that the meldonium would still be present in his or her body on or after 1 January 2016. In these circumstances, WADA considers that there may be grounds for no fault or negligence on the part of the athlete.*

However, given that the presence of meldonium in the athlete's sample collected on or after 1 January 2016 constitutes an anti-doping rule violation, the disqualification of the athlete's results shall (even where there is no fault or negligence) be dealt with in accordance with the applicable Code provisions. If the sample was collected in competition, then the results in the competition in question will be automatically disqualified in accordance with Article 9 of the Code."[30]

In case of admission or other evidence for intake after 1 January 2016 or in case

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3. Glucocorticoids: In-competition (by routes of administration other than oral, intravenous, intramuscular or rectal) and Out-of- Competition (all routes of administration)

4. Telmisartan: In and Out-of-Competition

5. Meldonium: In and Out-of-Competition

** The World Anti-Doping Code (Article 4.5) states: "WADA, in consultation with Signatories and governments, shall establish a monitoring program regarding substances which are not on the Prohibited List, but which WADA wishes to monitor in order to detect patterns of misuse in sport."* Retrieved from: https://www.wada-ama.org/en/resources/science-medicine/monitoring-program. (23 April 2017).

29 Class S4 Hormone and Metabolic Modulators. 5. Metabolic modulators (5.3). Retrieved from: https://www.wada-ama.org/en/media/news/2015-09/wada-publishes-2016-prohibited-list. (23 April 2017). Meldonium is also prohibited by the same class in the WADA Prohibited List 2017. Retrieved from: https://www.wada-ama.org/en/media/news/2016-09/wada-publishes-2017-prohibited-list. (23 April 2017).

30 (Fn 27), chapter B, paras 5 and 6.

of a concentration of the substance above certain thresholds, the results management was to be continued.

WADA, by this notice, became a victim of the strict liability rule, and – as for the automatic disqualification of results – made the Anti-Doping Organizations, following its notice, contravene against the principle nulla poena sine lege, because they were instructed to impose a sanction on an athlete for use of a substance, which – at the moment when the athlete used it – was not forbidden. But also to deal with the respective athletes based on the No Fault rule, meant that they were considered having committed an anti-doping rule violation, which they, in fact, did not at the moment, when they used the substance. WADA by its Notice moved the date of entry into force of the 2016 Prohibited List to the date when it was published in September 2015. Due to the fact, that the Prohibited List, as mentioned above, is integral part of the UNESCO Convention, this became also an issue of international and national law.

On 30 June 2016, WADA issued a further Meldonium – Notice to its stakeholders based on the results of some urinary excretion studies that had been commissioned by WADA. There, WADA further specified the thresholds of concentration of meldonium relevant for results management, but admitted also that "*it cannot be excluded that, at very low dosages, as indicated in the above table, the use of meldonium could have occurred before the Prohibited List was published by WADA on 29 September 2015. In these unique circumstances, WADA would consider it acceptable that the athlete's results not be disqualified or be reinstated in the absence of any evidence that meldonium was used after 29 September 2015.*"[31]

A footnote, added to this notice, became crucial for the responsibility of an IF in a CAS proceedings: "*As a matter of course, for reasons of efficiency, WADA does not conduct excretion studies before including a substance on the Prohibited List. This information is generally provided by the manufacturer. In the case of meldonium, no information was provided as it relates to urinary excretion.*"[32] The hearing in this case also showed that WADA contacted the inventor of meldonium only in September 2016.[33]

The decision to include meldonium on the WADA Prohibited List 2016 was taken by the WADA Executive Committee. This body is currently composed of the President and Vice-President of the WADA Foundation Board and five members of the Olympic Movement and five members of the public authorities. Like in the WADA Foundation Board Russia is not represented, but there is also no representative of China and of the area of the former Soviet Union on the WADA Executive Committee.

There remains a bitter taste of a decision having been taken prematurely and

31 Retrieved from: www.wada-ama.org/.../meldonium-notice-june-30-2016. (23 April 2017).

32 See Fn 26, at para 54.

33 See Fn 26, at para 51.

not on a safe scientific and unbiased ground. The authority driving the universal harmonization of anti-doping rules and policies on the non-governmental as well as governmental level obviously has a structural issue.

4. The McLaren Reports I and II and the Consequences

This finding is supported by the timing and evidentiary value of the Independent Investigation Reports, Prof. Richard McLaren submitted on 18 July 2016[34] and 9 December 2016.[35]

After even the Russian President Putin has recognized substantial deficiencies in the Russian anti-doping system at the occasion of a preparatory meeting for the organization of the Universiade 2019 in Krasnoyarsk,[36] there will remain hardly any doubt that the two first key findings[37] of Report I, that "*the Moscow Laboratory operated, for the protection of doped Russian athletes, within a State-dictated failsafe system, described in the report as the Disappearing Positive Methodology*", that "*the Sochi Laboratory operated a unique sample swapping methodology to enable doped Russian athletes to compete at the Games*" with a question-mark as to "State-dictated" can be otherwise considered as undisputedly established.

Whether also the third key finding of Report I stating that "*the Ministry of Sport directed, controlled and oversaw the manipulation of athlete's analytical results or sample swapping, with the active participation and assistance of the FSB* [Russian Federal Security Service]*, CSP* [Center of Sports Preparation of National Teams of Russia]*, and both Moscow and Sochi Laboratories.*" can stay or need to be revised finally stating, for example, that some persons or a criminal organization in these offices or organizations directed, controlled and oversaw the manipulation" might become established only once the results of the investigations of the Russian Investigative Committee, which has been set-up on the Russian side as a consequence of McLaren Report I, will be known.[38]

34 Retrieved from: https://www.wada-ama.org/en/resources/doping-control-process/mclaren-independent-investigation-report-part-i. (23 April 2017).

35 Retrieved from: https://www.wada-ama.org/en/resources/doping-control-process/mclaren-independent-investigation-report-part-ii. (23 April 2017).

36 See eg "*Putin: Russian anti-doping system failed, we should listen to WADA*". Retrieved from: https://www.rt.com/news/379060-putin-anti-doping-russia/. (23 April 2017).

37 Fn 34, p 85.

38 See "*Full speech of the Investigative Committee deputy chief Ilya Lazutov at the meeting of the Independent Public Anti-doping Commission in Moscow*" of 30 November 2016. Retrieved from: http://ipadc.ru/en/media/news/the-investigation-is-making-good-progress. (23 April 2017).

The same goes for Report II, which confirms the key findings of Report I,[39] but otherwise speaks of an "Institutionalised Doping Conspiracy and Cover Up".[40]

To break down the full report itself and the evidence attached to the report to individual cases of athletes and entourage will cause considerable difficulties. The report itself is hearsay-evidence and, thus, of limited value in court cases. The evidence attached to the report suffers from various quite substantial deficiencies, which were discussed in a recent meeting in Lausanne.[41] It will cause some headache to the respective Anti-Doping Organizations, to CAS and to national courts in order to determine whether the evidence carries the cancellation of events, the suspension of athletes and/or staff and sanctions against Russian sports federations or major event organizers.

It is, thus, with little surprise, that on 16 March 2017, the IOC Executive Board expressed substantial concerns with regard to the present structure of WADA and adopted "12 Principles for a more robust and independent global Anti-Doping System to protect clean athletes".[42] The 5th Olympic Summit developed the principles of this proposal further on 6 October 2016.[43]

The IOC urges in principle 1, that WADA, "*must be equally independent from both sports organisations and from national interests. This is necessary because even the perception of a conflict of interests can be considered damaging to the credibility of the anti-doping system.*"

The 5th Olympic Summit included into its declaration a chapter "*More Harmonisation*" and asks for the following:

"*1. WADA to establish one centralised worldwide anti-doping system.*

• Standard level of testing to be harmonised per sport in close cooperation with the relevant International Federation (IF) to ensure that athletes from all nations are treated equally. • Increasing the level of targeted testing.

2. The entourage of athletes, including coaches, doctors, physiotherapists and other officials, to be held criminally responsible for facilitating doping.

• The United Nations Educational, Scientific and Cultural Organisation (UNESCO), with the help of WADA and the Olympic Movement, to provide model legislation and to encourage adoption for a worldwide harmonisation in this respect."

39 See Fn 35, p 2 number 4.

40 See Fn 35, p 1.

41 See "WADA admits McLaren's 'doping' evidence against Russian athletes insuficient." (25 February 2017). Retrieved from: https://www.rt.com/sport/378572-mclaren-wada-russia-evidence-insufficient/. (23 April 2017).

42 Retrieved from: https://www.olympic.org/news/declaration-of-the-ioc-executive-board-1. (23 April 2017).

43 Retrieved from: stillmed.olympic.org/media/Document Library/OlympicOrg/News. (23 April 2017).

The initial example of the construction of the ILC offers a good example, how an independent WADA legislative body could be set up by the WADA Foundation Board. The Statute of the ILC, as last amended in 1981, includes in articles 2 – 10 model rules for candidates and the election procedure, easily adaptable to WADA for the creation of a WADA Legal Committee.[44] This WADA Legal Committee could be endowed with "*legislation with regard to the World Anti-Doping Code including the list of prohibited substances and standardization of anti-doping procedures*" as mentioned by principle 4.a of the IOC Declaration.[45] At the same time it could be the legislative basis for a centralized world-wide anti-doping system asked for by the 5th Olympic Summit.

Given the state of development of national anti-doping legislation, shown above at the German and Austrian examples, UNESCO model legislation alone might come too late with regard to quite some states. A UNESCO Convention on Harmonizing National Anti-Doping Laws or a Protocol to the current UNESCO Anti-Doping Convention addressing harmonization might be needed in addition to model laws.

At any event, the harmonization of anti-doping policies within the international scenario is a challenge that can be met on the IOC's and Olympic Summit's ground.

44 Retrieved from: www.un.org. Under: legal.un.org/ilc/texts/instruments/english/statute/statute.pdf. (22 April 2017).

45 See Fn 42 above.