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ARTICLE

The Russian doping scandal at the court of arbitration for sport: lessons for the world anti-doping system

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Abstract The Russian doping scandal that rocked the sporting world during the past 2 years is far from over. The World Anti-Doping Agency is still in turmoil over its total failure to discover the Russian doping scheme and the International Olympic Committee and other Sports Governing Bodies are still struggling to find the appropriate response to Russia's total disregard of the spirit and letter of the World Anti-Doping Code. Yet the recent publications of a string of awards related to the scandal by the Court of Arbitration for Sport (CAS) provides us with the opportunity to offer some preliminary reflections on the role of the CAS in dealing with the consequences of the scandal for the world anti-doping system at large. This article will analyse the relevant CAS awards in a chronological order. It will start with the 'IAAF Award', before turning to the awards rendered by the CAS ad hoc Division in Rio, and finishing with the 'IPC award'. The modest ambition of this paper is to retrace the reasoning used by the CAS panels and to analyse its broader consequences for the practical operation of the world anti-doping system.

Keywords Doping · World Anti-Doping Agency · World Anti-Doping Code · Court of Arbitration for Sport · Olympics · Sports Law · International Arbitration

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1 Introduction

The Russian doping scandal that rocked the sporting world during the past 2 years is far from over. The World Anti-Doping Agency (WADA) is still in turmoil over its failure to discover the Russian doping scheme and the International Olympic Committee (IOC) and other Sports Governing Bodies (SGBs) are still struggling to find the appropriate response to Russia's disregard of the spirit and letter of the World Anti-Doping Code (WADC). Yet the recent publications of a string of awards related to the scandal by the Court of Arbitration for Sport (CAS) provide us with the opportunity to offer some preliminary reflections on the role of the CAS in dealing with the consequences of the scandal for the world anti-doping system at large.

Since December 2014, and the broadcasting of an alarming documentary by the German public broadcaster,[1] much happened. The documentary triggered the *Pound* investigation financed by the WADA,[2] which led to two damaging reports for the Russian anti-doping system and the International Association of Athletics Federations (IAAF).[3] Yet, this was only the beginning. Shortly after, the former head of Moscow's anti-doping laboratory

[1] H. Seppelt, The secrets of doping: How Russia makes winners, ARD, Youtube, 27 April 2015. https://www.youtube.com/watch?v=iu9B-ty9JCY. Accessed 25 January 2017.

[2] WADA announces details of independent commission, WADA Press release, 16 December 2014. https://www.wada-ama.org/en/media/news/2014-12/wada-announces-details-of-independent-commission. Accessed 25 January 2017.

[3] WADA Independent Commission Report #1, 9 November 2015. https://www.wada-ama.org/en/resources/world-anti-doping-program/independent-commission-report-1. Accessed 25 January 2017, and WADA Independent Commission Report #2, 14 January 2016. https://www.wada-ama.org/en/resources/world-anti-doping-program/independent-commission-report-2. Accessed 25 January 2017.

provided a detailed sketch to the *New York Times* of the operation of a general state-led doping scheme in Russia.[4] The system was designed to avert any positive doping tests for top-level Russian sportspeople and was going far beyond athletics. These allegations were later largely confirmed and reinforced by the McLaren investigation initiated by WADA in May 2016,[5] and which led to the publication of a first report in July 2016 shortly before the Rio Olympics.[6] The second and final report of the McLaren investigation was released in December 2016.[7] Based on this influx of information and investigations, the facts are relatively straightforward: the Russian state organized a fail-proof system to protect 'its' athletes from failing anti-doping tests. Thus, as the IOC's litany of retroactive decisions sanctioning Russian Olympic medallists for past anti-doping violations demonstrate, it secured the success of its athletes in recent Olympiads. The revelation of such a sophisticated state-led system to circumvent the world anti-doping system could not be left unsanctioned. Otherwise, the WADC would be deprived of the little efficacy it had left. Hence, the IAAF, first, and subsequently the IOC (even though in an indirect fashion as will be explained in section II) and the International Paralympic Committee (IPC) issued sanctions against their Russian members and, thus, indirectly also against Russian athletes.

The IAAF quickly suspended the Russian Athletics Federation in November 2015 and declared its athletes ineligible for IAAF competitions. This controversial decision was later confirmed in June 2016 before the Rio Olympics, and barred Russian athletes access to the Olympic Games. The IAAF did, however, foresee a narrow exception for Russian athletes able to show that they were properly tested outside of Russia. Nonetheless, the athletes using this exception were to compete under a neutral flag at the Olympics. Unsurprisingly, Russian athletes led by pole superstar (and now IOC member), Yelena Isinbayeva, and the Russian Olympic Committee decided to challenge this decision in front of the CAS. Unlike the IAAF, the IOC's decided not to decide on 24 July 2016 and, instead, granted to the International Federations (IFs) the competence to determine whether each Russian athlete put forward by the Russian Olympic Committee (ROC) to participate in the Olympics meets a limited set of conditions.[8] Moreover, the ROC was also barred from entering athletes who were sanctioned for doping in the past, even if they have already served their doping sanction. In the end, a majority of the Russian athletes (278 out of 389 submitted by the ROC[9]) cleared the IOC's bar relatively easily. However, this also meant that a considerable number of Russian athletes (111) did not fulfil the IOC's conditions, leading many of them to fight for their right to compete at the Rio Olympics before the CAS ad hoc Division.[10]

Finally, on 22 July, the IPC decided to open suspension proceedings against the National Paralympic Committee of Russia (NPC Russia) in light of its apparent inability to fulfil its IPC membership responsibilities and obligations.[11] A few weeks later, on 7 August, the IPC Governing Board decided to suspend the Russian Paralympic Committee with immediate effect.[12] Consequently, the Russian Paralympic Committee lost all rights and privileges of IPC membership. Specifically, it was not entitled to enter athletes in competitions sanctioned by the IPC, and/or to participate in IPC activities. This was an obvious blow to Russia's Paralympic team and, as was to be expected, the RPC decided to challenge the decision at the CAS.

Thereafter, the CAS became the central legal playing field where the cases involving decisions of the SGBs due to the Russian doping scandal were challenged and fought on.[13] Henceforth, it also had the future shape of the world anti-doping system in its hands. Would it favour the right of

[4] Rebecca R. Ruiz and Michael Schwirtz, Russian Insider Says State-Run Doping Fueled Olympic Gold, New York Times, 12 May 2016. http://www.nytimes.com/2016/05/13/sports/russia-doping-sochi-olympics-2014.html. Accessed 25 January 2017.

[5] WADA publishes Terms of Reference for Independent Person heading Sochi Investigation, WADA Press Release, 20 May 2016. https://www.wada-ama.org/en/media/news/2016-05/wada-publishes-terms-of-reference-for-independent-person-heading-sochi. Accessed 25 January 2017.

[6] McLaren Independent Investigation Report – Part I, 18 July 2016. https://www.wada-ama.org/en/resources/doping-control-process/mclaren-independent-investigation-report-into-sochi-allegations. Accessed 25 January 2017.

[7] McLaren Independent Investigation Report – Part II, 9 December 2016. https://www.wada-ama.org/sites/default/files/resources/files/mclaren_report_part_ii_2.pdf. Accessed 25 January 2017.

[8] Decision of the IOC Executive Board Concerning the Participation of Russian Athletes in the Olympic Games Rio 2016, IOC Press Release, 24 July 2016. https://www.olympic.org/news/decision-of-the-ioc-executive-board-concerning-the-participation-of-russian-athletes-in-the-olympic-games-rio-2016. Accessed 25 January 2017.

[9] See Wikipedia, Russia at the 2016 Summer Olympics. https://en.wikipedia.org/wiki/Russia_at_the_2016_Summer_Olympics. Accessed 25 January 2017.

[10] In general on the role of the CAS Ad Hoc Division in Olympic selection dispute see Duval (2016a), pp 52–66.

[11] The IPC opens suspension proceedings against NPC Russia, IPC Press Release, 22 July 2016. https://www.paralympic.org/news/ipc-opens-suspension-proceedings-against-npc-russia. Accessed 25 January 2017.

[12] The IPC suspends the Russian Paralympic Committee with immediate effect, IPC Press Release, 7 August 2016, https://www.paralympic.org/news/ipc-suspends-russian-paralympic-committee-immediate-effect. Accessed 25 January 2017.

[13] Additionally to the cases reviewed here, the CAS is also dealing with cases involving specific individuals, such as the former head of the Russian federation, Valentin Balakhnichev, and the son of the former head of the IAAF, Papa Massata Diack. At the time of writing, it had not yet rendered its awards.

athletes to participate in the Olympics, and thus, weaken the effectiveness of the sanctions issued by the SGBs, and through them of the WADC? Or would it choose to uphold the sanctions, and risk depriving innocent Russian athletes from the once-in-a-life-time chance to shine at the Olympics? There is no easy answer to this delicate balancing exercise, and the CAS was up for a series of hard cases, which would define the operation of the world anti-doping system for years to come. In the end, as this article will show, the CAS sided with the tough stance adopted by some SGBs and decided that shoring up the world anti-doping system was worth depriving some of the Russian athletes from their Rio perch.

This article will analyse the CAS awards in a chronological order. It will start with the 'IAAF Award',[14] before turning to the awards rendered by the CAS ad hoc Division in Rio,[15] and finishing with the 'IPC award'.[16] The modest ambition of this paper is to retrace the reasoning used by the CAS panels and to analyse its broader consequences for the practical operation of the world anti-doping system.

2 The 'IAAF Award'

2.1 From the ARD documentary to the ineligibility of Russian athletes for the Rio Olympics

The IAAF started acting upon the suspicions of doping in Russian athletics only after the publication of the first *Pound* report on 9 November 2015. In its first press release after the publication of the report, the president of the IAAF, Sebastian Coe, announced that he had "taken the urgent step of seeking approval from his fellow IAAF Council Members to consider sanctions against the Russian Athletics Federation (ARAF)."[17] He was considering "provisional and full suspension and the removal of future IAAF events." This announcement was quickly followed on 13 November 2015 with the provisional suspension of the ARAF by the Council of the IAAF.[18] Consequently, Russian athletes and athlete support personnel were banned from competing in international competitions including World Athletics Series competitions and the Olympic Games. Furthermore, Russia lost the right to host the 2016 World Race Walking Team Championships (Cheboksary) and 2016 World Junior Championships (Kazan), while ARAF were to delegate the conduct of all outstanding doping cases to the CAS. The provisory ban was based on IAAF Constitution Article 6.11(b) and Article 14.7. The ARAF could have challenged the decision of the Council but declined to do so and accepted the sanctions.[19] Simultaneously, the decision also included a specific procedure for RusAF (former ARAF) to regain IAAF membership. It foresaw that an inspection team led by an Independent Chair, Rune Andersen, would verify whether RusAF complies with a long list of precise criteria.[20]

In early 2016, the IAAF taskforce started its verifications based on the aforementioned criteria. In March 2016, after its first visit to Moscow in January, the taskforce considered that "the Russian delegates have made significant progress towards meeting many of the Verification Criteria established by IAAF Council."[21] Yet, it also added that "there is significant work still to be done to satisfy the Reinstatement Conditions and so RusAF should not be reinstated to membership at this stage." However, after the revelations of the *New York Times* in May 2016, the IAAF taskforce recommended that "RusAF should not be reinstated to membership at this stage, because several important Verification Criteria have not been met."[22] The taskforce considered the following:

- The deep-seated culture of tolerance (or worse) for doping that led to RusAF being suspended in the first place appears not to have changed materially to date.

[14] CAS 2016/O/4684, *The Russian Olympic Committee* ("*ROC*") et al. *v. The International Association of Athletics Federations* (*IAAF*), Award of 21 July 2016.

[15] The following awards are reviewed: CAS OG 16/13, *Anastasia Karabelshikova & Ivan Podshivalov v. FISA & IOC,* Award of 4 August 2016; CAS OG 16/04, *Yulia Efimova v. ROC, IOC & FINA,* Award of 4 August 2016; CAS OG 16/09, *RWF v. IWF,* Award of 3 August 2016; CAS OG 16/11, *Daniil Andrienko et al. v. FISA & IOC*, Award of 2 August 2016; CAS OG 16/18, *Kiril Sveshnikov et al. v. UCI & IOC*, Award of 5 August 2016; CAS OG 16/19, *Natalia Podolskaya & Alexander Dyachenko v. ICF*, Award of 7 August 2016; CAS OG 16/12, *Ivan Balandin v. FISA & IOC*, Award of 4 August 2016; CAS OG 16/21, *Elena Anyushina & Alexey Korovashkov v. ICF & RCF*, Award of 7 August 2016; CAS OG 16/24, *Darya Klishina v. IAAF*, Award of 15 August 2016.

[16] CAS 2016/A/4745, *Russian Paralympic Committee v. International Paralympic Committee*, award of 23 August 2016.

[17] IAAF Statement – WADA's Independent Commission Report, IAAF Press Release, 9 November 2015. https://www.iaaf.org/news/press-release/statement-wada-independent-commission-report. Accessed 25 January 2017.

[18] IAAF Provisionally Suspends Russian Member Federation ARAF, IAAF Press Release, 13 November 2015. https://www.iaaf.org/news/press-release/iaaf-araf-suspended. Accessed 25 January 2017.

[19] ARAF Accepts Full suspension – IAAF Council Meeting, Monaco, IAAF Press Release, 26 November 2015. https://www.iaaf.org/news/press-release/araf-accepts-full-suspension. Accessed 25 January 2017.

[20] ARAF Reinstatement Conditions and Verification Criteria, IAAF Press Release, 11 December 2015. https://www.iaaf.org/news/press-release/araf-reinstatement-verification-criteria. Accessed 25 January 2017.

[21] Council Focuses on IAAF Reform and Russian Verification – IAAF Council Meeting, Day 2, IAAF Press Release, 11 March 2016. https://www.iaaf.org/news/iaaf-news/council-meeting-2016-reforms-russia. Accessed 25 January 2017.

[22] 'RusAF Has Not Met Reinstatement Conditions' – IAAF Council Meeting, Vienna, IAAF Press Release, 17 June 2016. https://www.iaaf.org/news/press-release/iaaf-council-meeting-vienna. Accessed 25 January 2017.

- A strong and effective anti-doping infrastructure capable of detecting and deterring doping has still not been created.
- There are detailed allegations, which are already partly substantiated, that the Russian authorities, far from supporting the anti-doping effort, have in fact orchestrated systematic doping and the covering up of adverse analytical findings.

This meant "that Russian athletes remain[ed] ineligible under IAAF Rules to compete in International Competitions including the European Championships and the Rio 2016 Olympic Games." The taskforce also recommended that RusAF remains suspended, i.e. that no "representatives of RusAF (i.e. officials, athlete support personnel, etc.) should take part in International Competition or in the affairs of the IAAF." The IAAF Council unanimously endorsed the recommendations. At the same meeting, and also upon recommendation of the taskforce, the IAAF Council passed a rule amendment "to the effect that if there are any individual athletes who can clearly and convincingly show that they are not tainted by the Russian system because they have been outside the country, and subject to other, effective anti-doping systems, including effective drug testing, then they should be able to apply for permission to compete in International Competitions, not for Russia but as a neutral athlete." These changes were introduced in Rule 22.1A IAAF Competition Rules (Rule 22.1A).[23] Finally, the IAAF also decided to let Yuliya Stepanova, the ARD whistle-blower, compete due to her "extraordinary contribution to the fight against doping in sport."

On 23 June, the IAAF published a set of guidelines on the basis of which Russian athletes could request a permission to compete in IAAF events (and the Olympics) if they could demonstrate not being tainted by the Russian state-doping system as provided under the exception enshrined in Rule 22.1A.[24] However, athletes using this exception would be allowed to compete only as neutral athletes. Stepanova was the first athlete authorized to compete at the Rio Games by the IAAF (ironically, she would later be blocked by the IOC) based on the rule 22.1A.[25] She was joined only by Darya Klishina (the IAAF later rescinded this eligibility in light of her involvement in the *McLaren* Report, but, as will be explained in greater details in section II, the CAS ad hoc division decided against all odds to let her compete in Rio).[26]

The IAAF felt comforted in its decisions by the release of the *McLaren* Report on 18 July.[27] Yet, the Russian athletes and the Russian Olympic Committee were obviously extremely dissatisfied with this outcome. Both sides agreed to submit the matter, through the ordinary arbitral procedure, to the CAS, which held a quick hearing on 19 July.[28]

2.2 The key legal questions at the CAS

While the decision to reject the demands of the Russian athletes was publicized immediately (on 21 July) on the CAS' website,[29] it was not until 3 months later that the full text of the award was made publicly available. For analytical purposes, and following the award's internal

[23] Rule 22.1A IAAF Competition Rules reads as follows:

1A. Notwithstanding Rule 22.1(a), upon application, the Council (or its delegate(s)) may exceptionally grant eligibility for some or all International Competitions, under conditions defined by the Council (or its delegate(s)), to an athlete whose National Federation is currently suspended by the IAAF, if (and only if) the athlete is able to demonstrate to the comfortable satisfaction of the Council that:

(a) the suspension of the National Federation was not due in any way to its failure to protect and promote clean athletes, fair play, and the integrity and authenticity of the sport; or

(b) if the suspension of the National Federation was due in any way to its failure to put in place adequate systems to protect and promote clean athletes, fair play, and the integrity and authenticity of the sport, (i) that failure does not affect or taint the athlete in any way, because he was subject to other, fully adequate, systems outside of the country of the National Federation for a sufficiently long period to provide substantial objective assurance of integrity; and (ii) in particular the athlete has for such period been subject to fully compliant drug testing in- and out-of-competition equivalent in quality to the testing to which his competitors in the International Competition(s) in question are subject; or

(c) that the athlete has made a truly exceptional contribution to the protection and promotion of clean athletes, fair play, and the integrity and authenticity of the sport.

The more important the International Competition in question, the more corroborating evidence the athlete must provide in order to be granted special eligibility under this Rule 22.1A. Where such eligibility is granted, the athlete shall not represent the suspended National Federation in the International Competition(s) in question, but rather shall compete in an individual capacity, as a 'Neutral Athlete'.

[24] Guidelines for applications under Competition Rule 22.1A, 23 June 2016. http://www.iaaf.org/download/download?filename=123611d5-208d-45b3-a34e-69d02554b44f.pdf&urlSlug=guidelines-for-applications-under-competition. Accessed 25 January 2017.

[25] Stepanova Eligible to Compete Internationally as an Independent Neutral Athlete, IAAF Press Release, 1 July 2016. https://www.iaaf.org/news/press-release/independent-neutral-athlete. Accessed 25 January 2017.

[26] Darya Klishina eligible to compete internationally as an independent neutral athlete, IAAF Press release, 9 July 2016. https://www.iaaf.org/news/press-release/darya-klishina-eligible-independent-neutral-r. Accessed 25 January 2017.

[27] IAAF Response to McLaren Report, IAAF Press Release, 18 July 2016. https://www.iaaf.org/news/press-release/iaaf-response-mclaren-report. Accessed 25 January 2017.

[28] IAAF President Sebastian Coe Attends CAS Hearings, IAAF Press Release, 19 July 2016. https://www.iaaf.org/news/press-release/sebastian-coe-cas-hearing-rusaf. Accessed 25 January 2017.

[29] The Court of Arbitration for Sport (CAS) Rejects the Claims/Appeal of the Russian Olympic Committee (ROC) and of 68 Russian Athletes, 21 July 2016. http://www.tas-cas.org/fileadmin/user_upload/Media_Release_4684_210716.pdf. Accessed 25 January 2017.

structure, this article will deal with the following four questions raised:

- Does the suspension of the RusAF extend to the eligibility of the Russian athletes?
- Is the new IAAF rule 22.1.A a sanction?
- Can the ROC nominate athletes to the Olympic Games without the assent of the IAAF?
- Will the Russian athletes falling under rule 22.1.A compete as neutral athletes in Rio?

2.2.1 Does the suspension of the RusAF under Rule 22.1(a) extend to the eligibility of the Russian athletes?

The Russian athletes challenged first the application by IAAF of Rule 22.1(a) IAAF Competition rules.[30] The Rule provides for the IAAF-wide ineligibility of "[a]ny athlete, athlete support personnel or other person whose National Federation is currently suspended by the IAAF." In other words, the claimants "want an exception to the rule for doping cases, so that the ineligibility for the athletes affiliated to a suspended national federation, a member of the IAAF, would not apply if the suspension is imposed for the federation's failure to ensure an effective doping control system."[31]

2.2.1.1 Rule 22.1(a) is a valid rule extending the ineligibility of a federation to its athletes The Panel rejected this challenge. First, it considered that it was not its duty to rewrite the IAAF's rules. Instead, the "rule- making power, and the balance to be struck in its exercise between the competing interests involved, is conferred on the competent bodies of the sport entity, which shall exercise it taking into account also the overall legislative framework."[32] Second, it highlighted "that the suspension of the Russian track and field federation is not disputed in this arbitration."[33] This is due to the fact that ARAF did not contest the original decision of IAAF in November 2015. Consequently, "the dispute heard by the Panel regards only the consequences for the athletes affiliated to the Russian federation of the suspension imposed on their federation and not the reasons for the suspension."[34] Thirdly, the Panel rejected the view that Rule 22.1(a) is a doping sanction. Rather, "it is a rule which affects the eligibility of athletes to enter into International Competitions and is a consequence of the organizational structure of international sport; national federations are members of international federations, and have the duty to respect the obligations deriving from such membership; athletes participate in organized sport, as controlled by an international federation, only on the basis of their registration with a national federation, which is a member of the international federation in question."[35] Thus, "Rule 22.1(a) is a rule of general application, not specific to doping cases, and would apply equally to athletes who are members of federations that fail to pay their membership dues as to athletes who are members of federations that engage in other breaches of federation obligations to the IAAF as a member thereof."[36]

The claimants sought to frame Rule 22.1(a) and Rule 22.1A as a package applying specifically to anti-doping cases. The Panel highlighted instead that "Rule 22.1(a) is not part of a new package of rules", as it "has existed since at least 2000, whereas Rule 22.1A is a recent amendment."[37] It saw Rule 22.1(a) as "a necessary consequence of the sanction imposed on RusAF."[38] In sum, the "athletes are ineligible because RusAF has been sanctioned, and accepted that sanction, not because of what the athletes have done."[39]

2.2.1.2 Rule 22.1(a) is not contrary to the World Anti-Doping Code The Panel also rejected the argument that Rule 22.1(a) would be contrary to the WADC. First, because it is not an additional doping sanction (and therefore is not covered by the Osaka rule jurisprudence of the CAS[40]) and second because it is consistent with the WADC's mandate to international federations to introduce sanctions in case their members do not comply with the Code.[41] Furthermore, "it is a fundamental principle of the law of associations in all applicable jurisdictions that members of associations have an obligation to satisfy the requirements for membership in the association and if they fail to do so those members may have their association membership adversely affected."[42] The Panel therefore refused to "disturb these well-accepted principles."[43]

[30] Rule 22.1(a) IAAF Competition rules.

[31] CAS 2016/O/4684, *The Russian Olympic Committee ("ROC") et al v. The International Association of Athletics Federations (IAAF)*, Award of 21 July 2016, para.115.

[32] Ibid., para.117.

[33] Ibid., para.118.

[34] Ibid.

[35] Ibid., para. 119.

[36] Ibid.

[37] Ibid., para. 120.

[38] Ibid., para. 121.

[39] Ibid.

[40] CAS 2011/O/2422, *United States Olympic Committee* (*USOC*) *v. International Olympic Committee* (*IOC*), Award of 4 October 2011.

[41] CAS 2016/O/4684, *The Russian Olympic Committee* ("*ROC*") *et al v. The International Association of Athletics Federations* (*IAAF*), Award of 21 July 2016, paras. 122-124.

[42] Ibid, para. 124.

[43] Ibid.

2.2.1.3 IAAF is not estopped to enforce Rule 22.1(a) on the Russian athletes The Panel further refused to find that the IAAF was estopped from considering the Russian athletes ineligible based on Rule 22.1(a).[44] Even though it is possible that some IAAF employees/executives were involved in a corruption scheme to cover-up doping cases, "[t]here is no suggestion that the IAAF officials were involved in the systemic doping of Russian athletes."[45] Moreover, "none of the Claimant Athletes has argued that they knew about the IAAF's wrongdoing and relied on it to their detriment, or that they believed that RusAF would not be suspended in the event of misconduct."[46] The arbitrators also deny that the Rule 22.1(a) was too imprecise. In particular, the fact that the length of the ineligibility is indeterminate is deemed a "simple consequence of the fact that it is contingent on the National Federation ("NF") being reinstated."[47]

2.2.1.4 The ineligibility of Russian athletes under Rule 22.1(a) is proportionate With the Panel considering that "Rule 22.1(a) is not a sanction", it therefore "does not have to pass any test of proportionality."[48] The Panel nonetheless decided to engage in a very interesting exercise to assess its putative proportionality. It found "that the effect (ineligibility to compete at International Competitions) on the athletes registered with a national federation suspended by IAAF is a proportionate consequence of the national federation's suspension for its failure to put in place an adequate system to protect and promote clean athletes, fair play and integrity of sport."[49] In the view of the arbitrators, "eradication of doping in sport, protection and promotion of clean athletes, fair play and integrity are undeniably legitimate objectives of extreme importance for the viability of sport at any level."[50] In this regard, "the measure taken by IAAF, and the effect it produces, is capable of achieving those objectives, as it prevents athletes under the jurisdiction of the suspended national federation (for having failed to promote a doping-free environment) from competing with athletes registered with federations that have not been the subject of an exclusion."[51] Furthermore, "the measure taken by IAAF is necessary to reach the envisaged goal: if the IAAF could not take a step having the mentioned effect, the suspension of the Russian federation would have no meaningful impact."[52] Thus, "the constraints which the affected athletes, including the Claimant Athletes, will suffer as a consequence of the measure are justified by the overall interest to achieve the envisaged goal, which outweighs them, and do not go beyond what is necessary to achieve it."[53] Finally, the Panel highlighted the role played by Rule 22.1A. This provisions evidenced "that the effect produced by the suspension of a national federation (in force since at least 2000) was recently made more flexible, to take into account individual cases, in a way consistent with the sought purpose of eradication of doping, protection and promotion of clean athletes, fair play and integrity."[54]

In conclusion, the Panel held "that IAAF Competition Rule 22.1(a) is valid and enforceable in the circumstances of the present dispute."[55]

2.2.2 Is IAAF Competition Rule 22.1A valid and enforceable in the circumstances of the present dispute?

The claimants were also challenging the validity of Rule 22.1A, as they were constructing the rule as an unforeseeable sanction against athletes who would not comply with the requirements enshrined in it. Yet, the Panel questioned the "interest the Claimants would have in seeing it set aside, given that it is a rule which allows athletes to be included, not excluded."[56] Indeed, if the Panel were to strike struck down Rule 22.1A, "the only consequence for the Claimants would be that any athlete who made him/herself eligible pursuant to Rule 22.1A would still be ineligible: the Claimant Athletes, on the other hand, would not regain the eligibility denied by Rule 22.1(a)."[57] The claimants argued that both rules were intimately connected and amounted to one sanction: if one would be deemed invalid the other would fall too.[58] However, the Panel noted in response to this argument "that (i) the legality of Rule 22.1(a) and its applicability in the present circumstances has already been confirmed, as per the considerations above, [and] (ii) the Claimants' submissions as to the legality of Rule 22.1A have no merit […]."[59] Thus, the Panel found Rule 22.1.A not to be inconsistent with the WADC as it did not constitute a sanction. Similarly, not being a sanction, its proportionality was not in question, nor did it appear to be a discriminatory rule. The athletes

[44] Ibid., paras. 125–127.
[45] Ibid., para. 126.
[46] Ibid., para. 127.
[47] Ibid., para. 128.
[48] Ibid., para. 129.
[49] Ibid., para. 131.
[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] Ibid., para. 132.
[54] Ibid.
[55] Ibid., para. 136.
[56] Ibid., para. 137.
[57] Ibid.
[58] Ibid., para. 138.
[59] Ibid., para. 140.

could not rely on any legitimate expectations to be eligible if they met the Verification Criteria published on 11 December 2015, as "they would have also known that RusAF would have to be reinstated before they became eligible."[60] Indeed, "Rule 22.1A did not change the way in which the Claimant Athletes could make themselves eligible", instead "it provided another route to eligibility, one which could be pursued even though RusAF had not been reinstated in accordance with the Reinstatement Conditions."[61]

In the end, the Panel only criticized the lack of legal certainty provided by Rule 22.1A(b), "as its terms may appear vague and retroactive in nature."[62] Nonetheless, "this does not help the Claimants in having the application of this rule set aside in the given case."[63] Even if "retroactive criteria in general are to be avoided as unfair and contrary to fundamental notions of due process and good sportsmanship, […] Rule 22.1A is an inclusionary rule, and only created an opportunity, not a bar, for the Claimant Athletes."[64] Hence, not applying it "would only have the effect of harming any other Russian athlete who satisfied Rule 22.1A(b)."[65]

2.2.3 *Can the ROC nominate athletes to the Olympic Games without the assent of the IAAF?*

The third question raised by the claimants was whether the ROC could bypass the IAAF's decision and nominate athletes without its approval to participate in the Rio Olympics. Here again the Panel from the outset found "that, under the *Olympic Charter,* the ROC is not entitled to nominate athletes who are not eligible under IAAF Competition Rules 22.1(a) and 22.1A."[66] In order to come to this conclusion, the Panel focused on the Olympic Charter. It noted that "Rule 40 of the *Olympic Charter* restricts participation in the Olympic Games to those who comply with the *Olympic Charter* and the WADC, including the conditions of participation established by the IOC, "as *well as the rules of the relevant IF as approved by the IOC*"."[67] Moreover, it interpreted the latter sentence as implying "mandatory compliance with IF rules."[68] The Panel found that "the *Olympic Charter* makes it clear that an NOC shall only enter competitors upon the recommendations for entries given by national federations (Rule 44.4), and that as a condition precedent to participation in the Olympic Games every competitor has to comply not only with the provisions of the *Olympic Charter,* but also with "the *rules of the IF governing his sport"* (Bye-law 4 to Rule 44)."[69] It concluded that "the NOCs can only exercise their right to send personnel to the Olympic Games if they comply with the rules of the relevant International Federation ("IF") because *otherwise* they would be contravening Rule 40 of the *Olympic Charter*."[70] Consequently, "ROC cannot enter into the 2016 Olympic Games athletes who do not comply with the IAAF's rules, including those athletes who are not eligible under Competition Rules 22.1(a) and 22.1A."[71] Even in the unlikely event, RusAF is deemed not to exist anymore for the purpose of the application of the Olympic Charter, and Bye-law 5 to Rule 44[72] of the Olympic Charter is deemed applicable, "the ROC would need the IAAF's, and IOC Executive Board's, approval to send competitors."[73]

Therefore, with or without RusAF, "the ROC cannot enter athletes who are ineligible pursuant to the IAAF's rules."[74]

2.2.4 *Will the Russian athletes enjoying the exception enshrined in Rule 22.1A compete as neutral athletes?*

Finally, the last interrogation posed by the claimants concerns the Russian athletes regaining eligibility through Rule 22.1.A and whether they could compete as representatives of Russia. Incidentally, this is the only point on which the claimants are found by the Panel to prevail. Indeed, it held "that, under the *Olympic Charter,* if there are any Russian track and field athletes who are eligible to compete at the 2016 Olympic Games under IAAF Competition Rule 22.1A, the ROC is entitled to enter them to compete as representatives of Russia."[75] In its view, "under the *Olympic Charter* it is not for an IF to determine whether an athlete, eligible for entry to the Olympic Games, has to compete as a "neutral" athlete, or as an athlete representing the NOC that entered him or her."[76] In

[60] Ibid., para. 151.
[61] Ibid., para. 152.
[62] Ibid., para. 143.
[63] Ibid., para. 146.
[64] Ibid., paras. 146 and 147.
[65] Ibid, para. 147.
[66] Ibid., para. 155.
[67] Ibid., para. 157.
[68] Ibid.
[69] Ibid., para. 158.
[70] Ibid., para. 159.
[71] Ibid., para. 161.
[72] Bye-law 5 to Rule 44 reads as follows: "Should there be no national federation for a particular sport in a country which has a recognised NOC, the latter may enter competitors individually in such sport in the Olympic Games subject to the approval of the IOC Executive Board and the IF governing such sport."
[73] CAS 2016/O/4684, *The Russian Olympic Committee* ("*ROC*") *et al v. The International Association of Athletics Federations* (*IAAF*), Award of 21 July 2016, para. 164.
[74] Ibid., para. 165.
[75] Ibid., para. 167.
[76] Ibid., para. 168.

other words, "athletes which are sent to the Olympic Games are not entered as neutrals, but are sent by an NOC."[77] Moreover, "an athlete does not represent his/her national federation; the federation's suspension does not prevent an athlete from being entered into the Olympic Games as a representative of his/her NOC."[78]

The Panel did recognize, however, the fact "that the ROC is entitled, under the *Olympic Charter,* to enter into the Olympic Games as representatives of Russia any Russian track and field athletes who are eligible to compete under IAAF Competition Rule 22.1A does not mean that the IOC is bound to accept such designation as athletes representing Russia."[79] In sum, it was not IAAF's competence to declare the athletes as neutral but the IOC's, and it declined to do so in practice.

Hence, unlike the IOC, which has shown little willingness to seriously crack down on Russia after the scandal, the IAAF has adopted a tough line. It sidelined Russia's athletics federation as soon as the suspicions voiced by whistle-blowers were substantiated and refused to let Russian athletes participate in the Rio Olympics, thus reinforcing the anti-doping fight with a symbolically important sanction. Indeed, the world anti-doping system will remain a paper tiger if Russia's systematic breach of anti-doping rules and spirit is not followed by truly deterrent sanctions. Surely, the system as a whole deserves a comprehensive reform addressing the massive deficiencies highlighted by the Russian scandal.

3 The Russian doping scandal at the CAS ad hoc Division

Since it was first introduced at the Atlanta Games in 1996,[80] the CAS ad hoc Division has never been as crowded as it was during this year's Rio Olympics. This is mainly due to the Russian doping scandal, which has fuelled the CAS with Russian athletes challenging their ineligibility to compete at the Games. The CAS statistics show that out of 28 ad hoc awards rendered, 16 involved Russian athletes challenging their ineligibility. The following section will provide an analysis of the ten CAS awards related to Russian athletes.[81]

3.1 The *Efimova* case: saved by the Osaka *déjà-vu*

Yulia Efimova, a top-level Russian swimmer, had a difficult time in Rio as her peers and the press heavily criticized her. Yet, as a sweet revenge, she did win two silver medals. Her achievement was made possible by a decision of the CAS ad hoc Division that enabled her to compete, although she had been sanctioned previously for doping and fell under paragraph 3 of the IOC Decision.[82] In principle, Efimova, like the rowers Anastasia Karabelshikova and Ivan Podshivalov, did not comply with the criteria imposed by the IOC. However, in two separate awards, the CAS Panels, relying primarily on the concept of 'natural justice' and referring to the established CAS jurisprudence regarding the so-called 'Osaka rule',[83] sided with the Russian athletes against the IOC. The 'Osaka rule', which was adopted by the IOC in June 2008 in Osaka, foresaw that any person sanctioned with a doping ban of more than 6 months would be ineligible for the Olympic Games following the date of expiry of the ban. In 2011, the CAS found that rule to be contrary to the WADC and the IOC's Olympic Charter.[84]

In both awards, the CAS ad hoc Division clearly identified that the "issues before the Panel focused primarily upon the legality of paragraph 3 of the IOC Decision."[85] The arbitrators emphasized that the IOC had acted in "good faith and with the best intentions"[86] in addressing the release of the IP Report. However, the Panels also stressed that the IOC Decision recognised the "right of the individual athletes to natural justice."[87] In this regard, both Panels challenged the legality of paragraph 3 of the IOC Decision. Thus, it is argued that this paragraph "contains simple, unqualified and absolute criterion."[88] Furthermore, "there is no recourse for such an athlete, no criteria that considers the promotion by the athlete of clean athletics (as the IAAF consider by way of an example) or any other criteria at all."[89] Therefore, the arbitrators struggled "to

[77] Ibid., para. 170.

[78] Ibid.

[79] Ibid.

[80] On the first years of the CAS Ad Hoc Division, see Kaufmann-Kohler (2001).

[81] For the detailed references, see above footnote 15.

[82] Decision of the IOC Executive Board concerning the participation of Russian Athletes in the Olympic Games Rio 2016, IOC Decision of 24 July 2016, para. 3: *"The ROC is not allowed to enter any athlete for the Olympic Games Rio 2016 who has ever been sanctioned for doping, even if he or she has served the sanction."*

[83] CAS 2011/O/2422, *USOC v. IOC*, Award of 4 October 2011 and CAS 2011/A/2658, *British Olympic Association* (*BOA*) *v. World Anti-Doping Agency* (*WADA*), Award of 30 April 2012.

[84] CAS 2011/O/2422, *USOC v. IOC*, Award of 4 October 2011.

[85] CAS OG 16/13, *Anastasia Karabelshikova & Ivan Podshivalov v. FISA & IOC*, Award of 4 August 2016, para. 7.5 and CAS OG 16/04, *Yulia Efimova v. ROC, IOC & FINA*, Award of 4 August 2016, para. 7.10.

[86] CAS OG 16/13, para. 7.11 and CAS OG 16/04, para. 7.12.

[87] CAS OG 16/13, para. 7.16 and CAS OG 16/04, para. 7.18.

[88] CAS OG 16/13, para. 7.17.

[89] Ibid.

reconcile this paragraph [3] with the stated aim to provide the athletes with an opportunity to rebut the presumption of guilt and to recognise the right to natural justice."[90] Consequently, "this denial of the rules of natural justice renders paragraph 3 as unenforceable."[91] Another related question was whether paragraph 3 should be treated as an eligibility rule or an additional sanction on athletes that had already been sanctioned for positive doping test. Though they deemed it a moot point, both Panels referred to the well-known case law of the CAS on the 'Osaka rule' to find that paragraph 3 constituted an additional sanction.[92]

While Efimova went on to win two medals, both Karabelshikova and Podshivalov were barred from participating to the Rio Games on other grounds.[93] The fact that paragraph 3 of the IOC Decision is deemed unenforceable should come as no surprise to anybody involved in international sports law. The CAS jurisprudence on this matter is very much a principle stand, meaning that under the current WADC there is simply no room for an Olympic ban in addition to a doping ban. This is a lesson often lost on the media and general public during Olympic days, but *non bis in idem* is a cornerstone principle of our legal systems and cannot be discarded lightly. Why the IOC decided to ignore this jurisprudence is open to interrogation.

3.2 On being implicated under the IOC Decision

The second, and by far largest, wave of complaints involved Russian athletes barred from the game under paragraph 2 of the IOC Decision.[94] As will be explained in this section, the CAS sided with the Ifs' tough stance on the Russian state-doping system. The first set of cases focussed on the definition of the word "implicated" in paragraph 2 of the IOC Decision. In this regard, on 2 August, the IOC sent a communication to the IFs aiming at providing some general guidelines. It reads as follows:

> *"In view of the recent appeals filed by Russian Athletes with GAS, the IOC considers it necessary to clarify the meaning of the notion "implicated" in the EB Decision.*
> *The IOC does not consider that each athlete referred to in the McLaren Lists shall be considered per se "implicated". It is for each International federation to assess, on the basis of the information provided in the McLaren lists and the Independent Person Report, whether it is satisfied that the Athlete in question was implicated in the Russian State-controlled doping scheme.*
> *To assist the International Federations in assessing each individual case, the IOC wishes to provide some information. In the IOC's opinion, an athlete should not be considered as "implicated" where:*
>
> - *The order was* a *"quarantine."*
> - *The McLaren List does not refer to* a *prohibited substance which would have given rise to an anti-doping rule violation or;*
> - *The McLaren List does not refer to any prohibited substance with respect to* a *given sample."*

The CAS went on to address this question in three cases analysed below.[95]

3.2.1 CAS OG 16/19 Natalia Podolskaya & Alexander Dyachenko v. ICF

Podolskaya and Dyachenko are two canoeists from Russia who were suspended by the International Canoe Federation (ICF) and removed from the Rio Games, because they were deemed implicated in the IP Report. In an affidavit to the CAS, referred to in the award, Richard McLaren disclosed the facts that led to both athletes being considered implicated.

Regarding Podolskaya, McLaren indicated that he has retrieved electronic evidence that "reveals that on 31 July 2013 at 00:50 h, in contravention of the International Standard for Laboratories, the Moscow Laboratory reported to email address av@sochi2014.com that sample number 2780289, belonging to a female canoe athlete taken at the Russian Championships in Moscow, was suspected for EPO and further inquired what should be done."[96] In his quick response of 1 August 2013, Alexey Velikodniy, then vice-minister for sports, "communicated back to Laboratory that the sample number 2780289

[90] Ibid., para. 7.18.

[91] CAS OG 16/13, para. 7.18 and CAS OG 16/04, para. 7.25.

[92] CAS OG 16/13, paras. 7.19–7.22 and CAS OG 16/04, para. 7–17.

[93] Reuters, Two Russians Rowers to Miss Rio despite Winning Doping Appeal, 5 August 2016. http://www.reuters.com/article/us-olympics-rio-rowing-cas-idUSKCN10G1WV. Accessed 25 January 2017.

[94] Decision of the IOC Executive Board concerning the participation of Russian Athletes in the Olympic Games Rio 2016, IOC Decision of 24 July 2016, para. 2: *"The IFs to examine the information contained in the IP Report, and for such purpose seek from WADA the names of athletes and National Federations (NFs) implicated. Nobody implicated, be it an athlete, an official, or an NF, may be accepted for entry or accreditation for the Olympic Games."*

[95] CAS OG 16/19, *Natalia Podolskaya & Alexander Dyachenko v. ICF*, Award of 7 August 2016; CAS OG 16/21, *Elena Anyushina & Alexey Korovashkov v. ICF & RCF*, Award of 7 August 2016; CAS OG 16/12, *Ivan Balandin v. FISA & IOC*, Award of 4 August 2016. A fourth case, CAS OG 16/18, *Kiril Sveshnikov et al. v. UCI & IOC*, was declared inadmissible.

[96] CAS OG 16/19, *Natalia Podolskaya & Alexander Dyachenko v. ICF*, Award of 7 August 2016, para. 2.11.

belonged to Ms. Natalia Podolskaya and instructed the Laboratory to "SAVE"."[97] Similarly, as far as Dyachenko is concerned, the "electronic evidence reveals that on 5 August 2014 at 12:09 h, in contravention of the International Standard Laboratories, the Moscow Laboratory reported to Alexey Velikodniy that pre-departure sample number 2917734, collected at a Training Camp on 3 August 2014, contained a lot of trenbolone and a little methenolone. Alexey Velikodniy's response to the laboratory on 6 August 2014 at 1%:26 [sic] was that sample number 2917734 from 3 August 2014 pre-departure test belonging to Mr Alexander Dyachenko, and on instruction from "llR", should be a "SAVE"."[98] McLaren concluded that for both "Ms. Natalia Podolskaya and Alexander Dyachenko, the "SAVE" instruction signalled to the Laboratory that no further analytical bench work was to be done on the samples and the Laboratory filed a negative ADAMS report for each athlete."[99]

In its assessment of the application of paragraph 2 of the IOC Decision by the ICF, the CAS Panel found that the "Applicants were among five athletes so [as implicated in the IP Report] named" and that the "ICF was entitled to conclude that the Applicants failed to meet the criteria in paragraph 2."[100] Moreover, this "conclusion has been reinforced by the evidence made available to the Panel by Professor McLaren" and "is justified on the standard of comfortable satisfaction."[101] The applicants, unsuccessfully, argued that they were never sanctioned for an anti-doping rule violation, and that the samples referred to in the IP Report cannot be tested anymore to prove their innocence. They also claimed that other contemporary samples returned negative and "that if they had used prohibited substances, all the tests would have returned positive."[102] Nonetheless, WADA pointed out that "due to the nature of the substances concerned and the timing of the provision of the samples, this cannot be concluded."[103] The Panel accepted "WADA's submission, not contradicted by the Applicants, that there are explanations consistent with the Applicant's assertion but also consistent with the taking of the prohibited substances at the relevant time."[104]

Finally, the Russian applicants tried to fight their ineligibility under the implication criteria laid down in paragraph 2 of the IOC Decision by arguing that it was not compatible with natural justice.[105] Nevertheless, the CAS refused to follow this line of reasoning. Instead, the Panel found that the "Applicants have challenged that decision in the CAS and have been given the opportunity to rebut that evidence", thus they "have not been denied natural justice or procedural fairness."[106]

3.2.2 *CAS OG 16/21 Elena Anyushina & Alexey Korovashkov v. ICF & RCF*

Anyushina and Korovashkov are also two canoeists from Russia. Similar to Podolskaya and Dyachenko, they were suspended on 26 July 2016 by the ICF and removed from the Rio Games as they were deemed implicated in the IP report. However, Anyushina was quickly reinstated and declared eligible to compete at the Games by the IOC.[107] The procedure was, consequently, limited to Korovashkov. He was deemed implicated because, as outlined by Richard McLaren in his affidavit:

On 15 August 2014 at 09:22 h, in contravention of the International Standard for Laboratories, the Moscow Laboratory reported to Alexey Velikodniy that sample number 2916461, collected 10 August 2014 in connection with an International Competition being held in Moscow, contained a *lot of marijuana that was certainly above the threshold. (The/CF website reflects that the/CF Canoe Sprint World Championships took place in Moscow from the 8–10 August 2014) Alexey Velikodniy's response to the Laboratory on 18 August 2014 at 08:59 identified that sample number 2916461 belonged to Mr. Alexey Korovashkov and instructed that it should be* a *'SAVE." Alexey Velikodniy also notes that Mr. Alexey sample is under investigation. Mr. Korovashkov's sample number 2916461 was reported negative in ADAMS.*[108]

The Russian canoeist argued that the "evidence concerning the relevant sample on which the ICF relies to support its decision is unreliable", because "there is no "threshold" provided for marijuana in WADA Technical Document TD 2013DL of 11 May 2013 concerning Decision Limits for the Confirmatory Quantification of Threshold Substances."[109] In his view, "[i]f there is no threshold, it is unlikely that the laboratory would have provided such odd information to Alexey Velikodniy rather than reporting the threshold itself; the evidence does not resemble a laboratory report Correspondence could not have been authored by the laboratory's employees, who are

[97] Ibid.
[98] Ibid.
[99] Ibid.
[100] Ibid., para. 7.13.
[101] Ibid., para. 7.14.
[102] Ibid., para. 7.24.
[103] Ibid., para. 7.24.
[104] Ibid., para. 7.26.
[105] Ibid., paras 7.15–7.26.
[106] Ibid., para. 7.18.
[107] CAS OG 16/21, *Elena Anyushina & Alexey Korovashkov v. ICF & RCF*, Award of 7 August 2016, para. 3.13.
[108] Ibid., para. 2.6.
[109] Ibid., para. 7.10.

fully aware that they would be required to calculate and then state the actual result."[110] The Panel rebutted this argument by pointing out that the relevant WADA document included a threshold for Cannabinoids.[111] The Panel concluded that "the evidence is that the state sponsored doping system was applied to the Second Applicant so as to prevent a positive report of marijuana over the threshold for that substance."[112] Consequently, Korovashkov was deemed implicated in the IP Report. The Panel did display its sympathy with the Russian athlete, as it pointed out that "[t]he ICF indicated that marijuana is not, in its view, a performance enhancing drug and the Panel notes that there is no suggestion of any other substance involved."[113]

The Panel further rejected Korovashkov's argument that the ICF's decision to declare him ineligible for the Rio Olympics amounted to a wrongful anti-doping sanction.[114] The applicant argued that the use of the word "suspended" in the original letter to the ICF was the terminology used under the WADC. The Panel found that even though "suspended" "is a word used, and a sanction provided for, in the WADA Code, this does not mean that its inclusion means that the decision is made under that Code."[115] Moreover, the CAS arbitrators considered it "clear that the letter was in direct response to the IOC Executive Board's decision and concerned the eligibility of Russian athletes to compete in the Games of the XXXI Olympiad in Rio de Janeiro Games and to be accredited to those Games."[116] Thus, it "was not a decision under the WADA Code and was not bound by the provisions of that Code."[117] In other words, the Decision should not and could not be misconstrued as a doping ban based on the WADC, but found its legal basis in the IOC Decision and in Article 12.3 of the ICF Anti-doping Rules.

This case demonstrates the willingness of CAS arbitrators to adopt a wide reading of the scope of the notion of implication under the IOC Decision. If an athlete benefitted from the Russian doping scheme, even in case of a relatively harmless substance like cannabis, it was considered legitimate for an IF to remove him or her from Russia's Olympic team.

3.2.3 CAS OG 16/12 Ivan Balandin v. FISA & IOC

Ivan Balandin is a rower from Russia who was declared ineligible to compete at the Rio Olympics by the World Rowing Federation (FISA) on 27 July 2016, due to his implication in the IP Report. More precisely, he appears in the Report as having been "saved" by the Russian Deputy Minister of Sport and his test was later reported as negative in the ADAMS system.[118]

The athlete first argued, as did Korovashkov, that this was an anti-doping sanction, which did not follow the appropriate procedure. WADA clarified "that the Athlete may yet face proceedings relating to an ADRV, however, the nature of these could yet to be determined [sic]"[119] and added that the "matter at hand concerns eligibility for the Rio Games."[120] The Panel concurred and concluded that the "dispute at hand concerns the Athlete's eligibility for the Rio Games alone."[121]

The next question was whether Balandin was implicated in the IP Report. The Panel noted, as pointed out in the IOC letter from 2 August 2016, that a simple implication in the Report does not necessarily indicate that an athlete benefited from the state-doping scheme. In his defence, the athlete singled out that a date of collection was missing for the sample, in order to attack the validity of the information provided by McLaren. FISA responded that it had taken "the necessary steps to establish this date by calling UKAD."[122] Moreover, Richard McLaren revealed in his amicus curiae that "the exact date and times of the message from the Moscow Laboratory that the screen of the Athlete's A sample revealed positive for the prohibited substance GW 1516 and the response from the Deputy Minister to change the positive into a negative, following the DPM."[123] In any event, the Panel was "satisfied that the information provided to FISA and the additional checks it took with UKAD, were sufficient to show the Athlete was "implicated" in this scheme."[124] The athlete was deemed implicated, but the question remained whether he actually benefit from the scheme. The Panel noted "that the substance GW 1516 is a metabolic modulator and a non-specified substance and is prohibited at all times (without a threshold)."[125] Additionally, "the instruction from the Deputy Minister was "save"."[126] Thus, the CAS arbitrators were "comfortably satisfied" that Balandin had benefitted from the scheme.

[110] Ibid., para. 7.12.
[111] Ibid., paras. 7.15–17.
[112] Ibid., para. 7.20.
[113] Ibid., para. 7.21.
[114] Ibid., paras. 7.23–7.27.
[115] Ibid., para. 7.24.
[116] Ibid., para. 7.25.
[117] Ibid.
[118] CAS OG 16/12, *Ivan Balandin v. FISA & IOC*, Award of 4 August 2016, para. 2.9.
[119] Ibid., para. 7.13.
[120] Ibid.
[121] Ibid., para. 7.15.
[122] Ibid., para 7.28.
[123] Ibid., para 7.29.
[124] Ibid.
[125] Ibid., para 7.30.
[126] Ibid.

In all three cases, the athletes mentioned in the Report as 'saved' were recognized as implicated by the CAS. The court clearly distinguished the notion of implication from the fact that the athletes committed an anti-doping violation as defined under the WADC. However, it is unclear whether the arbitrators would have deemed an athlete implicated, if he or she was not named in the evidence provided by McLaren. As the disappearing positive methodology implemented by the Moscow laboratory was an *ultima ratio*, this still entails that many Russian athletes competing in Rio might have profited from Russia's state-doping scheme by escaping a positive test altogether. Hence, the IOC's choice to narrow down on implicated athletes seems rather inadequate to tackle the generalized doping system unveiled by the IC and IP reports.

3.3 On being sufficiently tested under the IOC Decision

Paragraph 2 of the IOC Decision also directed the IFs to verify the athletes' individual anti-doping record.[127] This part of the IOC Decision was central to a case involving Daniil Andrienko and 16 other members of the Russian rowing team, who challenged a decision of the World Rowing Federation (FISA) to declare them ineligible for the Rio Olympics. The FISA Executive Committee took the decision on 24 July 2016, because they had not "undergone a minimum of three anti-doping tests analysed by a WADA accredited laboratory other than the Moscow laboratory and registered in ADAMS from 1 January 2015 for an 18 month period."[128] In their submissions, the Russian applicants did not challenge the IOC Decision, and thus the criteria enshrined in paragraph 2, but only its application by FISA.[129] The Russian athletes argued that FISA's decision deviated from the IOC Decision in that it was imposing as an additional requirement that rowers must "have undergone a minimum of three anti-doping tests analysed by a WADA accredited laboratory other than the Moscow laboratory and registered in ADAMS from 1 January 2015 for an 18-month period."[130] The Panel acknowledged "the IOC Executive Board decision does not refer explicitly to the requirement of three tests or to a period of 18 months."[131] Nonetheless, it found "that the Challenged Decision is in line with the criteria established by the IOC Executive Board decision."[132] Indeed, the IOC's Decision provided "that in order to examine whether the level playing field is affected or not (when admitting a Russian athlete to the Rio Olympic Games), the federation must look at the athlete's respective anti-doping record, i.e. examine the athlete's anti-doping tests" and that "[i]n doing so, the IOC Executive Board decision specifies that only "*reliable adequate international tests*" may be taken into account."[133] In this regard, the Panel, and FISA, shared the view that "a reliable adequate international test can only be assumed if the sample has been analyzed in a WADA-accredited laboratory outside Russia."[134]

Finally, with regard to the need of having three tests, the "relevant paragraph in the IOC Executive Board decision further refers to "*adequate international tests*" and, consequently, makes it clear that - in principle - a single test is not sufficient to rebut the presumption of "collective responsibility"."[135] This follows "from the word "tests" being used in the plural form, but also from the word "adequate", since a single negative anti-doping test can hardly be adequate to rebut the presumption of "collective responsibility"."[136] The CAS also points out a number of other reasons why three tests are a rational benchmark:

- "[…]rowing is at the same time a sport requiring strength and endurance and, thus, is exposed to a significant doping threat";
- There is "a history of doping cases in the Russian Rowing Federation";
- FISA "took also into consideration WADA's "Guidelines Implementing an Effective Testing Programme", which refers to a minimum of three tests per year for Registered Testing Pool athletes";
- "FISA also bore in mind that it only provides for a relatively small number of events where tests can be carried out compared to other sports."[137]

Hence, "FISA's implementation and application of the criteria listed in the IOC Executive Board decision is consistent and fully compliant with the wording and the spirit of the IOC's decision."[138] The CAS Panel rejected the pleas brought forward by the athletes on the basis of natural justice and fundamental procedural principles, as they did not challenge the IOC Decision directly but only its implementation.

Surprisingly, FISA was the only Federation (alongside the IAAF), which systematically refused entry to Russian

[127] Decision of the IOC Executive Board concerning the participation of Russian Athletes in the Olympic Games Rio 2016, IOC Decision of 24 July 2016, para. 2: "*The IFs should carry out an individual analysis of each athlete's anti-doping record, taking into account only reliable adequate international tests, and the specificities of the athlete's sport and its rules, in order to ensure a level playing field.*"

[128] CAS OG 16/11, *Daniil Andrienko et al. v. FISA & IOC*, Award of 2 August 2016, para. 2.6.

[129] Ibid., para. 7.3.

[130] Ibid., para.7.4.

[131] Ibid., para.7.5.

[132] Ibid.

[133] Ibid., para. 7.6.

[134] Ibid.

[135] Ibid., para. 7.7.

[136] Ibid.

[137] Ibid.

[138] Ibid.

athletes because they were not exposed to proper independent anti-doping testing. If each IF had imposed similar standards, it is unlikely that many Russian athletes would have been able to participate in the Rio Games. Furthermore, the case also highlights once again that the CAS was ready to endorse strict conditions for the eligibility of Russian athletes. Here again, the IOC could very well have decided to impose a similar condition across the board instead of leaving each federation decide for itself and, thus, promote differentiated treatments depending on the sporting discipline.

3.4 On bringing weightlifting into disrepute

In paragraph 2 of its Decision, the IOC mentioned the possibility for IFs to "apply their respective rules in relation to the sanctioning of entire NF's." This is exactly what the International Weightlifting Federation (IWF) did when it decided on 29 July 2016 to exclude the whole Russian Weightlifting Federation (RWF) from the Rio Olympics for having brought the sport into disrepute. Indeed, Article 12. 4 of the IWF Anti-doping Policy, foresees that:

> "If any Member federation or members or officials thereof, by reason of conduct connected with or associated with doping or anti-doping rule violations, brings the sport of weightlifting into disrepute, the IWF Executive Board may, in its discretion, take such action as it deems fit to protect the reputation and integrity of the sport."

The Russian Federation first disputed, to no avail, that there was sufficient legal basis in the IWF regulations for such a blanket ban. The Panel found that "Article 12.4 ADP constitutes a sufficient legal basis."[139] Moreover, it added that the "power of the IWF Executive Board, in its discretion, to take such action as it deems fit to protect the reputation and integrity of the sport, was not challenged by RWF."[140]

There were subsequently two main questions related to application of Article 12.4 ADP to be discussed:

- Based on the information available, could the IWF reasonably conclude that there was a "conduct connected with or associated with doping"?
- And, was it sufficient to "bring the sport of weightlifting into disrepute"?

First, the CAS Panel noted that in assessing whether there was a "conduct connected with or associated with doping", IWF "referred to various sources of information."[141] It relied on the IP Report that "submits that 117 Russian weightlifters were included in this centrally dictated program"[142] and "on the results from the retesting of the London and Beijing Olympics",[143] which "turned out nine AAFs for Russian weightlifters."[144] The Panel held that this "information constitutes "*conduct connected with or associated with doping*"" that "on its face is sufficiently reliable."[145] Indeed, it reminds that the IP Report applied a standard of proof of "beyond reasonable doubt." Furthermore, the Panel adds that "the findings of the *McLaren* Report were taken seriously by the IOC and lead to the IOC Executive Board's decision dated 24 July 2016 that enacted eligibility criteria specifically for Russian athletes, which is unique in the history of the Olympic Games"[146] and "were endorsed by WADA, the supreme authority in the world of sport to lead and coordinate the fight against doping and by other international federations, such as the IAAF."[147] Finally, "the information contained in the McLaren Report is also corroborated by the reanalysis of the athlete's samples at the London and Beijing Olympics."[148] The fact that all nine Russian athletes retested were positive for the same substance, Turinabol, is deemed "a strong indication that they were part of a centrally dictated program."[149]

Are these findings enough to bring weightlifting into disrepute? For the Panel, disrepute "refers to loss of reputation or dishonour."[150] Thus, "the IWF's conclusion that the above facts bring the sport of weightlifting in disrepute is neither incompatible with the applicable provisions nor arbitrary."[151] The Russian doping scandal is "one of the biggest doping scandals in sports history", and "paired with the findings from the retesting of samples led the IWF to consider that the actions of the RWF and the Russian weightlifters brought the sport of weightlifting into disrepute, because it draws a picture of this sport as being doping infested."[152] Consequently, the CAS arbitrators considered that "the Applicant has failed to demonstrate that the IWF's conclusion that, based on the evidence before it, the conduct of the RWF brought the sport of weightlifting in disrepute, was unreasonable."[153]

Lastly, the RWF brought forward the much-used 'we were not the only ones!' argument. Indeed, it highlighted that the

[139] CAS OG 16/09, *RWF v. IWF*, Award of 3 August 2016, para. 7.5.
[140] Ibid.
[141] Ibid., para. 7.10.
[142] Ibid.
[143] Ibid.
[144] Ibid.
[145] Ibid., para. 7.11.
[146] Ibid., para. 7.12.
[147] Ibid.
[148] Ibid.
[149] Ibid.
[150] Ibid., para. 7.13.
[151] Ibid.
[152] Ibid.
[153] Ibid.

"retesting of the London and Beijing samples has not only resulted in AAFs [Adverse Analytical Findings or positive doping test] for Russian athletes, but also revealed AAFs for other member federations."[154] Yet, the Panel rebuked this argument by stating "that the situation in Russian weightlifting is - apparently - of a different dimension", as it "has not been reported nor submitted that other member federations are involved in a centrally dictated and managed doping program."[155] In this regard, it noted "the impressive number of 61 Russian weightlifters benefitted from the Disappearing Positive Methodology" and the fact "that the whole Russian delegation for the London Olympics was - according to the information provided - involved in doping."[156]

Once again, an IF taking a strong stance and barring the whole Russian team to participate in the Rio Olympics is vindicated by the CAS.

3.5 Saving the last Russian woman standing: the *Klishina* miracle

Darya Klishina is now an Olympic celebrity. She will not enter the history books for winning a gold medal or setting a world record, however. Instead, her idiosyncrasy lies in her nationality: she was the sole Russian athlete authorized to stand in the athletics competitions at the Rio Olympics. And yet, a few days before the start of the long jump contest in which she was due to take part, the IAAF surprisingly decided to revoke her eligibility.[157] Klishina successfully appealed the decision to the CAS ad hoc Division and, as a result, was allowed to compete at the Olympics.

Two important questions are raised by this case:

- Why did the IAAF changed its mind and decide to retract Klishina's authorization to participate?
- Why did the CAS overturn this decision?

3.5.1 The IAAF's second thoughts over the implication of Klishina

So, what happened between 9 July, when Klishina was first green lighted by the IAAF Doping Review Board (IAAF DRB) and 10 August when the IAAF DRB revoked its previous decision to let her compete? Basically, the publication of the *McLaren* Report, and the communication of evidence showing "that the Applicant had been directly affected and tainted by the state-organised doping scheme described in the IP Report."[158] More concretely, according to the Report, Klishina was affected in the following three ways:

(i) "a sample collected on 26 February 2014, yielding a T/E ratio of 8.5, had been subject to a "SAVE" order by the Ministry of Sport on 3 March 2014;
(ii) a sample collected on 17 October 2014 and subsequently seized by WADA on December 2014 was found to bear marks and scratches consistent with the removal of the cap and contained urine from the Applicant but also from another female athlete; and
(iii) a sample collected on the occasion of the 2013 IAAF World Championships in Moscow was also found to bear marks and scratches consistent with the removal of the cap."[159]

In its original decision, the IAAF DRB had reserved its right "to reconsider the Applicant's case should information ever be brought to its attention (including but not limited to as a result of the current investigation being conducted by Professor McLaren on behalf of WADA) that the Doping Review Board considers is such as to undermine the basis upon which the application was accepted."[160] Thus, unsurprisingly, the CAS acknowledged that the IAAF DRB had the competence to reconsider the eligibility granted to the athlete. Nonetheless, unexpectedly, it found that such reconsideration was not legitimate.

3.5.2 The surprising decision of the CAS to let Klishina jump

Klishina won in front of the CAS. From an outsider's perspective this must be a surprising decision, since she was at least as implicated in the IP Report as numerous other Russian athletes who were barred from entering the Games. Indeed, she had clearly profited from being "saved" by the Russian Ministry of Sport. So why did the CAS decide to let her jump?

This decision is intimately linked with the legal basis of the original decision of the IAAF DRB. Despite the repeated view of the IOC that the IAAF policy was stricter than its own,[161] the *Klishina* case demonstrates that this is not universally true in practice. The main point was that in its previous decision the IAAF DRB had recognized that since 1 January 2014, Klishina "had been subject to fully

[154] Ibid., para. 7.14.

[155] Ibid.

[156] Ibid.

[157] BBC, Rio Olympics 2016: Russia's Darya Klishina Banned by IAAF, 13 August 2016. http://www.bbc.com/sport/olympics/37073758. Accessed 25 January 2017.

[158] CAS OG 16/24, *Darya Klishina v. IAAF*, Award of 15 August 2016, para. 2.12.

[159] Ibid.

[160] Ibid., para. 2.8.

[161] CAS OG 16/13, *Anastasia Karabelshikova and Ivan Podshivalov v. World Rowing Federation (FISA) and International Olympic Committee (IOC)*, Award of 4 August 2016, para. 7.14 and CAS OG 16/12, *Ivan Balandin v. FISA & IOC*, Award of 4 August 2016, para. 7.22.

compliant drug testing in- and out-of-competition"[162] and therefore fulfilled the criteria enshrined in the IAAF Competition rule 22.1A(b). This was based on the following factual findings:

- "The fact that she had spent 632 days out of Russia, being 86.6% of her time, in the Relevant Period;
- She had relocated permanently to the United States in March 2014 and had been trained under a US coach since October 2013;
- She regularly competes in competitions on the international circuit;
- A total of 11 samples had been collected from the Applicant outside of Russia in the Relevant Period;
- 1 sample had been collected by the IAAF since June 2016 and sent for analysis by a laboratory outside of Russia."[163]

The question is then whether the new information, indicating that Klishina was implicated and benefitted from the Russian doping scheme, recognized as valid by the Panel,[164] could justify revisiting the first decision. In other words, could this new information lead to reconsidering the eligibility of Klishina under the regime of IAAF Competition rule 22.1A(b) on which the original decision was based? To assess this, the Panel started by pointing out that the rule "is not the same as the decision of the IOC Executive Board made after the publication of the IP Report. (…) As the parties agreed, the IOC Executive Board decision is not in evidence in this case and decisions of the Ad hoc Panel of the CAS for the Games of the XXXI Olympiad in Rio de Janeiro as to the application of, or the terms of, the IOC Executive Board decision are not applicable."[165]

The CAS Panel insisted that the IAAF's DRB "was comfortably satisfied that during the Relevant Period the Applicant satisfied each of the criteria set out in the Rule for exceptional eligibility, notwithstanding the suspension of the National Federation."[166] Furthermore, "in making its findings, the DRB was aware of, and took no account of, tests conducted in Russia and that it was cognisant of inadequacies in the system of testing in Russia, for which RusAF had been suspended."[167] Those are decisive conclusions that will lead to the second decision being set aside. The CAS Panel was of the view "that the conclusion reached in the Second Decision, and the basis for that decision, are not in accordance with the Rule which was purportedly invoked."[168] It is so, because "the further evidence considered by the DRB for the purposes of the Second Decision did not undermine its finding in the First Decision that the Applicant was eligible to compete by reason of her compliance with the Rule."[169] This analysis led to a seemingly unfair solution as the undisputed evidence pointed at Klishina profiting not once but on three occasions from the Russian doping scheme.

This decision is grounded on the following legal reasoning: the Panel considered that the "implication [of Klishina in the State-doping system] is not relevant to the application of criteria which, if fulfilled, mean that for the purposes of the Rule [22 IAAF], the Applicant is not affected or tainted by the failures of the National Federation."[170] Indeed, the IAAF Rule "provides for a mechanism or a basis by which an athlete is granted exceptional eligibility."[171] And this "mechanism is fulfilment of the two criteria which, for this athlete, was established by the DRB in the First Decision."[172] Thus, the "fact that the athlete was subjected to or the subject of drug testing that was not fully compliant during the Relevant Period does not derogate from the fact that she was, during the Relevant Period (that is, 'a *sufficiently long period*'), subject to fully compliant drug testing in- and out-of- competition by reason of the fact that she was during that time training in and resident in the United States and not in Russia."[173] Additionally, "there is no evidence to suggest that the testing that she was subject to was other than equivalent in quality to the testing to which her competitors were subject."[174] In other words, "an athlete may have undergone non-compliant testing while concurrently being subject to fully compliant testing and still fulfil the second criterion."[175] This is comforted by the fact "that the Rule is addressed to the suspension of any International Federation for failure to put in place an adequate system and the impact on the eligibility of the athlete" and the "criteria are directed to the establishment by an athlete that he or she is outside the country of his or her National Federation during the Relevant Period."[176] Hence, it "is not addressed to the implication of an athlete in a defective system."[177] Instead, "it states that an

[162] CAS OG 16/24, *Darya Klishina v. IAAF*, Award of 15 August 2016, para. 7.3.
[163] Ibid., para. 7.14.
[164] Ibid., paras. 7.40–45.
[165] Ibid., para. 7.24.
[166] Ibid., para. 7.34.
[167] Ibid., para. 7.35.
[168] Ibid., para. 7.46.
[169] Ibid.
[170] Ibid., para. 7.56.
[171] Ibid.
[172] Ibid.
[173] Ibid., para. 7.57.
[174] Ibid.
[175] Ibid., para. 7.58.
[176] Ibid., para. 7.60.
[177] Ibid.

athlete is taken not to be affected or tainted by the action of the National Federation if he or she was subject to other, compliant systems outside of the country."[178] In a nutshell, for the CAS Panel, the "relevant question is not whether the athlete was affected by the Russian System, or how, or whether she had knowledge of the way in which the system worked."[179] No, the only question is "whether she fulfilled the criteria of the Rule."[180] And the direct answer to that question is: she did early July; and she still does in August!

This case is disconcerting as it contradicts the line of cases regarding the implication of athletes in the IP Report discussed above. The CAS relied on the ambiguous wording of the IAAF provision to offer an escape route to Klishina. In doing so, it disregarded the spirit and objective of the provision, which was to provide a mechanism for athletes who were not personally tainted by the Russian doping scandal to participate in IAAF competitions. Yet, another aspect of the case is even more bizarre. Why did the IOC not block the eligibility of Klishina on the basis of paragraph 2 of the IOC Decision? She was undoubtedly implicated and benefited from the scheme. In fact, only one of the three sources of implication provided by McLaren should (and would) have been enough for the IOC Review Panel and the CAS arbitrator reviewing her eligibility to discard her from the Olympics.[181] It did not happen, Zeus only knows…

3.6 Conclusion

In general, the CAS has been willing, with the exceptions of Efimova and Klishina, to approve the ineligibility of Russian athletes. Rightfully, in my view, the CAS has supported the IFs that have opted for a strict approach in dealing with the eligibility of Russian athletes for the Rio Olympics. The CAS has also unsurprisingly rebutted the blunt rule of the IOC excluding Russian athletes who were previously sanctioned for doping. Nevertheless, it has surprisingly let Klishina participate, in spite of all the factual elements pointing at her being implicated in, and having profited from, the Russian state-doping scheme. Overall, the CAS ad hoc Division has served its purpose as a review instance well, forcing the IFs and the IOC to properly justify their decisions and providing an avenue for the Russian athletes to be heard.

These cases also highlight the variety/plurality of responses to the Russian doping scandal and its impact on the eligibility of Russian athletes for the Rio Olympics. It seems that some IFs have taken WADA's call for a strong response seriously.[182] Unfortunately, and this is one of the negative consequences of the IOC's decision to delegate the final decision to the IFs, due to a lack of information, it is impossible to assess the different policies of the IFs which have not faced (due to their reluctance to act or else) a challenge of their eligibility decisions in front of the CAS ad hoc Division. In light of recent revelations concerning the International Swimming Federation (FINA), it is likely that a number of IFs decided to interpret narrowly the IOC criteria and waved through the overwhelming majority of Russian athletes without a proper check.[183]

Finally, the awards show that CAS arbitrators would have been ready to condone a general ineligibility of Russian athletes, with a narrow exception for those capable of proving that they were not affected by the scandal or who could not benefit from the scheme because they were residing outside of the Russian Federation. The CAS recognized the seriousness of the situation and the collective responsibility of Russia's SGBs. It seemed also ready to follow-up on this collective responsibility by endorsing collective ineligibilities that would most likely have been found compatible with the Russian athletes 'natural rights'. The CAS emphasized also its judicial restraint and respect for the autonomy of the SGBs and their decisions with regard to the Russian athletes. Hence, ultimately, the IOC's decision to let the Russian athletes compete at the Rio Olympics may have been politically unavoidable, but was certainly not legally mandated. I leave to the reader to appreciate whether this decision is compatible with the IOC's proclaimed fundamental values and its commitment to enforcing the WADC.

4 The 'IPC Award'

Finally, the last award of the CAS related to the Russian doping scandal concerned the use of clauses 9.2.2 and 9.3 of the IPC Constitution to suspend the Russian Paralympic Committee (RPC) for failing to fulfil its obligations as a member. The member's obligation provided in clause 2 of

[178] Ibid.

[179] Ibid.

[180] Ibid.

[181] IOC Review Panel Decides on the Participation of Russian Athletes at the Olympic Games Rio 2016, IOC Press Release, 4 August 2016. https://www.olympic.org/news/ioc-review-panel-decides-on-the-participation-of-russian-athletes-at-the-olympic-games-rio-2016. Accessed 25 January 2017.

[182] WADA Statement: Independent Investigation Confirms Russian State Manipulation of the Doping Control Process, WADA Press Release, 18 July 2016. https://www.wada-ama.org/en/media/news/2016-07/wada-statement-independent-investigation-confirms-russian-state-manipulation-of. Accessed 25 January 2017.

[183] FINA: swimming's governors surprised at anti-doping resignations, The Guardian, 4 September 2016.https://www.theguardian.com/sport/2016/sep/04/fina-swimming-governors-surprise-anti-doping-resignations. Accessed 25 January 2017.

the IPC Constitution includes the obligation "to comply with the World Anti-Doping Code"[184] and to "contribute to the creation of a drug-free sport environment for all Paralympic athletes in conjunction with the World Anti-Doping Agency (WADA)."[185] The RPC challenged the claim that it had failed to comply with these obligations. Furthermore, it considered that in any event the sanction applied was disproportionate.

4.1 Did the RPC fail to comply with its membership obligations?

The RPC contested in full the factual findings of the *McLaren* Report. Yet, the Panel held that the RPC failed to provide the necessary evidence to rebut McLaren's factual claims. In particular, the RPC "decided not to cross-examine him although given the opportunity to do so"[186] and "did not call any athlete named by Professor McLaren as having been subject to the system he described."[187] In other words, "McLaren's evidence stands uncontradicted."[188] However, in light of the lack of precise information, the Panel refused to conclude at the IPC's request that "the RPC and its Board Members were involved in, or complicit in, or knew of the existence of State sponsored doping of athletes and the methodologies as set out in the IP Report."[189]

Nonetheless, the arbitrators also asserted that it is "undisputed that the RPC accepted the obligations imposed on it as a member of the IPC", and amongst those obligations there is "the specific obligation under Article 20.1 of the WADA Code to adopt and implement anti-doping policies and rules for the Paralympic Games which conform with the WADA Code."[190] Moreover, "the obligation vigorously to pursue all potential anti-doping rule violations within its jurisdiction and to investigate cases of doping (Article 20.4.10), are not passive."[191] Thus, at a national level "the RPC is the responsible entity having the obligation to the IPC as well as to the IPCs' members to ensure that no violations of the anti-doping system occur within Russia."[192] However, the mere "existence of the system as described in the IP Report and in the McLaren affidavit means that the RPC breached its obligations and conditions of membership of the IPC."[193]

Those are extremely important considerations to support the effectiveness of the world anti-doping system. In practice, the CAS is closing the door on national federations hiding behind the failure of other anti-doping bodies to deny their responsibility. If decided inversely, this would have led to a situation of organized irresponsibility, in which the bucket is simply passed over to a public institution (in Russia's case RUSADA) that cannot be effectively sanctioned under current anti-doping rules. Indeed, WADA declared RUSADA noncompliant, but RUSADA is not a member of sporting associations and it does not enter athletes in international sporting competitions. Consequently, SGBs would be hard pressed to find a way to impose any deterrent sanctions against it. If noncompliance is to be met with adequate sanctions, national SGBs, which are tasked to supervise specific sports at national level, must bear the indirect responsibility for the systemic failure of the anti-doping system operating in their home country.

4.2 Is the sanction imposed by the IPC proportionate?

As the Panel recognized from the outlet: "the more difficult question for consideration is whether the decision to suspend the RPC without reservation, or alleviation of the consequences to Russian Paralympic athletes, was proportionate."[194] The RPC submitted "that the IPC could have adopted a "softer measure" that still permitted clean Russian athletes to compete in the Paralympic Games in Rio."[195] Furthermore, it argued, "that a blanket prohibition is not justified, as it has not been established that all para-athletes nominated by the RPC have ever been implicated in doping."[196]

4.2.1 Whose rights are disproportionately affected?

The Panel considered first that as para-athletes are not parties to this appeal, "[q]uestions of athletes' rights that may not derive from the RPC, but of which they themselves are the original holder, such as rights of natural justice, or personality rights, or the right to have the same opportunities to compete as those afforded to Russian Olympic athletes by the IOC in its decision of 24 July 2016 regarding the Olympic Games Rio 2016, are not for this Panel to consider."[197] Instead, the "matter for review by this Panel is thus not the legitimacy of a "collective sanction" of athletes, but whether or not the IPC was

[184] IPC Constitution, Clause 2.1.1.

[185] IPC Constitution, Clause 2.27.

[186] CAS 2016/A/4745, *Russian Paralympic Committee v. International Paralympic Committee*, award of 23 August 2016, para. 43.

[187] Ibid., para. 44.

[188] Ibid., para. 43.

[189] Ibid., paras. 54 - 55.

[190] Ibid., para. 56.

[191] Ibid., para. 59.

[192] Ibid., para. 60.

[193] Ibid.

[194] Ibid., para. 73.

[195] Ibid., para. 76.

[196] Ibid.

[197] Ibid., para. 79.

entitled to suspend one of its (direct) members."[198] Furthermore, "the collective member cannot hide behind those individuals that it represents."[199]

Here the Panel adopted a relatively formalistic reasoning by denying the RPC the competence to invoke the rights of its members (the athletes). This might be in contradiction with the idea that athletes bear a responsibility for the noncompliance of their national SGBs. The RPC does, at least partly, represent the athletes, and there is a good case that can be made for it to be allowed to raise the potential infringements of the personality rights of its members in this procedure. It does not mean that the rights of the athletes were disproportionately affected, only that they should have been considered and not brushed aside at this preliminary stage as the Panel did in the present instance.

4.2.2 *The extraordinary nature of the RPC's regulatory failure*

Unfortunately, the award's analytical structure can lead to some confusion when dealing with the proportionality analysis of the IPC's decision. There are two (implicit) steps that are key in the decision. First, an analysis of the depth (and consequences) of the RPC's regulatory failure, and second an analysis of the proportionality of the sanction responding to this failure. The former will be dealt with in this section.

The Panel pointed out that the IPC "was faced with probative evidence of widespread systemic doping under the RPCs "watch"."[200] Moreover, as argued by the IPC, the RPC's failure to act is even more acute in light of the IPC's dependence on national members to implement its policies at national level. Thus, in particular, "the IPC relies on the RPC to ensure compliance in Russia with its zero tolerance anti-doping policy."[201] More generally, "this federal system with complementary international and national obligations is the core back-bone of the fight against doping."[202] In this context, the fact that the RPC claimed that "it did not know what was happening and that it had no control over those involved in the system described by Professor McLaren does not relieve the RPC of its obligations but makes matters worse."[203] Though it is unclear from the formulation used in this section of the award, the outcome of the case points undoubtedly to the fact that the Panel endorsed the IPC's understanding of the scope of responsibility of the RPC. Furthermore, the arbitrators insisted that the "damage caused by the systemic, non-compliance is substantial."[204] Concluding, therefore, that the RPC "had a non-delegable responsibility with respect to implementing an anti-doping policy in conformity with the WADA Code in Russia."[205] In other words, the RPC could not simply "delegate the consequences [of this responsibility] where other bodies within Russia acting as its agent implement a systemic system of doping and cover-up."[206]

4.2.3 *The proportionality of the sanction*

The key question in the proportionality analysis was whether the sanction inflicted upon the RPC was adequate and necessary to attain its aim. The reasoning of the Panel is piecemeal and spread around a number of paragraphs of the award, which are regrettably not well connected together.

The first question is whether the IPC was pursuing a legitimate objective when imposing a sanction on the RPC. On the IPC's own account, the sanction was considered "the only way to ensure that the system, and systematised doping, in Russia no longer continued."[207] It added "that it was a legitimate aim to send a message that made clear the lack of tolerance on the part of the IPC to such systemic failure in a country."[208] The Panel recognized that the "concern that clean athletes, inside and outside of Russia, have confidence in the ability to compete on a level playing field, and the integrity and credibility of the sporting contest, represent powerful countervailing factors to the collateral or reflexive effect on Russian athletes as a result of the suspension",[209] and constituted "an overriding public interest that the IPC was entitled to take into account in coming to the Decision."[210]

The second question linked to the proportionality of the sanction relates to its necessity. Was there a less restrictive alternative sanction available to attain the aim pursued? The IPC argued that the suspension of the RPC's membership was necessary for three reasons:

- "to provoke behavioural change (for the future) within the sphere of responsibility of the RPC";
- "the suspension took into account that the failures in the past had resulted in a distorted playing field on an international level, because the IPC anti-doping policy

[198] Ibid.
[199] Ibid.
[200] Ibid., para. 81.
[201] Ibid., para. 82.
[202] Ibid.
[203] Ibid.
[204] Ibid., para. 86.
[205] Ibid.
[206] Ibid.
[207] Ibid., para. 83.
[208] Ibid., para. 84.
[209] Ibid.
[210] Ibid.

was not being adequately enacted and enforced vis-à-vis para-athletes affiliated to RPC";

- "a strong message had to be issued to restore public confidence, since the Paralympic movement depends – much more than other sports – on the identification with moral values."[211]

The Panel held that the suspension was "a powerful message to restore public confidence." It insisted also that there "was no submission to the Panel of an alternative measure that would, comparably and effectively, restore a level playing field for the present and the immediate future, affect future behavioral change and restore public trust."[212]

Finally, the Panel concluded that "in light of the extent of the application of the system described by Professor McLaren and his findings of the system that prevailed in Russia, made beyond reasonable doubt, the Decision to suspend the national federation was not disproportionate."[213] Moreover, it insisted that the consequences for the athletes were following logically from the suspension of the RPC and therefore proportionate, as it had decided in the IAAF case. The Panel also brushed aside the RPC's attempt to portray the IPC's decision as contrary to the IOC Decision. On the one side, it found the IOC Decision to be irrelevant for the IPC and, on the other, it considered the IPC's suspension to be in any event compatible with the Decision.

The German courts (including the German Constitutional Court), before which the Russian athletes tried to challenge the IPC decision, later fully endorsed this approach.[214] They insisted that a balancing exercise between the interests of the athletes to participate in the Paralympic Games and the interests of the IPC to defend clean and doping-free competitions, would be decided to the benefit of the latter. Even though athletes might not be directly responsible of the state-doping scheme, they share the responsibility (as in the IAAF case) for the governance failures of their governing bodies.

5 Conclusion

The CAS has played (and will play in upcoming disputes) a key role in responding to the Russian doping scandal. This is in line with its general function as a judicial check on the autonomy of the SGBs, while also acknowledging their legitimate authority in setting the rules of the game. In the awards reviewed, it has clearly sided with the SGBs (e.g. IAAF, IPC, FISA, IWF) which have adopted a tougher stance *vis-à-vis* their Russian members and Russian athletes. Broadly speaking, there are three main takeaways from these cases:

– First, an athlete's eligibility to international sporting competitions cannot be severed from the status of her national SGBs. In other words, the athletes, as members of a national SGB, bear part of the responsibility for the SGB's failure to comply with, for example, its duties under the WADC. This does not preclude the introduction of legal mechanisms that, as the one introduced by the IAAF, would enable athletes to discharge this responsibility in specific circumstances.
– Second, IFs can impose painful sanctions upon their affiliates in case of noncompliance with their duties under the WADC. The CAS recognized that in order to function properly, the WADC needs to be supported at the national level, and to be supported at the national level noncompliance must be met with deterrent sanctions that will necessarily extend to the athletes affiliated with the noncompliant body. Again, the athletes are not passive members of a national SGB. They bear a share of the political (and in the end legal) responsibility attached to its governance.
– Third, the CAS has demonstrated that there was no fatality in taking a lenient road to deal with the Russian state-doping scandal. In the IAAF award, the Panel even left open the possibility for the IOC to decide that Russian athletes would have to compete under a neutral flag. This is a good reminder that the IOC's decisions to let the Russian athletes compete at the Rio Olympics, and thus dilute the negative effects of being caught organizing a comprehensive state-doping system (as was very recently evidenced by the second *McLaren* Report), was not a legally mandated decision but a political choice that deserves critical scrutiny.[215] Thus, the IPC's decision to find all Russian athletes ineligible for the Rio Paralympics was endorsed by both the CAS

[211] Ibid., para. 88.

[212] Ibid., para. 89.

[213] Ibid., para. 91.

[214] On the German rulings see A. Duval, The Russian Doping Scandal at the Court of Arbitration for Sport: The IPC's Rio Ineligibility of the Russian Paralympic Athletes, ASSER International Sports Law Blog, 18 January 2017. http://www.asser.nl/SportsLaw/Blog/post/the-russian-doping-scandal-at-the-court-of-arbitration-for-sport-the-ipc-s-rio-ineligibility-of-russian-paralympic-athletes. Accessed 25 January 2017.

[215] For such critical scrutiny, see Sean Ingle, The IOC has failed to Protect its Honest Athletes in the Doping Scandal, The Guardian, 31 July 2016. https://www.theguardian.com/sport/blog/2016/jul/31/ioc-russia-doping-athletes-rio-olympics. Accessed 25 January 2017.

and, remarkably, by the German Constitutional Court.[216]

At the time of writing, it is unclear where the Russian doping scandal will lead us next.[217] The IOC is still in the process of investigating the situation and determining whether it will adopt sanctions against the ROC.[218] The IAAF and the IPC are now in a second phase, aimed at monitoring with the help of WADA and independent taskforces the evolution of Russia's anti-doping policies.[219] Once Russia's policies will be deemed compliant with the IAAF and IPC's reinstatement criteria, the Russian SGBs will recover their full membership rights and Russian athletes their eligibility for international competitions. Finally, WADA is still trying to re-organize its operation to strengthen its compliance capabilities.[220]

The Russian doping scandal has highlighted many unsuspected weaknesses of the world anti-doping system. First, it has become clear that the WADC is not self-applicable. In fact, harmonizing the anti-doping rules was not sufficient to have the levelling, or "defragmenting",[221] effect hoped for.[222] In other words, we are re-discovering in the anti-doping context the well-known distinction between law in the books and law in action.[223] Second, and logically following from this first lesson, the national (and local) level matters very much for the concrete operation of the WADC. The world anti-doping system does not constitute a separate transnational legal order disconnected from national laws. Nor did the entry into force of the UNESCO Convention really put an end to the diversity of approaches to anti-doping at the national level.[224] Legal pluralism and particularism characterize the enforcement and implementation of the WADC in a world akin to a mosaic of diverse regulatory realities.[225] Instead of evidencing the emergence of an overarching global administrative law, as envisaged for example by Lorenzo Casini,[226] the WADC has been rather the embodiment of what one could call 'glocal administrative law'.[227] Third, it is now obvious that WADA is a weak institution as far as its capacity to monitor and enforce the WADC is concerned.[228] In enforcing the Code, WADA must rely on the goodwill of national authorities and their material capacity to deploy efficient anti-doping policies. Moreover, the enforcement of the WADC is also dependent on the willingness of SGBs to sanction their members (and ultimately the athletes) for their noncompliance with the Code. WADA is constructed as a toothless tiger deprived of the private or public power to enforce its claim to authority. At best it can flag and publically shame noncompliant public or private authorities, but if the SGBs do not follow through on the information provided, its capacity to give real bite to the WADC ends there. In other words, we need to make peace with the fact that the world anti-doping system is currently an asymmetric, diachronic and heterarchic transnational regulatory "assemblage",[229] rather than a neat hierarchical global regulatory construct.

In this regard, the often-obsessive focus of the media (and some legal scholars) on WADA and its Code obfuscate in my view the complex transnational/glocal geography of the world anti-doping system.[230] Interestingly, the CAS has shown a good grasp of this particular reality in assessing the responsibilities of national SGBs and athletes in the Russian doping scandal. In any event, it is time for WADA to be reformed to match the challenges posed by this peculiar transnational/glocal regulatory landscape, and for the SGBs to fully commit to supporting WADA in doing so. Until now, it seems that the world anti-doping system has been good at catching

[216] See A. Duval, The Russian Doping Scandal at the Court of Arbitration for Sport: The IPC's Rio Ineligibility of the Russian Paralympic Athletes, ASSER International Sports Law Blog, 18 January 2017. http://www.asser.nl/SportsLaw/Blog/post/the-russian-doping-scandal-at-the-court-of-arbitration-for-sport-the-ipc-s-rio-ineligibility-of-russian-paralympic-athletes. Accessed 25 January 2017.

[217] Nick Butler, What is Likely to Happen Next in the Struggle Against Russian Doping, Inside The Games, 16 January 2017. http://www.insidethegames.biz/articles/1045894/nick-butler-what-is-likely-to-happen-next-in-the-struggle-against-russian-doping. Accessed 25 January 2017.

[218] Declaration of the IOC Executive Board, IOC Press Release, 7 December 2016. https://www.olympic.org/news/declaration-of-the-ioc-executive-board. Accessed 25 January 2017.

[219] Information on the Suspension of the Russian Paralympic Committee (RPC) by the IPC, IPC Press Release, 21 November 2016. https://www.paralympic.org//russian-paralympic-committee-suspension. Accessed 25 January 2017 and Standing Tall for Clean Athletes – IAAF Council Meeting, Day 2, IAAF Press Release, 1 December 2016. https://www.iaaf.org/news/press-release/council-meeting-2016-rusaf. Accessed 25 January 2017.

[220] In this regard, I have outlined a number of potential reforms in Duval (2016b).

[221] Latty (2011).

[222] The idea that harmonizing the rules would be the miracle cure to doping was at the heart of the IOC's drive for the creation of WADA. See IOC Medical Commission (1999). See also more recently: Foschi (2006); Latty (2007), p. 411; DeFrantz (2009); and Mitten and Opie (2010), pp. 282–283.

[223] On this old distinction see Pound (1910).

[224] As hoped by many, see for example Wagner (2011).

[225] See on the prevalence of this pluralism Vidar Hanstad et al. (2010) and Soulé and Lestrelin (2012).

[226] See Casini (2009).

[227] For a similar conclusion framed differently, see Demesley and Trabal (2007) and Soulé and Lestrelin (2012), pp. 149–151.

[228] Contrary to what some considered recently, see Casini (2009), p. 446. See also for high hopes Houlihan (2002).

[229] Sassen (2006).

[230] Calling for a similar new research agenda, see Amos and Fridman (2009), p. 368.

poor or poorly advised athletes, unable to rely on the adequate support to navigate or circumvent the anti-doping rules and procedures. For example, the many cocaine cases are a symptom of this tendency to catch the ill-informed and careless.[231] I personally hope the Russian doping scandal will help to shift the focus towards enhancing our understanding of the complex operation of the network of institutions active in the fight against doping and of their respective responsibilities in ensuring a doping-free environment.[232] This would imply both a renewed focus on a critical descriptive analysis of the operation of the system at the local level(s) and from a normative perspective the willingness to take potential local shortcomings seriously and, thus, to actively support the capacity of a weak centre (WADA) in sanctioning them. Fortunately, in its awards dealing with the Russian doping scandal, the CAS has shown a willingness to embrace such an endeavour.

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[231] See the CAS' cocaine cases reviewed in Duval (2015).

[232] Already in favour of such a shift, see Demesley and Trabal (2007), p. 160.