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GLOBAL HYBRID PUBLIC-PRIVATE BODIES:  
THE WORLD ANTI-DOPING AGENCY (WADA)

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### *Introduction*

In 1960, at the opening ceremony of the Rome Olympics, when the unified German team entered the stadium for the Parade of Nations, the President of the International Olympic Committee (IOC) Avery Brundage, addressing himself to Giovanni Gronchi, then President of the Italian Republic, observed: “East German athletes and West German athletes in the same uniform marching behind the same leaders and the same flag”. “Impossible”, Gronchi replied. To which Brundage responded, “While it might be impossible politically, in the nonpolitical Olympic Games, such surprising things can happen”; adding that “Contestants on Olympic fields are individual athletes and not countries. Neither ideologies of different kinds nor political systems are at stake. In the Olympic Games, it is pure sport and sport only. German sport leaders are demonstrating their devotion to the Olympic idea in a way that will make sport history”<sup>1</sup>.

This episode illustrates one of the most compelling dualities of the sports governance regime<sup>2</sup>: the relationship between sports and politics at the global level<sup>3</sup>. Whilst sports institutions – and the IOC in particular – have traditionally proclaimed their independence from public authorities<sup>4</sup>, at the same time the connections between these two spheres – one private, the other public – are numerous<sup>5</sup>: the recent political protests against the Beijing Olympics provide only one of the most recent examples<sup>6</sup>. Moreover, with the growing

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<sup>1</sup> D. Maraniss, *Rome 1960. The Olympics that changed the world*, New York (2008), at p. 97 f.

<sup>2</sup> The term regime refers here to the notion of “international regime”, that can be defined as “principles, norms, rules, and decision making procedures around which actor expectations converge in a given issue-area” (S.D. Krasner, “Structural causes and regime consequences: regimes as intervening variables”, in *International Regimes*, ed. by S.D. Krasner, Ithaca and London, Cornell University Press (1983), p. 1 et seq., here 1)

<sup>3</sup> T. Humphrey, “The Politics of Sport: The Why, When and How of Sports Law Development and Implementation”, *I.S.L.R.* (2008) 30.

<sup>4</sup> See, for instance, art. 6.1. of the Olympic Charter (“competitions between athletes in individual or team events and not between countries”) or art. 29.4, in which it is established that governments or other public authorities shall not designate any members of a National Olympic Committee (NOC) (even though an NOC may decide, at its discretion, to elect as members representatives of such authorities).

<sup>5</sup> J.D. Spotts, “Global Politics and the Olympic Games: Separating the Two Oldest Games in History”, *13 Dick. J. Int'l L.* (1994) 103.

<sup>6</sup> Following European protests against the violent repressive action of the Chinese government in Tibet (protests in Paris and London tried to stop the journey of the Olympic torch to Beijing), the President of the

importance (political, social, and economic) of sports events, the level of political pressure on sports regimes has increased apace<sup>7</sup>.

Relations between private sports regimes and public authorities, however, are not only those of contrasts or conflicts, but can also include forms of both procedural and institutional cooperation. In fact, the sports sector provides a good example for analyzing many different forms of public and private partnerships (PPPs)<sup>8</sup>. Instances of this type of collaboration can be seen in the jointly led initiative in the fight against HIV by the IOC and the UN, or in agreements concluded between the ILO and the Fédération Internationale de Football Association (FIFA) intended to help in the fight against the use of child labor. The most important example of this kind of relationship between States and the sports regime, however, comes from the field of anti-doping. Acting in concert, States, sporting institutions and members of the international community have created a body that is emblematic of the emergence of the new forms of hybrid public-private governance mechanism in the global sphere: the World Anti-Doping Agency (WADA)<sup>9</sup>.

The purpose of this paper is to examine the structure and activities of this institution, in order to highlight a number of problems concerning public-private relationships at the global level more generally. Section 1 will outline the context in which WADA operates (i.e. the Olympic movement) and the role that public authorities play in it. Section 2 will examine WADA's organization and functions, as well as its most important achievement thus far: the World Anti-Doping Code (WADC)<sup>10</sup>. Lastly, section 3 will identify the main

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IOC emphasized the incompatibility between the Olympic values and any form of violence, and went on to ask China to reach a quick and peaceful solution to the controversy (*Olympic Official Calls Protests a 'Crisis'*, in *New York Times*, 11 April 2008). During the organization of the Beijing games, another issue that arose was the procedures followed in the construction of the Olympic venues: see M.M. Hopkins, *Olympic Ideal Demolished: How Forced Evictions in China Related To The 2008 Olympic Games Are Violating International Law*, in 29 *Houston Journal of International Law* 155 (2006). More generally, see S. Brownell, *Beijing's Games. What the Olympics Mean to China*, Plymouth, Rowman & Littlefield (2008).

<sup>7</sup> J.A.R. Nafziger, "The Future Of International Sports Law", *Willamette Law Review* (2006) 861.

<sup>8</sup> The term Public/Private Partnerships (PPPs) here is meant in a broad sense, to indicate the more general phenomenon of privatization and of collaboration between public authorities and private actors.

<sup>9</sup> C. Miège and J.-C. Lapouble, *Sport & Organisations Internationales*, Paris, Economica (2004), p. 215 et seq., A. Van Varenbergh, "Regulatory features and administrative law dimensions of the Olympic movement's anti-doping regime", IILJ Working Paper 2005/11 (Global Administrative Law Series), and J.-L. Chappelet and B. Kübler-Mabbott, *The International Olympic Committee and the Olympic System: The governance of sport*, Routledge, Abingdon (2008), p. 132 et seq.

<sup>10</sup> P. David, *A Guide to the World Anti-Doping Code. A Fight for the Spirit of Sport*, Cambridge, Cambridge University Press (2008).

challenges raised by this form of global public-private partnership; in particular, an analysis of WADA allows us to shed light on broader global governance trends affecting areas such as the institutional design of private regimes, the formation of global private “law”, and the increasing adoption of administrative law-type principles and mechanisms in global decision-(and rule-)making procedures.

### 1. *The Olympic regime and the relationship between sporting institutions and public authorities*

In August 2008, in Beijing, over 10,000 athletes from 205 nations – more than the 192 UN Members – competed for over 300 gold medals at the most important sports event in human history: the Olympics Games<sup>11</sup>. The Olympics provide us with the most powerful example of the universal value of sport<sup>12</sup>. Since the end of the 19<sup>th</sup> century, an incredibly complex system has been created to regulate this: the Olympic Movement<sup>13</sup>. It is governed by the International Olympic Committee (IOC), and draws on the Olympic Charter to form its very own “Constitution”, which sets forth not only the fundamental principles and rules of the Olympic Games (see, for instance, the “Fundamental Principles of Olympism”, in which it is proclaimed that “the practice of sport is a human right”), but also the organizational and procedural rules governing the Olympic movement<sup>14</sup>. From this perspective, the development of the global sports order represents an example of

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<sup>11</sup> D. Wallechinsky, J. Loucky, *The Complete Book of the Olympics*, London (2008); in Athens 1896, there were around 250 athletes, from 14 countries competing in 43 events; in Rome 1960, there were over 5,000 athletes, from 83 countries competing in 150 events. The total amount for European Broadcasting Union Contracts for Beijing 2008 was over 400 million US\$, whilst it was 28 million US\$ for Seoul (1988); in the last twenty years, the amount for U.S. Television Networks for Summer Olympics has risen from 300 million US\$ to 900 million US\$ (*Encyclopedia of the Modern Olympic Movement*, ed. by J.E. Findling and K.D. Pelle, London (2004), at p. 515).

<sup>12</sup> A. Tomlinson, *Olympic survivals: The Olympic Games as a Global Phenomenon*, in *The Global Politics of Sport. The Role of Global Institutions in Sport*, ed. by L. Allison, London (2005), p. 46 et seq.

<sup>13</sup> J.-L. Chappelet and B. Kübler-Mabbott, *The International Olympic Committee and the Olympic System: The governance of sport*, quoted.

<sup>14</sup> The Olympic Charter, then, is a “basic instrument of a constitutional nature”, that sets forth and recalls the Fundamental Principles and essential values of Olympism, serves as statute for the International Olympic Committee, and defines the main reciprocal rights and obligations of the three main constituents of the Olympic Movement, namely the International Olympic Committee, the International Federations and the National Olympic Committees, as well as the Organizing Committees for the Olympic Games, all of which are required to comply with the Olympic Charter (see Introduction to the Olympic Charter: [http://multimedia.olympic.org/pdf/en\\_report\\_122.pdf](http://multimedia.olympic.org/pdf/en_report_122.pdf)).

constitutionalism close to that of the British tradition: “a tradition of continuity, legitimacy pluralism and the spontaneous evolution of a legal order”<sup>15</sup>.

Beside the IOC, the system is built upon two categories of institutions: the International Federations (IFs) – which set the “rules of the game” for each sport, acting like global standard setters<sup>16</sup> – and the National Olympic Committees (NOCs). The IOC recognizes only one IF for each sport, and only one NOC per country. The National Federations (NFs, charged with the regulation of each sport at the national level) are then associated to their respective IFs and NOC. This structure has been described as a “double pyramid”, one relating to the relationship of IOC with the NOCs, the other relating to the relationship of the IFs to the NFs<sup>17</sup>; however, the system seems better understood as a series of “multiple pyramids”, meaning those that relate the IOC to the NOCs, on one hand, and to the many IFs of different sports (35, to count only those IFs that are within the Olympic Movement) and the respective NFs on the other. Further, these pyramids are linked to each other, both vertically and horizontally: for instance, to be recognized by the IOC, NOCs must include every NF affiliated with an IF<sup>18</sup>.

The field of sports regulation has thus generated a very complex set of subjects and norms, and has even established its own dispute settlement body (the Court of Arbitration of Sport (CAS))<sup>19</sup>: it is for this reason that some speak of “International Sports Law”<sup>20</sup>, “Global Sports Law”<sup>21</sup> or *lex sportiva* (the latter refers specifically to the law produced by

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<sup>15</sup> C. Möllers, *Transnational Governance Without A Public Law?*, in *Transnational Governance and Constitutionalism*, ed. by C. Joerges, I.-J. Sand, G. Teubner, Oxford (2004), p. 329 et seq., who adds that “it is not a tradition of founding a new order, but of limiting, organising and controlling a pre-existing (and pre-democratic) one” (p. 334-335).

<sup>16</sup> See C. Dordi, “Le federazioni sportive internazionali”, in *Diritto internazionale dello sport*, ed. by E. Greppi and M. Vellano, Torino, Giappichelli (2005), p. 71 et seq., and R. Socini Leyendecker, “Les federations sportives internationales dans le domaine des organisations non-gouvernementales”, in *Annuaire de l'Association des Auditeurs et Anciens Auditeurs de l'Académie de Droit International de La Haye*, vol. 42/43-1972/73, La Haye, 1975, p. 41 et seq., who highlights that a distinguishing feature of IFs amongst international organizations is their “normative” functions (p. 43).

<sup>17</sup> M.R. Will, “Les structures du sport international”, in *Scritti in onore di Rodolfo Sacco*, ed. by P. Cendon, Milano, Giuffrè (1994), p. 1211 et seq.

<sup>18</sup> Olympic Charter, Art. 29.

<sup>19</sup> D.H. Yi, “Turning Medals Into Medal: Evaluating The Court Of Arbitration of Sport As An International Tribunal”, 6 *Asper Review of International Trade & Business Law* 289 (2006), and *The Court Of Arbitration For Sport 1984-2004*, ed. by I.S. Blackshaw, R.C.R. Siekmann and J. Soek, The Hague (2006).

<sup>20</sup> J.A.R. Nafziger, *International Sports Law*, II ed., New York, Transnational Publishers (2004) (the first edition has been published in 1988).

<sup>21</sup> K. Foster, “Is There a Global Sports Law?”, 2 *Entertainment Law* (2003) 1.

the CAS)<sup>22</sup>. Many scholars, then, have taken sports regulation as a paradigmatic example that can shed light on the broader issues relating to the coexistence of many legal orders more generally<sup>23</sup>. There exists, in fact, one Olympic regime, ruled by the IOC, and many other international sports regimes (as many as there are international sports) ruled by each IF; most of the IFs are members of the Olympic Movement, but some fall outside the IOC's jurisdiction (such the International Cricket Council and the Fédération Internationale de l'Automobile, which regulate sports that don't compete in the Olympics).

The main characteristic of sports regimes is that they are private and voluntary; therefore, some have asserted that they don't belong to the field of public international law, but, rather, to that of transnational law<sup>24</sup>. The IOC is a non-governmental organization, based in Lausanne; and the IFs governing different sports are similarly all private bodies. Moreover, sports can be analogized with other global private regimes, such as the Internet and the Domain Names System governed by the Internet Corporation for Assigned Names and Numbers (ICANN)<sup>25</sup>. In addition, the principle of one national body per country is characteristic not only of the Olympic movement, but also the DNS (there is only one registry for "country-code domain name", such as ".ch" or ".uk"), the International Organization for Standardization (ISO)<sup>26</sup> and the Red Cross and Red Crescent Movement<sup>27</sup>.

However, in spite of the private nature of the Olympic regime, and in light of the increasing relevance of sport in many fields (political, economical, and social), States and public authorities are playing an increasingly important role in global sports regulation. Furthermore, NOCs are under the jurisdiction of their own States, and are, in some circumstances, themselves public administrations (as in France and in Italy, for example).

The relationships between the sports regimes, in particular the Olympic regime, and

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<sup>22</sup> M. Beloff, "Is there a lex sportiva?", *I.S.L.R.* 3 (2005) 49, J.A.R. Nafziger, "Lex Sportiva", *ISLJ* (2004) 3, and A. Röthel, "Lex mercatoria, lex sportiva, lex technica – Private rechtsetzung jenseits des Nationalstaats?", 62 *Juristen Zeitung* (2007) 755.

<sup>23</sup> S. Romano, *L'ordinamento giuridico*, Pisa (1917), W. Cesarini Sforza, "La teoria degli ordinamenti giuridici e il diritto sportivo", in *Foro it.* (1933), c. 1381, and M.S. Giannini, "Prime osservazioni sugli ordinamenti giuridici sportivi", *Riv. dir. sport.* (1949) 1. More recently, see F. Latty, *La lex sportiva. Recherche sur le droit ransnational*, Leiden-Boston, Martinus Nijhoff (2007).

<sup>24</sup> F. Latty, *La lex sportiva. Recherche sur le droit ransnational*, quoted.

<sup>25</sup> D. Lindsay, *International Domain Name Law. ICANN and the UDRP*, Portland, 2007.

<sup>26</sup> Art. 3, point 3.2, *Iso Statutes*.

<sup>27</sup> Art. 4, *Statute of the International Red Cross and Red Crescent Movement*.

States can be categorized in different ways<sup>28</sup>. Firstly, in some cases the International Community recognizes *de facto* the sports governance body, even in the absence of a formal act that gives this body an international legal status<sup>29</sup>: two examples relating to the IOC are the protection of the Olympic symbol (see the Nairobi Treaty signed in 1981), and the Olympic truce (the “ekecheiria”: see the resolution UN A/RES/62/4 *Building a peaceful and better world through sport and the Olympic ideal*, adopted in 2007 by the General Assembly). Secondly, there are many examples of reciprocal influences between States and sports: the “ping-pong diplomacy” between the USA and China in the 1970s; the fight against the apartheid and the exclusion of South Africa from the Tokyo Olympic Games in 1964; and the reciprocal “boycotts” between U.S.A. and U.S.S.R. during the Cold War<sup>30</sup>. Thirdly, States (including, on occasion, public NOCs) might act in violation of the Olympic Charter or the regulations of the relevant IF (e.g. the divergences between IOC and Italy as to anti-doping rules during the 2006 Winter Games in Turin<sup>31</sup>); in such cases, a conflict between public authorities and international sports institutions emerges<sup>32</sup>. More important, however, is where the global regulation of sports begins to impact upon fields subject to the jurisdiction of States, as happens when sports norms affect fundamental rights or economic activities provided for or regulated by law (this often happens in EC law, as in, for

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<sup>28</sup> Most of these relationships are regulated directly by the Olympic charter, in which the term “countries” – i.e. independent State recognised by the international community (art. 31, Olympic Charter) – occurs around thirty times. Similarly, the term “governments” is used around ten times, usually in order to underline the independence of sport from politics (see for instance art. 29, Olympic charter).

<sup>29</sup> C. Vedder, “The International Olympic Committee: An Advanced Non-Governmental Organization and International Law”, *German Yearbook of International Law*, 1984, p. 232 ss., D.J. Ettinger, “The Legal Status of The International Olympic Committee”, 4 *Pace Yearbook of International Law* 97 (1992), F. Latty, *Le Comité internationale olympique et le droit international*, Paris (2001).

<sup>30</sup> *Sport, Droit et Relations Internationales*, sous la direction de P. Collomb, Paris, Economica (1988).

<sup>31</sup> T. Schultz, “La *lex sportiva* se manifeste aux Jeux olympiques de Turin: suprématie du droit non étatique et boucle étranges”, *JusLetter* 20 February 2006.

<sup>32</sup> See for instance art. 37.2 of the Olympic charter: “In the event of non compliance with the Olympic Charter or other regulations or instructions of the IOC, or a breach of the obligations entered into by the NOC, the OCOG or the host city, the IOC is entitled to withdraw, at any time and with immediate effect, the organisation of the Olympic Games from the host city, the OCOG and the NOC, without prejudice to compensation for any damage thereby caused to the IOC. In such a case, the NOC, the OCOG, the host city, the country of the host city and all their governmental or other authorities, or any other party, whether at any city, local, state, provincial, other regional or national level, shall have no claim for any form of compensation against the IOC”.

example, the well-known “Bosman” case<sup>33</sup>). Lastly, there are cases of “cooperation” between sporting institutions and public authorities. The Olympic charter, for instance, states that the IOC’s role is also “to cooperate with the competent public or private organizations and authorities in the endeavour to place sport at the service of humanity and thereby to promote peace” (art. 2.4); at the national level, “in order to fulfill their mission, the NOCs may cooperate with governmental bodies, with which they shall achieve harmonious relations” (art. 28.5). The fight against doping and the action of WADA belongs to this latter category: the cooperation between a private sports regime, on one side, and public authorities on the other.

## 2. *The fight against doping and the World Anti-Doping Agency (WADA)*

The phenomenon of doping has always occurred in sports, with peaks in the 1960s and in the 1980s that led to the creation of the IOC Medical Commission and to the adoption of the Anti-Doping Charter for Sport by the Council of Europe<sup>34</sup>. However, the decade between the end of 1980s and 1990s has been marked by several scandals (in, amongst others, athletics, swimming, and cycling)<sup>35</sup>.

In response to the huge increase of doping cases (such as, for example, the scandal that shocked the cycling world in the summer of 1998), the IOC convened a new World Conference on Doping in Sport (there had been four conferences previously, the first in Ottawa in 1988). Held in Lausanne in February 1999, the Conference produced a Declaration on Doping in Sport, in which the creation of “an independent international anti-doping agency” was proposed. Pursuant to the terms of the Declaration, the WADA was created on 10 November 1999 in Lausanne to promote and coordinate the fight against

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<sup>33</sup> European Court of Justice, Judgement of 15 December 1995, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, Case C-415/93.

<sup>34</sup> For an interesting overview, see J. Todd and T. Todd, “Significant Events in the History of Drug Testing and the Olympic Movement: 1960-1999”, in *Doping in Elite Sport: The Politics of Drugs in the Olympic Movement*, ed. by W. Wilson and E. Derse, Champaign, Human Kinetics Publishers (2001), at p. 65 et seq.

<sup>35</sup> See *Drugs and Doping in Sport: Socio-Legal Perspectives*, ed. by J. O’Leary, London, Cavendish (2001).



doping in sport internationally<sup>36</sup>.

### 2.1. *An equal public-private partnership: WADA's structure*

From the legal perspective, WADA is a private foundation governed by its Constitutive Instrument, and by Articles 80 et seq. of the Swiss Civil Code. It has been set up under the initiative of the IOC, with the support and participation of intergovernmental organizations, governments, public authorities, and other public and private bodies fighting against doping in sport<sup>37</sup>. WADA's headquarters are in Montreal and it has four regional offices based in Europe (Lausanne), Asia/Oceania (Tokyo), Africa (Cape Town) and Latin America (Montevideo)<sup>38</sup>.

WADA has the typical structure of most foundations, with a Board (the highest organ), an Executive Committee, and an Auditing Body. There are also a Director General and ten directorates (the four regional offices; medical, based in Lausanne; science; standards and harmonization; education; communications; legal affairs), with a staff of around 50 people.

The "equal partnership between the Olympic Movement and public authorities" is reflected by the structure of the Foundation Board (of up to 40 members, up to 18 of whom are appointed by the Olympic Movement, with another maximum of 18 appointed by public authorities, and 4 appointed jointly by the two), and is clearly expressed in Article 7 ("Organization of the Board") of the WADA Constitutive Instrument of Foundation, in which it is also provided that "to promote and preserve parity among the stakeholders, the Foundation Board will ensure that the position of chairman alternates between the Olympic Movement and public authorities, and that in particular this occurs after two three-year terms, unless no alternative nomination is made. To further maintain equal partnership

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<sup>36</sup> J.-L. Chappelet and B. Kübler-Mabbott, *The International Olympic Committee and the Olympic System: The governance of sport*, quoted, p. 136 et seq. The idea of creating an agency for fighting doping was first launched in 1989: see F. Latty, *La lex sportiva. Recherche sur le droit ransnational*, quoted, p. 384 et seq.

<sup>37</sup> See <http://www.wada-ama.org>. It is noteworthy, however, that the first proposal presented at the conference was rejected because of a too close link between the agency and the IOC and the absence of representatives of governments on the board. Public authorities protested requesting a more significant role (they were also skeptical about the IOC, after the episodes of corruptions related to the awarding of the 2002 Winter games in Salt Lake City). See B. Houlihan, "The World Anti-Doping Agency: Prospects for success", in *Drugs and Doping in Sport: Socio-Legal Perspectives*, quoted, p. 125 et seq.

<sup>38</sup> In 2002, in fact, WADA moved its headquarters from Lausanne to Montreal (Canada), and the regional offices were subsequently established.

between the Olympic Movement and the public authorities, the vice chairman must be a personality nominated by the public authorities if the chairman is a person nominated by the Olympic Movement, and vice versa<sup>39</sup>.

The WADA Executive Committee also demonstrate an investment in this type of equal partnership: it is composed of a chair and vice chair (who are the chairman and the vice chairman of WADA), it has five members from the sports movement and five from governments and is appointed annually<sup>40</sup>. Moreover, WADA may invite a limited number of intergovernmental organizations or other international organizations to act in a consultative capacity for the Foundation (this is the case, for instance, of World Health Organization (WHO) and the International Criminal Police Organization (Interpol))<sup>41</sup>.

In terms of finance, WADA is funded equally by the Olympic Movement on one hand, and public governments on the other: 12 million US\$ was received from each of these sources in 2008<sup>42</sup>.

Furthermore, it is worth noting that WADA's statute foresees that the Agency will be entitled to prepare plans and proposals in light of its conversion, if necessary, into a different structure, "possibly based on international public law" (art. 4)

## 2.2. *WADA's public interest mission and its normative functions*

In spite of its formally private nature, WADA carries out functions that aim to further public goals, such as 1) promoting and coordinating at the international level the fight against doping in sport in all its forms, including through in- and out-of-competition tests

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<sup>39</sup> Government representation follows the five Olympic Regions as agreed by governments at the International Intergovernmental Consultative Group on Anti-Doping in Sport meeting in Cape Town, South Africa, in May 2001: Africa, 3 members; Americas, 4 members; Asia, 4 members; Europe, 5 members; Oceania, 2 members. The Governments of each respective region are responsible for the process of electing members to the WADA Foundation Board and Executive Committee and notifying WADA of the appointments (for example, the European members are designated half by the Council of Europe and half by the EU).

<sup>40</sup> The Board has also created other committees of experts: Athletes; Education; Finance & Administrations; Ethical Issues Review Panel; Health, Medical & Research Committee (which oversees various scientific working groups in relation to the Prohibited List, Therapeutic Use Exemptions, and Laboratory Accreditation).

<sup>41</sup> Art. 6.2, WADA Constitutive Instrument of Foundation. Such organizations, which will be invited on the basis of their legitimate interest in the work of the Foundation and their powers in the corresponding areas, may take part in the discussions of the Foundation Board but may not vote when the Foundation Board takes decisions.

<sup>42</sup> See <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=259>.

(to this end, the Foundation cooperates with intergovernmental organizations, governments, public authorities and other public and private bodies fighting against doping in sport, and seeks from all of them the moral and political commitment to follow its recommendations); 2) reinforcing, at the international level, ethical principles for the practice of doping-free sport, and helping protect the health of the athletes; 3) encouraging, supporting, coordinating and, where necessary, actually undertaking, in full cooperation with the public and private bodies concerned (in particular the IOC, IFs and NOCs), the organization of unannounced out-of-competition testing; 4) devising and developing anti-doping education and prevention programmes at the international level; and 5) promoting and coordinating research in the fight against doping in sport<sup>43</sup>.

However, WADA's most important activity, in terms of its "public" function is its role as a global standard setter. In particular, it is charged with carrying out three main tasks: 1) to establish, adapt, modify and update, at least yearly, for all the public and private bodies concerned the list of substances and methods prohibited in the practice of sport; 2) to develop, harmonize and unify scientific, sampling and technical standards and procedures with regard to analyses and equipment, including the homologation of laboratories, and to create a reference laboratory; 3) to promote harmonized rules, disciplinary procedures, sanctions and other means of combating doping in sport, and contribute to the unification thereof, taking into account the rights of the athletes.

It is clear, then, that WADA carries out significant normative functions as the establishment of international standards, and also produces "soft-law" in the form of recommendations and good practices. Beside these tasks, WADA carries out other relevant

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<sup>43</sup> In terms of its mission and priorities, the *WADA Strategic Plan 2007-2012* establishes eight main objectives: 1) Provide leadership on current and emerging issues and in the communication of effective strategies and programs in the campaign against doping in sport; 2) Achieve compliance with the Code by all anti-doping and international sport organizations; 3) Generate universal involvement of public authorities and public leaders in the campaign against doping in sport; 4) Promote an international framework for education programs that instill the values of doping-free sport; 5) Promote universal awareness of the health risks of doping so that stakeholders, with a particular focus on medical practitioners and other members of the athlete entourage, use that knowledge in their interaction with and education of athletes for the purpose of preventing doping and protecting health; 6. Implement an international scientific research program and foster an international scientific research environment that monitors (as well as predicts) trends in doping science and actively promotes reliable research outcomes in the development, improvement and implementation of detection methods; 7) Lead, assist and perform oversight so that every accredited anti-doping laboratory performs at a level consistent with international standards; 8) Be a respected organization whose corporate governance and operating standards reflect international best practice ([http://www.wada-ama.org/rtecontent/document/StratP\\_07\\_12\\_En.pdf](http://www.wada-ama.org/rtecontent/document/StratP_07_12_En.pdf)).

administrative activities, such as monitoring anti-doping tests during major sports event through the office of an “independent observer”.

### 2.3. *Global hybrid public-private norms: the World Anti-Doping Code (WADC)*

The most significant outcome of WADA’s activities is the World Anti-Doping Code (WADC), which was adopted in 2003 and entered into force on January 1, 2004<sup>44</sup>. On March 5, 2003, at the Copenhagen World Conference on Doping in Sport, over 1000 delegates representing 80 governments and international and national sports institutions unanimously agreed to adopt the WADC as the basis for the fight against doping in sport (the Copenhagen Declaration). A second version of the Code was unanimously adopted by WADA’s Foundation Board and endorsed by the 1,500 delegates present on November 17th 2007, the final day of the Third World Conference on Doping in Sport, hosted in Madrid; the new Code entered into force on January 1, 2009<sup>45</sup>.

WADC’s Signatories (i.e. those entities signing the Code and agreeing to comply with it) include the IOC, IFs, the International Paralympic Committee, NOCs, National Paralympic Committees, Major Event Organizations, National Anti-Doping Organizations (NADOs), and WADA. Governments instead are not asked to be signatories to the Code, but rather to sign the Copenhagen Declaration (2003) and ratify, accept, approve or accede to the UNESCO Convention against Doping in Sport (see below). Although the acceptance mechanisms may be different, the attempt to combat doping through the coordinated and harmonized program reflected in the Code is very much a joint effort between the sport movement and governments<sup>46</sup>.

The WADC works in conjunction with five International Standards aimed at encouraging harmonization between anti-doping organizations<sup>47</sup>: the *Prohibited List*, the

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<sup>44</sup> The WADA Code 2003 is available at [http://www.wada-ama.org/rtecontent/document/code\\_v3.pdf](http://www.wada-ama.org/rtecontent/document/code_v3.pdf). See E. Carolan, “The New WADA Code and The Search For A Policy Justification for Anti-Doping Rules”, 16 *Seton Hall Journal of Sports and Entertainment Law* (2006) 1.

<sup>45</sup> The new Code is available at [http://www.wada-ama.org/rtecontent/document/code\\_v2009\\_En.pdf](http://www.wada-ama.org/rtecontent/document/code_v2009_En.pdf). See L. Tarasti, “Some Juridical Question Marks In The Revised World Anti Doping Code”, *I.S.L.R.* (2008) 17 ss., and P. David, *A Guide to the World Anti-Doping Code. A Fight for the Spirit of Sport*, quoted, p. 240 et seq.

<sup>46</sup> See art. 22 WADC.

<sup>47</sup> P. David, *A Guide to the World Anti-Doping Code. A Fight for the Spirit of Sport*, quoted, p. 53 et seq.

*International Standard for Testing*<sup>48</sup>, the *International Standard for Laboratories*<sup>49</sup>, *Therapeutic Use Exemptions (TUEs)*<sup>50</sup>, and *Protection of Privacy and Personal Information*<sup>51</sup>. These standards have been the subject of lengthy consultation among WADA's stakeholders and are mandatory for all signatories of the Code<sup>52</sup>. Amongst these standards, the *Prohibited List* is a "cornerstone" of the Code (see art. 4 et seq, WADC) and a key component of harmonization. It is an international standard – reviewed annually – identifying substances and methods prohibited in-competition, out-of-competition, and in particular sports<sup>53</sup>.

The WADC, then, is the core document that provides the framework for the harmonization of anti-doping policies, rules, and regulations within sports organizations and among public authorities. For example, for the first time, universal criteria were set for deciding whether a substance or method should be banned from use. Moreover, the WADC sets the standard for minimum and maximum sanctions, while providing flexibility for the consideration of circumstances of each individual case (the revised version of the Code has introduced a more flexible mechanism for determining sanctions). In addition, the WADC provides important procedural guarantees, such the right to a fair hearing granted to any person who is alleged to have committed an anti-doping rule violation (Art. 8, which establishes requirements such as that of a timely hearing before a fair and impartial body).

Around 600 sports organizations, including all 35 IFs of Olympic sports and the IOC

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<sup>48</sup> The purpose of the International Standard for Testing (IST) is to plan for effective testing and to maintain the integrity and identity of samples, from notifying the athlete to transporting samples for analysis.

<sup>49</sup> The International Standard for Laboratories aims to ensure production of valid test results and evidentiary data and to achieve uniform and harmonized results and reporting from all accredited laboratories.

<sup>50</sup> The purpose of the International Standard for Therapeutic Use Exemptions (ISTUE) is to ensure that the process of granting TUEs is harmonized across sports and countries. A TUE is granted by IFs or NADOs and the criteria for granting it are that the athlete would experience significant health problems without taking the prohibited substance or method; that the therapeutic use of the substance would not produce significant enhancement of performance; and that there is no reasonable therapeutic alternative to the use of the otherwise prohibited substance or method.

<sup>51</sup> The International Standard for the Protection of Privacy and Personal Information (ISPPPI) establishes a set of minimum privacy protections to which all relevant parties involved in anti-doping in sport must adhere when collecting and using the personal information of athletes, such as information relating to whereabouts, doping controls and therapeutic use exemptions.

<sup>52</sup> See <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=268>.

<sup>53</sup> Substances and methods are classified by categories (e.g., steroids, stimulants, gene doping). The use of any Prohibited Substance by an athlete for medical reasons is possible by virtue of a Therapeutic Use Exemption (the list was first published in 1963 by the IOC; since 2004, WADA is responsible for the preparation and publication of the List).

itself, have thus accepted the WADC. Moreover, the Olympic Charter states that the WADC is mandatory for the whole Olympic movement (art. 44) and imposes on IFs and NOCs the adoption and the implementation of the Code; governments or sporting institutions that fail to comply with the WADC might be sanctioned by being rendered ineligible for bids related to the Olympic games or other major international events<sup>54</sup>.

In addition, States have played an important role in improving the force of the Code. In October 2005, an international treaty, the International Convention against Doping in Sport, was unanimously approved by 191 governments at the United Nations Educational, Scientific, and Cultural Organization (UNESCO)'s General Conference. In particular, the Convention enables governments to align – the principles of the WADC are “the basis” for national measures – their domestic policy with the Code, thereby harmonizing global sports regulation and public legislation in the fight against doping in sport<sup>55</sup>. The Convention, currently ratified by 110 States, refers explicitly to WADA and its Code as providing an illustration of good practice of cooperation between private actors and public authorities within the global context. In the fight against doping in sport, standards and rules set by a private body have gradually been accepted as “binding” by States<sup>56</sup>; a process made possible mostly as a result of the particular hybrid structure of WADA.

In conclusion, although the WADC formally rests on an instrument of private law (as it itself clarifies: the Comment to Article 22 provides that “Most governments cannot be parties to, or be bound by, private non-governmental instruments such as the Code”<sup>57</sup>), it displays rather a hybrid nature, due to the role played by public authorities both in WADA's decision-making process and in the procedure for the drafting of the Code. As to the former aspect, the WADC establishes that “Amendments to the Code shall, after appropriate consultation, be approved by a two-thirds majority of the WADA Foundation

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<sup>54</sup> See art. 22.6 and 23.5 of the Code.

<sup>55</sup> Article 3 of the UNESCO Convention establishes that “In order to achieve the purpose of the Convention, States Parties undertake to: (a) adopt appropriate measures at the national and international levels which are consistent with the principles of the Code; (b) encourage all forms of international cooperation aimed at protecting athletes and ethics in sport and at sharing the results of research; (c) foster international cooperation between States Parties and leading organizations in the fight against doping in sport, in particular with the World Anti-Doping Agency”.

<sup>56</sup> Even though Article 5 of the UNESCO Convention clarifies that the Code – reproduced for information purposes as Appendix to the Convention – is not an integral part of it and does not create any binding obligations under international law for States Parties.

<sup>57</sup> Governments are not asked to be Signatories to the Code (see above).

Board including a majority of both the public sector and Olympic Movement members casting votes” (art. 26.2.3). Regarding the latter, WADA must ensure a consultative process for both receiving and responding to recommendations and for facilitating, review and feedback from athletes, sporting institutions and governments concerning recommended amendments (art. 26.2.2).

Similar provisions govern the development of WADA’s International Standards. For example, the process for the annual review of the Prohibited List, includes three meetings of the WADA List Committee (in February, April-May and September) and a draft discussion List for publication in June. The List is intended to be circulated for consultation by governments and sporting institutions. At its third meeting in September, the List Committee, following the full and proper consideration of the submissions received through the consultation process, recommends the revised List to the Health, Medical and Research Committee which in turn makes recommendations to the WADA Executive Committee. The Executive Committee at its September meeting finalizes the List. The updated List is published by October 1 and it comes into effect on January 1 the following year.

### 3. *WADA and the anti-doping regime: a model for global administrative governance?*

The structure and functions of WADA within international sports regimes give rise to several kinds of issues. They embrace many aspects of global governance: the increasing use of global public-private partnerships and the development of hybrid public-private regimes and bodies; the spread of normative functions carried out by global institutions and the binding force of private or hybrid public-private “law”; problems concerning the harmonization of different regulations at the global level and the interaction between global PPPs and domestic authorities; and the adoption of administrative law type mechanisms within global regimes and the emergence of global administrative law.

#### 3.1. *The institutional design of global private regimes: towards equal public-private partnerships?*

The first set of issues concerns the emergence of global private regimes and of global

private regulators<sup>58</sup>. WADA's hybrid public-private structure provides us with a very significant institutional model for enabling a private regime to work together with public authorities. Moreover, considering the success of the Code, this model seems to work reasonably well, though much progress can of course still be made<sup>59</sup>. Thanks to a decision-making process shared between public and private actors, and also to the fundamental role of the CAS in deciding appeals concerning the application of the WADC<sup>60</sup>, the goal of harmonization in anti-doping regulation has been reached.

Could this model be usefully extended to other fields? And might WADA's hybrid public-private organization be a suitable means for making global regulators more accountable? The example of WADA is "unique in that it gathers on equal footing States and private organizations"<sup>61</sup> and experimental<sup>62</sup>. Nevertheless, some have tried to draw comparisons between WADA and other institutions, namely the World Conservation Union (formerly the International Union for the Conservation of Natural Resources (IUCN)) and the International Red Cross and Red Crescent Movement (IRCRCM)<sup>63</sup>. Other scholars have expressly included WADA within the category *hybrid intergovernmental-private bodies*, composed of both public and private actors, such as the Codex Alimentarius Commission and the Internet Corporation for Assigned Names and Numbers (ICANN)<sup>64</sup>. In other terms, WADA would be an example of genuine global public administration, and its existence

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<sup>58</sup> See G. Teubner, "Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sector?", in *Public Governance of the Age of Globalization*, ed. by K.H. Ladeur, Aldershot, Ashgate (2004), p. 71 et seq., and H. Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, Oxford and Portland, Hart (2005).

<sup>59</sup> As the report from Beijing by WADA's independent observer seems to demonstrate. The report is available at <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=342>. See R.H. McLaren, "Corruption: Its Impact On Fair Play", 19 *Marq. Sports L. Rev.* 15, here at 36.

<sup>60</sup> Art. 13 of the Code. Before the adoption of the Code, in fact, the CAS carried out an important function of harmonization of different anti-doping rules: see F. Oschütz, "Harmonization of Anti-Doping through arbitration: the Case Law of the Court of Arbitration for Sport", 12 *Marquette Sports Law Review* (2002) 675.

<sup>61</sup> CAS 2005/C/481, Advisory Opinion upon request of CONI, 26 april 2005 (p. 9), available at [http://www.coni.it/fileadmin/template/main/new\\_coni/opinion/opinion.pdf](http://www.coni.it/fileadmin/template/main/new_coni/opinion/opinion.pdf).

<sup>62</sup> R. Pound, "The World Anti-Doping Agency: an Experiment in International Law", *I.S.L.R.* 2 (2002) 54.

<sup>63</sup> J.-L. Chappelet and B. Kübler-Mabbott, *The International Olympic Committee and the Olympic System: The governance of sport*, quoted, p. 149 et seq.

<sup>64</sup> See B. Kingsbury and R.B. Stewart, "Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations", in *International Administrative Tribunals in a Changing World*, ed. by S. Flogaitis, London, Esperia (2009). These bodies often have significant administrative components, including expert committees for developing and steering the implementation of regulatory norms.



would provides us with real evidence of the development of a global administrative law<sup>65</sup>.

Putting aside any concerns regarding the classification of WADA, this body offers a prime example of an *equal* institutional public-private partnership (PPP) that is unusual both at the global level and in domestic contexts. In comparison with the “traditional” PPPs, WADA displays at least three main differences. Firstly, the history of its creation marks the entry of public powers into a fully private regime, following an action launched by a private body (namely the IOC, which convened the World Conference on Doping in Lausanne); in contrast, in more traditional PPPs, it is often the public authorities that try to involve private actors in order to increase resources, expertise or more consensus (as happens, for instance, in the environmental or public health sectors)<sup>66</sup>. In other words, the usual track for PPPs is a form of “privatization”, whilst in the case of WADA we have instead a partial “nationalization” of a formerly fully private regime (on the other hand, this phenomenon often occurs at the national level, due to increasing role of public authorities within domestic sports regime, such as for Italy and France<sup>67</sup>). Secondly, this perfect equality between public and private actors is quite uncommon: usually public authorities maintain some special powers, such as the power to appoint the chairman or to impose specific oversight mechanisms (as often occurs, for instance, with public companies in many European countries). Thirdly, in contrast to what usually happens in PPPs, where the public and private interests at stake might be in conflict and the hybrid public-private body has to mediate between them, WADA was born from a convergence of aims pursued equally by the IOC and by governments (the fight against inequality of sport and doping as a form of unfair competition; protecting the spirit of sport; protecting public and athletes

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<sup>65</sup> See B. Kingsbury, N. Krisch and R.B. Stewart, "The Emergence of Global Administrative Law", 68 *Law and Contemporary Problems* (2005) 15, S. Cassese, "Administrative Law without the State? The Challenge of Global Regulation", 37 *NYU Journal of International Law and Politics* (2005) 663, and D.C. Esty, "Good Governance at the Supranational Scale: Globalizing Administrative Law", 115 *The Yale Law Journal* (2006) 1490.

<sup>66</sup> B. Bull and D. McNeill, *Development Issues in Global Governance. Public-Private Partnerships and Market Multilateralism*, Abingdon, Routledge (2007). More generally, on the increasing use of private law instruments by international organizations, see G. Burdeau, "La privatisazation des organizations internationales", in *L'Émergence de la société civile internationale. Vers la privatisation du droit international?*, sous la direction de H. Gherari et S. Szurek, Cahiers internationaux n. 18, Paris, Pedone, 2001, p. 179 et seq.

<sup>67</sup> See G. Napolitano, "Le nouveau droit de l'organisation sportive italienne", 97 *R.F.A.P.* 39 (2001), and G. Simon, *Puissance sportive et ordre juridique étatique. Contribution a l'étude des relations entre la puissance publique et les institutions privées*, Paris, L.g.d.j (1990).

health; convergent economic interests)<sup>68</sup>. This came about also thanks to important changes on the international scene, such as the end of the Cold War and of states-sponsored doping regimes<sup>69</sup>. Fourthly, the global private (at least formally) anti-doping regime maintains a very high degree of complexity, both procedural and institutional: thus it seems to confirm what some scholars argue with respect to global private “law”, namely that it is “not a radical departure from state law, but really more of the same”<sup>70</sup>. The WADA experience, therefore, is particularly useful in illustrating the development of a global administrative space, in which both public and private bodies act together in furtherance of a common goal – in this case, the fight against doping; but this model can perhaps be applicable to other fields, such as those of environmental or health regulation.

### 3.2. *Global private “law”: hybrid law-making processes and the interplay between global institutions and domestic authorities*

A second set of issues refers to the binding force of the WADC. The Code offers, in fact, a prime instance of a source of formally private source of norms that show a high degree of “publicness”<sup>71</sup>. This “public” character is due to many factors. Firstly, governments take part both in the drafting process of the Code, through wide consultation, and in its final adoption, through the WADA decision-making process and the Final Declaration at the World Conference on Doping. Secondly, the UNESCO International Convention against Doping in Sport expressly refers to WADA and its Code and requires that States align their anti-doping legislation with the WADC principles. Furthermore, States’ ratification of the UNESCO Convention triggers an implementation mechanism

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<sup>68</sup> E. Carolan, “The New WADA Code and The Search For A Policy Justification for Anti-Doping Rules”, quoted.

<sup>69</sup> D.L. Koller, “From Medals to Morality: Sportive Nationalism and the Problem of Doping in Sports”, 19 *Marq. Sports L. Rev.* (2008) 91.

<sup>70</sup> A. Riles, “The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State”, 56 *Am. J. Comp. L.* (2008) 605, here 629.

<sup>71</sup> On the concept of “publicness” at the global level, see B. Kingsbury, “The Concept of ‘Law’ in Global Administrative Law”, IILJ Working Paper 2009/1 Global Administrative Law Series, and Id., “International Law as Inter-Public Law” in *NOMOS XLIX: Moral Universalism and Pluralism*, ed. by H.R. Richardson and M.S. Williams, New York, New York University Press (2009), p. 167 et seq., especially at 175 et seq. See also G. Teubner, “Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sector?”, quoted. Regarding the non-state law, more recently, *International Governance and Law. State Regulation and Non-state Law*, ed. By H. van Schooten and J. Verschuuren, Cheltenham, Edward Elgar (2008).

relating to WADA's policies and regulations that produces significant effects in the domestic context: for instance, since the US ratified the Convention in August 2008, the public relevance of the US Anti-Doping Agency has been increasing, and some scholars suggest that it should be considered as a State-Actor<sup>72</sup>. The WADA Code, then, provides a very relevant example of norms that cannot be labeled as fully private or fully public, but rather as "*sources de caractère mixte*"<sup>73</sup>. As the CAS observed in 2005, the WADC is "an original and unique piece of international legislation in that it reflects the intents of both public and private sectors in sport"<sup>74</sup>.

In connection with this, the specific role of public authorities within the anti-doping regime becomes crucial. In particular, this issue can be approached from a dual perspective: horizontal and vertical. The former has been already discussed in the examination of WADA's structure and its equal public-private partnership (§ 2). The vertical dimension relates to the increasing attention paid by domestic authorities to the fight against doping. This phenomenon has led, in many cases, to the adoption of legislation that is even more restrictive than the Code and, in many countries doping has been criminalized. This growing number of national anti-doping legislations – in the past there were only a few such domestic laws – and the establishment of criminal law provisions might complicate the implementation of the WADC, in so far as the Code is a not an instrument of criminal law<sup>75</sup>. The interplay between criminal procedures and anti-doping procedures, for instance, could produce duplications in terms of sanctions and fact finding, even leading to divergent judicial resolutions<sup>76</sup>. The role played by States within the anti-doping regime is determining: as some scholars argue, the future of the anti-doping regime largely depends

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<sup>72</sup> M. Straubel, "The International Convention Against Doping in Sport: Is It the Missing Link to USADA Being A State Actor and WADC Coverage of U.S. Pro Athletes?", 19 *Marq. Sport. L. Rev.* (2008) 63; before the ratification of the Convention, P. McCaffrey, "Playing Fair: Why The United States Anti-Doping Agency's Performance-Enhanced Adjudications Should Be Treated As State Action", 22 *Wash. U. J.L. & Pol'y* (2006) 645. The State Action's Doctrine has also been recalled in the case of the US Olympic Committee: D.L. Koller, "Frozen In Time: The State Action Doctrine's Application To Amateur Sports", 82 *St. John's Law Review* (2008) 183.

<sup>73</sup> The definition is adopted in international economic law (see D. Carreau and P. Juillard, *Droit internationale économique*, Paris, Dalloz (2003)) and it has been applied to sports law by F. Latty, *La lex sportiva. Recherche sur le droit ransnational*, quoted, p. 391.

<sup>74</sup> CAS 2005/C/481, Advisory Opinion upon request of CONI, quoted (p. 9).

<sup>75</sup> On these aspects, even though former to the adoption of WADC, see J. Soek, "The Legal Nature of Doping Law", *ISLJ* (2002) 2.

<sup>76</sup> L. Tarasti, "Interplay Between Doping Sanctions Imposed by a Criminal Court and by a Sport Organization", *ISLJ* (2007) 15.

on the decisions of States<sup>77</sup>. It could even happen that in the next years the interests represented by governments within the WADA might diverge, in so far as costs for maintaining effective anti-doping regimes are constantly increasing.

In addition, interactions between WADA and national administrations are even more frequent in the case of National Anti-Doping Organizations (NADOs). Unlike States, these domestic bodies – which are funded by governments or are public entities – are signatories to the WADC. This provides a very relevant example of relations between International Organizations and national administrations<sup>78</sup>. Furthermore, whenever such anti-doping public administrations are established, an athlete acquires the right to challenge their determinations as to doping violations in domestic courts (such as in Australia, for instance)<sup>79</sup>. It emerges, then, that the anti-doping regime offers a prime example of “a growing number of sector-specific non –governmental (private) global governance regimes whose procedures, decisions, substantive standards and goals national courts may increasingly be called upon to address”<sup>80</sup>.

Within this context, the WADC itself claims and underlines its international character, indicating that it “shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the Signatories or governments” (art. 24.3). As some suggest, the WADC “can be likened to international instruments and agreements which operate in areas such international trade, and provide a code for rights and liabilities in relation to carriage of goods by sea or air, or seek to establish uniform commercial practice concerning documentary credits, which will apply in a wide range of legal systems”<sup>81</sup>.

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<sup>77</sup> B. Haoulihan, “Building an international regime to combat doping in sport”, in *Sport and International Relations, An emerging relationship*, ed. by R. Levermore and A. Budd, London, Routledge (2004), p. 62 et seq. here at 74 et seq.

<sup>78</sup> S. Cassese, “Relations between International Organizations and National Administrations”, in IISA, *Proceedings, XIXth International Congress of Administrative Sciences*, Berlin (1983).

<sup>79</sup> See the Australian Sports Anti-Doping Authority Act (2006) and the Australian Sports Anti-Doping Authority Regulations (2006); P. David, *A Guide to the World Anti-Doping Code. A Fight for the Spirit of Sport*, quoted, p. 15 et seq.

<sup>80</sup> B. Kingsbury, “Global Administrative Law: Implications for National Courts”, in *Seeing the World Whole: Essays in Honor of Sir Kenneth Keith*, ed. by C. Geiringer and D. Knight, Wellington, University of Wellington Press (2008), p. 101 et seq., here at 109.

<sup>81</sup> P. David, *A Guide to the World Anti-Doping Code. A Fight for the Spirit of Sport*, quoted, p. 86 et seq., here 87.

### 3.3. *Global harmonization of regulation and its discontents*

A third series of issues is related to the process of normative harmonization accomplished by WADA<sup>82</sup>. This particular form of PPP has in fact produced very positive results with respect to aligning the many different regulations produced by IOC, IFs, NOCs, and States. While the very technical decisions adopted by WADA – such as the establishment of the International Standard for Testing or of the the International Standard for Laboratories – may be compared with the standardizing activity carried out by other bodies, such as ISO<sup>83</sup>, many features of the WADC have broader significance: consider, for instance, issues such as the fundamental rights of athletes or the proportionality of sanctions<sup>84</sup>. The WADC establishes procedural requirements and principles, such as the right to a fair hearing, thereby harmonizing the activity of more than 500 bodies, both public and private<sup>85</sup>. The process of harmonization, however, does not have only positive effects: the “zero tolerance” approach adopted in the WADC has in fact raised many concerns regarding the protection of fundamental rights of the athletes<sup>86</sup> (the Code however seems to have filled the harmony gap relating to sanctions between anti-doping regimes, which in the past led to more than one court decision, such as in the well-known cases of Reynolds and Krabbe)<sup>87</sup>. In particular, some protests have arisen regarding the rigid application of the strict liability principles and the burden of proof rules<sup>88</sup>. Moreover, some sporting institutions have claimed that harmonization should not lead to uniformity, without

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<sup>82</sup> See *Legal Comparison and the Harmonization of Doping Rules, Pilot Study for the European Commission*, ed. by K. Vieweg and R. Siekmann, Duncker & Humblot GmbH, Berlin (2007); formerly, J. Soek, “The WADA World Anti-Doping Code: The Road to Harmonisation”, *ISLJ* (2003) 2.

<sup>83</sup> There has been an attempt to produce a specific ISO standard for doping control, which was triggered by a joint initiative WADA/ISO (see *ISO Bulletin* January 2002, p. 16). In any event, the WADA International Standard for Laboratories imposes on the anti-doping laboratories the obligation to meet the ISO/IEC 17025:2005 standard concerning the testing processes carried out by the laboratory.

<sup>84</sup> J. Houben, “Proportionality in the World Anti-Doping Code: Is There Enough Room for Flexibility”, *ISLJ* (2007) 10.

<sup>85</sup> Many of the problems that emerged before the adoption of the Code, such as the lack of procedural guarantees for athletes, have been solved: see M.S. Straubel, “Doping Due Process: A Critique of the Doping Control Process in International Sport”, 106 *Dickinson Law Review* 523 (2002); D. Panagiotopoulos, “International Sports Rules’ Implementation-Decisions’ Executability: The Bliamou Case”, 15 *Marquette Sports Law Review* 1(2004).

<sup>86</sup> R.R. Goldstein, “An American in Paris: The Legal Framework of International Sport and the Implications of The World Anti-Doping Code on Accused Athletes”, 7 *Virginia Sports and Entertainment Law Journal* (2007) 149.

<sup>87</sup> P. David, *A Guide to the World Anti-Doping Code. A Fight for the Spirit of Sport*, quoted, p. 36 et seq.

<sup>88</sup> J.W. Soek, *Strict Liability Principles And The Human Rights Of Athletes In Doping Cases*, The Hague, Asser (2006).

considering the specificities of each individual sport (as, for example, did FIFA with its insistence on “factor specific to football”<sup>89</sup>). The revised WADC, which entered into force in January 1<sup>st</sup> 2009, has introduced more flexibility (mostly regarding sanctions); but the new text has been criticized for being too ambiguous as to its scope of application<sup>90</sup>. The fact is that the WADC, even though it should be a basis for sporting institutions’ anti-doping rules, is actually meant to be directly applicable simply by reference.

The pay-off of the WADA experience to date, however, seems positive, especially if we consider that the Code was accepted also by sporting institutions that are outside of the Olympic movement, such as most of the IFs not recognized by the IOC. In this sense, the global anti-doping regime indicates perhaps the most useful steps along the road to harmonization of global norms: the creation of a global institution based upon equal public and private partnership; the involvement of both private and public actors in the “law”-making process through consultation and participation (similar to those followed by national administrations when carrying out their rulemaking activities); the application of administrative law-type principles, such as transparency and due process; the adoption of review procedures and centralized dispute settlement mechanisms that provide a harmonious interpretation of the global “law” and its implementing regulations (this is the case of the Court of Arbitration of Sport (CAS)).

#### *3.4. The role of administrative law in private and hybrid public-private regimes: transparency, participation, due process, and review*

Lastly, a fourth set of topics concerns procedural aspects. The WADA example highlights well the growing importance of administrative law type principles at the global level. We can find, for instance, a relevant application of the principles of transparency in the requirement that the Foundation Board and the Executive Committee make reports on all their meetings publicly available on the WADA website. And, even more significantly, the global anti-doping regime shows that the principles of participation and due process are widely applied. Following the American tradition of the twofold distinction between

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<sup>89</sup> CAS 2005/C/976 & 986, FIFA & WADA, Advisory Opinion on FIFA compliance with the WADC, 21 april 2006, available at [http://www.wada-ama.org/rtecontent/document/CAS\\_Opinion\\_FIFA.pdf](http://www.wada-ama.org/rtecontent/document/CAS_Opinion_FIFA.pdf).

<sup>90</sup> L. Tarasti, “Some Juridical Question Marks In The Revised World Anti Doping Code”, quoted.

rulemaking and adjudication, the case of WADA allows us to track the progress of these two categories of administrative action<sup>91</sup>. As to the rulemaking, the drafting process of the WADC offers a clear case of “notice and comment” at the global level through which all affected parties, whether private or public, can participate in the procedure. As to adjudication, the WADC requires that all anti-doping organizations provide a fair hearing process for any person who is alleged to have committed an anti-doping rule violation. This process must respect principles such as a timely hearing, a fair and impartial hearing panel, and the right of each party to present evidence, including the right to call and question witnesses<sup>92</sup>. Even though the WADC clarifies that these provisions “are not intended to supplant” each sporting institutions’ own rules for hearings – but rather “to ensure that each sporting institutions provides a hearing process consistent with these principles” – the provisions do offer a very clear manifestation of the spread of “global” due process norms<sup>93</sup>. In addition, they provide the term “hearing” with a full meaning, even more detailed compared with the way in which the same expression is used at national level (i.e. as “a verbal coat of many colors”)<sup>94</sup>.

Furthermore, the anti-doping regime contains compelling mechanisms for the global review of national administrative decisions. The most relevant is represented by the Court Arbitration of Sport (CAS), but there are also important monitoring and review activities carried out by WADA directly. For instance, in the case of the Therapeutic Use Exemption (TUE) granted to athletes by federations or National Anti-Doping Organizations (NADOs), the WADA TUE Committee has the right to monitor and review any TUE granted and,

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<sup>91</sup> Administrative Procedure Act (5 U.S.C. Subchapter II, § 553 and § 554. See R.B. Stewart, “The Reformation of American Administrative Law”, 88 *Harvard Law Review* (1975) 1670, at 1723, and *Administrative Law in the Twenty-first Century*, 78 *N.Y.U. Law Rev.* (2003) 437, and S.G. Breyer, R.B. Stewart, C.R. Sunstein and A. Vermeule, *Administrative Law and Regulatory Policy. Problems, Text, and Cases*, VI ed., New York (2006), p. 479 et seq.

<sup>92</sup> See WADC, art. 8.1, that also includes the right to be represented by counsel at the Person’s own expense; the right to be informed in a fair and timely manner of the asserted anti-doping rule violation; the right to respond to the asserted anti-doping rule violation and resulting consequences; the person’s right to an interpreter at the hearing, with the hearing panel to determine the identity, and responsibility for the cost, of the interpreter; and a timely, written, reasoned decision, specifically including an explanation of the reason(s) for any period of ineligibility (P. David, *A Guide to the World Anti-Doping Code. A Fight for the Spirit of Sport*, quoted, p. 159 et seq.).

<sup>93</sup> S. Cassese, “A Global Due Process of Law?”, Paper presented at New York University, Hauser Colloquium on Globalization and Its Discontents, September 13, 2006 (<http://www.iilj.org>).

<sup>94</sup> S.G. Breyer, R.B. Stewart, C.R. Sunstein and A. Vermeule, *Administrative Law and Regulatory Policy. Problems, Text, and Cases*, quoted, p. 479.

pursuant to such review, to reverse any decision. Moreover, an athlete whose TUE Application is rejected by a federation or anti-doping organization, can appeal the decision to the WADA TUE Committee (which can reverse the decision). This case becomes even more significant whenever the decision reversed was adopted by a public body (some NADOs are funded by governments or indeed are themselves public entities, such as in Italy or in France<sup>95</sup>). Moreover, it gives further evidence that WADA's activities substantially affect private parties (namely athletes) directly<sup>96</sup>.

In conclusion, although WADA and anti-doping regime have many peculiarities, this case illustrates the different shapes that PPPs can take at the global level and the broadening scope of this phenomenon. PPPs, in fact, carry the promise of providing a useful tool not only for delivering services or financing, their traditional scope, but also for producing norms that can directly affect both national administrations and private actors. Within this context, the adoption of administrative law-type principles – both organizational and procedural – seems to offer a suitable coat in order to confront most of the challenges issued by the development of global private and hybrid public-private regimes.

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<sup>95</sup> In Italy, the role of NADO is played by the Italian NOC. In France, l'Agence française de lutte contre le dopage (AFLD) is an independent public agency established by law (loi du 5 avril 2006).

<sup>96</sup> B. Kingsbury, "The Administrative Law Frontier in Global Governance", *ASIL Proceedings* 2005, 143, here at 147.