Université de Montréal

The Application of a Pluralist Approach of Global Administrative Law on the Governance of Doping in Sport

par

Erdal Gök

Faculté de droit

Thèse présentée à la Faculté des études supérieures
en vue de l'obtention du grade de Docteur
en droit (LL. D.)

Septembre 2014

Université de Montréal

Faculté des études supérieures

Cette thèse intitulée:

The Application of a Pluralist Approach of Global Administrative Law on the Governance of Doping in Sport

présentée par

Erdal Gök

Faculté de droit

a été évaluée par un jury composé des personnes suivantes:

Matthew P. Harrington	:	presidente-rapporteur
France Houle	:	directrice de recherche
Hugues Parent	:	co-directeur de recherche
Lorne Sossin	:	examinateur externe
Hoi Kong	:	examinateur externe
Matthew P. Harrington	:	représentante de la doyenne de la FES

ABSTRACT

Several issues which are related to the use of prohibited substances and doping methods in sport pose great challenges to the anti-doping governance. In order to fight against doping, some countries have implemented legal frameworks which are based exclusively on criminal law while other countries have relied on specialized mechanisms and bodies, either based exclusively on private law or on a hybrid regime of public and private law. These different regulatory approaches make the fight against doping in sport severely complicated as its success requires a degree of international cooperation as well as the concerted involvement of public authorities. However, such cooperation is often difficult to realize. At present, it can be observed, for example, that nation states are unable to effectively prevent transnational organized crime syndicates and organizations from involving in the doping market nor from restricting and eliminating prohibited doping substances and methods through their regulatory frameworks.

Furthermore, the anti-doping governance framework which is based on the rules and standards of the World Anti-Doping Agency (WADA) distinguishes athletes from non-athletes, placing the former in a disadvantageous position. For example, the standard of *strict liability of no fault or negligence* imposed on athletes requires less than proof beyond a reasonable doubt and allows the use of circumstantial evidence to establish an anti-doping rule violation. This standard of proof undermines the *presumption of innocence* principle and the principle of *no penalty without a law*. Moreover, the new World Anti-Doping Code of 2015 will empower the National Anti-Doping Organizations (NADOs) with investigative and intelligence-gathering powers and will add new categories of non-analytical based doping categories, while reducing the rights of athletes even further.

In this thesis, we discuss specifically the private law-based regulatory framework of WADA because it fails to meet the current needs of global anti-doping governance. We therefore advocate for the adoption of a new approach where the *penal* and *public global* nature of doping is clearly recognized. Such recognition, combined with a suitable governance model based on a pluralistic approach of global administrative law, will produce a better accepted and more effective anti-doping governance among athletes and will also be of benefit for non-athletes. However, the new governance model that we propose will require all state and non-state parties to adjust their governance frameworks to meet the current challenges and problems, related to the global governance of doping in sport.

Keywords: Global administrative law, doping law, sport law, global criminal law, global constitutional law, global public good, global public interest.

RESUMÉ

Plusieurs problèmes liés à l'utilisation de substances et méthodes interdites de dopage dans les sports posent de grands défis à la gouvernance antidopage. Afin de lutter contre le dopage, certains pays ont mis en œuvre des cadres juridiques basés exclusivement sur le droit pénal tandis que d'autres pays ont plutôt misé sur des mécanismes et organismes spécialisés trouvant fondement en droit privé ou sur un régime hybride de droit public et privé. Ces différentes approches réglementaires ont pour conséquence de faire en sorte qu'il est très difficile de lutter efficacement contre le dopage dans les sports, notamment parce que leur exécution requiert un degré de collaboration internationale et une participation concertée des autorités publiques qui est difficile à mettre en place. À l'heure actuelle, on peut par exemple observer que les États n'arrivent pas à contrer efficacement la participation des syndicats et organisations transnationales liés au crime organisé dans le marché du dopage, ni à éliminer des substances et méthodes de dopage interdites par la réglementation.

Par ailleurs, la gouvernance antidopage basée sur les règles prescrites par l'Agence mondiale antidopage prévoit des règles et des normes distinctes de dopage distinguant entre deux catégories de personnes, les athlètes et les autres, plaçant ainsi les premiers dans une position désavantageuse. Par exemple, le standard de *responsabilité stricte sans faute ou négligence* imposé aux athlètes exige moins que la preuve hors de tout doute raisonnable et permet l'utilisation de preuves circonstancielles pour établir la violation des règles antidopages. S'appliquant pour prouver le dopage, ce standard mine le principe de la *présomption d'innocence* et le principe suivant lequel une personne ne devrait *pas se voir imposer une peine sans loi.* D'ailleurs, le nouveau Code de 2015 de l'Agence attribuera aux organisations nationales antidopage (ONADs) des pouvoirs d'enquête et de collecte de renseignements et ajoutera de nouvelles catégories de dopage non-analytiques, réduisant encore plus les droits des athlètes.

Dans cette thèse, nous discutons plus particulièrement du régime réglementaire de l'Agence et fondé sur le droit privé parce qu'il ne parvient pas à répondre aux besoins actuels de gouvernance mondiale antidopage. Nous préconisons donc l'adoption d'une nouvelle approche de gouvernance antidopage où la *nature publique* et *pénale mondiale* du dopage est clairement reconnue. Cette reconnaissance combiné avec un *modèle de gouvernance adapté* basé sur une approche pluraliste du droit administratif global produira une réglementation et une administration antidopage mieux acceptée chez les athlètes et plus efficace sur le plan des résultats. Le nouveau modèle de gouvernance que nous proposons nécessitera toutefois que tous les acteurs étatiques et non-étatiques ajustent leur cadre de gouvernance en tenant compte de cette nouvelle approche, et ce, afin de confronter les défis actuels et de régler de manière plus satisfaisante les problèmes liés à la gouvernance mondiale du dopage dans les sports.

Mots-clés: Droit administratif mondial, droit du dopage, droit du sport, droit pénal mondial, droit constitutionnel mondial, bien public mondial, l'intérêt public mondial.

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

AAA	American Arbitration Association
AU	African Union
ACC	Australian Crime Commission
ADAMS	Anti-Doping Administration and Management System
ADHD	Attention Deficit and Hyperactivity Disorder
AEK	Athlitiki Enosis Konstantinoupoleos
AFLD	Agence Française de Lutte Contre le Dopage
AFM	Atomic force microscopy
AIOWF	Association of International Olympic Winter Sports Federations
AIWF	Allied Independent Wrestling Federations
AIWF	Association of International Winter Sports Federations
ANOC	Association of National Olympic Committees
ASADA	Australian Sports Anti-Doping Authority
ASEAN	Association of Southeast Asian Nations
ASOIF	Association of Summer Olympic International Federations
B.N.A.	British North America
BALCO	Bay Area Laboratory Co-operative
BCI	Brain-computer interface
Bull. Acad. Natle. Méd.	Bulletin de l'Académie Nationale de Médecine
CAMDC5	5th Session of the Africa Union Conference of Ministers of Drug Control
CAS	Court of Arbitration for Sports
CBF	Confederação Brasileira de Futebol
CCES	Canadian Centre for Ethics in Sport
CCP	Permanent Central American Commission for the Eradication of Production, Trafficking, Consumption and Illicit Use of Narcotic and Psychotropic Substances and Related Crimes
ccTLD	Country Code Top-Level Domain
CEO	Chief Executive Officer
CICAD	Inter-American Drug Abuse Control Commission
CIOA	Committee for International Olympic Aid
CND	Commission on Narcotic Drugs
COE	Council of Europe
CONI	Comitato Olimpico Nazionale Italiano
CPADS	Canadian Policy Against Doping in Sport
CPLD	Conseil de prévention et de lutte contre le dopage
DCC	Doping Center Code
DESA	UN Department of Economic and Social Affairs
DESG	Deutsche Eisschnelllauf Gemeinschaft e.V.
DNA	deoxyribonucleic acid
DoC	Department of Commerce

EADC	European Anti-Doping Convention
EC	Executive Committee
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECOSOC	Economic and Social Council of United Nations
EJP	E-Justice Portal
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction
EPO	erythropoietin
ETO	Egyetértés Torna Osztály
EUDS	European Union Drugs Strategy
EU	European Union
FC	Football Clup
FEI	Fédération Equestre Internationale
FIFA	Fédération Internationale de Football Association
FINA	Fédération Internationale de Natation
GAC	Governmental Advisory Committee
GAISF	General Association of International Sports Federations
GAL	Global Administrative Law
GPG	Global Public Good
GPI	Global Public Interest
gTLD	Generic Top-Level Domain
hCG	Human Chorionic Gonadotrophin
HET	Human Enhancement Technologies
HFF	Hellenic Football Federation
HGBOCs	hemoglobin based oxygen carriers
hGH	Human Growth Hormone
HGP	Human Genome Project
HONLEA	Heads Of National Drug Law Enforcement Agencies
IAAF	International Association of Athletics Federation
IADA	International Anti-Doping Arrangement
IANA	Internet Assigned Numbers Authority
ICANN	Internet Corporation for Assigned Names and Numbers
ICAS	International Council of Arbitration for Sport
IILJ	Institute for International Law and Justice
IFs	International Federations
IGF-1	insulin like growth factor 1
INCD	International Narcotics Control Board
INTERPOL	International Criminal Police Organization
IOC	International Olympic Committee
IPC	International Paralympic Committee
IP	Intellectual Property
ISI	Institute of Scientific Information
ISO	International Organization for Standardization
ISTI	International Standard for testing and Investigations

IST	International Standards for Testing
ISU	International Skating Union
ITU	International Telecommunication Union
IWF	International Weightlifting Federation
L.G.D.J.	Librairie générale de droit et de jurisprudence
LASIK	Laser-Assisted In Situ Keratomileuisis
MINEPS	Ministers and Senior Officials Responsible for Physical Education and Sport
MPG	Max Planck Gesellschaft
N.Y.U.J. Int'l L.	New York University Journal of International Law
NADO	National Anti-Doping Agency
NOCs	National Olympic Committees
NPS	New Psycoactive Substances
O.C.A.	Ontario Court of Appeal
OAS	Organization of American States
OC	Olympic Charter
OD	Oxford Dictionaries
OCOG	Olympic Charter Organizing Committee
OM	Olympic Movement
OPC	Office of Privacy Commission
OSCE	Organization for Security and Co-operation in Europe
P.U.F.	Presses Univesitaires de France
PDCL	Promulgation of Drugs Control Law
PFCs	hemoglobin based oxygen carriers
PIED	Performance and Image Enhancing Drugs
PILA	Private International Law Act
PKK	Kurdistan Workers Party
PPI	Paris Pact Iniative
PPP	Public Private Partnership
QCCS	Cour supérieure du Québec
RCD	Real Real Club Deportivo
RFEC	Federación Española de Ciclismo
RFEC	Real Federacion de Ciclismo
Ritalin	Methylphenidate
RNA	Ribonucleic acid
RS	Royal Society
RTP	Registered Testing Pool
S.C.R.	Supreme Court Review
SCC	Supreme Court of Canada
Seq.	sequens
SFS	Svensk författningssamling
SFT	Swiss Federal Tribunal
SK	Sportovní klub
SMCD	Supreme Military Council Decree

SSC	Sweden Sports Confederation
STJD	Superior Tribunal de Justiça Desportiva do Futebol
TBA	Turkish Basketball Association
TBF	Turkish Basketball Federation
TDKM	Türkiye Doping Kontrol Merkezi
TFA	Turkish Football Association
TFF	Turkish Basketball Federation
TGA	Therapeutic Good Administration
THG	Tetrahydrogestronome
TNOC	Turkish National Olympic Committee
TRC	Truth and Reconciliation Commission
TSP	two step prohibition
TUEs	Thrapeutic Use Exemptions
U.S.C.	United States Code
UCI	Union Cycliste Internatotionale
UDRP	Uniform Dispute Resolution Policy
UEFA	Union of European Football Associations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFDAC	UN Fund for Drug Abuse Control
UNODC	United Nations Office on Drugs and Crime
UNODCCP	UN Office for Drug Control and Crime Prevention
USADA	United States Anti-Doping Agency
USFDA	United States Food and Drug Administration
UV	Ultraviolet
VEGF	Endothelial Growth Factor
VNGOC	Vienna NGO Committee on Narcotic Drugs
WADA	World Anti-Doping Agency
WADC	WADA Code
WHO	World Health Organizations
WIPO	World Intellectual Property Organisation
WSLP	World Sport Law Report

ACKNOWLEDGEMENTS

Je tiens à remercier ma directrice de recherche, madame France Houle et mon codirecteur, monsieur Hugues Parent**,** pour leur encouragement, pour leur soutien et pour leur encadrement. Sous leur supervision, j'ai eu le plaisir d'etre un doctorant en droit et de contribuer à la connaissance de droit.

Je dis également merci aux professeurs Lorne Sossin, Hoi Kong et Matthew P. Harrington d'avoir accepté de sieger dans le jury de cette these.

En fin, je remercie particulièrment ma mere Şükran Gök et mon père Orhan Gök pour qu'ils étaient toujours là pour moi pendant ce long voyage de doctorat qui a débuté en septembre 2005.

I dedicate this thesis to my *Mother* and *Father.*

Preliminary note

To emphasize certain words or phrases and for foreign language words, phrases or excerpts, I used the italic form in this dissertation.

In citing sources, I used a customized model which is consistent throughout the thesis.

Law is order, and good
law is good order.
-Aristotle

General Introduction

It is unlikely that anyone has missed the Lance Armstrong doping scandal. The seven-time *Tour de France* champion shocked the sporting world with his admission of the cutting-edge doping methods he employed, and the perplexing statements he made afterwards. However, the Armstrong case has not only put into question the technical preparedness of the anti-doping regime in detecting *state-of-art* doping methods, but has also raised ethical, social, and public health concerns of doping.[1]

The issues concerning the anti-doping regime of today brought to light by the Armstrong case are broader than one athlete. There are significant public and criminal law based concerns as well as diversity and collaboration related challenges which necessitate revisiting the present day anti-doping governance (regulation & administration).[2] In this regard, the World Anti-Doping Agency (WADA), founded as a Swiss private law Foundation, seated in Lausanne, Switzerland, and headquarted in Montreal, is inefficient in overcoming all these mainly public law related issues as the regulator and administrator of the World Anti-Doping Program.[3] Worse, its centralized

[1] In his interview with Oprah Winfrey, Armstrong admitted to have won all his seven *Tour de France* championships by benefiting from the undetectable or difficult-to-detect doping substances and methods such as *EPO, growth hormones*, and *blood doping*. He told Oprah what he did was smart and he used the substances and methods that everyone else around him also accessed. Besides, he indicated that he was not alone in overcoming the doping tests and there was a doping culture: Oprah WINFREY, "Oprah and Lance Armstrong: The Worldwide Exclusive," *Oprah Winfrey Network (OWN)*, 16 January 2013, available at HYPERLINK: <http://www.oprah.com/own_tv/onc/lance-arms trong-one. html> [last visited on February 2, 2013]; Namely, there has still been uncaught athletes applying for the substances or methods which are undetectable or difficult-to-detect such as *gene therapy* or *gene doping.* For the definitions of *gene therapy*, *EPO*, *growth hormonses*, and *blood doping*, see *infra* p. 37 *et seq.*

[2] Organized crime involvement, public use of doping substances and methods, collaboration need in the realm of different legal cultures and societies are the ongoing challenges, see *infra* pp. 17-22.

[3] Notarized by Antoine Rochat with original number 1185 on 10 November 1999 in Lausanne, English language version Art. 1 of the WADA Constitutive Instrument states the designation as follows: "Under the name "Agence mondiale antidopage", "World Anti-Doping Agency", hereinafter referred to as "the Foundation" or "the Agency", is

supreme rule-making status (which has produced the Code,[4] whose principles must be respected by the anti-doping legislation, regulation, policies or administrative practices of the countries, party to the UNESCO Convention),[5] exacerbates the problems inherent in the governance of doping.[6]

Strickly speaking, this WADA based private law regime today fails to accommodate the needs of global anti-doping governance with its current structure.[7] There is a need to have a novel anti-doping governance approach, responding to all these issues and concerns. As a result, I have decided to write this thesis, proposing a new governance model which can answer the requisites of

---

constituted as a Foundation governed by the present provisions and articles eighty et seq. of the Swiss Civil Code." And, Article 2 states the seat of the Foundation as Lausanne: *The Constitutive Instrument of Foundation of the World Anti-Doping Agency,* 1999. The modified and latest version of the Instrument which dates back 1 September 2009 includes the same words and is available at HYPERLINK:<http://www.wadaama.org/Documents/About_ WADA/ Statutes/WADA_Statu- tes_2009_FR.pdf > [last visited on November 3, 2013]. [Constitutive Instrument]; In this aspect, WADA regulates and administers the world anti-doping program in three levels: 1) The Code (fundamental), 2) International Standards (technical and operational), and 3) Models of Best Practice and Guidelines (advisory). Moreover, WADA has had three chances to constitute the World Anti-Doping Program through a supreme document of Code since its establishment in 1999. January 1st of 2004 and of 2009 have in this regard been the dates when the first and second version of the Code entered into force. The latest version of the Code will be effective as of January 1st, 2015. The *WADA Code*, "The 2015 World Anti-Doping Code", available at HYPERLINK: < http://www.wada ama. org/Documents/World_Anti-Do-ping_Program/WADP-TheCode/ Code_ Review/ Code%20Review%202015/Code% 20 Final%20Draft/WADA-20 15-World-Anti-Doping-Code.pdf > [last visited on October 29, 2013]. [Code]

[4] The Code defines itself as follows: "The *Code* is the fundamental and universal document upon which the World Anti-Doping Program in sport is based. The purpose of the *Code* is to advance the anti-doping effort through universal harmonization of core anti-doping elements. It is intended to be specific enough to achieve complete harmonization on issues where uniformity is required, yet general enough in other areas to permit flexibility on how agreed-upon anti-doping principles are implemented. The *Code* has been drafted giving consideration to the principles of proportionality and human rights," *Ibid.,* p. 11.

[5] Entered into force in 2007 and signed by over 170 coutries, the International Convention against Doping in Sport (UNESCO Convention) empowers the WADA Code in governing the anti-doping efforts in the world through its principles. In this sense, Article 3(a) of the Convention states the following: "[…] 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." Besides, Article 4.(1) affirms "[…] States Parties commit themselves to the principles of the Code as the basis for the measures provided for in Article 5 of this Convention." Lastly, Article 5 clarifies the measures as "[...] each State Party undertakes to adopt appropriate measures. Such measures may include legislation, regulation, policies or administrative practices:" The UNESCO Convention, "The International Convention against Doping in Sport," 2005, available at HYPERLINK: <http://www.unesco.org/new/ en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/>[last visited on October 29, 2013]. [UNESCO Convention]

[6] See *infra* pp. 20-22.

[7] See *supra* note 2.

global anti-doping regulation and administration. The governance approach I propose will be based on an adapted model, a model that can fill the necessary gaps in the existing governance of doping.

Therefore, I recommend a *penal* and *public global* nature of doping be recognized and such recognition be combined with an *adapted* governance model, based on a pluralist approach of global administrative law (GAL), in order to produce a better accepted and more effective anti-doping regulation and administration. This adapted governance model requires the present anti-doping regime, nation states, and other related organizations and affected groups to adjust their actions to accommodate the needs of global anti-doping governance. The international collaboration requirements of anti-doping justify such an adjustment need in the realm of public and criminal law based issues and in the presence of different doping legal cultures and societies.

For instance, transnational organized crime syndicates or organizations are heavily involved in the doping trafficking and the Australian Crime Commission (ACC) has recently confirmed such connection through a 12-month long investigation.[8] Access to prohibited substances outside of a sporting competition is very common, and a wide range of users from students to body builders are already quite familiar with these drugs and/or methods.[9] In other words, there are crucial threats to the anti-doping governance structure outside of WADA's regulatory and administra-

[8] The investigation was supported by the Australian Sports Anti-Doping Authority (ASADA) and the Therapeutic Good Administration (TGA):The Australian Crime Commission (ACC)*, Organised Crime and Drugs in Sport: New Generation Performance and Image Enhancing Drugs and Organized Criminal Involvement in Their Use If Professional Sport,* Canberra: Australia Crime Commission, February 2013.[ACC Report]; Moreover, access to the prohibited substances outside of competition is very common and a wide range of users from students to body builders are already quite familiar with these drugs and/or methods.

[9] In a recent survey conducted in Sweden, 15-30 % of the bodybuilding community knew about steroids and these drugs could be easily found through the internet and the black market: Martine DUCLOS, "Doping and Its Consequences in Terms of Individual Health and Public Health," (2012) 35/2 *Le dopage et ses conséquences en termes de santé individuelle et de santé publique,* p. 58.

tion scope. Current anti-doping governance cannot handle the presence of organized crime nor the public health-related issues alone.

Furthermore, the issue of restricting the prohibited doping substances and methods is another challenge globally when there are different national legal mechanisms regulating national anti-doping regimes and when such restriction or elimination increasingly requires the involvement of public authorities. For instance, national laws regulate anti-doping with their own understanding of doping, taking into account the WADA-based rules and standards. Some countries have strict legal frameworks and other countries have distinct and specialized bodies regulating the fight against doping.

For example, Italy,[10] Spain,[11] and Greece[12] have criminal law mechanisms, whereas Canada, Australia, the United States, and Turkey have private law mechanisms. Finally, France has a mixed mechanism.[13] There is no consistency in the world with respect to the fight against doping in terms of public law or private law approaches. Although one of the purposes of WADA Code is to harmonize and unify anti-doping rules and standards in the world, nation states can still apply stricter measures in the fight against doping according to the UNESCO Convention Art. 4

[10]Article 9 of the Italian "Disciplina della tutela sanitaria delle attività sportive e della lotta contro il doping," law number 376 – 2000 criminalizes doping. The Code is available at HYPERLINK:< http://www.camera.it/parlam/leggi/00376l.htm> [last visited on October 28, 2013]. [Italian Code]

[11]A new Spanish law on Protection of the Athlete Health and Fight against Doping in Sport, titled "Ley Organica 3/2013, de 20 de junio, de proteccion de la salud del deportista y lucha el dopaje en la actividad deportiva," numbered "law no 6732 of 3 June 2013," and describing the criminalization of doping, has been recently adopted on 3 June 2013. The law is available at HYPERLINK: <https://www.boe.es/boe/dias/ 2013/06/21/pdfs/BOE-A-2013-6732. pdf> [last visited on 28 October, 2013].

[12]Articles 7, 8, 9, 10 and 11 of Greek Law 1646 / 1986 stipulate criminal penalties to the athletes, physicians, officials, and coaches. Gregory IONNIDIS, Legal Regulation of Doping in Sport: The Case for The Prosecution, (2003) 1-1 *Obiter*, 15-17. The article is also available at HYPERLINK: <http://www.lawfile.org.uk/Obiter1-2003. pdf > [last visited on October 28, 2013].

[13]The French Code of Sport whose legislative and regulatory parts were respectively ratified in May 2006 and in July 2007 criminalizes doping with Articles 232-25 to 29. The Code is available at HYPERLINK: <http://www. legifrance.gouv.fr> [last visited on September 17, 2012].

(1).[14] Moreover, singling out private law would not be fair for the countries that want to benefit from the private law. Thus, there is a genuine interest to have an anti-doping governance mechanism which appropriately applies the public and private law tools at the global level. However, the question of balancing the weight of private and public law in the governance of doping remains a great challenge to overcome when a distinction of private and public law does not exist in every legal system.[15]

Hence, enhanced collaboration and assistance is required. For instance, WADA has already signed a cooperation agreement with INTERPOL in 2009.[16] However, the severity of the issue requires the mutal assistance of nation states and collaboration of international organizations such as the United Nations Office on Drugs and Crime (UNODC) and World Health Organization (WHO). Besides, how nation states with their diverse legal systems and cultures will have to adapt to such sophisticated collaboration needs is another issue to tackle.

Nevertheless, WADA's private law-based governance mechanism has, despite its collaboration efforts with INTERPOL and despite its admittance of organized crime involvement into doping, abstained from recognizing the public and criminal law based aspects of doping in the Code. The Code will continue to answer such public authority required concerns with proposing distinct

[14] "[…] Nothing in this Convention prevents States Parties from adopting additional measures complementary to the Code:" UNESCO Convention, *supra* note 5.
[15] For instance, there is no private law and public law distinction in common law.
[16] WADA, "INTERPOL and WADA joins forces to fight cheats," available at HYPERLINK: < http://www.wada-ama.org/en/media-center/archives/articles/INTERPOL-and-wada-join-forces-to-fight-sports-cheats/> [last visited on September 28, 2013]. And, the Agreement signed with INTERPOL can be found in: WADA, "Coordinating Investigations and Sharing Anti-Doping Informationa and Evidence," May 2011, available at HYPERLINK:< http ://www.wada-ama.org/Documents/World_AntiDoping_Program/Governments/Investigations/WADA_Investigations_Guidelines_May2011_EN.pdf> [last visited on April 11, 2014] [WADA and INTERPOL Collaboration]

doping rules and procedures. However, such strategy puts athletes and other individuals, subject to the doping adjudication, in a disadvantaged position.[17]

For instance, Article 1 of the Code defines doping as the occurrence of one or more anti-doping rule violations, regulated in Articles 2.1 to 2.10.[18] According to these rules, the presence of a prohibited substance in an athlete's body is considered doping; athletes are responsible for ensuring no prohibited substances enter their bodies; and, intent and fault are irrelevant in the case of doping.[19] Namely, athletes are under a regime of *strict liability of no fault or negligence* when doping is concerned.[20] Furthermore, a "less than proof beyond a reasonable doubt standard" and use of circumstantial evidence to establish the doping violations apply to proof of doping.[21]

Additionally, the new 2015 Code, while undermining the nature and scope of doping more in the realm of different anti-doping perceptions in the world, prefers empowering the National Anti-Doping Organizations (NADOs) with investigation and intelligence gathering powers (Art. 5.8) and adding new non-analytical based doping categories. In this respect, working or associating with a banned athlete – or his or her support personnel − can lead to a violation (Art. 2.10). In other words, the anti-doping adjudication with the advent of new designated powers for NADOs will challenge the protection and promotion of the human rights of athletes and other persons subject to the proceedings.

---

[17] WADA's harmonization strategy in regard to doping rules and procedures is combined with the consideration of nature of doping and doping proceedings are distinct from criminal and civil proceedings: The Code, "Introduction," *supra* note 3, p. 17.
[18] *Ibid.*
[19] *Ibid.,* Art. 2.1.
[20] For more information about the strict liability principle, see: Frank J. VANDALL, *Strict Liability: Legal and Economic Analysis*, New York / London: Quorum Books, 1989, p. 182; Richard A. EPSTEIN, *A Theory of Strict Liability: Toward a Reformulation of Tort Law*, San Francisco: Cato Institute, 1980, p. 140.
[21] Code, *supra* note 3, Art. 3.1 and 2.

Nonetheless, considering the accusatory nature of doping, athletes' fundamental rights should be guaranteed under the principles of natural justice, as stated in Article 6 of the European Convention on Human Rights (ECHR).[22] Even though the 2015 Code refers to natural justice and the internationally accepted human rights principles, athletes still have to deal with the strict liability of no fault or negligence (Art.2.1.1) and the special standard of proof (Art. 3.1), which is "greater than a mere balance of probability, but less than proof beyond a reasonable doubt" while the nature of doping is not private at all.

Although Professors Gabrielle Kaufmann Kohler and Antonio Rigozzi consider the WADA Code Article 10.6 is compatible with Article 6 of the ECHR, saying that doping is non-criminal offense,[23] the reverse thinking that doping is a quasi-criminal offense can include the principles of natural justice in the Code. Yet, determining the nature of doping in light of the current standard of proof and strict liability view of the Code is almost impossible.[24]

Consequently, such ambiguity and contradiction raise important questions for the fairness of doping adjudication and challenge the principles of no penalty without a law and presumption of innocence. Besides, the application of *non-analytical positives*[25] and *athletic profiling* (also

[22] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights), as amended by Protocols Nos. 11 and 14, 4 November 1950, available at HYPERLINK:< http://www.echr.coe. int/ Documents/Convention_ENG.pdf> [last visited on July 26, 2014][ECHR]
[23] Gabrielle K. KOHLER and Antonio RIGOZZI, "Legal Opinion on the Conformity of Article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes," 2007, p. 8, available at HYPERLINK: <http:// www.wada-ama.org/rtecontent/ document/Legal Opinion Conformity_10_6_complete_document.pdf> [last visited on December 2, 2012].
[24] Rachelle DOWNIE, "Improving the Performance of Sport's Ultimate Umpire: Reforming the Governance of the Court of Arbitration for Sport," (2011) 12/2 *Melbourne Journal of International Law,* p. 330.
[25] Non-analytical positives allow the doping tribunals to charge athletes with doping violation through circumstantial evidence without a positive test result. In other words, admission, allegation, or documentary evidence might be sufficient to establish a doping violation as long as the tribunal is comfortably satisfied with the circumstantial evidence: Richard H. MCLAREN, "An Overview of Non-Analytical Positive & Circumstantial Evidence Cases in Sports," (2006) 16-2 *Marquette Sports Law Review*, pp. 193-212. "Non-analytical positives" have already been app-

known as *doping passport*),[26] which are considered prospective solutions to cope with the undetectable or difficult-to-detect doping challenges,[27] can still undermine the fair trial (ECHR Art. 6) and privacy rights (ECHR Art. 8) of athletes and other persons, subject to the proceedings.[28]

As a result, the doping investigation and adjudication procedures of the Code do not only apply to a subject which implicates public and criminal law aspects, but also creates a mechanism in favor of NADOs. Putting aside the private law structure aspect of WADA, these specific legal issues of different legal cultures and societies, international collaboration needs, and public and criminal law aspects are combined with other aspects of doping. Therefore, as witnessed in the case of Lance Armstrong, why athletes dope, who benefits from doping, what kind of new doping methods can challenge the detection of doping and whether doping should be allowed or legalized in a competition, are other probable questions to ask for a better comprehension of the nature of doping.

In other words, the matter of doping is *inter/multidisciplinary* and I will consider legal, technical, ethical, political, social, and public health aspects of doping in the determination of a theoretical framework which will shape the governance of anti-doping. Specifically saying, the good

---

lied in many international doping incidents, such as the famous BALCO investigations and, most recently, in the Lance Armstrong incident: A summary timeline of the various investigations involving Bay Area Laboratory Co-operative (BALCO) is available at HYPERLINK: <http://www. usatoday.com/sports/balco-timeline.htm> [last visited on September 25, 2012]; The United States Anti-Doping Agency (USADA) sanctioned Lance Armstrong with a lifetime ban on August 24, 2012. Source HYPERLINK: <http://www.usada.org/ media/ sanction-armstrong 8242012> [last visited on October 28, 2013].

[26]The doping passport method aims at periodically recording the blood and urine test results of the athlete and monitoring them for any irregular biological changes in the athlete's organisms. The Guidelines with respect to the doping passport were approved by WADA in 2009, following a seven-year-long preparation. Source HYPERLINK: <http://www.wada-ama.org/en/science-medicine/athlete-biological-passport/operating-guidelines/ > [last visited on October 29, 2013].

[27] James A.R. NAFGIZER, "Circumstantial Evidence of Doping: Balco and Beyond," (2005) 16 *Marquette Sports Law Review*, pp. 46-47.

[28] ECHR, *supra* note 22.

grasped nature of doping after overviewing all these aspects will evidence what theoretical framework can be more helpful to accommodate the global governance needs of doping. Considering the above-mentioned issues, the GAL model is a more appropriate theoretical framework to benefit from in this thesis in comparison to other leading global governance theories, such as global constitutionalism and global legal pluralism.[29]

For instance, the pluralist version of global constitutionalism, combined with its monistic approach, cannot resolve the diversity based anti-doping challenges. The supranational rule-making aspect and difficulty to ensure the recognition (voluntary) of supreme rule or principle in different legal cultures and societies prevent me from focusing on this model.[30] Global legal pluralism cannot be helpful either since the current anti-doping regime is more and more recognized by nation states as sole legal order (as obligatory to abide by it) and the presence of multiple legal orders at the global level is not direct, but the indirect aspect to consider.

After all, the thesis requires a theoretical framework which must first comform with the direct legal aspects of anti-doping governance, such as the nature of doping, participation to the global rule-making process, and legitimacy and accountability of the regime. Aside from this, the *inter/multidisciplinary* aspect of doping also requires a governance model which can answer all non-legal issues of doping, from research and development to education and public health.

[29] Shaffer outlined that global constitutionalism, global legal pluralism, and global administrative law were the leading theoretical concepts in current international law scholarship for answering the challenges of global governance: Gregory SHAFFER, "International law and global public goods in a legal pluralist world," (2012) 23/3 *European Journal of International Law*, p. 684.

[30] Supranational law making may not be consistent with the domestic dynamics and structure of the law making process: Ernest A. YOUNG, "The Trouble with Global Constitutionalism," (2003) 38/3 *Texas International Law Journal,* p. 529.

Therefore, the GAL model will better support this thesis. As summarized by Sabino Cassese in 2005, the GAL model can be framed as "informal global regulatory entities should be subject to certain administrative law principles in their actions and regulations when they act as a global legal order." Furthermore, Prof. Cassese expressed his view of the GAL model as follows:

> *"*The more that global organizations widen their scope of action beyond states and domestic public organizations, the more that it becomes important to ensure respect for the rule of law, the principle of participation, and the duty to give a reasoned decision."[31]

Although, Cassese intended to formulate a comprehensive theory of global administrative law, there is still ongoing work on the content and the emergence of global administrative law, starting with the GAL Project initiative at New York University.[32] What these developments about the GAL model demonstrate is global administrative law is still a fluid concept,[33] which continually seeks a mutually recognized, or at least an overwhelmingly approved pattern in the world. Different views on its theoretical foundations will not, however, prevent one from adding new avenues of research into the existing debates of global administrative law.

For that reason, I will integrate the global public good and global public interest tenets into the GAL model in order to better capture the subject area, informed participation, knowledge sharing, and accountability and legitimacy aspects. Such integration will provide a required governance

---

[31] Sabino CASSESE, "Administrative law without the State? The Challenge of Global Regulation," (2005) 37 *N.Y. U.J. Int'l. L. & Pol.*, p. 694.

[32] Institute for International Law and Justice (IILJ),"The Global Administration Law Project," New York University School of Law, available at HYPERLINK: <http://www.iilj.org/gal/> [last visited on November 3, 2013].

[33] Daniel Mockle has affirmed the fluid nature of GAL by taking notice of the fluidity aspect of GAL principles. His exact words on this subject are as follows: "*[c]e débat est très significatif puisqu'il met en lumi- ère la fluidité des principes entre divers champs dans l'évolution du droit contemporain. C'est précisément cette fluidité qui constitue un terreau fertile pour les spéculations relatives au droit administratif global*." Daniel MOCKLE, "Le débat sur les principes et les fondements du droit administratif global," (2012) 53/1 *Cahiers de Droit*, pp. 31-32. Thus, if the administrative principles which are fundamental to the theory of GAL are fluid and are hard to arrive at a global consensus on them, I may then claim that GAL can also be speculated to include more practical and acceptable tenets such as *global public good* and *global public interest* next to its fluid principles and values.

model for the matter of doping. In other words, even though Casini has considered WADA as the foremost example of GAL and has presented it as a global governance model, I believe the WADA model along with the views of Casini should be revisited.[34] As I already expressed above why GAL should be modified to accommodate the needs of doping governance, this thesis will reveal how one should be cautious to associate the theory of GAL with any subject matter. In this respect, the WADA based anti-doping governance is much more different than, for example, the ICANN based domain name governance model, despite their association with GAL in a similar way. [35]

As a result, this theoretical framework will guide me to build the adapted governance model in order to answer the above-mentioned needs of anti-doping. In this regard, I repeat my thesis again: The *penal* and *public global* nature of doping should be recognized and such recognition should be combined with an *adapted* governance model, based on a pluralist approach of GAL, in order to produce a better accepted and more effective anti-doping regulation and administration.

As for the methodology to produce this thesis, the particularity of the subject matter requires the application of primarily *inter/multidisciplinary* doctrinal sources and international instruments, such as conventions, policies, and guidelines. However, I am also going to give sufficient weight to legislation and jurisprudence when required to do so. In this respect, the constitutional and

[34] Lorenzo CASINI, "Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)," (2009) 6/2 *International Organizations Law Review*, pp. 421- 440.
[35] According to Casini, both model are the examples of GAL although these subject matters differ from each other: *Ibid,* p. 427; ICANN abbreviation represents The Internet Corporation for Assigned Names and Numbers.

criminal laws of the many countries along with their respective doping regulations[36] and the CAS jurisprudence will be studied.

In my analysis, I will benefit from the analogy, comparison, and exemplification methods as much as possible. Given the nature of thesis, I will need to interpret the data in a way that I can propose a solution or a model which will eventually require critical and creative thinking. Namely, I will explain the research problem and proposed adapted model as strongly as possible with diverse resources, including case studies from different subject areas, such as Internet governance, and will present my points and my thesis accordingly as clear as possible through tables and illustrations.

This thesis will contribute to the legal, ethical, scientific, social, economic, political, and public health knowledge. In this respect, proposing the *penal* and *public global* nature of doping and an *adapted* governance model, based on a pluralist approach of GAL, and elaborating the governance of doping in a more complete way, from its private law based structure to its *inter/multidisciplinary* aspects, have not yet been tried. Although, some authors have already elaborated and concluded the public health concerns and the involvement of organized crime aspects in the matter of doping,[37] this thesis is a more complete work evidencing the transformation needs of the global anti-doping regime and recommending a road map for change.

[36] I will study the relevant legislative sources coming from the following countries: Australia, Austria, Belgium-Flanders, Canada, China, Cuba, Dr Congo, Cyprus, Denmark, Finland, France, Ghana, Guatemala, Greece, Hungary, Iceland, Italy, India, Japan, Kazakhstan, Latvia, Lithunia, Luxembourg, Mexico, Morocco, New Zealand, Nicaragua, Niger, Norway, Peru, Portugal, Romania, Russian Federation, San Marino, Serbia, Singapore, Sri Lanka, South Africa, Spain, Swaziland, Sweden, Switzerland, Tunisia, Turkey, Uruguay, The Philipinnes, The United Arab Emirates, The United Kingdom, The United States of America.

[37] Alessandro DONATI, "World Traffic in Doping Substances" (Translated by Alessandra Lombardi), February 2007, pp. 78-79, available at HYPERLINK: < http://www.wadaama.org/Documents/World_AntiDoping_Program/Governments/WADA_Donati_Report_On_Trafficking_2007.pdf> [last visited on April 28, 2014], and see Letizia

In addition, this thesis which departs from the nature of doping brings a novel approach on the governance of doping by considering benefits for the society-at-large (global community), exceeding the borders of the sport community. Moreover, the adapted (pluralist) governance model of GAL I propose can also apply to other subject areas with global concerns, such as public health and global security. Furthermore, the *inter/multidisciplinary* aspect of thesis, elaborating the subject matter from different angles (legal and non-legal), will reduce the communication gaps of law with other disciplines and fields studying the anti-doping subject.

Lastly, this adapted GAL model will not only ensure a more adequate anti-doping governance, but will also encourage collaboration in the world regarding the production and maintenance of other global public goods. The adapted model will improve the theory of GAL, contributing to the knowledge of global governance law and theory. Moreover, this model will provide insight into the possible conversion of the WADA Foundation under public international public law as Article 4 (8) of the WADA Constitutive Instrument entitled the WADA Foundation to consider such transformation in the future.[38]

As for the plan, the thesis consists of one preliminary chapter and two parts. In the preliminary chapter, I will elaborate the nature of doping from the legal, technical, social, ethical, political,

---

PAOLI and Alessandro DONATI, "The Supply of Doping Products and the Potential of Criminal Law Enforcement in Anti-Doping: An Examination of Italy's Experience," 30 Januray 2013, pp. 7, 12, 21, 31, available at HYPERLINK:<http: //www.wadaama.org/ Documents/News_Center/News/2013-Paoli-Donati-Report-Executive-Summary-EN.pdf>[last visited on April 28, 2014]. Moreover, PAOLI and DONATI have recently elaborated the sport doping markets and confirmed the involvement of organized crime aspects in doping in their most recent book: Letizia PAOLI and Alessandro DONATI, *The Sports Doping Market: Understanding Supply and Demand and the Challenges of Their Control,* New York: Spinger, 2014.

[38] "[…] The Agency will be entitled to prepare plans and proposals with a view to its conversion, if necessary, into a different structure, possibly based on international public law: " Constitutive Instrument, *supra* note 3.

and public health points of view in order to distinguish the main elements in the nature of doping that will guide me in finding the appropriate theoretical framework for the governance of doping.

In the first part, I will elaborate the theoretical model that I will apply to the governance of doping. To do this, I will first review the historical background of global governance law. Next, I will make a comparative analysis of doping governance in terms of three global governance theories: global constitutionalism, global legal pluralism and global administrative law, bearing in mind the major doping nature elements I concluded in the preliminary chapter. Finaly, having justified why the GAL model must apply to the governance of doping, I will propose the adapted governance model, based on a pluralist approach of GAL.

In the second part, I will validate my thesis and conclude the *penal* and *public global* nature of doping while proposing a road map for the transformation needs in the governance of doping. In this respect, I will first evidence the current institutional issues of present private law based anti-doping regime. I will then demonstrate why this private law based anti-doping regime fails to accommodate the needs of global governance. Following this, I will demonstrate the need to reconsider the legal nature of doping and review the *penal* and *public global* nature of doping.

Finally, I will confirm the *penal* and *public global* nature of doping by elaborating the national and international level strategies in restricting the prohibited substances and methods. In this second and last part of my thesis, I will make a proposal to transform the regulatory framework of doping in sport, under the guidance of adapted (pluralistic) GAL model.

PRELIMINARY CHAPTER: Settting the Stage of Doping

The main objective of this part is to define the concept of doping and overview the technical, public health, social, political, ethical, and economic aspects of doping before commencing to seek out an appropriate theoretical framework to accommodate the needs of the general research problem. I will analyze these aspects in two sections. In the first section, I will study the definition of doping in terms of WADA Code and reflect upon criteria or conditions required to determine when doping occurs. In learning how the WADA Code perceives and defines doping, we will better define the departure point to examine other aspects to consider for a greater understanding of doping.

In the second section, I will answer the questions of why athletes dope, who benefits from doping, and what ethical, social, and technical considerations are present. Understanding these different aspects and considerations is important as we will see what challenges and facts to be taken into account while seeking a theoretical framework for this thesis. In this regard, knowing the matter of doping does not ony have legal issues, but also has other aspects to consider will be an asset in seeing the more complete picture view of global anti-doping governance.

Finally, in this chapter, I will also benefit from empirical studies as much as possible to support my qualitative analysis and provide a factual basis for what doping actually is and how this matter should be approached when seeking a theoretical framework to govern it.

Section 1 ***Definition and Legal Aspects***

The first use of doping dates back centuries ago. Ancient Greek athletes benefitted from natural substances to improve their physical and mental conditions.[39] It was not until the 19th century, however, that new chemical substances appeared.[40]

Cycling and boxing were the first sports to involve doping.[41] After World War II, doping cases increased tremendously and the matter of doping took on a scientific character as of the 1960s.[42] As a result, the use of doping became an important issue for many sports organizations. Thereafter, the *Union Cycliste Internatotionale* (UCI) and the *Fédération Internationale de Football Association* (FIFA) introduced the first doping tests in their World Championships in 1966.[43]

On November 10th, 1999, approximately one year after the *Tour de France* scandal,[44] WADA was established in Lausanne to set unified standards for the matter of doping and to coordinate the anti-doping related activities of sports organizations and public authorities.[45] The Agency moved its headquarters from Lausanne to Montreal in 2001 and WADA adopted its universally

[39] WADA, "A Brief History of Doping," June 2010 (last updated), HYPERLINK: <http://www.wada-ama.org/en/About-WADA/History/A-Brief-History-of-Anti-Doping/> [last visited on February 2, 2013]. [Doping History]
[40] In this regard, the cyclists used Strychnine to improve their endurance: *Ibid.*
[41] Piermarco ZEN-RUFFINEN, *Droit Du Sport*, Zurich: Schulthess, 2002, p. 430.
[42] *Ibid,* 431.
[43] Code, *supra* note 3.
[44] In this scandal, a large number of prohibited medical substances were found by the police in a raid during the *Tour de France*. This scandal showed that French public authorities were not sufficiently prepared for the fight against doping. For more information, see BBC News, "Tour tarnished by drugs scandal," 3 August 1998, available at HYPERLINK: <http://news.bbc.co.uk/2/hi/special_report/1998/07/ 98/tour_de_france/144326.stm> [last visited on February 2, 2013]. [Tour de France]
[45] WADA, "WADA Histroy," available at HYPERLINK: <http://www.wada-ama.org/en/About-WADA/History/WADA-History/> [last visited on March 15, 2014]. [WADA History]

accepted anti-doping Code in 2003.[46] The Code consisted of a set of regulations and included certain standards with additional recommendations for its signatories.[47]

The definition of doping is highly important in order to set up an effective doping control system. Articles 1 and 2 of the WADA Code state that doping is defined as the occurrence of one or more of the anti-doping rule violations which are regulated in Articles 2.1 to 2.10.[48] According to these rules, the following violations are considered doping:

-Presence of a prohibited substance or its metabolites or markers in an athlete's sample.
-Use or attempted use by an athlete of a prohibited substance or a prohibited method.
-Evading, refusing or failing to submit to sample collection.
-Whereabouts failures.
-Tampering or attempted tampering with any part of doping control.
-Possession of a prohibited substance or a prohibited method.
-Trafficking or attempted trafficking in any prohibited substance or prohibited method.
-Administration or attempted administration to any athlete in-competition of any prohibited substance or prohibited method.
-Administration or Attempted Administration to any Athlete In-Competition of any Prohibited Substance or prohibited method, or administration or attempted administration to any athlete out-of-competition of any prohibited substance or any prohibited method that is prohibited out-of-competition.
-Complicity.
-Prohibited association.

Along with the direct violation thought, attempting to violate the rules is also considered doping in certain cases, as seen above. Besides, athletes are under the regime of strict liability when the presence and attempted use of the prohibited substance and method are considered doping.[49]

---

[46] *Ibid.*
[47] Simon GARDINER et al., *Sports Law*, 3rd Edition, Sydney / London: Cavendish Publishing Limited, 2006, p. 272. And the signatories of the Code were "the International Olympic Committee, International Federations, International Paralympic Committee, National Olympic Committees, National Paralympic Committees, Major Event Organizations, National Anti-Doping Organizations, and WADA:" WADA, "The WADA Code 2003," available at HYPERLINK: <http://www.wada ama.org/Documents/World_ Anti-Doping_Program/ WADP-The Code/Code_ Review/1st_Consultation/WADA_Code_2003_EN.pdf> [last visited on March 15, 2014]
[48] Code, *supra* note 3.
[49] For instance, Art. 2.1 and 2 ensure the application of strict liability principle: Code, *Ibid*.

Thus, how to prove attempting when applying the *strict liability* rule has created important challenges in the determination of a doping violation. And, the Code has intended to overcome this challenge by choosing the *comfortable satisfaction of hearing panel* as the standard of proof.[50]

However, that the standard of proof and strict liability in doping disputes are not properly established does not help us easily determine the nature of doping.[51] Moreover, these ambiguities and contradictions about the nature of doping raise important questions with respect to the fairness in doping adjudication. Thus, there is a genuine interest to consider the distinct legal nature of doping, not only when one explores a proper theoretical framework for its governance, but also when the nature of doping impacts on the whole governance schema. In other words, one needs to well measure the subject matter first in order to tailor an appropriate governance mechanism for it. We can see the different outcomes of this distinct nature of doping in the national anti-doping regimes, favoring criminal law to private law or private law to criminal law, or both together private law and criminal law.[52]

There is a divergence among the national anti-doping regimes, albeit the WADA Code intends to unify such diversity one way another. Thus, one should carefully consider how to approach these diverse legal regimes and legal cultures when they are shaped and practiced in diverse societies. For instance, Soccer and Hockey do not have the same attention everywhere in the world, just as criminalization of a matter does not have the same approach or justification in the world.[53]

---

[50] *Ibid.*, Art. 3.1.
[51] DOWNIE, *supra* note 24.
[52] That is why Italy, Spain, and Greece apply criminal law mechanisms, whereas Canada, Australia, the USA, and Turkey have private law mechanisms, and France pursues a mixed mechanism: See further elaboration of these models in the second part of the thesis in *infra* pp. 191-202.
[53] On this subject, the decriminalization and/or legalization of cannabis (marijuana) is a good example of the different views and approaches to regulating a drug. Some societies regulate it with soft rules while certain societies

Therefore, one needs to take into consideration the diversity with respect to the subject matter and the impact of the regulation or governance mechanism on the different societies whilst looking for a proper theoretical framework. That being said, doping has also technical, sociological, political, economic, and ethical aspects, all along with its judicial aspect. All these non-legal aspects should also be overviewed in / during the exploration of an appropriate theoretical framework.

I will turn to the legal nature examination of doping, particularly in terms of criminal and public law, in the second part of the thesis. And, as required for the time being, I will briefly elaborate the technical, social, ethical, political, and economical aspects of doping.

Section 2 *Other Aspects*

Having studided the definition of doping and having outlined the legal characteristics, I will briefly define the technical, social, ethical, political, health, and economic aspects in this section. While studying these aspects, my main objective will be to consider how they impact on the proper theoretical framework search for this thesis.

To begin, I will outline the Prohibited List and give examples for how advanced technology makes the detection of doping difficult. Thereafter, my focus will be on the reasons behind dop-

consider it to be criminalized as seen in the examples of the Netherlands and Turkey. Marije WOUTERS et al., "Cannabis use and proximity to coffee shops in the Netherlands," (2012) 9/4 *European Journal of Criminology*, p. 338; Mehmet Zülfü ÖNER, "Türk Ceza Hukuku'nda Uyuşturucu Madde İmal, İthal ve İhraç Suçları," (2010) 88 *TBB Dergisi,* pp. 144-145.

ing use, providers and beneficiaries of doping outside of athletes, economic and political impact of doping, and finally the impact of these aspects on the selection of theoretical framework.

2.1 Technical Aspects

What is considered a prohibited substance and method changes from year to year since the list of prohibited substances and methods has to be updated annually by WADA.[54] In other words, one should know how different or how challenging the substance or method can be. The matter of doping is much more different than many other subject matters in this sense. Although the Prohibited List of WADA does not distinguish the challenge of these substances and methods, it tells what is prohibited and what is not.

2.1.1 Prohibited List

The WADA Prohibited List of 2014, effective as of January 1st, 2014, outlines the prohibited substances and methods as follows: [55]

Table 1 Prohibited Substances and Methods

Substances and Methods Prohibited at all Times (In-and out-of-competition)	
Prohibited Substances	***Prohibited Methods***
S0. Non-Approved Substances	*M1.Manipulation of Blood and Blood Components*
S1. Anabolic Agents	*M2.Chemical and Physical Manipulation*
S2. Peptide Hormones, Growth Factors and Related Substances	*M3.Gene Doping*
S3. Beta-2 Agonists	

[54] Code, *supra* note 3, Art. 4.1.

[55] The table shows the list of substances and methods as general. For more information about these substances and methods, see the 2014 Prohibited List: WADA, "The World-Anti-Doping Code Prohibited List 2014," 1 January 2014, available at HYPERLINK: < http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-Prohibited-list/2014/WADA-prohibited-list-2014-EN.pdf> [last visited on March 17, 2014]. [Prohibited List]

S4.Hormone and Metabolic Modulators
S5.Diuretics and Other Masking Agents

Substances and Methods Prohibited in Competition

Prohibited Substances
S6.Stimulants
S7.Narcotics
S8.Cannabinoids
S9.Glucocorticosteroids

Substances Prohibited in Particular Sports

1- Alcohol *2- Beta-Blockers*

Looking at the Prohibited List, one can reasonably ask WADA to be prepared for detecting any prohibited substance or method, including so-called *gene doping*.[56] Otherwise, there is no point of having this list. However, seeing gene doping[57] is still a threat for WADA − thanks to the most recent Lance Armstrong case − I can argue that WADA needs to revise itself from a scientific research and technology point of view. Such an argument would be more feasible when a very small proportion of scientific doping research is conducted by WADA. For instance, only 40 academic articles published between 2004 and 2012 include gene doping in their titles and around 470 academic articles published during the same period were related to gene doping. However, WADA funded a very limited portion (5 to 10 %) of these publications as of July 2012.[58] And, this argument of WADA's scientific research and technology revision would be even much stronger when I indicate that WADA's primary purpose at the time it was established was to conduct scientific doping research.[59]

[56] As seen in the table above, gene doping is also defined as a prohibited method.
[57] WADA describes gene doping as follows: "The following, with the potential to enhance sport performance, are prohibited: 1) The transfer of polymers of nucleic acids or nucleic acid analogues, 2) the use of normal or genetically modified cells:" Prohibited List, *supra* note 55.
[58] I collected these numbers through a search I conducted in the Web of Science database by using the separate and combined key words of *gene*, *doping*, and *gene doping*: Web of science-Institute of Scientific Information, "Official Website," available at HYPERLINK: <www.isinet.com> [last visited on November 4, 2013].
[59] Arne LJUNQVIST "Championing the Science," (2007) 2 *Play True*, pp. 3-8.

After all, the UNESCO Convention (International Convention against Doping in Sport) Art. 34.1 empowers WADA to revise the Prohibited List, and the List is considered the integral part of the Convention.[60] And, such delegation increases the responsibility of WADA in both the preparation of the List and proper function of the detection mechanisms. What WADA is obliged to do in the preparation of the List is only fulfilling the requirement of consultation with signatories and governments.[61] Namely, WADA has still the final word on it. Thus, I conclude that the technical preparedness of WADA and a proper consultation process should be considered as well in the research of proper theoretical framework.

Finally, alerted with other doping challenges coming out nanomedicine applications, gene doping is only the tip of the doping iceberg. For instance, nanomedicine, which can be defined as the use of nanotechnology in medical applications and which has already contributed a lot to the detection and treatment of diseases, leads one to consider its eventual impact on the human enhancement methods.[62] In this regard, I can also mention designer drugs, hormones, blood doping, nanosurgery and neuroprosthetics as the eventual threats for WADA, next to gene doping.[63]

---

[60] The Convention entered into force on 1 February 2007: UNESCO Convention, *supra* note 5.

[61] Code, *supra* note 3, Art. 4.1.

[62] For the regulatory based challenges and other eventual problems with respect to the Human Enhancement Technologies, see Charlotte CAMERON, "Regulating Human Enhancement Technologies: The Role of the Law and Human Dignity," (2010) 17/5 *Journal of law and medicine,* pp. 807-815; Henry T. GREELY, "Regulating Human Biological Enhancements: Questionable Justifications and International Complications," (2005) 7 *UTS Law Review,* pp. 87-110; Eileen M. MCGEE, "Toward Regulating Human Enhancement Technologies," (2010) 1/2 *AJOB Neuroscience,* pp. 49-50.

[63] The UK Parliament report mentioned Tetrahydrogestronome (THG) as a well-known example of a "designer drug," in addition to hormones, blood doping and gene doping as potential HETs for doping: House of Commons Science and Technology Committeee-Human Enhancement Technologies in Sport, Second Report of Session 2006-2007, available at HYPERLINK: <http://www.publications.parliament.uk/pa/cm200607 /cmselect/cmsctech/ 67/67. pdf> [last visited on February 2, 2013]. The medical applications of nanotechnology, such as nanosurgery and nanodevices inserted into the brain, in other words, neuroprosthetics can also be considered other future HETs. At this point, a recent report, dated November 2012, prepared by a joint workshop which was hosted by the Academy of Medical Sciences, the British Academy, the Royal Academy of Engineering, and the Royal Society emphasized these cognitive and other physical enhancement methods as potential HETs: The report titled "Human enhancement and the future of work" is available at HYPERLINK: <http://royalsociety.org/ uploadedFiles/ Royal_Society Con-

2.1.2 Difficult-to-Detect Doping Methods

Having briefly mentioned about the Nanomedicine challenges above, I believe outlining a few examples of difficult-to-detect prohibited substances and methods would be necessary to emphasize the challenges arising out of advanced technology use and WADA's technical preparedness to meet this challenge. The idea is to disclose the complexity of advanced technology used in doping so that one can consider the technical preparedness requirement in the research of a proper theoretical framework. Thus, studying these substances and methods − designer drugs, hormones, blood doping, neuroprosthesis, and nanosurgery − in detail are not required. However, I will include the relevant sources as much as possible for further reading during the elaboration of each substance or method.

To start with, *designer drugs* are produced from existing drugs by modifying their molecular structures. Simply explained, an existing drug is modified to make it undetectable in doping tests. For example, Tetrahydrogestrinone (THG) was discovered in the famous BALCO investigation in 2003.[64] As a result, the challenge with designer drugs is knowing which drug was modified to overcome drug tests is very difficult.[65] *Hormones* are another technical challenge to the proper doping detection. According to WADA, Human Growth Hormone (hGH) and the glyco-

---

tent/policy/ projects/ human-enhancement/2012-11-06-Human-enhancement.pdf > [last visited on February 2, 2013].

[64] Angela J. SCHNEIDER, "Genetic Enhancement of Athletic Performance" in Claudio TAMBURINI and Torbjörn TÄNNSJÖ (dir.), *Genetic Technology and Sport*, Routledge: London / New York, 2005, p. 39.

[65] For more information about the future challenges coming from designer drugs, see Phil TEALE, James SCARTH, and Simon HUDSON, "Impact of the Emergence of Designer Drugs Upon Sports Doping Testing,"(2002) 4/1 *Bioanalysis*, pp. 71-88. Nevertheless, to give an example, a drug named "bromantan" was used by five athletes in the Atlanta Olympics in order to gain unfair advantage and there was no available detection method for this drug, which had been developed in Russia and was new to the world scientific community at that time: Wayne WILSON and Ed DERSE, *Doping in Elite Sport : The Politics of Drugs in the Olympic Movement*, Champaign, IL: Human Kinetics, 2001, p. 14.

protein hormone erythropoietin (EPO) are main examples of such doping methods.[66] These hormones are difficult to detect and WADA still admits the presence of issues related to developing ultimate testing mechanisms for them.[67]

Blood doping is defined as "the misuse of certain techniques and/or substances to increase one's red blood cell mass, which allows the body to transport more oxygen to muscles and therefore increase stamina and performance."[68] The main problem with this method to consider in the research of theoretical framework is its ability to harm the athlete. In a recent study, researchers claim that half of the athlete population's health is in danger due to gene doping methods, extending to the latest blood doping technologies.[69]

Neuroprosthesis are molecule-sized devices which can be inserted in the brain to manipulate the athlete. A neuroprosthesis can be defined as a device which restores a lost or altered neural function.[70] These molecular sized vehicles, which are inserted in the brain, have already been used for the treatment of Parkinson's disease[71] and can also be used to stimulate the athlete's mental en-

---

[66] "hGH functions stimulate the liver and other tissues to secrete an insulin-like growth factor (IGF-1) which regulates production of cartilage cells. Cartilage cells play a key role in bone, muscle and organ growth. That is why hGH is mainly used for recovery from injury:" WADA, "Human Growth Hormone," available at HYPERLINK: <http://www.wada-ama.org/en/Resources/Q-and-A/Human-Growth-Hormone-hGH/ > [last visited on March 18, 2014]; WADA, "EPO," available at HYPERLINK:< http://www.wada-ama.org/en/Resources/Q-and-A/Blood-Doping/ > [last visited on March 18, 2014].

[67] WADA, "Human Growth Hormone" and "EPO," *Ibid.*

[68] WADA, "Blood Doping," available at HYPERLINK :< http://www.wada-ama.org/en/Resources/Q-and-A/Blood-Doping/ > [last visited on March 18, 2014].

[69] For more information about the subject, see Elmo W. I. NEUBERGER et al., "Detection of Epo Gene Doping in Blood," (2012) 4/11 *Drug Testing and Analysis,* pp. 859-69; Jordi SEGURA, Núria MONFOR, and Rosa VENTURA, "Detection Methods for Autologous Blood Doping," (2012) 4/11 *Drug Testing and Analysis*, pp. 876-881; Michel AUDRAN, "Blood Doping: Substances, Methods, Detection," (2012) 31/ 334 *Le dopage sanguin: Substances, méthodes, détection,* pp. 28-30.

[70] Steffen K. ROSAHL, Neuroprosthetics and Neuroenhancement: Can We Draw a Line, (2007) 9-2 *Virtual Mentor,* p.132, also available at HYPERLINK : <http://virtualmentor.ama-assn.org/2007/02/msoc2-0702.html> [last visited on January 2, 2013].

[71] For more information about the subject, see David GUIRAUD, "Interfacing the Neural System to Restore Deficient Functions: From Theoretical Studies to Neuroprothesis Design," (2012) 335/1 *Comptes Rendus – Biologies,* pp.1-8; Alim L. BENABID et al., "Deep Brain Stimulation. Bci at Large, Where Are We Going To?," (2011) 194,

durance.[72] In addition, the term neuroprosthesis is also used interchangeably with brain-computer interface (BCI) since they share the same aims, such as repairing sight, hearing, move- ment, and even cognitive function.[73] Finally, the possibility of infrared vision, the perception of radio-frequency signals, ultrasound hearing, and even invisible communication[74] indicate the potential that neuroenhancements can bring to athletes – and others − in the near future.

Nanosurgery is defined simply as molecular repair at the cellular level.[75] By this method, one can manipulate the cellular components without damaging the cell.[76] According to Berger, Atomic Force Microscopy (AFM) and laser nanosurgery have consequences in cell therapy, eye surgery, neurosurgery, tissue engineering, gene therapy, and laser-assisted in-vitro fertilization.[77] That being said, the toxicological implications of nanosurgery constitute regulatory and ethical

---

Prog Brain Res., pp. 71-82; Pratik Y. CHHATBAR and Subrata SAHA, "The Future of Implantable Neuroprosthetic Devices: Ethical Considerations," (2009) 19/2 *Journal of Long-Term Effects of Medical Implants,* pp.123-137; Robert K. SHEPHERD, "Special Section on Medical Bionics," (2012) 9/6 *Journal of Neural Engineering,* pp.1-3.

[72] In this regard, Dr. Rosahl explains the function of neuroprostheses as follows: "Neural prostheses work in one of two ways, either (1) by delivering electrical stimulation that excites or inhibits neural tissue or (2) by picking up electricity generated by the brain and using it to control computer cursors, electromechanical devices or even paretic limbs. Until now, both methods have been applied only after pharmacologic options have been exhausted. They have proven to be very effective, most prominently with respect to deep brain stimulation in Parkinson's disease where high-frequency stimulation causes inhibition of the subthalamic nucleus:" Steffen K. ROSAHL, "Neuroprosthetics and Neuroenhancement: Can We Draw a Line," (2007) 9-2 Virtual Mentor, p. 133, also available at HYPERLINK : <http://virtualmentor.ama-assn.org/2007/02/msoc2-0702.html> [last visited on January 2, 2013].

[73] For more information about BCI, see Jeffrey G. OJEMANN, Eric C. LEUTHARDT, and Kai J. MILLER, "Brain-Machine Interface: Restoring Neurological Function through Bioengineering," (2007) 54 *Clinical Nanosurgery*, pp. 134–136, also available at HYPERLINK: <www.neurosurgeon. org/ publications /clinical/54/pdf/ cnb001070 00 134.pdf >[last visited on January 2, 2008].

[74] GARDINER, *supra* note 47, p. 137.

[75]According to the glossary of Foresight Nanotech Institute: Advancing Beneficial Nanotechnology, nanosurgery is a generic term including molecular repair and cell surgery, available at HYPERLINK: <http://www.foresight.org/ UTF/ Unbou nd_LBW/Glossary.html> [last visited on September 26, 2012].

[76] The current nansurgery techniques might be numbered as near-infrared laser ablation, pulsed UV laser surgery, atomic force microscopy (AFM) tips, and the use of chemical agents: Meghana HONNATTI and Gareth HUGHES, "Intracellular Nanosurgery," *zyvex application note 9721*, available at HYPERLINK: <http://www.zyvex.com/ Documents/ 9721.pdf> [last visited on January 3, 2013].

[77]Michael BERGER, "A closer look at nanomedicine," *Nanowerk*, 23 May 2007, available at HYPERLINK: <http:// www.nanowerk.com/spotlight/spotid=1975.php> [last visited on February 2, 2013].

challenges, which will require important avenues for future studies and reflections.[78] For the purpose of this thesis, I will only elaborate briefly the eye surgery and gene therapy implications of nanosurgery.

The most common method of *eye surgery* is known as *LASIK* (Laser-Assisted In Situ Keratomileusis) which is "a procedure that permanently changes the shape of the cornea, the clear covering of the front of the eye, using an excimer laser."[79] This elective surgery is common among the many players now, the golfer Tiger Woods among them.[80] *Gene therapy* forms the process of gene doping and requires the more elaboration in this sense. Thus, I will give more attention on explaining how this method works and why it has been a threat to the anti-doping regime.

To explain gene therapy, one needs to understand DNA (deoxyribonucleic acid),[81] which, essentially, provides process for the transmission of genetic information throughout the generations of the same organism[82] and which resulted in the discovery of gene therapy in 2003 through the

[78] For more information about the subjects, see Mette EBBESEN and Thomas G. JENSEN, "Nanomedicine: Techniques, Potentials, and Ethical Implications," (2006) 51516 *Journal of Biomedicine and Biotechnology,* pp. 1-11; Bolanle ASIYANBOLA and Winston SOBOYEJO, "For the Surgeon: An Introduction to Nanotechnology," (2008) 65/2 *Journal of Surgical Education*, pp. 155-161.

[79] The US Drug and Food Administration Center for Devices and Radiological Health, "Official Website," available at HYERLINK: <http://www.fda.gov/Medica lDevices/Products and MedicalProcedures/SurgeryandLifeSupport/ LASIK/ ucm061358.htm> [last visited on January 3, 2013]. For more information about the Lasik surgery, see Mea A. WEINBERG and Michael S. INSLER, "Lasik Refractive Eye Surgery in the 21st Century," (2010) 35/4 *U.S. Pharmacist*, pp. 20-24.

[80] Craig Bestrom and John Strege explain the contribution of the LASIK laser eye surgery in the Tiger Woods career as follows: "«Woods» post-Lasik vision is 20/15 without corrective lenses, and he says that the hole looks bigger and his ability to read greens has improved dramatically. Coincidence or not, Woods won the first five tour events he played after having the surgery. Then he won four consecutive majors beginning with the U.S. Open in 2000:" Craig BESTROM and John STREGE, "Eyes of the Tiger-Tiger Woods- LASIK laser eye surgery- Brief Article," (June 2002) *Golf Digest*, available at HYPERLINK: <http://www.medownick lasereyesurgery.com.au/laser-eye-surgery/ tiger-woods/> [last visited on January 3, 2013].

[81] DNA is the blueprint for building the organism with its four building blocks: A,C,T, and G. The order of these four letters concludes the DNA codes: Peter SCHJERLING, "The basics of gene doping" in TAMBURRINI and TÄNNSJÖ, *supra* note 64, p. 19.

[82] Julian KINDERLERER and Diane LONGLEY, "Human Genetics: The New Panacea," (1998) 61 *Modern Law*

Human Genome Project (HGP).[83] The official web page of the HGP defines gene therapy as follows:

> "Gene therapy is a technique for correcting defective genes responsible for disease development. Researchers may use one of several approaches for correcting faulty genes:
> 1. A normal gene may be inserted into a nonspecific location within the genome to replace a nonfunctional gene. This approach is most common.
> 2. An abnormal gene could be swapped for a normal gene through homologous recombination.
> 3. The abnormal gene could be repaired through selective reserve mutation, which returns the gene to its normal function.
> 4. The regulation (the degree to which a gene is turned on or off) of a particular gene could be altered."[84]

As noted above, deleterious genes constitute the main reason of gene therapy aimed at curing a disease or malfunction. However, the question of conducting gene therapy for a healthy person and whether it is a form of enhancement to gain unfair advantage needed an answer, and Schjerling responded to this question as "yes".[85]

In contrast, Andy Miah, author of the book *Genetically Modified Athletes: Biomedical ethics, gene doping and sport* argues against the position that genetic modification should be considered in the same way as other forms of doping.[86] Instead, he states that ethical issues regarding genet-

---

Review, p. 603 in Shelia A.M. MCLEAN (dir.), *Genetics and Gene Therapy*, The International Library of Medicine, Ethics and Law, Dartmouth / Ashgate, 2005.

[83] The HGP, which was coordinated by the U.S. Department of Energy and the National Institutes of Health, was the foremost step towards exploration of the DNA: The official web site of the Project is available at HYPERLINK : < http://www.ornl.gov/sci/ techresources/ Human Genome/home.shtml > [last visited on February 2, 2013]. Although this project was completed in 2003, analyses of the data are continually evolving: The latest handbook dated on January 28, 2013 is available at HYPERLINK: <http://ghr.nlm. nih.gov/handbook /hgp.pdf > [last visited on February 2, 2013].

[84] *Ibid.*

[85] His exact words on the issue are as follows: "Gene doping is doping based on gene therapy which is a medical treatment involving the use of gene modification in the patients. That is, gene therapy is adding or altering genes in cells within the body in order to treat a disease. As with normal medical treatment, some treatments can have a beneficial effect on the performance of athletes and can therefore be expected to be used as doping:" SCHJERLING, *supra* note 81, p. 19.

[86] Andy MIAH, *Genetically Modified Athletes: Biomedical ethics, gene doping and sport,* London / New York: Routledge Taylor & Financing Group, 2004, pp. 12–31.

ics are more different than those of other forms of enhancement technology in sport.[87] To understand whether using gene therapy on an athlete is a form of gene doping, one should first examine the process of gene therapy. Each DNA owns a coding order according to which a construction project in the body takes place. To initiate a certain construction project, the DNA needs to be activated and the project should be copied in the coding region (RNA) where a specific protein is made for such construction. The DNA determines when and how much protein should be produced in line with the structure of different regulatory proteins in the coding order.[88]

How then, will this process of protein production be manipulated? If the DNA coding region is modified, the protein production process will be likewise modified.[89] The simplest way is to replace the coding region with another, more active, coding region. This can be made artificially in the laboratory.[90] The following gene therapy treatments can currently be used to enhance the performance of athletes: Erythropoietin (EPO),[91] Insulin-Like Growth Factor 1 (IGF-1), and Vas-

[87] Some of his arguments are as follows: "The media factor about doping and doping users, rejecting doping on the basis of health concern alone, the concept of sport ethics in terms of medical-ethical concern of health," *Ibid,* p. 13.
[88] This is a very simplified explanation of the gene therapy process. For more detailed and technical explanation of this process, see SCHJERLING*, supra* note 81*,* p. 20.
[89] We can also modify the DNA coding order which regulates the protein production. Even if it sounds more difficult, we have witnessed some progressive works in recent years. For example, expanding the coding capability of DNA is one of them: Jed SHIMIZU, "Changing The Language of DNA," (2005) *Science Creative Quarterly*, available at HYPERLINK:< http://www.scq.ubc.ca/changing-the-language-of-dna/> [last visited on February 2, 2013]. For more information regarding gene replication and sequencing, see SCHJELING, *supra* note 81, pp. 19-20; Steven B. KARCH, "Changing Times: DNA Resequencing and the 'Nearly Normal Autopsy,'" (2007) 14/7 *Journal of Forensic and Legal Medicine*, pp. 389-397; Judith L. CAMPBELL, "DNA Replication: Changing Faces, Trading Places," (2010) 6/10 *Nature Chemical Biology*, pp. 701-702.
[90] MIAH, 2004*, supra* note 86, p. 21.
[91] In 2006, German Coach Thomas Springstein was suspended for 16 months as he was supplying Repoxgen which makes extra EPO to a minor. He was detected through an e-mail saying that *[…] the new Repoxygen is hard to get*. This is the first known case of gene doping: Gretchen RENOLDS, "Outlaw DNA [Gene Doping in Sports]," 4 June 2007, *New York Times*. The full story is available at HYPERLINK: < http://geneticsandsociety. org/article. php?Id = 3484 > [last visited on February 2, 2013].

cular Endothelial Growth Factor (VEGF). As long as gene therapy becomes a doping technique, however, it is likely that artificial genes, designed specifically for gene doping, will emerge.[92]

2.2 Ethical, Social, Political, and Public Health Aspects

Having briefly explained the technical challenges of doping, analyzing doping phenomenon from the perspectives of economics, health, politics, ethics, and sociology will be essential before focusing on the research of a proper theoretical framework. In this regard, to simplify the issue of learning about the other aspects of doping, I will first ask the question of why athletes dope and who benefits from it, and then will brief the ethical, social, and public health aspects of doping.

2.2.1 Why Do Athletes Dope?

According to Richard Pound, the former president of WADA, the athletes dope in a deliberate manner, knowing exactly what they are doing. In other words, athletes do not generally dope by mistake or accident.[93] In his interview with Oprah Winfry in January 2013, Lance Armstrong stated that winning without doping was impossible and that was the reason why he doped. [94] At the very beginning when he was diagnosed with cancer, he believed that he had nothing to lose and he started from that point. According to Armstrong, what he did was *considered smart* and he even seemed to be proud of doing that. Thus, the first question that comes to mind is how

[92] For instance, existing genes can be changed or better protein versions can be found in other tissues. For more information, see SCHERLING, *supra* note 81, p. 26.
[93] Richard W. POUND, *Inside Dope : How Drugs Are the Biggest Threat to Sports, Why You Should Care, and What Can Be Done About Them,* Mississauga, Ont.: J. Wiley & Sons Canada, 2006, pp. 67-70.
[94] WINFREY, *supra* note 1.

Lance Armstrong can influence young athletes in a competitive sport, filled with the ambition to win.

Would it be enough to say *I am sorry* or would it be better to remove of all his titles to punish him and prevent young aspiring athletes from doping? One author claims that kids need better mentors and heroes and a bad mentor can easily lead kids to become involved in doping.[95] In an interview, golf legend Jack Nicklaus answered a question with respect to his mentor and heroes that inspired him and shaped his career as follows:

> "[…] As I grew up, my father was my role model. My father always played by the rules, he always competed hard, he had a great work ethic and he taught me to the same. As I grew up, playing golf at Scioto Country Club in Columbus, I was, as a youngster, thrown in with adults, so I had to learn how to behave and treat my elders with respect and deal with being a young person in an adult world. I feel as if that experience made me grow up, perhaps a little quicker and it also made me understand that most of these people, who have already experienced some of the problems that youngsters face, learned to cope with them. These people became mentors to me, and from many of them, I learned how I should conduct my life. And I believe that is one of the great aspects about the game of golf: Youngsters interact regularly with adults, and things that kids are tempted by and from in today's society aren't necessarily found in that atmosphere or environment. So I was a lucky one. And then he teacher I had, Jack Grout, taught me much of the same thing-hard work, dedication, sportsmanship, playing by the rules. All the values I consider most important I learned from my dad and Jack Grout. These were important lessons for me in my life and lessons I wish would be pushed onto all kids as they grow up. Unfortunately, it doesn't work that way. Not all sports are really involved around the adult world. And youngsters are under pressure. Sure, I had peer pressure and I succumbed to peer pressure in several ways. But, also because of the values I was taught from my other associations, the peer pressure wasn't a major influence on my life; the adult atmosphere was […]."[96]

As seen above, parents and mentors are crucially important during the school and sports life of an athlete in influencing his involvement of drugs and other substances. In his book, Michael Sandel was asking a hard question: "whether genetic modification of an athlete should be al-

[95] John MCCLOSKEY and Julian E. BAILES, *When Winning Costs Too Much : Steroids, Supplements, and Scandal in Today's Sports,* Lanham, MD: Taylor Trade Pub.: Distributed by National Book Network, 2005, pp. 21-22.
[96] This part of interview is reproduced from the book of John MCCLOSKEY and Julian E. BAILES, *Ibid*, p. 23.

lowed when it is considered to have no health risks." Moreover, he even included the parenting concept in this question as the modification can have led them to have a child they desired to have at the very beginning. In his answer, he was distinguishing therapy and enhancement concepts and was finally emphasizing the gift, given by God, and the importance of his choice in our creation rather than our own desires as parents. He explains these views with the following words:

> "Improving children through genetic engineering is similar in spirit to the heavily managed child-rearing that is now common. But this similarity does not vindicate genetic enhancement. On the contrary, it highlights a problem with the trend toward hyper parenting."[97]

Surprisingly, a recent survey conducted in Italy among 508 athletes found the following outstanding result: doping was a part of sport life and many of the athletes were familiar with doping under different names and labels.[98] In the survey, 40% of the athletes admitted that they used doping in national and international competitions while 87% of them believed that doping was a widespread fact in sport.[99] These results are particularly surprising when one takes into consideration the fact that doping is criminalized in Italy.

It would not be a mistake to claim that drug-taking or doping is seen as normal or is culturally accepted even outside the sport world. As such, the doping phenomenon cannot exactly be ended or diminished by educational and training programs.[100] Doping rates can even become much

[97] Michael J. SANDEL, "The Case against Perfection - What's Wrong with Designer Children, Bionic Athletes, and Genetic Engineering: A Prominent Political Philosopher Investigates the False Promise of Human Mastery," (2004) *The Atlantic monthly,* p. 58.
[98] Alessandra TAVANI, Paolo COLOMBO, Vilma SCARPINO, Piergiorgio ZUCCARO, Roberta PACIFICI, and Carlo La VECCHIA et al., "Beliefs on and Attitude toward Doping Use among Athletes: An Italian Survey," (2012) 9/4 *Italian Journal of Public Health,* 9/4, pp. e8669.1-e69.7.
[99] *Ibid.*, p. 8669.5-7.
[100] Giuseppe LIPPI, Massimo FRANCHINI, and Gian C. GUIDI, "Doping in Competition or Doping in Sport?," (2008) 86/1 *British Medical Bulletin*, 95-107, p. 99.

higher and/or more widespread due to the economic or other social factors of winning or doing better in competition. As Lippi claims, doping is used even in bridge and billiards competitions. They propose that doping even be prevented at the outside of sport competi-tions.[101] We should know and be prepared to learn more that the doping issue cannot be resolved through education or strict doping rules. One should understand the facts behind the use of doping and performing better or being the best at any cost. As a result, I should now look at who benefits from doping. Is it simply an individualistic attitude that leads someone to take this risk?

2.2.2 Who Benefits from Doping?

Following the 1998 *Tour de France* incident, the French Minister of Youth and Leisure declared the following in the French National Assembly during the debates on the law project for doping in sport: "we know what drives doping and it is the escalating commercial interests taking place in the most mediatized sports" (my translation).[102] These commercial interests benefit not only from the simple win in a competition, but also from the wide spectrum of media and entertainment outcomes of doping and/or doping scandals. Then, we are simply coming to the position that an athlete will benefit more from a doping scandal than a clean win in a competition as a result of the media and entertainment market interests.

To say it differently, as long as an athlete becomes the center of attention through a doping scandal, the illegal doping market and the media sector will also benefit from the incident one way or another. Thus, any doping incident considered a *scandal* will supply the materials for

[101] *Ibid*., pp. 104-105.
[102] Jean P. ESCRIVA, "Policy Uses of Athlete Doping: Business Morality to Questions of Public Health?," (2002) 8/3-4 *Usages politiques du dopage sportif: De l'entreprise morale aux questions de santé publique?,* p. 48.

other commercial interests, putting aside how the scandal has consequences for the athlete. Catherine Carstairs affirms the following:

> "[...] Doping scandals show athletes involved in life-shattering events that raise critical issues about competition, fairness, health, heroism, and nationalism, which are of interest to many people, both sports fans and non-sports fans. Doping scandals put sports on the front page of newspapers and at the top of the news, corralling a larger audience." [103]

Counter arguments for the ban against doping involve that the athlete should benefit from the performance enhancing technologies because "modified" athletes would provide a better spectacle for the viewers. Posner and Miah support such a view. For instance, Posner sees athletes as a biological test machine whose function is to entertain the viewers with his super human abilities;[104] Miah wishes that we can have enhanced Olympics in the future.[105] So the vital question is whether the whole doping matter is a result of supply and demand. In my view, an argument about watching a race or competition of modified athletes would be a lot of fun is over-simplified and missing the point. Banning doping is not only to maintain the fair-play, but also to maintain and promote the spirit of sport, health and ethics in the society-at-large. Even if the use of human enhancement technology is 100 % safe, we cannot simply allow it because spirit of sport requires hard work, dedication, and discipline. And, using the advanced technology to gain unfair advantage can easily deteriorate such spirit.

Even if I put the spirit of the sport argument aside for a moment, I can still use the argument of unequal access to the technology in the world. Frank Pasquale draws attention to the fact that

---

[103] Catherine CARSTAIRS, "The Wide World of Doping: Drug Scandals, Natural Bodies, and the Business of Sports Entertainment," (2003) 11/4 *Addiction Research and Theory*, p. 264.
[104] Richard A. POSNER, "In Defense of Prometheus: Some Ethical, Economic, and Regulatory Issues of Sports Doping," (2008) 57/6 *Duke Law Journal*, p. 1729.
[105] Andy MIAH, "Why Oscar Pistorius Has Already Made History and Why It's a Good Thing for Everyone,"*Huffin tonpost*, 14 July 2012, available at HYPERLINK : <http://www.huffington post.co.uk/andy-miah/why-oscar-pisto rius-has-already-made-history_b_1664742.html> [last visited on February, 2, 2013].

technology does not always serve to improve social welfare, but also is applied to attain better positions or higher benefits over others in a society where the competition is at stake.[106] Namely, the diffusion of innovations will hardly be realized equally in the society where the total benefit from technology depends on others − being totally excluded from accessing it. For instance, when a designer drug is produced for a certain group of people, the total benefit from the impact of this drug will accordingly depend on limiting the access of other athletes to this drug. However, the natural improvement of physical and mental capacity ensures somewhat equality among athletes coming from the different parts of the world with different conditions.

From the commercial point of view, the price of this drug will likely be higher when we consider its limited distribution. The answer to the question of who would pay for this kind of drug or technology seems clear − the ones who can profit more from the winning athlete through other commercial interests. At this point, I would not be wrong to name the BALCO (Bay Area Laboratory Co-Operative) case as an example of a private corporation's involvement in the doping business, which ended with one of the most famous doping scandals in the history. The striking fact in this case was that BALCO's president had neither a science background nor obtained nutrition related education.[107]

Not only would the commercial interests be flourished by the doping scandal, but national governments can also benefit from it in two ways. One way is to win the gold medal at any cost and serve the best interests of national pride; and another way is to catch the biggest cheaters in his-

[106] Frank PASQUALE, "Technology, Competition, and Values," (2007) 8 *Minnesota Journal of Law, Science & Technology*, p. 608.
[107] Mark FAINARU-WADA and Lance WILLIAMS, *Game of Shadows : Barry Bonds, Balco, and the Steroids Scandal That Rocked Professional Sports,* New York: Gotham Books, 2007, pp. 10-11.

tory and still serve the best interests of national pride by having the most sophisticated and ethically correct anti-doping regime. Dione Koller states specifically this fact in his article *How the United States Government Sacrifices Athletes' Constitutional Rights in the Pursuit of National Prestige.*[108] On the other side, Thomas Murray affirms the government involvement in doping by the following words:

> "[…] A more persuasive justification for banning performance-enhancing drugs emerged from research begun in the early 1980s that entailed talking to athletes and others—coaches and officials—in high-level sport. This research made it abundantly clear that athletes do not see the decision whether to use anabolic steroids, stimulants, or other performance-enhancing drugs as an entirely free choice. On the contrary, such choices are often highly constrained. We now know that at times athletes have had drugs literally forced upon them, sometimes without even being told what drugs they were being given. The Collapse of the Iron Curtain revealed what many had suspected, namely, that the East German sports establishment had created a massive, sophisticated, successful, secret—and immoral—organization to perfect doping and evade detection. To accomplish this, it used the services of more than 100 physicians and scientists. In its boldness and organization, the East German doping machine may eclipse all others; but it would be naive to think that efforts to achieve the same goals have not arisen elsewhere, including in the United States, albeit without government support.[…]."[109]

As a result, when specifying about who benefits from doping, it is hard to name a single group, whether commercial or government, or to explain it only by the choice of the athlete. From the notion of winning at any cost to making the most money or broadcasting the highest rated exclusive news, a very much diversified group of people is involved in doping phenomenon one way or another. This phenomenon of doping can even trigger a physical and mental wellness enhancement culture in the near future. Namely, what we today call *cheating* or *gaining an unfair advantage* can be replaced by a usual *enhancement* or *improvement* practice. Therefore, I beli-

[108] Dionne L. KOLLER, "How the United States Government Sacrifices Athletes' Constitutional Rights in the Pursuit of National Prestige," (2008) 5 *Brigham Young University Law Review,* pp.1465-1544.
[109] Thomas H. MURRAY, "Reflections on the Ethics of Genetic Enhancement," (2002) 4/6 SUPPL *Genetics in Medicine,* p. 29S.

eve that examining the ethical and social aspects in the fight against doping in sport is timely and necessary.

2.2.3 Ethical and Social Issues

The fundamental rationale for the WADA Code is to preserve what is intrinsically valuable about the sport. WADA outlines this intrinsic value by referring to the spirit of sport, which is the essence of Olympism. According to the WADA Code, the spirit of sport is defined as "the celebration of the human spirit, body, and mind, and is characterized by the following values: ethics, fair play and honesty, health, excellence in performance, character and education, fun and joy, teamwork, dedication and commitment, respect for rules and laws, respect for self and other participants, courage, community and solidarity."[110] The WADA Code further states that doping is contrary to the spirit of sport and proposes an educational program for youth, athletes, and coaches to develop and promote the spirit of sport.[111]

Beamish and Ritchie highlight the fact that in the real world the top scale competitions such as the *Tour de France* and the Olympics are the scenes for the best of the best, and the myth of pure *athletism,* laden with the spirit of sport, can be easily overridden because of the world focus on high performance, not on the mythology.[112] In arguing for the fair play and for maintaining the spirit of sport, Beamish and Ritchie distinguish the rules of the game in terms of their ancillary and principal effects on the athlete. They suggest that one take into consideration if the

[110] Code, *supra* note 3, p. 17.
[111] *Ibid*, p. 17.
[112] Rob BEAMISH and Ian RITCHIE, *Fastest, Highest, Strongest : A Critique of High-Performance Sport,* New York; London: Routledge, 2006, pp. 114-115.

rule regulates high performance sport or the behavior within any given sport field.[113] Moreover, they recommend that the regulation be in the best interests of athletes and other participants, serving the construction of world class sport.[114]

However, we should remember that the paternalism and protection of athletes' health and welfare are the other arguments that one has to bear in mind in the analysis of the best interests of the aforementioned groups. Even though Beamish and Ritchie mention these arguments in detail, there is no need to repeat them here as we agree with Murray that doping is a public health issue and paternalism is not enough to explain its existence.[115] Besides, in certain high adrenaline sports which are considered extremely dangerous, such as solo yachting or mountain climbing, the focus is on to the rescue team rather than the athlete.[116]

In doing so, Thomas Murray identifies the ethical problems in doping at two stages: 1) establishing a fair doping deterrence system, and 2) elaborating unethical aspects of using performance enhancing drugs.[117] For Murray, establishing a fair doping deterrence system should be done through collective action, from adequate analytic capacity to adjudication and research. And, he further asserts that doping is unethical since it destroys the meaning of the sport competition which is to compete through a pre-determined set of rules.[118] In other words, according to him, if there is a sport competition with different meaning and different set of rules in which the use of performance enhancing drugs are welcomed, then the modified athletes would not be

[113] *Ibid.,* p. 122.
[114] *Ibid.*
[115] Thomas H. MURRAY, "Doping in Sport: Challenges for Medicine, Science and Ethics," (2008) 246/2 *Journal of Internal Medicine*, p. 96.
[116] Chris E. COOPER, *Run, Swim, Throw, Cheat : The Science Behind Drugs in Sport,* Oxford: Oxford University Press, 2012, p. 224.
[117] *Ibid.,* p. 95.
[118] *Ibid.* pp. 95-98.

ethically problematic.[119] It is important to point out that Murray also distinguishes the therapeutic use and enhancement based use of particular doping methods in order to clarify the ethical grounds of doping.[120]

When we look at the main issue around the spirit of sport and fair play, we try to draw a perfect picture of fairness and mutual respect among athletes, clubs, coaches and other groups. Then, one decides to develop and promote this perfect picture through education. However, this perfect picture does not go well with the today's world where governments and even politics are involved in the enhancement journey of athletes. Namely, doping is a social fact and no individualistic approach will help us understand and resolve this issue. With the involvement of politics and economics, these social facts become far too complicated to be resolved through the picture-perfect scenarios. Voy and Deeter explain these social and political facts in their book by giving the example of the United States Olympic Committee.[121]

Even though one considers that education is an important tool to ensure the deterrence of doping and to establish an environment of fair play and that we read the positive feedback from the world about how the educational programs are successful,[122] education may not work in the case of doping. This is because the athlete's minds are not shaped only through the education given by schools and families. For instance, where the use of supplements is part of the culture and

[119] *Ibid.* p. 96.
[120] For more information about the therapeutic and enhancement use of human growth hormone, see MURRAY (2002), *supra* note 109.
[121] See Chapter 9, titled "The Money Pot: The Politcs That Control the United States Olympic Committee:" Robert O. VOY and Kirk D. DEETER, *Drugs, Sport, and Politics*, Champaign, Ill.: Leisure Press, 1991, p. 131.
[122] For the Greek example and their success story, see Nellie ARVANITI, "Ethics in Sport: The Greek Educational Perspective on Anti-Doping,"(2006) 9/2 *Sport in Society,* pp. 354-370.

people use enhancement drugs outside of competition in gyms and on the streets,[123] we will not easily attain the desired goal through the anti-doping education. As Lippi also affirms, doping is now considered a *public health* problem.[124] Therefore, we should also analyze this issue from the public health point of view and the tools of public health should be used when we take into consideration its ethical, social, economic, and political angles.

2.2.4 Public Health Considerations

As we mentioned earlier, access to the prohibited substances outside of competition is very common and a wide range of users from students to body builders are already quite familiar with these drugs and/or methods. In a recent survey conducted in Sweden, 15-30 % of the body-building community knew about steroids and these drugs could easily be found through the Internet and the black market.[125]

Moreover, we know that Ritalin is used by many students to improve their concentration and cognitive abilities even though the students do not have the proper diagnoses, such as ADHD and Learning Disabilities to be prescribed for these medications. The students using the medication only take into considerations its benefits. According to the recent report, at least four percent of American undergraduates use prescription stimulants for off-label use.[126] However, they know very little about the risks of these medications when used among normal people.

---

[123] LIPPI, FRANCHINI, and GUIDI, (2008), *supra* note 100, p. 99.
[124] *Ibid.*
[125] DUCLOS, *supra* note 9.
[126] Margaret TALBOT, "Brain Gain: The underground world of 'neuroenhancing' drugs,"*The New Yorker,* 2009, available at HYPERLINK: <http://www.newyorker. com/reporting/ 2009/ 04/27/090427fa_fact_talbot> [last visited on February 3, 2013].

Finally, a certain group of people argue that doping should be legalized since the cost of anti-doping programs is so high and everybody in the public should benefit from these substances as long as they know how to use it.[127] However, such arguments can no longer find supporters where everybody is aware of the common side effects arising from these substances and drugs such as *addiction.*[128] Besides, one can always argue that the fight against doping is not successful since the approach and mindset of anti-doping regimes have not considered the public health aspects of doping.

To give an example, imagine an anti-doping education program in a school for athletes or future athletes. If the students, among whom very low percentage will become athletes, have to first compete for grades at any cost, teaching them competing in sport is different than competing for grades will not be easy. When only grades matter in the course of educational life because they open the most wanted doors in professional life, the students will have desire to use off-label drugs for better concentration and accordingly for better grades. These students will be inclined to benefit from such drugs despite the fact that they are aware of their side effects.

Conclusion of the Preliminary Chapter

Having defined the doping and analyzed the other aspects of doping, I conclude that the prospective theoretical framework should accommodate the diversity and external issues of doping governance, such as organized drug and crime regimes and public health considerations. And, maintaining an effective anti-doping governance at the presence of future unknown challenges

[127] For more information with respect to these arguments and the approach of Duclos to these arguments with scientific data, see DUCLOS, *supra* note 9.
[128] ESCRIVA, *supra* note 102, p. 57.

should be taken into account in the prospective theoretical framework search. Namely, the theoretical framework should ponder the research and development as well.

In addition, the matter of doping constitutes multiple aspects and all these aspects should be considered in the selection of proper theoretical framework. Particulaly, varying knowledge levels of doping among athletes, increasing requirement for doping research and test development, and informing all affected groups about doping and doping governance are needed. In other words, the theoretical framework should accommodate such needs of education, training, research, development and should answer the required collaboration needs of diversity, organized crime, and public health related issues.

As a result, the matter of doping is *inter/multidisciplinary* and we should consider this aspect of doping while developing the appropriate theoretical framework. In this respect, although legal issues of doping should be well deliberated, there is also genuine interest to think through other aspects of doping in finding the proper theoretical framework. However, focusing more on the principal governance issues of public and criminal law is required to make the point of why and how these issues evidence the major transformation needs in the governance of doping.

FIRST PART: *SEARCHING FOR A PROPER THEORETICAL MODEL*

The primary objective of this part is to determine the appropriate theoretical framework to accommodate the specific needs of anti-doping governance. In this regard, I will first study the global constitutionalism and global legal pluralism models along with the theory of global administrative law since all three frameworks are considered the leading governance models in international law.[129] I will then validate my choice of global administrative law as a theoretical framework. Once I have validated the GAL model as the appropriate theoretical framework, I will then look at whether this model requires certain modifications in order to better accommodate the specific needs of global anti-doping governance.

For instance, we must necessarily consider the protection and promotion of global public interest in order that global society, composed of the actors of the regulation (both individuals, states and other actors affected by regulation), can effectively benefit from global regulation without disrupting other global societies. Thus, we will need a collectively recognized global governance model which will protect and promote the global public interest of every member and/or entity in this pluralist global society-at-large.[130] And, the degree of this recognition will obviously depend on the subject matter of global governance. In this regard, Professor Auby, proposing that global administrative law will serve well in the production of global public goods,[131] leads me to ponder whether the anti-doping can be considered a global public good and its actual public health and

[129] SHAFFER, *supra* note 29, p. 684.
[130] In this sense, when the subject matter, such as health, security, and environment constitute global consequences which exceed national borders, the aspect of protecting and promoting the national public interest at the global level should be taken into account as well.
[131] Jean-Bernard AUBY, "Public Goods and Global Administrative Law" in Gordon ANTHONY et al. (eds.), *Values in Global Administrative Law*, Hart Publishing, 2011, p. 247.

organized drug and crime involved aspects can be repaired under the global administrative law schema.

Consequently, the first chapter will focus on the institutional frameworks. In those frameworks, I will see how the global administrative law approach corresponds to doping governance. In the second chapter, I will examine whether the GAL model, redesigned to take into account global public good and global public interest tenets, can better serve the needs of the anti-doping re-gime.

FIRST CHAPTER: Testing the Leading Global Governance Theories

In this chapter, my main goal is to seek out an appropriate theoretical framework for this thesis, which will adequately answer the issues of the anti-doping regime. In other words, I will justify why the global administrative law (GAL) theory of global governance should apply to the anti-doping regime. However, to decide on the application of such governance theory, I first need to examine why the global governance models of *global constitutionalism* and *global legal pluralism* are inappropriate when applied to the anti-doping governance.

Such an examination will help me understand what kind of governance patterns I will seek out in the GAL model to better accommodate specific subject matters such as doping in sport. In this regard, the criminal and public law aspects of doping and the impact of governance model on different societies which horizontally and/or vertically exist[132] will be vital aspects to associate with appropriate anti-doping governance patterns.

To better grasp the essence of these leading global governance theories of law, I will begin with a brief historical introduction to these theories.

Section 1 *A Brief Introduction to the Global Governance Theories*

Kelsen defined constitutional laws as the laws which regulate the rights and duties of the indivi-

[132] As I indicated earlier, we could simply categorise different societies as the sport community and non-sport community which would go along with the national variations in different countries and/or regions and as the supranational sport society and non-sport society which would go along with international sport governing bodies and organized crime groups, see *supra* pp. 17, 27, 48, and 56.

-duals within a state they live in.[133] He categorized constitutional laws into two groups: as the first being the organizational structure of the state and second as the rights which arise from the first group of constitutional laws. Kelsen then argued that having a completely logical legislation was almost impossible and therefore the courts had a duty to ensure and/or maintain a *whole logic*.[134]

Even though Kelsen tried to establish a certain organizational structure of norms by placing the constitution on top of that structure, he believed that legislation was not enough to answer all possible questions arising from the interactions of the individuals with each other and with the state. Therefore, he suggested that the courts have had a duty to fill the gaps through the general principles of law and the scientific reasoning.[135] A very first position of Kelsen for the international law, which draws our attention more on his thesis on the theory of law, stated that "There can be no law acting outside of a state's boundaries. In other words, international law is not conceivable."[136] However, Hart disavowed this position and affirmed that "international law simply consisted of a set of separate primary rules of obligation which were not united in this manner."[137]

A few years later, Kelsen proposed a theory of international law and affirmed the existence and validity of international law. He further distinguished international law from a national legal order. Kelsen branded his theory of international law as a supreme legal order which could not be

[133] Hans KELSEN, *General Theory of Law and State*, New York: Russell & Russell, 1961, p. 455.
[134] *Ibid.,* p. 423.
[135] *Ibid.,* p. 573.
[136] *Ibid.,* p. 86.
[137] Herbert L. A. HART, *The Concept of Law*, Oxford: Clarendon Press, 1961, p. 228.

restricted by territorial, temporal, and personal scopes.[138] Defining international law as *inter-state law,* Kelsen also categorized it in two dimensions: firstly as a general international law, applying to all states and called as *customary international law,* and secondly as a particular international law, applying to certain states and created by treaties or a particular custom.[139]

Kelsen's theory of international law was in direct opposition to John Austin's view on international law, which dated back to the 1830s. Austin refused to recognize international law as positive law because its law-setting authority was not a sovereign state that had a superior or a coercive power. However, he accepted a possibility to form independent societies outside of the sovereign state in which general opinion or mutual conversation sets the rules.[140] For that reason, according to Austin, the coercive power of an independent society could be limited to moral sanctions. Then, he argued that fear from such moral sanctions and associated mechanism of obedience to the rules would create such coercive power.[141]

Criticized by Hart and Dworkin, Austin's proposition of the obedience to a set of rules by fear was not necessarily required to create the normative framework in a given society.[142] Hart, proposing a requirement of voluntary recognition of such a set of rules by the society in order for them to be considered law, refused the idea of acceptance of a set of rules by obedience, driven

[138] Hans KELSEN and Robert W. TUCKER, *Principles of International Law*, New York: Holt, Rinehart and Winston, 1966, p. 177.
[139] *Ibid.,* pp. 288-300.
[140] John AUSTIN, *The province of jurisprudence determined*, London: J. Murray*,* 1832, p. 208.
[141] *Ibid.*
[142] Ronald DWORKIN, *Law's Empire*, Cambridge, Mass.: Belknap Press, 1986, pp. 34-35.

primarily by fear. Dworkin agreed at some point that a normative framework can also be created by fear notwithstanding its unsatisfactory status in a given society.[143]

Joseph Raz reviewed Austin, Kelsen, and Hart for their focus on the external boundaries of determining criteria. Briefly studying such external boundaries such as a *sovereign state enacting* (Austin), *a basic norm authorization* (Kelsen), and *a rule of recognition acceptance* (Hart), he mainly drew attention to a requirement of material unity in the legal system. Raz then proposed a test on the content of the laws and the practice and traditions of the institutions.[144]

As a result, a norm may not be considered a part of the legal system when the content of the norm and the practice of the institution with respect to this norm are not in accordance with the character of the legal system. According to this test, for a norm to be considered as part of the legal system, it should be clear and uncontroversial.[145] Such an approach could also find an application in international law since it was only required to determine the existence of a legal system and to take into consideration the character of this legal system.[146]

Even though Raz's assumption of distinguishing the legal system from its components can pave the way to a liberation of norms regardless of the legal system to which it belonged, Kelsen drew the line between pluralism and monism by noting that national legal order cannot be applied at the same time with an international legal order whose validity is ensured by the national legal

[143] Dworkin also criticized Hart, who completely refuses a theory of acceptance by fear. And, he gave the example of Nazi Germany and Hitler, making law to which people were obeying as a result of fear. *Ibid.*
[144] Joseph RAZ, "The Identity of Legal Systems," (1071) 59/3 *California Law Review,* p. 796.
[145] *Ibid.,* p. 797.
[146] Raz also highlighted the applicability of his theory with other types of legal systems by the following: "I have limited the discussion throughout to municipal law. Other types of legal systems are the law of other types of social organizations, be they tribes, churches, or the international community, and they bear similar relations to those organizations," RAZ, *supra* note 165, p. 815.

order in the very first place.[147] However, *law-as-consensus* approach of pluralism instead of *law-as-command* approach of positivism emerged at the international level through the adoption of resolutions of the United Nations (UN) by diverse countries, representing different social, economic, and political views.[148]

Starting with the debates on the legal status of the UN Resolutions, a movement of global constitutionalism began in the 1970s in the form of pluralistic approach. At this point, Morozov affirmed that UN Resolutions should be considered a source of international law when they were voted by the countries representing two socioeconomic systems (capitalism and socialism) and three principal political groups (socialist, occidental, and neutral).[149] Such propositions and reflections on the source of international law were in time followed by the debates on global governance models based on private law-making and on the rule of law which unrolled outside of the state, but which would have direct effects on them.

As a consequence, well established legal theories such as positivism and pluralism found new dimensions at the global level. Global constitutionalism, global legal pluralism, and global administrative law were the foremost examples of such globalized reflections on legal theory and global governance. Under the following sections, I will briefly study global constitutionalism, global legal pluralism, and global administrative law from the standpoints of their anti-doping governance application. My main goal in this analysis is to choose the most applicable governance model, answering the issues of the anti-doping regime, either with its current model or with its reconsidered model.

[147] KELSEN and TUCKER, *supra* note 138, p. 585.
[148] Edward MCWHINNEY, *Conflit Idéologique Et Ordre Public Mondial,* Paris: A. Pedone, 1970, pp. 83-84.
[149] "MOROZOV, Gregory I., Organizatsiya Obedinennikh Natsii (1962), 208 et seq.," cited in *Ibid.,* p. 83.

Section 2 *Testing Global Constitutionalism and Global Legal Pluralism*

In this section we will study the global constitutionalism and global legal pluralism theoretical structures which are considered two of the three leading theories of global governance in international law. The third leading theory which goes along with the global constitutionalism and global legal pluralism frameworks is global administrative law.[150]

For that aforementioned reason, I will first define global constitutionalism and global legal pluralism. I will then apply them to the anti-doping governance with certain hypothetical scenarios in order to determine their applicability. This is because, as Shaffer stated, there are different global public goods which need different production and organization models. And these models can be subject to different institutional responses.[151] In this regard, I believe understanding the characteristics of the subject area is enormously important, not only to determine the nature of a global public good, but also to answer appropriately the needs of its global governance, which have implications outside the boundaries of nation states.

2.1 Testing Global Constitutionalism

Global constitutionalism is a concept of global governance model which has lately been presented by certain authors with backgrounds in different disciplines. Before I study this concept, I believe summarizing the concept of constitutionalism is required to better understand how the

[150] SHAFFER, *supra* note 29, p. 684.
[151] *Ibid.,* p. 675.

theory of global constitutionalism has evolved with a goal to answering the needs of global governance.

2.1.1 Constitutionalism in a Nutshell

The very first use of the term *constitution* dates back to the Roman Empire, where the acts of legislation, made by the emperor, were named as *constitutio*. The term referred to only a means to distinguish laws made by the emperor from the ancient customs which were known as *consuetudos*.[152] A modern day understanding of the constitution, namely a sole act which designs the organization of the state, was first used by Bishop Hall in 1610 in the phrase of "The Constitution of Commonwealth of Israel."[153]

On this subject, Bellamy indicates that a constitution does not only regulate the organization of the state, but also defines the limits on the rights and liberties of the people, subject to the constitution. He then draws a line between good and bad regimes in the quest to describe such two main functions of constitutions. Bellamy also affirms that constitutions in "good" regimes are not even necessary instruments in the regulation of social conditions, culture and the political system.[154]In addition, Bellamy raises concerns about "bad" regimes using constitutions as a shield against any undesired attacks of personal rights and liberties, giving the example of the constitutional structure of former Communist bloc countries which were very liberal in nature.[155]

---

[152] Charles H. MCILWAIN, *Constitutionalism, Ancient and Modern*, Ithaca, N.Y.: Cornell University Press, 1947, pp. 23-24.
[153] *Ibid.,* p. 25.
[154] Richard BELLAMY, "Introduction: Constitutionalism, Democracy and Sovereignity" in Richard BELLAMY (ed.), *Constitutionalism, Democracy and Sovereignity: American and European Perspectives*, Avebury, 1996, p. 1.
[155] *Ibid.*

Along with the views of Bellamy on the purpose of the constitution, the term *constitutionalism* is defined by the Oxford dictionary as "an adherence to a constitutional system of government" at its simplest context.[156] Adherence to a constitutional system of government is intended for gaining economic, social, cultural, and political development where the law is used as a *mechanism* through which the acts of government shall be executed, and as an *authority* upon which the government shall be bound to while executing its activities.[157] That said, Preuss considered that constitutionalism was a response to the two conditions of modernity: 1) emergence of magnetic sovereign state, and 2) idea of the natural freedom of the individual.[158]

Reading the reflections of Foucault on how the modern state took the form of a new kind of pastoral power in the 18th century previously fulfilled by the Christian Church,[159] Preuss's observation that the emergence of constitutionalism as a response to the emergence of the modern state was not incorrect. Thus, he underlined: "in fact, the legal form of government which rejects the idea of any kind of pre-legal power is the main feature and the great achievement of modern constitutionalism."[160]

However, Preuss's views on the constitution as a law became skeptical when he asserted that positivism and legality should have prevailed over plurality and morality in order to improve the quality of the constitution as a law. Moreover, he contradicted himself when he began talking about the differences in the sources of legality and/or authority in the British, American, and

[156] Oxford Dictionaries, available at HYPERLINK: <http://oxforddictionaries.com> [last visited on July 3, 2013]. [Oxford Dictionary]
[157] Ulrich K. PREUSS, "The Political Meaning of Constitutionalism" in BELLAMY, *supra* note 154, pp. 11-16.
[158] *Ibid.,* p. 13.
[159] Michel FOUCAULT, "The Subject and Power," (1982) 8/4 *Critical Inquiry,* p. 783.
[160] PREUSS, *supra* note 157, p. 13.

French constitutional traditions.[161] This is simply because all these three traditions were considered very much liberal although their sources of authority and the method of interpretation of the constitution as a law were different.

For instance, the law of the land in British constitutional tradition, the founding act in the American example, and the constituent power in the French tradition cannot be limited to any form of positivism since they included the history, culture, language, and beliefs which will likely need to be considered in any interpretation.[162] In our view, the quality in a constitution as a legal document will likely depend on the quality in its contemporary responsiveness to the needs of the society which will preferably include every aspect of the society. To attain this objective, a constitution as a legal document should not limit itself with textual and top-down frameworks.

At this very delicate point, Peter Hogg, a leading authority on the Canadian constitutional law, evaluates the term *constitutionalism* by referring to the *rule of law* and affirms that these two terms often have the same significance in their theoretical origin of which government officials shall perform their duties according to the requirements of law.[163] Elucidating the supremacy of law with constitutionalism and/or rule of law, Hogg also correlates the foundation of personal liberty and economic development with a supremacy-of-law based governance model.[164] However, he draws relatively important attention to the challenges of the constitutional organiza-

[161] *Ibid.,* pp. 13-24.
[162] *Ibid.*
[163] Peter W. HOGG, *Constitutional Law of Canada*, Toronto, Ont.: Carswell, 2012, pp. I-2.
[164] *Ibid.*

tion of the state when it is *federal*, and how the allocation of constitutional powers require a delicate consideration of respecting and protecting the values and differences of a federal state.[165]

2.1.2 Global Constitutionalism as a Theory

At the global level, the idea of respecting and protecting values and differences through global constitutional structures is even more challenging in comparison to an aforesaid federal state model. Values and differences, even at the theoretical level from a notion of state into an organization of state, significantly vary in cross-continental spheres. However, such an idea of supreme legal structure, and/or a ground norm as Kelsen proposed, and a requirement of constitution for protecting values of a nation as Hogg said, can somehow be functional at the global level when we are able to define the scope of globalized values and when we have difficulty in protecting them through national laws.

As a result, in order to promote social progress and protect liberties and human rights at the global level, certain initiatives of global supreme constitutional frameworks started with the *United Nations Charter* in 1945 and with the *Universal Declaration of Rights of Man of 1948*.[166] Later on, a trend of constructing supranational legal structures continued at the regional level. The European Union was a more interactive example of such trend.[167]

---

[165] *Ibid.,* pp. I-1.
[166] Luigi FERRAJOLI, "Beyond Sovereignity and Citizenship: A Global Constitutionalism" in BELLAMY, *supra* note 154, p. 154.
[167] *Ibid.,* p. 155.

Early examples of such global constitutionalism intended to diminish the inequalities with respect to the rights and liberties among the citizens of the global and/or regional community.[168] As a result, such an approach seemed to represent the only option of ensuring solid responses to global challenges, such as war prevention, protecting human rights in underdeveloped countries, and overall social progress in the world.[169]

The approach of global constitutionalism has various forms of theoretical and practical understanding of global governance. On the one hand, David S. Law and Mila Versteeg argue that the constitution signifies a form of membership in the global community along with its representation of a national identity. According to them, the constitution validates that there is a certain degree of textual convergence and conformity among national constitutions over the years.[170] Law and Versteeg, however, underline that the constitution is subject to certain level of polarization due to their preferences of *organized market economy* or *liberal market economies.*[171] Conversely, a handful of authors has revealed that global constitutionalism involves non state-based centralized supranational decision-making which takes place through the hegemony of international institutions or non-governmental organizations.[172]

[168] *Ibid.,* pp. 156-159.
[169] Michael L. BRUNER, *Democracy's Debt : The Historical Tensions between Economic and Political Liberty*, Amherst, N.Y.: Prometheus Books, 2009, pp. 318-326.
[170] LAW and VERSTEEG, *supra* note 39, p. 1244.
[171] This validation is supported by empirical research: *Ibid.,* p. 1245.
[172] SHAFFER, *supra* note 29, p. 685; Akihiko KIMIJIMA, "Japan's Contribution to Global Constitutionalism," (2009) 4/2 *Societies Without Borders,* p. 109; Hauke BRUNKHORST, "Globalising Democracy without a State: Weak Public, Strong Public, Global Constitutionalism," (2002) 31/3 *Millennium: Journal of International Studies,* pp. 680-689.

Taking into consideration our subject matter, we will not examine at depth the theories of global constitutionalism.[173] However, we will focus on centralized institutions forming a constitutional entity whose rules and principles are forced to be recognized and to be followed worldwide, such as WADA and ICANN. As opposed to Shaffer, who indicated that "centralized institutions operating under international law help to align national incentives and to overcome free rider problems facing the production of aggregate efforts global public goods,"[174] it is unlikely that a centralized decision-making process can be a helpful tool where diversity and plurality are present in their most basic forms. For instance, the constitution, formally identical to each other, can serve the needs of completely different national interests.[175] And, a formal document or norm, which is not even formally recognized as *constitutional rule* or *principle*, can be imposed worldwide among the distinct societies and groups.[176]

Such a supranational framework response can represent the only way to overcome global concerns and challenges, such as the environment and public health issues, where the cooperation of states is a must and immediate action, at times, is required. However, ensuring the legitimacy of

[173] Certain theories of global constitutionalism involve "progressive global constitutionalism," "organic global constitutionalism," "formal global constitutionalism," "pluralistic global constitutionalism," etc. For more information, see Robert B. AHDIEH, "From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction," (2007) 57/1 *Emory Law Journal,* pp. 1-30; Johannes G.V. MULLIGEN, "Global Constitutionalism and the Objective Purport of the International Legal Order," (2011) 24/2 *Leiden Journal of International Law,* pp. 277-304; Wesley A. CANN, "On the Relationship between Intellectual Property Rights and the Need of Less-Developed Countries for Accuss to Pharmaceuticals: Creating a Legal Duty to Supply under a Theory of Progressive Global Constitutionalism," (2004) 25/3 *University of Pennsylvania Journal of International Economic Law,* pp. 755-944; Christine E. J. SCHWÖBEL, "Organic Global Constitutionalism," (2010) 23/3 *Leiden Journal of International Law,* pp. 529-553; Lucrezia PALANDRI, "Theoretical Reflections on Legal Pluralism and Global Constitutionalism:Their Possible Reconciliation in an Alternative Model of Plural Constitutionalism," (2013) 54/1 *Acta Juridica Hungaria,* pp. 58-72.

[174] SHAFFER, *supra* note 29, p. 685.

[175] Despite the formality based similarities among the constitutions of Luxembourg, Switzerland, and North Korea, North Korea represents a quite different approach of rights and liberties. David S. LAW and Mila VERSTEEG, "The Evolution and Ideology of Global Constitutionalism," (2011) 99/5 *California Law Review,* pp. 1229-1230.

[176] The standardized rules of WADA might be a very good example of the norms and rules that require to be applied by the parties even though they are not explicitly recognized as the constitutional rule or principle beforehand.

such frameworks cannot necessarily be handled by the checks and balances system simply because not all states share similar constitutional and administrative understandings, cultures, and/or mechanisms of legitimacy or accountability.[177] In other words, as Ernest A. Young indicated, supranational law-making may not be consistent with the domestic dynamics and structure of the law making process.[178] However, such inconsistency, like Anne Marie Slaughter and David Zaring also urged, should not exempt decentralized structures or networks, which operate at the supranational level, from legitimacy and accountability controls.[179]

Along with the concerns of legitimacy and accountability at the supranational level, the realization of such a difficult requirement of control is only possible in theory. This is because the democratic process or participation in many countries/nations/states is already in question. And, balancing the power in any democratic participatory structure outside of national states is technically a very difficult task to accomplish.[180]

2.1.3 Difficulty to Overcome Different Constitutional Cultures: EU Example

Difficulty in the delegation and recognition of supranational legal framework can also be witnessed in the constitutions of the EU member and candidate states. Even though the EU member and candidate states theoretically recognize the supremacy of EU law, the degree of recognition of international law and the hierarchy of international law within their legal systems vary. We

[177] Shaffer indicates that check and balances system might nevertheless ensure the legitimacy of such supranational frameworks: SHAFFER, *supra* note 29, p. 685.
[178] YOUNG, *supra* note 30, p. 529.
[179] Anne M. SLAUGHTER and D. ZARING, "Networking Goes International: An Update," (2006) 2 *Annual Review of Law & Social Science*, p. 223.
[180] Having very few publications which study global public goods might be a sign of such difficulty as well. SHAFFER, *supra* note 29, p. 686.

simply observe this divergence since some constitutions practice monism (direct involvement of international law as applied to national law) while some practice dualism (incorporation of international law as legislation to the national law).

Signing a supranational convention, which regulates the hierarchy of the norms can seem a practical solution, but altering the constitutional culture or habit through a supreme document will be quite difficult for certain countries when they have constitutional cultures or habits dating back centuries.[181] Therefore, we must also take into account different constitutional cultures as well when we design a supreme /supranational document.

I believe validating such an argument of different constitutional cultures with a different hierarchy of norms is needed. And, my analysis of twenty-eight (28) constitutions of the EU member and candidate states reveals an important fact: only a handful of constitutions contain explicit regulation for an eventual power delegation to an international organization. Moreover, the supremacy of international treaties over national laws in case of a conflict is not also explicitly defined in many constitutions.[182]

Putting aside such theoretical and practical views regarding the feasibility of global constitutionalism through the example of the EU, one can argue and can then propose that the current governance structure of WADA constitutes a good example of global constitutionalism attempt in

[181] On this subject, the EU has recently intended to establish a hierarchy of norms within the Union by the Treaty of Lisbon: European Union, "Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community," 2007/C 306/01,13 December 2007, available at HYPERLINK: < http://eur-lex.europa.eu/en/treaties/ index.htm> [last visited on November 2, 2913].

[182] My findings with respect to the hierarchy of international law within national legal systems and the constitutional preparedness for an eventual power delegation to an international organization are presented by a table which can be found at the ANNEX A of this thesis, see *infra* pp. 340-343.

the matter of doping in sport. The reason is that WADA's private law-based structure overcomes the traditional practices of public law-based international law incorporation.

2.1.4 WADA Code and Constitutionalism

The WADA Code, considered the doping constitution, has the power to alter existing laws and regulations in a given country which seeks a visa to get in, to host and, to organize an international gaming or sport event. The compliance with the Code process enables countries to adopt and recognize the WADA Code and Standards. The process of modification of this doping constitution and other standardized rules that the WADA produces and updates regularly forms a dynamic or living document, which is designed to keep current with the most advanced technologies and global developments. Legitimacy and accountability concerns can be prominent downsides or the major critics of this global doping constitutionalism initiative.

However, the question to ask at this point is how to measure the legitimacy or accountability that we can use in disfavoring the doping constitutionalism. In her recent work, Professor Houle suggested that the legitimacy of a regulation be measured in two steps. According to the first step, the authority should justify the social and economic acceptability of the regulation by impact analyses, and at the second step, the authority should provide reasonable possibilities to the stakeholders − social and economic actors which are/can be affected by the legislation − to reflect on the foundations of the legislation which the public authority presents.[183]

[183] France HOULE, *Analyses d'impact et consultations réglementaires au Canada, Étude sur les trasformations du processus réglementaire féderal: de la réglementation pathogène à la réglementation intelligente*, Éditions Yvon Blais, 2012, pp. 4-5.

When we look at the regulatory process in WADA, we do not often see a fair and an understandable impact analysis process which justifies the regulation. Even though there is a quite-well organized consultation process where the signatories and stakeholders can submit their suggestions for the eventual *code* or *standard* revision, WADA does not have to follow these suggestions.[184] Despite this transparent and democratic consultation process, we should bear in mind that WADA only takes into consideration the suggestions which respect "the general principles of law, proportionality and human rights, and also be able to withstand legal challenges in courts across the world."[185]

Replacing the impact analysis process, WADA, however, commissions research whose findings will likely have certain impact on the eventual doping regulation. For instance, certain commissioned projects of 2012 in the field of social sciences include the effect of the level of physical fitness, multilevel factors influencing drug-taking, and a statistical analysis of the literature of personal and situational variables that predict doping.[186]

Based on these facts, I cannot say that WADA totally undermines any requirement of a legitimated regulation in the matter of doping in sport. However, I have to say that global constitutionalism is not a true model from which we can benefit for the purposes of global doping lawmaking or supranational decision making in the matter of doping. The foremost reason for this is

[184] WADA, "Code and IS Review," available at HYPERLINK: <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/Code-Review/> [last visited on June 1, 2013].
[185] WADA, "Q&A on the Code Review Process," available at HYPERLINK: <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/Code-Review/QA-on-the-Code-Review-Process/> [last visisted on June 1 2013].
[186] WADA, "Funded Research Projects," available at HYPERLINK: <http://www.wada-ama.org/en/EducationAwareness/Social-Science/Funded-Research-Projects/> [last visited on November 2, 2013].

that global constitutionalism in the case of doping in sport can hinder diversity and participation.[187]

For instance, stakeholders and signatories which can be named by an undemocratic process in their respective countries, outside of the sport community can still be affected by the regulation on which they have a certain level of responsibility. Such impact can also be worsened with lack of knowledge about the nature of matter and its governance consequences. Hence, the unequal knowledge level among the people who are affected from the regulation needs to be taken into consideration as well. After all, the field of sport, considered inherently political by many, should not be subject to such centralized structure in which only certain groups can possibly have the final word.[188]

However, one can argue that a decentralized network in which the flow of information and cooperation among states[189] is ensured can be more helpful than creating a centralized structure, which will hardly answer the needs of different states, entities, societies, and people. In any case, a subject specific approach would help us better understand the global governance issues and better respond to the needs of doping in sport. As a result, a top down global constitutionalism based approach that WADA seemingly applies in governing the matter of doping in sport does not correspond well to the needs of our subject matter. Besides, such an adherence to the global con-

[187] Shaffer on this subject refers that size of the states, their use of democracy, and organizational schema of the international organization might all impact on the democratic process of accountability and legitimacy: SHAFFER, *supra* note 29, p. 686.
[188] Maxwell J. MEHLMAN, Elizabeth BANGER, and Matthew M. WRIGHT, "Doping in Sports and the Use of State Power," (2005) 50/1 *Saint Louis University Law Journal,* p. 52.
[189] Such mechanism is argued by France Houle while defining the "network federalism" and I consider such network idea might be also useful in the case of doping governance. HOULE (2012), *supra* note 183, p. 174.

stitutionalism model would not be preferable when we consider the current problems in the system that I mentioned in the preliminary chapter.[190]

2.2 Testing Global Legal Pluralism

Global legal pluralism is a recent global governance approach, developed in Europe and North America in the last decade. To better understand this theory in a globalized context, we should examine its theoretical development and fundamentals. Therefore, under this section, I will first define legal pluralism as a theory and then will reflect on the global legal pluralism.

2.2.1 Legal Pluralism as a Theory

Underlying the fact that a legal system can exist outside of state law or *legal provisions*, Eugen Ehrlich can be considered as one of the first authors to raise the idea of the multiplicity of legal orders in a given place in a given time. His proposition of living *law*[191] was a leading concept that one had to take into account when referring to the law in a society where a social order existed even before the law − legal provisions − were put into practice in that given society.[192]

Today, most modern legal systems contain parallel and often contradictory legal orders which are based on different types of legitimation, such as international law, state law, religious law,

[190] See *infra* pp. 29-55.
[191] Ehrlich defines the source of living law through the observation of the textual legal document (primary source) and social life in general which comprises commerce, customs and usages, associations, and etc.(secondary source): David NELKEN, "Eugen Ehrlich, Living Law, and Plural Legalities," (2008) 9/2 *Theoretical Inquiries in Law,* p. 446.
[192] Eugen ISAACS and Nathan EHRLICH, "The Sociology of Law," (1922) 36/2 *Harvard Law Review,* p. 132.

customary law, and new forms of self-regulation.[193] This type of legal complexity, which is defined by the term *legal pluralism,* allows us to recognize the multiplicity of legal orders on the same territory in a given moment, and to realize the fact that, sociologically, Western states do not have a monopoly of legal regulations.[194]

Legal pluralism is designated by two different strands of thought. The first strand of thought, which we already mentioned in the definition above, takes legal orders and society into consideration in order to explain legal pluralism. Proponents of this concept come from different disciplines and include: anthropologists such as Léopard Jaroslv Pospisil,[195] Sally Falk Moore,[196] Norbert Rouland;[197] sociologists such as Santi Romano,[198] Guy Rocher,[199] Jean Guy Belley;[200] and theorists of jurisprudence such as Masaji Ciba.[201]

In addition, this strand of legal pluralism thought is further distinguished into two different concepts by some authors.[202] The first concept is weak legal pluralism or pluralism intra-territorial in which the monism of state is maintained and the state delegates the power of the production of

[193] Project Group Legal Pluralism of Max Planck Institute for Social Anthropology, New Project: *Law Against The State*, a draft of project is available at HYPERLINK: < http://www.eth.mpg.de/ > [last visited on June 2, 2013].
[194] Andrée LAJOIE "Synthèse introductive" in Andrée LAJOIE et al., *Le statut juridique des peuples autochtones au Québec et le pluralisme*, Québec, Yvon Blais, 1996, p. 7.
[195] Jaroslv L. POSPISIL, *Anthropology of Law: A Comparative Theory*, New York, Harper & Row, 1971, p. 385.
[196] Sally F. MOORE, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study," (1973) 7 *Law and Society Review*, pp. 719-746.
[197] Norbert ROULAND, *Anthropologie du droit,* Paris, P.U.F., 1988, pp. 78-119.
[198] Santi ROMANO, *L'ordre juridique* (trad. L. François et P., Gotho, intro. P. Francescakis), Paris, Dalloz, 1975, p. 174.
[199] Guy ROCHER, "Pour une sociologie des ordres juridiques" in G., ROCHER, *Études de sociologie du droit et de l'éthique*, Montréal, Thémis, 1996, pp. 134-135.
[200] Jean G. BELLEY, "L'État et la régulation juridique des sociétés globales : pour une problématique du pluralisme juridique," (1987) 18/1 *Sociologie et sociétés,* pp. 11-32.
[201] Masaji CHIBA, *Asian Indigenous Law: An Interaction with Received Law*, KPI: London and New York, 1986, pp. 2-6.
[202] LAJOIE, *supra* note 194; BELLEY, *supra* note 200.

normative orders to other legal order.[203] The second concept is strong legal pluralism or pluralism extra-territorial in which the state neither delegates its power to produce normative orders nor implicitly recognizes a legal order outside of the state.[204]

However, it is vital to define what legal order is. According to Guy Rocher, a legal order must contain the five following criteria:

> "1-The system of rules and standards should be admitted by the members a nation, society or organization.
> 2-The agents or apparatus should be recognized in this society as specialist of
> -stating the new rules or modifying the existing ones.
> -interpreting existing rules
> -applying them and make them respected.
> 3-The members of this society should have the conscience of three functions of these agents
> 4-The three functions of these agents should be exerted.
> 5-The rules and agents of this legal order should be permanent." [205]

The second strand of thought defining legal pluralism considers that, whilst legal pluralism occupies a place outside of the state, it is inside the individual rather than society and legal order. Proponents of this strand include Roderick Macdonald[206] and Jacques Vanderlinden. For instance, Vanderlinden defined legal pluralism as follows:

> *Le pluralisme juridique est la situation, pour un individu, dans laquelle des mécanismes juridiques relevant d'ordonnancements différents sont susceptibles de s'appliquer à cette situation*.[207]

However, this thought is criticized as it denies the social character of law. According to Tamara, law is a conceptual creation and is not complicated to accept it as a social construct.[208]

---

[203] *Ibid.*
[204] *Ibid.*
[205] ROCHER, *supra* note 199.
[206] Roderick A. MACDONALD, "Pour une reconnaissance d'une normativité juridique implicite et inférentielle" in (1987) 18/1 *Sociologie et sociétés*, pp. 47–58.
[207] Jacques VANDERLINDEN, "Vers une nouvelle conception du pluralisme juridique," (1993) 18/2 *Revue de la recherche juridique droit prospectif,* p. 583.

2.2.2 Global Legal Pluralism as a Theory

The concept of global legal pluralism has been argued in different forms for the last fifteen years. And, international arbitration was a central tool that first ignited the reflections for a global legal order which was not necessarily supposed to be placed within any hierarchical national legal order. In this sense, Gunther Teubner refrained from arguing a theory of global legal pluralism. He indicated that *lex mercatoria* and *lex laboris internationalis* were the examples of a *private* global norm-production regime which could not be associated with a national legal order.[209]

Teubner further stated that there were many other alike global legal regimes which were emerging in the areas of technical standardization and professional self-regulation, human rights, internet, ecology, and sport. However, the legal status of these global legal regimes before a national legal order was a complicated issue since they were not considered a law despite their mere effect of law.[210]

However, along with his observation of the emergence of global law without states in the certain fields and/or areas, Teubner confidently asserted that such emergence of global law can only be explained by legal pluralism.[211] Besides, drawing attention to the distinctiveness of such global

---

[208] Brian Z. TAMANAHA, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," (1993) 20/ 2 *Journal of Law and Society*, p. 198.
[209] Gunther TEUBNER, "Breaking Frames: The Global Interplay of Legal and Social Systems," (1997) 45/1 *American Journal of Comparative Law,* p. 157.
[210] *Ibid.,* pp. 157-58.
[211] Gunther TEUBNER, "Global Bukowina: Legal Pluralism in the World Society" in Gunther TEUBNER (ed.), *Global Law without a State*, Darthmouth, Aldershot, 1997, p. 2.

legal orders, he argued that they should not be evaluated or compared with national legal orders.[212]

This phenomenon of global law without state or implicitly said global legal pluralism that Teubner specifically evaluated through well-established theory of legal pluralism automatically impacted on the classical hierarchy of norms within the nation state. As indicated earlier, the hierarchy of international law in most EU member and candidate states varies considerably, although many of these countries classify the constitution as a supreme law of the nation.[213] However, such global legal frameworks deconstructed the pre-determined hierarchy of norms within a nation when they were applied to certain fields and areas where national laws primarily had jurisdiction.[214]

Heavily criticizing Teubner on his approach of global legal pluralism which emphasizes on the decentralized, non-state actors and non-hierarchical soft law, Snyder proposed a distinct theory of global legal pluralism in 1999, simply based on a *network model* with two main dimensions, depending on the market and polity.[215]

Viewing the theory of global legal pluralism from the angle of sociology, Snyder particularly differentiated from Teubner who explained the global legal pluralism through a normative strand.[216] In other words, leaving aside the normative explanations of global legal pluralism, he

[212] *Ibid.*
[213] See ANNEX A, *infra* pp. 340-343.
[214] Gunther TEUBNER, "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy," (1997) 31/4 *Law and Society Review,* pp. 767-770.
[215] Francis SNYDER, "Governing Economic Globalisation: Global Legal Pluralism and European Law," (1999) 5/4 *European Law Journal,* pp. 371-374.
[216] *Ibid.*

focused more on the global economic development and interactions of the global actors which were structured and governed by global legal pluralism.[217] Although he limited his views to the sociological strands, his view of global legal pluralism helped us realize how the multiplicity of normative structures, legal cultures, and political actors should be taken into consideration in any eventual reflection on global governance through law.[218]

The global commodity chain of *toys* example that Snyder used, pictured how many different legal, social, political, and cultural sites could have involved in the production chain. Taking into account such an example of Snyder, we should yet state the practical struggle to apply his theory, considering the difficulty in interdisciplinary and intercultural understandings.

As a result, recognizing such version of global legal pluralism which governs and /or administers a *global network* among different disciplines, cultures, institutions, and groups in light of global economic developments, certain authors proposed a post-modern response of interdisciplinary and intercultural hermeneutics, helping to translate such differences.[219] Actually, when we intend to offer a global governance model either through global constitutionalism, global legal pluralism or global administrative law, we will likely need to grasp well the differences and/or plurality in its particular meaning. Peters and Schwenke elucidated this requirement with the following words:

> "With regard to the dangers of false (U.S.-centered, Eurocentric and hegemonic) Universalism, interdisciplinarity and comprehensiveness appear, however, in a new

[217] *Ibid.,* p. 344.
[218] Reading Snyder, we can summarise the potential problems that global legal pluralism will need to deal with as follows: "differences in the decision-making structures, potential conflicts in different sites due to the differences on the legal cultures and social relations, potential favorism of national based products, policies, politics, etc. over their foreign counterparts, and problem of hierarhy and binding nature of the sites, etc.:" *Ibid.,* pp. 371-374.
[219] Anne PETERS and Heiner SCHWENKE, "Comparative Law Beyond Post-Modernism," (2000) 49/4 *International and Comparative Law Quarterly,* pp. 832-834.

> light. They direct our attention to the moral and political, eventually technically dysfunctional, underpinning of rules in a historical, sociological and cultural perspective. So interdisciplinarity and comprehensiveness are a conditio sine qua non for avoiding erroneous assumptions on ostensibly "identical" societal problems and erroneous, decontextualized evaluations of legal solutions."[220]

As we see above, any global governance model will need to require the application of *interdisciplinarity* and *comprehensiveness* conditions when they involve the multiplicity of legal, social, cultural, and political orders. In my view, this is also a must when we want to be efficient in designing a governance model. Mutual understanding in cross-disciplines and cross-cultures will likely improve the quality of any proposal when all stakeholders and/ or actors in charge of decision making grasp the problem much better. For instance, in the case of doping, finding global solutions will likely require *interdisciplinarity* and *comprehensiveness* since doping, as a subject, includes quite different disciplines, cultures, legal systems, and political conceptions.

Such interdisciplinary and intercultural hermeneutics-based global legal pluralism understanding of Snyder also found assistance from Tamanaha, who defined legal pluralism by a conventionalist approach in which a social arena determines what the law is and where its hierarchy lies in a legal system.[221] In other words, Tamanaha also criticized Teubner for his functionality based view of legal pluralism, founded on normative structures which are completely disconnected from the state and which are non-hierarchical to the state law. Then, Tamanaha argued that the delimitation of non-state law in the name of functionality could create dysfunctional consequences.[222]

---

[220] *Ibid.,* p. 833.
[221] Brian Z. TAMANAHA, "A Non-Essentialist Version of Legal Pluralism," (2000) 27/2 *Journal of Law and Society,* p. 318.
[222] *Ibid.,* p. 308.

What is important in the views of Tamanaha and Teubner is that both did not specifically distinguish global legal pluralism from legal pluralism. Namely, they did not propose a distinct theory of global legal pluralism. Instead, they seemingly believed that their approaches of legal pluralism could theoretically find applications in local and global arenas at the same time. In any account, a social arena of Tamanaha cannot be limited within local boundaries, and normative structures of Teubner, which are disconnected from the state, cannot be always found in a local arena either.

Following such early reflections on the global legal pluralism at the very beginning of the millennium, Oran Perez approached the subject from a completely different point of view. While not rejecting normative structures of Teubner, he however categorized them into two groupings: state oriented international organizations and hybrid or private systems. Both categories produce norms in a global arena. [223] Similar to Snyder, Perez also tried to propose a novel approach of global legal pluralism, based on the difficulties or challenges arising from such norm-producing systems. As stated before, while Snyder raised the prospect that a better mutual understanding among multiplied disciplines, legal cultures, political groups, and communities would help produce a more prudent response to the global problems,[224] Perez wanted to defy any domination or exclusion that a normative structure could cause through creative re-designs of such said structures.[225]

[223] Oren PEREZ, "Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law," (2003) 10/ 2 *Indiana Journal of Global Legal Studies,* p. 25.
[224] SNYDER, *supra* note 215, p. 833.
[225] PEREZ, *supra* note 223, p. 57.

Giving an example from the WTO in which certain designated gradual procedural conditions filter to perform certain rights, such as applying to the precautionary principle, he argued such creative normative structures could help in transforming legitimacy and accountability deficient transnational legal institutions into a self-justified and a self-criticized reflexivity based legal institutions.[226]

However, such a constant reflection (reflexivity based) required platform of Perez can easily be challenged by the consistency argument. And, he also accepted this weakness in his approach at some point saying that "Normative uncertainty could (although not necessarily) impose economic or mental costs on those who rely on the law."[227] Certain fields that the global law making systems have to deal with, such as global public health, cyberspace, and environment, are characterized by relatively rapid technical advancements that normative structures cannot always answer properly and timely by their traditional law making process. Accepting such phenomena of a rapid response requirement from the normative law making institutions, reflexivity based solutions can seem a welcome approach.

However, one should remember that creativity and/or reflexivity should not be seen as a requirement to apply to normative structures. Any normative structure, naming itself as a *structure* requires creativity at some point. The question to ask can be how we can design a *better/ smarter/ more intelligent* regulation. The answer can include: applying for *creativity* and *reflexivity,* but the real response should always include: applying for *collectivity* and *participation,* which would boost the creativity and reflexivity at any point.

[226] *Ibid.,* pp. 60-64.
[227] *Ibid.,* p. 58.

One can ask at this stage what would happen if perfectly designed normative structures collide with other perfectly designated normative structures? How would we handle such a potential challenge? Lescano and Teubner, explaining global legal pluralism as a consequence of regime collisions in a global society, believed that weak *normative compatibility*, which can be ensured by *specific network logic* rather than focusing on the unity of global law, is required to resolve such problems.[228] In other words, they pointed out that the traditional understanding of conflict of laws − which compounds an internal logic to overcome conflicts of laws − can guide us to create a simplified or weak network logic, which will develop a normative compatibility for the colliding regimes in the global arena.[229]

Even though such a proposition can be relatively functional considering conflict of laws rules are quite helpful for the nation states, the feasibility of such compatibility networks in the global arena − even in its weak form − can be almost impossible in the realm of emerging private law normative structures, such as ICANN. The reason is that the primary goal of such private regimes, as in the case of ICANN, cannot envision a *normative structure* which requires dealing with the other normative structures at times. Rather, its goal can envisage accomplishing a *technical task* [230] even if such technical duty eventually creates a legal order. Besides, encouraging a

[228] Andreas F. LESCANO and Gunther TEUBNER, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law," (2004) 25/4 *Michigan Journal of International Law,* p. 1004.
[229] *Ibid.,* pp. 1000,1045.
[230] ICANN descibes itself as follows: "The Internet Corporation for Assigned Names and Numbers (ICANN) is an internationally organized, non-profit corporation that has responsibility for Internet Protocol (IP) address space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) Top-Level Domain name system management, and root server system management functions. Originally, the Internet Assigned Numbers Authority (IANA) and other entities performed these services under U.S. Government contract. ICANN now performs the IANA function. As a private-public partnership, ICANN is dedicated to preserving the operational stability of the Internet; to promoting competition; to achieving broad representation of global Internet communities; and to developing policy appropriate to its mission through bottom-up, consensus-based processes. The DNS translates the domain name you type into the corresponding IP address, and connects you to your desired website. The DNS also enables email to function properly, so the email you send will reach the intended recipient:" ICANN,

sovereign state to be part of a certain compatibility regime, created by a private corpora-tion, can be an important issue to consider as well.[231]

Over and above, Ralf Michaels reasonably argued that the states would not recognize such network logic or such a Universalist form of conflict of laws. Political reasons and responsiveness of the practical solutions that they already developed to overcome non-state norms, such as incorporation, deference, and delegation would not allow states to do so.[232] Michaels, however, did propose that states have modified themselves in order to better answer the consequences of globalization and legal pluralism. After all, handling global legal pluralism with traditional conflict of laws rules has caused undesired consequences even more.[233]

Following these early debates on global legal pluralism, Paul Schiff Berman published a prominent work in 2007 titled *Global Legal Pluralism*, which established a distinct theory of global legal pluralism. His position of global legal pluralism aimed at benefitting from the hybridity of multiplied procedural mechanisms, institutions, and practices. According to him, trying to eliminate the divergence for the purposes of resolving the globalization based issues in an easier, but less fruitful way would be incomplete.[234] Finally, Berman summarized his view of global legal pluralism as follows: "Pluralism offers not only a more comprehensive descriptive account of the

---

"Glossary," available at HYPERLINK: < http://www.icann.org/en/about/learning/ glossary> [last visited on July 6, 2013].

[231] *Ibid.*

[232] Ralf MICHAELS, "The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism," (2005) 51/3 *Wayne Law Review,* p. 1249.

[233] Michaels also argued having multiple jurisdictions for the same issue and the problem of which norm will apply to the issue at stake would impact on weak countries and non-state communities since strong states can refuse to recognize the jurisdiction of such normative structures: *Ibid.,* pp. 1254-1259.

[234] Paul S. BERMAN, "Global Legal Pluralism," (2007) 80/6 *Southern California Law Review,* p. 1155.

world we live in, but also suggests a potentially useful alternative approach to the design of procedural mechanisms, institutions, and practices."[235]

As a result, an important question to ask at this point is how we can manage the global legal pluralism in a productive way? Introducing the theory of global legal pluralism, Berman indicates several mechanisms, which can be preferable to each other according to its nature of practice, to manage pluralism. And, they are listed as follows: "dialectical legal interactions, margins of appreciation, limited autonomy regimes, subsidiarity schemes, jurisdictional redundancies, hybrid participation agreements, mutual recognition regimes, safe harbor agreements, and a pluralist approach to conflict of laws."[236] Leaving aside an explanation on the use or application of such mechanisms, we can potentially include a pluralist approach of global administrative law in this list although Berman did not exclusively mention about it.

As Tamanaha pointed out, we should avoid neither proposing a global legal pluralism managing tool nor creating a mechanism in which the state law will be competing with other non-state law normative structures. This is because both propositions require a careful analysis of the social arena in which the normative structure exists.[237] We need an authority which will have to manage the plurality and this authority should be solely created and/or empowered by the sovereign states. However, guidance of this authority through smart mechanisms is a must, and I believe that a pluralist approach of global administrative law can be helpful to attain this goal.[238]

---

[235] *Ibid.,* p. 1156.
[236] *Ibid.,* pp. 1196-1235.
[237] Brian Z. TAMANAHA, "Understanding Legal Pluralism: Past to Present, Local to Global," (2008) 30/3 *Sydney Law Review,* p. 411.
[238] Certain authors established also different forms of interaction theories as to the multipled normative orders such as "internormativity" which is theorized as "juridical" and "sociological" internormativity depending on the focus "moving from one legal order to other" or "analysis of the ineractions among multipled legal orders" (Charbonier,

2.2.3 Case Studies of ICANN and WADA

Before studying the global administrative law model of governance, I should explain why private law normative structures cannot be always explained by the theory of legal pluralism. To do that, I will briefly study two contemporary examples of private law norm-making structures through the lens of legal pluralism. First is ICANN, which was founded as an American non-for-profit corporation, and the second is WADA, which was founded as a Swiss private law Foundation.

2.2.3.1 ICANN Example

ICANN (established in 1998 as a nonprofit organization and incorporated in the United States) had the responsibility for IP address space allocation, protocol parameter assignment, domain name system management, and root server system management functions previously performed under the United States (US) government contract by IANA and other entities.[239] In other words, its main task was coordinating the Internet on a technical level.

In 1999, ICANN initiated a Uniform Dispute Resolution Policy (UDRP) which introduced mandatory arbitration. This was required because domain name disputes increasingly arose due to trademark holders claiming intellectual property rights against the holder of domain names.

Belley, Rocher, etc.): Karim BENYEKHLEF, *Une possible histoire de la norme : les normativités émergentes de la mondialisation,* Éditions Thémis, 2008, p. 797. However, at some point, we need to move forward from what is happening now to what should happen. In other words, instead of taking the picture of global legal pluralism or inter-normativity, we need to focus on mechanisms managing these interactions and/or pluralism. In this regard, global administrative law can play an important role.

[239] Brian FITZGERALD and Anne FITZGERALD, *Cyberlaw,* Victoria, LexisNexis Butterworths, 2002, p.105.

However, this policy, which has international consequences, caused certain problems as it normally had to be created by a public entity.[240]

As a result, ICANN states new rules and the UDRP is the foremost example of these rules. ICANN also interprets the existing rules. According to the UDRP, mandatory arbitration is obligatory for certain disputes and the UDRP are interpreted by the dispute resolution service providers.[241] Finally, ICANN applies the UDRP with its self-executing system which makes the arbitration decisions executed by canceling the domain name or transferring it to the complainant in compliance with the UDRP procedure.

In this regard, ICANN is a legal order and we have a case of global legal pluralism since we can have the multiplicity of legal orders on the given territory in a given time. Namely, this legal order has international effects as its jurisdiction is global due to the network of computers around the world. Before analyzing the international effects of this legal order, we need to know whether this legal order is delegated by the United States government.

ICANN was founded according to the US private law as a not-for-profit corporation. The US Department of Commerce has veto power over ICANN policy decisions.[242] In other words, there

[240] Uniform Domain Name Dispute Resolution Policy (UDRP), available at HYPERLINK: <http://www.icann.org/en/help/dndr/udrp/policy> [last visited on July 3, 2013]. [UDRP]

[241] The applicable disputes for the mandatory administrative process are as follows: "(i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and (ii) you have no rights or legitimate interests in respect of the domain name; and (iii) your domain name has been registered and is being used in bad faith," *Ibid.,* Art. 4.

[242] Jonathan WEINBERG, "Governments, Privatization, and "Privatization": ICANN and the GAC", (2011) *18 Mich. Telecomm. Tech. L. Rev*., pp. 189, 194, also available at HYPERLINK: <http://www.mttlr.org/voleighteen/weinberg. pdf> [last visited on July 10, 2013]; Konstantionos KOMAITIS, "ICANN: Guilty as Charged?," (2003) 1 *The Journal of Information, Law and Technology (JILT)*, available at HYPERLINK: <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2003_1/komaitis/> [last visited on July 10, 2013]; A. Michael FROMKIN, "Wrong Turn in

is a delegation to ICANN, but this delegation is not legitimate. That is because ICANN is not a public corporation in its legal status. Thus, there is a certain legitimacy gap in the US side. Even if there is no legitimate delegation to ICANN making it become a legal order in the matter of domain name governance, we cannot deny an implicit full delegation to this authority in the matter of domain name governance. Thus, I can conclude a weak version of legal pluralism for the US.[243]

However, the most important point to consider here is that this US based legal order stating rules which have international consequences. And, from the point of international law, we know that this entity is not delegated by national governments. Even if around 50 governments advise the Board of Directors via the Governmental Advisory Committee (GAC),[244] there is neither a delegation, nor a consensus over ICANN from these governments. After all, ICANN's Board of Directors itself oversees the policy development process and finally sets the policies. Besides, we should not forget that the US Department of Commerce always has veto power over policy decisions.[245]

Cyberspace: Using ICANN to Route Around the APA and the Constitution," (2000) 50/ 17 *Duke L. J.,* p. 111. Though, a recently signed Agreement (Affirmation of Commitments, 2009) between ICANN and DoC make us think that ICANN becomes totally independent, an overall analysis of the Agreement still raises the questions of dependence: Thomas M. WHITE and Lawrence J. LENARD, "Improving Icanns Governance and Accountability: A Policy Proposal," (2011) 23/2 *IEPOL Information Economics and Policy,* p. 191.

[243] I also consider applying the weak and strong legal pluralism distinction in the characterization of legal pluralism just as Lajoie and Belley, see *supra* p. 77.

[244] ICANN defines the current status of the GAC membership as follows: "Membership of the GAC is open to all national governments and distinct economies as recognised in international fora. Multinational governmental organisations and treaty organisations may join the GAC as observers. Currently, the GAC is regularly attended by approximately 50 national governments, distinct economies, and global organisations such as the ITU, UNESCO, the World Intellectual Property Organisation (WIPO), INTERPOL and regional organisations such as the OECD, Asia Pacific Forum, and Council of Europe": ICANN, "About the GAC," available at HYPERLINK: <https://gac-web.icann.org/display/gacweb/About+The+GAC > [last visited on July 10, 2013].

[245] Lelia GREEN, *The internet: An introduction to new media*, Oxford: Berg., 2010, p. 35.

In any case, there is an implicit interaction between governments and ICANN. First of all, ICANN hands over the administration of country name domain spaces to the country code managers who are domiciled in their home country. Nation states were as well involved in the UDRP procedure for country domain name disputes. Second, there is no major consensus to establish an alternative to ICANN and the international community expects the US government to legitimize ICANN. Nevertheless, governments claim jurisdiction when it comes to the country domain name spaces.

Since there is neither an explicit delegation, nor is there an explicit refuse of this legal order, I can conclude that there is a weak legal pluralism between ICANN and other nation states, outside of the US. In doing so, ICANN is the foremost example of global legal pluralism as it states normative rules within its *borders*, what we can call market or Internet Addressing. The *visa* to get in is only issued to those who accept these rules. On one hand, governments implicitly recognize and/or admit ICANN's technical coordination task because they cannot easily propose and/or develop an alternative at the international level. On the other hand, governments refuse the jurisdiction of ICANN as a legal order because of sovereignty issues.

In this case of ICANN, we considered the concept of legal pluralism in terms of international law. We can call such multiplicity of legal orders as global legal pluralism when an international legal order comes from the implicit delegation of a single government. This situation seems to occur when there is no international delegation, but an implicit obligatory recognition due to the fact that many governments cannot compete with the rapid advancements in technology and the consequences of globalization.

At this point, one can consider if the legitimacy gap is preeminently lifted and a preponderant consensus from the countries is provided, how would we define ICANN? Would we call it as the foremost example of global governance or still as an example of legal pluralism which is at the corner of competing jurisdictions over Internet domain names? We can probably answer this question by studying WADA − which we can cite as the foremost global governance example on doping in sport − through the lens of legal pluralism.

2.2.3.2 WADA Example

In the case of WADA, we have relatively different governance structure and dispute resolution mechanism in comparison to that of ICANN. WADA was established as a private law Foundation in accordance with Swiss law.[246] And, the UNESCO Convention, signed by over 170 countries, stipulates that the WADA Code and the principles of the Code, which include a mandatory dispute resolution mechanism for the matters of doping, will be recognized.[247] Countries can bring additional measures according to Art. 4 and 5 of the UNESCO Convention in order to fight against doping and this can lead a country to criminalize the doping, although the Code only applies to administrative penalties.

Even though countries, in theory, can adopt complementary measures such as criminalizing doping, for which Italy is the foremost example, this can cause further problems when athletes come across two legal orders and two different rules, applicable to them. At this point, the Turin Winter Olympics in Italy was the scene for the multiplicity of legal orders although the issue was

[246] For more detailed information about the WADA structure, see *infra* pp. 218-222.
[247] UNESCO Convention, *supra* note 5, Art.3; Code, *supra* note 3, Art. 22.4.

resolved when Italy had to recognize the rules of the WADA Code.[248] Therefore, I can conclude that the recognition of WADA legal order among nation states will become faster and faster despite the multiplication of normative structures on the administration of the fight against doping in the world is present. This is because the IOC Charter ensures heavy measures and sanctions for countries, such as the right to withdraw the organization of the Olympic Games from the host city, which would not collaborate with itself and which would not apply to the rules of WADA.[249]

For the categorization of legal pluralism, I see that such pluralism falls in the weak legal pluralism strand in terms of Italy.[250] However, from the international law perspective, what we see here is also rather a form of doping governance delegation to WADA through the international instruments (UNESCO Convention, IOC Charter, and WADA Code, *WADA Guidelines* etc.). Namely, nation states authorize WADA either voluntarily or obligatorily, depending on their drives to cooperate with the IOC and WADA in the fight against doping.

Consequently, WADA and the anti-doping governance cannot be explained through legal pluralism since WADA slowly but surely turned into the sole norm producing authority in the matter of doping. However, this norm production mechanism has been subject to the certain issues in

[248] Thomas SCHULTZ, *La "Lex Sportiva" Se Manifeste Aux Jeux Olympiques De Turin: Suprématie Du Droit Non-Étatique Et Boucles Étrangés*, Cambridge University (Lauterpacht Research Center for International Law, 2006.
[249] The IOC Charter Sec. 59: The Charter, which is in force as of 9 September 2013, is available at the IOC Website, see HYPERLINK: <http://www.olympic.org/documents/olympic_charter_en.pdf> [last visited on April 21, 2014]. [Charter]
[250] See *supra* note 243.

regards to the anti-doping governance[251] even though it was once promoted as the foremost example of global administrative law.[252]

Conclusion of the Second Section

Neither global constitutionalism nor global legal pluralism model properly answers to the needs of anti-doping governance. A centralized model, undermining the diversity and causing further issues, will automatically force us to consider whether a pluralist model can be more helpful. However, applying to a prospective pluralist model is not, unfortunately, helpful either, since the anti-doping regime is recognized as a legal order by nation states.

Thus, from the practical point of view, I cannot talk about the multiplicity of legal orders for the same matter in a given time on a given territory. And, from the theoretical point of view, I cannot associate the anti-doping regime with legal pluralism. As a consequence, I need to study the global administrative law while bearing in mind the conclusion of this section. Namely, neither a centralized monist model nor a pluralist model is a solution. We need to look for a governance model for the anti-doping regime at the outside of traditional constitutionalism and legal pluralism based frameworks. Hence, in the following section, I will test whether the GAL model can be an appropriate theoretical framework to accommodate the needs of global anti-doping governance.

[251] As I indicated these issues in the preliminary chapter of this thesis, in the second part of the thesis I will focus more on the criminal and public law aspects of doping, which generate the principal global doping governance issues, see *supra* p. 56.
[252] CASINI (2009), *supra* note 34.

Section 3 *Testing Global Administrative Law (GAL)*

Having studied the theories of global constitutionalism and global legal pluralism from the perspectives of anti-doping governance, in this section, I will study WADA and the anti-doping governance from the glances of global administrative law. Searching an appropriate theoretical framework for the governance of doping and seeing global constitutionalism and global legal pluralism cannot effectively assist, I believe the GAL theory can be of help in accommodating the needs of global anti-doping governance.

Thus, I will first elaborate the GAL model and will then demonstrate why and how the GAL model can apply to this thesis in the realm of global anti-doping governance needs.

3.1 Global Administrative Law as a Theory

Prior to reviewing the early reflections on global administrative law, I should briefly define what the *administrative law* means from the comparative law point of view and how it should be defined in the realm of globalization.

3.1.1 Defining Administrative Law

Defining administrative law is not an easy task where the legal traditions in the world have different understandings and applications of the administrative law due to either the economic regime they practice or the rule of law they recognize. For instance, we may not expect that the

Chinese administrative law will have similar understanding and functioning with the French administrative law even though both China and France are social states. This may be explained probably by which administrative law is seen as a distinct law − separated from the ordinary law − in civil law countries and is defined as *the law of the administration* in its most general understanding.[253] This is because the concept of administration can expectedly change from one country to another.

Without elaborating the subject in detail, I can give a few examples of how administrative law is perceived in different legal systems so as to demonstrate the divergence in its understanding. Therefore, I first need to start by describing how administrative law was born within the civil law traditions. Then, I need to continue with how other legal traditions, such as common law and customary law, perceived administrative law in comparison with the civil law traditions.

In ***civil law,*** we can confidently say that administrative law is not as old as Roman law as there was no administrative law in Roman law.[254] Regarding its origin, one can cite France as the birthplace of administrative law and 1790 as the date of its birth when the jurisdiction of courts over administrative matters was banned by the law which separated the administrative and judicial authorities.[255] Following this law, the *Conseil d'État* was established in 1799 so as to function as a court which would settle the disputes between the citizens and administration.[256] Later on, the dispersed principles and rules of administrative law, shaped by the decisions of the

[253] For instance in Turkey, it is defined as " the law of the administration." Metin GÜNDAY, *İdare Hukuku*, Ankara: İmaj, 2011, pp. 3, 25.
[254] *Ibid.,* p. 28.
[255] Kemal GÖZLER, *İdare Hukuku Dersleri*, 12 edn.; Bursa: Ekin, 2012, p. 28.
[256] *Ibid.,* p. 29.

Conseil d'État, led the doctrine to structure the administrative law as early as 1822.[257] Germany followed France a few decades ahead with its first administrative law book published in 1857.[258]

In Turkey, the development of administrative law goes back to the Ottoman Empire where a French *Conseil d'État* identical institution, named as *şurayı devlet* was established in 1858.[259] The first known administrative law book was published in 1891 by İbrahim Hakkı Paşa.[260] The newly founded republic of Turkey, also integrating *de Novo* the model of *şurayı devlet* in 1925, established differently a superior court of administration, named as *Danıştay* in 1961 which would only apply to the unique administrative law rules in order to settle disputes.[261] To note, this characteristic of applying only to the administrative law rules separated Turkey from France, which applies private law rules to the administrative matters.[262]

In ***common law***, explaining the administrative law in English law should definitely start with Dicey who was not a very much on the side of administrative law. Highlighting the precarious red lines of administrative law with respect to the principles of English law and /or the law of the land of England, Dicey asserted why such power of administrative law was not a good fit within English law at the very beginning of the 19th century:

> "It ought, too, to make us perceive that such law, if it be administered in a judicial spirit, has in itself some advantages. It shows us also the inherent danger of its not becoming in strictness law at all, but remaining, from its close connection with the executive, a form of arbitrary power above or even opposed to the regular law of the land."[263]

[257] The first administrative law book was written in 1822 by Louise de Cormein: *Ibid.,* p. 30.
[258] Friedrich F. Mayer was the author of the book titled "*Grundzüge des Verwaltungsrechts und Rechtsverfahrens:" Ibid.*, p. 31.
[259] *Ibid.*
[260] *Ibid.,* p. 32.
[261] *Ibid.*
[262] *Ibid.*
[263] Albert V. DICEY, *Introduction to the Study of the Law of the Constitution*, London, Macmillian and Co., 1908, p. 374.

Dicey explained his view of administrative law by referring to the French legal system and arguing that the structural differences in both legal systems did not prevent them from arriving at similar conclusions, depending on how we set the understanding of rule of law in either legal system. Therefore, his understanding of the rule of law, which has three meanings (supremacy of the parliament, equality before the law, and the law of the constitution), actually did not leave much practical room for the administrative law where it could exist.[264]

Moreover, Dicey radically argued that administrative law within the common law legal systems could not exist and further, that the principles of *ultra vires* and natural justice were sufficient for maintaining administrative justice. However, the subsequent developments of administrative law in common law legal systems, particularly in the English legal system, gradually eroded the legitimacy of this view, culminating with the membership of the UK in the European Union.[265] In doing so, the American administrative law progressed through giving emphasis on the constitutionality, judicial review, and rule making respectively.[266]

As for Canadian administrative law, it already completed the judicial review phase by following the decisions of *Crevier, Bibeault*, and *MacMillian Blodel* [267] and started placing emphasis upon rule making through the recent decision of *Agraira* where the Supreme Court of Canada followed the guidelines of the immigration board to reach the final decision.[268]

---

[264] *Ibid.,* pp. 198-199.
[265] John A. ROHR, "Dicey's Ghost and Administrative Law," (2002) 34/1 *Administration & Society,* pp. 16-17.
[266] Horace B. JACOBINI, *An Introduction to Comparative Administrative Law*, New York: Oceana Publications, 1991, p. 55.
[267] These decisions confirmed the judicial review power of the superior courts over the administrative decisions: Lorne Mitchell SOSSIN and Colleen M. FLOOD, *Administrative Law in Context*, Toronto: Emond Montgomery Publica- tions, 2013, p. 23.
[268] *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, para 98 delivers the landmark confirmation of such rule making through guidelines by the following: "In the case at bar, the Guidelines created a

Leaving aside the evolution of administrative law in the common law jurisdictions at the expense of discrediting Dicey, at this point, we can wonder what would affect the development of administrative law in a given legal system. In Turkey, Metin Günday set five conditions which determine the degree/step of such a development or progress: "1) recognition of the supremacy of the law, 2) recognition of the public law and private law distinction, 3) development of the administrative functions of the state becoming a social state, 4) judicial review of the administration, 5) existence of administrative justice."[269]

In any case, the degree of administrative law development will vary depending on the legal system which apparently determines the scope of the above-said conditions. For instance, Gözler stated that the meaning and functioning of administrative law are quite different in common law systems in comparison to the civil law systems such as France, Germany, Italy, Greece, Turkey, etc. where administrative law is a distinct law, which solely applies to the administration.[270] However, we should cite that administrative law is a relatively young field whose birth dates back to the very early 19th century. Remember, there was no administrative law in Roman law.[271]

Besides other distinct legal systems, such as the Chinese legal system, based on civil law and customary law, has a distinct mechanism of administrative law where censorate or an *inspectorate* serves as a control-based supervision and ombudsman so as to ensure that *everything is*

---

clear, unambiguous and unqualified procedural framework for the handling of relief applications, and thus a legitimate expectation that that framework would be followed. The Guidelines were published by CIC, and, although CIC is not the Minister's department, it is clear that they are "used by employees of [both] CIC and the CBSA for guidance in the exercise of their functions and in applying the legislation."

[269] GÜNDAY, *supra* note 253, pp. 26-27.

[270] GÖZLER, *supra* note 255, pp. 26-27.

[271] GÜNDAY, *supra* note 253, p. 28.

under control.[272] As a result, the definition of administrative law will be different in those legal systems.

However, seeing the diversity in the concept of administrative law, we can envisage a definition of modern administrative law, which has also implications for the global administrative law, which is not belonging to a particular legal system such as civil law, common law, or customary law. We can call it as the negotiated and reviewed law on the administration since every community and state regardless of the legal system in which they reside or which they represent ought to negotiate the law of the administration in order to make it more effective and reliable.[273]

Consequently, I believe such a definition of modern administrative law will function well in the global arena where we cannot easily simplify the multiplied cultures, communities, and groups to one single entity. Besides, undermining diversity will not produce effective solutions when the global arena is made up by the same diversity. Therefore, negotiation and consent should be the key terms guiding any governance theory which seeks effectiveness and functionality. Otherwise, control-oriented and laid-back solutions will only be helpful to the ones who are respon- sible for the governance, not to the ones who are governed. Bearing in mind this assumption, we can now study how global administrative law has developed with the advent of globalization.

---

[272] JACOBINI, *supra* note 266, pp. 186-187.

[273] Even though we started seeing the negotiation and consultation process related to the administrative rule-making in recent years under the term of "smart regulation" (HOULE (2012), *supra* note 183, pp. 112-122 and 163-170), we witnessed the negotiated administrative law practice in the early Ottoman Empire where the rules of administration were set through a process of negotiation with each community of the empire. In other words, although the empire was principally applying to the *shari'a* − Islamic or religious law − there was no strict line between *shari'a* and state law: Dina R. KHOURY, "Administrative Practice between Religious Law (Shari'a) and State Law (Kanun) on the Eastern Frontiers of the Ottoman Empire," (2001) 5/4 *Journal of Early Modern History,* pp. 329-330.

3.1.2 Early Reflections on Global Administrative Law

The reflections surrounding GAL in the early 1990s were attempting to stretch international law out by analyzing the potential legal problems that individuals were facing at the international arena and by looking at the law making character of international organizations.[274] For instance, Jacobini, not using the term of *global,* but emphasizing well the global character of administrative law with the term *international,* defined five aspects of international administrative law in 1991, arising out of international organizations and legal matters involving international bureaucrats or/and individuals. These features of the international administrative law are as follows:

> "1) Those instances which have to do with the legal relationships of international bureaucrats to their agencies or organizations;
> 2) Those aspects having to do with persons (natural and/or legal) who contend that such agencies have in some way contravened their rights or interests;
> 3) Situations in which individuals and or international agencies charge that states have violated international organization accords and have thus caused injury;
> 4) Those instances in which charges are brought before international courts, commissions, or committees that the civil or human rights of persons have been infringed by states, or by international organizations;
> 5) Those settings in which international agencies actually make law."[275]

Examining the multiplication of law making international tribunals and the emergence of required global citizenship (at certain points), Jacobini divided law making international organizations into two categories: political and technical.[276] Although he concluded that such a distinction

[274] Then and there, Jacobini numbers out certain international organizations which are the construction of the international administrative law and which make law. Among them, we can name the United Nations Administrative Tribunal, the International Labor Organization Administrative Tribunal, the Court of the European Communities, the Commission and the Court of the Council of Europe, and the Inter-American Commission and the Court of Human Rights: JACOBINI, *supra* note 266, p. 240.
[275] *Ibid.,* p. 239.
[276] According to him, the U.N. Security Council, the U.N. Assembly, the Organization of American States, and the European Economic Community were the examples for the political organizations while the World Health Organization and the International Civil Aviation Organization could be named as the technical organizations. *Ibid.,* p. 261.

did not make any practical difference when the law making outcome was processed and legitimized by similar institutions, we disagree with him, considering the different recog- nition level of such laws − made by either technical or political organizations − by states.[277] For instance, WADA, which can be considered a technical organization at some point by the terms of Jacobini today, creates the doping law that very few states can refuse to recognize. However, such technical organizations have to be freed from the politics when they lose their technical and convincing character with the inclusion of politics, such as *sport* or more specifically *doping in sport.*

Following such developments of administrative law in the international arena in the early 90s, the beginning of the 21st century witnessed the debates on determining the future of administrative law. For instance, Alfred Aman stated that the traditional understanding of administrative law had to be transformed since state sovereignty had a new view of understanding thanks to the emerging denationalized, deregulated, and privatized markets.[278] Trying to foresee the future of administrative law in a need-to-be redefined *state* in the realm of globalization and in the newly emerged denationalized markets, he seemingly originated the theory of global administrative law by the following words without referring to the term of "global administrative law:"

> "How one conceptualizes the relationship of globalization to markets, and their relationship to government, can greatly affect the legal approaches that are available for providing transparency and participation in governance, whether it occurs on the local, state, national, or international levels. These relationships of globalization with markets vary from laissez faire at one end of the spectrum to more activist approaches to regulation on the other, where the market is used primarily as a means of accomplishing public-oriented goals, rather than being an end in itself."[279]

[277] *Ibid.,* p. 262.
[278] Alfred C. AMAN, "The Limits of Globalization and the Future of Administrative Law: From Government to Governance," Indiana Journal of Global Legal Studies (2001) 8/*2 Indiana Journal of Global Studies*, pp. 385-387.
[279] *Ibid.,* pp. 386-387.

Along with Aman, the transgovernmentalism approach of Anne-Marie Slaughter and Eleanor Kinney that we can term as *micro-level* global administrative law[280] also pave the way the GAL discussions. The reason why I call it as *micro* is the relationships based network analysis among denationalized institutions and/or markets. Such network analysis requires a more specific focus in comparison to the accountability and legitimacy based analysis of denationalized institutions and/or markets as whole.[281]

Regardless getting into the details on the history of this *micro* approach, which was first developed by political scientists and which dates back to the late 1960s,[282] we can refer to a short description of the transgovernmentalism that Slaughter and Kinney used. According to both authors, the transgovernmental networks, which are seen in public international organizations and in the issue based *sui-generis* spontaneous networks, have the responsibility for the policy coordination and coalition building. Namely, the networks are responsible for the flow of information. However, these transgovernmental networks raise differrent accountability issues depending on the structure in which their actions are legitimized.[283] Other than these authors, Benyekhlef, who notes the critics of accountability, democracy (primarily due to the hegemony of the technocracy), and transparency on transgovernmentalism, proposed that transgovernmen-

[280] When we name it as *micro-level* global administrative law, it is in the context of government officials involved networks which constitute important components for the *things getting done* in any global administration or organization; however, the approach, developed by political scientists, will always require a context-based analysis for each network, involving a through-comprehension of different disciplines, such as psychology, sociology, international relations, science, technology, ethics, and law. For instance, we cannot look at the issues related to the stem cell regulation and cross-border tax regulations through the same lenses of network analysis. Thus, in my view, we should do such analysis at the micro-level with multi-disciplinary tools in order to better understand the nature of the interactions before we come to the conclusions which have macro-level consequences.
[281] In this regard, we might also call it as *macro level* global administrative law.
[282] Anne M. SLAUGHTER, "The Accountability of Government Networks," (2001) 8 *Indiana Journal of Global Legal Studies,* p. 350.
[283] *Ibid.,* p. 351; Eleanor D. KINNEY, "The Emerging Field of International Administrative Law: Its Content and Potential," (2002) 54 *Administrative Law Review,* pp. 415-434.

talism could also be associated with the theories of *soft law, epistemiological communities, public choice,* and *regulatory globalization.*[284]

These reflections on transgovernmentalism emphasized the importance of the interactions, which had a huge impact on decision-making at the transnational arena. However, spontaneous and state-disconnected institutions have caused a higher level of accountability issues due to their technocracy-based activities, leading to a globalized norm-production.[285] As was noted in the ICANN example earlier, it can also be concluded here that ICANN, practically state-disconnected in the administration (though, practically connected to the DoC),[286] but theoretically state-connected in the governance (through the GAC for the decision-making), is a good example of transgovernmentalism, falling into the category of which a global organization creates huge accountability problems.[287]

Following the ICANN example, one can consider that the theory of transgovernmentalism can have implications for WADA since the decision making process of WADA intends to balance the impacts of governments and the Olympic Movement, and the process of norm-making is actually based on interactions among diverse interest groups. However, such beliefs, while they would not be erroneous, would have created limited concerns due to the reasons I mentioned in the micro-macro level understanding of global administrative law.[288]

---

[284] BENYEKHLEF, *supra* note 238, pp. 747-755.
[285] SLAUGHTER, *supra* note 282, pp. 363-364.
[286] Constitution (Bylaws) of the ICANN Art. VI Sec.4-1 states that "No official of a national government or a multinational entity established by treaty or other agreement between national governments may serve as a Director" on the Board of the ICANN which is the supreme decision-making body at ICANN (Art. II, Sec.1). Bylaws for ICANN is available at HYPERLINK: < http://www.icann.org/en/about/governance/bylaws> [last visited on November 3, 2013].
[287] For the discussions about ICANN, see *supra* pp. 87-91.
[288] See *supra* note 280.

3.1.3 Theorizing Global Administrative Law

Paralleling with the theories of global constitutionalism and global legal pluralism, a project of global administrative law (GAL) at New York University School of Law to which Cassese and Kingsbury were the first contributors, was initiated in 2005. The goal of the project was to "focus on an emerging field of research and practice: the increasing use of administrative law-type mechanisms, in particular those related to transparency, participation, accountability and review, within the regulatory institutions of global governance."[289]

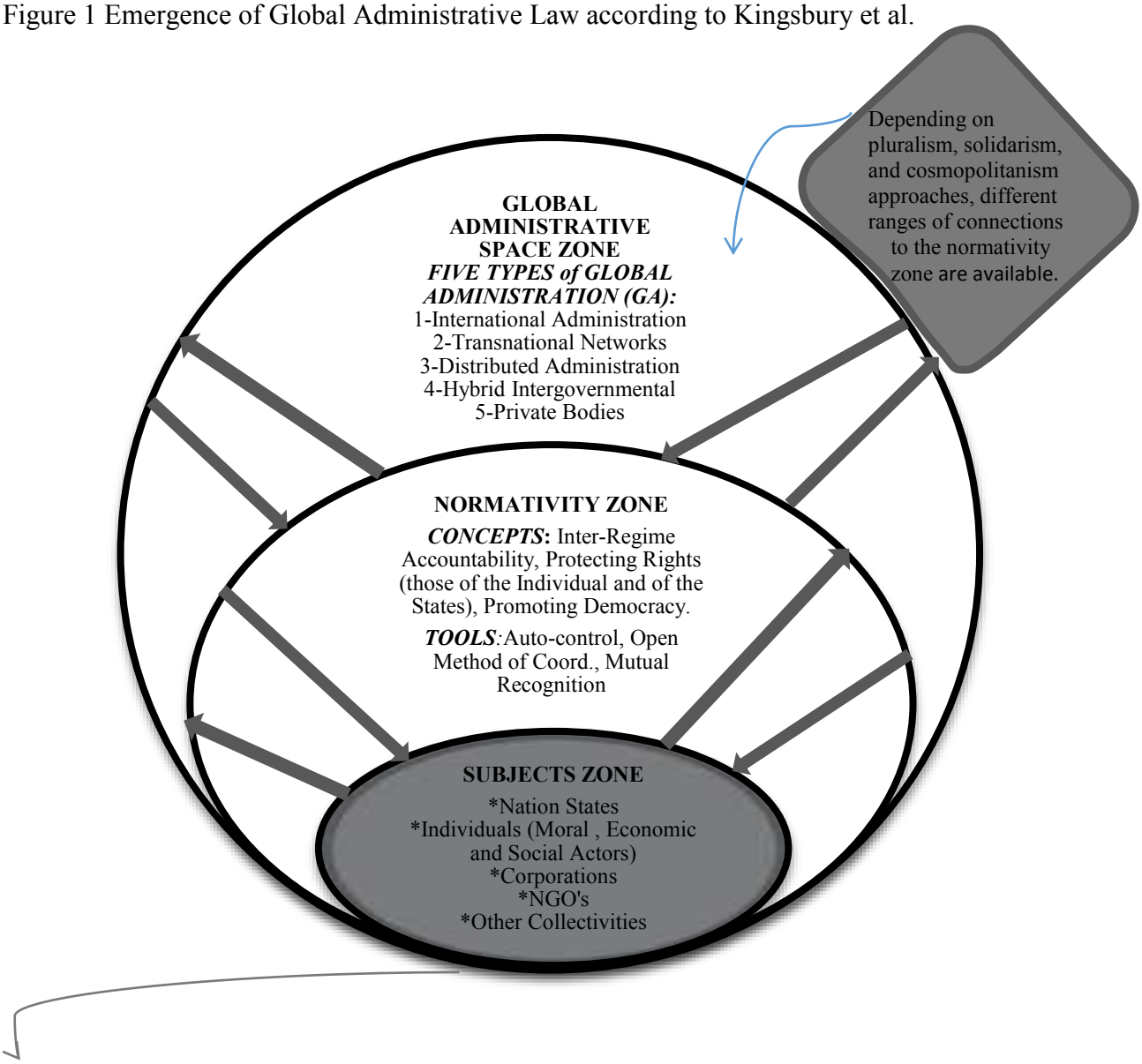
Hence, as part of the first works of the GAL project, a theory of global administrative law emerged in 2005, following the publication of Kingsbury, Krisch, and Stewart (hereinafter "Kingsbury") titled *The Emergence of Global Administrative Law,*[290] and the publication of Cassese titled *Administrative Law without the State - The Challenge of Global Regulation.*[291] Both authors identified the emergence of global administrative law from the point of proliferation of international organizations and the hegemony of global administration, which has caused legitimacy and accountability issues.

Although both authors intended to define global administrative law they significantly differed in their approach of analyzing GAL. As a result, we arrive at different conclusions on their view of GAL and global administration, despite the fact that they primarily aimed at clarifying the emergence of global administrative law. For instance, Kingsbury followed a more detailed and theo-

[289] Institute for International Law and Justice (IILJ), "The Global Administration Law Project," *New York University School of Law*, available at HYPERLINK: <http://www.iilj.org/gal/> [last visited on November 3, 2013].
[290] Benedict KINGSBURY, Nico KRISCH, and Richard B. STEWART, "The Emergence of Global Administrative Law," (2005) 68/ 3-4 *Law and Contemporary Problems,* pp. 15-62.
[291] CASSESE, *supra* note 31.

retical way of explaining GAL while indicating the subjects, sources, and doctrinal foundations of the global administration and GAL respectively. Cassese focused on a more theorized response to the global administration problems. In this regard, we can illustrate the Kingsbury approach of GAL by the following figure:

Figure 1 Emergence of Global Administrative Law according to Kingsbury et al.



At this peak point, we see a perfect intersection and/or recognition of a given global administration type by the subjects of the GA when the normativity zone enables the global administration to connect rightfully with the subjects.

As we see above, there are three zones that I identified and that interact with each other. They are as follows: *zone of global administration subjects*, *normativity zone*, and *global administrative space zone*. Kingsbury, without emphasizing or putting the clear distinctions among these zones,[292] creates a good picture of global administration and global administrative law with its emerging problems and with its proposed solutions. However, Kingsbury avoided taking a clear side of any normative basis for global administrative law that he listed as "inter-regime legality, protecting rights, and promoting democracy."[293]

Despite his reluctance to propose a theory of global administrative law, he urged to focus more on the inter-regime legality and protecting rights based normative foundations of global administrative law. He did not favor of promoting a democracy concept in the short term.[294] However, he underlined that the open method of coordination tool, developed within the European Union, can help in the progress of global administrative law in the long term. To note, this model ensures an effective flow of information, best solution based negotiations, and enhanced participations of the actors.[295]

As a result, what we understand from the postulate of Kingsbury, a contemporary normative basis for the global administrative law can be required meanwhile there is no clear distinction among the subjects of global administration, among the normative concepts of global administrative law, and even among the limits of global administrative space. Thus, I believe that, reading Kingsbury, we need to take into account the specificity of global administration subjects and

[292] According to him the definitions of center, subordinate, periphery, delegation, and supervision will not be the same and will change from one system to another system. KINGSBURY, *supra* note 290, p. 45.
[293] *Ibid.,* pp. 42-53.
[294] *Ibid.,* p. 51.
[295] *Ibid.,* p. 59.

current normative examples of multi-state administration, such as the European Union. And, we have to do this while we intend to fit the global administrative law into a functional and legitimated normative structure.

Unlike Kingsbury, Cassese studied the global administrative law phenomenon in a more convincing way. He used an actual case study regarding the problem of *tuna* overfishing and its global administrative law advents. Cassese finally reached a theoretical proposal of global administrative law. Distinguishing global administrative law from the domestic administrative law with a focus on its distinct legal and institutional components, he believed that the global administrative law could not be justified without implicating the civil society that were affected from the global administration in the process.

Cassese argued that such an implication of civil society was necessary since the global administration lacked a constitutional foundation or a supreme legal authority.[296] Moreover, he refused any normative approach of global administrative law, which separated global law from domestic law and global space from domestic space.[297] As a result, he proposed an interactive and open model of networks that legalized global administrative law while creating a universal rule of law in the long term. The illustration of such networks is as follows:

[296] CASSESE, *supra* note 31, pp. 687-689.
[297] *Ibid.,* pp. 683-684.

Figure 2 Global Administrative Law according to Cassese

As we see in the figure, a network of national laws, administrative rules and principles, national citizens, international organizations, and courts, all together play certain role in the emergence or creation of global administrative law. Moreover, Cassese believes such a coordination and consistency can lead the world to have a universal rule of law in the long term.

Cassese notably tried to give a rotation to the global administrative law rather than taking a picture of it in the global arena. To do so, he considered mainly the inclusion of civil society in the global administration. The rationale for such an inclusion was the necessity for better communication between the global system and nation states in the absence of a constitutional foundation.[298] Giving the example of the United States where civil society and private interests play a significant role in the course of administrative decision-making, he asserted that global decision-making, which did not involve such private interests or civil society, would not be well received and/or recognized.[299]

[298] *Ibid.,* p. 688.
[299] *Ibid.,* pp. 688-689.

In addition, proposing the inclusion of civil society into global administration, he acknowledged certain concerns for the safe operation of such inclusion, based on the presence of different administrative law understandings and cultures across the world. He believed that governing administrative law principles of the process would not be recognized at the same level in the world, although global administration mechanisms already started involving such rules and principles, and created a certain level of unification and/or institutionalism.[300]

Consequently, despite their different approaches for the emergence of GAL, both authors concluded relatively identical concepts and definitions of GAL. Hence, Kingsbury defined GAL as "comprising the mechanisms, principles, practices, and supporting social understanding that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make."[301] Cassese expressed it with "the more that global organizations widen their scope of action beyond states and domestic public organizations, the more that it becomes important to ensure respect for the rule of law, the principle of participation, and the duty to give a reasoned decision."[302]

What we understand from these two major postulates of Kingsbury and Cassese is theorizing global administrative law is not as simple as it seems. It requires a distinct regard which can

[300] He grouped the applicable principles in the governance of global law as follows: principle of legality, right to participate in the formation of norms, duty of consultation, right to be heard, right to access admnistrative documents, duty to give reasons for administrative acts, right to decisions based upon scientific and testable data, and the principle of proportinality: *Ibid.,* pp. 691-692.
[301] While Kingsbury proposed such a definition of GAL, they also emphasized the importance of administrative action in global governance. They portray such view in the definition of GAL as follows: "in proposing such a definition, we are also proposing that much of global governance can be understood and analyzed as administrative action: rulemaking, administrative adjudication between competing interests, and other forms of regulatory and administrative decision and management:" KINGSBURY, *supra* note 290, p. 17.
[302] CASSESE, *supra* note 31, p. 694.

leave aside the traditional view of national administrative law, international law, and supranational law. The reason is that neither international organizations nor principles of global administrative law are in the form of unity. Therefore, seeing such difficulty in unifying the administrative law principles and being aware of the complexities of global administration, certain authors proposed alternative theoretical approaches of GAL exclusively in 2006, right after Kingsbury and Cassese published. Among these authors, we can exclusively name Carol Harlow,[303] Daniel Esty,[304] and Nico Krisch.[305]

For instance, Daniel Esty projected the creation of a distinct structure of global administrative law, disconnected from national administrative law, but based on the good governance principle, and mutually recognized procedural rules of global administration.[306] Carol Harlow and Nico Krisch considered the pluralist approaches of GAL would fit best to the needs of global administration. However, both authors differed in their scheme of pluralism which steers global administrative law.[307]

In the following years, Benvenisti argued national courts could ensure the global check and balances through cross-border judicial cooperation.[308] Ming-Sung Kuo suggested global administrative law be a new paradigm of law due to its character of "post-public legitimacy instead of inter-

[303] Carol HARLOW, "Global Administrative Law: The Quest for Principles and Values," (2006) 17/1 *European Journal of International Law,* pp. 187-214.
[304] Daniel C. ESTY, "Good Governance at the Supranational Scale: Globalizing Administrative Law," (2006) 115/7 *Yale Law Journal,* pp. 1490-1562.
[305] Nico KRISCH, "The Pluralism of Global Administrative Law," (2006) 17/1 *European Journal of International Law,* pp. 247-278.
[306] ESTY, *supra* note 304.
[307] Carol Harlow based on the "principles and values" whereas Krisch focused on a "consociationalist approach" supported by mutual challenge mechanisms. HARLOV, *supra* note 303; KRISCH, *supra* note 305.
[308] Eyal BENVENISTI and George W. DOWNS, "Toward Global Checks and Balances," (2009) 20/3-4 *Constitutional Political Economy,* pp. 366-387.

public legality."[309] And finally, Daniel Mockle criticized the holistic view of global administrative law, which undermined the content and systematic structure of national administrative law systems. Mockle supported a pluralist, an evolutionary, and a progressive theoretical framework, which could be created through the help of already emerged field of international organizations law, international administrative law, and transnational law.[310] For that reason, Mockle, arguing the fludity aspect of the GAL principles, concluded that GAL could be further developed.[311]

As a result, and agreeing with Mockle, I conclude that global administrative law is still a fluid concept,[312] which continually seeks a mutually recognized, or at least an overwhelmingly approved pattern in the world. Different views on its theoretical foundations will not, however, prevent us from adding new venues on the existing debates of global administrative law. At this point, doping in sport provides an excellent example of interdisciplinary and multidimensional collaboration requirement in answering its governance needs. Moreover, as we have seen,[313] the particularities of the anti-doping regime necessitate a *sui-generis* governance mechanism which I need to tailor from not only a fluid, but an effective concept.

Thus, bearing in mind the principle and value based fluidity of GAL, I suggest that global administrative law focus more on the needs of subject matter at hand from which a GAL model origi-

[309] Ming-Sung KUO, "Inter-Public Legality or Post-Public Legitimacy? Global Governance and the Curious Case of Global Administrative Law as a New Paradigm of Law," (2012) 10/4 *International Journal of Constitutional Law,* p. 1053.
[310] MOCKLE, *supra* note 33, pp. 45-48.
[311] *Ibid.,* pp. 31-32.
[312] I also came across such arguments of fluidity in another form (more general and straight forward) with respect to GAL on an "online" or "forum based" debate taking place on the Global Governance Programme website: Jill GOLDENCIEL, "Global Administrative Law-Global Governance Debate Program," *comment*, 29 June 2012, available at HYPER- LINK: <http://network.globalgovernanceprogramme.eu/498/ > [last visited on July 5, 2013]. [GAL Debate]
[313] Should we recall, we witnessed WADA and ICANN were actually quite diffferent in their governance structures although they were associated together with GAL: CASINI, *supra* note 34, p. 427.

nates. For instance, GAL, according to the characteristics of the subject matter, should consider other disciplines and fields of law and modify itself to accommodate the global governance needs of the subject matter at stake.

To explain this subject matter aspect with the example of doping, we need to include inter/multidisciplinarity, informed collaboration, and criminal law aspects in the GAL framework. Namely, the aspects of criminal law as well as the private law will have to comply with the very technical aspects of doping such as testing, detecting, and research in the matter of doping governance. Accordingly, such consideration of inter/multidisciplinarity and criminal law aspects will necessitate an enhanced coordination and collaboration among states and international organizations, outside the current jurisdiction and power of WADA and NADOs.

Eventually, such reconsiderations of GAL can originate an adapted (pluralist) GAL model which can help the governance of other subject matters by tailoring itself to their needs. Hence, in the following chapter of this thesis, I will propose such pluralist version of GAL with the help of what I concluded in the preliminary chapter: legal, social, political, economics, ethics, technical, and public health aspects of doping and the presence of diverse societies impact on and are impacted by the governance of doping.

Conclusion of the Third Section

What I conclude from the analysis of the theory of GAL is that GAL is still a fluid concept and we can add new venues to it according to the particularities of subject area. And, this can make

GAL become a functional governance model for the subject area at issue. When we come across different models of governance under the same category of private law making, such as WADA, we acknowledge the importance of a subject area originated focus. Thus, instead of trying to find a *one size fits all model,* we need to focus on the design of a governance model which is in accordance with the fundamentals of global administrative law, and which requires the participation of all affected groups in the decision-making whilst taking into account the features of the subject area. Certainly, such a design can accommodate monism and pluralism according to the requirements of the subject matter in question.

Conclusion of the First Chapter

I studied three global governance models in this chapter and concluded that GAL could better help in my research of a theoretical framework. The issues of the anti-doping regime cannot be resolved by the global constitutionalism and global legal pluralism based models since the particularities of the subject area and diversity in the interest groups require a more result-based model. Namely, we need a certain level of mutual recognition, mutual consensus, and mutual ongoing support among the interest groups.

Although the impact analysis can be very helpful in this regard, we need to equalize the doping knowledge of interest groups before we demand their participation in the governance process. Therefore, I propose a pluralistic model of global administrative law which will arise from the particularity of subject area whose governance needs will be better acknowledged by the in-

formed participation and knowledge sharing, which channel the diverse interest groups at different levels − individual, society, and state − into the governance structure.

Such a proposal has valid grounds when we consider the fluid concept of global administrative law, which is technically open to further reflections on it. Consequently, in the next chapter, I will elaborate this pluralistic approach of global administrative law and will apply it to the anti-doping regime.

SECOND CHAPTER: Proposing a Pluralist (Adapted) Theory of GAL

Having summarized the main theoretical and practical views on global administrative law and having seen the multiplicity of theoretical proposals on the foundations of global administrative law, I concluded how a pluralist approach, arising out of a good characterization of subject area could produce a practical and beneficial governance model. As a result, I believe the reflections, already emerged on global public good and global public interest, can help me with such characterization.

This characterization is particularly important in revealing the effects of cross-border interests emergence with respect to a subject area. Moreover, the economic and social impacts of a subject area, which have global implications, constitute the primary reason for why and how a governance mechanism should be appropriately established and fruitfully maintained. In this regard, the global governance of doping in sport stands a good example for such subject area classification. Doping is at the crossroads of multiple disciplines and interests, with impacts on diverse global interests.

As a result, in the first section, I will elaborate an adapted (pluralist) theory of global administrative law, which includes the aspects of global public good and global public interest. In the second section, I will apply this pluralistic view of global administrative law to the anti-doping regime with a view to answering the concluding elements of the preliminary chapter.

Section 1 ***A Pluralist (Adapted) Theory of GAL***

Guy Rocher noted how globalization caused the fragmentation of social sciences and humanities by creating sub-disciplines, such as the field of sociology, which diverges into other sub disciplines, such as sociology of politics and sociology of economics and cultures.[314] Following in his view, we can then examine administrative law in the global arena by seeing its fragmentation into various sub-disciplines. In other words, we should not to theorize global administrative law with the tools of administrative law since these tools will still require transformation or adjustment when applied to the global administration.[315] Yet, at the same time, we ought to be creative and look at the bigger picture. Thus, an adapted approach of GAL can be helpful as long as it is realistic and feasible.

The ongoing pluralist approach of global administrative law focuses mainly on the difficulty to define a centralized, universal, and/or hierarchical mechanism in the realm of diverse legal cultures of constitutional and administrative law mechanisms[316] and at the presence of differing views on administrative law principles and values.[317] Some scholars hold the view that a model, recognizing diversity, (such as pluralism), can serve better the needs of global governance. However, there are challenges which arise from the management of multiplicity.[318]

---

[314] Guy Rocher believes that hegemonization in culture, politics and economics will have to compete with fragmentation, fournished by the globalisation itself through the new emerging particularities in culture, politics, and economics. Guy ROCHER, "Hégémonie, fragmentation et mondialisation de la culture," (2000) 11 *Horizons philosophiques Horizons philosophiques,* pp. 132-133.

[315] Henceforth, it is important to point that we need to distinguish the terms of *global administrative law* and *administrative law* since a global approach of administrative law will be or have to be different than the traditional approach of administrative law. MOCKLE, *supra* note 33, p. 48.

[316] KRISCH, *supra* note 305, p. 278.

[317] HARLOW, *supra* note 303.

[318] Kirsch asserts that "lack of centrality and power disparities" are the potential challenges that a pluralist version of global administrative law should take into consideration. KRISCH, *supra* note 305, p. 275.

If we agree that a pluralist approach of GAL is required where the multiplicity of legal orders is at stake, we need to distinguish the pluralism according to the level and form of recognition, along with the cooperation required. In my view, the global public good and global public interest tenets may determine the level and form of required recognition and cooperation for a subject area.

I propose that a particular subject area first be evaluated in terms of a global public good standing in order to conclude why and how we need a global governance model for this particular subject area. Accordingly, the GAL model can require adjustment in the production and governance of such global public good. Once we complete the adjustment of the GAL model, the global public interest tenet should be used to benefit from diversity, and thereby ensure the good production and maintenance of related global public good. This suggestion merges the "different public good" and "different institutional response" of Schaffer's approach and "different publics" and "different public interest" approach of Morison and Anthony,[319] while making GAL a sole institutional response. Besides, when necessary, this structure can accommodate the constitutionalism and pluralism based models in its governance scheme, depending on the subject area.

[319] To recall, Nordhaus had raised that failure in the production of global public goods would have also affected the status quo and voluntary nature of international law and might have pushed it to become more responsive to the needs of global public goods: William D. NORDHAUS, "Paul Samuelson and Global Public Goods: A commemorative essay for Paul Samuelson" *in* Michael SZENBERG, Lall RAMRATTAN, and Aron A. GOTTESMAN (eds.), *Samuelsonian Economics and the Twenty-First Century,* Oxford University Press, 2006, p. 8. Inspired by Nordhaus, Shaffer studied the global public goods and institutional response options of international law for the public good production: SHAFFER, *supra* note 29. Then, involving the public interest tenet into global administrative law requires a pluralist approach of publicness which we also need to take into consideration in the production of global public good. For the global public interest and global administrative law relationship, see John MORISON and Gordon ANTHONY, "The Place of Public Interest" in Gordon ANTHONY et al. (eds.), *Values in Global Administrative Law*, Hart Publishing, 2011, pp. 215-238.

Therefore, studying global public goods will be an asset before I focus on the process of their governance through *said* global administrative law. In this way, we will be able to see the range and scope of global public interest, which will require balancing and/or steering the global administrative law approach. My view suggests that there be a certain distinction between global public good and non-global public good when we apply the theory of global administrative law to its governance. This is because the impact of global public goods in our lives may be greater and their proper production and adqueate governance may be urgent.[320]

Consequently, a good characterization of a particular subject area in terms of the applicability of a global governance model, and a productive collaboration of diversity in the realm of global public good and global public interest tenets, may help us design a more suitable administrative structure for the global governance of this particular subject area. Finally, the idea of global public good and global public interest focused filter is to reduce and control the involvement of politics and private interests.[321] However, the question of how to design and make this GAL model accountable to the affected people and/or entities needs to be elaborated in more detail. Understanding the patterns of a particular subject area in terms of GAL with the help of global

[320] For instance, putting *health,* considered as a global public good, in the same category with *standardization in car making*, cannot be necessarrily helpful. This is because they require different levels of global public interest due to their characteristics. In other words, one may requisite health and wellness before the need of a car and its proper regulation. For instance, Africa, considered as one of the limited carmaking industries, necessitates today more *health* and *wellnes* production than car. For health care needs in Africa, see David H. SHINN, "Massive Health Care Needs in Africa," *International Policy Digest*, 30 November 2012, available at HYPERLINK: <ht tp://www.İnternationalpolicy digest.org/2012/11/30/massive-health-care-needs-in-africa/ > [last visited on Novem ber 3, 2013]. For car production needs in Africa, see Jean P. RÉMY, "Where Are the African Carmakers?," *Guardian Weekly*, 9 August 2011, available at HYPERLINK: <http://www.theguardian.com/society/2011/ aug/09/africa-development-industrial-sector-kenya>[last visited on August 24, 2013]. For the sectors of standartization, see International Organization for Standardization (ISO), available at HYPERLINK: <http://www.iso.org/iso/home/news_in dex/iso-in-action.htm> [last visited on August 24, 2013].

[321] The reason why independent administrative organisations appeared at the national level was to prevent the politics, political entities, and actors which had special private interests of involving in such regulatory areas. Besides, these advanced technology regulatory areas constitute and affect important parts of our daily lifes: Ali ULUSOY, *Bağımsız İdari Otoriteler*, Turhan Kitabevi, 2003, p. 5.

public good criterion, ensuring the good governance of this subject area with the help of global public interest tenet, and lastly safeguarding the good governance with the help of ultimate review mechanism, can be ascribed as the three pillars of this adapted (pluralist) global governance mechanism.

1.1 Approaching the Subject Area as a 21st Century Jurist

To understand the needs of subject area in terms of GAL, we need to benefit from other disciplines and consider diverse societies and legal cultures. Further, to understand the needs of global governance, we need to know whether a particular subject area requires global governance, namely global intervention. Thus, in this section, I will elaborate the definition of subject area, benefitting from other disciplines and legal cultures and applying them to the criterion of global public good.

1.1.1 Defining the Subject Area

The Oxford dictionary defines *subject* as "a person or thing that is being discussed, described, or dealt with" and subject matter as "the topic dealt with or the subject represented in a debate, exposition, or work of art."[322] To give an example, according to such definitions, we may say that *doping* and *governance* are considered as two different subjects while *governance of doping* represents a subject matter alone. What we see in common in the current debates on global adminis-

[322] While subject matter has only one meaning, subject has five different meanings according to the Oxford Dictionary. We consider the primary meaning of subject here. Oxford Dictionary, *supra* note 156.

trative law is the attention to the subject matter of global administrative law alone. There are few works studying the genuine characteristics of certain subject areas with which GAL is associated.

In one of those few works, Mattlı & Bühte examined the technical aspects of accounting and they concluded highly important findings. For instance, they found that the participation level can be varied when the subject requires more technical expertise. They arrived at this conclusion while determining the domestic and global governance on accounting standards.[323] They highlighted that when the subjects required technical expertise, countries were inclined to use a delegation mechanism that enabled the national or international private organizations to regulate and govern in this area.[324]

Thus, a general tendency in the debates on global administrative law is to focus on global administrative structures which are present in the current global arena, and to describe them according to their public or private nature while discovering or seeking out their theoretical foundations. However, there is a significant benefit to analyze or qualify a subject area on or for which we create governance models. In other words, we cannot, for example, put the governance of Internet domain names in the same category with the governance of doping although both subjects are considered highly technical. They are relatively different subjects, and they require different expertise and patterns.

For instance, Internet domain names do not necessarily require an interactive and/or physical relationship between the users and ICANN whilst the governance of doping requires a genuine

[323] Walter MATTLI and Tim BÜTHE, "Global Private Governance: Lessons from a National Model of Setting Standards in Accounting," (2005) 68 *Law and Contemporary Problems*, p. 261.
[324] *Ibid.* p. 230.

relationship between athletes and national doping agencies, which includes testing and sample collection. This simple distinction is enough to explain how different governance problems can arise.

The characterization of subject and subject areas was also mentioned in the GAL project in 2005, but the proposition only involved naming the regulatory areas and determining the actors and/or elements of global administration, which play an important role in the global administrative space or which are affected from the global governance. These elements included "states, individuals, corporations, NGOs, and other collectivities."[325] Alongside with the subject of global administration, some of the subject areas raised in the project were national security, banking, doping, internet domain names, health, and environment, distinguishing the national security and central banking as the special issue areas.[326]

Cassese numbered the subject areas of a global regulatory framework as "trade, finance, the environment, fishing, and exploitation of marine resources, air and maritime navigation, agriculture, food, postal services, telecommunications, intellectual property, the use of Space, nuclear energy, and energy sources, the production of sugar, pepper, tea, and olive oil."[327]My aim is to concentrate on the differences in these subject areas rather than enhancing or shrinking these lists of Cassese and Kingsbury.

In my view, we have to distinguish these areas of regulation, and need to center upon each subject area, according to its characteristics. For instance, we should not put public health regulation

[325] KINGSBURY, *supra* note 290, p. 23.
[326] *Ibid.* p. 15 *et seq*.
[327] CASSESE, *supra* note 31, p. 671.

in the same category with the regulation of telecommunications or Internet domain names. We can say the same thing for doping, which has public health and ethical concerns, and which has been associated with other regulatory mechanisms, such as ICANN, the International Organization for Standardization (ISO), and the Red Cross and Red Crescent Movement.[328]

We can also need to highlight that certain regulatory areas require a deeper understanding of its contents before we begin to design a governance model for them. For instance, public health is a broad concept which can have cross-border implications, attached to a specific area of health such as infectious diseases,[329] or which can be associated with certain subject areas, such as doping in sport.[330] Therefore, we should be attentive when we work in a subject area, which can have interdisciplinary and cross-border implications. Categorizing a subject area according to the degree of technical expertise cannot alone be helpful when values and ethical considerations are at stake. Namely, a subject area can be very technical while having ethical and social considerations at the same time. Health is the foremost example for such a subject area.

1.1.2 Maximizing the Benefit from other Disciplines and Legal Cultures

Benefitting from the conclusion of various disciplines while studying the different patterns of subject areas with qualitative or quantitative methods will undoubtedly be helpful in order to reflect more cautiously on the governance of a subject area.[331] The idea is not to push the jurist to

[328] CASINI (2009), *supra* note 34, p. 427.
[329] Thedore H. TULCHINSKY and Elena VARAVIKOVA, *The new public health an introduction for the 21st century*, Academic Press, 2000, p. 789.
[330] Michel RIEU and Patrice QUENEAU, "The flight against doping: A public health challenge (La lutte contre le dopage: Un enjeu de santé publique)*,*"(2012) 196/6 *Bull. Acad. Natle Métle,* pp. 1169-1172.
[331] Igne Kaul raised the importance of multidisciplinary approach in the definition of global public goods and affirmed that other disciplines, in addition to economics, such as international relations and political science, should

become an ultimate *inter/multidisciplinary* scholar where we have different legal education cultures along with differing legal academic backgrounds across the world. However, the idea is to recognize the strength of each legal culture, take into consideration the relevant developments of other disciplines, and value the expertise.

For instance, administrative law, as was noted earlier, is a more developed discipline in the civil law traditions in comparison to the common law systems. However, global administrative law, which requires taking into account the plurality of administrative law as a discipline in its theoretical approach, also needs to consider a distinct knowledge and good understanding of other disciplines, such as political science, economics, and sociology. Therefore, the recognition of any kind of global administrative law project/theory/model among different legal scholars around the world will likely depend on how well the project is adequately presented to them from the point of law, namely from the point of administrative law.

The reason for such a conclusion is that the recognition of views coming from other disciplines will be limited among the legal scholars, who are not familiar with the *inter/multidisciplinary* approach, although the findings in other disciplines and/or other legal systems should be taken into consideration. Thus, there is a need to translate or transform such views or approaches into a legal context by the legal scholars, who can interpret the language of these disciplines. Once the project (such as the GAL Project of New York University) is understood, the administrative law

---

be taken into consideration in defining global public goods. Therefore, as a 21st century jurist, when we claim to define global public goods in terms of law, we then need to take notice of economics, international relations, and political science aspects as well: Inge KAUL, "Rethinking Public Goods and Global Public Goods" in Eric BROUSSEAU, Tom DEDEURWAERDERE, and Bernd SIEBENÜNER (eds.), *Reflexive Governance for Global Public Goods*, The MIT Press, 2012, p. 51.

expertise from different legal systems can modify or sharpen it further for its better application to the subject area at hand.

However, we should be very prudent while performing an *inter/multidisciplinary* approach when the subject area requires intensive and/or distinct disciplinary works, such as doping in sport, which can include pure science, social science, and the humanities. Besides, a holistic approach that the interdisciplinary conclusion provides can be considered mostly political which is, at times, too weak to produce concrete solutions.[332] Moreover, when we do not have a chance to see the counter challenges to the ideas and evidence proposed in a holistic conclusion in their respective disciplines alone, any conclusion we come to can sound less convincing.

For example, discovering that testosterone levels in different genders may provide an unfair advantage for athletes can require policy considerations which need to be developed by the relevant experts from other disciplines. This is because the scientific evidence and the subsequent policy considerations are completely separate issues, which require a distinct course of further reflection within the borders of its own discipline or disciplines. In other words, the parallel development of scientific discovery and policy propositions will result in a fast-track holistic conclusion which needs to adjust both scientific discovery and policy propositions in the same language which will likely be less comprehensive, and then will create less impact on the policy or legal world.[333]

---

[332] In this regard, the subject areas of *climate change, global terrorism,* and *global economics* are the given examples for such failure: David ALVARGONZÁLEZ, "Multidisciplinarity, interdisciplinarity, transdisciplinarity, and the sciences," (2011) 25 *International Studies in the Philosophy of Science,* pp. 400-401.

[333] For instance, we experienced this danger of holistic approach in a research paper with respect to doping and genetic testing in which I was also co-author.Therefore, the impact of a fast-track policy proposition, which parallels with scientific findings and which is titled by very technical terms, may be very low in the law and policy world.The reason is that there are a very limited number of jurists with genetic testing background who can grasp the content of

However, knowing the developments in other disciplines, such as economics, political science, sociology, and international relations can be fruitful when the time comes to write a judgment or to design a regulatory framework. In other words, a contemporary jurist, working on an *inter/multidisciplinary* subject area, needs to take into consideration the developments in other disciplines, and needs to learn how to align this knowledge with law in the form of a common legal language.

Finally, a 21st century jurist, working on a global regulatory subject area, needs to take into consideration other concepts, developed in other disciplines, but playing an important role in the design of governance schemas. Benefitting from the tenets of global public good and global public interest in this regard can be helpful when we apply GAL as a theoretical framework to the governance of a subject area, which has global consequences and which requires a collective action.

1.1.3 Applying to the Criterion of Global Public Good

As highlighted above, we need to take into consideration the potential legal, social, cultural, technical, and political orders of a particular subject area in order to see which regulatory strategies we can develop through the special aspects of each order.[334] The concept of global public

whole paper: Lena EKSTRÖM et al.,"Doping and genetic testing: Sex difference in UGT2B15 expression, testosterone glucuronidation activity and urinary testosterone/epitestosterone glucuronide ratio," (2012) 10 *Current Pharmacogenomics and Personalized Medicine*, pp. 125-131.

[334] In this sense, coming again to the example of the anti-doping regime, if we do not take into consideration the organized crime and gambling aspect of doping in sport, we will have a limited chance to produce effective governance strategies through the application of private law tools. The same thing goes with athletes who used doping. For instance, if we do not know the psychological and sociological reasons of why athletes dope, we may not be able to produce effective strategies for the anti-doping governance. Besides, we may also need to take into consideration the plurality of societies where the subject area is differently perceived. To note at this point, a recent

good which is generally elaborated by non-law scholars, but which has recently attracted legal scholars to study it from the international and global administrative law perspectives,[335] can be a good candidate to classify the subject areas according to their governance needs. After all, the global bublic good doctrine can stand for a mutually recognized criterion.

Therefore, the classification of a subject area in terms of a global public good standing is a good start to properly answer the needs of global governance. In this regard, knowing that human genomics,[336] cyberspace,[337] food security,[338] global warming,[339] public health and disease control,[340] tropical forests,[341] agriculture,[342] knowledge,[343] or education[344] are already considered *global public goods* is already very helpful. Such conclusions, although they can require further analysis,

---

research, conducted among elite athletes (wrestling) in Turkey, revealed that knowledge of doping was very poor: Gözde GENÇTÜRK, Tekin ÇOLAKOĞLU, and Mehmet DEMİREL, "Elit Sporculardа Doping Bilgi Düzeyinin Ölçülme- sine Yönelik Bir Araştırma (Güreş Örneği)," (2009) 3 *Niğde Üniversitesi Beden Eğitimi ve Spor Bilimleri Dergisi,* pp. 213-221.

[335] SHAFFER, *supra* note 29; Jean-Bernard AUBY, "Public Goods and Global Administrative Law" in Gordon ANTHONY et al. (eds.), *Values in Global Administrative Law*, Hart Publishing, 2011, p. 247.

[336] Bartha M. KNOPPERS and Claudine FECTEAU, "Human genomic databases: A global public good?," (2003) 10 *European Journal of Health Law,* pp. 27-41; Halla THORSTEINSDÓTTIR, Abdallah S. DAAR, Richard D. SMITH, Peter A. SINGER, "Genomics-A global public good?," 361/9361 *Lancet,* pp. 891-892.

[337] Cyberspace was considered a shared resource for the global public good by the 94 per cent of respondents in the survey conducted by the International Telecommunication Union (ITU): ITU, "Global Support for Information Society Targets in ITU Survey," 17 May 2004, available at HYPERLINK: < http://www.un.org/News/ Press/docs/ 2004/pi1580.doc.htm > [last visited on November 3, 2013].

[338] Laurian J. UNNEVEHR, "Food safety as a global public good," (2007) 37/S1 *Agricultural Economics*, pp. 149-58.

[339] Erik B. BLUEMEL, "Unraveling the global warming regime complex: Competitive entropy in the regulation of the global public good," (2007) 155/6 *University of Pennsylvania Law Review*, pp. 1981-2049.

[340] Bruno BOIDIN, "Is health a global public good or a human right?," (2005) 33/3 *La santé:Approche par les biens publics mondiaux ou par les droits humains?,* pp. 29-44; Richard D. SMITH et al, "Communicable disease control: A 'Global Public Good' perspective," (2004) 19/5 *Health Policy and Planning,* pp. 271-278.

[341] Alain KARSENTY and Romain PIRARD, "Tropical forests: The question of global public good and multilateral economic instruments for establishing an international regime," (2007) 59/5 *Forêts tropicales: La question du bien public mondial et la quête d'instruments économiques multilatêraux pour un régmie international*, pp. 537-545.

[342] Dana G. DALRYMPLE, "International agricultural research as a global public good: Concepts, the CGIAR experience, and policy issues," (2008) 20/3 *Journal of International Development,* pp. 347-379.

[343] Gert VERSCHRAEGEN and Michael SCHILTZ, "Knowledge as a global public good: The role and importance of open access," (2007) 2/2 *Societies without Borders*, pp. 157-174.

[344] Gabriel BISSIRIOU and Francis E. KERN, "Could education as a global public good be compatible to the General agreement on trade in services?," (2005) 33/ 4 *L'éducation comme bien public mondial est-elle compatible avec l'Accord général sur le commerce des services?*, pp. 39-55.

can help us for further reflections on global administrative law as a theoretical framework of governance. At least, we know the further elaboration of global public good tenet from the point of global administrative law can be advantageous.

Moreover, despite the fact that Schaffer studied the production of global public goods in terms of global governance theories of law − with a major reference to Nordhaus's work, titled *Samuelson and Global Public Goods* − his conclusion of international law can play a role of *facilitator* and *constraint* in the production of global public goods needs to be elaborated further.[345] The idea that global administrative law, global constitutional law, and global legal pluralism based institutional choices can all play an effective role in the production of different types of global public goods[346] is not realistic in practice. This is because each of these governance mechanisms is distinct and holds particular issues as I studied in the earlier sections. Therefore, a subject area, labelled as a global public good, should not be easily associated with these governance mechanisms.

Consequently, I believe that the global public good based criterion can serve well in the pluralistic view of global administrative law. If the impact of a subject area can be varied depending on its different global public good standing, then we need to prepare appropriate cooperation mechanisms, dealing with the production and governance of such subject area.[347]

[345] SHAFFER, *supra* note 29, pp. 689-692.
[346] *Ibid.,* p. 693.
[347] For instance, Barret concluded that global public goods might be classified according to the requirement of different cooperation that they need. Then, he proposed "*best-shot, aggregate efforts, and weakest-link*" cooperation models. Scott BARRETT, *Why cooperate?: the incentive to supply global public goods,* Oxford University Press, 2007, pp. 2-7; SHAFFER, *supra* note 29, p. 679.

1.2 Ranging the Cooperation through the Provision of Global Public Good

Preparing appropriate cooperation mechanisms which deal with the production and governance of a subject area requires first characterizing the subject area in terms of the global public good standing. Once a subject area is classified a global public good, then we can determine the appropriate cooperation strategies according to the particularities of that global public good. Thus, in this section, I will elaborate how to classify the subject area in terms of a global public good and how to determine the appropriate cooperation strategies through the adequate and legitimate production mechanism of GAL.

1.2.1 Defining Global Public Good

Samuelson was the first to divide goods as public and private in order to explain how the ordinary market pricing system was a failure in the case of public goods. As a learned economist, he concluded that price and individual preferences were not the only optimization factors in the assumption of demand, giving the example of public goods.[348] According to him, private goods are the ones which can be reduced and can be subject to competition while public goods are collective goods which cannot be diminished, and which are out of competition.[349] Moreover, he raised the point that global public goods cannot be agreed upon since they can arise from non-rivalrous consumption and non-excludability.[350]

---

[348] Paul A. SAMUELSON, "The pure theory of public expenditure," (1954) 36 *The Review of Economics and Statistics,* pp. 387-389.
[349] *Ibid.* p. 387.
[350] They can be also divided as "pure and impure," *Ibid*; Joseph, E. STIGHLITZ, "Global public goods and global finance: does global governance ensure that the global public interest is served?" in Jean P. TOUFFUT, *Advancing public goods,* Edward Elgar, 2006, pp. 149-152.

More importantly, Samuelson showed that collective (public) goods and government activities could not give us zero sum patterns to properly decide their production when their consumption are non-rivalrous and non-excludable and when everyone could have non-calculable interest in benefitting from them.[351] Thus, the sum of interests can become collective and their production can be required despite the fact that the market pricing system is silent on them.[352]

Following Samuelson, a concrete definition of global public goods was made by Kaul, Gruenberg, and Stern in 1999. They defined global public good as "outcomes (or intermediate products) that tend towards universality in the sense that they benefit all countries, population groups, and generations. At a minimum, a global public good would meet the following criteria: its benefits extend to more than one group of countries and do not discriminate against any population group or any set of generations, present, or future." [353]

Similar to Kaul, other authors have arrived at a similar definition of global public goods. For Stighlitz, public goods are not like private goods for which we need to compete nor are they allocated to a specific group, from whose use others can be excluded.[354]Auby expressed that global public goods, in theory, are the outcomes of market failures for the issues or matters where their production have been limited in the global scene. This is because the difficulty to control their use results in the limited compensation of their production cost, leaving aside a profit from

[351] AMAN (2001), *supra* note 278, p. 389.
[352] *Ibid.*
[353] Inge KAUL, Isabelle GRUNBERG, and Marc A. STERN, "Defining Global Public Goods" in Inge KAUL, Isabelle GRUNBERG, and Marc A. STERN (eds), *Global Public Goods: International Cooperation in the 21st Century*, UNDP, 1999, p. 16.
[354] STIGHLITZ, *supra* note 350, p.150.

them.[355] Thus, their production is not a preferable one in the market system while the societies in a globalized world need the advancement of global public goods.[356]

However, such approaches of non-rivalrousness and non-excludability were recently considered non-sufficient in order to properly answer to the definition of global public goods by Kaul [357] and Brousseau.[358] In defining global public goods, Kaul raised the arguments of actor failure and the political process and life-cycle analysis requirement of public good in addition to the market failure aspect. Thus, her political process and life-cycle analysis-based distinction of global public goods included "infeasibility of exclusion"− goods which are technically non-excludable (i.e. Moonlight), "intentional publicness" − goods which are decided by policy choice (i.e. Human rights), "inadvertent publicness"− goods which require knowledge (i.e. Environmental hazards), and "policy neglect or hesitation" − other goods which are associated with "public domain" (i.e. Global climate change).[359]

Brousseau raised the importance of individual and collective preferences over the qualification decision of a global public good. He then concluded how these preferences can be subjective as a result of particular interests.[360] Moreover, Brousseau urged that these preferences cannot always be made because of complete information. Informing the individuals well can alter positively individual preferences and can result in a more efficient expression of collective preferences.[361]

---

[355] Jean B. AUBY, *La globalisation, le droit et l'état*, L.G.D.J., 2010, pp. 178-179.
[356] *Ibid.*
[357] KAUL(2012), *supra* note 331.
[358] Eric BROUSSEAU and Tom DEDEURWAERDERE, "Global Public Goods: The Participatory Governance Challenges" in Eric BROUSSEAU, Tom DEDEURWAERDERE, and Bernd SIEBENÜNER (eds.), Reflexive Governance for Global Public Goods, The MIT Press, 2012.
[359] KAUL (2012), *supra* note 331, p. 49.
[360] BROUSSEAU and DEDEURWAERDERE, *supra* note 358, p. 34.
[361] *Ibid.*

Considering the definitions and approaches above, I can conclude that a global public good will have to fulfill two conditions. First, it should produce *benefits* outside the boundaries of a nation state without having any present and future negative effect on any set of people, groups, and entities in the world. Second, there should be a convincing level recognition of the global public good in the sub-global community that the good has impacts on. We can sum up these conditions as technical and social conditions. To note, in the absence of a recognized global community, we can always consider the affected community of global public good as the sub-global community.[362] In this regard, my view is that public health and security are the foremost candidates for global public goods since they can likely fulfill the technical and social conditions.

While not getting into the details of Keynesian economics − which can be summarized "the national demand of a product depends on the global demand for this product"[363] − Samuelson was one of the prominent Keynesian economists.[364] And, the economics and development based analysis of global public goods will certainly trigger further research and reflections on their global production justifications. However, what we can get from the current stage of global public goods from the perspective of economics, there is a need to produce them, at least, due to the market failure justification.[365] Besides, the political failure argument [366] should even further necessitate the production of global public goods.

[362] Brousseau, refusing the existence of a recognized global community, exposed two forms of sub-global communitty: "1) Sociopolitical and geographically delimited jurisdiction based (whose aim is to create a collective decision making mechanism), and 2) Mutually shared interests and/or proximities of preferences based (whose aim is to realize of a common end):" *Ibid.*, pp. 33-34.
[363] HOULE (2012), *supra* note 183, p. 23.
[364] Lawrence R. KLEIN, "Paul Samuelson as a "Keynesian" Economist" in Michael SZENBERG, *Samuelsonian Economics and the Tewnty-First Century*, Oxford University Press, 2006.
[365] AUBY (2011), *supra* note 131, pp. 240-243.
[366] KAUL (2012), *supra* note 331, p. 49.

Consequently, once we qualify a subject matter as a global public good, we need to choose the most adequate way of producing it. Since the type of global public goods will vary due to the technical and social differences, they cannot require the same level of cooperation requirements. Therefore, there is a need to classify the potential methods for the production of global public goods.

1.2.2 Classifying Global Public Goods and Fundamental Cooperation Strategies

Nordhaus believes that a globalized world, with countries having different tastes and wealth, can better benefit from the coordination and technological cooperation in the production of global public goods.[367] I agree with Nordhaus on the cooperation requirement for the production and governance of global public goods. However, we ought to distinguish further the methods of global public good production according to the type of global public good. Therefore, putting aside the classifications of global public good as pure and impure,[368] there is a practical and realistic benefit to classify them according to the range and scope of cooperation they need for in their production and governance.

Thus, in line with the classifications of Nordhaus and Barett, we can sum up the fundamental cooperation strategies for the production of global public goods into three categories, depending on the requirement of cooperation: "1) best-shot, 2) contributive efforts, and 3) weakest-link."[369]

[367] NORDHAUS, *supra* note 319, pp. 93-94.
[368] The degree of rivalrousness and excludability determines the pureness of global public good differiantiation. If the global public good posseses some degree of rivalrousness and excludability, it is considered an impure global public good. For instance, knowledge is an impure global public good since it might be rivalrous and excludable due to the patent or trade secrets. STIGHLITZ, *supra* note 350, p. 152.
[369] NORDHAUS, supra note 319, p. 94; BARRETT, *supra* note 347, pp. 2-7.

For the best-shot requirement, every country needs to maximize their efforts to increase the chances of success for the desired solution, although the solution can come from any country. For instance, Nordhaus gave the example of research efforts for the cure of a deadly disease. He said the outcome can come from one researcher, although many scientists work on the same problem around the world.[370]

For the contributing efforts, the more countries contribute, the more the solution can be achieved. Barrett gave the example of climate change and the greenhouse gas emissions for which every country should contribute in order to reach a solution.[371] For the weakest link, there should be a full-level of collaboration among all countries for the desired success in regard to a matter. The production and trafficking of anti-doping substances and organized crime can be a good example for this requirement since Nordhaus portrayed also *combatting illegal drugs* as an example of the weakest link requirement.[372]

I.2.3 Adequate and Legitimate Provision of Global Public Good and GAL

Kaul proposed an adequate and legitimate provision of global public goods in order to effectively reach the preferences of nations and people as part of participatory decision-making or as part of reflexive governance.[373] She combined such approach of adequate and legitimate provision with a *triangle of publicness* vision and phrased it as follows: "where publicness in consumption is matched by publicness in decision making the resultant provision of the good is likely also to

[370] NORDHAUS, *Ibid.,* p. 94.
[371] BARRETT, *supra* note 347, p. 6.
[372] NORDHAUS, *supra* note 319, p. 94.
[373] KAUL (2012), *supra* note 331, pp. 51-52.

generate publicness in utility, that is, a distribution of net benefits that concerned stakeholders perceive as adequate-relatively efficient, effective, fair, and, therefore, also legitimate."[374]

Then, in sum, her understanding of global public goods, which principally centers upon the concept of *global public good*, is more dynamic, more diversified, and more result-based with a view to including all affected people and nations in the decision-making process rather than focusing only on the state and on the field of public economics.[375] In this regard, Brousseau, raising similar concerns with respect to the governance of global public goods, suggested the inclusion of public ordering, market exchange, public debate, and the diffusion of information and knowledge into the governance of global public goods. He underlined that such inclusion should be realized at both the *national* and *international* levels as well as at the *citizen* and *institutional* levels.[376]

My understanding of the *adequate* and *legitimate* provision of global public goods is that they can theoretically respond well to the accountability and legitimacy concerns of global administrative law. However, this is only possible as long as we can consider a subject area as a global public good. Therefore, there is a genuine interest to benefit from the adequate and legitimate provision concept when we apply GAL to a subject area, which is considered global public good. Or reversely, GAL can be taken into account whenever and wherever we seek a production and governance model for a global public good.

[374] *Ibid.,* p. 52.
[375] *Ibid.,* p. 51.
[376] BROUSSEAU and DEDEURWAERDERE, *supra* note 358, p. 36.

Even though Auby contemplates that global administrative law cannot play a role in the categorization and production of global public goods, but it can improve the performance of global public goods,[377] we have to disagree with him to the extent that our pluralist understanding of global administrative law is not limited to the administrative process. In other words, global administrative law can play a crucial role in the categorization and production of the global public goods as long as it performs a task of global administration.[378]

The concept of global public good, which is probably the foremost substantive element in the global public sphere, needs to be elaborated more in the realm of global administrative law. As Shaffer indicated, the question of who decides the production of global public goods requires a greater level of institutional analysis. I believe such an institutional challenge can be handled by a pluralist approach of global administrative law when we integrate the global public interest tenet into the global administration. However, such integration has to come with accommodating all divergent interests while lifting the conflicting interests, coming out of different states, organizations, private groups, and even individuals.[379]

In other words, when we consider the certain goods at the disposal of more than one group of countries, such as *knowledge,* we need to balance the interests between the producers and all other interest groups around the world. For instance, the intellectual property (IP) issues and protecting the use and distribution of knowledge through privatization with patents cannot be in the

[377] AUBY (2011), *supra* note 131, p. 247.
[378] SHAFFER, *supra* note 29, p. 684.
[379] In this respect, Morison and Anthony well express such a benefit by stating the following: "[...the] notion of a global public interest may easily come to be seen simply in terms of bolstering up one particular view of what this should be, and so require the integration of wider subaltern interests within a newly defined greater interest that silences more diversely democratic interests:" MORISON & ANTHONY, *supra* note 319, p. 231.

best interests of the developing countries when they need to benefit from such knowledge.[380] Thus, we need a balancing concept of conflicting interests, and global public interest is a concept, worth elaborating more.

Therefore, I believe that differently classified global public goods – best shot, contributive efforts, and weakest link – can find institutional implications within the global administrative law framework through global public interest criterion. In other words, and for more clarity, there is no need to go with the route of different global governance mechanisms − i.e. global constitutionalism and global legal pluralism − for the production of different global public goods. Moreover, before we make institutional comparisons to safeguard the production of global public goods in the realm of international law,[381] we need to know why there is a need to produce a global public good in terms of law and how we can guarantee its decent production where the fragmentation and deformalization of international law is already at stake.[382]

Finally, global administrative law can primarily contribute to the production of global public goods through the global public interest tenet while serving the accountability of global administration.The global public interest tenet will decide how the global administrative law mechanism will respond to the production and performance of different global public goods.

[380] Keith MASKUS & Jerome REICHMAN, "The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods," (2004) 7/2 *Journal of International Economic Law*, pp. 279-320.
[381] SHAFFER, *supra* note 29, p. 693.
[382] For the fragmentation and deformalization of international law, see Martti KOSKENNIEMI, "The Fate of Public International Law: Between Technique and Politics," (2007) 70/1 Modern *Law Review*, pp. 4-10.

1.3 Balancing the Accountability and Legitimacy through the Global Public Interest Tenet

In this section, I will explain how to balance the accountability and legitimacy through the global public interest tenet when the governance mechanism has to make governance decisions on behalf of the interested and affected parties to the subject matter of governance. Therefore, I will first define global public interest and later will elaborate how the pluralism and ultimate review mechanism can ensure and maintain an accountable and legitimate governance.

1.3.1 Defining Global Public Interest

The idea of global public interest was first considered as a tool which could fill the democratic gaps in the global administration by Amah in 1999.[383] According to Amah, the issues with certain impact levels, exceeding national borders, should be handled at a local level in a way involving other concerned parties, situated outside of the national state borders.[384] Thus, he explains with the following why and how the global public interests can be created:

> "It is necessary to bring the State back in, though in new ways and in creative partnerships with the private sector and non-State actors. In other words, the creation of a global public interest approach at the local level will require new combinations of power and various public-private partnerships, and it will, of course, involve the State in new partnerships with non-State actors."[385]

Nonetheless, his approach of global public interest, which requires a more sensitive and relaxed transformation of a nation state in the regulatory areas involving advanced technologies, such as

[383] Alfred C. AMAN, "Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy and the Furtherance of a Global Public Interest (Earl A. Snyder Lecture in International Law)," (1999) 6/2 *Indiana Journal of Global Studies*, p. 404.
[384] *Ibid.*
[385] *Ibid.,* p. 410.

the Internet,[386] raises important questions when we consider the global public interest outside of state borders. In this regard, the definition of Kulick is more helpful since he deliberates global public interest as an agent which works for "the individual and collective interests that unfold relevance on both the domestic and the international stages."[387]

From the point of GAL, Morison and Anthony affirm that public interest in a global meaning can find applications where we can identify publics.[388] Therefore, we need to look at first whether a global public sphere exists. Then, we can confidently reflect upon global public interest. The previous sections of this thesis on global administrative law, global constitutionalism, and global legal pluralism apparently confirm the existence of a global public sphere where the states, private interest groups, international organizations, and hybrid entities interact with each other.[389] We need to elaborate more the substantive elements in the global public sphere rather than the process of decision making if we really want to benefit from the global public interest as a collection of diverse interests, which often steer the process of governance.[390]

Moreover, the absence of a single global state and the difficulty to have a concept of global citizenship can hinder democratic endeavours in the global arena since the affected people do not

[386] *Ibid.,* p. 419.
[387] Andreas KULICK, *Global public interest in international investment law*, Cambridge University Press, 2012, p. 154.
[388] Making analogy between the classical nationwide public interest understanding associated with the public sphere and administrative proces, they believe that global public interest can emerge where we encounter with "identifiable publics" and "institutionalization process:" MORISON and ANTHONY, *supra* note 319, p. 215.
[389] Morison and Anthony justified the existence of a global sphere with the global administrative law project: *Ibid.,* p. 223. I then strengthen their argument with the global constitutionalism and global legal pluralism approaches that I already studied in the earlier sections, see *supra* pp. 64-93.
[390] For instance, Uruena described that the role of expertise in the global governance was powerful enough to distinguish itself from a domestic conflict of interest understanding and to rename itself in a global scheme of conflicting interests: René URUENA, "How to start thinking about conflict of interest in global governance?" in Anne PETERS and Lukas HANDSCHIN (eds.), *Conflict of Interest in Global, Public and Corporate Governance*, Cambridge, 2012, p. 89.

always have the possibility to participate in the regulatory process due to the political and technical reasons such as membership, language, or internal process.[391] Thus, focusing on the creation of global public interest and the existence of different public spheres − along with the subject area − can be an alternative approach to cure the democratic gaps.[392]

Finally, as Morison and Anthony concluded, such global public interest should be the product of a pluralist view and take into consideration many publics.[393] Thus, the negotiation and cooperation among different publics which include those of states, international organizations, interest groups, etc. hold the primary condition for the creation of global public interest.[394]

1.3.2 Global Public Interest through Pluralism

France Houle marked the importance of cooperation and sharing regulatory risks between governments and other interest groups of regulation while pointing to a necessity of change in the organizational culture in order to better answer the economic and social protection and progression of the society.[395] Such a change of institutional culture should also be realized in the global scene where institutions have impact on the global world, notably in the production of global public goods.

Although the theory of public choice, which is also an economic analysis based theory, stipulates the inclusion of all interest groups – and/or all affected groups − in the decision-making process

[391] MORISON and ANTHONY, *supra* note 319, p. 228.
[392] *Ibid.,* p. 231.
[393] *Ibid.,* p. 237.
[394] *Ibid.*
[395] HOULE (2012), *supra* note 183, p. 168.

through consultations in order to align the conflicting interests,[396] the global public interest concept can hardly be associated with such an approach. In a global society where the number of publics and interest groups are many, we cannot necessarily align global public interest among all of the interest groups through consultations. There are subject areas which require a certain level of awareness, such as doping in sport. And, the unequal knowledge level about the subject area will impede the effectiveness of consultation process. In other words, the unconscious participation will only satisfy a procedural requirement rather than the substantial requisite which we need to have and which is vital in the decision-making process.

Seemingly and/or theoretically, such kind of consultation process can be helpful for the similar societies which are familiar with the subject area. However, when we take into account complex subject areas, the actual participation in the decision-making process will be limited to the ones (stakeholders), who are familiar with the subject area even if we try to involve all interest groups in the process. A solution for this, as Brousseau proposed, is to equalize the knowledge level among all interest groups and ensure an effective and fruitful participation.[397]

Individuals are already grouped into communities at a national and sub-national level, although a global community has yet to take hold. However, before I talk about pluralism and society by which global public interest will be ensured, we need to know what kind of social interaction model can help us ensure this flow of information and participation in the decision-making. As a

[396] *Ibid.,* pp. 44-45.

[397] In this regard, Brousseau states the following: "[...] governance is not just a question of designing techniques to aggregate preferences (so as to manage collective choices) and implementing incentives to harmonize individual behaviour. It also involves producing and sharing information to allow individuals to establish and modify their preferences. Furthermore, governance is about innovating and enhancing the collective capability to influence behavior so that individuals can discover and share new beliefs, more effective ways of resolving issues, and better techniques for confronting problems of collective action:" BROUSSEAU and DEDEURWAERDERE, *supra* note 358, p. 27.

result, Brousseau concluded four social interaction models: "1) The Neoclassical Social Planner, 2) Market, 3) Communism/Family/Non-Profit Organizations, 4) Social Network." These models and interactions are explained as follows in the table below.[398]

Table 2 Four Social Interaction Models of Brousseau[399]

Two forms of individual preferences: *Transaction* and *Gift*, and two forms of collective action responses to these individual interactions models: *Centralized* and *Decentralized.*	**(1)Transaction (trade/compensation)** Relationships among individuals are based on exclusive (individual) interests	**(2) Gift (sharing/compromise)** Relationships among individuals are based on inclusive (common) interests
(1) Centralized (collective decisions) Relationships between individuals are organized, because this increases the efficiency of managing interdependencies	**(1) (Neoclassical) social planner:** an entity is in charge of optimizing the performance of the social system, no collective interest; the social planner overcomes coordination difficulties.	**(3) Communism/family/non-profit organizations:** an elite governs the society for the benefit of all, either because it is enlightened or because it has been consensually chosen. No perfect match for what is given and what is taken.
(2) Decentralized (bilateral negotiations) Relationships among individuals are spontaneous	**(2) Market:** All social interactions are organized on a quid-pro-quo basis. Market failures may exist.	**(4) Social networks (gift/counter-gift):** individuals freely choose to contribute to a collective venture without expecting compensation proportional to their contribution

According to Brousseau, an adequate and legitimate provision of global public goods should benefit from all these four interaction models rather than focusing and choosing one model. As a result, he summed up his view as follows:

> "[…] what seems needed for the legitimate and efficient governance of global public goods is the broadening of our categories of public debate, both through deliberation in international organizations, and though more local forms of participatory governance and the involvement of communities and citizens in collective learning on GPG issues."[400]

[398] *Ibid.,* pp. 27-29.
[399] The main part of this table was borrowed from the table of Brousseau and it is expanded more to include his definitions of social interaction models which are based on individual and collective preferences: *Ibid.*
[400] *Ibid.,* p. 36.

I can then conclude that informed individuals will create a more responsive collective preference within their local community and local communities will create a more adequate preference at the national level. Finally, these national level diversified preferences will lead to a global public preference, namely to global public interest, upon which the core pillars of regulation will be tailored.

However, from the perspective of global administrative law, when we consider the level of plurality and the need to benefit from such plurality at the global level in the realm of different public spheres they belong to, we need to develop tools in order to recognize these public spheres. This is because such recognition, which will be realized through negotiation and compromise, will eventually lead to the achievement of global public interest as long as all affected authorities at the national and international levels are open to the idea of institutional and organizational transformation.[401]

To do so, we need a coordinator institution depending on the needs of subject area. This institution should have a coordination function for the negotiation and compromising process – we can also call it as *mutual recognition process*.[402] Once global public interest requires the establishment of an independent and authoritative institution or organization, an organization with a duty of coordination can be founded. For the organizations, already established and functioning as global decision makers, we can transform them according to the global governance needs of the

[401] MORISON and ANTHONY, *supra* note 319, pp. 237-238.
[402] Mutual recognition is also a preferable concept in the regulation which replaces the harmonization endevaours. This is when we need to accomodate the diversity and dynamism in the regulated area: HOULE (2012), *supra* note 183, pp. 72-76.

subject matter in question. As such, the tenet of global public interest will play a vital role in such a transformation or conversion process.

As a result, the global public interest tenet will serve well to the production and maintenance of global public goods by originating the effective feedback through efficient regulatory networks. Even though such a mutual recognition process can be very difficult in the beginning because of the conflicting interests, it will become easier and more established once the different interest groups know each other and interact with each other for the sake of meeting the needs of global public interest.

1.3.3 Safeguarding the Governance through Ultimate Review Mechanism

Balancing the accountability and legitimacy requires an ultimate review mechanism in order to safeguard the interests of the affected and interested parties to subject matter of global governance. However, creating a review mechanism and ensuring the impartiality of such review mechanism are not easy. In this section, I will elaborate more the question of why we need a review mechanism and how we can create and finance it.

1.3.3.1 Why Do We Need a Review Mechanism?

The Oxford dictionary defines review as a "formal assessment of something with the intention of instituting change if necessary."[403] In terms of law, this definition can be extended to a reconside-

[403] Oxford Dictionary, *supra* note 156.

ration of a judgement, sentence, etc. by a higher court or authority.[404] When we talk about a review mechanism, we should understand it as a mechanism generating a second and ultimate opinion. As we have seen in the examples of ICANN and WADA, international organizations tend to create also their own dispute resolution mechanisms in order to safeguard their own legal orders in a given subject area.[405]

However, there is a need to create review mechanisms which will serve well the global public interest while safeguarding the good/adequate/acceptable governance.[406] This is because private dispute resolution bodies, regardless they are for a subject area classified as global public good, can involve the public aspect which will automatically generate the global public interest consideration. This publicness will be definitely higher on a subject matter, considered global public good, and the establishment of review mechanism related to such subject matter will be inevitable in order to make sure the protection of global public interest, which has already been negotiated and compromised.

1.3.3.2 How to Create this Review Mechanism?

These review mechanisms should be created through the spectrum of mutual recognition and compromise principles by which all interest groups will play important role in concluding the type and content of review mechanism. In this regard, we should be open to any appropriate form

[404] *Ibid.*
[405] See *supra*, pp. 83-87.
[406] Esty believes the decision makers know that their conclusions are subject to review and oversight and "will further enhance the legitimacy of policy outcomes as well as the prospect of social welfare gains:" ESTY, *supra* note 304, p. 1522.

of review mechanism from the institution of ombudsman to judicial review, depending on the particularity of the subject area.

Even though the idea of applying the law of a national state as an ultimate review mechanism can be practical, such a choice should be collectively recognized. This is because the composition of a court with one country represented jurists and applying one country represented national law in the review process can easily raise impartiality questions. Such an initiative should be very exceptional and only be decided upon the agreement of all countries participating in the governance. A review mechanism, agreed upon by countries through a negotiation and compromising process, will naturally and actually have to take into consideration the principles and values of global administrative law.[407]

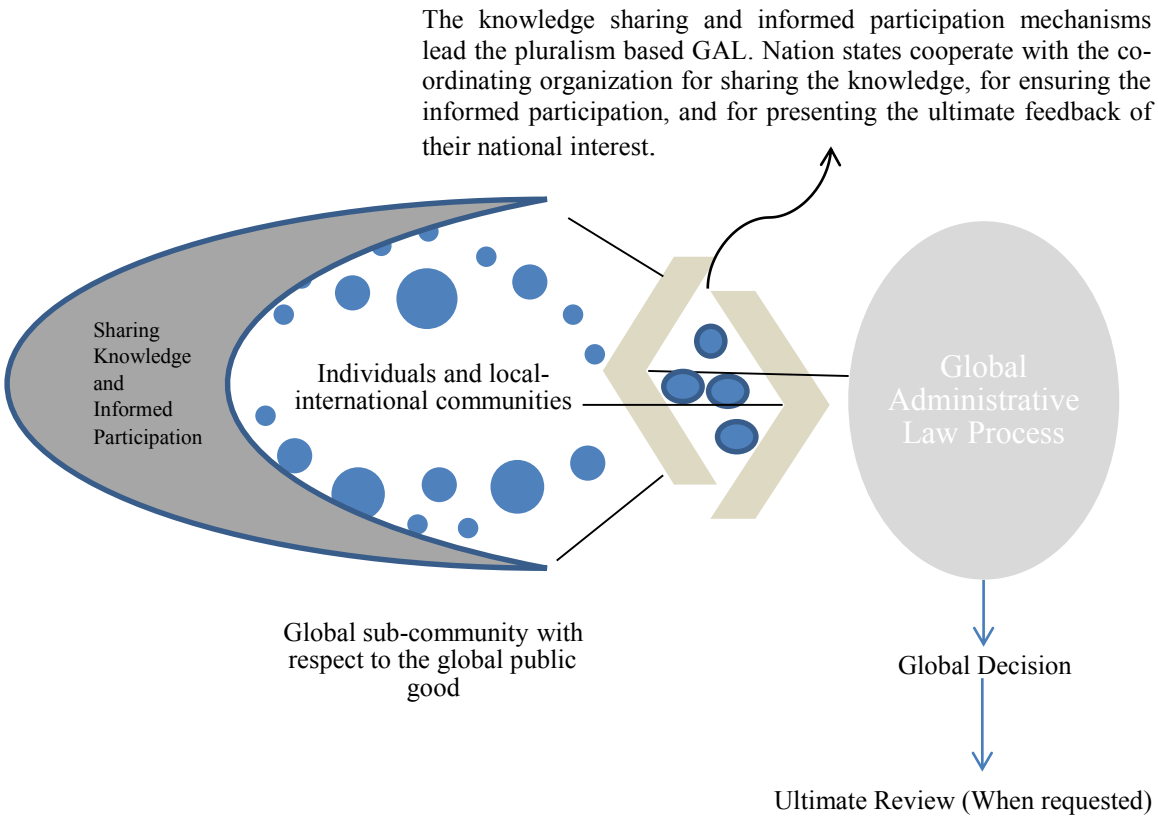
Such review mechanisms can be constituted as review boards which equally represent all countries by having one representative (or judge) from each contracting country − as in the case of the European Court of Human Rights (ECHR) − [408] or by having a limited number of democratically and delicately selected representatives. Along with review boards, the option of the ombudsman mechanism can also be considered if the parties agree. Yet, any review mechanism, either as a board or ombudsman, ought to accommodate diversity or plurality. Excluding the examples of current dispute settlement bodies of the United Nations and the other supranational organizations such as the ECHR, we will only highlight the need for a review mechanism which will be a real safeguard of the diversity which steers the governance.

[407] Harlow numbers such principles and values of GAL as follows: "accountability, transparency and access to information, participation, the right of access to an independent court, due process rights, including the right to be heard and the right to reasoned decisions and reasonableness. Proportionality and legitimate expectation are the outsiders, brought in from European legal systems:" HARLOW, *supra* note 303, p. 195.
[408] ECHR, *supra* note 22.

1.4 How to Finance all this Process?

Financing can be burdened by all countries, stakeholders, or interest groups depending on their population, benefits, and economic development. In this regard, the concept of *public good aid* needs to be further elaborated since the process of governance will require to be financed at different levels.[409] However, it is extremely important that such a governance mechanism should be funded adequately without raising any issue of dependency. More importantly, the review mechanism should be financially and institutionally independent. Consequently, I illustrate my pluralist approach of GAL in the figure below before testing it with the anti-doping regime.

Figure 3 The Adapted Pluralist Approach of GAL



[409] Todd SANDLER and Daniel G. ARCE, "New Face of Development Assistance: Public Goods and Changing Ethics" in BROUSSEAU, *supra* note 358, pp. 55-72.

Conclusion of the First Section

In this section, I have proposed a pluralist approach of GAL which emphasizes three pillars as distinct features: 1) subject area classification, 2) informed participation and knowledge sharing, 3) ultimate review mechanism. These three pillars can respond to the potential accountability and legitimacy gaps in a prospective global administration mechanism while ensuring the required production and governance of global public good at the global level.

Focusing on the GAL framework without distinguishing subject areas cannot be functional when we consider the distinct particularities of individual subject areas. Therefore, I conclude that GAL should principally focus on the subject areas categorized as global public goods. This choice will help the subject areas requiring immediate global action to draw better and more adequate attention without being melded, mixed, and considered with other subject areas.

Adequately informing the interest groups of global administration with a view to equalizing the knowledge and awareness level among them as participants of the decision-making will naturally create more conscious participation in the governance. And, this awareness will lead to a more proactive decision-making, easier implementation of the decisions, and a more functional global administration as a consequence. Moreover, the ultimate review mechanism which will safeguard the governance will also ensure the administrative mechanism at the global level be recognized, maintained and trusted.

Consequently, the criterion of global public interest, developed through pluralism, will be more easily understood, will be more prudently approached, and will be better answered in the process of ensuring the adequate governance of the subject area, classified as global public good. Such clarification of global public interest will lead the interest groups – from the individual to the society/ies − to become the owner, protector, and beneficiary of the global governance with regards to the subject area at issue.

Section 2 ***Testing the Adapted Model of GAL with the Anti-Doping Regime***

In this section, I will test the pluralist theory of GAL in order to see whether the anti-doping regime needs to remodel itself. Thus, I will first look at whether the anti-doping regime can be considered a *global public good.* If so, I will look to see if global public interest is taken into consideration in the production and performance of this global public good. If so, I will look at if there is an ultimate review mechanism in order to safeguard the governance. If the anti-doping regime passes all these tests, I can claim the anti-doping regime is governed by the adapted model of global administrative law and the global governance needs of anti-doping subject matter are ensured.

Yet, before I test the anti-doping regime with the adapted model of GAL, which is structured in the advent of emerging theories of global administrative law, I should clarify whether we can consider WADA as a hybrid model of GAL governance.

2.1 Can WADA Be Considered a Public-Hybrid Example of GAL Model?

The purpose of establishing WADA was to lead the anti-doping activities in the world.[410] And, attaining this goal has required certain interactions with national normative structures.The sporting events were held in the territories of nation states where diverse national normative structures, which regulate doping, have been present.[411]

In the past decade, such normative contradictions were intended to be reduced by the UNESCO Convention, inviting nation states to recognize the authority of WADA and by the International Olympic Charter, empowering the authority of WADA's rules and standars through its soft powers. However, we cannot guarantee the same level of unification success in every subject matter with global consequences.

Thus, we should distinguish whether the public-hybrid model of doping governance deserves all the gratitude for such a fast recognition in the world. Besides, we should question whether the subject area of doping, which needs immediate attention across the world, results in such governance model. Answering these two questions is quite important since the response will affect the successful application of this model to other subject areas. In this regard, I disagree with Casini who proposes that doping governance be an aspiring model for other public private partnerships (PPPs). As a result, I am of the view that his following conclusion can be revisited:

> "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

[410] Constitutive Instrument, *supra* note 3, Art. 4.
[411] For instance, Italy criminilazed doping in 2000: Italian Code, *supra* note 10.

> delivering services or financing, their traditional scope, but also for producing norms that can directly affect both national administrations and private actors."[412]

Neither the status of WADA nor the particularity of the subject matter gives us such a simple conclusion when we have already different views on its structure. For instance, the GAL Project in 2005 first put WADA in the category of private regimes rather than a hybrid organization while ICANN was considered an example of hybrid-intergovernmental private administration.[413] Yet, another publication of Kingsbury with Casini evaluated WADA in the category of hybrid organizations.[414] As we see from the dilemmas in categorizing WADA as a private or hybrid organization, we believe there is a huge benefit in defining the particularities of a subject area before we design a governance model for it.

Namely, we need to well define the particularities of a subject area before we intend to find theoretical foundations for its governance. Once we have defined and have come to the conclusion that the subject area is considered a global public good, we need to design the appropriate governance structure for it within the limits of global administrative law. All this said, this process of design needs to be continued through joint negotiations with the concerned parties, which are not exclusive to the states, in the development of global public interest.

In sum, either promoting private governance models which are completely disconnected from national states or believing the administrative law principles and rules which have often different applications and meanings in the world, can only advance the definition of global administrative

[412] CASINI (2009), *supra* note 34, p. 446.
[413] KINGSBURY, *supra* note 290, pp. 22-23.
[414] Benedict KINGSBURY and Lorenzo CASINI, "Global administrative law dimensions of international organizations law," (2009) 6/2 *International Organizations Law Review*, p. 351.

law without concluding a concrete as well as functional theory of global administrative law.[415] Thus, our concern should not be seeking the unity of administrative law principles and rules and/or determining the concept of law in global administrative law since the idea of proposing a concrete and functional theory of global administrative law needs a pluralist application. And, this pluralist vision will need to take into consideration any legal, social, political, and cultural diversity.[416]

Finally, as per the difficulty in explaining current anti-doping regime with the public-hybrid example of GAL, we have to look at whether the anti-doping regime can be associated with the adapted (pluralistic) GAL model.

2.2 Can We Associate the Anti-Doping Regime with the Adapted GAL model?

To associate the anti-doping regime with the pluralist GAL model, we need to assess whether the anti-doping regime is a global public good, whether the regime applies to knowledge sharing and informed participation to accommodate the needs of global public interest, and whether the regime includes an ultimate review mechanism to safeguard the accountable and legitimate governance.

[415] Pierre LAROUCHE, GAL Debate, *supra* note 312.
[416] We have recently witnessed that Cassese highlighted the importance of a pluralist approach in the global administrative law which may benefit from the pluralist governance structures of past empires as the "Roman-German, the Austro-Hungarian, the Spanish, and the Ottoman:" CASSESE, *Ibid.*

2.2.1 Is the Anti-Doping Regime a Global Public Good?

As concluded before, we have two conditions to fulfill when we decide the existence of a global public good: 1) *technical condition* and 2) *social condition.* To clarify, these conditions have functions of checking the status of candidate subject area in terms of generating *benefits* outside the boundaries of a nation state without having any present and future negative effect on any set of people, groups, and entities in the world, and in terms of being implicitly or explicitly recognized by the sub-global communities.[417]

According to technical and social conditions, we should clearly consider the anti-doping regime in the category of global public good. There is a need to produce and maintain the anti-doping as its production and performance benefits exceed the national boundaries and it does not constitute any present and future negative effect on any sub-set of people, groups, and entities in the world. Moreover, the sub-global communities recognize such need of the anti-doping regime through the UNESCO Convention, the IOC Charter, and the WADA Code.

2.2.1.1 Does the Anti-Doping Regime Overlap with other Global Public Goods?

Today the anti-doping regime does not only deal with the ethical concerns within the spirit of Olympics and fair play posed by doping, but also has to take into consideration the public health and safety related threats in the fight against doping. Thus, the anti-doping regime can intersect with other sub-global communities, such as *public health* and *global peace* in restricting and eliminating the production, promotion, dissemination, and use of the prohibited substances and

[417] See *supra* pp. 131-132.

methods.[418] Then, there can be a fundamental need to recognize, and to be recognized, by other sub-global communities for the accomplishment of efficient cooperation.

Such recognition and collaboration endeavours should be realized through the informed participation schemas of countries and other interest groups. In other words, in order for the global public good production and performance, the *contributive* and *weakest-link*-based efforts should be merged and put into practice. The nation states must inform their local communities and citizens about the reasons and consequences of the participation. Neither a country should be allowed to benefit from being a weakest-link position as a producer, promoter and disseminator, nor should a user of a prohibited substance or a country be imposed upon unrealistic obligations to fulfill procedural requirements. For example, forcing a country to abide by the rules and regulations of doping, whose local communities and citizens are not well informed about doping, will not practically help attain the targeted goals of the governance.

Although one can argue that a weak relationship exists between the prohibited doping substances and the controlled substances, such as heroin, cocaine, etc., we should not forget that a lucrative market of trafficking doping substances can easily be used as a tool in financing other globalized criminal activities. If the goal of organized crime syndicates is to gain financial benefits, they will logically target the legalized or not seriously "illegalized" markets in order to buy or produce the substance. Thus, they will opt to go to the most lucrative markets to maximize their

[418] I can also determine health as a global public good according to our criteria. Such global public good aspect was already confirmed as global public health risks grow more than ever thanks to the unreported infectious diseases, unequal access to the health care, and unsupported health research at the national levels: Lincoln C. CHEN, Tim G. EVANS, and Richard A. CASH, "Health as a Global Public Good" in KAUL, *supra* note 353, pp. 264-265. Most importantly, I can consider the transnational illegal drug trafficking and organized crime activities in the context of global peace, which might also be classified as global public good. This is because such activities which have impacts on the anti-doping regime have also consequences on the economy, politics, development, security, and health.

profits where the strict laws and rules are prohibiting that substance. If the goal of organized crime syndicates is to conduct the outlawed activities, such as terrorism, they will also apply to such lucrative markets in order to finance their organizations.[419]

Additionally, organized crime members prefer to infiltrate the sport business through the sponsorships and other business relationships because of the prestige, popularity, and respect generated by these markets.[420]

2.2.1.2 Does the Anti-Doping Regime Need to be Considered in the GAL Zone?

The UNESCO Convention, the IOC Charter, [421] and the WADA Code – the three institutional pillars of the fight against doping − are currently representing the instruments for the production and performance of this global public good of anti-doping. Moreover, WADA, by setting the global standards and rules with respect to the prohibited substances and methods, testing, laboratories, therapeutic use exemptions, and protection of privacy and personal information, works towards becoming the global legal order in the matter of doping.

WADA is the global public good producer since its set of rules and standards, including the WADA Code, are developed and modified by WADA. I call it as the performer since WADA

[419] For instance, a major terrorist group in Turkey, called PKK (Kurdistan Workers Party) and listed as a terrorist group in the EU and Canada, is mainly funded by the transnational organized criminal activities which include illegal drug trafficking. For further information, see Murat SEVER and Mitchel P. ROTH, "The Kurdish Workers Party (PKK) as Criminal Syndicate: Funding Terrorism through Organized Crime, A Case Study," (2007) 30/10 *Studies in Conflict and Terrorism*, pp. 901-920.
[420] ACC report, *supra* note 8, pp. 29-30.
[421] The IOC defines the Olympic Charter (OC) as "the codification of the Fundamental Principles, Rules and By-laws adopted by the International Olympic Committee (IOC). It governs the organization and running of the Olympic Movement and sets the conditions for the Olympic Movement and for the celebration of the Olympic Games:" The International Olympic Committee (IOC), "Official Website," available at HYPERLINK: <http://www.olympic .org> [last visited on February 5, 2013]. [IOC]

intends to fulfill the global administrative law principle of participation in the production of such rules.[422] Moreover, the existence of an established doping adjudication mechanism, subject to certain review procedures of CAS, the Swiss courts, and the ECHR, makes us consider the anti-doping regime in the GAL zone.[423]

In concluding the anti-doping regime as a global public good and considering it as a subject of global administrative law, I have to elaborate more the classification of the anti-doping regime as a global public good within the context of global administrative law. Such classification will lead me to decide what kind of global administrative law structure is required for the production and governance of this global public good.[424]

2.2.2 Testing the Adapted (Pluralistic) Model of GAL with the Anti-Doping Regime

As we recall, my adapted (pluralistic) approach of GAL was elaborating the global public good at the local and international levels simultaneously. Then, the model was generating mutually recognized conclusions by recognizing various publics and by ensuring the global public interest. Thus, we should analyze whether the anti-doping regime benefits from knowledge sharing and informed participation aspects of global public interest. This analysis should include whether the anti-doping regime takes into consideration the feedback coming from informed participants situated at the local and international levels. Moreover, we should make sure whether the anti-

[422] For instance, according to the WADA Code, an international standard will be constituted after a long consultation process which involves stakeholders and signatories: The Code, *supra* note 4, p. 12. Moreover, the WADA Code affirms that the rules of the Code are reached through a consensus of stakeholders, coming from all around of the world: Code, *supra* note 3, p. 17.
[423] See the ultimate review mechanism section, *infra* p. 168 *et seq.*
[424] As we recall, characterizing a matter as a global public good does not mean that such matter is already produced by an already established organization. In the case of the anti-doping regime, we witness an already established doping public good producer and performer.

doping regime recognizes and/or applies to the global public interest. And lastly, we should test whether the anti-doping regime is under the protection of an ultimate review mechanism.

2.2.2.1 Knowledge Sharing and Informed Participation

Testing whether the anti-doping regime includes the knowledge sharing and informed participation features will include elaborating the consultation, decision making, training, and education aspects of the anti-doping regime.

2.2.2.1.1 Consultation

My analysis of the WADA Code reveals that the consultation process is imposed within the Code for any regulatory initiative, including the Code itself and the International Standards. The Code also ensures the efficacy of the monitoring program with respect to the unlisted prohibited substances. Finally, monitoring the compliance with the Code includes a consultation process with the signatories and governments.[425]

When we look at the UNESCO Convention and the *European Anti-Doping Convention*, we see the consultation process is also considered in the amendment process. The UNESCO Convention Art. 34.2 obligates a consultation process with state parties for the modification of the Annex of the Convention. However, Art.13.3 of the European Convention differently, does not obligate a specific consultation in the amendment process for the Convention articles. Instead, it suggests the monitoring group consult with related sports organizations, when necessary.

[425] Code, *supra* note 3, Art. 4.5. and 23.5.

Moreover, although the WADA Code modification process sets up a compulsory consultation process, it does not yet consider the results of the consultation process as binding. According to Art. 23.7.3, the decision is made by "a two-thirds majority of the WADA Foundation Board including a majority of both the public sector and Olympic Movement members casting votes." In addition, athletes,[426] other stakeholders and governments[427] are the participants of this consultation process.[428] When we see the existence of an online data entry tool available to the public during the course of an ongoing consultation process, I can conclude that WADA intends to reach as many of the affected parties as possible.[429]

2.2.2.1.2 Decision-making

The WADA decision making organs are divided into two bodies: supreme decision making body and ultimate policy making body. The supreme decision making body, titled *Foundation Board* is composed of thirty-eight (38) members which represent equally the Olympic Movement and

[426] The Code defines an athlete as "[a]ny Person who competes in sport at the international level (as defined by each International Federation) or the national level (as defined by each National Anti-Doping Organization). An Anti-Doping Organization has discretion to apply anti-doping rules to an Athlete who is neither an International-Level Athlete nor a National-Level Athlete, and thus to bring them within the definition of "Athlete." In relation to Athletes who are neither International-Level nor National-Level Athletes, an Anti-Doping Organization may elect to: conduct limited Testing or no Testing at all; analyze Samples for less than the full menu of Prohibited Substances; require limited or no whereabouts information; or not require advance TUEs. However, if an Article 2.1, 2.3 or 2.5 anti-doping rule violation is committed by any Athlete over whom an Anti-Doping Organization has authority who competes below the international or national level, then the Consequences set forth in the Code (except Article 14.3.2) must be applied. For purposes of Article 2.8 and Article 2.9 and for purposes of antidoping information and education, any Person who participates in sport under the authority of any Signatory, government, or other sports organization accepting the Code is an Athlete:" Code, *supra* note 3, p. 131.

[427] There is no clear definition of what stakeholder means in the Code. However, there is a reference to "a broad spectrum of stakeholders with an interest in fair sport" in the introduction. Thus, I can conclude that anayone with an interest in fair sport can be part of the consultation process, including the sigatories of the Code: Code, "Introduction," *Ibid.*, p. 17.

[428] Code, *Ibid.,* Art. 23.7.2.

[429] Creating an account for the data entry in the WADA website takes only a few minutes and anyone who wishes to express himself can enter data during the consultation process. Personally, I created an account in a few minutes as putting myself in the category of student or other. WADA, "The WADA Consultation Process," available at HYPER LINK:<http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-AntiDopingOrganizations/TheCode/Code-Review/Consultation-Process/> [last visited on September 20, 2013].

public authorities. The ultimate policy making body, titled *Executive Committee*, is composed of twelve (12) members which equally represent the Olympic Movement and governments (public authorities). In the both governance bodies, The WADA president and vice-president are excluded in the equal composition criteria of the Olympic Movement and Governments. The country based distribution of these representations is as follows:

Table 3 Foundation Board and Executive Committee

Foundation Board

Olympic Movement Representatives (18 Members)	**Public Authorities Representatives (18 Members)**
IOC Representatives: Switzerland, Switzerland, Fiji, Canada (four members)	**Member States of the European Union Representatives:** Grand Duchy of Luxembourg, Belgium, Ireland (three members)
ANOC Representatives: Zambia, Brazil, United Kingdom, Republic of Kazakhstan (four members)	**Council of Europe Representatives:** Italy, Russian Federation (two members)
ASOIF Representatives: Hungary, Turkey, Italy (three members)	**Africa Representatives:** Egypt, Botswana, Seychelles (three representatives)
Sport Accord Representative: Switzerland (one member)	**The Americas Representatives:** Panama, Canada, Uruguay, USA (four members)
AIOWF Representative: Norway (one member)	**Asia Representatives:** Saudi Arabia, Malaysia, China, Japan (four members)
IOC Athletes Commission Representatives: Germany, Zimbabwe, UK, Canada (four members)	**Oceania Representatives:** Australia and New Zealand (Two members)
IPC Representative: Spain (one member)	

Executive Committee

Olympic Movement Representatives	**Public Authorities Representatives**
Canada, Turkey, Italy, Switzerland, and United Kingdom	Australia, South Africa, France, Peru, Japan
Working Committee Chairs (attending the Executive Committee meetings): Health, Medical and Research Committee (Sweden), Finance and Administration Committee (United Kingdom), Education Committee (USA), Athlete Committee (Russian Federation).	

The Constitutive Instrument of the WADA Foundation obliges that "the Foundation Board will seek to ensure that parity is maintained between, on one side, the members of the Foundation Board representing the Olympic Movement (viz. the IOC, ASOIF, AIWF, GAISF, ANOC and

the IOC Athletes' Commission), and, on the other side, those representing the public authorities."[430] The Foundation Board appoints the Executive Committee.[431]

Therefore, I conclude the supreme decision-making organ of the anti-doping regime is the *Foundation Board*, and the ultimate policy-making body of the anti-doping regime is the *Executive Committee*. These two bodies possess a legitimized full authority to govern the anti-doping regime under Swiss law.[432] Their authority give the legitimacy to undermine the consultation and other participation process in the decision-making if the Board desires.[433] The consultation process, highlighted within the Code, can then be a fruitful process when the Board seriously takes into consideration its results.

More importantly, a centralized public data entry option in its current stage can also limit participation since it requires the identification disclosure and certain language and information technology abilities. In other words, the individuals and interest groups cannot all be effectively reached out in the current online system. Thus, athletes, stakeholders and governments will be asked to fill the gaps of local data collection in such a consultation process.[434]

I can assert that the decision-making process seemingly intends to include the participation of the athletes, signatories, and other interest groups in the decision-making process through consultation. However, I can still claim that the participatory process needs to be enlarged and be given

[430] Constitutive Instrument, *supra* note 3, Art. 6.4.
[431] *Ibid.,* Art. 11.
[432] *Ibid.,* Art. 1, 19.
[433] There is no compulsory consultation process mentioned in the WADA Statute: *Ibid.*
[434] Art. 23.7.2 of the Code ensures the participation of athletes, other stakeholders, and governments in the modification of the WADA Code: Code, *supra* note 3. Moreover, as I mentioned earlier, the International Standards policy making process also requires the participation of the signatories: Code, "International Standards," *Ibid*., p. 12.

more preponderance in the decision-making process. This is basically because the final decision is rendered by the Foundation Board and Executive Board. The participatory groups do not necessarily cover the outside of the sports and the anti-doping related interest groups and individuals.

However, broadening and giving more decisive power to the participants and eventual participants should only be applicable when the awareness of anti-doping and public health considerations are truly developed by the practice of effective knowledge sharing and training initiatives.

2.2.2.1.3 Knowledge Sharing and Education

In this sub-section, I will verify whether the anti-doping regime conforms to the education, training, and research aspects of the GAL model. In this respect, I will analysis the knowledge sharing and training aspects in terms of WADA and international conventions. The WADA Code, the WADA Constitutive Instrument, the UNESCO Convention, and the *European Anti-Doping Convention* will thus be the main instruments to examine.

2.2.2.1.3.1 Education and Training

The UNESCO Convention obligates all forms of international cooperation, which is aimed at protecting the athletes and ethics in sport in order to achieve the goal of the Convention.[435] In this regard, the UNESCO Convention expects State parties to cooperate with leading organizations,

[435] UNESCO Convention, *supra* note 5, Art. 3 (b).

which essentially include WADA, in the fight against doping in sport.[436] The Convention contains specific provisions for the education and training purposes, targeting the sporting community in general, athletes, and athlete support personnel. These provisions force the State parties to support, devise, or implement education and training programs on anti-doping.[437]

States therefore are the first target groups bound up with the obligation of doping education and training. However, there is a need to understand what *sporting community* means in the Convention. My analysis of the Convention indicates that *community-at-large* is also associated with raising awareness through education and training in the Preamble of the Convention.[438] My view is that the *community-at-large* includes the individuals who are not athletes and athlete support personnel. Namely, the individuals who are not belonged to the sporting circles are also part of the *community-at-large*.

Unlike the UNESCO Convention, the *European Anti-Doping Convention* describes target groups and the educational strategies to be deployed for each. In this regard, Art. 6 (1) asserts the following:

> "[T]he Parties undertake to devise and implement, where appropriate in co-operation with the sports organizations concerned and the mass media, educational programs and information campaigns emphasizing the dangers to health inherent in doping and its harm to the ethical values of sport. Such programs and campaigns shall be directed at both young people in schools, sports clubs, and their parents and at adult sportsmen and sportswomen, sports officials, coaches and trainers. For those involved in medicine, such educational programs will emphasize respect for medical ethics."[439]

[436] *Ibid.,* Art. 3 (c).
[437] *Ibid.,* Art. 19 (1).
[438] The Preamble includes the following words with respect to the education and training position of the Convention: "[...] aware also of the importance of ongoing education of athletes, athlete support personnel and the community at large in preventing doping," UNESCO Convention, *supra* note 5, p. 1.
[439] *Ibid.*

Seemingly complementing the UNESCO Convention in this context, the WADA Code has very similar education and training strategies to the European Convention. The Code then asserts the following for the target groups and communication strategies: "these programs should be directed at young people, appropriate to their stage of development, in school and sports clubs, parents, adult athletes, sport officials, coaches, medical personnel and the media. (The media should also cooperate in supporting and diffusing this information.)"[440] Moreover, the WADA Constitutive Instrument comprises devising and developing anti-doping education and prevention programs at the international level among the objectives of WADA.[441]

2.2.2.1.3.2 Research

A regulatory organization needs to be equipped with the tools promoting and leading the scientific research on the subject area. This function should be the primary duty of an organization which seeks out constant recognition and support from the beneficiaries of global administration. Many countries do not have enough resources to conduct such scientific researches and the countries with adequate resources can come to the subjective conclusions when their national interests related to the subject area to be taken into account. What is more, the research subject areas and subject matters can be pre-determined by a government, and the research, conducted in these given subject areas, can be even controlled during the progress of research.[442]

[440] Code, *supra* note 3, Art. 18. 2.
[441] Constitutive Instrument, *supra* note 3, Art. 4 (7).
[442] Andrée Lajoie revealed relatively similar concerns about the controlled research and importance of maintaining *free research.* Her years of academic research and grant-receiving experience before the Canadian public grant agencies well questioned the distinction between the "free research" and "controlled research" while advancement in a particular scientific field and development of the society-at-large are unquestionably the desire of all. For more information, see Andrée LAJOIE, *Vive la recherche libre!: les subventions publiques à la recherche en sciences humaines et sociales au Québec,* Liber: Montréal, 2009. However, for now, her words, produced in an op-ed, are pertinant to this discussion: " […] *cela m'a permis de voir dans quelle mesure ces transformations successives ont*

When I analyzed the UNESCO Convention, I noticed the promotion of scientific research is widely undertaken.[443] Similarly, the *European Anti-Doping Convention*,[444] the WADA Code,[445] and the WADA Constitutive Instrument[446] include provisions for the promotion of research. As a result, WADA established a scientific research program in 2001 and now claims a commitment of 56 million dollars up to date for the purpose of scientific research.[447] Add to this, the general director of WADA had claimed in 2007 that about 30 % of the WADA budget would be allocated to research.[448] However, we have witnessed that the research in certain areas, such as gene doping which is at the crossroads of the legal, medical, and public policy fields, receives more attention in the academic circles outside the WADA Research Program.[449]

Such procedures of organizing research initiatives can take a longer period of time and *inter/multidisciplinary* collaboration, required in certain subject areas, such as gene doping in sport, can need special frameworks.[450] Nonetheless, the final results would help WADA to

---

aidé certaines formes de recherche et nui à d'autres qui auraient été souvent beaucoup plus utiles à la société: " Assia KETANI , "Vive La Recherche Libre ! - De L'utilitarisme à La 'Prostitution Intellectuelle,'" *Le Devoir,*21 February 2009, available at HYPERLINK:<http://www.ledevoir.com/societe/science-et-technologie/235083/vive-la-recherche-libre-de-lutilita risme-a-la-prostitution-intellectuelle>[last visited on August 13, 2013].

[443] UNESCO Convention, *supra* note 5, Art. 24-27, 3 (b), and the Preamble.

[444] Art. 6 (2); To note, the aim of this Convention was to take a collective action in the fight against doping and ensure the domestic coordination among the members of the Council. As a result, the adoption of the necessary regulations described in the Convention at the national level was the main goal. In doing so, Article 3.2 stated the following referring to the member states: "They shall ensure that there is practical application of this Convention, and in particular that the requirements under Article 7 are met, by entrusting, where appropriate, the implementation of some of the provisions of this Convention to a designated governmental or non-governmental sports authority or to a sports organisation:" Council of Europe, "Anti-Doping Convention," (ETS 135, 16.11.1989).The Convention is available at HYPERLINK: <http://conventions.coe.int/Treaty/en/ Treaties/Html/135.htm> [last visited on October 31, 2013]. [European Convention]

[445] Code, *supra* note 3, Art. 19.

[446] Constitutive Instrument, *supra* note 431, Art. 4 (8).

[447] WADA, "Research," available at HYPERLINK: <http://www.wada-ama.org/en/science-medicine/research/>[last visited on August 13, 2013].

[448] David HOWMAN, "Progress Based on Research," (2007) 2 *Play True Magazine*, p. 2.

[449] In this respect, see the example on gene doping research, *supra* p. 35.

[450] According to a research, conducted in the Netherlands, there are many factors impacting the disciplinary and inter-disciplinary collaboration. These factors vary from gender to discipline and previous experience. Frank J. V. RIJNSOEVER and Laurens K. HESSELS, "Factors associated with disciplinary and interdisciplinary research

achieve its goals more prudently and then more effectively with respect to the anti-doping regime. Therefore, I claim that the anti-doping regime has not yet reached a complete knowledge sharing and informed participation stage. The anti-doping regime yet seems to work on ensuring the effective knowledge sharing and informed participation in the long run. As implied in the UNESCO Convention,[451] I believe the nation states will undertake more responsibilities in this area. The reason is that they probably better know how to communicate the relevant anti-doping knowledge with their local and international communities and individuals.

However, the knowledge production and sharing process, such as related to gene doping, will still require the coordination help of WADA in order to produce a faster and more efficient outcome from this practise. This is because the technological development imbalance among nation states can result the countries equipped with advanced technologies in gaining unfair advantage. For instance, such unfairness can arise when the countries or research groups let their national athletes have the technology in order them to better compete in international competitions for the sake of winning the gold medal and safeguarding the national pride. Thus, there can be a practical need that the nation states with advanced technologies cooperate fully with WADA. Besides, this cooperation requirement is even more necessary when we have classified the anti-doping

collaboration," (2011) 40/3 *Research Policy*, pp. 463-472. Besides, a subject area such as doping in sport which requires significant amount of interdisciplinary research, needs to be prepared for the organizational and management challenges coming from interdisciplinary collaborations. Therefore, organizations might play an important role as independent coordinators or facilitators of such interdisciplinary research and collaboration. Although there is little research on how to structure interdisciplinary research, there will be certainly a need to elaborate this subject more in the future. Bettina KÖNIG et al., "A framework for structuring interdisciplinary research management," (2013) 42/1 *Research Policy*, pp. 261-272.

[451] UNESCO Convention, *supra* note 5, Art. 3, 19.

regime as a global public good and when the UNESCO Convention has already established a bridge of legitimacy for such cooperation.[452]

2.2.2.2 Recognizing a Global Public Interest Standing

To conclude whether the anti-doping regime applies or recognizes the global public interest, I need to analyze the founding legal instruments and doping case law. In this connection, I will first study the legal instruments and will investigate whether the anti-doping regime takes into consideration the concept of public interest. Second, I will look at the case law in order to see whether the applications of public interest in the decisions can lead us to conclude the emergence of global public interest through pluralism within the anti-doping regime.

In this regard, my analysis of legal instruments includes the UNESCO Convention, the *European Anti-Doping Convention*, the WADA Constitutive Instrument, and the WADA Code. For the case law, I screened all the CAS decisions rendered between 1987 and 2013. The results of my findings are summarized in the following tables.

[452] UNESCO Convention Articles 24-27 ensures the framework of national research and obligates the parties to share the results with other states. For instance, Art. 26 states the following: "[…] subject to compliance with applicable national and international law, States Parties shall, where appropriate, share the results of available anti-doping research with other States Parties and the World Anti-Doping Agency." Thus, when I consider the research results, related to the advanced technology application such as gene doping, I can claim that WADA and other nations will probably have a great interest to know the results.

Table 4 Legal Instruments

Questions / Legal Instruments	Is there an explicit reference to the public interest?	If there is no explicit reference, can we imply the public interest? And How?
UNESCO Convention	No	Yes, Interpretation of the Preamble and Art. 1 of the Convention.[453]
WADA Constitutive Instrument	No	Yes, Interpretation of the Art. 4 of the Statute.[454]
European Anti-Doping Convention	No	Yes, Interpretation of the Preamble and Art. 1 of the Convention.[455]
WADA Code	No	Yes, Interpretation of the Introduction of the Code.[456]

Table 5 Case Law

Questions / Parties	Is there an explicit reference to the public interest?	If there is an explicit reference to the public interest, what is the scope of the reference?
FIFA v. STJD & CBF & Mr Ricardo Lucas Dodô -WADA v. STJD & CBF & Mr Ricardo Lucas Dodô[457]	Yes (para 5, para 51.2)	Reference to "CAS panel must also consider the public interest of the fight against doping."
WADA & UCI v. Alejandro Valverde & RFEC[458]	Yes (para 60.c)	Reference to "Internationally accepted fight against doping is a public interest."
Benfica v. UEFA & FC Porto-Vitória Guimarães v. UEFA & FC Porto[459]	Yes (para 51)	Reference to "The immediate enforceability of the decision in the public interest has to be justified."
Ahongalu Fusimalohi v/ FIFA[460]	Yes (Para 31,77, 100, 102,103 105)	Considered Swiss Civil Code Art.28 para 2. Considered the ECHR case of Mosley v. UK. Scope: the balance between the Appellant's and other private or public interest.
Amos Adamu v/ FIFA[461]	Yes (para73, 95, 96, 98, 99,101)	Considered Swiss Civil Code Art.28 para 2. Considered the ECHR case of Mosley v. UK. Scope: the balance between the Appellant's and other private or public interest.
Maccabi Haifa FC v. Real Racing Club Santander[462]	Yes (Para 14)	Considered the plea of res judicata. Scope: res judicata is founded on the principle of public interest based – *interest rei publicae ut sit finis litium*.

[453] UNESCO Convention, *supra* note 3.
[454] Constitutive Instrument, *supra* note 3.
[455] European Convention, *supra* note 444.
[456] Introduction part includes the notion of *"interest in fair sport*:" Code, *supra* note 3, p. 17.
[457] CAS 2007/A/1370 FIFA v. STJD & CBF & Mr Ricardo Lucas Dodô CAS 2007/A/1376 WADA v. STJD & CBF & Mr Ricardo Lucas Dodô, order on provisional measures of 10 December 2007.
[458] CAS 2007/A/1396 & 1402 WADA & UCI v. Alejandro Valverde & RFEC, award of 31 May 2010.
[459] CAS 2008/A/1583 Benfica v. UEFA & FC Porto CAS 2008/A/1584 Vitória Guimarães v. UEFA & FC Porto, award of 15 July 2008
[460] CAS 2011/A/2425 Ahongalu Fusimalohi v/ FIFA.
[461] CAS 2011/A/2426 Amos Adamu v/ FIFA.
[462] CAS 2006/A/1029 Maccabi Haifa FC v. Real Racing Club Santander, award of 2 October 2006.

RCD Mallorca v. FA & Newcastle United[463]	Yes (Para 10, 15, 16)	Considered the *amicus curiae*-friend of the court- tradition. Scope: public interest is protected by *amicus* participation.
AEK Athens and SK Slavia Prague / UEFA[464]	Yes (Para 67,69,152)	Considered Swiss Civil Code Art.28 para 2. Considered ECJ Case Law. Scope: the balance between the Appellant's and other private or public interest.
Amadou Diakite c. FIFA[465]	Yes (Para 32, 47)	Considered Swiss Civil Code Art.28 para 2. Considered the ECHR case of Mosley v. UK. Scope: the balance between the Appellant's and other private or public interest.
Györi ETO v. UEFA [466]	Yes (Para 76)	Considered section 310 of the Hungarian criminal laws. Scope: completing a public interest service to avoid paying a fine.
G. / CGC & TC [467]	Yes (Para 23)	Reference to "the public interest of the sport trumps the private interests of the athlete."
Alejandro Valverde Belmonte c. CONI [468]	Yes (Para 74)	Reference to "une lutte efficace contre le dopage constitue en tout état de cause non seulement un intérêt privé de l'association mais aussi un intérêt public. Cela est également mis en évidence par des Conventions, dont la Suisse est état contractant (Convention contre le dopage du Conseil de l'Europe no. 135, Convention internationale contre le dopage dans le sport de l'UNESCO)."

The findings above demonstrate that the public interest notion was explicitly considered in the case law while its implicit consideration can be observed in the legal instruments. What we need to distinguish here is the scope of public interest in the case law and its meaning in the legal instruments are not necessarily identical despite their common considerations of public interest. For instance, along with the notion of public interest view in the anti-doping regime, the case law has a broad range of public interest application which also recognizes other traditions and applications outside of the CAS jurisprudence and the legal instruments of anti-doping regime, such as the Swiss Civil Code, the ECJ, and the ECHR applications.

[463] CAS 2008/A/1639 RCD Mallorca v. FA & Newcastle United, award of 24 April 2009.
[464] CAS 98/200 AEK Athens and SK Slavia Prague / UEFA, award of 20 August 1999.
[465] TAS 2011/A/2433 Amadou Diakite c. FIFA, sentence du 8 mars 2012.
[466] CAS 2012/A/2702 Györi ETO v. UEFA, award of 8 May 2012.
[467] CAS Ad hoc Division CG 02/001G. / CGC & TC, award of 2 August 2002.
[468] TAS 2009/A/1879 Alejandro Valverde Belmonte c. CONI sentence du 16 mars 2010.

Therefore, having a specific reference to public interest in the case law and observing an implicit reference to public interest in the legal instruments, lead us to conclude that the anti-doping regime is under the direction of embodying global public interest in the anti-doping governance. More specifically, the anti-doping regime seems to be going in this direction by doing both recognizing other publics (i.e. Swiss and the EU) and creating its own public of reference. Such emergence of global public interest will then have to ensure the adequate participation of all affected groups of the anti-doping regime in the long run.

2.2.2.3 Having an Ultimate Review Mechanism

McLaren considers CAS as a supreme doping court[469] just as the Swiss Federal Tribunal (SFT) ruled so in the *Lazutina* and *Danilova* appeal against the IOC before the SFT. The Tribunal in this judgment of 27 May 2003 referred to the CAS as the *Supreme Sport Tribunal*.[470] This decision was also confirmed again in 2008 by the SFT in the case between the Azerbaijan Field Hockey Federation and the *Federation Internationale de hockey*.[471]

However, concluding the supreme court nature of CAS from only Switzerland's perspective would be incomplete when CAS has effect and create concerns at the outside of Switzerland

[469] Richard H. MCLAREN, "Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror," (2010) 20/2 *Marquette Sports Law Review*, p. 305.
[470] Larissa Lazutina and Olga Danilova v. IOC (ATF 129 III 445), cited in Louise REILLY, "An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes," (2012) 2012/1 *Journal of Dispute Resolution*, p. 64.
[471] In this case, the Court stated that review cannot be made on the basis of Case C-519/04P David Meca-Medina and Igor Macjen v. Commission, [2006] ECR I-6991.Thus, whether the arbitration tribunal applied the law is outside of the SFT's application to render its decision: Azerbaijan Field Hockey Federation. v. Fédération Internationale de Hockey, 4A_424/2008 (1st Civil Ct., 22 January 2009), cited in Matt J. MITTEN, "Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations," (2009) 10/1 *Pepperdine Dispute Resolution Law Journal,* pp. 51-68.

mainly. Besides, there is a need to elaborate the arbitration − private justice − aspect of CAS. As a result, I believe studying the related supranational law, Swiss law, and the New York Convention aspects would be required in order to conclude the ultimate supremacy of CAS. Namely, a right to create *lex sportiva*, bestowed to CAS under certain conditions,[472] may require further confirmation.

2.2.2.3.1 Supranational Law

The European Court of Justice, the highest court in the European Union, surprisingly decided that the decisions of CAS can be reviewed under the EC competition law on the grounds that sport activities are economic in nature and the rules regulating anti-doping can be excessive (or can exceed their purpose) where an athlete is unjustifiably excluded from the competition due to a sanction.[473]

Even though this decision was widely criticized by certain authors,[474] I consider the judgment, which was rendered by the highest court in the EU, as a positive development purely for the reason of its contribution to fair competition and/or fair play. After all, as highlighted in the decision, there is an acceptable possibility that the conditions for application of the rules and their severity can be unreasonable.[475]

---

[472] Eric T. GILSON, "Exploring the Court of Arbitration for Sport," (2006) 98/3 *Law Library Journal*, p. 504.
[473] Case C-519/04P David Meca-Medina and Igor Macjen v. Commission, [2006] ECR I-6991, para 47.
[474] MITTEN, *supra* note 471, pp. 66-67; Craig CALLERY and David MCARDLE, "Doping, European Law and the Implications of Meca-Medina, " (2011) 3/2 *International Journal of Sport Policy,* pp. 163-175.
[475] Para. 48 of the decision states the following: "[...] rules of that kind could indeed prove excessive by virtue of, first, the conditions laid down for establishing the dividing line between circumstances which amount to doping in respect of which penalties may be imposed and those which do not, and second, the severeity of those penalties," *Ibid.*

Pointing out the conformity of the court with the independent nature of CAS in this decision, one can conclude that CAS is the supreme authority in the sport-related matters. However, in order to reach such a confirmation, we should also agree on whether judicial review is possible under the EC competition law and the ECJ route. This is because neither the court itself, nor the doctrine on the subject, denied this possibility when there was incoherence between the legitimate objective of the rule and the scope of the limitations to attain this objective.[476]

Above and beyond, someone can consider the possibility of applying to the European Court of Human Rights (ECHR), completing the SFT route. After all, Switzerland is also a member of the Council of Europe and is subject to the ECHR jurisdiction. This assumption can be even stronger when we look at the CAS Tribunals' position for the ECHR provisions in the settlement of CAS disputes. For instance, in a recent case, the CAS panel affirmed that the ECHR provisions are not binding on the CAS panel even though they should be taken into consideration by the panel.[477]

Overall, our inquiries on this subject will be soon answered by the ECHR since Omer Riza has recently appealed an SFT decision to the ECHR basing on Article 6 of the European Convention on Human Rights, which deals with fair trials.To give more information about the history of the case, Omer Riza had a contractual dispute with his football club in Turkey and applied to FIFA to resolve it. FIFA returned the case to the Turkish Football Association (TFA). The case was resolved by the TFA through arbitration and resulted in disfavor of Omer Riza. Riza appealed it to CAS, despite the finality of the decision according to Art. 14 of the TFA Arbitration Code. CAS decided that it lacked jurisdiction on the case and Omer Riza appealed this decision again

[476] KOHLER and RIGOZZI, *supra* note 23, p. 50 para 57.
[477] CAS 2011/A/2384 UCI v. Alberto Contador Velasco & RFEC, CAS 2011/A/2386 WADA v. Alberto Contador Velasco & RFEC (Final Award rendered on 6 February 2012), para. 173.

to the SFT. However, the SFT confirmed the decision of CAS[478] and the case is now pending before the ECHR. Having seen the supranational law side, I next elaborate the Swiss law and New York Convention[479] aspects.

2.2.2.3.2 Swiss Law

According to R57 of the CAS Code, the arbitration panel has full power to review the facts and the law of the dispute. In other words, it may render a new decision or annul the decision which leads the premier instance of the decision to re-trench the dispute.[480] The applicable law as to the merits is the law on which the parties agreed; however, in the absence of such choice, the panel can apply to the law of the country where the federation, association or sports-related body is domiciled or other appropriate law as long as justifying such choice.[481]

Considering most of the associations and federations are domiciled in Switzerland and justifying the application of any other law rather than that of Switzerland is quite difficult, Swiss law is most likely to be the applicable law in the cases where the parties fail to choose the applicable law. The decision rendered by the panel is considered final and binding upon the parties. R59 explicitly determines the scope of review with the following:

---

[478] This news was released in May 2012 by the World Sports Law Report and included the following summary: "An appeal by Ömer Riza to the European Court of Human Rights (ECHR) will test whether footballers can take cases beyond the Court of Arbitration for Sport (CAS) and the Swiss Tribunal Fédéral if they feel they have been denied justice:" Ömer Riza ECHR Case to Test Post-Cas Avenues of Appeal', (May 2012) 10/5 *World Sports Law Report.*

[479] The United Nations Conference on International Commercial Arbitration, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," New York, The USA, 10 June 1958, available at HYPERLINK:< ww.unci tral.org/pdf/english/texts/arbitration/NY-conv/XXII _1_e.pdf > [last visited on October 30, 2013]. [New York
Convention]

[480] CAS, "Statutes of the Bodies Working for the Settlement of Sports-Related Disputes," 1 March 2013, Switzerland, available at HYPERLINK:<http://www.tas-cas.org/d2wfiles/ document/4962/ 5048/0/Code 20201320 FINAL2 0VER-SION20_en_.pdf > [last visited on October 30, 2013]. [CAS Code]

[481] *Ibid.*

> "It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in particular at the outset of the arbitration." [482]

As we see above, the judicial review of CAS arbitral award is not regulated in the CAS Code. However, we can reflect that review is possible under R59 when we read "it may not be challenged" in conjunction with "it may then be challenged" outside of the non-residence or setting aside as agreement reasons. The only limitation for these kinds of challenges can then be considered the ones defined in the Swiss arbitration law and in the New York Convention.[483]

Since the seat of arbitration for each arbitration panel is determined as Lausanne, Switzerland in the Code (R28),[484] we can consider that ICAS, designer of the Code, intended to handle every aspect of the arbitration, including its review process under Swiss law.[485] This is because the Swiss Private International Rules on Arbitration requires the application of Swiss law where the seat of arbitration is Switzerland and one of the parties is neither domiciled, nor habitually resident, in Switzerland when the arbitration agreement was concluded.[486]

In theory, we can say the seat of arbitration being Switzerland is a legal fiction in which the jurisdiction of Swiss courts and the application of Swiss law follow any CAS arbitration wherever

---

[482] *Ibid.*
[483] Maureen A. WESTON, "Simply a Dress Rehearsal - U.S. Olympic Sports Arbitration and De Novo Review at the Court of Arbitration for Sport," (2009) 38/1 *Georgia Journal of International and Comparative Law*, p. 116.
[484] CAS Code, *supra* note 480.
[485] Maureen A. WESTON, "Doping Control, Mandatory Arbitration, and Process Dangers for Accused Athletes in International Sports," (2009) 10/1 *Pepperdine Dispute Resolution Law Journal,* p. 23.
[486] Swiss Federal Code on Private International Law (CPIL), 18 December 1987, Art. 176.1, available at HYPERLINK: < http://www.umbricht.ch/pdf/SwissPIL.pdf > [last visited on October 30, 2013]. [CPIL]

it takes place in the world.[487]As a result, I would not be mistaken to affirm that such designation aimed at minimizing the interference of national courts with the CAS arbitration[488] and creating a centralized and unified dispute resolution mechanism for the sport-related disputes.

Nevertheless, Chapter 12 of the *Private International Law Act* (PILA) regulates international arbitration and according to Article 176, the condition of a PILA application depends on the seat of arbitration and where the parties are domiciled. As a result, if the seat of arbitration is Switzerland and one of the parties is neither domiciled, nor habitually resident in Switzerland, the arbitration is considered *international* and the PILA rules apply to the arbitration.[489]

Knowing the seat of arbitration is Switzerland in the CAS cases, we will accordingly only look at the residency condition in order to apply the PILA for CAS awards. Once the residency requirement is met, a party can apply to the Swiss Federal Supreme Court to set aside an award according to Art. 191 of the PILA and the Court will vacate the award in the presence of one of the following situations:[490]

> *a. if a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly;*
> *b. if the arbitral tribunal erroneously held that it had or did not have jurisdiction;*
> *c. if the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims;*
> *d. if the equality of the parties or their right to be heard in an adversarial proceeding was not respected;*
> *e. if the award is incompatible with Swiss public policy.*

[487] Holly RUDOLPH, "Horse Sense and High Competition: Procedural Concerns in Equestrian Doping Arbitration," (2010) 2/1 *Kentucky Journal of Equine, Agriculture, & Natural Resources Law,* p. 50.
[488] MCLAREN (2010), *supra* note 469, p. 309.
[489] CPIL, *supra* note 486.
[490] *Ibid.,* Art. 190.2.

In particular, Swiss public policy and due process requirements permit a very broad range of interpretation since Switzerland's public policy understanding can be very different from that of other countries. On this subject, Rouiller states that the court should also look at the public policy understanding of the country in which the award will be executed in order to create a more democratic review process without imposing Swiss law upon other countries.[491] Moreover, he underlines that this Swiss public policy condition will potentially apply to the awards whose execution will be sought in democratic countries.[492]

Conversely, Justice Corboz, former Chairman of the 1st Civil Law Chamber, contemplates that the Swiss fundamental rules should apply to the public policy aspects even if these rules are not welcomed in other legal systems.[493] For instance, *pacta sunt servanda* and *good faith* principles, which are well developed and recognized in the Swiss legal system can be the basis of many contract violations[494] although these two principles are not well known and accepted in other legal systems, such as common law.

2.2.2.3.3 New York Convention

According to Art. I, the Convention applies to the recognition and execution of foreign arbitral awards made in a foreign state or the awards which are considered non-domestic.[495] In other words, there is a certain degree of implicit delegation to any arbitral tribunal from the states

[491] WADA, "Claude ROUILLER, 'Legal Opinion on Whether Article 10.2 of the World Anti-Doping Code Is Compatible with the Fundamental Principles of Swiss Domestic Law,'" 25 October 2005, p. 50 para. 46.
[492] *Ibid.*
[493] WADA, "Antonio RIGOZZI, 'Legal Opinion on the Conformity of the Exclusion of "Team Athletes" from Organized Training During Their Period of Inelligibility with Swiss Law, Including the General Principles of Proportionality and Equal Treatment," 9 July 2008, pp. 251-252.
[494] *Ibid.,* pp. 252-255.
[495] New York Convention, *supra* note 479.

signing this Convention which makes it more efficient in the arbitration world.[496] This includes the CAS arbitration as well.

The New York Convention Article V regulates the conditions and scope of the challenge to set aside an arbitral award by two types of defenses: "1) defenses that one of the parties can raise (known as procedural defenses) and, 2) defenses that the court on their own accord can raise (known as substantive defenses)."[497] The validity of the arbitration agreement, proper notice of arbitration, claim preclusion, composition of the arbitral tribunal, and the finality of the award constitute procedural defenses, while the arbitrability of the subject matter and public policy issues are considered substantive defenses as stated in Article V of the Convention.[498]

However, with regard to the CAS awards, the application of the New York Convention is theoretically very limited since the seat of arbitration in the CAS arbitration is Switzerland and the parties have the possibility to use the public law route to vacate any CAS award.[499] This theoretical limitation can be even worsen by the practical limitation when the parties seek to set aside a CAS award before national courts outside of Switzerland. Based on Gatlin's Federal case and Landis's vocatur petition, Weston underlines this aspect with the following:

> "Although an athlete may seek initial relief through the domestic arbitration provided under the Amateur Sports Act, interlocking rules of the international sporting bodies permit de Novo review to a separate CAS panel seated in Switzerland. An athlete's chal-

[496] Abbas RAVJANI, "The Court of Arbitration for Sport: A Subtle Form of International Delegation," (2009) 2/2 *Journal of International Media & Entertainment Law,* p. 262.
[497] WESTON (U.S.), *supra* note 483, p. 117.
[498] New York Convention, *supra* note 479.
[499] The public law route functions differently for the domestic awards and international awards, but CAS awards − one will look for the recognition and execution in another state rather than Switzerland − are considered as *international awards*. Therefore, the real focus on this matter should be international awards, also defined in the PILA (Private International Law Act). In addition, according to Rigozzi, almost all CAS awards sought to be set aside before the Swiss Federal Tribunal were international awards: Antonio RIGOZZI, "Challenging Awards of the Court of Arbitration for Sport," (2010) 1/1 *Journal of International Dispute Settlement,* p. 218.

> lenge to a CAS award must be made pursuant to the New York Convention and applicable Swiss law, as designated in the CAS rules. Since 1970, the New York Convention has been a part of U.S. treaty and statutory law and is the means by which an athlete or a court may seek to deny enforcement of a CAS award within the United States, yet only the SFT has authority to set aside the CAS award pursuant to Swiss law. Accordingly, an athlete forfeits options for judicial recourse in his home country, and U.S. courts are effectively ousted of jurisdiction to review cases involving athlete doping or eligibility decisions." [500]

Consequently, I conclude that the Swiss Federal Tribunal is implicitly recognized as the supreme authority for the CAS awards. Switzerland is the legal home to the IOC, WADA, CAS, and more than 20 International Sport Federations and around 20 International Sport Organizations. In other words, Switzerland has already been the center of the sport world. Through a simple line of reasoning, one can perceive this jurisdictional delegation of *Swiss law* can thus hardly be questioned.

2.2.2.2.3.4 Final Considerations

Therefore, I am of the view that CAS awards are subject to certain review mechanisms, which are particularly derived from European jurisdictions, including Swiss law and European supranational law. This particular review mechanism can yet shade the supremacy of CAS arbitration, while enhancing the protection of fundamental rights, which vary from one country to another, but which have many common points in democratic societies, such as the right to a fair trial. In

[500] In Gatlin Case, Gatlin's demand of preliminary injunction under the *US Disabilities Act* with respect to the CAS decision was refused by the U.S. Federal Court due to the jurisdictional reasons. Moreover, the Court underlined the following (incorporated fromWeston): "Although the federal court considered the CAS decision "arbitrary and capricious" and the underlying action in violation of the Americans with Disabilities Act, it acknowledged that Gatlin's only avenue of relief was with the discretion of the Swiss Supreme Court." Similarly, in the Landis's vacatur petition, the Court also avoided to rule on Landis's demand of vacation the CAS award due to jurisdiction reasons and suggested Landis apply to the Swiss court because of the designated choice of law: WESTON (U.S.), *supra* note 483, pp. 123-126.

other words, that the decisions of CAS are subject to judicial review[501] prevents us from naming it as the "Supreme Doping Court."

One should bear in mind that having a review mechanism through these instruments of the ECHR, the EC competition law, the Swiss law, and the New York Convention will certainly strengthen the force and authority of the ultimate decision-making, albeit such a review mechanism should be mutually agreed upon and properly structured. However, a review mechanism, leading the doping jurisprudence to create *lex dopingiva*, should respond to the needs of all interest groups and the distinct nature of doping in order to be named as an ultimate review mechanism for the matter of doping.

2.2.2.4 Conclusion

Having tested the anti-doping regime in terms of the application of the pluralistic view of GAL, I have come to the conclusion that the anti-doping regime in its current stage may not fully and completely be associated with GAL. However, the anti-doping regime seems to move forward in fulfilling the requirements of the adapted (pluralist) GAL model in the long term. The key characteristics of the pluralist GAL model – knowledge sharing and informed participation, global public interest standing and ultimate review mechanism – can be observed, though they are not truly and fully implemented, in the anti-doping regime.

These initiatives can generate a more result-based and more effective anti-doping governance as long as they progress in fulfilling the requirements of the pluralistic GAL model. However, the

[501] *Ibid.*

more result-based and more effective anti-doping governance may require recognizing other global public good production and governance areas and cooperating with them eventually. Such recognition and cooperation can only be realized once the governance structures at the national and international levels are able to accommodate the needs of anti-doping regime in the name of global public interest.

The involvement of transnational organized crime in the doping market and the public health aspects of doping justify such a proposal in its simplest way. Any anti-doping governance model, undermining the outside aspects of the anti-doping regime such as "organized crime and public health" will be possibly unsuccessful. Thus, the anti-doping regime needs the help of national governments and other international organizations to handle these external aspects of the anti-doping regime. Such help or cooperation need still entails the organizational preparedness of WADA and cooperating parties. Therefore, I believe the pluralistic approach of GAL will firstly provide enough preparedness for WADA, and secondly will help the cooperating parties to transform themselves according to the needs of the anti-doping regime.

Additionally, we have considered the anti-doping regime as a global public good. As such, the pluralistic model of GAL as a producer of this global public good will likely overlap or intersect with other global public goods and/or global public good candidates, such as public health, security, research and development, economy, and peace. The question of whether the pluralistic view of GAL should be involved in producing these aforesaid global public goods/candidates in the extent of their overlap or intersection with the anti-doping regime should be simply answered "no".

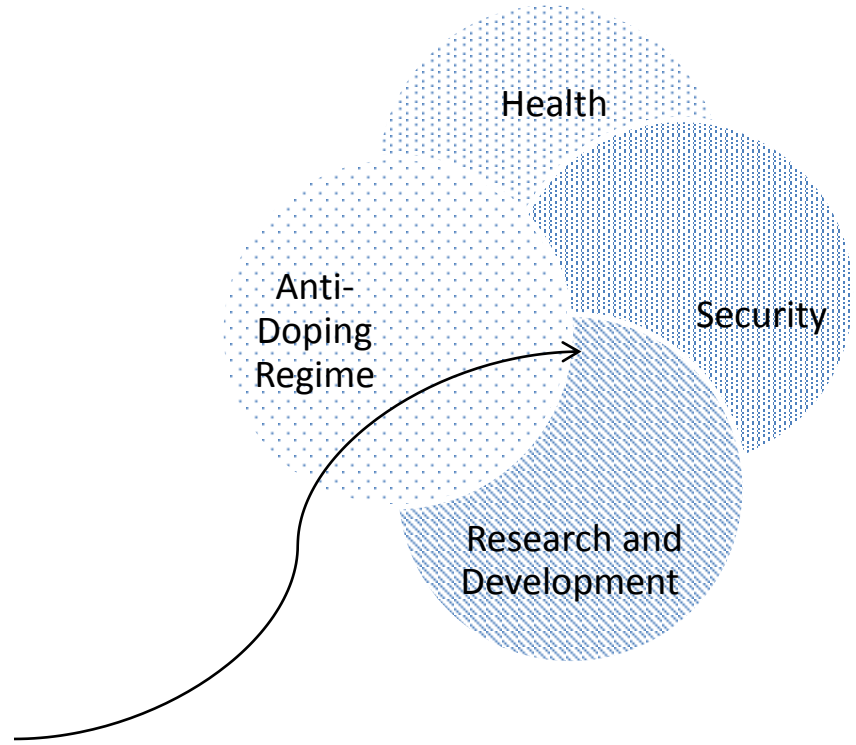
However, the question of whether the pluralistic view of GAL should produce other global public goods/candidates separately without considering the aspect of anti-doping regime should be answered "yes". The reason is that global public interest can be different for each global public good and this interest should not be interfered or manipulated by the global public good producing mechanisms whereas the recognition and cooperation among these mechanisms can be desired. This cooperation requirement and its limits should be determined according to the scope and range of intersecting or overlapping areas.

One can argue that waiting for the production of other global public goods, which have overlapping or intersecting areas with the anti-doping regime, may take a long time. The anti-doping regime needs to answer the needs of these overlapping areas soon. The involvement of transnational organized crime and public health concerns in the doping matter is the foremost reason why the anti-doping regime should respond to these overlapping areas quickly. My view in this regard is the anti-doping regime should reconsider its organizational structure and its strategy of fighting against doping with private law tools.

In this respect, the distinct legal nature of doping, the organizational structure of the anti-doping regime, and its review mechanism need to be revisited in light of the internal aspects of doping governance: informed participation and knowledge sharing and in light of the external aspects of doping: diversity, cooperation, organized drug and crime and public health. Such "revisiting" initiative can better guide the current national and international mechanisms, such as UNODC, INTERPOL, UNESCO, and WHO, and the states, which have already produced some global public goods overlapping with the anti-doping regime. Moreover, this initiative can prepare

WADA for a more effective collaboration with other global public good producing regimes which overlap or intersect with the anti-doping regime. Finally, such collaboration, performed with the remodelled anti-doping regime, will excel at responding appropriately to the needs of the overlapping areas.

Figure 4 Illustration of the Overlap or Intersection



Other overlapping "global public goods"/ "global public good candidates" can be added to these aforesaid overlapping areas with the anti-doping regime.

Conclusion of the Second Section

The anti-doping regime in its current stage may not be fully and completely associated with GAL. However, the anti-doping regime seems to include certain aspects of the adapted GAL model. The knowledge sharing and informed participation feature, the global public interest standing, and the ultimate review mechanism all, one way another, have certain applications in

the anti-doping regime. After all, the anti-doping regime holds the standing of a global public good consideration.

However, the pluralistic model of GAL as a producer of this global public good will likely overlap or intersect with other global public goods and/or global public good candidates, such as health, security, research and development, environmental protection, peace and welfare. Therefore, the involvement of transnational organized crime organizations in the doping market and the public health aspects of the prohibited substances or methods used out-of-the anti-doping schema require the anti-doping regime to collaborate with related instances, seek mutual legal assistance, and share in collective action at the national and international levels. However, neither can the anti-doping regime overcome all these challenges alone, nor should WADA handle these issues by itself in the long term.

Such challenges should be handled through the assistance of other global public good regimes to which the nation states and interest groups are bound more, such as global *organized crime* and *drug* regime.[502] The function of WADA here should be *collaborative* in the course of informed participation, knowledge sharing, and mutual legal assistance that the organized crime and drug regime will need to produce and perform under the GAL schema.[503] However, as I mentioned

[502] Organized crime and drug regime can be considered a global public good since there is an interest in its global production and the nation states recognize it through the treaties and international organizations that they formed.
[503] Such an organizational schema can be also developed according to the pluralistic (adapted) model of GAL. However, I limit this dissertation to focusing only on the criminal and public law aspects of the anti-doping regime arising from the public health and security considerations. Therefore, I will validate the organizational transformation or conversion needs of the anti-doping regime and other anti-doping intersected global public good producing regimes through the criminal and public law aspects of doping. Once I have evidenced the application of the adapted GAL approach on the governance of doping in sport through such subject matter consideration, the other mechanisms of GAL, which are bound to the subject matter focus (informed participation, knowledge sharing, and ultimate review mechanism), will have enough basis to be looked upon more enhancely in other studies.

previously, the anti-doping regime must still revisit its organizational structure in order to encourage better collaboration.

Conclusion of the Second Chapter

The pluralist approach of GAL, focusing on the subject area classification, the informed participation and knowledge sharing condition, and the ultimate review mechanism can be beneficial for the governance of the anti-doping regime. I consider this to be the case since the global public good and global public interest tenets will shift the direction of current anti-doping governance towards better accommodating the needs of global anti-doping governance. Even though the current anti-doping regime applies to our GAL model in a limited way, a full application of this model can be accomplished in the long term. In order for this to happen, the regime should transform itself to permit a better collaboration with other anti-doping intersected global public good producing regimes, such *global security*, *global public health*, and *global research* and *development*.

The organizational structures of these overlapped global public good producers and the form of the cooperation could be the subject of further studies. Neverthless, it can be concluded that the anti-doping regime with its current structure cannot produce these public goods alone and should not produce them alone in the long term either. Instead, the regime should contribute to their production by way of cooperating with such global public goods producing regimes in the intersected areas of anti-doping.

Considering nation states and organizational mechanisms have different constitutional and administrative frameworks, this proposal can require them to transform their institutional structures to better accomodate the required cooperation. In addition, the aforementioned global public goods schemas, including the anti-doping regime, should determine the scope of this transformation. Nonetheless, one needs to validate more profoundly why and how the transformation of the anti-doping regime should be realized in the near future, bearing in mind its central importance to the fight against doping.

Thus, excluding the research and development aspect which involves the education and training considerations,[504] I am going to validate such conversion need by focusing only on the global security and global public health aspects of doping, which requires the elaboration of criminal and public law considerations.

Conclusion of the First Part

In the first part of this thesis, I reviewed the major global governance models of global constitutionalism, global legal pluralism, and global administrative law with a view to finding an appropriate theoretical framework for the anti-doping regime. I decided on global administrative law as a theoretical framework, which would help me respond better to the problems of the anti-doping regime. My justification of such a choice focused on the fluid character of GAL which could accommodate the tenets of global public good and global public interest. I then proposed the pluralist theory of GAL, based on the subject area classification, informed participation,

[504] *Ibid.*

knowledge sharing, and the ultimate review mechanism − which will be required for the anti-doping governance in the longer term.

Having applied this pluralist theory of GAL onto the current anti-doping regime, I observed that the anti-doping regime included certain aspects of my pluralist GAL model. In this regard, I confirmed the global public good standing, some implications of knowledge sharing and informed participation, and the presence of a review mechanism. However, the anti-doping regime, categorized as global public good, needs to cooperate with other global public good regimes such as *global security*, *global public health*, and *global research* and *development* in the intersected areas of the anti-doping regime. At the same time, WADA must prepare itself for more intensive collaboration. As seen, this collaboration need may not perfectly be achieved through the instruments of private law alone.

Namely, the criminal and public law aspects of the doping as well as the diversity angle should also be considered in this transformation. However, I need to validate such requirements of diversity considerations and criminal and public law aspects of the anti-doping regime. Thus, excluding the global research and development intersection part,[505] I can accomplish such demonstration through the global security and global public health considerations.

Overall, if I demonstrate the anti-doping regime involves criminal and public law aspects associated with diversity considerations and public health consequences, I can then conclude on the transformation or conversion elements of the anti-doping regime. Therefore, I should first verify whether the current anti-doping regime constitutes relevant aspects of criminal law. I should then

[505] *Ibid.*

look at the current position of international level strategies with respect to their regards to the aspect of restricting the prohibited substances and methods. Should the current anti-doping regime fail to consider the required criminal law aspects in the governance of doping and should the multiplied national and international level strategies fail to answer properly the restriction of prohibited substances and methods, I will validate this thesis.

SECOND PART: *REMODELING THE ANTI-DOPING REGIME*

Having concluded the anti-doping regime should be remodeled to accommodate the needs of global doping governance in the first part of the thesis, I will now validate this theoretical conclusion in detail and outline the main aspects of such transformation or remodeling process. As I indicated at the end of the first part, I will only focus on the global security and global public health aspects in validating this thesis, excluding the global research and development consideration.[506] I will identify the major issues of the current anti-doping regime which intersect with the public goods of global security and global public health. In this regard, elaborating the criminal and public law aspects of the anti-doping regime in the realm of diversity, vertically and horizontally present, will be the essential aspect of confirming the thesis. The public health and collaboration related concerns of present anti-doping regime will further support my proposition: the anti-doping regime needs to be remodeled.

Thus, I will process the validation of this thesis and will outline the transformation or remodeling needs of the anti-doping regime by the following steps: I will first study the actual problems of the anti-doping regime, arising from the different perception of doping in the presence of different societies which originate from the failure to acknowledge the criminal law and public law aspects of doping. My primary goal in this regard, is to spot what transformational needs the anti-doping regime should consider for a better collaboration with other global public good

[506] For instance, though the anti-doping regime requisites the reconsideration of the economic, social, political, technical, research, and training aspects of the anti-doping regime which intersect with the global public good of research and development in accommodating the needs of global governance, I will not focus on them in this dissertation. As I mentioned earlier, the global public health and security concerns which generate the criminal and public law considereations of doping will suffice to validate my thesis of transformation or conversion needs for the doping governance: *Ibid.*

producing regimes of security and health, and finally for a better fight against doping in the presence of different perceptions on the matter of doping. Once I have finished elaborating such problems of the anti-doping governance in the first chapter, I will propose what modifications the anti-doping regime think through in the second chapter.

Therefore, the first chapter will investigate why and how the anti-doping regime fails to answer the needs of global governance, undermining the different perceptions of the nature of doping and excluding the criminal and public law aspects in the matter of doping. Namely, the private law-based structure intends to unify or harmonize the fight against doping while the legal nature of doping is perceived differently among countries. The latter constitutes the main issue to study in this chapter.

In the second chapter, I will work on the transformation process of anti-doping governance to accommodate the needs of global governance in the matter of doping. In this regard, what I concluded in the first part when I developed the pluralist GAL model will guide me. To repeat it again, I had highlighted the anti-doping regime should have more thoroughly considered the legal nature of doping and should have better taken into account the collaboration necessities with other anti-doping intersected global public goods producing regimes. In this regard, we need to assess the perception of doping and its legal nature in different societies in light of *pluralism* and *criminal and public law* aspects. This elaboration will finally lead me to propose how the anti-doping regime must transform itself and how other actors, such as international organized crime and drug and public health producing regimes, should better and more effectively contribute in the global anti-doping governance.

To say it differently, a better collaboration in the fight against doping will require settling the legal nature of doping at the global level and evaluating the diverse national and international level strategies in restricting the prohibited substances and methods. Once the legal nature of doping is determined and the diverse national and international level strategies are properly analyzed, my thesis of transformation and collaboration necessities for a better global anti-doping governance will be validated at the end of the second chapter. Accordingly, I will validate that *pluralism*, *criminal and public law* aspects and *collaboration* should be given much greater weight in the governance of anti-doping to protect and promote primarily the public health and security of the affected groups and individuals. To note again, I will limit myself by only focusing on the criminal and public law, collaboration, and diversity aspects of doping since they will suffice to validate this thesis.[507]

[507] *Ibid*.; after all, such validation of transformation needs of the anti-doping regime will eventually make easier the elaboration of other intersected global public good producing regimes in other studies later on.

FIRST CHAPTER: Problems with the Actual Anti-Doping Regime Structure

In this chapter, I will first elaborate how the diversity in the national anti-doping regimes cannot be easily overcome by the unification or harmonization attempts when the legal nature of doping is perceived differently among countries. The objective here is to demonstrate that the fight against doping is perceived differently around the world and the unification or centralization cannot help as required when the nation state level understanding or perception of doping changes from country to country.

Secondly, I will study how the anti-doping regime at the international level fails to answer the needs of global governance with its private law based structure. In this regard, I will particularly focus on the criminal and public law aspects of doping governance and its failure to pay greater attention to these aspects in the doping governance. Moreover, I will study the major international organizations responsible with doping governance, from WADA to the IOC and CAS, in order to provide evidence for such failure.

Section 1 *Managing the Different Perceptions of Doping in the Different Societies*

The anti-doping regime at the national level includes three different mechanisms, based on criminal law, private law, and mixed of criminal and private law (hybrid). Giving examples from each mechanism of criminal law, private law, and hybrid systems, I will indicate how the unified or centralized anti-doping governance can influence different societies in their perception of the legal nature of doping. I will thus briefly study certain national anti-doping regimes, which in-

clude Italy, Australia, Canada, the United States, Turkey, France, and Sweden. I have selected these national anti-doping regimes randomly since my point here is to reflect the local (nation state) level diversity in the fight against doping. As a result, I will only study the general context of these national anti-doping regimes.

1.1 Examples of the Diverse National Anti-Doping Regimes

In this section, I will examine diverse national anti-doping regimes which benefit from the criminal justice mechanism, private law based system, and hybrid approaches. My aim here is to demonstrate a picture of complexity regarding how good the centralized or unified global anti-doping regime can be without considering such diversity and difference in the perception of doping. In other words, the impact of a top-down anti-doping rule or standard can be different when the recognition of this rule or standard is perceived differently at the local level on account of different legal systems/cultures and infrastructural preparedness aspects.

1.1.1 Criminal Law Mechanism: *Italy*

Italy is the foremost example of the fight against doping through criminal justice mechanisms. The criminal law mechanism constitutes the most challenging strategy to WADA's legal nature perception of doping. As seen in the Turin Olympics, the regime collisions took place because of the difference between Italian laws and regulations about doping and the global doping rules and standards of the WADA Code.[508] Although the problem was overcome when Italy had to concede

[508] Italian Code, *supra* note 10; The IOC did not welcome Italy's Anti-Doping Law stipulating prison penalties. Italy's non-application to the criminal sanctions during the games resolved the problem. However, we should bear in

to WADA's legal order, the impact of doping criminalization continued once the games were over in Italy. Therefore, one cannot deny that restricting and eliminating the prohibited substances or methods will require external tools outside of WADA's legal order.[509] In Italy, the matter of doping is regulated with the *Disciplina della tutela sanitaria della attivita' sportive e della lotta contro il doping*, law number 376 of 2000, which ensures the application of the criminal justice mechanisms to overcome the fight against doping. [510]

1.1.2 Private Law Mechanisms: *Canada, Australia, the United States* and *Turkey*

In *Canada,* the fight against doping is primarily regulated by administrative mechanisms, rather than the extensive imposition of, or contribution from, the criminal justice mechanism. Although the majority of the prohibited substances listed in the WADA Prohibited List are also included in

---

mind that Italy did not have to obey what IOC demanded while not having much choice other than collaborating with the IOC in order to continue hosting the games. To note, on this subject, some authors concluded the "power of private legal order (IOC) over a national legal order." For instance, Thomas SCHULTZ analyzed this issue in terms of the European legal theory: Thomas SCHULTZ, *La "Lex Sportiva" Se Manifeste Aux Jeux Olympiques De Turin: Supré matie Du Droit Non-Étatique Et Boucles Étrangés*, Cambridge University (Lauterpacht Research Center for International Law, 2006. [Turin Olympics]

[509] In this sense, as I will study in detail in the second part of this thesis, the report of HOULIHAN and GARCIA which involves highly important qualitative and quantitative data on this subject holds the foremost evidence for this assumption: Barrie HOULIHAN and Borja GARCIA, *The Use of Legislation in Relation to Controlling the Production, Movement, Importation, Distribution and Supply of Performance-Enhancing Drugs in Sport (Peds),* WADA-UNESCO, 2012, p. 56.

[510] According to this law, "doping controls and analyses are carried out by laboratories accredited by the IOC or other international organizations recognized by the international regulations in force, on the basis of a convention signed by the Commission for the Monitoring and Control of Doping and the Protection of Health in Sporting Activities" is expressed in Article 4.1; and "the integration of the sporting organizations' regulations into law number 376 of 2000" is stipulated in Article 6. In doing so, CONI (*Comitato Olimpico Nazionale Italiano*), national sports federations, affiliated sports clubs, sporting organizations, and public and private organizations shall provide "the sanctions and disciplinary procedures to regulate their members in the case of doping or refusal to submit to testing"(Article 6.1). As to the penalties, "any athlete using banned substances is punished with impri- sonment for a period of three months to three years and a fine of € 2500 to €5000; any person, including a doctor, athlete, manager, or attendant of a sports team, supplying drugs to athletes is punished with imprisonment for a period of two to six years and a fine €5,000 to €75,000)." The Act also makes possible "a permanent sanction from employment with a sport organization" (Article 9). For a critical analysis of using criminal justice mechanism to combat with doping, see Christopher MCKENZIE, "The Use of Criminal Justice Mechanisms to Combat Doping in Sport," (2007) 9 *Sports Law eJournal,* p. 7, available at HYPERLINK: <http://epublications.bond.edu.au/slej/ 4/> [last visited on February 26, 2013]; Sergio BONINI, *Doping E Diritto Penale* Padova: CEDAM, 2006.

the *Controlled Drugs and Substances Act*, one can also say the fight against doping in Canada is well supported by the criminal law mechanisms as well.[511] Revised when necessary, a 2011 version of the Canadian Anti-Doping Program (CADP) has been effective as of March 1, 2011, and integrates the following: "2009 Word Anti-Doping Code; The Canadian Policy Against Doping in Sport (CPADS) approved by federal, provincial and territorial governments on April 30, 2004 and again in February 201; The Physical Activity and Sport Act passed on March 19, 2003; and The Canadian Strategy for Ethical Conduct in Sport." [512]

This Canadian Anti-Doping Program is run by the Canadian Centre for Ethics in Sport (CCES) which describes itself as "a non-profit organization independent from organizations and govern-

[511] Seeking, obtaining, possessing, trafficking, importing, and production of doping substances are only punished with criminal sanctions when the substances are prohibited by the 1996 Controlled Drugs and Substances Act. In this regard, the Prohibited List of substances and stimulants is modified when necessary and the last modification was made in February 2013.Thus, for example, "anabolic steroids and their derivatives, cannabis, and Methylphenidate (Ritalin)," which are known as doping substances, are prohibited: Controlled Drugs and Substances Act, SC 1996, c 29. Nonetheless, knowing that the prohibited doping methods such as gene doping is neither a substance, nor a stimulant and cannot be included in this Act and the fact that the words of *doping*, *designer*, or *enhancement* are not mentioned in the Act make us think of a blurry line framing the scope of the Act, around which an interpretation will always be possible.

[512] CCES, "Canadian Anti-Doping Program," 1 March 2011, available at HYPERLINK:< http://www.cces.ca/files/pdfs/CCES-POLICY-CADP-E.pdf> [last visited on October 30, 2013]. To give a brief histrocial explanation for what led the CADP to take its actual form, the Canadian Anti-Doping Initiative, named as the Canadian Anti-Doping Program today, first came into effect on 1 June 2004 and integrated national (notably the *Canadian Policy on Doping in Sport* [2002] and the *Canadian Policy against Doping in Sport* [1991]) and the international developments (notably the WADA Code) in doping. Particularly, after the Ben Johnson scandal in 1988, the Canadian government started taking the fight against doping seriously; The Dubin report on the Ben Johnson inquiry was highly important to raise the awareness at the governmental level and led the Government to inject more funding into the Canadian Anti-Doping Program; In particular, the sentences of Justice Dubin in the fight against doping and the impact of sport on society highlighted that the Government's funding of sport was not only to unite the country and express Canadian culture and heritage, but also to promote the social policies of the country at the national and international levels; As response to the recommendations in the Dubin report, the Canadian Centre for Drug-free Sport was founded in 1991 under the rules of the *Corporations Act*. This private organization was recognized later by a federal-provincial agreement entitled "Canadian Policy against Doping in Sport" and adopted in 1991 as the body responsible for the Canadian doping control at the provincial and federal levels; Parallel to the establishment of the Centre, which is fully funded by the Government, the Canadian Policy on Penalties for Doping in Sport describes the activites of the newly formed Centre: Charles L. DUBIN, "Report of the Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Atheletic Performance XV," (1990), p. 5, cited in Joseph DE PENCIER, "Law and Athlete Drug Testing in Canada," (1994) 4/2 *Marque- tte Sports Law Journal,* p. 264.

ments with a mission to safeguard Canadian Anti-Doping initiatives."[513] And, the CADP includes:[514]

> *1- Conducting Athlete Education programs (rule 2) and doping controls and analysis (rule 6)*
> *2- Investigation of doping is to be conducted via the CCES by active cooperation and participation of Sports Organizations (rule 1.19 and 7.64)*
> *3- Administering the Athlete Whereabouts Program (6.80-6.122) and Results Management Program for the Athlete Biological Passport (7A.1-7A.12)*

Canada punishes doping violations by disciplinary and administrative sanctions.[515]

In *Turkey,* the fight against doping is regulated by private law mechanisms, albeit there is no centralized organization coordinating the anti-doping activities for the time being. Following the instructions of WADA, Turkey is establishing a centralized anti-doping agency for which a doping commission was already founded in June 2011 within the Turkish National Olympic Committee (TNOC).[516] Nonetheless, the Law Project providing the establishment of the Turkish National Anti-Doping Agency is still under the process of enactment.[517] In Article 3, the Project

[513] The CCES declares its funding sources as follows: "the CCES receives its funding from a variety of sources, including Sport Canada, fee-for-service revenues and grants:" The CCES, "Funding," available at HYPERLINK : < http:// www.cces.ca/en/aboutus> [last visited on February 27, 2013].
[514] The Program applies to "athletes, athlete support personnel, sport organizations, all other organizations adopting the program, and individuals that are members of, or participants in any organization adopting the program" (rule 1.3). In addition to that, the governments are laden with "roles and responsibilites in the implementation of the program even though they do not adopt the program" (rule 1.3a). These responsibilities can be in the form of "imposing additional consequences or disciplinary rules" (rule 1.8).
[515] These sanctions can range from the athletes to teams, national sport organizations, athlete support personnel, and any other person. For instance, "reduction or elimination of governmental financial assistance for individuals" (rule 7.57) and "discretionary financial sanctions for any anti-doping violations" can be imposed upon while teams (rule 7.59) and national sports organizations (rule 7.60-1) can face with "disqualification or participation in a compulsory educational program funded by the sport organization."
[516] The Agency is now in the process of complying with the WADA Standards which include those of the laboratories and testing.WADA, "Minutes of the Wada Foundation Board Meeting," 20 November 2011, p. 26, available at HYPERLINK:<http://www.wada-ama.org/Documents/About_WADA/ Foundation Board_Minutes/WADA _ Foundation_Board_Meeting_Minutes_20Nov2011_ENG_FINAL.pdf> [last visited on October 31, 2013].
[517] The Law Project was first submitted to the Turkish Grand National Assembly (TGNA) on 16. 02.2007, but could not be enacted due to the procedural reasons (International regulation of the TGNA, Art. 77). Subsequently, the Office of the Prime Minister submitted it again to the TGNA on 9 April 2008. The law project and its history of submission are available at HYPERLINK: < http: //www2.tbmm.gov.tr/d23/1/1-0562.pdf> [last visited on October

states that "The Agency should be established according to the private law provisions and should be independent. It is not funded by the government, but is to be audited by the Government (Art. 6)."[518]

Aside from these developments, Turkey fights against doping through government regulations and the rules of the anti-doping programs, imposed by the national sport organizations or federations which tend to comply with WADA rules and standards more and more, such as the Turkish Football Federation (TFF) and the Turkish Basketball Association (TBA).[519]

In this regard, Turkey's fight against doping was first governed by a regulation of the General Directorate for Youth and Sports, dated 26 August 1993, and titled *Regulation on the fight against doping.*[520] This Regulation was prepared according to the requirements of the Council of Europe Anti-Doping Convention, adopted in 1980 and ratified by Turkey.[521] As well as recogniz-

---

31, 2013]. For further reading about the history of doping in Turkey, see Kısmet ERKİNER, "Dopingle Mücadelede Türki- ye'nin Pozisyonu," *60. Hukuk İlmi Uluslararası Birliği – IALS Kongresi Spor Hukuku Sempozyumu*, 14.05.2010.

[518] *Ibid.*

[519] In this regard, the TFF and TBA conduct doping analyses: Ahmet ARAMAN, "Dünyada ve Ülkemizde Dopingle Mücadele Kurumları" in Turgay ATASÜ, İlker YÜCESİR, and Bülent BAYRAKTAR (eds.), *Dopingle Mücadele Ve Futbolda Performans Artırma Yöntemleri*, Ankara: Ajansmat, 2011, p. 143; And, these doping analyses are complied with the UNESCO Convention, the Eureopean Anti-Doping Convention (EADC), FIFA, FIBA, and UEFA: Article 3 of the TFF Anti-Doping Code:Türkiye Futbol Federasyonu, "Türkiye Futbol Federasyonu Futbolda Dopıngle Mücadele Talimatı," 25.08.2009, available at HYPERLINK:<http://www.tff.org/Resources/TFF/Documents/2009 DK/TFF/talimatlar/Dopingle-Mucadele-Talimati-25-08-2009.pdf> [last visited on October 31, 2013]; Türkiye Basketbol Federasyonu, "Türkiye Basketbol Federasyonu Dopingle Mücadele Yönergesi," 08.2.2010, available at HYPERLINK: <http://www.tbf.org.tr/tbf/mevzuat/y%C3% B6nergeler> [last visited on October 31, 2013]. However, there is a tendency in the TFF towards having more flexibility in framing its anti-doping program since UEFA and FIFA provide certain latitude to do so in comparison to the other International Federations: Turgay ATASÜ, "Futbol Açısından Ülkemizde ve Dünyada Doping Konusuna Genel Bakış" in ATASÜ, *Ibid*., p. 27.

[520] Gençlik ve Spor Genel Müdürlüğü, "Genclik Ve Spor Genel Müdürlüğü Dopingle Mücadele Yönetmeliği," 26.8.1993, available at HYPERLINK:< http://www.thsf.gov.tr/Sayfalar/Content View.aspx?ContentUrl =/Yonetmelikmevzuat/Genclik ve Spor Genel Mudurlugu Dopingle Mucadele Yonetmeligi.pdf> [last visited on October 31, 2013]. [Turkish Doping Regulation]

[521] The aim of this Convention was to take a collective action in the fight against doping and ensure the domestic coordination among the members of the Council. As a result, the adoption of the necessary regulations described in the Convention at the national level was the main goal. In doing so, Article 3.2 stated the following reference to the

ing the pre-established Hacettepe University Doping Center which was founded in 1989[522] by a protocol, concluded between Hacettepe and General Directorate of Youth and Sports, the Regulation included the general frameworks of sample collection, administration, analysis, appeal mechanisms, and sanctions.[523] The Center was accredited by the IOC in 2001 and by WADA in 2003.[524] Governed by the academics from Hacettepe University, the Center is empowered to "prevent unfair competition among athletes and protect the health of athletes; conduct sample collection, analysis, and administration of the results; participate in research and develop projects with respect to the detection of doping; inform the public regarding doping and to organize seminars, conferences, and panels to accomplish this goal."[525]

As such, the Center executes a more technical function in the fight against doping and the adjudication and sanction mechanisms are conducted by different bodies outside of the Center.[526] The other interesting point about Turkish doping regime is the knowledge level of the athletes about doping and its negative effects is far behind the regulatory momentum aimed at effectively

---

member states: "they shall ensure that there is practical application of this Convention, and in particular that the requirements under Article 7 are met, by entrusting, where appropriate, the implementation of some of the pro visions of this Convention to a designated governmental or non-governmental sports authority or to a sports orga nisation:" European Convention, *supra* note 444.

[522] Founding director of the Center was Prof. Dr. Atilla HINCAL: Turgay ATASÜ and İlker YÜCESİR , "Dopingin Tarihçesi" in ATASÜ, *supra* note 519, p. 11.

[523] *Ibid.*

[524] Nursabah BAŞÇI, "Türkiye Doping Kontrol Merkezi" in ATASÜ, *supra* note 519, p. 150.

[525] Art. 4 and 6-9 of the Bylaws of the Center: Türkiye Doping Kontrol Merkezi, "Türkiye Doping Kontrol Merkezi Yönetmeliği," 20 July 2004, available at HYPERLINK < http://www.resmigazete.gov.tr/eskiler/ 2004/07/20 040 720.htm#3> [last visited on October 31, 2013].

[526] Therefore, the adjudication and sanction mechanisms are conducted by the sport organizations in accordance with the general rules of the International Federations to which they are entitled. However, there are also some additional administrative sanction mechanisms for the athletes competing at the national level. Turkish Doping Regulation, *supra* note 298, Art. 15; Article 48 of the Regulation on Sanctions for Amateur Sports: Gençlik ve Spor Genel Müdürlüğü, "Gençlik ve Spor Genel Müdürlüğü Amatör Spor Dalları Ceza Yönetmeliği," 07 January 1993, available at HYPERLINK: <http://www.yonetmelikler.com/2010/11/amator-spor-dallari-ceza-yonetmeligi/> [last visited on October 31, 2013].

fighting against doping in the country.[527] Finally, what one can conclude from the experience of Turkey is there is also an infrastructure problem. Thus, accommodating a supranational regulatory mechanism, let alone the issues of the proposed regulatory system, cannot be as easy and effective as expected.

The *United States* fights against doping through a centralized agency, known as the United States Anti-Doping Agency (USADA). Established in 2000, USADA carries out research, education, testing, and adjudication with regards to doping.[528] However, the Agency limits its doping control function to the Olympic, Paralympic, and Pan American games, thereby excluding professional events, while aiming at maintaining the integrity of sport and protecting the health of athletes.[529] What is worthy to note about USADA is it undertakes public law duties, such as the prosecution of doping matters within its private law structure, which is shaped by the international rules and standards.[530]

Thus, the question of how to maintain the fairness and impartiality in the investigation and adjudication of doping remains unresolved when the USADA charges can be brought to

[527] According to a recent academic research which was conducted in Turkey, the athletes knew very little about doping: Mehmet KARATAŞ, Özgür KARATAŞ, and Hakan ÇEVRİM, "Beden Eğitimi ve Spor Yüksekokulu Öğrencilerinin Doping Kullanımına Bakışları Ve Etik," (2012) 14/3 *Düzce Tıp Dergisi,* pp. 28-31; Gözde GENÇ-TÜRK, Tekin ÇOLAKOĞLU, and Mehmet DEMİREL, "Elit Sporcularda Doping Bilgi Düzeyinin Ölçülmesine Yönelik Bir Araştırma (Güreş Örneği)," (2009) 3/3 *Niğde Üniversitesi Beden Eğitimi ve Spor Bilimleri Dergisi,* pp. 213-21; Ebru ÇETİN, Burcu E. DÖLEK, and Özlem ORHAN, "Gazi Üniversitesi Beden Eğitimi ve Spor Yüksekokulu Öğrencilerinin Ergojenik Yardımcılar, Doping ve Sağlık Hakkındaki Bilgi ve Alışkanlıklarının Belirlenmesi," (2008) 6/3 *SPORMETRE Beden Eğitimi ve Spor Bilimleri Dergisi,* pp. 129-132.

[528] Laura S. STEWART, "Has the United States Anti-Doping Agency Gone Too Far - Analyzing the Shift from Beyond a Reasonable Doubt to Comfortable Satisfaction," (2006) 13/1 *Villanova Sports & Entertainment Law Journal,* p. 224.

[529] *Ibid.*

[530] The Agency describes itself as a non-profit corporation, registered according to the *Colorado Non-profit Corporation Act*: Article 1 of the USADA Bylaws, see USADA, "Bylaws of the United States Anti-Doping Agency," 10 February 2012, available at HYPERLINK: <http://www.usada.org/uploads/usada %20by laws. pdf> [last visited on October 31, 2013]; In describing itself so and being empowed by the US Congress, the USADA activities range from the investigation and adjudication of doping to doping sanctioning: STEWART, *supra* note 528, p. 224.

arbitration under the rules of the American Arbitration Association (AAA) and the awards of these arbitration tribunals can be appealed to CAS.[531] In other words, the international rules and standards with respect to the doping investigation and adjudication can be in conflict with the US rules and standards of due process. This conflict can be even more in evidence when the nature of investigation and accusation reflects criminal law aspects, but when the accused ones have only private law tools at their disposal to protect themselves.[532]

In *Australia*, the Australian Sports Anti-Doping Authority (ASADA), similar to USADA, was established in 2006, and has been responsible for testing, education, and advocacy, but also has had the power of investigating doping allegations and presenting them to the related sport tribunals.[533] However, the legal structure of ASADA differs from that of USADA since the *Australian Sports Anti-Doping Authority Act* regulates it as a government entity (a constitutional corporation).[534] Moreover, its Chief Executive Officer (CEO) is appointed by the government and the minister can give directions to the CEO.[535]

[531]The Result Management procedure also indicates that USADA is the supreme doping authority in the United States, considering it is not subject to any contol of the United States Olympic Committee (USOC) and declares itself as the "National Anti-Doping Organization:" USADA, "United States Anti-Doping Agency Protocol for Olympic and Paralympic Movement Testing," 01 January 2009, available at HYPERLINK: <http://www.usada. org/files/pdfs/usada-protocol.pdf> [last visited on October 2013, 2013].

[532] As a result, I conclude that USADA is tightly bound to WADA and the U.S. system fights against doping with a separate and specialized private body which is in compliance with international doping rules. That INTERPOL can also be involved in the prosecution procedures of USADA under the rules of substantial assistance according to Art. 10.5.3 of the USADA Protocol can result more in the violation of athletes' fundamental rights if they remain to defend themselves with private law tools. On this subject, Michael STRAUBEL also states that WADA can also aggravate such unfairness based on its Art. 14.2.2. in which NADOs should inform WADA about their prosecutions: Michael S. STRAUBEL, "Lessons from Usada V. Jenkins: You Can't Win When You Beat a Monopoly," (2010) 10/1 *Pepperdine Dispute Resolution Law Journal,* p. 151.

[533] WADA, "Elise PARHAM, Australia and the World Anti-Doping Code, 1999-2008," 1 June 2008, p. 57.

[534] *The Australian Sports Anti-Doping Authority Act* 2006.

[535] *Ibid.,* Art. 24.

However, despite such governmental authority over ASADA, the regulation of the sensitive information exchange between ASADA and other national authorities, such as the Australian Customs Service and Australian Federal Police and international organizations with law enforcement functions, distinguishes it from USADA again.[536]

1.1.3 Mixed Mechanisms: *France and Sweden*

Along with the implementation of the WADA Code, France decided to have an independent anti-doping agency and created *L'Agence Française de Lutte Contre le Dopage (AFLD)* in 2006, known as the French Anti-Doping Agency.[537] France's anti-doping regime was subject to major criticism in 1998 because of the sensational doping scandal of *Tour de France*.[538] Afterwards, France started the fight against doping more seriously and established *Le Conseil de prévention et de lutte contre le dopage (CPLD)* in 1999, the precursor organization to the AFLD.[539]

---

[536] *Ibid.,* Art. 67-8, 72.f, and 73; According to Parham, ASADA can be a global model that is accountable as well as effective in the fight against doping with its given investigation and adjudication powers: PARHAM, *supra* note 533, pp. 57-58; Nonetheless, in this respect, I should note that Russia modelled its Anti-Doping Agency in line with the USADA model which has more autonomy and authority in the investigation and adjudication of doping cases: *Ibid.,* p. 58.

[537] The law which created the AFLED is known as *Loi n° 2006-405 du 5 avril 2006 relative à la lutte contre le dopage et à la protection de la santé des sportifs*.

[538] Tour de France, *supra* note 44.

[539] The CPLD was established within the National Laboratory for the Detection of Doping, situated in Châtenay-Malabry and functioned under the authority of the Ministry of Sport: The founding law is known as *Loi n° 99-223 du 23 mars 1999 relative à la protection de la santé des sportifs et à la lutte contre le dopage*. The CPLD functioned well and its success in the fight against doping was recognized in the report of observers regarding the *Tour de France* held in 2003. However, the necessity for a closer relationship among WADA, the CPDL, the UCI, and other French authorities in order to have more realistic feedback and access to all required documentation caused the establishment of the APLD in 2006: In this sense, the following statement was included in the report of observers: "[...] the strategy developed by France in its fight against doping, especially in the area of legislation and through creating the CPLD, providing a high-quality anti-doping control laboratory and implementing measures to prevent trafficking of doping substances:" WADA, "Luis HORTA, Anik SAX, and Jennifer EBERMANN, 'Independent Observer Report-Tour De France 2003," p. 34, available at HYPERLINK: <http://www.wada-ama.org/- rtecontent/ document/tdf_io_report.pdf> [last visited on October 31, 2013].

France not only wanted to strengthen its task-specific centralized anti-doping program by empowering the AFLD, but also wanted to back up this administrative scheme by criminalizing doping.[540] In its *Code du Sport,* known as the French Code of Sport, adopted in 2006, Articles L232-25 stipulate "a six-month imprisonment and a 7,500€ fine when athletes refuse to comply with a legal doping test or fail to abide by an administrative sanction given by the AFLD."[541] The AFLD, whose organization structure and whose functions are described by a specific decree,[542] is authorized to conduct research, test on site, control analyses, and ensure doping prevention.[543] It also has the following disciplinary powers:[544]

> *1-Imposing disciplinary sanctions to persons not licensed to participate in training, competitions, or sporting events, of persons relevant to the disciplinary power of a sports federation (Article L 232-22, 1°-2°).*
> *2-Being able to modify the decisions of national sports federations and extend the disciplinary sanction of an athlete given by a federation for his activities relevant to other federations (Article L 232-22, 3°-4°).*

As seen above, the AFLD's powers do not apply when international competitions take place in France. The *Code du Sport*, with the exclusion of international competition aspect from the competence of the AFLD and National Sport Federations (NSFs), accepts the competence of the International Federations (IFs), namely the WADA rules and CAS jurisdiction.[545] Further, the

---

[540] Apart from criminalizing doping under the rules of the *Code of Sports*, France has a specific regulation on prohibiting trafficking the doping products: *Loi no 2008-650 du 3 juillet 2008 relative à la lutte contre le trafic de produits dopants*. [Code du Sport]

[541] Besides, supplying a doping substance to an athlete is also punishable by five years' imprisonment, a fine of 75.000€, and a disciplinary sanction (Article L232-26). Nevertheless, the athletes are free to have either penal sanction or disciplinary sanction: *Ordonnance no 2006-596 du 23 mai 2006 relative à la partie législative du code du sport*.

[542] *Décret n°2006-1204 du 29 septembre 2006 relatif à l'organisation et au fonctionnement de l'Agence française de lutte contre le dopage*.

[543] *Loi n° 2006-405 du 5 avril 2006*, *supra* note 537.

[544] *Code du Sport*, *supra* note 330. The scope of this disciplinary power is also regulated by a decree: *Décret no 2011-58 du 13 janvier 2011 relatif aux sanctions disciplinaires en matière de lutte contre le dopage*.

[545] Frédéric BUY et al., *Droit du Sport*, L.G.D.J.: Monthchretien, 2006, p. 511.

case of whether international or national rules will be applicable to international athletes still remains unclear.[546] This is important because the AFLD decisions cannot be appealed to CAS.[547]

In *Sweden,* the Sweden Sports Confederation (SSC), responsible for the Swedish Government Anti-Doping Policy, is the main authority in the fight against doping. The SSC has the following duties: "doping control, analyses, legal affairs, research and development, education and training, information, collaboration at the national level, and collaboration at the international level."[548]

In addition to the SSC and its anti-doping policy, the *Doping Agents Act* (1991-1969), which came into effect on 1 July 1992 and which was made stronger in 1999, prohibits certain types of doping agents and imposes "imprisonment of up to four years for the supplying, production, acquisition with intent to supply, sale, possession, or use of 'synthetic steroids, testosterone and its derivatives, growth hormones, and chemical substances that increase the production and release of testosterone and its derivatives or of growth hormones' except for medical or scientific purposes."[549]

The SSC's aim is to ensure that all sport branches in Sweden are subject to the same doping rules. The punishment of doping activities is managed by the disciplinary bodies of sports organizations and the decisions of these sport bodies can be appealed to the independent *Swedish*

---

[546] Alain DUFFAUT, *Séance Senat 19 oct. 2005 (compte rendu des débats sur le projet de loi sur le dopage) p. 6*, cited in *Ibid*., p. 505.

[547] The appeal which may be only on a point of law can be made to the Supreme Court (Article L. 232-29): *Loi n° 2006-405 du 5 avril 2006*, *supra* note 537. Howewer, in a recent law adopted in February 2012, International Organizations are also required to inform the relative judicial authorities with respect to the sanctions regulated in the article *L. 232-25* and *26*: Art. L 232-10-1, *Ordonnance n° 2010-379 du 14 avril 2010 relative à la santé des sportifs et à la mise en conformité du code du sport avec les principes du code mondial antidopage*. The Ordonance was ratified by Art. 14 of the *Loi no 2012-158 du 1er février 2012 visant à renforcer l'éthique du sport et les droits des sportifs.*

[548] Sec. 1-7, of the SCC By-laws: *RF:s Stadgar I lydelse efter RF-stämman 2011*.

[549] Sec. 1-3, *Lag (1991:1969) om förbud mot vissa dopningsmedel*, 19.12.1991.

Sports Tribunal.[550] It should be noted that Sweden is the first country to ratify the UNESCO Convention in the world,[551] and is one of the nine member countries of the International Anti-Doping Arrangement (IADA), which aims at cooperatively pursuing the anti-doping activities in sport.[552]

In addition, Sweden differs from other Nordic countries of Denmark and Norway in terms of its mixed strategy in the fight against doping. The most significant difference is that other Nordic countries do not penalize doping. The other differences and similarities can be summarized in the following table:[553]

Table 6 Sweden and Other Nordic Contries

Most similar and different outcome strategies

Common Scandinavian variables	***Sweden differs from Denmark and Norway***
-Support for CoE anti-doping conventions	-Ministry of Health and Social Affairs responsible for doping issues beyond sport; Ministry of Culture responsible for doping issues associated with sport
-Formal support for WADA and the 2005 UNESCO Convention	-Legal prohibition of doping use
-Top results in doping-associated sports	-Political anti-doping in sport profile downplayed after 1998
-Formal support for the World Anti-Doping Code (WADC)	-Focus on fitness sector/popular use of doping substances prior to 1999
-Formal commitment to international anti- doping initiatives prior to 1998	-No independent, separate elite sport organization/ unit
-National sport icons associated with doping scandals/abuse	-No hosting of major international anti-doping events

[550] *Ibid.,* Sec. 8.
[551] Sweden ratified the Convention on November 9, 2005: UNESCO, "Sweden first State to ratify Convention Against Doping in Sport," 25.11.2005, available at HYPERLINK: <http://portal. unesco.org/en/ev.php> [last visited on March 4, 2013].
[552] The arrangement was established in 1995 by the governments of Canada, Australia, New Zealand, Norway and the United Kingdom and later on Denmark, Finland, Sweden and the Netherlands joined. Barrie HOULIHAN, "Detection and Education in Anti-Doping Policy: A Review of Current Issues and an Assessment of Future Prospects," (2008) 49 *Hitotsubashi Journal of Arts and Sciences,* pp. 57-58.
[553] The table is borrowed from Wagner and Hanstad: Ulrik WAGNER and Dag V. HANSTAD, "Scandinavian Perspectives on Doping - a Comparative Policy Analysis in Relation to the International Process of Institutionalizing Anti-Doping," (2011) 3/3 *International Journal of Sport Policy,* p. 365.

According to Wagner and Hanstad, Sweden is under the process of reviewing its anti-doping structure and replacing it with a more independent organization. Criticizing the Swedish model because its anti-doping activities are conducted by the same organization that is responsible for the elite sport, Wagner and Hanstad also highlight that Sweden conducts the fight against doping at the fitness level outside of the traditionally understood doping regime scope.[554]

1.2 Impact of such Diversity in the Fight against Doping

Having seen that nation states do not have a unified strategy against doping when they apply to the criminal justice mechanism or private law mechanism in the fight against doping, I can ask how far this diversity will impact on an effective global anti-doping governance and how this diversity or different perceptions on doping can be overcome or should be taken into consideration. In this sense, I will analyze two aspects of this impact consideration: 1) effectiveness in the global doping governance, and 2) WADA's response.

1.2.1 Impact on the Effectiveness

Seeing that there are also dissimilarities among the private law regimes, as witnessed in the cases of Turkey, the USA, and Australia, I can argue that the impact of the anti-doping regime at the local level will not be the same everywhere in the world, albeit the unification or harmonization of the anti-doping rules and standards at the global level goes for reducing or overcoming such issue.

[554] *Ibid.,* 369.

Even though the UNESCO Convention Art. 4 asserts countries can take additional or more rigid measures in the fight against doping, the presence of different mechanisms across the world can still cause problems. Overriding the issue of proper compliance with the WADA Rules or Standards at the time of an international competition,[555] it will affect the efficiency of the anti-doping regime outside of the international competition. For instance, doping has still been criminalized in Italy despite the applicability of WADA Rules and Standards during the Turin Olympics. Turkey, as noted earlier, has infrastructure issues, as the application of the WADA Rules or Standards cannot be pursued due to weaknesses in proper testing, education, investigation, and adjudication mechanisms.

In addition, different perceptions about doping at the local level can result in the collaboration deficits in the global governance of doping. For example, the communication of doping intelligence about a doping substance or method can face different barriers when the doping perception differs among countries. There is a huge difference between applying the public law tools and authority and using the private law tools and strategies when collaboration is needed in the fight against doping.

Thus, there is a genuine interest in considering the different impacts of global anti-doping regime in different societies when one designates the global anti-doping rules and standards. In other words, one cannot ignore the traditional understanding of criminal law and private law mechanisms that countries have applied for years in the fight against doping. The regulatory variances at the national level, not properly balancing the public and private law application, and failure to

[555] As happened in the case of Turin Olympics, see *supra* note 508.

applying the tools of criminal and public law effectively can create further problems, such as creating illegal doping markets and paving the way for the organized crime activities.

That is why, taking notice of the different legal cultures and regimes in light of their perceptions of doping is crucially important. In this regard, the legal nature of doping should be well defined so that countries can accommodate a more functional mechanism in the fight against doping. In other words, if countries know well about the social harm, public health, and security issues of doping, let alone the ethics and morality aspects, their doping perceptions can change. In this concern, what the anti-doping regime needs to settle is a good determination of the legal nature of doping. Saying doping is distinct in its nature is not helpful and can sound evasive in producing realistic anti-doping strategies.

1.2.2 WADA Code Response

Looking at the WADA Code and seeing the legal nature of doping is taken as "distinct" (by excluding the traditional criminal and private law proceedings), I empower my argument in regards to the ineffective doping nature determination. The distinct nature of doping cannot be overcome by creating distinct rules and standards, which will apply to countries with different national anti-doping perceptions.[556] Such nature of doping will lead countries to comply with the distinct rules and standards at the expense of abandoning their established perceptions in the

[556] For instance, at this point, the WADA Code affirms the following: "[...] these sport-specific rules and procedures, aimed at enforcing anti-doping rules in a global and harmonized way, are distinct in nature from criminal and civil proceedings.They are not intended to be subject to or limited by any national requirements and legal standards applicable to such proceedings, although they are intended to be applied in a manner which respects the principles of proportionality and human rights. When reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware of and respect the distinct nature of the anti-doping rules in the Code and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport:" Code, *supra* note 3, p. 17.

fight against doping. In a way, this view can be functional in certain countries where there is no previously established anti-doping structure and where there is no profound knowledge and/or perception about the matter of doping. However, there remains the problem of preparedness to accommodate such rules and standards in these given countries.[557]

The unification and harmonization option through the WADA Code cannot create effective solutions when the criminal and public law tools are undermined and when the diversity is not well perceived. For instance, the recent Code envisages empowering WADA and NADOs in the investigation of doping and making NADOs more autonomous and independent in their decisions and activities.[558] While doing so, the Code undermines the criminal law and public law aspects of doping.[559] Nonetheless, such an initiative without a proper impact analysis and informed participation review can add more problems to the current structure of the anti-doping regime.[560]

An idea of empowering NADOs and WADA more in the investigation of doping seems very radical, but can sound practical when one considers that a specialized agency with more investigation power is needed to gather and process the more specialized doping intelligence and information. However, taking into consideration the actual concerns of doping beyond the sport community, such as public health and security, I believe the anti-doping regime can cause more issues in the future by becoming harsher on athletes. For instance, athletes can be more inclined

[557] See the example of Turkey, s*upra* pp. 194-197.
[558] Code, *supra* note 3, Art. 22.6.
[559] *Ibid.,* Articles 20.5(1, 9, 10) and 20. 7 (10); WADA, "International Standard for testing and Investigations," available at HYPERLINK: < http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Code%20Review%202015/Code%20Final%20Draft/WADA-2015-ISTI-Final-EN.pdf> [last visited on April 18, 2014]. [ISTI 2015]
[560]Jean P. COSTA, "Legal opinion regarding the draft World Anti-Doping Code," 25 June 2013, Strasbourg, p. 6, available at HYPERLINK: <Legal opinion regarding the draft World Anti-Doping Code> [last visited on November 10, 2013]

to become mediatized by doping scandals in the harsher anti-doping regime. Moreover, organized crime groups can find the illegal doping market more attractive in the riskier environment of trafficking the prohibited substances and providing the prohibited methods.

Besides, such investigative powers can give more burden upon private law institutions of WADA and other NADOs when they have to take into consideration the human rights concerns, subject to public law. For instance, in Canada, the *Canadian Charter* applies to every person physically present on Canadian soil,[561] and any human right violation of an international athlete by the CCES can be theoretically challenged before the Canadian courts. Thus, practically every athlete faced with a human rights violation in Canada can bring it to the court.

The new international standard for testing and investigation (ISTI) takes in very broad concepts that can be risky. According to the new ISTI, "Anti-Doping Organizations shall do everything in their power to ensure that they are able to capture or receive anti-doping intelligence from all available sources"[562] and "Anti-Doping Organizations shall have policies and procedures in place to ensure that anti-doping intelligence captured or received is handled securely and confidentially, that sources of intelligence are protected."[563] Besides, NADOs may be able to share the gathered intelligence with other NADOs, law enforcement organizations, and disciplinary bodies "where appropriate and subject to applicable law."[564]

[561] *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.
[562] ISTI 2015, *supra* note 559, Art. 11.2.1.
[563] *Ibid.,* Art. 11.2.2.
[564] *Ibid.,* Art. 11.4.2.

Although the new Code aims at overcoming such dilemmas by including the principles of fair hearing,[565] giving a timely reasoned decision,[566] proportionality,[567] and other application of human rights,[568] I doubt how these principles will properly function with the strict liability and standard of proof applications which remain unchanged in the Code.[569] In any case, likewise in the example of Canada, international athletes can yet challenge any human rights violations in the local courts as long as the local legislation allows them to do so.

Conclusion of the First Section

The unification or harmonization solution to overcome the different perceptions about doping and to maintain the effective global anti-doping governance may not be functional when the legal nature of doping is not well determined and the criminal and public law aspects of doping are undermined. Determing the legal nature of doping as "distinct" and creating distinct doping proceedings accordingly have not yet resolved the issues related to the criminal and public aspects of doping coming out of the strict liability, standard of proof, and non-analytical positives concepts.[570] In this aspect, empowering WADA and NADOs with investigation powers and injecting internationally accepted human rights considerations into the Code as a security tool will create more problems where the legal nature of doping is perceived differently across the world.

[565] Similar to Article 6.1 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* and the ones generally accepted in international law: see Code, *supra* note 3., comment 8.1.
[566] *Ibid.*
[567] The Code 2015 includes the following while defining the *Code*: "[...] the Code has been drafted giving consideration to the principles of proportionality and human rights:" *Ibid.,* p. 1.
[568] *Ibid.*
[569] See *Ibid.* Art. 2.1-3.1.
[570] For non-analytical positives, see *Ibid.,* Art. 5.1.2 (b) and 5.8 (3).

That is why the adapted (pluralist) model of GAL is crucial. Namely, one cannot treat every subject area with the same governance model. Second, everyone affected by the governance of subject area should participate in the governance. Third, this participation should be conscious to maximize the benefit of participation, and participants should be informed and/or educated about the subject area. Fourth, the final regulation should be the product of both quantitative and qualitative analysis.[571] And fifth, once the anti-doping rules and standards are prudently developed and mutually agreed, the proper application of these rules should be safeguarded by an ultimate review mechanism.

Concluding the current anti-doping regime involves certain aspects of the adapted GAL model, such as consultation, informed participation, and review mechanism, I believe the anti-doping scheme should focus more on better determining the legal nature of doping in accordance with its criminal and public law aspects. However, there is a need to elaborate "the criminal and public law aspects of doping" which will justify the required collaboration between WADA, nation states, and other global public good producing regimes for an effective fight against doping at the global level.

Section 2 ***Managing the Criminal and Public Law Aspects of Doping***

Three international institutions known as the International Olympic Committee (IOC), the World Anti-Doping Agency (WADA), and the Court of Arbitration for Sport (CAS) administer

[571] France HOULE and Lorne SOSSIN, *Powers and Functions of the Ombudsman in the Personal Information Protection and Electronic Documents Act: An Effectivenes Study*, Office of the Privacy Commissioner of Canada, August 2010, p. 14.

the anti-doping governance. In this section, I will study these three institutional structures and their view on the criminal and public law aspects of doping. In other words, I will look at how the structure of anti-doping governance perceives the nature of doping and determines the strategies related to the criminal and public law aspects of doping in the fight against doping. Particularly, the question of a supreme law-making feature with a private law status poses great challenges when the nature of doping requires the implication of criminal and public law tools in the governance of doping and when the perception of doping, or the legal nature of doping in the world differs.

Therefore, this section will include the analysis of the international conventions and documents such as the *Olympic Charter*, the *International Convention against Doping in Sport*, and the WADA Code in light of their particular answer to the said "distinct" nature, diversity, and collaboration aspects of doping when they constitute the supreme anti-doping governance instruments.

2.1 The International Olympic Committee (IOC)

The International Olympic Committee (IOC), created on 23 June 1894, organized the first Olympic Games in Athens on 6 April 1896 under the direction of Pierre de Coubertin, and has ever since acted as the supreme authority of the Olympic Movement.[572] The IOC, located in Lausanne, adopted its first Charter of the organization in 1908 under the title of *Annuaire du Comité International Olympique* and consisting of only three pages on goals, recruiting,

[572] The International Olympic Committee (IOC), "Official Website," available at HYPERLINK: <http://www.olympic.org> [last visited on February 5, 2013]. [IOC Website]

meetings, and administration sections.[573] The 2013 Olympic Charter (OC) now in force is approximately 100 pages long and is a detailed codification of the IOC.[574]

According to the Charter, the IOC is "an international non-governmental not-for-profit organization, of unlimited duration, in the form of an association with the status of a legal person, recognized by the Swiss Federal Council in accordance with an agreement entered into on 1 November 2000."[575] And this private law based supreme organization of the Olympics defines the *Olympic Charter* (OC) as "the codification of the Fundamental Principles, Rules and Bylaws adopted by the International Olympic Committee (IOC). It governs the organization and running of the Olympic Movement and sets the conditions for the Olympic Movement and for the celebration of the Olympic Games."[576]

However, the IOC receives criticism for holding a transnational law-making status, for singling out the domestic participation, and for undermining democratic intellectual property rights.[577] The solidarity was the key component of the IOC as Pierre de Coubertin declared in 1923 that the games would conquer Africa.[578] And, the IOC emphasizes solidarity in its Charter and states

[573] The 1908 Charter is available at the IOC web site, see HYPERLINK:<http://www.olympic. org/ Documents/Olympic%20Charter/Olympi_Charter_through_time/1908-> Charte_Olympique.pdf (last visited on February 5, 2013)
[574] Charter, *supra* note 249.
[575] *Ibid.* Sec.15, para 1,
[576] IOC Website, *supra* note 572; it also explains the concept of Olympism as "[…] a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind. Blending sport with culture and education, Olympism seeks to create a way of life based on the joy found in effort, the educational value of good example and respect for universal fundamental ethical principles:" *Ibid.,* "Fundamental Principles," para. 2.
[577] For more information about the critics which point out the IOC's accountability and transparency issues under the auspices of International Social Movement, see: Dan BOUSFIELD and Jean M. MONTSION, "Transforming an International Organization: Norm Confusion and the International Olympic Committee," (2012) 15/6 *Sport in Society,* pp. 823-838.
[578] Pascal CHARITAS, "Birth of a Solidarity Movement. The Conditions Surrounding the Origins of Olympic Funding for Sports Development (the Committee for International Olympic Aid, 1952-1964)," (2008) 80/2 *La naissance d'une solidarité- les conditions d'émergence de l'aide au développement sportif olympique (la commission d'aide internationale olympique, 1952-1964),* pp. 23-32.

that it may grant part of its revenues to the International Federations, the National Olympic Committees which include Olympic Solidarity, and the OCOG (Organizing Committee).[579] Nevertheless, becoming a supreme authority does not seem to help achieve this goal[580] when the critics of singling out domestic participation in the decision making occurs.

Looking at the IOC Charter regarding the composition and general organization of the Olympic Movement, one can also be concerned with the creation of a supreme governing authority, whose aim is to have a leading role in many aspects of sport, let alone Olympism and Olympic Movement.[581] For instance, the IOC Charter affirms that the IOC has a leading role in the fight against doping in sport.[582]

In this regard, as seen in the wording of the Charter, maintaining an effective anti-doping program is the fundamental goal of the IOC. Section 43 of the Charter declares that the WADA Code is mandatory for the entire Olympic Movement and Section 21 indicates that the IOC president must establish a medical commission in order to implement the Code and all other IOC Anti-Doping Rules with respect to the Olympic Games.[583]

---

[579] Charter, *supra* note 249, Sec. 24 para. 2, p. 51.
[580] However, the initiatives started at the time of Coubertin cannot be underestimated and the Committee for International Olympic Aid (CIOA), which was unofficially declared in 1961 and officially formed in 1972, is now a good example of programs developed within the IOC and aimed at answering the needs of National Olympic Committees: *Ibid.*, p. 30.
[581] The Charter defines this becoming supreme authority phenomenon as follows: "[…] under the supreme authority and the leadership of the International Olympic Committee, the Olympic Movement encompasses organizations, athletes and other persons who agree to be guided by the Olympic Charter. The goal of the Olympic Movement is to contribute to building a peaceful and better world by educating youth through sport practiced in accordance with Olympism and its values:"Charter*,* supra note 249, "Composition and General Organisation of the Olympic Movement," Chapter 1, para. 1, p. 15.
[582] *Ibid.*, Sec. 2, para 8.
[583] *Ibid.,* Sec. 43, p. 79 and Sec. 21 Bye- Law to Rule 21, para. 7, p. 50.

The IOC highlights the conditions of participation in the Olympic Games at the individual level and obliges the competitor, coach, trainer and other team officials to comply with the *Olympic Charter* and respect and comply with the WADA Code in all aspects.[584] The Dispute Resolution provisions of the Charter ensure that the IOC Executive Board or the Disciplinary Commission, referred in under 2.4, may take measures or sanctions in the case of any violation of the IOC Charter, the WADA Code, or any other regulation.[585] Moreover, the Charter underlines the exclusive authority of the IOC Committee and includes the authority of the Court of Arbitration for Sport (CAS) in the following section. The provisions regulating the power sharing between CAS and the IOC Committees are as follows:

> *1. The decisions of the IOC are final. Any dispute relating to their application or interpretation may be resolved solely by the IOC Executive Board and, in certain cases, by arbitration before the Court of Arbitration for Sport (CAS).*
> *2. Any dispute arising on the occasion from, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration.*[586]

As seen above, the IOC Executive Committee has a position of supreme authority, not only within the Olympic Movement, but also within the Olympic check and balances, including the anti-doping regime. As a result, it will be required to elaborate the structure of the IOC Committee and the IOC Membership under separate sections.

2.1.1 The IOC Executive Board

The Executive Board of the IOC is composed of the president, four vice-presidents, and ten other members. The Board is elected by the majority of votes cast in a secret ballot through the

[584] *Ibid.,* Sec. 40, p. 77.
[585] *Ibid.,* Sec. 59, p. 101.
[586] *Ibid.,* Sec. 61, p. 105.

IOC Session, known as a general meeting of the IOC members, and is considered the supreme organ of the IOC.[587] According to the IOC Charter, the Session is comprised of the IOC members whose numbers cannot exceed 115.[588] Therefore, it is important to know how the IOC members are selected and who can be eligible to be elected. This is because this supreme organ of the IOC also elects the IOC Board, which has a vital role in the Olympic decision-making process.

Considering the purpose of this thesis is to study the anti-doping regime, I will only analyze the IOC member selection process in order to see its representative and participatory structure. As a result, I will mostly take into consideration the procedural and normative structure of the IOC membership which has a key role in the determination of democratic, accountable, and representative governance.

2.1.2 The IOC Membership

Section 16 of the *Olympic Charter* determines each category represented by a certain number of the members. For instance, the number of members whose function is not linked to any function of office cannot exceed 20; the number of active athletes cannot exceed 15; the number of presidents or persons holding an executive or senior leadership position within IFs, the associations of IFs or other organizations recognized by the IOC cannot exceed 15; and finally the number of presidents or persons holding an executive or senior leadership position within National

[587] *Ibid.,* Sec. 18 and 19, p. 41-43.
[588] *Ibid.,* Sec. 16 para. 1, p. 32.

Olympic Committees (NOCs), or world or continental associations of NOCs cannot exceed 15.[589]

The IOC members, IFs, the associations of IFs, NOCs, the world or continental associations of NOCs and other organizations recognized by the IOC, submit the nominations in writing to the IOC president.[590] Then all submissions are evaluated by the IOC Nominations Commission which includes at least one representative from the IOC Ethics Commission and one representative from the IOC Athletes Commission.[591] The evaluation report of each candidate member is submitted to the IOC Executive Board and the Executive Board has the ultimate authority to propose a membership candidature to the Session. The Board can propose several candidates; however, the Session elects any member in a secret ballot through a majority of the votes cast.[592]

Each member is elected for eight years and can be reelected.[593] And, there may be a representation limitation of one member from each country; however, this rule is not absolute and does not apply to the members who were elected before 11 December 1999.[594] As a result, the current world distribution of members varies.

For instance, the statistics I prepared with the help of the member information available at the IOC home page indicate the following facts: the number of IOC members is 101 and 26 of these members participated in Olympic Games during their careers. 101 members come from 72

[589] *Ibid.*
[590] *Ibid.,* Bye-Law to Rule 16, p. 37.
[591] *Ibid.,* p. 38.
[592] *Ibid.,* p. 39.
[593] *Ibid.,* Sec. 16 para. 1, p. 33.
[594] *Ibid.,* Bye-Law to Rule 16, para. 2.7.2., p. 39.

different countries. While 17 countries have more than one member at the Session, 55 countries are represented by only one member.[595] It is interesting to point out that half of the IOC members (N=51) were elected before 2000. The most senior member was elected in 1971, whereas the election of the most recent member was performed in 2012.

2.1.3 Specifying the Main Doping Governance Issue of Public Law Authority

As seen in the facts highlighted above, the IOC Executive Board has immense power within the IOC and they may even control a member's accession by determining whether or not to propose a candidate for selection to the Session. Besides, this organizational and governance structure can raise many other concerns related to the legitimacy, accountability, and efficiency of the IOC governing body. However, my main goal in this section is to focus on how a private law-based organization becomes a supreme governance authority of a subject matter which is considered a human right. According to the IOC Charter, the practice of sport is a *human right*,[596] and this consideration concerns very much the fight against doping as well.

[595] The following is the list of countries represented by more than one member: Switzerland: Five, Great Britain: Four, Spain: Three, China: Three, Russia: Three, USA: Three, Italy: Three, South Korea: Three, Ireland: Two, Australia: Two; Cuba: Two, New Zealand: Two, France: Two, Ukraine: Two, Germany: Two, Belgium: Two, Canada: Two, Finland: Two; and, the list of the countries represented by only one member is as follows: Argentina, Aruba, Austria, Barbados, Burundi, Cameroon, Chinese Taipei, Colombia, Denmark, Djibouti, Egypt, Ethiopia, Fiji, Gambia, Greece, Guatemala , Hong Kong, Hungary, India, Indonesia, Israel, Japan, Jordan, Kuwait, Lebanon, Liechtenstein, Luxembourg, Malaysia, Mexico, Monaco, Morocco, Namibia, the Netherlands, Nigeria, North Korea, Norway, Oman, Pakistan, Panama, Peru, Poland, Puerto Rico, Qatar, Saint Lucia, Saudi Arabia, Senegal, Singapore, South Africa, Sweden, Syria, Thailand, Turkey, the United Arab Emirates, Uruguay, and Zambia: IOC Website, *supra* note 572.

[596] Charter, *supra* note 249, "Fundamental Principles of Olympics," para 4, p. 11.

Through the actions taken by Italy during the Turin Olympics as a result of the IOC sanctioning restraints,[597] I can conclude the IOC has a supreme authority over nations.[598] This supreme authority can even sanction the violation of any applicable public law and regulation in the context of the Olympic Games.[599] Therefore, we have the issue of which a private law mechanism functions as a global legal order with respect to a subject matter which has criminal and public law concerns.

Even though one can raise certain questions as to the power and control of the IOC Executive Board on leading the response to doping in sport, the main aspect of the IOC under this title is its regard to the governance of doping with its private law-based legal status. As seen, the IOC has a leading role in the governance of doping in sport and has supreme authority over nations on the subject of the compliance and application of the WADA Rules and Standards. With its private law-based legal status, the IOC functions as a public law authority. However, I still need to examine the WADA and CAS aspects in order to better shape and determine the consequences of such supreme authority.

2.2 The World Anti-Doping Agency (WADA)

WADA was established on November 10, 1999 in Lausanne as a Swiss private law Foundation to promote and coordinate the anti-doping regime internationally. Its headquarters moved to Montreal in 2002, though its seat remains in Lausanne.[600] The private law legal status of WADA

[597] Turin Olympics, *supra* note 508.
[598] *Ibid*.
[599] Charter, *supra* note 249, sec. 59, para 2.
[600] WADA History, *supra* note 45.

is based on the *Swiss Civil Code* Article 80 *et seq.* which regulate the Foundations.[601] Headquartered in Montreal, WADA has four regional offices. The Latin America Office is situated in Montevideo, Uruguay; the Europe Office is in Lausanne, Switzerland; the Asia-Oceania Office is located in Tokyo, Japan; and South Africa hosts the Africa Office in Cape Town.[602]

WADA is governed by three principal organs: a decision-making body (the Foundation Board), a management body (the Executive Committee), and advisory organs (other Committees). According to the WADA Constitutive Instrument, the maximum number of attendees on the Foundation Board is 40 and this number is appointed equally for a period of three years (who may be re-elected) by the Olympic Movement (OM) (up to 18 members) and public authorities (up to 18 members).[603] If necessary, other members can be appointed by a joint proposal of the OM and public authorities.[604] The term *public authorities* should be understood as "intergovern-

[601] Constitutive Instrument, *supra* note 3.
[602] WADA, "Regional Offices" (last updated on June 2011), available at HYPERLINK:< http://www.wada-ama.org/en/About-WADA/Regional-Offices/ > [last visited on February 6, 2013].
[603] Constitutive Instrument, *supra* note 3, Art. 6; as of January 2013, the 38 members (the president, the vice-president, 18 representatives of the Olympic Movement, and 18 representatives of public authorities) constitute the Foundation Board which is considered WADA's supreme governance organ: WADA, "Governance-Foundation Board" (last updated in January 2013), available at HYPERLINK: <http://www.wada-ama.org/en/About WADA/ Governance/ Foundation-Board/ > [last visited on February 7, 2013]; the 12-member Executive Committee (EC) is appointed by the Foundation Board. Since the president and vice-president of the Foundation Board are automatically designated members of the EC, the remaining 10 members are appointed by the Foundation Board equally from the representatives of the Olympic Movement and public authorities for a period of one year and they may be re-elected. However, the procedure for the advisory committees is slightly different as the Executive Committee appoints the Chair − a WADA Board member or former Board Member − of each standing or ad hoc committee and the Chair decides the composition of the committee in consultation with the Foundation Board president and general director of the EC: Constitutive Instrument, *supra* note 3, Art. 11; As of January 2013, the list of standing committees is as follows: "Athlete Committee; Education Committee; Finance & Administration Committee; Health, Medical & Research Committee; Ethical Issues Expert Group; Prohibited List Expert Group; Therapeutic Use Exemption (TUE) Expert Group; Laboratory Expert Group; and Gene Doping Expert Group:" WADA, "Governance-Advisory Committees" (last updated in January 2013), available at HYPERLINK: <http://www.wada-ama.org/en/About WADA/- Governance/>[last visited on February 7, 2013].
[604] *Ibid.*

mental organizations, governments, public authorities or other public bodies involved in the fight against doping in sport."[605]

WADA is funded equally by the Olympic Movement and governments. The governments reconfirmed their commitment to finance WADA in the *Copenhagen Declaration on Anti-Doping in Sport* and the *International Convention against Doping in Sport*.[606] For instance, WADA already invoiced a total amount of $26,420,098 for its 2013 budget to the Olympic Movement and public authorities.[607] It is now important to clarify WADA's strategy and role in the fight against doping and to understand its system and structure in the criminal and public law aspects of doping.[608] I will now study these aspects in the following sections.

2.2.1 WADA's Strategy and Role in the Anti-Doping Regime

According to the WADA Constitutive Instrument Art. 4, the objective of the WADA Foundation, listed in 8 paragraphs,[609] can be summarized as governing all aspects of the anti-doping

[605] *Ibid.*
[606] The Declaration is produced at the second World Conference on Doping in Sport held in Copenhagen, Denmark in March 2003, and indicated the interests of the governments to implemet the WADA Code and form the International Convention against Doping in Sport: The Copenhagen Declaration, "Copenhagen Declaration on Anti-Doping in Sport," March 2003, available at HYPERLINK:< http://www.wada-ama.org/en/World-Anti-Doping Program/Governments/Copenhagen-Declaration-on-Anti-Doping-in-Sport/> [last visited on October 29, 2013]. [Declaration]
[607] WADA, "Contributions to WADA's Budget 2013," February 2013, available at HYPERLINK: <http://www.wada-ama.org/PageFiles/18892/WADAContributions 2013 updateEN.pdf> [last visited on February 6, 2013].
[608] Should we remember, WADA is empowered by the IOC and the UNESCO Convention to produce the supreme global doping rules and standards.
[609] "1. To promote and coordinate at international level the fight against doping in sport in all its forms including through in and out-of-competition; to this end, the Foundation will cooperate with Intergovernmental organizations, governments, public authorities and other public and private bodies fighting against doping in sport, inter alia the International Olympic Committee (IOC), International Sports Federations (IF), National Olympic Committees (NOC) and the athletes; it will seek and obtain from all of the above the moral and political commitment to follow its recommendations; 2. To reinforce at international level ethical principles for the practice of doping-free sport and to help protect the health of the athletes; 3. To establish, adapt, modify and update for all the public and private bodies concerned, inter alia the IOC, the IFs and NOCs, the list of substances and methods prohibited in the practice

regime in-and-out-of competition at the global level. This mission of WADA holds a form of giving top-down direction to the fight against doping at the global level at the expense of undermining the nature of doping and the different perceptions on doping. In other words, WADA wants to lead the anti-doping regime through its top-down policies and expects the public authorities to follow its instructions and its leading role in this area. More importantly, WADA anticipates the latter when the nature of doping is perceived differently around the world and the anti-doping regime requires the collaboration with other anti-doping intersected global public good producing regimes.

Although WADA's private law-based structure can be replaced by a public international law-based organization, WADA does not have such plans or proposals to do so.[610] However, the fight against doping requires more and more the implication of public law tools into the anti-doping governance. Moreover, the possibility of public international law based conversion which was stressed in the WADA Constitutive Instrument evidences that WADA's mission could have required public law tools.

---

of sport; the Agency will publish such list at least once a year, to come into force on 1st January of each year, or at any other date fixed by the Agency if the list is modified during the course of the year; 4. To encourage, support, coordinate and, when necessary, undertake, in full cooperation with the public and private bodies concerned, in particular the IOC, the IFs and NOCs, the organization of unannounced out-of-competition testing; 5. 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; 6. 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; 7. To devise and develop anti-doping education and prevention programs at the international level, in view of promoting the practice of doping-free sport in accordance with ethical principles; 8. To promote and coordinate research in the fight against doping in sport. 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. The Agency will above all seek to build on the existing corresponding skills, structures and networks, and create new ones only when necessary. The Agency may, however, set up working parties, commissions or working groups, on a permanent or ad hoc basis, in order to accomplish its tasks. It may consult with other interested private or public organizations, which may or may not be involved in sport. In order to achieve its objective, the Foundation has the right to conclude any contract, to acquire and transfer, free or against payment, all rights, all movables and any real estate of whatever nature, in any country. It may entrust the performance of all or part of its activities to third parties:" Constitutive Instrument, *supra* note 3.

[610] *Ibid.,* Art. 4, para. 8.

In my view the current private law-based structure of WADA was a fast-track response to the urgent needs of the fight against doping in that time following the *Tour de France* scandal in 1998. However, as indicated already, WADA needs to be ready for such transformation in the coming years. At this point, I will principally elaborate whether WADA should consider a structural conversion, and should the conversion be required, how WADA should execute this transformation process. To complete this task, I must briefly look at the status and aspects of international law instruments which empower WADA in order to see how other global level instruments next to the IOC perceive WADA's position in the fight against doping. As a result, this analysis will enable us to understand why and how WADA's perception on the nature of doping creates issues which urge WADA to consider such conversion possibility in the near future.

The *European Anti-Doping Convention*, adopted in 1989 by the Council of Europe, intends to eliminate the doping in sport.[611] Seeing the Convention is also open to non-member states of the Council of Europe, one can conclude that another purpose of the Convention is to take a collective action in the fight against doping.[612] For instance, the Preamble of the Convention reveals the importance of public authorities, collaboration, and other aspects of doping, such as protecting the health of athletes.[613]Thus, the nation states/signatories have more autonomy to adopt necessary regulations, respecting only the common standards which are described in the Convention. In doing so, Article 3.2 stated the following reference to the signatories:

[611] European Convention, *supra* note 444, Art. 1.
[612] In this regard, Art. 3, 7, and 8 aimed to establish common standards for the domestic and international coordination and cooperation in the fight against doping: *Ibid.*
[613] "[…] aware that public authorities and the voluntary sports organizations have complementary responsibilities to combat doping in sport, notably to ensure the proper conduct, on the basis of the principle of fair play, of sports events and to protect the health of those that take part in them; Recognizing that these authorities and organizations must work together for these purposes at all appropriate levels:" The Preamble, *Ibid.*

> *They shall ensure that there is practical application of this Convention, and in particular that the requirements under Article 7 are met, by entrusting, where apropriate, the implementation of some of the provisions of this Convention to a designated governmental or non-governmental sports authority or to a sports organisation.*

Namely, the Convention abstains from any strict unification or harmonization work in the fight against doping with specific rules and standards to follow. Instead, it determines a general framework that the signatories should consider when they establish their own anti-doping regimes. Therefore, referring to the constitutional borders of the signatories in the measures to be taken for eliminating the doping use and application in sport defines well the scope and prospective goal of the Convention.[614]

The *Copenhagen Declaration on Anti-Doping in Sport* (Copenhagen Declaration) is the first initiative to form a serious consensus in the fight against doping. The governments agreed to implement the WADA Code and drafted a Declaration, indicating their commitment to the recognition and implementation of the WADA Code at the second World Conference on Doping in Sport, which was held in March 2003 in Copenhagen, Denmark. This initiative was an important step towards developing an international convention against doping in sport.[615] The Declaration included the phrase of "political and moral understanding" in order to explain the scope of the commitment as well as the recognition of diversity in the legal systems.[616] Even though the Declaration is considered a political document supporting the WADA Code, the main issues in the fight against doping, such as sample collection and measures to be taken by the national governments, were also covered.[617]

[614] *Ibid.,* Art. 1.
[615] Declaration, *supra* note 606.
[616] *Ibid.,* Art. 1-2.
[617] *Ibid.,* Art- 5-7.

The *International Convention against Doping in Sport* (UNESCO Convention) is then a fruit of the Copenhagen Declaration. However, one should know that the plans and preparations for the UNESCO Convention date back to December 1999 when the need for an international convention in the fight against doping was voiced at the 3rd International Conference of Ministers and Senior Officials Responsible for the Physical Education and Sport (MINEPS III) in Uruguay.[618]

Following the opinion of the international community, a ministerial round table was held at UNESCO in January 2003, and the 32nd Session of the UNESCO General Conference initiated the preparations for the *International Convention against Doping in Sport*.[619] As a result, the Convention was drafted, based on the consultations and meetings with approximately 100 country representatives, and was finally adopted on 19 October 2005.[620] The Convention entered into force on 1 February 2007, and over 170 countries have ratified it so far.[621]

The purpose of the Convention stands as follows: "Within the framework of the strategy and program of activities of UNESCO in the area of physical education and sport is to promote the prevention of and the fight against doping in sport, with a view to its elimination."[622] The Convention stipulates that the states must comply with the principles of the WADA Code and encourages cooperation between governments and WADA in the fight against doping at the

[618] UNESCO, "Towards a Better Sport," available at HYPERLINK: <http://www.unesco. org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/> [last visited on February 8, 2013].
[619] *Ibid.*
[620] *Ibid.*
[621] *Ibid.*
[622] UNESCO Convention, *supra* note 5, Art. 1.

national and international levels.[623] However, the states can take additional measures that are complementary to the WADA Code in the fight against doping since there is no provision in the Convention preventing them from doing so.[624]

The WADA Code and International Standard for Laboratories and Testing which are reproduced in the appendices section of the Convention are not integrated into the Convention. However, the Prohibited List and the Standards for Granting Therapeutic Use Exemptions (TUEs) which are annexed to the Convention are the integral parts of the Convention.[625] These two Annexes of the Convention require a special amendment procedure which commences with the initiative of WADA.[626] In other words, the Prohibited List and TUEs are subject to a flexible and easier amendment procedure as they will require modifications from time to time due to the advancements in technology and science.

What is important to note is the Convention undertakes the anti-doping regime at the global level. The expression of "underlined full recognition of the WADA Code principles" in the Convention should be understood as WADA is considered the central authority in the fight against doping and in the doping policy making.[627] Thus, the WADA Code has become the supreme legal document of the anti-doping regime and other standardized guidelines have become the global authorities in their respective areas, such as sample collection, laboratory approvals, etc. As a result, there is a superior need to focus on the WADA Code exclusively as the Code has the international support and recognition from the IOC to the UNESCO to become the su-

[623] *Ibid.,* Art. 3.
[624] *Ibid.,* Art. 4
[625] *Ibid.*
[626] *Ibid.,* Art. 34.
[627] KINGSBURY and CASINI, p. 414.

preme doping governance authority. In this aspect, I will study how the WADA Code perceives the nature of doping and what specific tools or strategies the Code has in line with its view of doping.

2.2.2 WADA Code Strategies for Overcoming the Nature of Doping

Before studying the nature of doping and the specific WADA tools, I should explain why the WADA Code is considered a supreme and central document of the anti-doping regime and why WADA's approach to the nature of doping becomes problematic. In other words, I should elaborate why and how the delegated power of supreme rule-making status creates more problems instead of facilitating (or making more efficient) the anti-doping governance.

2.2.2.1 Supreme and Centralized Status of the WADA Code

The WADA Code was first adopted in 2003 and was put into effect in 2004. Revised recently in 2013, a new version of the Code will become effective as of January 1, 2015.[628] The purpose of the Code is "protecting the Athletes fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide, and ensuring harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping."[629]

[628] Code, *supra* note 3.
[629] *Ibid.* p. 11.

Defining itself as "the fundamental and universal document, upon which the World Anti-Doping Program in sport is based," the Code intends to realize the universal harmonization of the principal anti-doping documents.[630] Therefore, it functions at the global level, independent and autonomous from any law or statutes of the signatories and governments.[631] Along with the Code, the *International Standards and the Models of Best Practice and Guidelines* constitute other principal bodies of the supreme rules and standards in the anti-doping governance. These standardizing rules and guidelines aim at ensuring the harmonization and best practice at the global level.[632]

The WADA Code assures this authority of supremacy over the signatories,[633] governments, athletes, and athlete support personnel through a mechanism of *obligatory acceptance* which is formed by the IOC Charter. The IOC Charter imposes certain obligations of acceptance upon the parties of this globally codified sport regime. Accepting or recognizing the WADA Code is one of these obligations. Nonetheless, the WADA Code itself also obliges the governments to ratify the UNESCO Convention and comply with the requirements of the Convention in order

[630] *Ibid.*
[631] Code, *supra* note 3, Art. 24.3.
[632] The purposes of the International Standards and the Models and Best Practice Guidelines are stated in the Code as follows: "[…]The purpose of the International Standards is harmonization among Anti-Doping Organizations responsible for specific technical and operational parts of the anti-doping programs. Adherence to the International Standards in mandatory for compliance with the Code. The International Standards may be revised from time to time by the WADA Executive Committee after reasonable consultation with the Signatories and governments. Unless provided otherwise in the Code, International Standards and all revisions shall become effective on the date specified in the International Standard or revision; models of best practice and guidelines, 'models of best practice and guidelines based on the Code have been and will be developed to provide solutions in different areas of anti-doping. The models will be recommended by WADA and made available to Signatories upon request but will not be mandatory. In addition to providing models of anti-doping documentation, WADA will also make some training assistance available to the Signatories," Code, *Ibid.,* pp. 12-13.
[633] The signatories of the Code are the entities signing the Code and agreeing to comply with the Code and they can be numbered: the International Olympic Committee, International Federations, International Paralympic Committee, National Olympic Committees, National Paralympic Committees, Major Event Organizations, National Anti-Doping Organizations, and WADA. Besides other sport organizations may also become the signatory when they accept the WADA Code following the invitation of WADA to do so: *Ibid.,* Art. 23.1.1-2.

them to bid for the Olympic Games. Governments cannot bid for any events such as the Olympics if they fail to do the latter.[634]

Namely, the WADA Code vertically and horizontally interacts with other international instruments when assuring its authority as the supreme doping law over the nations. What is more, WADA is required to execute only a consultation process with athletes, governments, and other stake holders during the amendment procedure of the Code.[635] Moreover, CAS indirectly recognizes the supremacy of the Code as long as the Code provisions comply with Swiss law.[636] In addition, the Code specifically underlines that national laws and standards cannot limit the Code rules and proceedings.[637] Therefore, specifying the authority of the Code rules and standards in the governance of doping in the world, I must conclude the supreme and centralized status of the Code.[638]

[634] *Ibid.,* Art. 22.8.
[635] Therefore, imposing new rules and standards or modifying the existing ones are not so difficult: *Ibid.* Art. 23.7. 2
[636] When the supremacy of the Code was challenged by FIFA through CAS in the advisory opinion on FIFA's (Federation Internationale de Football Association) compliance with the WADA Code, WADA asked whether the FIFA Disciplinary Code should have been in compliance with the WADA Code. And the CAS Panel answered this question by the following: "[…]as an association governed by Swiss law, FIFA is free, within the limits of mandatory Swiss law, to adopt such anti-doping rules it deems appropriate, whether or not such own rules comply with the WADC." Therefore, I might conclude that the compliance with Swiss law aside, the WADA Code has a supreme status of doping rules and standards making; after all, CAS also mentioned in the decision that FIFA would face with the sanctions of the IOC upon a decision of non-compliance with the Code: Hans NATER, Corinne SCHMIDHAUSER, and Stephan NETZLE, "Cas Advisory Opinion on Fifa Compliance with the World Anti-Doping Code," *CAS 2005/C/ 976 & 986, FIFA & WADA*, 21 April 2006, para. 176. However, CAS also mentioned in the decision that FIFA would face with the sanctions of the IOC upon a decision of non-compliance with the Code: *Ibid.*
[637] Code, *supra* note 3, p. 17.
[638] As a result, having seen the IOC Charter requires that International Federations be subject to the WADA Code, I can conclude that the WADA Code is the supreme anti-doping governance document, empowered by CAS as well: Charter, *supra* note 249, Art. 25 and 43.

2.2.2.2 Nature of Doping and Specific Anti-Doping Tools in the Code

According to the WADA Code, the nature of doping is considered *distinct* and the Code rules and procedures can neither be associated with the traditional criminal and civil law proceedings, nor be limited by the national requirement and legal standards.[639] WADA's approach on the nature of doping intends to facilitate the harmonization and unification of the anti-doping rules at the global level.[640] Introducing new tools for the fight-agaisnt doping, such as the distinct liability regime and specific standard of proof consideration is also in line with the doping view of WADA.

Strict liability is defined in the Code as "the rule which provides that under Article 2.1 and Article 2.2, it is not necessary that intent, fault, negligence, or knowing use on the Athlete's part be demonstrated by the Anti-Doping Organization in order to establish an anti-doping rule violation."[641] And, as emphasized earlier,[642] the standard of proof in all cases is "greater than a mere balance of probability but less than proof beyond a reasonable doubt."[643] Along with the particular view of doping nature, *non-analytical positives*, *athlete biological profile*, *ADAMS*, and *whereabouts mechanism* give direction to the investigation and adjudication of doping violations in the world.

The anti-doping regime of today has chosen a *sui generis* strategy in establishing the global anti-doping rules and proceedings framework. From the theoretical point of view, such a strategy is

[639] *Ibid.*
[640] *Ibid.*
[641] Code, *supra* note 3, p. 141.
[642] See *supra* p. 21
[643] *Ibid.,* Art. 3.1.

successful as the anti-doping rules and proceedings have been recognized in the world today. However, such recognition, as said earlier, is also due to the *obligatory acceptance* mechanism.[644] The specific anti-doping mechanisms and tools, which are produced as a result of the distinct view of doping and the unification goal of global anti-doping rules and standards, need to be also analyzed in order to conclude the functionality of this *sui generis* strategy from the practical point of view.

In this regard, the *WADA Standardized Rules, Guidelines,* and *Protocols* are the first tools to note. The harmonization and unification objective of doping rules and regulations led WADA to prepare international standards, model rules and guidelines and protocols. According to the WADA Anti-Doping Program, there are international standards for the Prohibited List, [645] Testing and Investigations,[646] Laboratories,[647] Therapeutic Use Exemptions,[648] and Protection of Privacy and Personal Information.[649] These standards are also in the category of supreme rules with which the signatories are obliged to comply with, according to the Code.[650] Whereas the

[644] See *supra* pp. 225-226.
[645] Prohited List, *supra* note 55.
[646] WADA,"The World Anti-Doping Code International Standards for Testing and Investigation," 1 January 2015, available at HYPERLINK: <http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Code%20Review%202015/Code%20Final%20Draft/WADA-2015-ISTI-Final-EN.pdf> [last visited on April 4, 2014]. [WADC Testing]
[647] WADA, "The World Anti-Doping Code International Standards for Laboratories," 1 January 2015, available at HYPERLINK:<http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Code%20Review%202015/IS%20Final%20Draft/WADA-ISL-2015-Final-v8.0-EN.pdf> [last visited on April 4, 2013].
[648] WADA, "The World Anti-Doping Code International Standard for Therapeutic Use Exemptions," 1 January 2015, available at: HYPERLINK: < http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Code%20Review%202015/Code%20Final%20Draft/WADA-2015-ISTUE-Final-EN.pdf> [last visited on October 29, 2013].
[649] WADA, "The World Anti-Doping Code International Standard Protection of Privacy and Personal Information," 1June 2009, available at HYPERLINK: < http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Code%20Review%202015/Code%20Final%20Draft/WADA-2015-ISPPPI-Final EN.pdf> [last visited on October 29, 2013].
[650] Code, *supra* note 3, p. 12.

Models of Best Practice and Guidelines are not mandatory, the stakeholders should take them into consideration as they give model solutions for known problems.[651]

That the number of these standardized rules, guidelines, and protocols increases in time leads us to conclude WADA accomplishes well its harmonizing and unifying role as outlined in the WADA Code and in the UNESCO Convention. In addition to these rules, guidelines and protocols, WADA has additional tools for enhancing public confidence (International Observer Program)[652] and for helping the athletes, sport and anti-doping organizations in performing their tasks of compliance with the anti-doping program (ADAMS,[653] Code Compliance Assessment Survey,[654] Doping Control Leaflet,[655] and Forms for Doping Control).[656]

---

[651] These Model Rules, Guidelines, and Protocols can be numbered as follows: "[...] Model Rules for Major Event Organizations, Model Rules for National Anti-Doping Organizations, and Model Rules for National Olympic Committees. Guidelines: Athlete Biological Passport, Blood Sample Collection, Breath Alcohol Collec- tion Certification, Detection by GC-C-IRMS, Detection of doping with human Growth Hormone, Education Prog- rams, Implementing an Effective Whereabouts Program, Laboratory Test Reports, Reporting and Manage ment of hCG Findings, Sample collection personnel, TUE Enquiries by Accredited Laboratories, TUE Guidelines, and Urine Sample Collection. Protocols: Protocol for Code Article 15.1.1:" WADA, "Model Rules & Guidelines," avail- able atHYPERLINK:<http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-DopingOrganizations /Model-Rules--Guidelines/> [last visited on April 4, 2014].

[652] The Independent Observer Program was first initiated in 2000 at the Sydney Olympic Games and since then the teams of independent observers appointed by WADA provide detailed reports at the end of each event. To date, 46 reports were presented to WADA: WADA, "Independent Observer Program Reports," available at HYPERLINK: <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/Indepen dent-Observers-Program/Reports/> [last visited on October 30, 2013].

[653] The Anti-Doping Administration and Management System.

[654] Article 23.4.2 of the WADA Code indicates that each signatory shall report to WADA every second year with respect to its compliance with the Code. To facilitate this process, WADA has developed an online survey system by which signatories are required to log in and enter the compliance or non-compliance related information. For more information, see WADA, "Code Compliance Assessment Survey," available at HYPERLINK: <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/Tools/Code-Compliance-Assess-ment-Survey/ > [last visited on February 16, 2013].

[655] The Leaflet aims at provinding athletes a procedural guideline which is supported by visual examples about the doping control mechanism. From the athlete selection to sample collection and laboratory process, the leaflet explains every step of doping control as simply and clearly as possible: WADA, "World Anti-Doping Agency Dop-ing Control Leaflet," 14 January 2009, available at HYPERLINK: <http://www.wada-ama.org/Documents/Anti-Dop ing _Com munity/ Doping_ Control_Leaflet_EN.pdf> [last visited on October 30, 2013].

[656] Considered as standardized documentation to facilitate the doping control process, these forms include *Doping Control Form*, *Supplementary Report Form*, *Chain of Custody Form*, *Doping Control Officer Report Form*, *Athlete Biological Passport-Supplementary Report Form*, and *Unsuccessful Attempt Form*. For more information see WADA, "Doping Control Documentation," available at HYPERLINK: <http:// www. wada ama.org/en/World-

Other than the international rules, standards, and guidelines, WADA has also developed novel mechanisms of fight against doping which are are also centralized and governed by the top-down rules and regulations. The Doping Passport (Athlete Biological Profile), ADAMS, and the Whereabouts System are three principal practices of WADA, which intend to bring efficiency and effectiveness in the fight against doping.

With the *Athlete Biological Profile*, WADA decided to initiate a more advanced doping detection mechanism, considering the advanced technology used in doping, such as gene doping. WADA has worked on the doping passport system since as early as 2002,[657] and already introduced the Hematological Module in December 2009 and Steroidal Module in 2014.[658] Through these two models, WADA monitors and compares the certain biomarkers of doping in the athlete's physiology over time in order to spot the abnormal changes in his body which results in an unfair advantage and which is inexplicable by the natural enhancement methods of training.[659]

Although WADA approved the *Athlete's Biological Passport Operational Guidelines* (ABP Guidelines) in December 2009 and revised it in November 2013, privacy, data protection, and

---

Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/Tools/Doping-Control Documentation/> [last visited on February 16, 2013].

[657] Particularly, the Turin Olympics of 2006 gave momentum to such debates and works on the doping passport system: WADA History, *supra* note 45.

[658] WADA, "Athlete Biological Passport," available at HYPERLINK: < http://www.wada-ama.org/en/Resources/Q-and-A/Athlete-Biological-Passport/> [last visited on April 5, 2014]

[659] *Ibid.* In addition to this simplified definition of doping passport, the UK Parliamentary report in regards to the Human Enhancement Technologies in Sport defines the function of the doping passport as follows: "[…] Athletes would be requested to give blood and urine samples at set points at the start of and during their career in sport. These samples would be tested and analyzed, for example of natural variation in hormone levels (such as natural levels of EPO) and markers of normal blood physiology (such as hemoglobin, the part of red blood cells responsible for carrying oxygen. The passport would then be used to measure variation in these levels and thus enable easier tracking of substance abuse [....]:" TAMBURINI and TÄNNSJÖ, *supra* note 64, p. 41.

applicable law issues still remain questionable.[660] The idea of having a notwithstanding clause in the *ABP Guidelines* to overcome the national and other privacy laws still reflects the same strategy of distinct doping nature and the same goal of unification and harmonization through the fastest and most simplistic way.[661] However, Nafziger is of the view that the Doping Passport Project will make athletes happier than does the current system of random testing with its standard of proof issues.[662] He states as follows:

> "[…] an individualized compilation and broader use of such data as an integral part of the anti-doping process, with sanctions against alleged violators, might seem highly intrusive. But it is likely that such measures are inevitable in all sports, contributing as they do to both the ''comfortable satisfaction'' of reviewing bodies and, temporarily, the uncomfortable dissatisfaction of the athletes themselves until testing becomes fully uniform and routine." [663]

Even though the idea of doping passport looks like a radical solution to the problem of undetectable or difficult-to-detect drugs or doping methods, what is obvious is the unification in doping detection can be achieved. However, the problem of protecting and managing individualized data alongside technological differences among countries remains to be overcome in the successful implication of this mechanism.[664]

---

[660] For more information about the privacy aspects resulting from the use of personalized medicine in athlete's biological passport, see Angela J. SCHNEIDER, Matthew N. FEDORUK, and Jim L. RUPERT, "Human Genetic Variation: New Challenges and Opportunities for Doping Control," (2012) 30/11 *Journal of Sports Sciences,* pp. 1117-29; Nicholas HAILEY, "A False Start in the Race against Doping in Sport: Concerns with Cycling's Biological Passport," (2011) 61/2 *Duke Law Journal,* p. 396.

[661] Article 14.6 of the WADA Code and the Athelete Biological Passport Guideline Clause 9 implies such view of data privacy consideration: WADA, "Athlete Biological Passport Operating Guidelines & Compilation of Required Elements," November 2013, available at HYPERLINK: <http://www.wadaama.org/ Documents/Science_ Medicine/ Athlete_ Biological_ Passport/WADA-ABP-Operating-Guidelines_v4.0-EN.pdf> [last visited on April 4, 2014]

[662] Especially, the current testing mechanism stipulates monitoring athletes rather than monitoring their biological findings and obliges the athletes to provide samples whenever asked (See Art.5 of the Code, *supra* note 4). In addition, athletes can be found *positive* by the doping tribunal without a *positive* test result through the distinct standard of proof consideration and circumstantial evidence tool as long as it is convinced at a confortable satisfaction level: Code, *supra* note 3, Art. 3.

[663] James A.R. NAFGIZER, "Circumstantial Evidence of Doping: Balco and Beyond," (2005) 16 *Marquette Sports Law Review*, p. 45.

[664] For more information about the biological passport and its consequences, see Nicolass M FABER and Bernard G. M. VANDEGINSTE, "Flawed Science 'Legalized' in the Fight against Doping: The Example of the Biological Passport," (2010) 15/6 *Accreditation and Quality Assurance,* pp. 373-374; Peter CHARLISH, "The Biological

In the *Whereabouts Program*, the athlete has an obligation to inform the International Federation (IF) and NADOs in and out-of-competition about his daily one-hour specific location for the duration of three months four times a year.[665] Art. 5.6 of the WADA Code states that only the athletes who are selected and included in the Registered Testing Pool (RTP) by their IFs or NADOs are obligated to give their whereabouts information. In other words, the IFs and NADOs have certain autonomy in the selection process. Additionally, they must inform WADA about the selected athletes and their whereabouts information with the help of the Anti-Doping Administration and Management System (ADAMS).[666]

Failing to provide the required information and/or missing a testing more than three times within the twelve-month period results in an anti-doping violation; and, the athlete is subject to an ineligibility sanction of one to two years − depending on the degree of the fault.[667] In academic circles, the Whereabouts system has been widely discussed in terms of its efficiency, privacy, and data protection aspects. Some authors, such as Hanstad & Loland, strongly supported the Whereabouts Program, defending their position with the empirical data in which 236 Norwegian elite

---

Passport: Closing the Net on Doping," (2011) 22/1 *Marquette Sports Law Review,* pp. 61-90; Mitja FERLEZ and Joško OSREDKAR, "Biological Passport in the Fight against Doping," (2012) 81/10 *Biološki potni list v boju proti dopingu,* pp. 717-725; Neil ROBINSON et al., "The Athlete Biological Passport: An Effective Tool in the Fight against Doping," (2011) 57/6 *Clinical Chemistry,* pp. 830-832; Christian TORRES, "Passport Control to Prevent Athlete Doping," (2010) 16/2 *Nature Medicine,* p. 142; Ulrik WAGNER "The International Cycling Union under Siege-Anti-Doping and the Biological Passport as a Mission Impossible?," (2010) 10/3 *European Sport Management Quarterly,* pp. 321-342; Michael WOZNY, "The Biological Passport and Doping in Athletics," (2010) 376/9735, *The Lancet,* p. 79; Mario ZORZOLI and Francesca ROSSI, "Case Studies on ESA-Doping as Revealed by the Biological Passport," (2012) 4/11 *Drug Testing and Analysis,* pp. 854-858; Mario ZORZOLI, "The Athlete Biological Passport from the Perspective of an Anti-Doping Organization," (2011) 49/9 *Clinical Chemistry and Laboratory Medicine,* pp.1423-1425.

[665] A more flexible application of the whereabout mechanism was first introduced in the WADA Code 2003 and the whole process was realized between NADOs and athletes; however, the impracticability and inefficiency of this process, due to the lack of coordination and mutual recognition between athletes and NADOs, caused WADA to upgrade it in its 2009 Code and 2015 respectively: WADA, "Whereabouts Requirements-Introductory Note," p. 4, available at HYPERLINK: <http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-Testing/WADA_Whereabouts_IntroductoryNote_ EN.pdf> [last visited on October 30, 2013].

[666] Code, *supra* note 3, Art. 5.6.

[667] *Ibid.*, Art. 2.4. and 10.3.2.

athletes were surveyed.[668] However, certain authors, such as Waddington[669] and Moller,[670] criticized it, highlighting its privacy and fairness issues. In a different tact, Pendleburry & McGarry drew a line between public authority and privacy by highlighting the arguments of both sides, ranging from the protection of clean athletes to the respect for athlete's privacy; and, they concluded the fight against doping naturally involves limiting the rights of athletes.[671]

ADAMS, launched in 2005 as a pilot project by WADA,[672] is "a web-based database management tool for data entry, storage, sharing, and reporting designed to assist stakeholders and WADA in their anti-doping operations in conjunction with data protection legislation."[673] As understood from the definition, this is a centralized system controlled by WADA aimed at facilitating the data management. However, the access to data by third parties and the identity of person entering the data can raise certain privacy issues. As Lev Kreft outlined in his article with respect to the consent form in the ADAMS system, consent is broadly defined, exceeding its scope of sharing the whereabouts information with the related IFs or NADOs. For instance, IFs can have access to athletes' personal information, which can include more than simple whereabouts information and which they can also share with NADOs.[674]

---

[668] Dag V. HANSTAD and Sigmund LOLAND, "Elite Athletes' Duty to Provide Information on Their Whereabouts: Justifiable Anti-Doping Work or an Indefensible Surveillance Regime?," (2009) 9/1 *European Journal of Sport Science,* pp. 3-10.
[669] Ivan WADDINGTON, "Surveillance and Control in Sport: A Sociologist Looks at the Wada Whereabouts System," (2010) 2/3 *International Journal of Sport Policy,* pp. 255-274.
[670] Verner MØLLER, "One Step Too Far - About Wada's Whereabouts Rule," (2011) 3/2 *International Journal of Sport Policy*, pp. 177-190.
[671] Adam PENDLEBURY and John MCGARRY, "Location, Location, Location: The Whereabouts Rule and the Right to Privacy," (2009) 40 *Cambridge Law Review,* pp. 63-75.
[672] It is also available in English, French, Spanish, German, Japanese, Russian, Italian, Dutch, Chinese, Korean, and Arabic. WADA, "ADAMS" (last updated on April 2012), available at HYPERLINK: <http://www.wada-ama.org/en/ ADAMS/> [last accessed on February 19, 2013].
[673] Code, *supra* note 3, p. 130.
[674] The consent form used in the article is as follows: "I,. ....(name of the Athlete), hereby consent that the IFBT has access to my personal data especially but not limited to my whereabouts information stored in the ADAMS register. The FIBT will allow WADA and other Anti-doping Organizations to have access to this

Nevertheless, the practical efficiency of this system in respect of its time and cost saving feature, the availability of data protection policies,[675] and the requirement of a system to protect the complex information, such as the whereabouts information, lead me to conclude its positive contribution to the anti-doping regime in the absence of other alternatives. ADAMS is also used as an athlete information clearinghouse, a doping control platform, and a TUE management tool.[676]

As a result, having briefly studied the nature of doping and the specific mechanisms and tools developed in line with such doping view, I confirm the anti-doping governance, structured by the private law tools, is getting more and more complex and centralized. This complexity and centralization do not help the fight against doping effectively when the anti-doping regime progressively interfaces with the criminal law and public law challenges. In other words, choosing a distinct strategy vis-à-vis the nature of doping with the aim of facilitating the harmonization and unification in the fight against doping cannot be functional when it does not answer to the needs of global anti-doping governance. Other global public goods of public health and security and the diversity aspect of the anti-doping regime should be taken into account as well to properly answer the governance needs.

The technical aspect of doping and putting it in a distinct category also isolate the anti-doping regime from having the assistance of other global public good producing regimes of security and public health. Nevertheless, the global doping governance necessitates the help of criminal and public law tools in the fight against doping. One can argue such isolation enables WADA to en-

---

information. (www.cces.ca/files/pdfs/ CCES-FORM-AthleteWhereabouts-E.doc):" Lev KREFT, "Elite Sports persons and Commodity Control: Anti-Doping as Quality Assurance," (2011) 3/2 *International Journal of Sport Policy,* p. 153.

[675] Code, *supra* note 3, Art. 14.5-6.

[676] *Ibid.,* Art. 4.4 and 14.3-5.

sure the anti-doping governance much easier and the technical aspects of doping require such isolation. But then again, this theoretical functionality will not guarantee the practical utility in the fight against doping when the anti-doping governance needs to consider the involvement of organized crime and public health aspects of doping.

Concluding such a distinct approach on the nature of doping which comes along with specific anti-doping mechanisms and tools is not practical, I will now study CAS. Learning about CAS will help me perceive how CAS is prepared for such distinct view of doping and what CAS can do against the criminal law and public law based concerns of doping.

2.3 The Court of Arbitration for Sport (CAS)

The Court of Arbitration for Sport (CAS) is based in Lausanne, Switzerland and considered the *Supreme Doping Tribunal*.[677] The Statute of CAS entered into force on June 30, 1984 and its first arbitration procedures started in 1986. CAS rendered its first arbitral award in 1987.[678] Functioning under the financial and administrative control of the IOC until 1994, CAS gained its financial and administrative independence from the IOC in 1994 by the *Agreement Related to the Constitution of the International Council of Arbitration for Sport* (ICAS).[679] By this Agreement,

[677] MCLAREN (2010), *supra* note 469, p. 305

[678] *Ibid.,* p. 306; Franck LATTY, *La Lex Sportiva Recherche Sur Le Droit Transnational*, Martinus Nijhoff Publishers/Brill Academic, 2007, p. 849; following this idea of eastablishing a sport tribunal, a working group was formed to elaborate the subject more under the presidency of Keba Mbaye, the IOC Member and Judge on the International Olympic Committee (IOC). And later on, the IOC adopted the statute of CAS in its New Delhi meeting, held on 26-28 March 1983: REILLY, *supra* note 470, p. 63.

[679] To note, the Agreement was signed by the presidents of the IOC, the Association of Summer Olympic International Federations (ASOIF), the Association of International Winter Sports Federations (AIWF) and the Association of National Olympic Committees (ANOC): The Paris Agreement, named as "the Agreement Related to the Constitution of the International Council of Arbitration for Sport (ICAS)," is available at HYPERLINK: < http:// www.tas-cas.or g/en/ arbitrage.asp/4-3-294-1023-4-1-1/> [last visited on October 30, 2013].

the creation of ICAS was decided under which CAS would have functioned.[680] And, the ICAS replaced the IOC function of administration and finance within CAS by establishing a zone area between the IOC and CAS.[681]

The independence of CAS, gained from the IOC, was also recognized in Swiss Federal Court rulings. The *Lazutina* and *Danilova* appeal against the IOC before the Swiss Federal Tribunal resulted in a landmark ruling on May 27, 2003, in which the Tribunal referred to CAS as the *Supreme Sport Tribunal*.[682] This decision was reconfirmed in 2008 by the Swiss Federal Court in the case between the Azerbaijan Field Hockey Federation and *Federation Internationale de Hockey*.[683]

Therefore, one can conclude CAS ensures the recognition of an anti-doping global legal order in the world by applying and interpreting the doping rules and standards. However, examining CAS further is required to see whether a right to create *lex sportiva* has been bestowed to CAS,[684] and in the event of delegation, how such mission has dealt with the distinct nature of doping and with the challenges coming from the global criminal law activities and public law considerations. Therefore, I will study the structural and procedural mechanisms of the CAS arbitration and mediation with an eye to verifying their impartiality.

---

[680] Even though CAS was established with a view to creating a distinct sport tribunal, its financial and administrative ties with the IOC were questioning its impartiality and independence. As a result, an obiter statement in a ruling from the Swiss Federal Tribunal stated the close links between CAS and the IOC in 1993, by indicating that CAS's independence might have been questioned when the IOC was party to a dispute before CAS: Arret Du Tribunal Federal Suisse, 1st Civil Division, 15 March 1993. *Ibid.,* p. 307; and, following this ground-breaking case, CAS reshaped its structure by the Paris Agreement of 22 June 1994: REILLY, *supra* note 470, p. 64.

[681] MCLAREN (2010), *supra* note 290, p. 307.

[682] Larissa Lazutina and Olga Danilova v. IOC (ATF 129 III 445) in REILLY, *Ibid.,* p. 64.

[683] In this case, the Court stated that review cannot be made on the basis of Case C-519/04P David Meca-Medina and Igor Macjen v. Commission, [2006] ECR I-6991).Thus, whether the arbitration tribunal applied the law is outside of the SFT's application to render its decision: Azerbaijan Field Hockey Federation. v. Fédération Internationale de Hockey, 4A_424/2008 (1st Civil Ct., 22 January 2009), cited in MITTEN, *supra* note 471, p. 9.

[684] GILSON, *supra* note 472, pp. 503-514.

2.3.1 Structure of CAS

The first section of the *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes* specify that ICAS and CAS are two separate organs, formed to resolve sports-related disputes through arbitration and mediation.[685] However, the supremacy of ICAS over CAS is emphasized in Section 2 while underlining its purpose in the sports dispute resolution. Thus, ICAS along with its responsibility for the administration and finance of CAS has a duty to facilitate the CAS arbitration and mediation while protecting the independence of CAS and the rights of the parties.[686]

ICAS is composed of twenty members who are appointed in three different steps for a term of four years which may be renewed. First, twelve members are appointed by each of the following: The International Federations (four), the Association of National Olympic Committees (four), and the International Olympic Committee (four). These twelve members then appoint a total of four additional members, and finally, all sixteen members appoint the other four. [687]

As seen above, the composition of ICAS can be easily questioned because there are ambiguity and discretion in the appointment procedure. In logic, seven out of ICAS's twelve members can shape the entire Board, should they decided to do so. For instance, these seven members can appoint four other members on the condition that they all will agree on the names of the last four members they wish to appoint. This can be a hypothetical assumption; however, nothing can disprove this assumption in the current procedure. The current country representation of ICAS

[685] CAS Code, *supra* note 480.
[686] *Ibid.,* Sec. 2.
[687] *Ibid.,* Sec. 4.

members is as follows: Switzerland (three), Canada (two), Sweden (two), Australia, United States, Egypt, Puerto Rico, Germany, Slovenia, Mexico, Syria, Malaysia, Singapore, and France (one each).[688]

ICAS members cannot be an arbitrator, mediator, or counsel before CAS while executing their duties and they should sign a declaration of conformity with the Code in which they undertake to exercise their functions with objectivity, independence, and confidentiality upon their appointment to the post.[689] As a result, they enjoy a very broad range of powers listed in the CAS Code.[690]

These power designations can be summarized as follows:

> *1. Adopting and amending the CAS Code;*
> *2. Electing from among its members for one or several renewable period(s) of four years: the President, two Vice-Presidents, the President of the Ordinary Arbitration Division, the President of the Appeals Arbitration Division of the CAS, and the Deputies of the two Division Presidents;*
> *3. Appointing the arbitrators and resolving challenges to and removals of arbitrators;*
> *5. Managing the financing of CAS;*
> *6. Appointing the CAS Secretary General;*
> *7. Supervising the activities of the CAS Court Office;*
> *8. Providing for regional or local, permanent or ad hoc arbitration;*
> *9. Having right to create a legal aid fund to facilitate access to CAS arbitration;*
> *10. Having right to take any other necessary action to protect the rights of the parties and to promote the settlement of sports-related disputes.*

It is significantly important to express that ICAS can delegate these functions to the ICAS Board, except for paragraphs 1, 2, 5.2 and 5.3. The ICAS Board is composed of the president, the two vice-presidents of the ICAS, the president of the Ordinary Arbitration Division, and the president

[688] CAS, "ICAS Members," available at HYPERLINK: <http://www.tas-cas.org/d2wfiles/document/459/5048/0/CIAS-bios20net20(2011).pdf> [last visited on February 21, 2013].
[689] CAS Code, *supra* note 480, Sec. 5.
[690] *Ibid.,* Sec. 6.

of the CAS Appeals Arbitration Division.[691] There is no regular meeting obligation for the ICAS in order to execute its operations. They meet on an as-needed basis for a CAS activity and must adhere to the "at least one meeting a year" rule.[692]

When we look at the responsibilities and duties of ICAS, loaded with the CAS administration and finance, one can easily raise the question of accountability and participation. Particularly, the arbitrator selection power and right to interfere any CAS procedure to protect the parties' right can be delegated to the ICAS Board. However, certain professional guarantees to the public stands the required conformity with the principles of accountability. Therefore, these accountability and democratic participation issues can lead one to question the independence and/or impartiality of CAS. As I mentioned in the first part of the thesis, the ultimate review mechanism should have been independent and impartial.[693] Such a dilemma in the accountability of CAS can yet impact on its recognized status of supreme doping court.

Having seen the WADA Code regarding its distinct strategy on the nature of doping and on the establishment of doping rules and standards in the world, one can justify such strategy of WADA with the argument of necessity and *suigeneris* nature of doping. One can also conclude the actual structure of CAS has also a distinct character to accommodate the needs of resolving sport-related matters. However, before coming to aforesaid conclusions, we should first examine the structure of CAS arbitration and mediation.

[691] *Ibid.,* Sec. 7.
[692] *Ibid.,* Sec. 8.
[693] See *supra* pp. 143-145.

2.3.2 Structure of the CAS Arbitration and Mediation Procedure

CAS has a mission to resolve the sports-related disputes by the arbitration or mediation mechanisms under its procedural rules (Articles 27 *et seq*.) defined in the CAS Code. [694] The *CAS Arbitration* consists of two divisions: 1) the Ordinary Arbitration Division, and 2) the Appeals Arbitration Division. In the Ordinary Division, the panel has a mission to resolve disputes submitted to the ordinary procedure, while Appeals Division deals with "the decisions of federations, associations or other sports-related bodies insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide."[695] The assignment of cases to the appropriate division is conducted through the CAS Court Office and the case assignment decisions cannot be objected. The Court Office is composed of the Secretary General and one or two counselors.[696]

In order to ensure objective, independent, and confidential CAS arbitration, the president of either division shall disqualify himself when an arbitrator, a counsel, or a party who has potential conflicts of interest with the president is involved in the arbitration. Upon failure to do so, the president can be challenged and ICAS decides the procedure as to any such challenge.[697] In addition to the CAS Ordinary and Appellate Division, the ad hoc Division of CAS is created by ICAS for the Olympic Games. The ad hoc arbitration is governed by the special rules under the title of *Arbitration Rules for Olympic Games* [698] and is separated from the CAS Code.

---

[694] *Ibid.,* Sec. 12.
[695] *Ibid.,* Sec. 20.
[696] *Ibid.,* Sec. 22.
[697] *Ibid.,* Sec. 21.
[698] CAS,"Arbitration Rules for the Olympic Games,"14 October 2003, New Delhi, available at HYPERLINK: <http: //www.tas-cas.org/adhoc-rules> [last visited on October 30, 2013].

The *CAS Mediation*, another alternative to resolving the sports-related disputes, is governed by the CAS Mediation Rules.[699] The mediator is appointed by CAS from the list of mediators, selected by ICAS. Parties have right to choose the mediator, but failure to agree on a mediator leads the CAS president to appoint the mediator after consultation with the parties.[700] The important point to remark in the mediation procedure is a mediator cannot be the arbitrator in the same dispute should the parties decide to go to arbitration at a future date.[701] Arbitration is available when parties cannot arrive at any solution by the mediation. Having briefly elaborated the arbitration and mediation procedures, I can now elaborate the issues of the CAS structure in terms of its *lex sportiva* creating function and in terms of its reliance on the distinct doping nature consideration of WADA.

2.3.3 Actual and Potential Issues to Consider

After studying the CAS setting together with its arbitration and mediation mechanisms, I have noticed the structure of CAS also complements with WADA's distinct nature of doping consideration. The private justice mechanisms of arbitration and mediation constitute the supreme doping tribunal and this justice mechanism executes the task of *lex dopingiva* creation as well. However, the criminal and public law aspects of doping should be considered in the production of *lex dopingiva*.

[699] CAS, "Cas Mediation Rules," available at HYPERLINK: <http://www.tas-cas.org/mediation-rules> [last visited on October 30, 2013].
[700] *Ibid.,* Art. 6.
[701] *Ibid.,* Art. 13.

In this regard, the available review mechanisms for the CAS arbitral awards that I studied at the end of the first part ascertain that the function of CAS in the resolution of doping disputes needs to be revisited.[702] This revisiting is a must when one considers the global public interest angle in the settlement of doping disputes.[703] CAS seems to represent the supreme authority in resolving sports-related matters although some forms of judicial review are available under the Swiss law, the New York Convention,[704] and the EC competition law. However, I should stress the fact that the right to create *lex sportiva* was bestowed to CAS under certain conditions − subject to the judicial review.[705] Although such conditions of the review can be crystallized when the nature of doping is perceived differently in the realm of different societies and legal systems, I conclude the presence of such review mechanisms is technically welcoming and satisfactory. At least, the creation of *lex dopingiva* is well guaranteed and legitimated.

However, when I raise the fact that the nature of doping embraces criminal and public law aspects and doping disputes can involve outside challenges coming from the organized drug and crime and public health regimes, the authority of CAS can be overburdened. Further, the creation of *lex dopingiva* with private law tools can be interrupted. The involvement of criminal and public law tools in the adjudication of certain doping cases would not be the principal reason for such interruption. The major reason would be the actual structure of CAS. CAS will struggle in accommodating the needs of impartiality and accountability principles when criminal and public

[702] These review mechanisms – all derived from the European Jurisdictions − excluding the New York Convention application, can shade the supremacy of CAS arbitration while enhancing the protecting of fundamental rights which vary from one country to another. For more information, see *supra*, pp. 168-176.
[703] *Ibid.*
[704] New York Convention, *supra* note 479.
[705] GILSON, *supra* note 472, p. 504.

law tools and other anti-doping overlapped global public good regimes are involved in doping disputes.

Conclusion of the First Section

Although the normative structures of the IOC, WADA and CAS reflect a supranational framework for the governance of doping, I cannot conclude this structure is technically above the nations. The Swiss private law based establishment, the UNESCO Convention (which particularly aims at national and international level collaboration in the fight against doping) and the existence of the review mechanisms for CAS decisions would prevent me from doing so. However, the decision-making status of the IOC and WADA and the powers of the IOC Charter, the WADA Code, and the WADA International Standards would lead me to conclude the existence of a private quasi-supranational anti-doping governance.

Nonetheless, the emergence of such a body of law should not be limited to the private law alone when the nature of doping and the structure of the IOC, WADA and CAS require the non-private law implications, such as those of criminal law and constitutional law. Even though the emergence of *lex dopingiva* by means of CAS decisions and/or judicial review of CAS decisions cannot be denied, the required implication of criminal and public law tools in the process would positively impact on the progression of such body of law, at least in its character.

Thus, there is a need to study the nature of doping in the realm of different societies and different legal cultures in the world. Once public law is given its proper weight in the governance of dop-

ing, I can have better and safer grounds to revisit what Casini has previously concluded: "*lex sportiva* (Global Sport Law) is made by the private sport judicial mechanisms acting as public international law institutions."[706] In other words, I can have better and safer grounds to conclude how *lex sportiva* should be made in the future rather than how *lex sportiva* is made now. In this regard, the challenges and cooperation requirements coming from other global public good producing regimes and the involvement of criminal and public law aspects in the governance of doping may need to be well taken into consideration.

Conclusion of the First Chapter

Studying the main pillars of the anti-doping regime at the global level, I conclude the current anti-doping regime characterizes a private quasi-supranational governance mechanism in the fight against doping. This mechanism has evolved in accordance with the distinct doping nature view of WADA. However, such quasi-supranational private regime raises excessive concerns when the nature of doping requires the involvement of non-private law aspects and compatibility of different societies, nation states, and legal systems in the world.

The needs for the fight against doping in the realm of public and criminal law considerations and diverse societies and legal cultures cannot be fulfilled by a private law based centralized governance mechanism. Intending to resolve public law based issues through private law tools, as stated in the Statute of WADA, is not an ultimate answer to the fight against doping. Even though the WADA Constitutive Instrument asserts that WADA can be replaced with a public interna-

[706] Lorenzo CASINI, "The Making of a Lex Sportiva by the Court of Arbitration for Sport," (2011) 12/5 *German Law Journal,* pp. 1317-1340.

tional law based another mechanism in the long term,[707] I feel such replacement won't take place in the near future. The reason is that WADA's structure of today has been already considered a role model for the hybrid organizations and global administrative law.[708]

Further, the divergence of criminal law, private law, and mixed mechanisms in national anti-doping strategies demonstrates excluding criminal and public law in the fight against doping would be unreasonable to the countries which choose benefiting from criminal and public law based measures. Applying to the criminal and public law tools is, nonetheless, a right – a right to have additional measures − which was confirmed by the UNESCO Convention.[709] In the same line of reasoning, I should also note singling private law out would be unfair for the countries which want to benefit from the private law tools in the fight against doping. That is why there is a genuine interest to have an anti-doping governance mechanism which applies both public law and private law tools at the global level.

However, the question of balancing the range and scope of public and private spheres in the governance of anti-doping is a difficult task to overcome. For instance, we should take into account diverse legal systems among which the distinction of private law and public law does not even exist. In my view, we should rather focus on the nature of doping and elaborate it in terms of its criminal and public law aspects while considering the other public spheres outside of the anti-doping regime. Such an approach to the governance of doping is more realistic and can be more helpful. Determining the nature of doping in light of its criminal and public law aspects and in the realm of its diversity and collaboration considerations is the foremost issue to overcome at

[707] Constitutive Instrument, *supra* note 3, Art. 4 (8).
[708] CASINI (2009), *supra* note 34, pp. 421-426.
[709] UNESCO Convention, *supra* note 5, Art. 4 (1).

first. Once one well determines the nature of doping under the abovesaid circumstances, working on the knowledge sharing, informed participation, and ultimate review mechanisms will be much easier and safer.[710]

In this regard, the criminal law and public law aspects and diversity and collaboration needs in the nature of doping can lead the anti-doping regime to reconsider its distinct strategy on the governance of doping. In other words, I confirm the anti-doping regime may need to revisit its strategy on the governance of doping when the non-private law and diversity aspects of doping governance overwhelmingly present and increasing challenge in the fight against doping.

Consequently, I will study the legal nature of doping in the next chapter in light of the multiplication of legislative, investigation, and adjudication strategies at the global level. The conclusion of the following chapter will lead to the validation of my thesis: the anti-doping regime can better benefit from the well-determined nature of doping and well-understood intersection of other global public good regimes in the fight against doping.

[710] As I mentioned earlier, either in the form of global public good producing regime such as "anti-doping" or in the form of anti-doping intersected global public good regime such as "research and development," the appropriate direction and scope of knowledge sharing, informed participation and ultimate review mechanism aspects can be determined through well elaboration of the nature of doping. Once the nature of doping elaboration is done and the relevant aspects arising from such nature of doping are outlined, the other mechanisms of adapted GAL model can be realized more easily and safely, see *supra* note 503.

SECOND CHAPTER: Remodelling the Anti-Doping Regime

Having studied why the anti-doping regime should have taken into account the nature of doping and criminal and public law aspects in light of diversity and collaboration characteristics, I will demonstrate why and how the anti-doping regime should transform itself to comply with the needs of global governance in this chapter. In this regard, revisiting the legal nature of doping and multiplication of legislative, investigation, and adjudication strategies at the global level will guide me in validating my thesis: considering the criminal and public law aspects in the governance of doping and transforming the anti-doping regime to accommodate such governance needs are required for a better global governance of anti-doping.

I will study the legal nature of doping in the first section. In this respect, I will study the nature of doping offenses in terms of criminal, administrative or quasi criminal categorizations. In order to better understand the nature of these categories in the realm of criminalization, I will also elaborate the foundations or main reasons for criminalization in connection with Canadian and comparative criminal law. Lastly, I will examine the legal nature of doping in terms of the WADA Code and will propose reconsidering such legal nature in light of public welfare concerns.

In the second section, I will first make a comparative analysis of legislative, investigative and adjudicative strategies in restricting and eliminating prohibited doping substances and methods at the national levels. Thereafter, I will study the main international instruments and organizations which intersect with the restriction and elimination of the prohibited substances and methods. At

the end of this section, I will affirm the legal nature of doping and determine the needs of this legal nature across the world.

Section 1 *Reconsidering the Legal Nature of Doping*

As determined in the first chapter, WADA chose a distinct strategy with respect to the nature of doping, a strategy that followed a *sui generis* path of excluding traditional criminal and civil proceeding mechanisms. After elaborating the outcomes of such strategy in regards to the nature of doping, I will investigate whether reconsidering the nature of doping is possible in terms of comparative law and theoretical approaches regarding criminalization.

In this regard, I will review the main theoretical foundations for criminalization and for the definition of crime in consideration of Canadian and comparative criminal law. While studying the WADA Code and its specific doping proceeding strategies such as strict liability of no fault or negligence, I will benefit from the Canadian perspective on the categorization of an offense in order to demonstrate the strictness of the liability regime regulated in the Code.

1.1 Nature of Doping Offenses: Is it Criminal, Administrative, or Quasi-Criminal?

In this sub-section, my goal is to revisit the definition of doping and analyze carefully the purpose of the WADA Code so that I can better perceive the nature of a doping offense. According to the WADA Code, the occurrence of the following violations are considered doping and will result in certain sanctions defined in the Code:

> "[The p]resence of a prohibited substance or its metabolites or markers in an athlete's sample, use or attempted use by an athlete of a prohibited substance or a prohibited method, evading, refusing or failing to submit to sample collection, whereabouts failures, tampering or attempted tampering with any part of doping control, possession of a prohibited substance or a prohibited method, trafficking or attempted trafficking in any prohibited substance or prohibited method, administration or attempted administration to any athlete in-competition of any prohibited substance or prohibited method, administration or attempted administration to any athlete in-competition of any prohibited substance or prohibited method, or administration or attempted administration to any athlete out-of-competition of any prohibited substance or any prohibited method that is prohibited out-of-competition, complicity, and prohibited association." [711]

In addition to this list of violations, the strict liability principle (Art. 2.1.1) and the relaxed standard of proof (Art. 3.1.) along with the circumstantial evidence tool (Art. 3.2) govern the doping adjudication process.[712] To remember, the strict liability principle defined in the Code released the Anti-Doping Organization from demonstrating the intent, fault, negligence, or knowing use of athlete in order to establish an anti-doping rule violation.[713]

The relaxed standard of proof expression is to indicate that the hearing panel can decide on an anti-doping violation through a standard requiring less than proof beyond a reasonable doubt. This is when the athletes are under the strict liability regime with no defense mechanism − such as due care or due diligence − available to rebut the presumption of an anti-doping violation. In other words, the athletes are faced with a liability regime, associated with absolute liability in Canada.[714]

---

[711] Code, *supra* note 3, Art. 2.1-10.
[712] *Ibid.*
[713] *Ibid.,* p. 141.
[714] In Canada, the offences of absolute liability were distinguished from the offences of strict liability by Judge Dickson in the landmark decision of *R* v. *Sault Ste. Marie.* Dickson argued for due care or due diligence defense with respect to the offences of strict liability would not only protect innocent people, but would also promote the belief in justice mechanism. Moreover, Dickson associated absolute liability only with the regulatory based and minor legislation requiring offences of small penalty such as traffic or liqour: *R.* v. *Sault Ste-Marie,* [1978] 2 S.C.R. 1299, pp. 1311-1326.

There is no defense mechanism available for innocent athletes who are found with a doping violation as a result of a prohibited substance entering into their body without their intention or knowledge. The availability of no fault or negligence-based defences in the determination of sanctions[715] does not remove the consequences of accusation and rigorous doping adjudication which an innocent party is subject to as "defendant." The adjudication process itself penalises the innocent party even if the hearing results in "*yes, he did doping, but there can be no sanction for him IF his violation falls in exceptional circumstances, such as….*"[716]

Besides, the possibility to challenge the analythical finding of a laboratory or of a scientific community which establishes an anti-doping violation (Art. 3.2.1-3) does bring a practical disadvantage on an innocent athlete because of the procedural delays and cost when he has contaminated the substance without his knowledge.[717] On top of that, the circumstantial evidence tool, which enables anti-doping organizations to establish the doping violation presumptions through

[715] The WADA Code allows athletes or other persons who are accused of doping under the regime of strict liability to avoid the sanction completely (Art. 10.1, Art. 10.4) or to reduce the sanction partially in the cases of no significant fault or negligence (Art. 10.5), substantial assistance (Art. 10.6.1), admission (Art.10.6.2-3), and multiple grounds (Art. 10.6.4).

[716] The way the sanction preventing or reducing rules will apply still threaten "the presumption of innocence and no penalty without a law" principles. For instance, as the Commentary of Code Art. 10.4 stated, deciding on the anti-doping violation is free from the application of fault or negligence and the application of fault or negligence in the determination of sanctions will only occur in the case of sabotage outside of the situations in which athletes must act with due diligence. In this regard, the Commentary of Article 10.4 evidences the strictness of such application as follows:"They will only apply in exceptional circumstances, for example, where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10.5 based on No Significant Fault or Negligence," Code, *supra* note 3.

[717] Namely, an athlete who believes he did nothing wrong will be more inclined to challenge the decision without knowing he was actually sabotaged or he contamined the substance without his knowledge.

indirect evidence such as testimony of third parties and documents, can let the hearing panel decide on the occurrence of an anti-doping violation.[718]

As seen above, the doping adjudication process is in favor of anti-doping organizations. Namely, the liability regime and standard of proof in doping which put aside the traditional understanding of criminal and civil proceedings establish a distinct doping adjudication mechanism which is only advantageous to anti-doping organizations. Certain authors have already highlighted and studied this controversial status of the WADA Code challenging the traditionally agreed theoretical and practical applications of criminal and civil proceedings.[719]

Over all, the nature of a doping offense, as seen in the definition of doping in the WADA Code, holds an accusatory aspect, and such an aspect combined with the strict liability and standard of proof mechanisms leaves little room for excluding the criminal and public law tools from the doping adjudication process. Namely, putting the doping adjudication within the borders of civil proceedings exclusively will not be convincing.

At this point, Michael Straubel defines doping as *quasi-criminal* and distinguishes it from a contractual dispute which is settled by arbitration tribunals or civil courts under civil proceedings

[718] Code, *supra* note 3, Comment to Article 3.2, p. 25.

[719] Soek studied the principle of strict liability in line with the human rights issues that athletes face with as a result of the application of the principle. For further reading about the subject, see Janwillem SOEK, *The Strict Liability Principle and the Human Rights of Athletes in Doping Cases,* T.M.C. Asser Press, 2006. Besides, McLaren, De Montmollin, and Pentsov elaborated the non-alaytical positives in their articles respectively: MCLAREN (2006), *supra* note 25; Jérôme De MONTMOLLIN and Dmitry A. PENTSOV, "Do Athletes Really Have the Right to a Fair Trial in 'Non-Analytical Positive' Doping Cases?," (2011) 22/2 *American Review of International Arbitration*, pp.189-240. Moreover, Nafziger overviewed the characteristics of circumstantial evidence by referring to the well-known BALCO case: NAFGIZER, *supra* note 663.

and private law.[720] The WADA Code refuses to associate such doping adjudication procedural rules with any criminal and civil proceedings, naming the procedural rules as distinct in nature.[721] Thus, there is a need to elaborate the nature of doping before one associates the criminal, civil, or distinct procedural rules in its adjudication. In order to conduct such elaboration, one should learn more about the scope of criminal, quasi-criminal, and civil proceedings in Canadian and comparative criminal law.

1.1.1 Understanding the Scope of Criminal, Quasi-Criminal, and Civil Proceedings

The distinction between criminal and civil proceedings is clearly acknowledged in a Canadian decision, *R.* v. *Vincent* by Judge Keirstead Co. Ct. citing at para 31 the *10 Hals. (3d) 271* which delivers the following:

> "A civil proceeding has for its object the recovery of money or other property, or the enforcement of a right for the advantage of the person suing while a criminal proceeding has for its object the punishment of a public offense."[722]

As seen above, the major distinction between criminal and civil proceedings is made in terms of their objectives. One is to enforce a right and the other is to punish a public offense. The offense can be distinguished as *public* and *non-public.* Namely, not all offenses require punishment, but the ones which are considered public offenses are subject to criminal proceedings. In this regard, one can infer that the public offense is associated with a wrongful act (*actus reus*) and a guilty mind (*mens rea*) in order to be considered the subject of criminal proceedings.[723]

---

[720] Michael STRAUBEL, "Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better," (2005) 36/4 *Loyola University Chicago Law Journal*, pp. 1270-1271.
[721] Code, *supra* note 3, "Introduction," p. 17.
[722] *R. v. Vincent* [1971] 18 C.R.N.S. 330, 4 N.B.R. (2d) 289.
[723] In the *R* v. *Mabior* decision, the Court also underlined the fact that not all civil wrongs require criminalization and there is a certain distinction between civil wrongdoing and criminal wrongdoing. Moreover, the Court cited J.

Even though making a distinction between criminal and civil proceedings is not that complicated, including the term *quasi-criminal* in this comparison can complicate the rationale of distinction. For instance, the term *quasi* originated from the Latin language is defined as "almost, to a certain extent,"[724] which can lead us to exclude any categorization within the meaning of the *criminal code* and the *code of criminal procedure*. However, any scope of *quasi-criminal* should be determined according to what criminal proceedings are present in any given jurisdiction. This is since the *quasi-criminal* term should be referred to the consequence of an action or inaction and the borders of such reference should be well framed in advance. Namely, the consequence of an action or inaction should not be punished through criminal law tools when the action or inaction is not determined as criminal beforehand.

However, the criminalization or determination of what is a crime or not is not an easy task when an action or inaction is perceived differently in a given society. In this kind of reflection, one could consider embedding the criminal law in the civil law proceeding and name it as a "distinct" proceeding instead of excluding the traditional terms of criminal, civil or quasi − as the WADA Code did − to overcome such regulatory challenges.

In my view, quasi-criminal is in the same category with a distinct proceeding if the proceeding is not exclusively civil or criminal. In this regard, I define quasi-criminal, whether it is called

---

Charron in *R.* v. *Betty*, [2008] 1 S.C.R. 49 at para 24 for his following words: "[...]if every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy. Such an approach risks violating the principle of fundamental justice that the morally innocent not be deprived of liberty." *R.*v. *Mabior* [2012] SCC 47, para 24.

[724] THESEARUS, "The Synonyms of Quasi," *available at HYPERLINK:* <http://thesaurus.com/ browse/quasi> [last visited on March 31, 2013].

distinct in the WADA Code or somewhere else, as a *criminal law embedded civil proceeding.*[725] Namely, it is a civil proceeding loaded with criminal law aspects. However, the range of criminal law aspects which will be included in the civil proceeding is the real issue to overcome in such an approach. Before anything else, the civil proceeding can turn into a complete criminal law proceeding and the real goal of a quasi-criminal proceeding can be undermined, not to mention the violation of human rights which can be at stake due to the application of such proceedings.

In spite of this complexity in its distinction, *quasi-criminal* terminology can still be used to overcome certain regulatory difficulties in a Federal State. For instance, in Canada, the term *quasi-criminal* was developed as a result of the *BNA Act 1867*. Sec. 91.27 and 92.15 distinguish the scope of federal and provincial powers in the matter of criminal law.[726] In other words, the classification and definition of crime along with criminal, civil, and quasi-criminal distinction differ from one jurisdiction to another and from the national level to the global level. For instance, the crime in many countries is not classified despite the fact that what determines the crime can be specified in the *criminal code*.

As a result, before studying how doping is criminalized under the civil proceedings through private law tools we should examine what is considered an offense which deserves punishment under comperative criminal law. Namely, we should first know the scope of the offense and what factors or tools determine this scope across the world.

---

[725] This approach should not be confused with the two-step prohibition (TSP) approach in which criminal proceding, which leads to the punishment, requires an initial civil proceding at the very beginning. Contrary, this approach does not require any pre-determined civil proceding, but the civil proceeding itself creates the punishment, similar to that of criminal, along with its proceedings and/or final decision. For more information on the TSP, see Andrew P. SIMESTER and Andreas V. HIRSCH, *Crimes, Harms, and Wrongs : On the Principles of Criminalisation*, Oxford; Portland, Or.: Hart Pub., 2011, pp. 213-233.

[726] *The British North America Act*, 1867.

1.1.2 Understanding the Scope of Criminalization in Comparative Criminal Law

When criminalization of an action or inaction is much related to the public order, public interest, and morality, determining a universal scope of criminalization with strict lines is not easy. The presence of different societies and different legal cultures in the world, which enjoy having different values and different interests interchangeably, creates such difficulty. However, the globalized world needs to come together at times to criminalize certain actions and inactions in the name of global public order and global public interest, when the subject matter creates harm and danger to the global society, and when a unilateral regulatory response fails to answer to it. As I studied in the first part of the thesis, the consideration of global public good and global public interest can be a key tool to help us in this sense.

The global community can benefit from this tool of global public good and interest, not only for criminalizing certain action or inaction with global consequences, but also for determining certain actions or inactions which involve criminal and public law aspects require collective regulatory responses. The globalized world needs some actions or inactions to be taken under control by criminal and public law tools and answering such issues by privatized structures of private and/or hybrid laws will not be operative.[727] This is despite the fact that certain global public goods will require strict criminal and public law tools when they are associated with global security, global public health, or global research and development. My point here is not to create global criminalization tools, but to raise the necessity of regulatory and collective actions for the production of certain global public goods which intersect with the anti-doping regime. In addi-

[727]And, even though they intend to help, answering to such matters with global consequenses through private or hybrid law tools result in legitimacy and accountability issues.

tion, the production of an anti-doping global public good necessitates implicating well the criminal and public law aspects whether they are in the form of quasi-criminal or criminal.

In order to determine the scope of such inclusion or exclusion of criminal and public law aspects, one should understand how criminalization takes place in different legal systems and cultures in the world. Namely, as Hugues Parent affirmed: "*bien que nous sommes tous, d'une manière ou d'une autre, capables d'identifier certaines infractions criminelles, bien peu sont en mesure de définir précisément les limites de ce concept*," I need to study the different concepts of criminalization in the world to see the limits of criminalization[728] at the national levels and to continue on my reflection of criminalization and global public good production aspects at the global level.

1.1.2.1 Fundamental Basis of Criminalization

There is no consensus on the fundamental basis of criminalization and the process of criminalization is considered political.[729] However, there are certain principles which steer the criminalization process. The harm principle, the offense principle, legal moralism, and legal paternalism are the leading principles which determine what actions or inactions should be criminalized.[730]

[728] Hugues PARENT, *Traité de droit criminel – Tome 2: La culpabilité* (3rd. ed.), 2014, Montréal: Éditions Thémis, 2014, p. 475.

[729] By way of a comparative analysis, Persak extensively studies the basis of criminalization which includes the harm principle, offence principle, and principles of legal paternalism and moralism. She concludes that the civil law system is not applying the harm principle in a principled way while the Anglo-Sakson systems do it. Nina PERSAK, *Criminalising Harmful Conduct the Harm Principle, Its Limits and Continental Counterpar*ts, Springer, 2007, pp. 5-6.

[730] The harm principle was first presented by John Stuart Mill while the offense principle, legal moralism, and legal paternalism were introduced by Joel Feinberg. For more information, see John S. MILL and Gertrude HIMMER-LFARB, *On Liberty,* Penguin, 1974; Joel FEINBERG, *The Moral Limits of the Criminal Law*, New York: Oxford University Press, 1984.

While there is no possibility to criminalize any action or inaction which does not cause harm under the harm principle, the offense principle makes criminalization possible without any harm. In legal moralism, the conduct which is not harmful or offensive, but is immoral, can be prohibited. Legal paternalism aims at the prevention of self-harm by criminalizing self-harming conduct.[731]

Of these principles, the harm principle, which is commonly accepted by the states as the leading justification for criminalization decisions,[732] was rejected by Canadian courts in the *R*. v. *Malmo-Levine* case.[733]Incidentally, the *R.* v. *Malmo-Levine* decision included the following words underlying the borders of criminalization and the application of the harm principle.

> "Assuming without deciding that the "harm principle" is a legal principle at all, it fails the principles of fundamental justice test inter alia because no broad social consensus exists that the "harm principle" is necessary to the full and fair exercise of justice in Canada. While harm to persons other than the actor engaging in the prohibited activity may be a reasonable foundation for a criminal prohibition, it does not follow that this is a necessary prerequisite to any such prohibition. In any event, the "harm principle" provides no benchmark or objective standard against which the exercise of Parliament's criminal law power can be accurately measured." [734]

The court also included in the judgment that the determination of which conduct should be criminalized is a policy question that may also find grounds outside of criminal law.[735] Following this decision, the Supreme Court of Canada shifted the Canadan position on the impact of the harm principle in the criminalization context by its ruling in the *Assisted Reproduction Reference* in 2010.[736] The Court underlined the following in the decision, which was a turning point:

---

[731] PERSAK, *supra* note 729*,* pp. 13-22.
[732] *Ibid.,* p. 13.
[733] *R* v. *Malmo-Levine,* [2003] SCC 74.
[734] *Ibid.*
[735] See Appendix, *Ibid.*
[736] Reference re *Assisted Human Reproduction Act,* [2010] SCC 61.

> "Human conduct causing harm is the fundamental stuff of the criminal law. The element of harmful human conduct transforms a public health problem, like cancer, into a public health evil, like tobacco. The criminalization of public health evils recognizes that criminal liability is not confined to crimes like murder and fraud, where human conduct is coupled with injury to a specific person."[737]

Moreover, another Canadian Supreme Court decision in 2011 stated that morality was nurturing criminal law, but it did not constitute the sole basis for the criminalization that prevents us from criminalizing all immorality.[738] However, the court asserted that the blameworthy conduct, which violates public order, should have been criminalized.[739] Thus, my understanding from this recent case is the Court denies legal moralism, but seemingly applies the offense principle in a strict manner by referring to the *blameworthy* rather than *unpleasant* conduct, which can be criminalized when it violates public order.[740] I can even associate the position of the Court with the views of Andrew von Hirsch who argues for the strict version of the offense principle, as opposed to Feinberg's theory of the offense principle in which unpleasant conduct is considered offensive.[741]

In his thesis, Hirsch asserts that the conduct must involve a wrongdoing and he identifies three legal offense reasons that are related to social conventions and mutual respect in society: 1) privacy 2) insult, and 3) public disruptive behavior.[742] Moreover, Hirsch adds that not all-offensive conduct should be prohibited, but the ones which cannot be tolerated by the mediating principles such as freedom of speech, and criminal and social policies, should be criminalized.[743]

---

[737] *Ibid.,* para 55.
[738] *R.*v. *Mabior* [2012] SCC 47, para 23.
[739] *Ibid.*
[740] Joel Feinberg, who first introduced the offense principle, argued that a conduct which contradicts with the sensibilities of people might be criminalized irrespective its harm to the people: Andrew P. SIMESTER and Andrew V. HIRSCH, "Rethinking the Offense Principle," (2002) 8/3 *Legal Theory,* p. 270.
[741] Andrew V. HIRSCH, "The Offence Principle in Criminal Law: Affront to Sensibility or Wrongdoing?," (2000) 11/1 *Kings College Law Journal,* p. 86.
[742] Hirsch also indicates that the evaluation of a conduct, whether or not it is offensive, should be maintained by moral and ethical reasoning of our everyday life. *Ibid.,* pp. 83-89.
[743] *Ibid.,* pp. 86-88.

When we look again at the *Malmo-Levine* decision, the Court indicates that the State has an interest in the avoidance of harm and the Parliament should assess the potential harm before it imposes a prohibition. And, the Court can only review whether the state interest sought and the prohibition imposed are proportional. As to the weight of harm that the Parliament should take into consideration in protecting the vulnerable groups, the Court asserted the following at para 134:

> "[…]While the risk of harm to the great majority of users can be characterized at the lower level of "neither trivial nor insignificant", the risk of harm to members of the vulnerable groups reaches the higher level of "serious and substantial". This distincti- on simply underlines the difficulties of a court attempting to quantify "harm" beyond a de minimis standard."[744]

What one understands from this statement is the Court does not reject a *de minimus* standard, but imposes upon the Parliament weighing the risk assessment in accordance with the standards of the vulnerable groups affected by the harm. As a result, the doctrine of *minimis non curat lex,* which can be defined as "seeking to avoid the criminalization of harmless conduct by preventing the conviction of those who have not really done anything wrong"[745] was referred by the Ontario Court of Appeal in the *R* v. *Carson* decision and by the Quebec Superior Court in the *R*.c. *Freedman* decision.[746] And not surprisingly, the Supreme Court underlined this view of *de minimus* standard in the *Assisted Procreation* decision at para 55 again by expressing the following: "Parliament is entitled to target conduct that elevates the risk of harm to individuals, even if it does not always crystallize injury."[747]

---

[744] *Supra* note 733.
[745] *R.* v. *Carson* , (2004) 185 O.A.C. 298, para 24.
[746] The Court in the *R.* c. *Freedman* decision affirmed that the *R. v. Malmo-Levine* decision did not reject the principle of *de mimimus*: *R*.c. *Freedman,* (2006) QCCS 8022, para 56.
[747] Reference re *Assisted Human Reproduction Act*, [2010] SCC 61, para 55.

What I conclude from the Canadian experience of criminalization is the public purpose or public concern such as peace, order, security, health and morality − as crystallized in the *Margarine Reference* − holds the principal reason leading the criminalization in Canada.[748] In other words, the harm principle, the offense principle, and morality principles can all apply to the criminalization of an action or inaction together or alone as long as the public purpose or public concern of the matter is at stake. And the *Assisted Reproduction Reference* affirms it with delimiting the traditional public purposes of peace, order, security, health, and morality.[749]

Criminalization requires the sanction mechanism, but I excluded adding the *association with a sanction* requirement to this Canadian perspective analysis. The reason is that characterization of the public concern or purpose under which the harm principle, the offense principle or morality aspects together or alone apply is the area of focus which suffices to give us an idea about the principal or main reason of criminalization in Canada. Seeing the characterization of public wrong is the foremost issue in the Canadian way of criminalization of a conduct, the sanction and liability mechanism will have to comform with the type of offence, categorized as criminal, public welfare or regulatory.[750]

[748] Public peace, order, security, health and morality were numbered as the public purposes in 1949 as stating the list could be extended in the future: Reference re *Validity of Section 5 (a) Dairy Industry Act,* [1949] S.C.R. 1 , p. 50.
[749] "The criminal law must be able to respond to new and emerging matters of public concern that go to the health and security of Canadians and the fundamental values that underpin Canadian society. A crabbed, categorical approach to valid criminal law purposes is thus inappropriate. On the other hand, a limitless definition, combined with the doctrine of paramountcy, has the potential to upset the constitutional balance of federal-provincial powers, Both extremes must be rejected. To constitute a valid criminal law purpose, a law's purpose must address a public concern relating to peace, order, security, morality, health, or some similar purpose. At the same time, extension that have the potential to undermine the constitutional division of powers should be rejected:" *supra* note 761, para 4.
[750] J. Dickson categorized the offences in three 1) Criminal (mens rea is reuired to be proved by the prosecution beyond reasonable doubt), 2) Public welfare (strict liability applies; no mens rea proving is required by the proseuction; defendant can make no fault defense), 3) Regulatory (absolute liability applies; no defense is available for defendant): *R.* v. *Sault Ste Marie, supra* note 714, pp. 1325-1326.

Namely, when one regulates an offence with no defense mechanism available for the party – as it takes place in the case of absolute liability − the designated sanction for this offence should be proportional and should not violate the human rights of convicted people. For instance, a heavy sanction such as imprisonment, imposed on a person as a result of only by doing the prohibited action or inaction, would be unfair.[751]

That being said, determining the public wrong aspect, which can be associated with the harm principle, the offense principle, or morality altogether or alone, as the principal reason of criminalization in the Canadian context, I lastly reproduce what Professor Parent perfectly outlined in this regard:

> *Pour qu'une loi constitue une règle de droit criminel valide, l'interdiction assortie d'une sanction doit s'inscrire dans la poursuite d'un objectif public sous-jacent du droit criminel. La question consiste alors à savoir si l'interdiction assortie d'une sanction est dirigée contre un « mal » ou un effet nuisible pour le public, troisième condition impliquée dans l'examen de la validité d'une règle de droit criminel*.[752]

In addition to the Canadian experience of criminalization of a conduct in the realm of main criminalization principles, applied in the Canadian courts, studying different national criminal codes in terms of their definition and classification of crime can help us learn about the common strategies of legislators with respect to the criminalization of an action or inaction across the world. This analysis will further assist me in picturing how I should approach the nature of doping in terms of criminal and public law when I conclude the anti-doping governance as a global public good.

[751] For instance, in the decision of *Re B.C. Motor Vehicle Act*, the Canadian court held that designating the imprisonment sanction for a regulatory offence which can easily convict someone violates the right to liberty of person, protected under s. 7 of the *Canadian Charter*: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.
[752] PARENT, *supra* note 728, pp. 480-481.

1.1.2.2 Definition and Classification of Crime in National Criminal Codes

Knowing how sovereign sates define and classify crime in their criminal codes will let me perceive what to consider in the approach of determining the nature of doping. Moreover, analyzing different criminal codes will tell how easy or difficult having a global view on the definition and classification of crime can be in the realm of diverse approaches in the world. Furthermore, we can draw conclusions regarding how one has to approach the definition of crime at the global level.

Therefore, in order to see the strategies of different countries in respect of the definition and classification of crime and in order to have a more collectively acceptable approach on the nature of doping, I analyzed thirty national criminal codes.[753] I group the results of my findings in the table below and portray my interpretation of these findings in the following pages.

[753] The methodology I used for the selection and analysis of criminal codes is as follows: I selected the criminal codes which were accessible and which I could study without any linguistic barrier. I thus benefitted from the database created by *www.legislationonline.org,* which is maintained by the Organization for Security and Cooperation in Europe (OSCE): OSCE, "Official Website," available at HYPERLINK: < http://www.osce.org> [last visited on October 31, 2013]; I eliminated some national codes due to linguistic reasons. In this sense, I excluded the codes which were not available in the form of English, French, Spanish, Italian, German, and Turkish languages. In addition, I added the Criminal Codes of Australia and the United States of America to the review list. Then, I had thirty national criminal codes to analyze. In my analysis, I sought an answer for the question of whether and/or how crime was defined and classified in the codes.To extract the related data in a given code, I used the manual skimming method and electronic keyword research tools. In this regard, the key words I used in the electronic research were as follows: *crime*, *offense*, *concept*, *classification*, *categorization*, *type*, *definition*, *public*, and *society*.

Table 7 Classification and Definition of Crime in the National Criminal Codes

Countries	Is there a classification of crime? If yes, how is it classified? If no, is there any other classification?		Is crime defined or distinguished in the code? If yes, what the main concept leads the definition?	
Albania[754]	No	*Criminal acts are classified as crimes and contraventions (Art.1*)	No	
Armenia[755]	Yes	*-Not very grave, Grave, Medium Grave, Particularly Grave (Art.19.1)*	Yes	*Crime or not crime according to the public danger (social danger) of the action or inaction (Art.18)*
Australia[756]	No	No	No	
Azerbaijan[757]	Yes	*-Public, less serious, serious, especially serious (Art.15.1)*	Yes	*Defined as 'socially dangerous action' (Art.14) - Crime or not a crime according to the public danger and harm of the action or inaction (Art.14.2)*
Belgium[758]	No	*Infractions are classified as -crimes, offenses, contraventions (Art. 1)*	No	
Bosnia and Herzegovina [759]	No	No	No	
Bulgaria[760]	No	No	Yes	*Crime or not crime according to public danger of the action or inaction to the society (Art.9).*
Canada[761]	No	No	No	
Estonia[762]	No	*Offenses are criminal offenses and misdemeanours (Art. 3.2.)*	No	
Finland[763]	No	No	No	
France[764]	No	*Criminal offenses are felonies and misdemeanours or petty offenses (Art. 111.1)*	No	
Georgia[765]	Yes	*-Misdemeanour, grave crime, especially grave crime (Art.12.1)*	Yes	*Crime or not a crime according to causing prejudice or threat t prejudice in the society (Art.7.2)*
Germany[766]	No	*Unlawful acts are felonies and misdemeanours (No specific provision demonstrating the distinct.)*	No	
Hungary[767]	No	*-Act of crimes are felonies and misdemeanours (Art. 11.1)*	Yes	*Crime or not crime according to public danger of action or inaction to the society (Art. 10.1-2)*
Iceland[768]	No	No	No	
Kazakhstan[769]	Yes	*-Lesser gravity, medium gravity, grave*	Yes	*Crime or not crime according to public danger*

[754] The Criminal Code of the Republic of Albania,1995 [last amended on October 13, 2009].
[755] The Criminal Code of the Republic of Armenia, 2003.
[756] The Australian Criminal Code Act, 1995 [last amended on June 7, 2010].
[757] The Criminal Code of the Republic of Azerbaijan, 2000 [last amended on June 18, 2010].
[758] The Criminal Code of the Kingdom of Belgium, 1867 [last amended on January 1, 2012].
[759] The Criminal Code of Bosnia and Herzegovina, 2003 [last amended on February 2, 2010].
[760] The Criminal Code of the Republic of Bulgaria, 1968 [last amended on May 28, 2010].
[761] The Criminal Code of Canada, 1985 [last amended on July, 2013].
[762] The Criminal Code of the Republic of Estonia, 2002 [last amended on July 15, 2013].
[763] The Criminal Code of Finland, 1889 [last amended on 28 December 2012].
[764] The French Penal Code, 2005 [last amended on October 13, 2013].
[765] The Criminal Code of Georgia, 2000.
[766] TheCriminal Code of the Federal Republic of Germany, 1998 [last amended on October 2, 2009].
[767] The Criminal Code of the Republic of Hungary, 1978.
[768] The General Penal Code of Iceland,1940 [last amended on [last amended on 30 December 2003].
[769] The Criminal Code of the Republic of Kazakhstan, 1997 [last amended on 9 December 2004].

		crimes, especially grave crimes (Art.10)		*of action or inaction to the society (Art. 9.1-2)*
Kyrgyzstan[770]	Yes	*-Petty, less severe, grave, and particularly severe (Art.9.1)*	Yes	*Crime or not crime according to public danger (socially dangerous) of action or inaction to the society (Art.8.2.)*
Latvia[771]	Yes	*Criminal offenses are violations and crimes (Art. 7.1). Crimes are classified as less serious, serious, and especially serious (Art.7.1)*	No	
Lithuania[772]	No	*Criminal acts are crimes and contraventions (Art.2)*	Yes	*Crime is a dangerous act (Art. 11.1)*
Malta[773]	No	*Criminal offenses are divided into crimes and contraventions (Art.2)*	No	
Moldova[774]	Yes	*-Minor, less serious, serious, and grave (Art.16.2)*	Yes	*Crime is a prejudicial act (Art.14.1)*
Mongolia[775]	Yes	*-Minor, less serious, serious, grave (Art. 17.1)*	Yes	*Crime or not crime according to public danger of action or inaction to the society (Art. 16.1-2)*
Montenegro[776]	No	No	Yes	*-Protection of a human being and other basic social values makes the basis and scope of the definition (Art.1)*
Norway[777]	No	*Criminal acts are felonies and misdemeanours (Art.2)*	No	No
Romania[778]	No	No	Yes	*-Offense or not according to the significance of social peril to the sovereignty, independence, unity, rights and liberties, the property and the rule of law (Art. 18-19.1)*
Russia[779]	Yes	*Little gravity, average gravity, grave crimes, especially grave crimes (Art. 15.1)*	Yes	*Crime or not crime according to socially dangerous act's harm or threat of harm to the society (Art.14)*
Sweden[780]	No	No	No	
Switzerland[781]	No	*-Offenses are felonies and misdemeanours (Art. 10)*	No	
Turkey[782]	No	No	No	
USA[783]	No	*-Offenses are felony, Misdemeanour or Petty offense (No specific provision indicating the classification)*	No	

As seen above, the majority of countries prefer distinguishing between crime and offense concepts by using different terminology, rather than delimiting an agreed concept of crime or of-

[770] The Criminal Code of the Kyrgyz Republic, 1997 [last amended on February 13, 2006].
[771] The Criminal Code of the Republic of Latvia, 1998 [last amended on April 1, 2013].
[772] The Criminal Code of Lithuania, 2000 [last amended on February 11, 2010].
[773] The Criminal Code of the Republic of Malta, 1854 [last amended on October 22, 2013].
[774] The Criminal Code of the Republic of Moldova, 2002 [last amended on March 6, 2012].
[775] The Criminal Code of Mongolia, 2002.
[776] The Criminal Code of the Republic of Montenegro, 2003 [last amended on July 19, 2006].
[777] The Criminal Code of the Kingdom of Norway, 1902 [December 21, 2005].
[778] The Criminal Code of the Republic of Romania, 2005.
[779] The Criminal Code of the Russian Federation, 13 June 1996 [last amended on June 29, 2009].
[780] The Criminal Code of the Kingdom of Sweden, 1965 [last amended on 1 May 1999].
[781] The Criminal Code of the Swiss Confederation, 1937 [1 July 2013].
[782] The Criminal Code of the Republic of Turkey, 2004 [last amended on 5 July 2012].
[783] The USC:Title 18- Crimes and Criminal Procedure, 1948 [last amended on August 13, 2013].

fense. Even though the words of *offense* and *crime* are mainly used in naming the wrongdoing or unlawful act, the classification of crime or offense is not always taken in the same manner.

For instance, some countries prefer using sub-categories or delimiting the crime or offense as serious, less serious, or particularly serious, while others choose to create distinct categories such as felonies and misdemeanors or crimes and contraventions. Although linguistic differences do not always allow us to reach a general consensus on the terminology, we can still assert the general approach of crime or offense in a criminal code by looking at the style of classification. Another aspect I notice in the table above is many countries tend to apply the very broad concept of public danger or prejudicial activity when they attempt to draw a line between crime and not crime. However, many European countries and Canada choose not to define the concept of crime or offense in their criminal codes, as happens in the codes of many ex-Soviet countries.

Moreover, the definition of a crime or offense is not always located in the criminal codes. And, the concept of *quasi-criminal*, which is not normally mentioned in any of the criminal codes above, should not be considered a subject of classification along with crime or offense. Although there is a definition of crime in the codes, it is hard to determine the borders of this definition because of the very broad concepts of the various elements. For instance, the concept of public danger that determines the criminalization of actions or inactions in many countries can be challenged by the very basic questioning of what constitutes public and danger.

Therefore, I conclude what constitutes a crime or an offense and how they are classified will depend on the sovereign state's view of public danger and social tolerance. However, in the case

of doping, I need to consider a global view of public and social tolerance in the assessment of the criminal law tools' implications. The subject matter has cross-border impacts which need the assistance of other nations and/or which require a global regulatory framework. As I concluded in the first part, the anti-doping governance as a global public good should include certain common grounds with which the nation states and related interest groups should be grouped. Such collaboration is a must in order to produce the global public good of anti-doping and the global public interest tenet should determine the range of this collaboration with the help of knowledge sharing and informed participation tools. Therefore, I conclude the application of criminal law tools to the matter of doping is validated in the case of any public danger, generated by the matter of doping.

However, the current doping supranational framework answers to this issue of the criminal law aspects of doping by applying the criminal and private law tools at the same time. This strategy, named *distinct,* makes the doping adjudication quite complex in understanding of what principles or what basis justify this *sui generis* structure when limiting athletes' rights. Add to this, the idea of creating a distinct proceeding, which is different from the traditional criminal and civil proceedings, also undermines the different legal cultures and traditions across the world some of which date back centuries. Conversely, using a common language of law rather than creating distinct tools would be more practical and less complicated for the nation states and other interest groups.

In sum, if the matter of doping constitutes a public danger and requires the application of criminal law tools accordingly, the anti-doping regime should apply the criminal law tools. Categoriz-

ing it as a global public good and determining the quasi-criminal aspect as a *criminal law tools embedded civil proceeding* also supports this view. In this regard, to better develop my reflection and to propose a more concrete view on this matter, I will study the legal nature of doping from the perspective of the WADA Code and will briefly explain which elements of the doping adjudication in the Code raise concerns.

1.1.3 The Solution of the WADA Code: Neither Criminalize nor Legalize

The standard of proof coming out of non-analytical positive cases and the strict liability coming out of analytical positives stand for the solutions used by the WADA Code to answer the complexities and difficulties in the fight against doping. The Code does not favor criminal law tools over civil law tools or civil law tools over criminal law tools. Instead, both criminal and civil proceedings together are referred in the Code to create a distinct or *sui generis* procedural framework in the adjudication of doping matters. More importantly, this distinct approach of the Code allows the anti-doping authority to use criminal law tools unilaterally in the adjudication process while leaving athletes with private law tools to protect their rights.

For instance, circumstantial evidence without a positive doping test can be enough to establish guilt against an athlete (non-analythical positives); and, an athlete is considered guilty for any prohibited substance found in his body without fault, intent, or negligence (analytical positives). However, both the WADA Code and the CAS jurisprudence confirm that an athlete can benefit from neither doubt nor presumption of innocence in the determination of whether an anti-doping violation has been committed. I will thus elaborate the *variation of the standard of proof in non-*

analytical positive cases and the *strict liability* principle in the following sub-sections to demonstrate the credibility of my assumption.

1.1.3.1 Variation of Standard of Proof in Non-Analytical Positive Cases

Article 3.1.of the WADA Code regulates burdens and standards of proof. According to the Code, the standard of proof should be the *comfortable satisfaction standard* and the seriousness of the allegation should be taken into account.[784] However, the variations in the possible range and scope of circumstantial evidence raise questions about how the seriousness of the allegation will be taken into account. In particular, the most recent non-analytical positive cases raise this concern. The *Michelle Collins* case was the first case dealing with *non-analytical positive evidence* arising out of the BALCO (Bay Area Laboratory Co-operative) investigation conducted by the U.S. Justice Department in September 2003. FBI agents discovered that BALCO was providing prohibited doping substances to the athletes. However, more interestingly, the substances were undetectable or difficult to detect in doping tests.[785]

Soon after the BALCO investigation, USADA, on the grounds of the circumstantial evidence collected by way of the investigation, charged Michelle Collins with the anti-doping violation according to the anti-doping rules of the IAAF (International Association of Athletics Federation). Collins was found guilty before the North American CAS panel without a positive test result, but with the circumstantial evidence against her, such as e-mails between herself and the president of BALCO in which she admits that she had used some prohibited substances in

[784] Code, *supra* note 3, Article 2.1,
[785] Richard H. MCLAREN, "Cas Doping Jurisprudence: What Can We Learn?," (2006) 1 *Sweet & Maxwell-International Sports Law Review,* pp. 10-11.

the past.[786] The CAS panel believed beyond a reasonable doubt that she used the designer steroid tetrahydrogestinome (THG), a testosterone / epitestosterone cream, and EPO, and suspended her for a period of eight years. The case was appealed to CAS International, but Collins later agreed to drop the appeal and USADA reduced the sanction from eight years to four years.[787]

In so doing, the other BALCO cases, as well as the *Montgomery* and *Gaines* cases, demonstrated the significant variations possible under a single standard of proof.[788] Professor McLaren describes the inconsistency in the WADA Code as follows:

> "[...] Unfortunately, the WADA Code does not provide instruction regarding what must be proven in a circumstantial evidence case. As a result, the trend continues in the post- WADA cases where panels leave unanswered the question of what is required to be proven and provide no clear direction for future panels [...]."[789]

In the case of *Galabin Boevski*,[790] a Bulgarian weightlifter, the International Wrestling Federation suspended three athletes, including Boevski, because, according to the laboratory results, the samples which were collected from them did not come from these athletes. Boevski appealed to CAS and claimed that he was the victim of conspiracy. However, the panel came to the decision that he switched the samples, as the place where the samples were collected was crowded and manipulation could have happened by switching devices. Finally, CAS found Boevski guilty with the following reason: "the method of manipulation is unknown. However, the panel was comfortably satisfied that the sample was manipulated by the athlete himself, since he had both the motive and the opportunity to do so."[791]

---

[786] *USADA* v. *Collins*, AAA No.30 190 00658 04 (2004), cited in MCLAREN (2006), *supra* note 25, pp. 201-203.
[787] *Ibid.*, p. 202.
[788] Montgomery: CAS 2004/O/645; Gaines: CAS 2004 /O/649, cited in *Ibid.,* p. 204.
[789] *Ibid.*
[790] Boevski: CAS 2004/A/607, cited in *Ibid.*
[791] *Ibid.*, p. 206.

However, the *Montgomery* case coming out of the BALCO scandal is even more surprising, as the circumstantial evidence was the testimony of a fellow athlete, whistleblower Kelli White. According to the panel, Ms. White was an intelligent, honest, and credible witness, and her testimony was essential for the case even though she was charged in a BALCO-related doping offense.[792] CAS found Mr. Montgomery guilty and punished him with a ban from competition for a period of two years starting on June 6, 2005, stripping him of his on-track achievements dating back to March 2001, and ordering him to repay an estimated $1 million in earnings.[793]

Furthermore, this decision was made by taking a third party's testimony into consideration when the testimony had comfortably satisfied the panel into believing that Montgomery was guilty. The CAS decision regarding Montgomery is not acceptable since the panel had violated due process in this quasi-criminal prosecution with the standard of proof applied. This is because, in many cases, CAS found doping cases to be criminal and quasi-criminal in nature and the scope of standard of proof, falling between the balance of probability (in a civil proceeding) and beyond a reasonable doubt (in a criminal proceeding) is not clear.[794]

Professor Straubel defines this dilemma as follows:

> "[...] Is proof to a comfortable satisfaction closer to proof beyond a reasonable doubt because doping cases are at the least quasi-criminal in nature? Or, is proof to a comfortable satisfaction closer to the preporandance of the evidence standard because doping cases are private in nature? [..] If doping cases truly are criminal in nature and if the comfortable satisfaction standard is a private-civil law standard, then, at the least, CAS is being doctrinally untrue and inconsistent by concluding that a private- civil law standard can be used in a criminal-like proceeding. At the worst, CAS allows due pro-

[792] *Ibid.,* p. 210.
[793] Paul GREENE, "United States Anti-Doping Agency v. Montgomery: Paving a New Path to Conviction in Olympic Doping Cases," (2007) 59/1 *Maine Law Review,* p. 163.
[794] Strahjia v. FINA, CAS 2003 /A/507 (affirming that the standard of proof falls between criminal and civil standards), B v. FINA, CAS 99/211, cited in STRAUBEL (2005), *supra* note 720, p. 1270.

cess violations by allowing the imposition of penal sanction with a non-criminal standard of proof."[795]

1.1.3.2 Strict liability of No Fault or Negligence

The strict liability principle applies in doping cases and no prohibited substance shall enter into the body of an athlete, according to the World Anti-Doping Code Article 2.1.1:

> "It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1."[796]

Although the liability regime in the Code can be associated with absolute liability in Canada, one should look at the wording of the liability regime in the Code without necessarily focusing on the term of liability. Namely, leaving no defense mechanism to the defendant is the point that we should examine in terms of the nature of doping subject matter.

That being said, some authors considered the strict liability principle was accepted because of the difficulty in proving a doping violation[797] and the goal was to benefit from the utility of the principle by sacrificing the innocent minority to the guilty majority.[798] Nevertheless, such arguments of necessity and difficulty in proving a doping violation can be criticized due to their regard on the justice mechanism and presumption of innocence. In this respect, J. Dickson, while proposing the due care or due diligence defense for the offences of public welfare such as pollution,

---

[795] *Ibid.,* pp. 1270-1271.
[796] Code, *supra* note 3.
[797] STRAUBEL (2005), *supra* note 720, p. 1263.
[798] Aaron N. WISE, '"Strict Liability' Drug Rules of Sports Governing Bodies," (1996) *146* New Law Journal, p. 1161, cited in KOHLER, MALINVERNI, RIGOZZI, *supra* note 814, para 91, and cited in Paul A. CZARNOTA, "The World Anti-Doping Code, the Athlete's Duty of "Utmost Caution," and the Elimination of Cheating,"(2012) 23/1 *Marquete Sports Law Review*, p. 68.

argued that relying on the absolute liability for the offences with the difficulty to prove full *mens rea* would harm the justice mechanism when punishing the innocent ones and when leaving no defense mechanism for them at all.[799]

Although I agree with the view of Dickson on the application of absolute liability, I should emphasize that some matters of public welfare can exceed the borders of national states and can be very complex to involve either the due care or due diligence defense. The matter of doping is a good example in this aspect. The public welfare consideration for doping will be evaluated differently at the global level in comparison to that of national level alone. Besides, the due care or due diligence defense can be easily manipulated in the matter of doping since athletes cannot always be proximate to the evidence and have the knowledge of doping.[800] This is why the WADA Code, probably, narrowed the application of no fault or negligence defense in the determination of sanctions.

However, I have to admit that all these arguments still do not justify the application of strict liability in this way in the matter of doping. This is because the presumption of innocence and no penalty without a law principles should be respected while protecting and promoting the belief in the justice mechanism and supremacy of law. Hence, one can consider the applicability of international human rights instruments in the doping cases as the UNESCO Convention in its

[799] See *supra* note 714.
[800] Although athelets have the responsibility to know of and comply with all applicable anti-doping policies and rules adopted pursuant to the Code (Art. 21.1.1), some athletes can have little knowledge about doping in the countries where the anti-doping knowledge is not well established. For instance, as I cited earlier, a survey conducted in Turkey proved this fact of having little knowlege about doping: GENÇTÜRK, ÇOLAKOĞLU, DEMİREL, *supra* note 334. Besides, athletes have to rely on other technical or professional people such as doctors, coaches, dieticians, managers, etc. during their career in order to be successful.

Preamble[801] and the WADA Code in its various parts (such as the purpose of the Code and Art. 8) specified.

Nevertheless, the standard of proof consideration and the strict liability tool of the WADA Code primarily violate the presumption of innocence principle according to Article 6.2 of the *European Convention on Human Rights*, Article 14.2 of the *UN Covenant on Civil Rights*, and Article 7.2 (d) of the *European Anti-Doping Convention*. In other words, let alone the particular standard of proof criterion, accusing an athlete with a doping violation through circumstantial evidence under the strict liability principle in such ease would violate the presumption of innocence in the first place.

In addition, NADOs are more empowered by the new Code for intelligence gathering and investigations and this extra power will strengthen the accusatory aspect in doping proceedings at the expense of potential human rights violations. For instance, Article 5.8.1-3 of the Code ensures that NADOs have right to obtain, assess, and process anti-doping intelligence (including non-analytical) from all available sources for the investigation of an anti-rule violation.

When I look at the ISTI 2015, I see the purpose of such investigative powers is to deter and detect doping. Namely, ruling out the possible doping violation and/or developing the substantial assistance for the initiation of an anti-doping rule violation are the primary objectives of the investigation (11.1 and 12.1 of the ISTI).[802] Accordingly, my argument of presumption of innocence violation will gain more support when NADOs have more chance to build cases against

[801] The Convention included "Referring to existing international instruments relating to human rights" section in the Preamble. UNESCO Convention, *supra* note 5.
[802] ISTI 2015, *supra* note 559.

the athletes through circumstantial evidence that they will be able to collect more easily as of January 2015 − when the new WADA Code and the new ISTI will come in effect.

Be that as it may, the argument of *non-criminal offense* in regards to a doping violation cannot be acceptable when there is inconsistency between the purpose of the distinct proceeding and the consequences of such proceeding. In the new Code, the accusing party will be more empowered when the accused parties will have the same limited private law tools to protect themselves. Namely, if the purpose of such a distinct proceeding is to ease the harmonization and unification around the world and finally deter and detect doping, paving the way for a much easier violation of human rights will undermine such purpose in the first place and will generate greater issues later. In addition to the latter, when such inconsistencies are also present in the jurisprudence, one can argue WADA's distinct nature consideration of doping should be questioned. For example, the Swiss Supreme Court, in the *Gundel* decision, stipulated that doping offenses were not subject to criminal law principles.[803] However, countries like Italy and France have criminalized doping offenses.

As a result, I conclude that the distinct approach of the WADA Code for the nature of doping creates bigger issues in the fight against doping instead of facilitating the harmonization and doping deterrence. In addition, this complexity or paradox of WADA's approach does not help one determine easily the nature of doping through the traditional tools of criminal and civil proceed-

[803] Professors Gabrielle Kaufman Kohler and Antonio Rigozzi argued, in their legal opinion on the conformity of article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes that Article 6.2 of the EHCR only applies in case of a *criminal charge* and is thus not applicable in doping cases. They justified their arguments with the decision of *Gundel* in which the Swiss Federal Tribunal stated that doping proceedings concerned private law issues, but not the notions proper to criminal law such as presumption of innocence and principle of "in *dubio pro reo*" (Gundel v. FEI, decision of 15 March 1993, reported in CAS Digest I, p. 561-575): KOHLER and RIGOZZI (2007), *supra* note 23, pp. 15-16.

ings.[804] Accordingly, these ambiguities and contradictions raise important questions with respect to the fairness in doping adjudication, as seen above. Lifting this complexity is possible when one approaches the nature of doping without taking into account WADA's distinct approach and when one proposes a road map through a reconsidered nature of doping.

1.2 Concluding the *Penal* and *Public Global* Nature of Doping

Having studied the fundamental basis of criminalization and the distinctions between criminal, civil, and quasi-criminal proceedings, I can now determine the legal nature of doping. When I look at the current doping adjudication mechanism, it is very hard to say that doping adjudication is *quasi-criminal* in nature, if not criminal or civil. Therefore, looking at the objective of doping law is vital. On this very important point, Lars Halgren outlines the following:

> "[...] It is on the one hand recognized that disciplinary doping law may be regarded as quasi-criminal law, but on the other hand the principles that are the part of criminal process do not all equally apply to doping trials. [...] It would make clear once and for all that doping law is punitive law, whose objective is to punish rather than to re-establish the prior situation." [805]

When the objective of doping law is to punish, it will be difficult to associate the private law tools with doping exclusively. However, what I conclude from the purpose of WADA Code is the regulation of doping governance which also includes the anti-doping punishment and deterrence mechanism in it. Namely, the goal of doping law in the Code is to regulate the matter of doping at a global level *once and for all* with a view to harmonizing and coordinating the anti-doping programs in the world.

[804] DOWNIE, *supra* note 24, p. 330.
[805] Lars HALGREEN, *European Sports Law: A Comparative Analysis of the European and American Rules of Sport,* København: Forlaget Thomson, 2004, p. 317.

Thus, the question to ask can be whether regulation of a matter can involve creating offences and such offences can be associated with heavy punishments and with strict liability regime.We need a response for this question since this is what happens in the current governance of doping. In my view, when a complex matter such as doping with criminal and public law aspect needs to be regulated at the global level, relying predominantly on the private law tools and creating one top-down document with *once and for all* approaches should be avoided. Otherwise, *once* the regulation is in effect its negative consequences will be higher than its positive contributions *for all.*

For instance, as one author highlighted, the punishment of doping has very heavy consequences for athletes, affecting his entire career and putting the athlete in a very difficult position in both training for and participating in any subsequent competition because of the nature of the profession.[806] Michael Straubel portrayed doping as a quasi-criminal disciplinary matter, similar to attorney discipline and disbarment proceedings, which are considered quasi-criminal in the United Sates.[807]

In a later publication, Straubel strengthened his position of disciplinary nature with a quasi-criminal character on doping cases and asserted that athletes need to be protected by criminal law tools. In this aspect, he argued the acquittal from any doping charge did not always take an easy process for the innocent athlete and this process could have been avoided at the very beginning if criminal law tools were applied.[808] In addition to Straubel, Soek concluded the punitive character-

[806] KOLLER, *supra* note 108, p. 1511.
[807] The USA Supreme Court affirmed the quasi-criminal nature of attorney disciplinary proceedings in re Ruffalo, 390 U.S. 544, 550-51 (1968), cited in Michael STRAUBEL, "The International Convention against Doping in Sport: Is It the Missing Link to Usada Being a State Actor and Wadc Coverages of U.S. Pro Athletes," (2008) 19/1 *Marquette Sports Law Review,* pp. 85-86.
[808] STRAUBEL(2010) *supra* note 532, p. 151.

istic of disciplinary doping law leads us to consider it as pseudo-criminal law. He further criticized the application of strict liability principle through private law tools and the idea of excluding the application of the ECHR Article 6 on the ground that doping disciplinary proceedings are not criminal at all.[809]

As a result, I also agree with the above-mentioned authors, considering the doping proceeding is not civil because of its punitive character and accusatory aspects which are very similar to those of criminal law.[810] In addition, the new investigation powers of NADOs with a view to deterring the doping add more punitive character to the matter of doping.

Nonetheless, when I look at the CAS case law, I see that the quasi-criminal character of doping was only discussed in certain decisions between 1999 and 2001. For instance, in the case of *B. v. International Triathlon Union (ITU)*, the nature of doping was underlined as "quasi-penal" by referring to its specific disciplinary character.[811] In addition, the Court in this case distinguished between the civil and quasi-penal proceedings while arguing that doping in sport should benefit from the principle of *in dubio pro*, known as the *benefit of the doubt.*[812] This was because doping in sport had an accused party and this party should have had right to benefit from the principle of *in dubio pro reo*.[813]

In another decision, CAS again referred to the quasi-penal character of doping in sport while accepting that the principle of *lex mitior,* known as *application of less severe punishment*, can be

[809] SOEK, *supra* note 719, pp. 391-401.
[810] DOWNIE, *supra* note 24, p. 331.
[811] CAS 98/222, B. / International Triathlon Union (ITU), para. 26, award of 9 August 1999.
[812] *Ibid.,* para. 43.
[813] *Ibid.,* para. 44.

applied to doping in sport.[814] However, surprisingly, six months later, CAS expressed "the legal relations between an athlete and a federation are of a civil nature and do not leave room for the application of principles of criminal law" and underlined the principles of *in dubio pro reo, nulla poena sine culpa*, and the presumption of innocence referred in Art. 6 of the ECHR cannot be applied in doping proceedings.[815] In addition to such a firm position of CAS about the criminal law aspects of doping, another CAS panel later stressed that criminal law could be considered in doping proceedings even though it cannot be directly applied. At this point, the Court in *WADA & UCI* v. *Alejandro Valverde & RFEC* decision phrased the following:

> "These provisions refer to criminal or penal proceedings and are not applicable here. They could however be considered in proceedings like the one at hand here, as it can be argued that a severe sanction imposed in disciplinary proceedings should be subject to the same principle."[816]

Moreover, CAS expressed that criminal law principles can be applied in doping proceedings when the principle in question is "an expression of a fundamental value system that penetrates all areas of the law" and the relationship between a sport association and athlete/club does not impose a limitation on it.[817]

Even though the early CAS decisions included some criminal law principles (while excluding the principle of *benefit of the doubt)* in their rulings and considered the legal nature of doping as *quasi-criminal*, the private law nature of doping in sport was emphasized by referring to the Swiss Federal Tribunal decision indicating that doping in sport is a private law matter and cannot

[814] CAS 00/289/A Union Cycliste Internationale (UCI)/ C. & Fédération Française de Cyclisme (FFC), award of 12 January 2001.
[815] CAS 2001/A/317 A. / Fédération Internationale de Luttes Associées (FILA), para. 26, award of 9 July 2001.
[816] CAS 2007/A/1396 & 1402 WADA & UCI v. Alejandro Valverde & RFEC, para. 118, award of 31 May 2010.
[817] CAS 2008/A/1583 Benfica v. UEFA & FC Porto CAS 2008/A/1584 Vitória Guimarães v. UEFA & FC Porto, award of 15 July 2008.

be regulated by criminal law tools.[818] However, a few years later, we witnessed in the CAS decisions on one hand the application of the principle of *lex mitior,*[819] and on the other hand, a firm interdiction against principles of criminal law in the admissibility of evidence.[820]

Having studied the certain CAS jurisprudence above, I cannot state that CAS absolutely refuses the quasi-criminal nature of doping and the arbitration panels sitting at different times confirmed this assumption. However, what is certain is the quasi-criminal understanding of CAS leaves very little room for the application of criminal law principles and the court is filtering the application of these principles through Swiss procedural public policy, as indicated: "however, the Panel will follow principles of procedural fairness and will endeavour to comply with all facets of Swiss procedural public policy." [821]

Therefore, Swiss public policy under the realm of the ECHR − Switzerland is a party to the European Convention on Human Rights − seems to protect the fundamental rights of the parties involved in doping proceedings. However, we should bear in mind that protecting the fundamental rights of parties in doping proceedings through Swiss public policy and procedural fairness holds complications as much as it deters athletes from being involved in doping. In this regard, the doping issue, which is quasi-criminal in nature and which involves great public health concerns,[822] requires assistance from the public authorities. The concerned authorities should not only work on fighting against the prohibited substance and manufacturers, suppliers, and traf-

[818] Swiss Federal Tribunal, 2nd Civil Division, Judgment of 31 March 1999, 5P.83/1999, c. 3.d, cited in CAS 2009/A/1912 & 1913 P. & DESG v. ISU, award of 25 November 2009.
[819] CAS 2009/A/1918 Jakub Wawrzyniak v. HFF, para. 19, award of 21 January 2010.
[820] CAS 2011/A/2426 Amos Adamu v. FIFA, para. 68. TAS 2011/A/2433 Amadou Diakite c. FIFA, para. 27. sentence du 8 mars 2012.
[821] *Ibid.,* Amos Adamu v. FIFA, para 72.
[822] For the public health concerns of doping, see DUCLOS, *supra* note 9.

fickers, but also focus on the harm reduction and/or elimination. Namely, the public authorities at the both levels − national and international − should also collaborate with the producers of public health, security, and research and development public goods along the lines of the intersected areas in the global anti-doping governance.

Choosing a distinct strategy about the doping proceedings and intending to keep criminal law aspects at a distance from such proceedings complicate the inclusion of public authority assistance and deteriorates trust between the parties to the proceedings. For instance, WADA issued the *Guidelines for Coordinating Investigations and Sharing Anti-Doping Information and Evidence* in 2011 with a view to establishing new partnerships with public authorities.[823] This initiative proves again the fact that WADA's distinct strategy about the nature of doping, undermining the criminal and public law aspects of doping, should be revisited. This is because 1) WADA deliberately needs the assistance of public authorities and already signed a collaboration agreement with INTERPOL for that purpose in 2009, 2) WADA accepts the fight against doping cannot be centralized, and 3) WADA practices the first two considerations when insisting on the nature of doping as non-criminal or distinct from criminal and civil proceedings.

Putting it another way, asking for the collaboration which involves the use of criminal and public law tools of public authorities contradicts with the nature of doping view of WADA. Even though such assistance is needed for the doping intelligence gathering, accusing the athletes of doping through the help of public authorities will punish the athletes more when they still remain with the private law tools to defend themselves. My point here is to emphasize WADA's restless efforts in the fight against doping with private law tools when conceding the following: the fight

[823] WADA and INTERPOL Collaboration, *supra* note 16.

against doping requires the collaboration of public authorities equipped with criminal and public law tools.

Considering all these circumstances, I suggest that the WADA Code reconsider the legal nature of doping and transform its specific tools and strategies according this reconsidered nature of doping. In this way, the requirement of collaboration with public authorities will be more legitimated and recognized while the protection and promotion of human rights and trust in the doping investigation and adjudication will be rightfully established.

Therefore, I conclude that the nature of doping involves criminal and public law aspects because of its public danger, health risks, and morality issues. Moreover, the anti-doping governance as a global public good would require the implication of the criminal and public law tools for its continued production and maintenance. This is because doping imperils the global society-at-large. What I suggest here is not to criminalize doping everywhere, rather what I establish is the nature of doping cannot be distanced from the criminal and public law. Thus, reconsidering the nature of doping in terms of such criminal and public law tools is required. One can call such reconsideration as a quasi-criminal, distinct, or criminal, but one cannot exclude criminal and public law aspects in the reconsideration of doping. Namely, the content and consequences of what doping is, impact more onto the global anti-doping governance rather than the terminology used in determining the nature of doping.

For now, I propose calling the nature of doping as *penal* and *public global*. This acknowledges the *sui generis* supreme doping law-making status of doping governance and the criminalization

of an action or inaction have to be exercised by national states rather than an international organization for the foremost reason of sovereignty. In this respect, the anti-doping regime should transform itself in order to accommodate this *penal* and *public global* nature of doping. As seen above, the anti-doping governance will have to accommodate the assistance of public authorities and the doping adjudication will need to involve the internationally recognized criminal and public law tools, which are not limited only to the internationally accepted human rights considerations. As a result, as mentioned in the WADA Constitutive Instrument, WADA can consider the structural conversion possibility under the rules of international public law to accommodate such *penal* and *public global* nature of doping.

Leaving aside the structural conversion proposal to better accommodate the reconsidered nature of doping, I need to elaborate the scope and power of public authorities in terms of restricting and eliminating the prohibited doping substances and methods in the world. This elaboration is a must for three reasons: 1) I will strengthen the *penal* and *public global* nature of doping consideration, 2) I will spot main collaboration issues and requirements at the global level with respect to restriction and elimination of prohibited substances and methods, and 3) I will demonstrate why and how the adapted (pluralist) approach of GAL will help the anti-doping regime and other global public good producing organizations intersected with the anti-doping regime transform themselves to ensure a more effective global fight against doping.

Considering the fight against doping aims at protecting the health of athletes, it should not be therefore differentiated from protecting and promoting the health of youth and/or individuals constituting the society-at-large. In other words, approaching the doping problem on the basis of

athletes and sport society as a particular group should be avoided. The individual and society-at-large, outside the sport community, should be considered as well.

Therefore, I should also take into consideration the other international drug prohibition laws when I elaborate the national legislations for their strategies in controlling the production, movement, importation, distribution and supply of performance-enhancing drugs.[824] By this way, I will be able to notice the different perspectives and common strategies which help me establish a right and effective collaboration schema at the global level in the fight against doping.

Conclusion of the First Section

The fact that sovereign nations decide on the crime or offense according to their view of public danger and social tolerance makes it difficult to conclude whether doping is an offense or a crime in the absence of a global view of public danger and a global acceptance of social tolerance. Seeing that the doping matter has cross-border implications and these cross-border consequences require the assistance and collaboration of nation states, we need to broaden the matter of doping into the circles of criminal and public law as well. However, the idea and practice of applying criminal law and private law tools at the same time while disfavoring athletes' rights, as witnessed in the WADA Code and in the doping jurisprudence, should be avoided.

Reconsidering the nature of doping is a must and this consideration should include the criminal and public law aspects. The difficulty to have a global public view on the public danger and so-

[824] There is a recent report submitted to WADA on this subject and I will particularly benefit from this research involving highly important qualitative and quantitative data related to the national legislations: HOULIHAN and GARCIA, *supra* note 509, p.56.

cial tolerance can be overcome by the tools of global public interest when the anti-doping regime is considered a global public good. Accordingly, the difficulty to determine the nature of doping through the actual standard of proof and strict liability considerations in the resolution of doping disputes[825] would be overcome by focusing on the outside tools of the anti-doping regime, such as public danger, social tolerance, and health considerations at large. Global public good consideration of doping, which requires the assistance of and collaboration with public authorities, will enable the *penal* and *public global* aspect of doping to become recognized in the world. Further, the global public interest tenet will ensure the range and scope of such recognition all around the world. As a result, the ambiguity and contradiction in the doping investigation and adjudication mechanisms will stop raising important questions related to the fairness of doping adjudication.

In order to better defend such *penal* and *public global* view, to determine further requirements of collaboration, and to demonstrate more how the adapted (pluralist) approach of GAL will be fruitful, I will elaborate the scope and power of public authorities in terms of restricting and eliminating the prohibited doping substances and methods in the world. Therefore, the next section of this thesis will include a comparative and international analysis of the availability and use of prohibited substances and methods at the global level.

Section 2 ***Restricting the Availability and Use of Prohibited Substances and Methods***

Having termed the nature of doping as *penal* and *public global* and concluded the criminal and public law aspects of doping, I will now validate why the anti-doping regime needs such a reconsideration on its doping nature approach. In this regard, my proposal is going to be simple. What

[825] DOWNIE, *supra* note 24.

I suggest is the anti-doping regime revisit its strategy on the nature of doping if the fight against doping involves restricting and eliminating prohibited substances and methods and such restriction and elimination requires the assistance of national states and international organizations. While demonstrating the requirement of such reconsideration on the nature of doping, I will expose the related collaboration needs and will apply the pluralist GAL approach in accommodating such collaboration needs regardless they are national or international. Consequently, I first analyze the national level strategies. Following the analysis of national level strategies, I will elaborate the international level strategies.

2.1 National Level Strategies

The UNESCO Convention Article 8.1 allowed the state parties to adopt additional measures with respect to trafficking, control, production, movement, importation, distribution, and sale of the prohibited substances and methods.[826] Similarly, Article 4.1 of the *European Anti-Doping Convention* adopted provisions allowing parties to adopt legislations, regulations, or administrative measures when appropriate to restrict the availability and use of banned doping agents and methods.[827]

The WADA Code also included that trafficking and administration or attempted administration to any athlete in-and-out of competition by any prohibited method or of prohibited substances

[826] UNESCO Convention, *supra* note 5.
[827] European Convention, *supra* note 444.

can constitute an aggravating circumstance, which could cause an increase in the ineligibility period of up to four years.[828] Moreover, WADA describes trafficking as:

> "[S]elling, giving, transporting, sending, delivering or distributing (or Possessing for any such purpose) a Prohibited Substance or Prohibited Method (either physically or by any electronic or other means) by an Athlete, Athlete Support Person, or any other Person subject to the jurisdiction of an Anti-Doping Organization to any third party; provided, however, this definition shall not include the actions of "bona fide" medical personnel involving a Prohibited Substance used for genuine and legal therapeutic purposes or other acceptable justification, and shall not include actions involving Prohibited Substances which are not prohibited in Out-of-Competition Testing unless the circumstances as a whole demonstrate such Prohibited Substances are not intended for genuine and legal therapeutic purposes or are intended to enhance sport performance."[829]

As seen in the definition, the jurisdiction of the Anti-Doping Organizations is the determinant factor in the application of the Code provisions for trafficking cases. However, one should note that the success of a productive investigation can vary as to the scope of support and involvement of public authorities and other international organizations and countries.[830] This can require well-designed legislation, leaving necessary space to the relevant authorities responsible for the investigation.

As a result, the biggest issue is to determine the relevant authority. In certain countries, as seen before, this power of authority was mainly given to NADO, such as in the United States, whereas in certain countries, the practice ranged from government supported mixed mechanisms (Sweden and France) to a mostly government involved criminal law mechanism (Italy).

---

[828] Code, *supra* note 3, Art. 10.6.
[829] *Ibid.,* p. 142.
[830] For instance, WADA started collaborating with INTERPOL as of November 2008 and with pharmaceutical and biotechnology companies as of July 2012: John T. WENDT, "Reflecting on Beijing - a Time of Transition in the War on Doping," (2009) 26/4 *Entertainment and Sports Lawyer,* p. 18; WADA, "Anti-doping collaboration launched with 2 Fields 1 Goal campaign," *Play True Magazine*, 23.7.2013, available at HYPERLINK: < http://playtrue.wada-ama.org/news/anti-doping-collaboration-launched-wtih-2-fields-1-goal-campaign/>[last visited on October 31,
2013].

2.1.1 Legislative Strategies on Doping Trafficking

In their recent research, Houlihan and Garcia created a map of legislative responses in certain countries with respect to the restriction of the availability and use of banned doping substances and methods.[831] Seeing the findings of this research were reliable and would contribute to my *penal* and *public global* approach of doping, I decided to use them in my analysis by creating the percentile variance tables of legislative strategies in the world. The following variance table of strategies in which the percentile equivalent of each strategy is indicated can simplify my own analysis of the results displayed in this research.[832]

Table 8 Legislative Strategies on Doping Trafficking

Strategies on Doping Traffic. (By percentile)	Scope of WADA Prohibited List Acceptance (Extensive, Substantial, Partial, or No Response)				Amendments to Other Legislation (Y/N)		Use of Other Legislation (Y/N)	
	Extensive	Substantial	Partial	No response	Yes	No	Yes	No
Group A (N=18)	*55.6*	*27.8*	*11.1*	*5.6*	*27.8*	*72.2*	*61.1*	*38.9*
Group B (N=4)	*0*	*75*	*0*	*25*	*50*	*50*	*75*	*25*
Group C (N=21)	*23.8*	*23.8*	*33.3*	*19.0*	*19.0*	*81.0*	*57.1*	*42.9*
Group D (N=8)	*12.5*	*62.5*	*12.5*	*12,5*	*25*	*75*	*25*	*75*

"***Group A*** *(Countries adopting specific doping legislation):Austria, China, DR Congo, Cyprus, Denmark, France, Hungary, Iceland, Italy, New Zealand, Norway, Portugal, Romania, San Marino, Serbia, Spain, Sweden, Tunisia.*

Group B *(Countries applying to general sports legislation): Greece, Luxembourg, Mexico, Nicaragua.*

Group C *(Countries applying to general drugs legislation: Belgium-Flanders Canada, Finland, Guatemala, India, Japan, Latvia, Lithuania, Niger, Peru, Philippines, Russian Federation, Singapore, Slovakia, Sri Lanka, Swaziland, United Arab Emirates, United Kingdom, United States of America, Uruguay.*

---

[831] HOULIHAN and GARCIA, *supra* note 509, pp. 12-14.

[832] To find the percentile, I first coded each answer of the countries in the work of Houlian and Garcia and later looked at the frequencies of each answer in their respective categories. In addition to the data provided by the surveyed countries, I tried ascertained the major legislative instruments of the countries regarding the doping trafficking. In this regard, I benefitted from the United Nations Office on Drugs and Crime (UNODC) country reports, available at HYPERLINK: <http://www.unodc. org/enl/browse_ countries> [last visited on March 9, 2013], the European Monitoring Centre for Drugs and Drug Addiction (MCDDA) country profiles, available at HYPERLINK: <http://www.emcdda.europa.eu/countries> [last visited on March 9, 2013], and the Council of Europe (COE) compilation of national laws with respect to the fight against doping, available at HYPERLINK: <http://www.coe.int/t/dg4/sport/ Doping/Antidoping database> [last visited on March, 9 2013].

Group D *(Countries using other legislation): Australia, Cuba, Ghana, Ireland, Kazakhstan, Morocco, Netherlands, South Africa*." [833]

As seen in the table above, the majority of countries adopting specific legislation to restrict the availability and use of banned substances and methods also benefit extensively from the WADA Prohibited List, annexed to the UNESCO Convention. Nevertheless, the majority of countries applying to the WADA List, substantially in the Group D, prefers neither relying on other legislation, nor amending the current legislation. Of these countries, Australia, Ghana, the Netherlands, and South Africa adopted the Convention in 2006, while Cuba and Ireland did it in 2008. Morocco and Kazakhstan ratified the Convention before 2010.[834]

In other words, countries are in the process of drafting additional legislation following the adoption of the UNESCO Convention. A further argument can be made with respect to the efficiency of the legislation that is in use in these countries. One can also question whether there is any need to amend or adopt additional legislations. Overall, the better and more reliable interpretation requires more diverse and specific data, including the number of doping cases that were successfully prosecuted and the number of athletes that were associated with doping scandals from these countries.

Moreover, Group C countries seem to use a diverse range of strategies involving the application of other legislation supporting the WADA List. As a result, I can conclude that the more countries adopt the specific legislations and follow the UNESCO Convention, the more they tend to

[833] These four groups of countries are identified in the research of Houligan and Garcia: HOULIHAN and GARCIA, supra note 509, p. 12-16; and, the legislative instruments of these countries which lead them to determine their own strategies are available in the ANNEX B part of this thesis, see p. 344 *et seq.*

[834] UNESCO, "States Parties to the UNESCO Doping Convention: list sorted by date of deposit," available at HYPERLINK: < http://www.unesco.org/eri/la/convention.asp?KO =31037& language=E > [last visited on October 31, 2013].

use other legislations as well. Thus, this conclusion demonstrates that such countries consider doping substances and methods are not only challenging to fair play, but also constituting threat to the society that should be also controlled by additional laws.

2.1.2 Investigation and Adjudication Strategies on Doping Trafficking

Again, in the research of Houlihan and Garcia, another interesting survey was conducted to reveal the investigation and adjudication strategies of these countries with respect to the prohibited doping substances and methods trafficking.[835] My interpretation of the data and the percentile equivalents of the investigation strategies are illustrated by the following table:[836]

Table 9 Investigation Strategies on Doping Trafficking[837]

Investigation Strategies (By percentile)	NADO	Magistrates	Government Department	Sport Federation	Police	Public Prosecutor	Other
Group A (N=18)	*40.74*	*35.18*	*9.25*	*12.96*	*57.4*	*59.25*	*29.62*
Group B (N=4)	*25*	*33.33*	*25*	*25*	*50*	*75*	*33.33*
Group C (N=21)	*12.69*	*17.46*	*15.87*	*3.17*	*60.31*	*41.27*	*39.68*
Group D (N=8)	*20.83*	*4.16*	*12.5*	*12.5*	*50*	*20.83*	*45.83*

As seen above, the countries in group A mostly use public prosecution, police, and NADO channels in doping investigations. On the contrary, the countries in group C rely very little on NADOs and Sport Federations; they mostly prefer using the police in the investigation of doping

[835] HOULIHAN and GARCIA, *supra* note 509, pp. 18-22.
[836] In their survey Houlihan and Garcia distinguished the investigation process in three parts: 1) Imitation to the investigation, 2) Collecting evidence, and 3) Decision process to prosecute. After then, they asked the same question of responsible authority for the each step. Seeing there was no significant deviance in the responses, I first obtained the mean values of each category and later divided them to the number of countries to which the question was addressed so that I might have found the percentile value for each strategy. However, it is worth noting that the present results of each strategy might only give us a general idea about the tendencies of the countries since the countries were mostly using collective strategies which contained more than one authority.
[837] The group of countries is the same that the table I identifies.

trafficking matters. Consequently, I can say that the more countries prefer specific legislations, the less they tend to leave the responsibility of investigation in the hands of sport federations and government agencies. Moreover, the preponderance in the use of the police and public prosecution services is elevated in all groups of countries, regardless of their regulatory strategy, indicating how important the criminal and public law aspects of doping can be present in the fight against doping.

Table 10 Adjudication Strategies on Doping Trafficking[838]

Adjudication Strategies (By percentile)	Criminal	Civil	Administrative	Criminal and Civil	Criminal, Civil, Administrative	Criminal and Administrative	Other
Group A (N=18)	*38.88*	*5.55*	*16.66*	*11.11*	*27.77*	*5.55*	*0*
Group B (N=4)	*50*	*0*	*0*	*0*	*0*	*50*	*0*
Group C (N=21)	*33.33*	*0*	*4.76*	*9.52*	*14.28*	*19.04*	*9.52*
Group D (N=8)	*50*	*0*	*1.25*	*1.25*	*1.25*	*0*	*0*

As seen above, the countries mostly prefer involving the criminal courts in the adjudication of doping trafficking matters. However, collective strategies, which comprise civil, administrative and criminal courts are also extensively applied by countries. This can be explained by distinguishing the nature of infraction or violation and by applying distinct or integrated procedural rules. In other words, countries choose different instances to settle doping matters according to their categorization of doping offenses, which can range from civil to criminal or quasi-criminal.[839] Thus, a country, considering doping as a quasi-criminal matter will naturally require quasi-criminal procedures, which can involve criminal, administrative and civil courts.[840]

[838] *Ibid.*

[839] The categorisation of doping has been discussed for a long period of time since the WADA Code provisions required the different evidentiary rules (Art.3.1.) which result in involving criminal law principles before a private law tribunal: DOWNIE, *supra* note 24, p. 330.

[840] For instance, as I studied above, Sweden and France are the two examples of countries which use a mixed system of administrative and criminal tribunals: see *supra*, pp. 198-202.

Overall, criminal and administrative tribunals seem to be the most preferred instances to settle doping trafficking matters.[841]

2.1.3 Collaboration Strategies between Countries and INTERPOL

Having seen the controversies among countries with respect to the choice of adjudication mechanisms, I believe consulting the research of Houlihan and Garcia with respect to their survey on the collaboration status of the countries with INTERPOL will be informative.[842] Again, the following table indicates my interpretation of the extracted data in the survey along with the percentile equivalents of each strategy.[843]

Table 11 Collaboration Strategies with INTERPOL

Collaboration Strategies with the INTERPOL (By percentile)	Is doping trafficking information passed to the INTERPOL?			If passed, which authority does it?				If not, can it be possible in the future?			If possible, which authority would do it?			
	Yes	No	No Response	Police	Government Authorities*	NADOs	No Answer	Yes	No	No Response	Police	Government Authorities*	NADOs	No Answer
Group A(N=18)	*33.3*	*55.6*	*11.1*	*16.7*	*27.8*	*5.6*	*50*	*44.4*	*11.1*	*44.4*	*5.6*	*22.2*	*5.6*	*66.7*
Group B (N=4)	*0*	*50*	*50*	*25*	*0*	*0*	*75*	*25*	*25*	*50*	*50*	*0*	*0*	*50*
Group C (N=21)	*23.8*	*61.9*	*14.3*	*9.5*	*9.5*	*0*	*81.0*	*47.6*	*14.3*	*38.1*	*14.3*	*4.8*	*23.8*	*57.1*
Group D (N=8)	*25*	*37.5*	*37.5*	*12.5*	*0*	*12.5*	*75*	*37.5*	*0*	*62.5*	*12.5*	*12.5*	*12.5*	*62.5*

*Ministry of Interior, National Intelligence Agencies, Ministry of Justice.

As seen above, countries do not extensively collaborate with INTERPOL and they are reluctant to disclose the collaborating authority when they do collaborate. However, non-collaborating

[841] HOULIHAN and GARCIA, *supra* note 509.
[842] *Ibid.,* pp. 27-29.
[843] I first coded the responses given in the survey and then looked at the frequencies of the each coded answer. Later on, I weighted the result according to the number of countries to find the valid percentile.

countries seem to be more positive in collaborating with INTERPOL in the future. Even though the countries, which do not collaborate with INTERPOL now, mostly look at a future collaboration with INTERPOL positively, they are still hesitant to name any authority which would conduct such collaboration.

Moreover, we cannot conclude that there is a significant inclination in group A countries towards collaboration in comparison to Group C and D countries; and, saying such collaboration is relatively higher in countries using specific legislation and police as the mostly preferred authority to pass information can still be incorrect when we look at the countries which do not use specific legislations (Group C and D) and which comprise about 49 percent − a much higher score than that of Group A countries.[844] This can lead anyone to argue that the specific legislation is not always encouraging contact with INTERPOL.

In addition to contact with INTERPOL, Houlihan and Garcia also assessed the impact of the legislation in countries by asking them how satisfied they were with their current legislation in restricting the use and availability of doping substances and methods. According to the results, the countries using specific legislation were reported to be the most satisfied group.[845] However, one should note that evaluating the impact of the legislation unilaterally may not always give realistic results. For instance, a piece of legislation can be very effective from the state authorities point of view in the short term while their impact can be limited in the long term. Logically, a country would generally like to have legislation that has the most desired impact. Therefore, it is likely that countries, which have adopted specific legislation, did so to have the most desired

[844] In this respect, I disagree with Houglihan and Garcia on their conclusion with respect to the data observed for the INTERPOL collaboration: HOULIHAN and GARCIA, *supra* note 509, p. 26.
[845] *Ibid.,* p. 31.

impact on this specific subject and their satisfaction response with the legislation can mislead us to assess their effectiveness.

Professors Houle and Sossin specified in their report, submitted to the Office of Privacy Commission (OPC) in Canada, that an effectiveness or ineffectiveness claim cannot simply be asserted through quantitative data. Thus, such claims should be supported by qualitative data coming from academics and stakeholders in order to arrive at a more satisfactory output.[846] In my view, however, such quantitative data still provides evidence that the anti-doping regime must collaborate with public authorities in order to restrict and eliminate prohibited substances and methods. And these collaboration requirements provide evidence for WADA reconsider the nature of doping. In other words, asking assistance from the public authorities cannot be properly realized without including the required criminal and public law aspects into the nature of doping.

The aforementioned legislative, adjudication and collaboration strategies also demonstrate the complexity, diversity, and lack of knowledge aspect of the issue for the countries. From the nature of the legislative instrument to the selection of public authority of collaboration, the countries need extensive guidance to enable them to be effectively and deliberately involved in the fight against doping. In this aspect, the pluralist approach of GAL will be fruitful with its global public good consideration for the subject matter of doping and with its knowledge sharing and informed participation mechanisms for the better recognition of and involvement in the fight against doping. Eventually, these adapted GAL tools will guide countries, stakeholders, interest groups, and other anti-doping governance intersected global public good producing regimes in transforming themselves to better answer the anti-doping global governance needs.

[846] HOULE and SOSSIN, *supra* note 571, p. 14.

Consequently, WADA should first remove the complexities and ambiguities about the nature of doping and should consider the *penal* and *public global* nature of doping. This *penal* and *public global* nature of doping will communicate more efficiently with the required public authorities of collaboration at the national level. And, knowledge sharing and informed participation between WADA and national governments will maximize the impact and efficiency of such collaboration. However, elaborating the international level strategies outside WADA and the anti-doping regime context is also required to see how the other global public good producing organizations impact on the restriction and elimination of the prohibited doping substance and methods in the world.

2.2 International Level Strategies

Restricting and eliminating the availability of the prohibited substances and methods at the national level overlaps with international level strategies. Although WADA's global guidance in the fight against doping has helped the harmonization and unification of the global anti-doping response, witnessing the growing activities of transnational organized crime obliges WADA to consider "outside of the box strategies" (external to the anti-doping regime) in the fight against doping.[847] Moreover, the national level strategies for the restriction and elimination of the prohibited substances and methods can be overlapped with the international level initiatives when the prohibited substance is considered controlled substance or narcotic drug or something similar to it at the same time. Cannabis is the foremost example in this regard.

[847] Owen GIBSON, "Drugs in Sport: Wada Says Doping and Organised Crime 'Too Big to Manage, '" *The Guardian*, 15 February 2013, available at HYPERLINK: <http://www.guardian. co.uk/sport/2013/feb/15/drugs-wada organised-crime> [last visited on November 2, 2013].

Additionally, that transnational organized crime activities should be evaluated under the international drug and crime schema compels one to look at the greater picture of the prohibited doping substance and method trafficking in the world. Seeing the ACC report has officially confirmed the involvement of transnational organized crime organizations in doping trafficking,[848] I believe reviewing the current international strategies regarding narcotics and drug law is required. Such review will help me better position my thesis which argues the involvement of criminal law and public law aspects in the doping governance in accordance with the global diversity and collaboration considerations. Besides, this review will picture further the global anti-doping governance needs that the adapted (pluralist) approach of GAL will consider in remodelling the anti-doping regime.

For instance, the report of the ACC indicates that the market for Performance and Image Enhancing Drugs (PIEDs) encompasses more than elite athletes. They are widely available to the public because of the absence of regulation. In addition, criminal organizations are attracted to the sport market as it helps them improve their social prestige while they associate themselves with famous sport people.[849] As a result, organized criminal activities in the illegal drug market of sport are likely to increase since making profit from drug trafficking or money laundering is not the main concern for the traffickers. After all, the sport industry is getting bigger and bigger as the new marketing strategies create more sport celebrities every day.[850]

[848] ACC Report, *supra* note 8.
[849] *Ibid.,* p. 32.
[850] Tim De LISLE, "How Did Sport Get so Big? DID SPORT'," *More Intelligent Life,* available at HYPERLINK: < http://moreintelligentlife.com/content/ideas/tim-de-lisle/how-did-sport-get-so-big> [last visited on April 14, 2013].

Therefore, there is a need to distinguish organized criminal activities in the matter of doping from other transnational narcotic and illegal drug trafficking when developing transnational strategies to prohibit and prevent organized crime activities in doping. However, prior to this, it is worthy to briefly examine the current legal and institutional framework which controls the transnational criminal activities with respect to the drug trafficking in the world.

2.2.1 International Drug Conventions and Organisations

There are presently three main conventions that govern the international drug prohibition sphere: 1) the *Single Convention on Narcotic Drugs* (1961) as amended by the Protocol (1972),[851] 2) the *Convention on Psychotropic Substances* (1971),[852] and 3) the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1988).[853] Prior to these conventions, Opium had been intended to be regulated by nation states. Three of these opium conventions, which are titled the *Hague Convention, 1912*, the *Geneva Convention, 1925*, and the *Limitation Convention, 1931*, were considered the principal conventions for the international legislation on opium. This is because the states consented to these conventions be considered so in the presence of a subject with international concern, such as opium.[854] Thus, international concern worked to bring nation states together when the subject matter required their collaboration.

---

[851] United Nations, "Single Convention on Narcotic Drugs," 1961, available at HYPERLINK: <https://www.unodc.org/unodc/en/treaties/single-convention.html> [last visited on November 2, 2013]. [1961 Convention]

[852] United Nations, "Convention on Psychotropic Substances," 1971, available at HYPERLINK:< http://www.unodc.org/unodc/en/treaties/psychotropics.html> [last visited on November 2, 2013]. [1971 Convention]

[853] United Nations, "Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances," 1988 available at HYPERLINK: <http://www.unodc.org/unodc/en/treaties/illicit-trafficking.html> [last visited on November 2, 2013]. [1988 Convention]

[854] Staricoff states that these three conventions should be considered *international legislation* with regards to the subject despite there is no mechanism or organ at the international level meeting the legislation requirement and procedure of a nation state. He arrives at this conclusion arguing that "If the result means more than the procedure which brings it about, then it is legitimate to say that the Opium Conventions do make International Law with

In this regard, Staricoff draws attention on the universality of these three opium conventions, giving the number of countries which ratified them as of 1936. According to his analysis, 59 states ratified the *Geneva Convention*, 53 states ratified the *Limitation Convention* and 56 states ratified the *Hague Convention*.[855] In addition, it is important to note that the post-1960 drug conventions have a significant participation rate world-wide. The current status of these conventions as of 15 April 2013 is illustrated in the table below.[856]

Table 12 The United Nations Drug Conventions Status

	Entry into Force	Registration	Status
1961 Convention[857]	*13 December 1964, in accordance with Article 41*	*13 December 1964, No. 7515.*	*Signatories: 61. Parties: 153*
1971 Convention[858]	*16 August 1976, in accordance with Article 26 (1)*	*16 August 1976, No. 14956*	*Signatories: 34. Parties: 183*
1972 Protocol to 1961 Convention[859]	*8 August 1975, in accordance with Article 18*	*8 August 1975, No. 14151*	*Signatories: 54. Parties: 125*
1988 Convention[860]	*11 November 1990, in accordance with Article 29 (1)*	*11 November 1990, No. 27627*	*Signatories: 87. Parties: 188*

respect to an entirely new subject, and that they therefore constitute Acts of International Legislation:" Joseph STARICOFF, "International Law and the Opium Conventions," (1936) 18 /1-4 *Journal of Comparative Legislation and International Law,* p. 94.

[855] *Ibid.,* p. 35.

[856] The table is prepared by the help of information displayed on the United Nations Treaty Collection Database. UN Treaty Collection, available at HYPERLINK: < http://treaties.un.org/ Pages/Index.aspx> [last visited on April 15, 2013].

[857]1961 Convention, *supra* note 851. To note, Canada and Turkey are parties to this Convention without any reservation. *Ibid.*

[858] 1971 Convention, *supra* note 852. To note, Canada and Turkey are parties to this Convention with reservation. Canada has a reservation on "whereas Canada is desirous of acceding to the Convention on Psychotropic Substances, 1971, and whereas Canada's population includes certain small clearly determined groups who use in magical or religious rites certain psychotropic substances of plant origin included in the schedules to the said Convention, and whereas the said substance occur in plants which grow in North America but not in Canada, a reservation of any present or future application, if any, of the provisions of the said Convention to peyote is hereby made pursuant to article 32, paragraph 3 of the Convention." Turkey's reservation is on "servation with respect to article 31 (2) of the Convention, made in accordance with its article 32 (2)." *Ibid.*

[859] Single Convention on Narcotic Drugs (1961) as amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs, 1961, available at HYPERLINK: <http://www.unodc.org/ pdf/convention_1961_en.pdf > [last visited on November 2, 2013] [1972 Protocol]. To note Canada and Turkey are parties to this convention, but Canada is "subject to a reservation with respect to subparagraphs (i), (ii) and (iii) of paragraph 2 (b) of the amen ding article 14:" *Ibid.*

[860] 1988 Convention, *supra* note 853. To note, Turkey and Canada are parties to this Convention without reservation. *Ibid.*

Having seen the high level participation in these conventions around the world, I can briefly describe their importance to the doping in sport context, despite the fact that *doping* and/or *doping substance* was not mentioned in any of these conventions [861] whereas certain prohibited doping substances such as *cannabis*, *heroine*, *cocaine* and *morphine* were alternately referred therein.[862]

2.2.1.1 Single Convention on Narcotic Drugs (1961) as amended by the Protocol (1972)

The *Single Convention on Narcotic Drugs* focussed on plant-based drugs,[863] which may be categorized in three following groups: 1) Opioids from the poppy (*papaver somniferum*) and derivatives, 2) Cocaine from the coca bush (*erythroxylum coca*), and 3) Cannabis from the cannabis plant (*Cannabis saliva*).[864] The Convention mainly regulated the definitions of controlled substances, organization of manufacture, inspection, trade and consumption of controlled substances, reporting and coordination obligations of the states, and actions against the illicit traffic and penal provisions.[865]

The importance of this Convention to doping in sport is that many doping substances prohibited today were also categorized as a controlled substance and the concept of public health and welfare was also referred in the determination of appropriate measures (Art. 2.5), cultivation (Art.22), and weight of the penal provisions (Art.39). Moreover, the establishment of Interna-

[861] I conducted an electronic key word research on these conventions through the *Adobe Acrobat Reader X Professional* software and did not come across any of these terms.
[862] *Ibid.*
[863] Daniel HEILMANN, "International Control of Illegal Drugs and the U.N. Treaty Regime: Preventing or Causing Human Rights," (2011) 19/2 *Cardozo Journal of International and Comparative Law,* p. 244.
[864] Robin ROOM and Peter REUTER, "How Well Do International Drug Conventions Protect Public Health?," (2012) 379/ 9810 *The Lancet,* p. 84.
[865] 1972 Protocol, *supra* note 859.

tional Drug Control Organs (Art.4) such as the Commission on Narcotic Drugs (CND) under the authority of the Economic and Social Council of United Nations (ECOSOC) and the International Narcotics Control Board (INCD) were important developments in terms of management and organization of the world-wide narcotic drugs. The Convention also included the drug prevention program and education (Art. 38) which held important steps affecting the fight against doping in sport.

Eventually, a CND resolution issued in 1968 including the following:[866]

> *[…] Believing that sports activities have an important role in keeping individuals in physical and mental health,*
> *Considering the influence exercised by the behaviour of champions upon a great many young people and even adults,*
> *Noting with anxiety the resort in certain cases to practices known as doping, which consist in the use of psychotropic or other pharmaceutical substances and even of narcotic drugs, in sports competitions with the sole object of artificially improving performance,*
> *Considering that these practices are dangerous for the health of sportsmen and are inconsistent with the proper medical and scientific use of these substances,*
> *Believing that the time has come to take a stand in this matter in view of the special influence which sport is bound to have throughout the world and particularly during this Olympic year,*
> *1. Draws the attention of Governments to the dangers of doping;*
> *2. Recommends that they take, where necessary, all appropriate measures to prevent such practices […]*

As seen in this resolution, the CND states that doping is a dangerous activity for the health of the athlete. In addition to this consideration, what is important in this resolution is doping does not only have individual consequences, but also raises public health and welfare issues. Namely, athletes have the power to influence youth and adults. Thus, a leading athlete associated with doping would not only generate harm to himself, but also would negatively affect society.

[866] ECOSOC, "Doping," *CND Res.2 (XXII),* January 1968, available at HYPERLINK: < http:// www.unodc.org/-documents/commissions/CND-Res-1960to1969/CND-session22-1968/CND-Resolution-22.2.pdf> [last visited on November 2, 2013].

The other point to highlight in the Convention is the only concerned subject stated in the Preamble was the *health* and *welfare* of mankind. However, it is important to mention the term "public" was not explicitly included despite the fact that it was mentioned in certain provisions noted above. In addition, the way in determining the scope of public health and welfare while taking the appropriate measures is not clear and leaving such determination to the discretion of nation states can create different practices in light of varying national interests. However, certain clarification was made in the commentary on the Convention prepared by the Secretary General of the United Nations.[867]

According to this commentary of the Convention "a Nation State is supposed to act in good faith rather than discretion and its opinion is required to be bona fide when they are obligated to take appropriate measures protecting the public health and welfare."[868] As a result, we can interpret this commentary as the international interest which, in these circumstances, prevails over the national interest as protected by a principled approach of *good faith* and such a principled control mechanism of an *international convention* would serve more for the efficiency and credibility of international legislation.[869] Another aspect of ensuring the credibility of the Convention is the amendment procedure of the schedules.

Subsequently, when a substance is to be included in the schedules or namely a schedule is sought to be amended, a certain procedure in which the Secretary General of the United Nations, the

[867] UN, "Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, 1961," 25 March 1972, available at HYPERLINK: < http://www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the_protocol_1961.pdf> [last visited on November 2, 2013].
[868] *Ibid*., 65.
[869] For the term of *international legislation*, see *supra* note 854.

World Health Organization (WHO), and the Commission on National Drugs (CND) are involved, should be followed.[870]

2.2.1.2 Convention on Psychotropic Substances (1971)

The 1971 Convention simply tightened the concept of controlled substances regulating Psychotropic drugs such as amphetamines, barbiturates and hallucinogens, which started posing a threat to the international community, as a result of increase in the advanced technology use in manufacturing.[871]

Similar to the 1961 Convention, the regulation of Psychotropic substances was structured in the same manner including the definitions, scope, manufacture, trade, and use of Psychotropic substance as well as penal provisions.[872] However, one of the important differences between these two conventions is the weaker control in the amendment and/or inclusion of a substance to the controlled list of substances. The decision of WHO on a future substance inclusion or exclusion into the list does not have a binding effect on the CND (Art. 2.6) unlike the procedure presented at the 1961 Convention.[873]

As a result, I can conclude that the CND has more discretionary power in such an amendment process and this discretionary power does not seem to be performed in a principled approach

[870] 1961 Convention, *supra* note 851, Art. 3.
[871] HEILMANN, *supra* note 863, p. 246.
[872] *Ibid.,* pp. 246-247.
[873] *Ibid.*

such as *good faith*.[874] Yet, this discretion is not absolute since the decisions of the CND are subject to the review process when asked by the Economic and Social Council of the United Nations according to Article 2.8 of the Convention. Another difference which is worth noting is the reference to the *public health* and *social problem* terms in the Preamble of the Convention.[875]

In doing so, I can imply there is a slight change in the strategy, which shifts from a more individualistic basis to a more public focus. At this point, observing that the parties are obligated to take preventive measures such as "early identification, treatment, education, aftercare, rehabilitation, and social reintegration of the persons involved" is important to note (Art.20).[876]

In terms of doping substances, I see that the list of controlled substances also includes the stimulants prohibited by the 2014 WADA Prohibited List such as amphetamine, methylphenidate, methamphetamine, etc.[877] However, the Convention does not have any direct reference to *doping*, similar to that of 1971. Finally, Room and Reuter find that the reason for the less strict approach in this Convention in comparison to the 1961 Convention was due to the non-medical use of these synthetic drugs and the treaty power of pharmaceutical companies, located in developed countries which could only manufacture such drugs because of the advanced technology required.[878]

---

[874] In my analysis of the commentary of the Convention, I observe the *good faith* principle should only be taken into consideration when the parties are supposed to perform an action or inaction: UN, "Commentary on the Convention on Psychotropic Substances,"21 February 1971, p. 28,34, 56, 64,78, 89,92,112, 251, 300, available at HYPERLINK: <http://www.unodc.org/ documents/treaties/organized_crime/Drug%20Convention/ Commentary_on_the_Convention_1971.pdf> [last visited on November 2, 2013].
[875] 1971 Convention, *supra* note 852.
[876] *Ibid.*
[877] *Ibid.*; Prohibited List, *supra* note 55.
[878] ROOM and REUTER, *supra* note 864, p. 84.

2.2.1.3 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)

Seeing that the previous two conventions were not so effective in the control of illicit drug traffic, the 1988 Convention aimed at controlling the illicit drug traffic by using a more holistic strategy which covered all chains of the illicit drug traffic from drug production to money laundering.[879] One of the strategies was to put more pressure on the illicit markets by inhibiting money laundering and having more tightened controls in the precursors, chemicals, and solvents.[880] Another strategy was to impose on the nation states that they classify the illicit drug traffic as an international criminal activity which requires an active collaboration and cooperation of nation states.[881] The importance of this new strategy is that the illicit drug traffic is no longer perceived as a punishable offense as occurred in the previous conventions.[882]

The other important point to highlight is the Convention also expressed that the danger or harm of illicit drug traffic to society was very high since children were used in many parts of the illicit drug traffic chains.[883] Overall, this Convention imposed more proactive roles onto the nation states so they could collaborate more systematically with other nations and use criminal justice mechanisms to be more effective against the organized crime organizations with cross-border activities.

[879] HEILMANN, *supra* note 863, p. 249.
[880] ROOM and REUTER, *supra* note 864, p. 84.
[881] Preamble of the Convention, 1988 Convention, *supra* note 853.
[882] HEILMANN, *supra* note 863, p. 250.
[883] *Supra* note 881.

However, the obligations of the nation states under the Convention were in line with their sovereignty and territorial integrity which was also clearly stated in the Convention (Art.2.2).[884] Moreover, the nation states had more room to consider how to determine the scope of criminal offenses with respect to possession and use while taking into consideration their basic concept of laws and limits of constitutional laws (Art.3.2).[885]

Unlike to the previous two conventions, the Preamble was more detailed and involved the summaries of certain articles which followed in the Convention. Further, the commentary of the Convention also included comments with respect to the Preamble, which were also unusual compared to the previous conventions.[886] I believe the change in the Preamble and weight on its scope and effect on the treaty interpretation was due to Art. 31.2 of the *1969 Vienna Convention on the Law of Treaties*, which states the Preamble and annexes of the convention, shall be also part of the treaty interpretation.[887]

Starke stated almost eight decades ago that one of the major difficulties in international drug conventions was to draw a line between licit and illicit activities since national governments first intended to determine the licit activities of dangerous drugs within their borders and then focus on preventing illicit activities through international collaboration.[888] This difficulty was supposed

[884] *Ibid.*
[885] Nicholas DORN,"UK Policing of Drug Traffickers and Users: Policy Implementation in the Contexts of National Law, European Traditions, International Drug Conventions, and Security after 2001," (2004) 34/3 *Journal of Drug Issues,* pp. 543-544.
[886] UN, "Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances," 20 December 1988, pp. 12-26, available at HYPERLINK: <http://www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the_united_nations_convention_1988_E.pdf>[last visited on November 2, 2013]. [Commentary 1988]
[887] This anecdote on the Vienna Convention and the binding effect of the preamble were also mentioned in the commentaries: *Ibid*., 12.
[888] Joseph G. STARKE, "The Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs,"

to be overcome by a specific provision in the Convention (Art.14.2), but this provision caused more complexity in drawing the line between illicit and licit activities by including the following:

> "The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment."

The 1961 Convention already outlawed the traditional use of cocoa chewing and opium smoking and the interpretation of Art. 14.1 of the Convention, which states that the measures that countries will take under the Convention, cannot be less strong than those of the eradication of the illicit drugs. Heilman, thus, states that the 1961 Convention did not leave any room for the production of traditional licit use.[889]

However, Article 14.2 is not as easy to interpret as Heilman has done since the *traditional illicit use*, *historic evidence*, and *protection of the environment* each have a very broad range of characteristics to consider, from complex risk assessments to region specific cultural and sociological evaluations. The commentary of the Convention also outlines this difficulty with the following words:

> "The use of toxic chemicals, especially where they are sprayed from aircraft, may prove highly effective but the environmental risks associated with that and similar practices need to be weighed. The geography of a given region may also directly influence the suitability of the use of one eradication method over another."[890]

Finally, aside from the systematics of the *1988 Convention on Narcotic Drugs and Psychotropic Substances*, the Convention did not mention the matter of doping similar to the previous conven-

---

(1937) 31/1 *American Journal of International Law,* pp. 31-32.
[889] HEILMANN, *supra* note 863, p. 251.
[890] Commentary 1988, *supra* note 886.

tions. However, the Convention included a mechanism of "mutual legal assistance" which would also serve the fight against doping. The reason is that the mechanism requires obligatory cooperation in investigations, prosecutions and judicial proceedings in relation to the certain criminal offenses such as "possession or purchase of any narcotic drug or psychotropic substance for the purposes of production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, etc."[891]

Nonetheless, countries can refuse the legal assistance in certain areas under certain conditions, such as prejudice of the request on the sovereignty, security, public order or other essential interests of the requested country (Art.7.15).[892] The *United Nations Convention against Transnational Organized Crime* and The Protocols Thereto enhanced the scope and practice of the mutual legal assistance[893] and such a revolutionary tool of legal assistance can guide the aspect and scope of collaboration among the national public authorities with respect to the prohibited substances and methods.

In other words, the presence of such international tools of the mutual legal assistance (Art. 18) and joint investigations (Art. 19) on which the countries were agreed already supports my view of considering the criminal law and public law aspects of doping along with the diversity and collaboration aspects. This is primarily because the collaboration among public authorities with respect to the anti-doping will require the assistance of same authorities which deal with the or-

[891] Interpretation of Art. 7.1 and 3.1.a. (i and iii):1988 Convention, *supra* note 853.
[892] 1988 Convention, *Ibid.*
[893] UN, "United Nations Convention against Transnational Organized Crime," 15 November 2000, available at HYPERLINK: <http://www.unodc.org/unodc/treaties/CTOC/> [last visited on November 2, 2013].

ganized crime and drug activities. Even if one can argue that NADOs can also exercise the mutual legal assistance role, I can still defend my position answering with "illicit drug or method activities cannot be always exclusive to doping and thinking NADOs can be as powerful as any national authority dealing with organized crime and drug trafficking is unrealistic."

As seen in the previous section when I analyzed the collaboration strategies with INTERPOL, the countries hesitated to give information about the identity of national authority passing the anti-doping information to INTERPOL.[894] In addition, noticing that the countries would be reluctant to collaborate with INTERPOL in the future with respect to the doping information is also worth remembering.[895] Thus, instead of focusing on the centralized global organization, such as INTERPOL and WADA, the mutual collaboration aspect, such as legal assistance and joint investigations should be given more weight. Therefore, elaborating the international and regional drug policy makers which also determine the scope of collaboration and which develop collective strategies will help me finalize how the anti-doping regime should accommodate the global governance needs and how the other anti-doping intersected global public good producing regimes will contribute to such accommodation.

II.2.2.International and Regional Drug Policy Makers

I can classify the International Drug Organizations in two groups as the United Nations based and Regional based. The United Nations based organizations are the Commission on Narcotic

[894] See *supra* p. 293 *et seq*.
[895] *Ibid.*

Drugs CND),[896] the International Narcotics Control Board (INCB),[897] and the United Nations Office on Drugs and Crime (UNODC).[898] The regional organizations, which work outside of the United Nations System, can be named as follows:[899]

-Europe: the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)[900] and the European Union Drugs Strategy (EUDS)[901]
-Asia: the Association of Southeast Asian Nations (ASEAN)[902] and the Drug Free ASEAN 2015[903]
-South America: the Inter-American Drug Abuse Control Commission (CICAD)[904] and Hemispheric Plan of Action on Drugs, 2011-2015[905]
-Central America: the Permanent Central American Commission for the Eradication of Production, Trafficking, Consumption and Illicit Use of Narcotic and Psychotropic Substances and Related Crimes (CCP)[906] and Convention of the Permanent Central Committee[907]

---

[896]UNODC, "Commission on Narcotic Drugs," available at HYPERLINK: < http://www.unodc.org/unodc/en/commissions/CND/ > [last visited on April 21, 2013]. [CND Website]
[897] INCB, "Monitoring and supporting Governments' compliance with the international drug control treaties," available at HYPERLINK: < http://www.incb.org/ > [last visited on November 2, April 21, 2013]. [INCB Web site]
[898] UNODC, "Official Website," available at HYPERLINK: < http://www.unodc.org/> [last visited on April 21, 2013]. [UNODC Website]
[899] HEILMANN, *supra* note 863, pp. 256-258.
[900] As a decentralized EU agency and located in Lisbon, Portugal, it advises the EU and its member states on drug law and policy making through factual and scientific data: EMCDDA, "Official Website," available at HYPERLINK: < http://www.emcdda.europa.eu/> [last visited on November 2, 2013]. [EMCDDA Website]
[901] The EU Drugs Strategy provides the overarching political framework and priorities for the EU drugs policy, identified by the member states and EU institutions for a certain period of time and adopted by the Council of the European Union. The new EU Strategy for the period of 2012 and 2020 was endorsed on 7 December 2012 by the Council of the European Union: Council of the European Union, "EU Drugs Strategy (2013-20)," 7 December 2012, available at HYPERLINK: < http://ec.europa.eu/justice/anti-drugs/european-response/strategy/index_en.htm> [last visited on
November 2, 2013].
[902] The ASEAN was established on 8 August 1967 in Bagkok, Thailand and is composed of ten members: Indonesia, Malaysia, Phillippines, Singapore, Thailand, Brunei Darussalam, VietNam, Lao PDR, Myanmar, and Cambodia: ASEAN, "Official Website," available at HYPERLINK: < http://www.asean.org > [last visited on April 21, 2013].
[903] The 22th ASEAN Summit's Declarations on Drug-Free ASEAN 2015, Bandar Seri Begawan, Malaysia, 24-25 April 2013, available at HYPERLINK: < http://www.asean.org/news/asean-statementcommuniques/item/chairmans-statement-of-the-22nd-asean-summit-our-people-our-future-together> [last visited on November 2, 2013].
[904] The CICAD was established in 1986 by the General Assembly of the Organization of American States (OAS) with the aim of reducing the production, trafficking and use of illegal drugs. The Organization considers itself as the Western Hemisphere's policy forum in dealing with the drug problem: CICAD, "Official Web Site," available at HYPERLINK: < http://cicad. oas.org/> [last visited on April 23, 2013].
[905] CICAD, "Hemisphreic Plan of Action on Drugs 2011-2015," 49th Reg. Session, Paramaribo, Suriname, 17 May 2011.
[906] The CCP was created on October 29 1993 by the Constitutive Agreement signed in Guatemala City by the countries of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama. Its primary function is to serve as consultative and advisory body for member states with respect to control of the production, trafficking, consumption and illicit use of narcotics and psychotropic substances and related crimes. The Organization also maintains technical cooperation activities at the request of member states. *Sistema de la Integracion Centroameri-*

-Africa: the African Union Conference of Ministers of Drug Control[908] *and the African Union Plan of Action on Drug Control and Crime Prevention*[909]
-Central Asia and Europe: and the Paris Pact Initiative, [910] *and the Vienna Declaration.*[911]

Outside of these organizations, according to the Vienna NGO Committee on Narcotic Drugs (VNGOC), there are around 100 not-for-profit drug policy organizations working in the field of narcotic drugs and psychotropic substances and which registered their organizational profile with the UN Department of Economic and Social Affairs (DESA).[912] Having seen their excessive numbers, I believe studying briefly the UN based organizations only will be sufficient, considering their role and authority in the international drug policy making.

---

cano (SICA), "Instituciones del SICA, CCP," available at HYPERLINK: <http://www.sica.int/> [last visited on April 23, 2013].

[907] *Convenio Constitutivo de la Comision CentroAmericana Permanente para la Erradicacion de la Producion, Trafico, Consumo y Uso Ilicitos de Estupefacientes y Sustancias Psicotropicas* (CCP), Guatemala City, Republic of Guatemala, 29 October 1993, available at HYPERLINK:< http://www. oas.org/juridico/spanish/tratados/sp_conve_ cons_centroame_rerma_erradi_produ_tafic_onsui_licito_estupe_sustan_psico.pdf > [last visited on November 2, 2013].

[908] The African Union Department of Social Affairs regularly organizes the conferences of ministers with respect to drug control and the 5th meeting was held in Addis Adaba, Ethipoia between 8 and 12 October of 2012. The outcome of this meeting was to outline the AU Plan of Action on Drug Control for the period of 2013 and 2017: AFRICAN UNION, *Department of Social Affairs*, available at HYPERLINK: < http://sa.au.int/> [last visited on April 23, 2013].

[909] The goal of action plan is summarised as "[...] improve the health, security and socio-economic well-being of the people in Africa by reducing drug use, illicit trafficking and other associated crimes:" AU Plan of Action on Drug Control (2013-2017), *Submitted for consideration by the 5thSession of the Africa Union Conference of Ministers of Drug Control (CAMDC5)*, 8-12 October 2012.

[910] The Paris Pact iniative is a partnership to counter the trafficking and consumption of opiates originating in Afghanistan and was established at the Ministerial Conference on Drug Routes from Central Asia to Europe, held in Paris in 2003. Its govermental partners are Afghanistan (Islamic Republic of), Albania, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, China (The People's Republic of), Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, India, Iran (Islamic Republic of), Ireland, Italy, Japan, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Luxembourg, Macedonia (The former Yugoslav Republic of), Malta, Moldova, (Republic of) Montenegro, Netherlands, Norway ,Pakistan (IslamicRepublic of), Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland Tajikistan, Turkey,Turkmenistan,Ukraine,United Arab Emirates,United Kingdom,United States of America, Uzbekistan: Paris Pact Iniative (PPI), "Official Website," available at HYPERLINK: < https:// www.paris-pact.net/> [last visited on April 23, 2013].

[911] The Vienna Declaration aimed at "[...]reaffirming the commitments of members of the international community towards the fight against illicit traffic in opiates, to strengthen cooperation between Paris Pact partners and to urge them to achieve substantial practical results in reducing illicit opiates trafficked from Afghanistan." Paris Pact Iniative (PPI), "3rd Ministerial Conference of the Paris Pact Partners on Combating Illicit Traffic in Opiates Originating in Afghanistan- Vienna Declaration," Vienna, Austria, 16 February 2012.

[912] VNGOC, "Membership," available at HYPERLINK: <http://www.vngoc.org/> [last visited on April 21, 2013].

2.2.2.1 The Commission on Narcotic Drugs (CND)

The Commission was established on 16 February 1946 by the Economic and Social Council (ECOSOC) of the United Nations as one of its functional commissions.[913] According to this resolution, the duties of the commission are grouped in two categories: assisting and advising. The Commission shall assist ECOSOC and the League of Nations Advisory Committee on Traffic in Opium and Other Dangerous Drugs in exercising its supervisory duties over the application of international conventions. Its advising duty is again to ECOSOC for all matters with respect to the control of narcotic drugs.[914] The resolution ensures that the Commission should be composed of 15 delegates representing the following governments: Canada, China, Egypt, France, India, Iran, Mexico, the Netherlands, Peru, Poland, Turkey, the United Kingdom, the USA, the Union of Soviet Socialist Republics, and Yugoslavia.[915]

As of today, the number of delegates is 53, composed of African states (11), Asian states (11), Latin American and Caribbean states (10), Eastern European states (6), Western European and other states (14), and one seat to rotate between the Asian, and Latin American and Caribbean states every four years.[916] As a treaty organ, the Commission has normative functions in deciding to place, remove, and modify narcotic drugs (1961 Convention), psychotropic substances (1981 Convention), and precursor chemicals (1988 Convention) under international control.[917] In performing this function, the Commission was first bound to the WHO recommendations under the

[913] "U.N. Econ. & Soc. Council Res. 9(1), at 129, U.N. Doc. E/RES/1946/9(1) (Feb. 16, 1946)," cited in HEILMAN, *supra* note 863, p. 253. [Resolution 9(1)]
[914] *Ibid.,* sec.2a-d.
[915] *Ibid.,* sec.6.
[916] ECOSOC Res. 1991/49, at 42, U.N. Doc. E/1991/103/Add.1, 21 June 1991, available at HYPERLINK: < http:// daccess-dds ny.un.org/doc/RESOLUTION/GEN/NR0/696/47/ IMG/NR069647.pdf?OpenElement> [last visited on November 2, 2013].
[917] CND Website, *supra* note 896.

1961 Convention. However, the binding effect of the WHO recommendations was removed by the 1971 Convention. With the 1988 Convention, the non-binding INCB recommendations assist the CND to perform such normative functions.[918]

Along with its normative functions which can be subject to the review of ECOSOC in case of an appeal coming from treaty parties,[919] the Commission has functioned as a governing body of the UNODC Drug Program since 1991 and monitored political commitments on drug control since 2009. Finally, the Commission has two subsidiary bodies designed for ensuring better regional cooperation in drug law activities and named "Heads of National Drug Law Enforcement Agencies (HONLEA) and Sub-commission on Illicit Drug Traffic and Related Matters in the near and Middle East."[920]

2.2.2.2 The International Narcotic Control Board (INCB)

The *Single Convention on Narcotics Drugs of 1961* founded the International Narcotics Control Board (INCB)[921] by replacing the functions of two bodies, formerly established and known as the Permanent Central Narcotics Board (1925) and the Drug Supervisory Body (1931).[922] Considered as a technical body monitoring the compliance with the International Drug Conventions (1961 Single Convention, 1971 and 1988 Conventions),[923] the INCB has a different

[918] *Ibid.*
[919] 1961 Convention, *supra* note 851, Art. 7;1971 Convention, *supra* note 852, Art.2.7;1988 Convention, *supra* note 853, Art. 12.7.
[920] CND Website, *supra* note 896.
[921] 1961 Convention , *supra* note 851, Art. 5.
[922] INCB Website, *supra* note 897.
[923] David W. SPROULE, "The UN Drug Trafficking Convention: An Ambitious Step," (1989) 27 *Canadian Year-book of International Law,* p. 290.

status compared to the CND, which is a UN body, and calls itself as an independent quasi-judicial expert body.[924]

However, this declaration of independence is being criticized since the thirteen members of the Board shall be elected by ECOSOC according to Art. 9.1 of the Single Convention.[925] The authority of the Board is limited to make recommendations and raise awareness in regards to the compliance of the parties with the treaties such as *potential public health* and *social danger of licit used drugs*[926] (Art.4.2, 1988 Convention).

In conclusion, the INCB Board seems to function today as a technical body without possessing any sanctioning authority over parties in the case of non-compliance with the treaties.[927] For instance, at this point, analyzing its latest report, we see that the INCB urges the governments to take measures and establish early warning systems and /or information sharing mechanisms with other nation states and with the WHO, INTERPOL, the World Customs Organization, UNODC and the INCB. The INCB stresses such sort of collaboration in order to overcome the challenges coming from new psychotropic substances which are not listed in the international drug conventions, but which pose serious public health threats.[928]

[924] INCB Website, *supra* note 897.
[925] HEILMANN, *supra* note 863, p. 255.
[926] 1988 Convention, *supra* note 853, Art.4.2.
[927] *Ibid.,* p. 256.
[928] INCB, *The Report of the International Narcotics Control Board for 2012*, E/INCB/2012/1, United Nations Publications: New York, 5 March 2013, para. 262, 269, 277, 292, 749, 782, 848.

2.2.2.3 The United Nations Office on Drugs and Crime (UNODC)

UNODC identifies itself as "a global leader in the fight against illicit drugs and international crime"[929] and functions as the Secretariat of the CND.[930] The history of UNODC goes back to 1991 when the Secretariat of the INCB, the functions of the Division of Narcotic Drugs (DND), and the UN Fund for Drug Abuse Control (UNFDAC) in 1991 was grouped into the UN Drug Control Program.[931] Later on, the UNDCP merged with the Centre for International Crime Prevention to form the UN Office for Drug Control and Crime Prevention (UNODCCP) in 1997.[932] In 2002, the UNODCCP was named as the UN Office on Drugs and Crime.[933] UNODC describes its core functions in the three following pillars:[934]

> *-Field-based technical cooperation projects to enhance the capacity of Member States to counteract illicit drugs, crime and terrorism.*
> *-Research and analytical work to increase knowledge and understanding of drugs and crime issues and expand the evidence base for policy and operational decisions.*
> *-Normative work to assist States in the ratification and implementation of the relevant international treaties, the development of domestic legislation on drugs, crime and terrorism, and the provision of secretariat and substantive services to the treaty-based and governing bodies.*

What drew my attention in this description of functions is the assistance on evidence-based policy making and operational decisions. As a result, the annual report and statistics of UNODC are today considered a very important resource for the world illicit drug matters.[935] For instance, the report of 2012 includes a wide range of statistics and trend analysis on cannabis, opiate, cocaine,

---

[929] UNODC Website, *supra* note 898.
[930] ROOM and REUTER, *supra* note 864, p. 85.
[931] HEILMANN, *supra* note 863, p. 256.
[932] UNODC Website, *supra* note 898.
[933] HEILMANN, *supra* note 863, p. 256.
[934] UNODC Website, *supra* note 898.
[935] ROOM and REUTER, *supra* note 864, p. 85. Besides, the World Annual Report is considered as the most cited document on global drug issues: HEILMANN, *supra* note 863, p. 257.

and amphetamine-type stimulants (doping related drugs and substances) − as well as a socioeconomic analysis of the drug problem.[936] It is worth noting that one of the conclusions of the report, based on evidence grounded data, is that the illegality of drugs and stimulants plays an important role in decreasing the propensity for them since people have lower tendencies to break the law when they get older.[937]

2.3 Affirming the *Penal* and *Public Global* Nature of Doping and Transformation Needs

As beheld in the national and international level strategies for restricting the availability and use of prohibited substances and methods, the criminal and public law aspects are highly at play. Simply, that the certain prohibited doping substances are also considered organized crime and drug materials according to the international conventions[938] and the criminal and administrative tribunals are mostly applied in settling the doping trafficking matters[939] affirm the *penal* and *public global* nature of doping. Moreover, the complexity and diversity in determining the unified and harmonized strategies for restricting and eliminating the prohibited substances and methods enable the adapted (pluralist) approach of GAL to be considered for the anti-doping governance. Therefore, the anti-doping regime needs to accommodate the *penal* and *public global* consideration of doping and the adapted GAL model in the global doping governance.

---

[936] UNODC, *World Drug Report 2012*, United Nations: Vienna, available at HYPERLINK: < http://www.unodc.org/unodc/en/data-and-analysis/WDR-2012.html> [last visited on November 2, 2013].
[937] *Ibid.,* p. 97. Moreover, the recently published 2013 Report concludes the threats coming from the new psycoactive substances (NPS) which include synthetic cannabinoids, cathinones, and the piperazines and whose 69% of them were bought at a specialized shop, at a party, or at a club: UNODC, *World Drug Report 2013*, United Nations: Vienna, p. 114, available at HYPERLINK: < http://www.unodc.org/unodc/secured/wdr/wdr2013/ World_Drug _Re- port_2013.pdf> [last visited on November 2, 2013]. To note, these substances are included in the 2013 Prohibited List, as well, see Prohibited List, *supra* note 55.
[938] Cannabis, heroine, cocaine, and morphine are controlled substances referred in the UN Drug Conventions, see *supra* p. 303.
[939] See *supra* pp. 289-291.

When the international drug and crime instruments highlight the public danger aspects of illicit drugs which include the prohibited doping substances as well,[940] the anti-doping regime cannot undermine the need for criminal and public law tools and continue the fight against doping with private law apparatuses. Even though the anti-doping regime intends to undermine the criminal law and public law aspects of doping by choosing a distinct strategy on the nature of doping with a view to facilitating the harmonization of the anti-doping governance in the world, the danger or harm of doping to the society requires the emergence of new strategies in the current doping governance.

These new strategies can in no way undercut the *penal* and *public global* nature of doping and a pluralist governance requirement.[941] As seen in the national level strategies, national states have diverse responses with respect to the legislative, adjudication, and collaborative strategies for restricting and eliminating the prohibited doping substances and methods. And, these national level strategies distance themselves from the international level strategies when the international drug and crime regimes do not particularly focus on the prohibited doping substances.

In my view, characterizing the anti-doping governance as *distinct* and expecting WADA to harmonize and unify the fight against doping was a must in 1999, but this approach needs certain modifications in 2014. As a minimum, the collaboration requirement with public authorities necessitates the involvement of criminal and public law tools more and more. In this regard, for instance, the mutual legal assistance and investigation tools, already established through the in-

[940] See *supra* p. 301.
[941] As I concluded in the first par of thesis, the pluralist governance model of GAL better suits the needs of global doping governance.

ternational crime and drug conventions, can better help the anti-doping regime when WADA recognizes the criminal and public law aspects of doping.

Moreover, these criminal and public law aspects, which are in line with the diversity and collaboration considerations, are even more crystallized when the other global public good producing regimes overlap with the anti-doping regime. The public health, security, and research and development regimes stand three examples for such global public goods which overlap with the anti-doping regime and whose production should be maintained. In other words, the fight against doping should be supported by the public health, organized drug and crime, and research and development regimes in their own global public good production and maintenance scopes.

Even if WADA creates the best research and development tools, produces the best rules and standards, and centralizes the anti-doping governance more and more, the impact and success of anti-doping regime will be limited with the borders of current anti-doping governance, which is determined by the Swiss private law in nature. Progressively empowering WADA or extending its jurisdiction through public law tools will not be a solution either since the diverse legal systems and cultures dating back centuries will differently respond to such centralization in the world. For instance, in Canada, the *Canadian Charter* applies to every person physically present in Canada[942] and any human right violation of an international athlete can be theoretically challenged before the Canadian courts. Thus, practically every athlete who are faced with human rights violation in Canada can bring it to the court.

[942] See s*upra* p. 207.

In this regard, as witnessed in the WADA Code 2015, empowering WADA and NADOs with the investigation and intelligence gathering without changing the private law structure of WADA and without reconsidering the nature of doping will cause greater issues in the future. Converting the private law structure of WADA to that of international public law will not be an ultimate solution when the other global public good producing regimes overlapping with the anti-doping regime are held on the outside of doping governance consideration.Therefore, as I concluded in the first part of the thesis, the anti-doping regime and other anti-doping regime intersected global public good regimes need to collaborate with each other ever more. And this collaboration requires the anti-doping regime reconsider the nature of doping as *penal* and *public global* and transform its structure according to the needs of global governance, which must primarily take into account the public international law.

Consequently, such transformation will require other anti-doping overlapped global public good regimes, such as public health, security, and research and development be adapted to the global level collaboration in producing and maintaining the global public good of anti-doping. In any case, the global public interest tenet of the adapted GAL model, which implicates with the knowledge sharing and informed participation mechanisms, will be able to determine the scope of such transformation and accommodation needs.

Conclusion of the Second Section

In this section, I first conclude there is no single best way by which countries can have the most desired impact in the restriction of prohibited substances and methods. Second, the divergence of

hybrid public and private law, pure public law, or pure private law mechanism at the national level lead us to conclude the potential struggles and challenges in the harmonization and collaboration process at the global level. Even though the international drug conventions and organizations tend to control and organize the research, policy making, and decision-making in the case of narcotic drugs, psychotropic substances, and organized crime, they do not and won't cover all prohibited doping substances and methods.

Third, the relationship of international drug and crime regimes with the anti-doping regime is not clear with respect to the doping substances that they consider controlled or prohibited − except that WADA signed a cooperation agreement with INTERPOL in 2009.[943] However, the mutual legal assistance tools of these international level drug and crime mechanisms may help the anti-doping regime with investigation, prosecution, and judicial proceeding. And to have this benefit, both the anti-doping governance and the international drugs and crime regimes require structural transformations.

Thus, the anti-doping regime should adopt the *penal* and *public global* nature of doping whose public health and social danger effects on the society is affirmed and recognized in the UN Drug Conventions. Other anti-doping intersected global public good producing regimes of public health (under the organizational structure of WHO), global security (under the organizational structures of UNODC and INTERPOL), and research and development (under UNESCO or a newly established organization) should also take into consideration the *penal* and *public global* nature of doping in their respective governance.

[943] WADA and INTERPOL Collaboaration, *supra* note 16; VERSCHRAEGEN and SCHILTZ, *supra* note 343.

Finally, such structural transformations or accommodations will require understanding the global administration or global governance from the point of law, which can likely benefit from the echoes of other disciplines on the issue such as economics, political science, and international relations. In this aspect, the adapted approach of GAL with its three tenets: 1) subject matter determination, 2) knowledge sharing and informed participation, and 3) ultimate review mechanism will play an important role in remodeling the anti-doping governance and in connecting with other anti-doping intersected global public good producing regimes. By this way, the global governance needs of anti-doping will be effectively delivered.

Conclusion of the Second Chapter

Having studied the actual problems of the anti-doping regime, in the second chapter, I elaborated how the current anti-doping governance should have remodeled itself to accommodate the needs of global governance. The distinct strategy of the WADA Code as to the nature of doping, which favors neither a criminal proceeding, nor a civil proceeding, distanced me from taking a firm position on the nature of doping in line with the WADA Code. After all, according to the WADA Code and the anti-doping jurisprudence, the accusatory, punitive, immoral, and harmful nature of doping were not enough to confirm the criminal and public law aspects of doping.

Thus, approaching to the nature of doping from the individual and society-at-large point of view instead of the athlete and sport community perspective was necessary. This is because I came across the public health and social peril concerns of doping in my analysis of international drug

and crime regimes and strategies for restricting the prohibited substances and methods.[944] The multiplication of legislative, investigative, and adjudication strategies at the national level in restricting the availability and use of prohibited substances and methods held another reason to consider the criminal and public law aspects in the matter of doping.

Therefore, I concluded the nature of doping should have included the criminal and public law aspects and proposed the term of *penal* and *public global* to describe the nature of doping. Such reconsideration of doping nature would not only improve the fight against doping in the anti-doping regime of WADA and the WADA Code, but also would positively impact on the collaboration aspects with other anti-doping overlapped global good producing regimes. As studied, the anti-doping regime needs the support of the public health, organized crime and drug, and the research and development regimes. The scope and range of this support demands more than a simple collaboration. The complexity and diversity at the national and international level strategies in restricting and eliminating the prohibited substances and methods provide evidence for the latter.

Finally, the adapted (pluralist) GAL model with its global public interest tenet (knowledge sharing and informed participation) can enormously help for determining the scope and range of such transformation at both sides simultaneously: the anti-doping regime side and other anti-doping governance intersected global public good producing regimes.

[944] In this aspect, I am not alone to arrive at the conclusion of public health concerns. There are other authors who raised the public health concerns in other studies, see DONATI, *supra* note 37; PAOLI and DONATI (2013), *supra* note 37; PAOLI and DONATI (2014), *supra* note 37.

Conclusion of the Second Part

In this part, I studied how the current anti-doping regime should have remodeled itself to accommodate the needs of global governance, determining its actual national and global level governance problems. As seen, the anti-doping regime was not only a challenge to global governance, but also was the challenge to the global community intervention. The reason was that determining the nature of doping in the realm of contradictory applications of public and private law tools in the doping investigation and adjudication mechanism was impossible and the private law-based structure of WADA, producing globally recognized anti-doping rules and standards, posed human rights and privacy issues. Besides, the different national legal mechanisms and approaches in handling the fight against doping, which include restricting the prohibited doping substances and methods, provided evidence for the anti-doping regime would need more and more the criminal and administrative law involvement in doping adjudication.

Additionally, I thought there was a need to focus on the individual and society-at-large aspect next to the athlete and sport community consideration. In this manner, determining the nature of doping would be realized in a more prudent way. Observing that doping was a danger to the individual and society-at-large and generated public health concerns next to its morally unacceptable cheating consideration, I concluded the nature of doping should have included the criminal and public law aspects. Therefore, I proposed the term of *penal* and *public global* describing the nature of doping. Otherwise, one could have confidently confirmed the quasi-criminal nature of doping by looking at the current anti-doping investigation, adjudication, and sanctioning mechanism.

Concluding the *penal* and *public global* nature of doping was not enough to resolve the global doping governance issues which overlapped with other global public good regimes such as health, security and research and development. Then, I considered the *individual*, *society*, *public law*, *private law*, and *divergence* aspects of the anti-doping regime in the realm of the adapted (pluralist) approach of GAL. And I determined that public health, organized drug and crime, and research and development regimes should have also transformed themselves to support the fight against doping. In other words, the global doping governance I proposed has required the transformation or adaptation by nation states and international bodies as well as WADA and its Code.

This transformation need obligates us to accept the global administration or global governance should be based on *mutually* and *voluntarily recognized law* when benefitting the reflections of other disciplines such as economics, political science, and international relations on the global governance. Thus, the negotiation among collaborating parties is inevitable. However, responding to the plurality of society and legal cultures and systems and creating a more informed individual in the realm of such diversity in a given legal system and in a given society is a very difficult task to accomplish.

Accordingly, I believe the success of this global anti-doping governance that I proposed highly depends on how and to what degree we can have informed society, collective action, and mutual recognition of the commons in this governance mechanism. Finally, maintaining and improving the success of such governance will surely depend on the quality of ultimate review mechanism which will produce *lex dopingiva*.

General Conclusion of the Thesis

In this thesis, I intended to remodel the anti-doping regime through an adapted governance mechanism designed for better perceiving the nature of doping, diversity, and collaboration aspects and finally accommodating the global governance needs of anti-doping. That the anti- doping regime poses major governing challenges to the affected community of the regime, including but not limited to the athletes, individuals, nation states, sport fans, and global governance, required me to approach the research problem from the angles of the individual and society-at-large in addition to the athlete and sport community in particular. Further, I tried to elaborate the research problem with an eye to proposing a governance model for it as simple as possible, considering the very much *inter/multidisciplinary* aspect of the subject area.

Throughout the thesis, which includes one preliminary chapter and two parts, my main objective was to validate why the anti-doping regime should have reconsidered its main strategy on the nature of doping and how my pluralist approach of GAL could help the anti-doping regime accommodate the other required global governance needs, such as pluralism and collaboration. In this journey of attaining my objective, global public good, global public interest, knowledge sharing and informed participation, and ultimate review mechanism tenets played principal roles in proposing the adapted (pluralist) GAL model. By this GAL model, I validated the external aspects of the anti-doping regime, such as global public health, global security, and global research and development, which should have also been considered in the doping governance. Following this introduction to my general conclusion of the thesis, I express how I have started and how I have concluded this thesis by the following.

The preliminary chapter enabled me to perceive what kind of theoretical approach I needed to seek out in reducing and eliminating the actual issues inherent in the existing anti-doping governance. The exclusion of criminal and public law considerations, the disregard of different societies, legal systems and cultures, and the inattention to public health and organized crime aspects were the ongoing issues in the anti-doping regime.

I then started the first part of my thesis with a view to seeking a governance mechanism that would help answer these present concerns of the anti-doping regime. Having analyzed the three leading global governance models of global constitutionalism, global legal pluralism, and global administrative law, I decided the global administrative law framework held the most promise in responding to the challenges of anti-doping governance. The main reason that led me to apply to the GAL model was I could benefit from its fluid concept of governance. Namely, the GAL model could be tailored according to the needs of a global governance of particular subjects. In addition, the GAL model would serve the doping governance much better with its more realistic approach on the global governance and with its more accommodating nature on the diversity aspect of anti-doping.

After all, global constitutionalism was results-based, but too unrealistic by its monistic approach, and global legal pluralism was welcoming, but too dispersed by its multiplying legal orders. Yet, GAL was a fluid concept, which separated it from the traditional administrative law understanding. Thus, I could have improved GAL mainly by adding the tenets of global public good for the *subject area* and global public interest for the *informed participation* and *knowledge sharing.* I then included these two tenets of global public good and global public interest into the GAL

mechanism in order to propose the pluralist GAL framework, which would be more appealing to the needs of global governance. This is because nationwide classical governance theories of constitutionalism, legal pluralism, and administrative law cannot be extended to the globalized world since we do not have and cannot have the conditions of the nation state in the global community. Therefore, I concluded that designing a governance mechanism in the global arena should have included a careful analysis of the subject area. By this careful analysis, one could have seen the importance of the global community, which has to come together in responding the issues with global consequences arising from that subject area.

In this regard, I focused on the concept of global public good as a criterion which determines the degree of importance of the subject area and I used the global public interest tenet which enables the global public good production and governance to be realized in a more deliberate and adequate way. Most importantly, I considered an ultimate review mechanism should have been a catalyzer for such a governance model while safeguarding the production and governance of the global public good. Actually, neither did I want to rediscover these tenets of global public good and global public interest, nor did I want to create another theory of GAL. Instead, I wanted to approach the global governance in a more realistic and prudent way, starting from understanding the particularities of the subject area at issue and continuing to answer these characteristics in a knowingly participated and mutually agreed way.

To say it differently, I believed the difficulties in concluding common or universal administrative law principles and values in a plural global society could be overcome by focusing on the subject area from the point of global public good and global public interest. After all, nation states

should collaborate with each other as to the matters or threats whose care or cure require collective actions and/or responses, such as *global public health* and *environment*. Thus, merging the global public good and global public interest with GAL can be at least tried.

I then reflected on a combined model of governance which was not exclusive to the law, but which was regulated and safeguarded by the law. In other words, better regulation would require an exhaustive understanding of *subject area*, a solid establishment of *informed participation*, and a fully realized *knowledge sharing* before one finalizes the ultimate rules and standards of the governance for this subject area at hand. However, such global rules and standards should be subject to a review mechanism when we consider their impact and importance in the lives of individuals irrespective their nationality. That is why I considered the importance of public law in the design of such governance mechanism and I proposed that public law should have had a greater weight in the creation and maintenance of the governance.

In the second part of the thesis, I intended to elaborate more the actual issues of the anti-doping regime so that I could remodel it to accommodate the global governance needs of anti-doping with the help of the pluralist approach of GAL. Therefore, the criminal and public law aspects of doping, the diversity and collaboration issues, and the external or much broader issues of public health, organized drug and crime, and research and development should have been demonstrated in order to validate my remodelling proposal. For instance, I have concluded in this regard:

- Relying on private law only was not enough, although the anti-doping regime was considered free from the public law and it was associated with the law of associations thanks to its legal status under the Swiss law.[945]

- Limiting the anti-doping governance to an association and membership to association level and trying to legitimate the actions and rule making status of the anti-doping regime (namely WADA) under the Swiss law of associations[946] was not as functional today in 2014 as it was in 1999.

- Although a review mechanism, which involved the public law implications of CAS and domestic arbitration awards, was available under the Swiss law,[947] one cannot yet have relegated the entire anti-doping regime to this mechanism.[948] This is because the fight against doping exceeds the borders of Switzerland not only in terms of the Swiss law and CAS procedure, but in terms of the cross-border public health, prevention, investigation and adjudication issues of doping.

Having reached these conclusions, I affirmed the anti-doping governance should have included the criminal and public law aspects and should have considered the external aspects of the anti-doping regime. Moreover, other anti-doping intersected regimes which deal with these external aspects should have also collaborated with the anti-doping regime. In other words, a two-sided transformation, one in the anti-doping regime and another at the external regimes (other global

[945] ROUILLER, *supra* note 491, p. 20.
[946] *Ibid.,* pp. 20-24.
[947] *Ibid.,* pp. 39-50.
[948] This is probably because the WADA Constitutive Instrument included a possibility of international public law based structural conversion in the future: Constitutive Instrument, *supra* note 3, Art. 4 (8).

public good producing regimes), would have been required. When I associated public law with the governance mechanism through global administrative law, I did not draw a line between public and private law. I thought the theory of GAL should not have gone so far to distinguish public and private when the public and private law distinction was differently perceived in the world of various legal systems.

However, what to emphasize was the public law consideration should have been perceived as the more involvement of constitutional, administrative, and criminal law tools in the global governance. Then, instead of talking about global administrative law, global constitutional law, or global criminal law, I could have focused only on GAL which could have merged them according to the needs of the subject area. This was the case in the governance of doping, which included constitutional law, administrative law, and criminal law aspects at the global level. And elaborating the actual issues of doping perfectly affirmed this conclusion.

To note, this pluralist view of GAL can be applied to other subject areas, which are considered global public good. I only tested it with the anti-doping regime and concluded that the anti-doping regime has already applied certain notions of this adapted GAL model in a limited way. However, the actual structure of WADA with the new rules and standards, which would be effective as of January 1st, 2015 distanced me from concluding the anti-doping regime was on the right track to accommodate progressively the needs of the pluralist GAL model.

Although the rules and standards prepared through the outcome of a pluralistic process of informed participation and knowledge sharing could constitute the fundamental basis for the anti-

doping regime, according to the pluralist GAL approach, the consultation process for the Anti-Doping Code of 2015 was missing the point. For instance, the legal opinion about the draft Code that WADA shared publicly on its official website does not seem to be a product of informed participation and shared knowledge. Therefore, they will unlikely remove the issues of the anti-doping regime anytime soon. For instance, a view of "the nature of the sanctions under the World Anti-doping Code is not criminal" is far away from understanding the nature of doping accusation, the punitive aspect of doping sanction, and the public danger and social peril aspect that I concluded in the second part of this thesis.[949]

Furthermore, introducing the sport-specific rules and procedures as distinct from the criminal and civil proceedings and expecting them to be in accordance with the principles of proportionality and human rights in their application are already problematic. These rules are not in favour of the clean athletes at the very first place when the strict liability principle of no fault or negligence and the distinct standard of proof applications can easily undermine the presumption of innocence and no penalty without a law principles.[950] And, increasingly empowering WADA and NADOs with intelligence gathering and investigative functions will add more issues onto the anti-doping governance rather than resolving the existing problems of it.

In other words, adding more and more public law functions to WADA and NADOs without having proper public law tools, which enable the doping investigation and adjudication to become fair for everybody, will create more issues. Such a strategy of WADA and the anti-doping

[949] This view of non-criminal aspect is expressed in the the legal opinion regarding the draft World Anti-Doping Code 2015: COSTA, *supra* note 560, p. 6; The same non-criminal regard is also expressed in the Code 2015 when the nature of doping is considered distinct, see Code, *supra* note 3, p. 17

[950] Code, *Ibid,* Introduction and Art. 2.1 (1) and 3.1.

regime is unrealistic and impractical when one considers the affected people of anti-doping regime, the technology used in doping, and the threats coming from the outside of the anti-doping regime are not as same today in 2014 as those of 1999.

Therefore, the affected people and groups should be consciously and effectively involved in the decision-making when the decision makers fail to make decisions adequately for them and when the material and moral costs of improper policies are high. For instance, according to the new WADA Code, WADA and NADOs are empowered in the investigation of doping[951] and the NADOs will be autonomous and independent in their decisions and activities.[952] Such an initiative without a proper impact analysis and informed participation consideration will add more issues to the current structure of the anti-doping regime, which still avoids benefitting from criminal and public law tools.[953]

An idea of empowering NADOs and WADA more in the investigation of doping matters seems very radical, but practical when one considers a specialized agency with more investigation power is needed to gather and process a more specialized doping intelligence and data. However, observing the actual public health and organized crime concerns outside of the sport community and the influential power of the mediatized doping scandals, I realize that the anti-doping regime is making a strategic mistake by missing the main goal in the fight against doping, let alone their already mistaken strategy on the nature of doping.

[951] *Ibid.,* Art. 20.5(1, 9, 10) and 20. 7 (10); ISTI, *supra* note 559.
[952] *Ibid.,* Art. 22.6.
[953] COSTA, *supra* note 560, p. 6.

In addition, such an investigative power can burden more on the private law institutions of WADA and other NADOs when they have to take into consideration human rights concerns, subject to public law. For instance, in Canada, the *Canadian Charter* applies to every person physically present in Canada,[954] and any human right violation of an international athlete by the CCES can be theoretically challenged before the Canadian courts. Thus, practically every athlete faced with human rights violation in Canada can bring it to the court.

After all, the new international standard for testing and investigation (ISTI) includes very broad concepts that can be risky such as "Anti-Doping Organizations shall do everything in their power to ensure that they are able to capture or receive anti-doping intelligence from all available sources"[955] and "Anti-Doping Organizations shall have policies and procedures in place to ensure that anti-doping intelligence captured or received is handled securely and confidentially, that sources of intelligence are protected."[956] Besides, NADOs can be able to share the gathered intelligence with other NADOs, with the law enforcement organizations, and with the disciplinary bodies *where appropriate* and *subject to applicable law*.[957]

Although the new Code envisages overcoming such dilemmas by including principles of fair hearing,[958] giving a timely reasoned decision,[959] proportionality,[960] and other application of human

[954] See *supra* p. 208.
[955] ISTI, *supra* note 559, Art. 11.2.1.
[956] *Ibid.,* Art. 11.2.2.
[957] *Ibid.,* Art. 11.4.2.
[958] Similar to Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the ones generally accepted in international law: Code, *supra* note 3, comment 8.1.
[959] *Ibid.*
[960] The Code 2015 includes the following in the definition of the Code: "The Code has been drafted giving consideration to the principles of proportionality and human rights:" *Ibid.,* p. 1.

rights,[961] I doubt how these principles will properly function with the strict liability and distinct standard of proof applications, which remain unchanged in the new Code.[962] In any case, as seen in the example of Canada, international athletes can yet challenge any human rights violation in local courts as long as local legislation allows it.

Thinking that the anti-doping regime does not have other options rather than empowering NADOs and WADA and including the human rights considerations in the Code is acceptable when one considers the Code as a supreme doping governance document. However, what should be questioned is the preparation of such an important document by undermining already *in question* issues, such as the criminal and public nature of doping, strict liability, standard of proof, and non-analytical positives.[963]Above and beyond, the easy prediction of potential challenges coming out of giving more powers to NADOs leads us to conclude the importance of designing a universal document in the realm of diverse legal cultures and systems, various affected individuals and groups, and very complex interdisciplinary subject area of doping.

Nevertheless, the current governance structure of WADA, applying to the education, consultation, guidance and establishing the collaborative relationship with INTERPOL was promising, albeit not sufficient nor efficient. Actually, that WADA governs all aspects of the anti-doping regime, including the investigation and adjudication of doping is unrealistic and is far from producing the effective outcomes. Although the pluralist GAL model can fully empower a global public good producing organization, the matter of doping is different with its external aspects which also intersect with other global public good producing areas, such as health, security, and

[961] *Ibid.*
[962] *Ibid.*, Art. 2.1-3.1.
[963] For non-analytical positives, see *Ibid.,* Art. 5.1.2 (b) and 5.8 (3).

research and development. And, the survey results of countries which use special legislations and NADOs in the fight against doping affirm that the specialized NADOs are also limited in their ability to address the challenges or threats coming from the investigation and adjudication of prohibited substances.[964]

The due process issues of the doping investigation and adjudication for the athletes and other personnel require better human rights protection that lacks in the current mechanism, which is loaded mainly with the private law tools and which will pose greater challenges with the entrance of the 2015 Code. Accordingly, the anti-doping regime should abandon handling the public law issues with private law tools and adding more issues to the existing ones. Instead, the anti-doping governance authority should reconsider the nature of doping by including the criminal and public law aspects in it. Besides, the fight against doping should connect better with other overlapping global public good producing organizations that already exist (such as WHO for global public health, UNODC and INTERPOL for security, UNESCO for research and development) or/ and that should be established in the future.

What we know for now is the global public health, global security, and global research and development subject areas are the most related ones to the anti-doping regime and the success of effective and fair anti-doping governance depends on the success of adequate governance of these subject areas. Whilst this thesis limits me to broadly study these areas in light of the pluralist GAL model I proposed, I can still recommend WADA avoid to try handling all these aspects of the anti-doping regime alone. In this aspect, as I concluded earlier, the organized crime activities, the public health issues, and the research and development aspects stand for the foremost

[964] See *supra* pp. 289-291.

examples of challenges in the governance of doping.[965] Hence, the anti-doping regime, reconsidering the nature of doping as *penal* and *public global,* should transform itself to connect better with other public authorities and global public good producing regimes.

By this way, the mutual legal assistance, joint investigation, public health intervention, education, research and development missions can be more effectively realized between WADA, nation states and international organizations such as UNDOC, INTERPOL, WHO, and UNESCO. However, this transformation requirement is not only limited to WADA and the anti-doping regime, but also should be extended to the other global public good producing regimes which overlap with the anti-doping regime.

The scope and range of these transformations which will generate the essential connection to the matter of doping can be determined by the global public interest tenet in which the knowledge sharing and informed participation tools need to be enhancely applied. The reason is that one can better and faster reflect and frame his opinion on the matters of which he has adequate knowledge and experience. Equalization of the knowledge level among the participants of the governance can seem utopic in the short term, but it will have a huge payback in the long term. Besides, the promising technological facilities in the dissemination of information can even help us attain this long term goal in less time.

Such a requirement of transformation can lead these organizations and nations to become more institutionally prepared for the enhanced cooperation and collective action. In any case, the production and governance of the global public good of anti-doping requires such cooperation and

[965] See *supra* pp. 182-183.

collective action. The anti-doping regime, in this respect, can be a pilot governance example that brings nation states and organizations together to achieve a common goal while paving the way slowly but surely for other collaborative relationships with respect to producing and maintaining other global public goods, such as security, public health, research and development, and environmental protection.[966] The new 2015 Code contains intensive collaboration strategies with governments, NADOs, law enforcement organizations, disciplinary bodies, etc., but such collaboration should be established on the proper legal structures which can take longer time to design, but which can prevent further policymaking errors and other negative effects to come across later.

Considering the anti-doping as a global public good and the production and maintenance of this global public good is required, nation states will be more than available to cooperate when approached by the proper tools and reasonable justifications. Moreover, they will be more than ready to recognize the rules or standards which they participated in their production. Such recognition will be even stronger when there is a trusted review mechanism to examine the proper application of these rules and standards. This trust can be created by letting the participants of governance, led by nation states, decide on the organizational structure of review mechanism. This can still continue to be the SFT and ECHR with more clarified and facilitated roads if agreed upon by the nation states. Or alternatively, this can be a newly established superior board over CAS which will represent all affected people of the anti-doping regime in the world.

[966] That is why the pluralist GAL model is crucial. First, we cannot treat every subject area with the same governance model; second, everyone affected by the governance of a subject area should participate in the governance; third, this participation should be conscious to maximize the benefit of participation, and the participants should be informed and/or educated about the subject area; fourth, the final regulation should be product of both quantitative and qualitative analysis. For the aspect of qualitative and quantative analysis impact on the prospective regulation, see HOULE and SOSSIN, *supra* note 571, p. 14. Besides, if we remember the pluralist GAL model I proposed, I justified each step through theoretical tenets: qualification of subject area by the global public good tenet, process of informed participation and knowledge sharing by the global public interest tool. This GAL model, which is specific to subject area and open to collaboration, was disfavoring the centralization.

Both options need to be further studied in terms of the nature and functions of a judicial review mechanism in light of the different legal systems around the world. However, what I can conclude for now is the requirement of an ultimate judicial review mechanism and the current structure of CAS need to be revisited when the ultimate review mechanism is fully considered in any other way. Establishing such an ultimate review process will obviously require international public law tools rather than private law tools, but waiting for the development of *lex dopingiva* can prudently and efficiently be replaced by ensuring the progress of *global doping law* on the right track.

As for the questions of the specific tools that the anti-doping regime produced as a result of the distinct nature of doping and the threats coming from the advanced technology use, such as doping passport and ADAMS, they may need to be revisited according to the reconsidered *penal* and *public global* nature of doping. In any case, the scope of such modification requirement in accordance with the newly considered nature of doping should be crystallized under the mechanisms of informed participation and knowledge sharing. In sum, WADA's transformation under the needs of global governance will impact on the international standards and guidelines next to the global doping rules.

In this regard, the remodelled WADA will have more focus on the technical, educational research, development, and training aspects of doping while restricting the availability of prohibited substances and methods along with their investigation and adjudication aspects are handled by the public authorities at national and international levels. For instance, "stronger or/and heavier criminal law and regulatory tools which particularly target at suppliers of doping such as

physicians, laboratory directors, producers, and traffickers; more sensitive media regulations with respect to the anti-doping scandals and personalities; and better organized and more result-based education and interdisciplinary research initiatives," can be the strategies to work on in the short term.

In any event, we need for conducting further studies on the preponderance of the criminal and public law tools, the scope of the education and knowledge production, the procedural frameworks for the public authority involvement, and the framework of inter-organizational cooperation as to the anti-doping intersected global public goods. But for now, I limit my thesis to outlining a road map of the adequate governance of the anti-doping regime.

Having highlighted the major conclusions of this thesis, I can summarize my specific conclusion as follows:

The anti-doping regime in its current form can be considered an example of GAL when one focuses only on whether the current regime includes the principles and values of administrative law. However, as seen, the GAL assessment of current anti-doping regime can hardly be accomplished by the traditional understanding of GAL theory. Namely, its criminal law and public law applications, such as the accusatory character of doping, its strict liability principle, and its supreme doping law making status lead me to conclude the anti-doping regime cannot be explained by the traditional understanding of GAL.

Thus, instead of focusing on the emerging global criminal law and global constitutional law theories next to GAL, reshaping the GAL theory in a way that can cover the aspects of criminal and public law is more practical. As seen in the example of anti-doping regime, such pluralist model of GAL can accommodate the aspects of constitutional law, administrative law, and criminal law, from applying to criminal and public law tools to ensuring a legitimated and accountable judicial review mechanism.

The new GAL model, which includes the tenets of global public goods and global public interest, is easier to understand and to be recognized by the global world. In addition, this GAL approach will facilitate the global community to come together in producing and maintaining other global public goods including, but not limited to anti-doping. The future of global governance should focus more on the production of global public goods and should be prepared for the institutional transformations allowing the mutual collaborations and flow of information to become easier.

The centralization will not be and cannot be a solution when a global public good is too big and too diverse to be adequately produced. The anti-doping regime is the foremost example for such centralization example. Producing different global public goods with different global governance models should be avoided.[967] Instead, this pluralist GAL model can apply to producing other global public goods by being tailored again according to the needs of subject matter.

Besides, such pluralist approach of GAL and the anti-doping governance do not cease the establishment of private law based global organizations if these organizations are necessary to produce global private goods. However, the global governance should distinguish the subject matter

[967] SHAFFER, *supra* note 29.

as public good and private good and the governance model of a global public good can further differ according to the needs of subject matter.

Finally, I end the general conclusion of this thesis by saying the WADA Foundation has to convert itself to a public law based structure as quickly as possible.[968] This thesis validated such need and the adapted governance model I proposed in the thesis should be supported by this new structure in order to better produce and maintain the global public good of anti-doping.

[968] Constitutive Instrument, *supra* note 3, Art. 4 (8).

ANNEX A

Divergence in the Hierarchy of EU and International Law[969]

Divergence in the Hierarchy of EU and International Law (Certain EU Member and Candidate Countries)			
Country	**Hierarchy of the Norms and the Rank of EU and International Law**	**Country**	**Hierarchy of the Norms and the Rank of EU and International Law**
Greece[970]	1-Constitution and founding treaties of the European Union, 2-Other international legal instruments, 3- By Law, 4-The presidential decree, 5-Administrative actions. Note: Art. 28 (1) of the Constitution explicitly warrants the supremacy of the ratified int'l treaties over national laws.	**Poland**[971]	1-Constitution, 2-Ratified international agreements, 3-Regulations, 4-Directives and decisions of the European Union, 5-Statutes, 6-Orders and acts of local authorities. Note: 1) Art. 91 of the Constitution explicitly warrants the supremacy of the ratified int'l treaties over national laws. 2) Art. 90 of the Constitution makes possible a delegation of constitutional powers to an int'l organization.
Malta[972]	1-Constitution, 2-Acts of Parliament, 3-Subsidiary legislation. Note: EU law should be taken into consideration. (Dualism)	**Romania**[973]	1-Constitution, 2-Organic law, 3-Ordinary law, 4-Government ordinances, 5-Government decisions, 6-Ministers' norms, 6-Acts issued by local government administrative bodies. Note: 1) Ratified treaties become a part of the national law. 2) Art. 3 (3) and 10 provide adherence to the generally recognized regulations of international law. (Dualism)
Estonia[974]	1-Constitution, 2-EU law, 3-International agreements, 4-Acts and decrees, 5-Government regulations and regulations issued by ministers. Note: Art. 123 of the Constitution explicitly warrants the supremacy of the ratified int'l treaties over national laws.	**Slovenia**[975]	1-Law of the European Union, 2-Constitution, 3-Generally accepted principles of international law and ratified international treaties 4-Statutes and other norms, 5-Executive acts and local ordinances, 6- General acts issued for the exercise of public authority, 7- Individual acts and the actions of state authorities. Note: 1) Art. 8 and 153 of the Constitution explicitly warrants the supremacy of the generally accepted principles of international law and ratified international treaties over laws and regulations. 2) Art. 3a of the Constitution makes possible a delegation of constitutional powers to an int'l organization.

[969] I prepared this table by carefully analysing the constitutions of the related states. In addition, I benefitted from the country based legal system information at the Euopean e-Justice Portal. The European e-Justice Portal, available at HYPERLINK: < https://e-justice.europa.eu/content_member_state_law-6-en.do> [last visited on June 24, 2013]. [E-Justice Portal]

[970] The Constitution of Greece,1975 [last amended on May 27, 2008].

[971] The Constitution of the Republic of Poland, 1997 [last amended on October 21, 2009].

[972] The Constitution of Malta, 1964 [last amended on September 28, 2007].

[973] The Constitution of Romania, 1991 [last amended October 29, 2003].

[974] The Constitution of the Repubic of Estonia,1992 [last amended on July 22, 2011].

[975] The Constitution of the Republic of Slovenia, 1991 [last amended on 20 June 2006].

Spain[976]	1-Constitution, 2-International treaties, 3-Law (including Royal decree law and Royal legislative decree), 4-Rules (Royal decree, decree, ministerial order). Note: Art. 93 of the Constitution makes possible a delegation of constitutional powers to an int'l organization. (Dualism)	**Slovakia**[977]	1-Primary legislation (acts), constitutional acts (always primary), acts (primary or derived from constitutional acts), 2- Secondary legislation: government regulations, legal provisions laid down by central government bodies, legal provision laid down by local government bodies, legal provisions exceptionally issued by bodies other than government bodies. Note: 1) Art. 7 (2) of the Constitution makes possible a delegation of constitutional powers to an int'l organization. 2) Art. 7 (5) explicitly warrants the supremacy of the ratified international treaties of certain categories over the national laws.
Belgium[978]	1-Constitution, 2-Special Acts, 3-Acts, Decrees and Ordinances, then, 4-Ministerial orders. Note: 1) Art. 34 of the Constitution makes possible a delegation of constitutional powers to an int'l organization. (Dualism)	**Finland**[979]	1-Constitution, 2-Ordinary acts (acts of Parliament), 2-Ordinary acts, 3-Decrees issued by the President of the Republic, the Council of Ministers and ministries, 4-Legal rules issued by lower-ranking authorities, 5-Preparatory legislative work and court decisions. Note: 1) Jurisprudence, general legal principles and factual arguments are not binding but admissible sources, 2) Art. 95 of the Constitution provides that international agreements have the same hierarchical ranking as the instrument used to implement them in Finland. (Dualism)
Italy[980]	1- Constitution 2-Laws, 3- Regulations. Note: 1) Art. 10 of the Constitution imposes Italian laws are in accordance with international law. 2) A sub-legislative Act should not contradict a legislative source.	**Sweden**[981]	1-Legislation, 2-Prepatory legislative material, case law, and academic literature. Note: 1) The importance of the preparatory documents in interpreting the law is unique to Sweden. However, as the law grows older more importance is attributed to the case law from the supreme courts. 2) Ch.10 Art. 5 of the Constitution makes possible a delegation of constitutional powers to an int'l organization. (Dualism)
Bulgaria[982]	1- Constitution, 2-EU Law and International Treaties are superior to national law according to Art. 5 (4) of the Constitution, 3-Legislative Instruments, 4- Decrees, Ordinances, Resolutions, Rules, Regulations, Instructions and Orders. Note: Note: Art. 5 (4) of the Constitution explicitly warrants the supremacy of the ratified int'l treaties over national laws.	**England and Wales**[983]	1-EU law, 2-The Constitutional doctrine of "parliamentary sovereignty" holds that the UK Parliament is the supreme legislative authority, 3- Human Rights Act 1998 which incorporated the ECHR into UK law, 4- Decisions of the courts. (Dualism)

[976] The Spanish Constitution, 1978.
[977] The Constitution of the Slovak Republic, 1992 [last amended on May 1st, 2006].
[978] The Constitution of the Kingdom of Belgium,1994 [last amended on July 9, 2012].
[979] The Constitution of the Republic of Finland, 1999 [last amended on March1st, 2012]
[980] The Constitution of the Italian Republic, 1947 [last amended on April 20, 2012].
[981] The Constitution of the Kingdom of Sweden, 1974 [1 January 2011].
[982] The Constitution of the Republic of Bulgaria, 1991 [last amended on February 6, 2007].
[983] E-Justice Portal, *supra* note 969.

Cyprus[984]	1-EU Law, 2-Constitution, 3-International conventions (agreements, treaties), 4-Formal laws, 5 Regulatory acts, 6- Supreme Court case law, 7- Common law and principles of equity. Note: Art. 169 (3) of the Constitution explicitly warrants the supremacy of the ratified int'l treaties over municipal laws if they are applied by the other party thereto.	**Northern Ireland**[985]	1-EU law, 2-The constitutional doctrine of "parliamentary sovereignty" holds that the UK Parliament is the supreme legislative authority, 3 Human Rights Act 1998 which incorporated the ECHR into UK law, 4- Decisions of the courts. (Dualism)
France[986]	1- Constitution, 2- International treaties ratified by France, 3- Legislative Rules, 4-Statutory Instruments (Orders, Regulations, and Collective Agreements), 5- Case-law laid down by the ordinary and administrative courts. Note: Art. 55 of the Constitution explicitly warrants the supremacy of the ratified int'l treaties over national laws.	**Scotland**[987]	1-EU law, 2-The constitutional doctrine of "parliamentary sovereignty" holds that the UK Parliament is the supreme legislative authority, 3-Human Rights Act 1998 which incorporated the ECHR into UK law, 4- Decisions of the courts. (Dualism)
Germany[988]	1-Constitution, 2-General Rules of International Law, 3-Laws of the Federation, 4-Statutory Instruments, 5-By laws. Note: Art. 25 of the Constitution explicitly warrants the supremacy of the general rules of international law over the laws of the federation and the Länder.	**Hungary**[989]	1-Constitution, 2- Acts of Parliament, 3-Decrees, 4-Government decrees, 5-Ministerial decrees, 6-Local government decrees, 7-International agreements, 8-Principles of international law, 9-Other sources (decisions, instructions, statistical communications, legal guidelines, directives, notices), 10-Decisions of the Constitutional Court, 11-Case law of courts. Note: Art. Q (3) of the Constitution stipulates Hungary shall accept the generally recognized rules of international law and other sources of international law shall become part of the Hungarian legal system by publication in the form of legislation. (Dualism)
Lithuania[990]	1-Constitution, 2-Constitutional laws, 3-Ratified treaties, 4-Laws, 5-Other legal acts implementing laws. Note: Art. 138 of the Constitution provides that the ratified treaties shall be a constituent part of the legal system of the Republic of Lithuania. (Dualism)	**Netherlands**[991]	1-International rules according to Art. 94 of the Constitution, European law, 2-Charter, 3-Constitution, 4-Acts of Parliament, 5- Other regulations. Note: Specific laws rank above general laws and law ranks above legal precedents. Note: 1) Art. 92 of the Constitution makes possible a delegation of constitutional powers to an int'l organization.

[984] The Constitution of the Republic of Cyprus, 16 August 1960.
[985] E-Justice Portal, *supra* note 969.
[986] The French Constitution, 1958 [last amended on July 21, 2008].
[987] E-Justice Portal, *supra* note 969.
[988] Tne Basic Law for the Federal Republic of Germany, 1949 [last amended on July 21, 2010].
[989] The Fundamental Law of Hungary, 2011 [last amended on April 1st, 2013].
[990] The Constitution of the Republic of Lithuania, 1992 [last amended on June 1st, 2006].
[991] The Constitution of the Kingdom of the Netherlands, 1815 [last amended on July 7, 2002].

Czech Republic[992]	1-Constitution, 2-Constitutional acts, 3-Ordinary acts, 5-Provisions. Note: 1) Art. 10 of the Constitution warrants the supremacy of the promulgated treaties over the statutes. 2) Art. 10a (1) of the Constitution makes possible a delegation of constitutional powers to an int'l organization.	**Austria**[993]	1-Guiding principles of the federal constitution, 2-Primary and secondary EU law, 3-"Ordinary" federal constitutional law, 4- Federal legislation, 5-Regulation, 6-Order. Note: 1) Art. 9 (1) of the Constitution stipulates the generally recognized rules of international law are regarded as integral parts of federal law. 2) Depending on the content of the treaty, general and specific incorporation process is available. (Dualism).
Latvia[994]	1-Primary sources of law: regulatory enactments, general principles of law, Customary norms of law. 2- Secondary sources of law: Case law and doctrine of law. Note: Art. 68 of the Constitution makes possible a delegation of constitutional powers to an int'l organization. (Dualism)	**Luxembourg**[995]	1-Constitution, 2-Internatioanal treaties, 3-Statutes. Note: Art. 18 of the Constitution explicitly warrants the supremacy of the ratified international treaties over the national laws.
Ireland[996]	1-EU Law, 2-Constitution, 2-ECHR Act 2003, 3-Principles of customary international law, 4-Primary legislation, 5-Secondary legislation. Note: Art. 29 (3) accepts the generally recognized principles of international law a as its rule of conduct in its relations with other states. (Dualism)	**Turkey**[997]	1- Constitution, 2- International treaties ratified by Turkey, 3-Laws, 4-Decrees, 5-By laws, 6- Regulations, 7-General statements, circulars, etc. Note: Art. 90 of the Constitution explicitly warrants the supremacy of the ratified int'l treaties over national laws.

[992] The Constitution of the Czech Republic,1992 [last amemded on November 14, 2002].
[993] The Constitution of the Federal Republic of Austria,1920 [last amended on December 14, 2010]
[994] The Constitution of the Republic of Latvia, 1922 [last amended on April 9, 2009].
[995] The Constitution of Luxembourg, 1868 [last amended on March 12, 2009].
[996] The Constitution of Ireland,1937 [last amended on June 24, 2010].
[997] The Constitution of the Republic of Turkey, 1982 [last amended on September 12, 2010].

ANNEX B

List of the National Legislative Strategies

Group A Countries (Countries adopting specific doping legislation): Austria,[998] China,[999] DR Congo,[1000] Cyprus,[1001] Denmark,[1002] France,[1003] Hungary,[1004] Iceland,[1005] Italy,[1006] New Zealand,[1007] Norway,[1008] Portugal,[1009]Romania,[1010] San Marino,[1011] Serbia, [1012] Spain,[1013] Sweden,[1014]

---

[998] Anti-Doping Federal Act (*Anti-Doping-Bundesgesetz*), 1.7.2007; Narcotic Substance Act, 1998.

[999] The State Council of China Anti-Doping Regulation, 1.3.2004; Narcotic Drug Control Act, 28.11.1987; Psychotropic Drug Control Act, 27.12.1988.

[1000] *Loi n° 11/023 du 24 décembre 2011 portant principes fondamentaux relatifs à l'organisation et à la promotion des activités physiques et sportives en République démocratique du Congo*; *Arrete No 91-107 Portant creation d'un comité de lutte conte la drouge*.

[1001] Ratifying Law of the International (UNESCO) Convention against Doping In Sports (No 7(Iii), 15.5.2009; Narcotic Drugs and Psychotropic Substances Law 1977, 29.6.1979.

[1002] Act on Promoting of Doping-Free Sport (Act No. 1438 of 22 December 2004); Act on Prohibition of Certain Doping Substances (Act no. 232 of 21 April 1999); Executive Order on Promotion of Doping-Free Sport (Executive Order no. 1681 of 12 December 2006); Euphoriants Act, 1955.

[1003] *Code du Sport,* supra *note* 330; *Loi n° 2006-405 du 5 avril 2006*, *supra* note 329; *Ordonnance n° 2010-379*, *supra* note 338; *La loi du 31 décembre 1970, relative aux mesures sanitaires de lutte contre la toxicomanie et à la répression du trafic et de l'usage illicite de substances vénéneuses*.

[1004] Government Decree (no. 43/2011), 7.4.2011; Sport Act (no. 2004/1), 13.3.2004. Act on Anti-Doping Convention (no. 2003/78), 21.11.2003; Act on Additional Protocol of the Anti-Doping Convention (no. 2007/34), 19.5.2007; Government Decree on Publishing of the Anti-Doping Convention (no. 99/2007), 9.5.2007; Government Decree on Publishing the Modification of the International Convention against doping in sport (Prohibited list) (no. 42/2011), 24.3.2011; Hungarian Criminal Code (Act IV), 1978.

[1005] Law on Pharmaceuticals *(Lög isi umlyfjamal),* 18.4.2009; Act on Habit-Forming and Narcotic Substances (no. 65), 21.5.1974.

[1006]Italian Code*, supra* note 10; Decree on Consolidation of the Laws Governing Drugs and Psychotropic Substances, The Prevention, Treatment and Rehabilitation of Drug Addicts (no. 309), 9.10.1990.

[1007] New Zealand Sports Drug Agency Act 1994; Public Act (no. 75), 26.7.1994; Sports Anti-Doping Act, 2006; Public Act (no.78), 7.11.2006. Misuse of Drugs Act,(no. 16), 1975.

[1008] The General Civil Penal Code (no.10), 22.5.1902; Act Relating to Medicaments and Poisons, etc. (no. 1966-51), 20.6.1964; Act on Medical Products, etc. (no 132), 4.12.1992.

[1009] *Estabelece o regime jurídico da luta contra a dopagem no desporto* (no. 27), 19.6.2009; Decree on Control, Use and Traffic of Narcotic Drugs, Psychotropic Substances and Precursors (no.15/93), 22.1.1993; Law on the Legal Framework Applicable to the Consumption of Narcotics and Psychotropic Substances, together with the Medical and Social Welfare of the Consumers of such Substances without Medical Prescription (no. 30), 29.11.2000.

[1010] Law Regarding Prevention and Fight against Doping in Sport (no. 227), 18.6.2006; Goverment Decree (no. 1592), 2006, updated as Government Decree 1056 on 29.11.2006; Law Regarding Prevention and Fight against the Manufacture and Illicit Traffic of the High Risk Doping Substances (no. 104/2008), 28.6.2011; Law on Combatting Illicit Drugs Trafficking and Consumption (no. 143), 26.7.2000.

[1011] Council Chamber Decree on Ratification of the International Convention against Doping in Sports and its Annexes (no. 32), 28.1.2010; Act on Control of , Trade in and Use of Narcotic Drugs (no. 7), 23.2.1957. Law (no. 32), 7.3.1988.

[1012] Law on Prevention of Doping in Sport, 14.11.2005; Law on Ratification of International Convention against Doping in Sport, 25.5.2009; Law on the Production and Trade in Narcotic Drugs, 14.2.1991.

[1013] Public General Act on the Protection of Health and the Fight against Doping in Sport (no. 7), 21.11. 2006; *Ley Organica sobre Proteccion de la Segruidad Ciudadana* (no. 4252), 21.2.1992.

and Tunisia.[1015]

Group B (Countries applying to general sports legislation): Greece,[1016] Luxembourg,[1017] Mexico,[1018] Nicaragua.[1019]

Group C (Countries applying to general drugs legislation) Belgium Flanders,[1020] Canada,[1021] Finland,[1022] Guatemala,[1023] India,[1024] Japan,[1025] Latvia,[1026]

[1014] Prohibition of Certain Doping Agents Act (SFS:1991:1969), 1.7.1992; Act on Penalties for Smuggling (SFS 2000:1225), 30.11.2000; Act Concerning Trade with Drugs (SFS 2013:40), 29.5.2007; Narcotic Drug Controls Act (SFS 1992:860); Act on Prohibition of Certan Substances which are Dangerous to the Health (SFS: 1999:42).

[1015] *Loi no 94-104 du 3 aout 1994, portant organisation et développement de l'éducation physique et des activités sportives,* 3.8.1994; *Loi n° 2007-54 du 8 août 2007, relative à la lutte contre le dopage dans le sport (1),* 8.8.2007; *Décret n° 2008-103 du 16 janvier 2008, fixant l'organisation ainsi que les modalités de fonctionnement de l'agence nationale de lutte contre le dopage*, 16.1.2008; *Décret n° 2008-2681 du 21 juillet 2008, fixant les cas d'autorisation d'usage des substances et méthodes interdites dans le sport ainsi que les conditions et les procédures de son octroi*, 21.8.2008; *Décret n° 2008-3937 du 22 décembre 2008, fixant les critères et modalités de prélèvement des échantillons biologiques dans le cadre de la lutte contre le dopage dans le sport,* 22.12.2008; *Loi No.69-54, portant réglementation des substances vénéneuses,* 26.7.1969.

[1016] Law on Combating Violence Occasion Sporting Events and other Provisions (no.3708), 8.3.2008; Decree on Necessary Measures and Procedures, Mechanisms and Systems Provided by the International Convention against Doping (doping) in Sports (Gazette 343), 17.2.2012; Decree on List of Banned Substances and Methods 2012, 30.12.2011. Law on Combat against the Spread of Drugs, Protection of Youth and other Provisions (no.1729), 7.8.1987.

[1017] *Loi concernant le sport*, 3.8.2005; Law on the Sale of Drugs and the Fight against Drug Addiction, 19.2. 1973.

[1018] *Ley General de Cultura Física y Deporte*, 24.2.2003; *Reglamento a la Ley General de Cultura Física y Deporte,* 14.4.2004; Regulations Concerning Narcotic Drugs and Psychotropic Substances (no 1977-1), 23.7.1976; *Ley General de Salud*, 7.2.1984.

[1019] *Ley General del Deporte, Educacion Fisica y Recreacion Fisica* (no.512- Gaceta No 68), 8.4.2005; Narcotic Drigs, Psychotropic Substances and other Controlled Substances Act (no 177), 22.5.1994.

[1020] Flemish Parliament Act on Medically and Ethical Justified Practice, 1.8.2008; Flemish Government Decree Implementing the 13 July 2007 Flemish Parliament Act on Medically and Ethically Justified Sports Practice, 1.8.2008; *Loi du 24 février 1921 concernant le trafic des substances vénéneuses, soporifiques, stupéfiantes, désinfectantes ou antiseptiques*, 28.2.2001.

[1021] Controlled Drugs and Substances Act, S.C. 1996, c. 19, 20.6.1996; Physical Activity and Sport Act, S.C. 2003, c. 2, 19.3.2003.

[1022] Doping Offence, 24.5.2002; Narcotics Act (no. 1289), 17.12.1993.

[1023] *Ley Nacional para el Desarrollo de la Cultura Física y del Deporte* (no. 76-97 del Congreso de la República de Guatemala) (Decree no. 92-70), 16.12.1970; Regulations for the Control of Psychotropic Substances (no. 1977/41), 24.8.1975.

[1024] Narcotic Drugs and Psychotropic Substances Act, 14.11.1985; Prevention of Illicit Trafficking in Narcotic Drugs and Psychotropic Substances Act, 4.7.1988.

[1025] Sports Promotion Act, 1961; Act Concerning Special Provisions for the Narcotics and Psychotropic Drug Control Act, etc. and Other Matters for the Prevention of Activities Encouraging Illicit Conducts and Other Activities Involving Controlled Substances Through International Cooperation, 5.10.1991; Narcotics and Psychotropics Control Act (no. 14), 1953; Cannabis Control Act (no. 124), 1948; Opium Act (no. 7-11), 1954; Stimulant Drug Control law (no 250), 1951.

[1026] Law on Council of Europe Anti-Doping Convention, 3.1.1997; Law on Additional Protocol of Council of

Lithuania,[1027] Niger,[1028] Peru,[1029] The Philippines,[1030] Russian Federation,[1031] Singapore,[1032] Slovakia,[1033] Sri Lanka,[1034] Swaziland,[1035] United Arab Emirates,[1036] United Kingdom,[1037] United States of America,[1038] and Uruguay.[1039]

Group D: (Countries using other legislation): Australia,[1040] Cuba,[1041] Ghana,[1042] Ireland,[1043] Kazakhstan,[1044] Morocco,[1045] The Netherlands, and South Africa.[1046]

Europe Anti-Doping Convention, 30.10.2002; Law on International Convention against Doping in Sports,10.3.2006; Law on Precursors, 9.5.1996; Law on Procedures for the Legal Trade of Narcotic and Psychotropic Substances and Drugs, 9.5.1996; Pharmacy Law, 10.4.1997.

[1027] Law on Physical Education and Sports Law, 20.12.1995; Government resolution on formation of Lithuanian Anti-doping Commission (no. 747), 23.7.2008; Law on Council of Europe Anti-Doping Convention, 7.11.1995; Order on implementation of International Convention against Doping in Sports in Lithuania, 17.1.2008; Law on UNESCO International Convention against Doping in Sports in Lithuania, 26.5.2006; Law on the Control of Precursorsof Narcotic Drugs and Psychotropic Substances (no 8-1207), 1.6.1999.

[1028] National Institute for Sports Act (no 31), 8.7.1992; National Drug Formulary and Essential Drug List Act (no. 16-252), 1990; National Drug Law Enforcement Agency Act (no. 16-253), 1990.

[1029] *Ley de promoción y desarrollo del deporte* (no. 28036), 24.7.2003. *Ley de Represion del Trafico Illicito de Drogas* (no. 22095), 21.2.1978.

[1030] The Philippine Sports Commission Act (no. 6847),1990; Comprehensive Dangerous Drugs Act of 2002 (no. 9165), 7.6.2002.

[1031] Federal Law on Physical Culture and Sport in the Russian Federation, 30.3.2008; Federal Law on Amendments to the Federal Law "On Physical Culture and Sport in the Russian Federation", 9.11.2010; Labor Code of the Russian Federation (extracts), 1.2.2002; All-Russian Anti-Doping Rules, 13.4.2011; Federal Act on Narcotic Drugs and Psychotropic Substances, 10.12.1997.

[1032] Singapore Sports Council Act (no. 44), 1.10.1973; Misuse of Drugs Act (MDA) (no. 5), 7.7.1973.

[1033] Act Support Sport (no.300), 1.9.2008; Act on Narcotic, Psychotropic Substances and Preparations (no. 139), 2.4.1998.

[1034] Sports Law (no. 25), 1973); Ordinance on Poisons, Opium and Dangerous Drugs of 1935 (amended in 1984 with act no. 13).

[1035] The Constitution of the Kingdom of Swaziland Act, 2005; The Swaziland Opium and Habit-Forming Drugs (Amendment) Proclamation (no. 2), 13.1.1956.

[1036] Law concerning Dubai Sports Council (DSC) (no. 11), 2009; UAE Federal Law of 1995 on the Counter Measures against Narcotic Drugs and Psychotropic Substances (no. 14), 1995.

[1037] Misuse of Drugs Act 1971, c.38; Medicines Act 1968, c. 67; Proceeds of Crime Act 2002, c. 29.

[1038] Chapter 25 Miscellaneous Anti-Drug Abuse Provisions, 7.1.2011; Controlled Substances Act, [21 U.S.C. 801 et seq], 1970.

[1039] *Ley Actividad Deportiva* (no. 14.996), 18.3.1980; *Ley Rendicion Nacional de Cuentas Correspondiente a los Ejercicios* (no. 13.737), 9.2.1969; *Decreto Ley Nº 14294-Junta Nacional de Drogas* (no. 14294), 11.11.1974; *Ley Estupefacientes* (no. 17.016), 28.10.1998.

[1040] Australian Sports Anti Doping Authority Act (no. 6), 2006; Controlled Substances Act, (no. 52), 1984.

[1041] Constitution of the Republic of Cuba, 1976; *Ley de Creación del Instituto Nacional del Deporte y la Recreación* (no. 936), 23.2.1961; *Ley Codigo Penal Cubano* (no. 62*)*, 29.12.1987; *DecretoSobre confiscación por hechos relacionados con las drogas, actos de corrupción o con otros comportamientos ilícitos* (no. 232)*,* 21.1.2003.

[1042] Sports Act 1976 (S.M.C.D. 54); Narcotic Drugs (Control, Enforcement and Sanctions) Law 1976 (PDCL 236).

[1043] The Misuse of Drugs Act, (1977 &1984); Irish Sports Council Act, 1999.

[1044] Law on Physical Culture and Sports Law of the Republic of Kazakhstan (no. 490), 2.12.1999; Criminal Code of the Republic of Kazakhstan (no. 167), 16.7.1997; Law on Narcotic Drugs, Psychotropic Substances and Precursors and the Measures to Counteract Illicit Drug Trafficking and Abuse, 10.6.1998.

[1045] *Loi n° 30-09 relative à l'éducation physique et aux sports,* 24. 8.2010; *Projet de loi N° 51.08 relatif à la lutte contre le dopage dans la pratique sportive; Le Code Pénale Marocain,* 26.11.1962.

ANNEX C

Major Changes in the Code 2015 in terms of this Thesis in Comparison to the Code 2009 [1047]

Categories	*Code 2015*
Definition of Doping	*Doping 2.1 to 2.10* *No change to Strict liability application. Added: Evading submitting the sample (2.3), complicity (2.9) and prohibited association are also doping (2.10).*
Proof of Doping	*No Change*
Purpose of the *Code*	*No Change*
Definition of the *Code*	*Added: The Code has been drafted giving consideration to the principles of proportionality and human rights.*
Interpretation of the *Code*	*No Change*
Purpose of International Standards	*Added: "other relevant stakeholders" term, next to the governments and signatories, is included for the consultation process. Publication condition in the WADA website is brought.*
Models of Best Practice and Guidelines	*Added: "International standards" term, next to the Code is included for the basis. 'Other relevant stakeholders' next to signatories is included for the consultation process which is not mandatory.*
Definition of Signatories	*No Change*
Involvement of Governments	*No Change*
Modification of the *Code*	*Added: "other stakeholders" term next to the governments and athletes is included for the purposes of consultation (23.7(1), 23 7(2)).*
Categories of International Standards	*Added: "Investigation standards" going with testing standards.*

[1046] South African Institute for Drug-Free Sport Act, 23.5.1997; Drugs and Drug Trufficking Act (no. 140), 1992. Misuse of Drugs Act, 1971.

[1047]To recall, this table reflects only how the certain aspects of the Code 2015 that I applied in this thesis were modified in comparison to the Code of 2009. The new aspects which are brought in the Code, such as the new rules related to the intelligence gathering and investigation are also excluded from this table. For the underlined version of the Code 2015 indicating all the modifications on the 2009 Code, see WADA, "World Anti-Doping Code 2015 – Final version redlined to 2009 Code," available at HYPERLINK: < http://www.wada-ama. org/ Documents/ World_ Anti-Doping_ Program/WADP-The-Code/Code_Review/Code%2 0Review %202015 /Code %20Final %20 Draft/ WADA-Redline-2015-WADC-to-2009-WADC-EN.pdf> [last visited on April 16, 2014]

Consultation	*Added: other relevant stakeholders' term, next to the governments and signatories, is included for the consultation process.*
Monitoring Program	*No change (Art. 4.5). Added: WADA Executive Committee will determine the Standard of monitoring for the code compliance (23.5.1).*
Definition of Athlete	*Added: NADO's discretion to expand its anti-doping program to individuals who engage in fitness activities but do not compete at all.*
Education	*Added: "Prevention" term next to the information and education programs is included. Also emphasized a particular focus on youth in school curricula should be given for the prevention programs.*
Research	*No change*

BIBLIOGRAPHY

I BOOKS and REPORTS

AUBY Jean B., *La globalisation, le droit et l'état*, L.G.D.J., 2010.

AUSTIN John, *The province of jurisprudence determined,* London: J. Murray, 1832.

BARRETT Scott, *Why cooperate?: the incentive to supply global public goods,* Oxford University Press, 2007.

BEAMISH Rob and Ian RITCHIE, *Fastest, Highest, Strongest: A Critique of High-Performance Sport,* New York; London: Routledge, 2006.

BENYEKHLEF Karim, *Une possible histoire de la norme : les normativités émergentes de la mondialisation,* Éditions Thémis, 2008.

BONINI Sergio, *Doping E Diritto Penale*, Padova: CEDAM, 2006.

BRUNER Michael L., *Democracy's Debt: The Historical Tensions between Economic and Political Liberty*, Amherst, N.Y.: Prometheus Books, 2009.

BUY Frédéric, Jean M. MARMAYOU, Didier PORACCHIA, and Fabrice RIZZO, *Droit du Sport*, L.G.D.J.: Monthchretien, 2006.

CHIBA Masaji, *Asian Indigenous Law: An Interaction with Received Law*, KPI: London and New York, 1986.

COOPER Chris E., *Run, Swim, Throw, Cheat: The Science Behind Drugs in Sport,* Oxford: Oxford University Press, 2012, p. 224.

DICEY Albert Venn, *Introduction to the Study of the Law of the Constitution*, London, Macmillian and Co., 1908.

DUBIN Charles L., *Report of the Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Atheletic Performance XV*, 1990.

DUFFAUT Alain, *Séance Senat 19 oct. 2005 (compte rendu des débats sur le projet de loi sur le dopage) p. 6*, cited in *Ibid*., p. 505.

DWORKIN Ronald, *Law's Empire*, Cambridge, Mass.: Belknap Press, 1986.

EPSTEIN Richard A., *A Theory of Strict Liability: Toward a Reformulation of Tort Law*, San Francisco: Cato Institute, 1980.

ERKİNER Kismet, 'Dopingle Mücadelede Türkiye'nin Pozisyonu,' *60. Hukuk İlmi Uluslararası Birliği – IALS Kongresi Spor Hukuku Sempozyumu*, 14.05.2010.

FAINARU-WADA Mark and Lance WILLIAMS, *Game of Shadows: Barry Bonds, Balco, and the Steroids Scandal That Rocked Professional Sports,* New York: Gotham Books, 2007.

FEINBERG Joel, *The Moral Limits of the Criminal Law*, New York: Oxford University Press,

1984.

FITZGERALD Brian and Anne FITZGERALD, *Cyberlaw,* Victoria, LexisNexis Butterworths, 2002.

GARDINER Simon, Mark JAMES, John O'LEARY, and Roger WELCH, *Sports Law*, 3rd Edition, Sydney / London: Cavendish Publishing Limited, 2006.

GREEN Lelia, *The internet: An introduction to new media*, Oxford: Berg., 2010.

GÜNDAY Metin, *İdare Hukuku*, Ankara: İmaj, 2011.

HALGREEN Lars, *European Sports Law: A Comparative Analysis of the European and American Rules of Sport,* København: Forlaget Thomson, 2004.

HART Herbert L. A., *The Concept of Law*, Oxford: Clarendon Press, 1961.

HOGG Peter W., *Constitutional Law of Canada*, Toronto, Ont.: Carswell, 2012.

HOULE France and Lorne SOSSIN, *Powers and Functions of the Ombudsman in the Personal Information Protection and Electronic Documents Act: An Effectivenes Study*, Office of the Privacy Commissioner of Canada, August 2010.

HOULE France, « La réglementation intelligente et la gouvernance publique contemporaine », in *Conférence des juristes de l'État 2011, XIXe conférence Le juriste de l'État au cœur d'un droit public en mouvement*, Cowansville, Éditions Yvon Blais, 2011.

HOULE France, *Analyses d'impact et consultations réglementaires au Canada, Étude sur les trasformations du processus réglementaire féderal: de la réglementation pathogène à la réglementation intelligente*, Éditions Yvon Blais, 2012.

HOULIHAN Barrie and Borja GARCIA, *The Use of Legislation in Relation to Controlling the Production, Movement, Importation, Distribution and Supply of Performance-Enhancing Drugs in Sport (Peds),* WADA-UNESCO, 2012.

INCB, *The Report of the International Narcotics Control Board for 2012*, E/INCB/2012/1, United Nations Publications: New York, 5 March 2013.

JACOBINI Horace B., *An Introduction to Comparative Administrative Law*, New York: Oceana Publications, 1991.

KELSEN Hans, *General Theory of Law and State*, New York: Russell & Russell, 1961, p. 455.

KELSEN Hans and Robert W. TUCKER, *Principles of International Law*, New York: Holt, Rinehart and Winston, 1966.

Kemal GÖZLER, *İdare Hukuku Dersleri*, 12 edn.; Bursa: Ekin, 2012.

KULICK Andreas, *Global public interest in international investment law*, Cambridge University Press, 2012.

LAJOIE Andrée, *Vive la recherche libre!: les subventions publiques à la recherche en sciences humaines et sociales au Québec,* Liber : Montréal, 2009.

LATTY Franck, *La Lex Sportiva Recherche Sur Le Droit Transnational*, Martinus Nijhoff Publishers / Brill Academic, 2007.

LECOMPTE Jacques, 'Karl POPPER (1902-1994) Science et raison critique', (1994) 61 *Sciences humaines*.

MATSUURA Jeffrey, *Nanotechnology Regulation and Policy Worldwide*, Artech House: Boston /London, 2006.

MAYER Friedrich F., Grundzüge *des Verwaltungsrechts und Rechtsverfahrens,* Laupp-Publisher, 1857.

MCCLOSKEY John and Julian E. BAILES, *When Winning Costs Too Much: Steroids, Supplements, and Scandal in Today's Sports,* Lanham, MD: Taylor Trade Pub. : Distributed by National Book Network, 2005.

MCILWAIN Charles H., *Constitutionalism, Ancient and Modern*, Ithaca, N.Y.: Cornell University Press, 1947.

MCWHINNEY Edward, *Conflit Idéologique Et Ordre Public Mondial,* Paris: A. Pedone, 1970.

MIAH Andy, *Genetically Modified Athletes: Biomedical ethics, gene doping and sport,* London / New York: Routledge Taylor & Financing Group, 2004.

MILL John S. and Gertrude HIMMERLFARB, *On Liberty,* Penguin, 1974.

MOROZOV Gregory I., *Organizatsiya Obedinennikh Natsii*, Publishing House of the IMO, 1962.

PAOLI Letizia and Alessandro DONATI, *The Sports Doping Market: Understanding Supply and Demand and the Challenges of Their Control,* New York: Spinger, 2014.

PARENT Hugues, *Traité de droit criminel – Tome 2: La culpabilité* (3rd. ed.), 2014, Montréal: Éditions Thémis, 2014.

PERSAK Nina, *Criminalising Harmful Conduct the Harm Principle, Its Limits and Continental Counterpar*ts, Springer, 2007.

POSPISIL Jaroslv L., *Anthropology of Law: A Comparative Theory*, New York, Harper & Row, 1971.

POUND Richard W., *Inside Dope: How Drugs Are the Biggest Threat to Sports, Why You Should Care, and What Can Be Done About Them,* Mississauga, Ont.: J. Wiley & Sons Canada, 2006.

ROMANO Santi, *L'ordre juridique* (trad. L. François et P., Gotho, intro. P. Francescakis), Paris,

Dalloz, 1975.

ROULAND Norbert, *Anthropologie du droit,* Paris, P.U.F., 1988.

ROYAL SOCIETY, '*Human enhancement and the future of work: report from a joint workshop hosted by the Academy of Medical Sciences, the British Academy, the Royal Academy of Engineering and the Royal Society'*, London, November 2012.

SCHULTZ Thomas, *La "Lex Sportiva" Se Manifeste Aux Jeux Olympiques De Turin: Suprématie Du Droit Non-Étatique Et Boucles Étrangés*, Cambridge University (Lauterpacht Research Center for International Law, 2006.

SIMESTER Andrew P. and Andrew V. HIRSCH, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation*, Oxford; Portland, Or.: Hart Pub., 2011.

SOEK Janwillem, *The Strict Liability Principle and the Human Rights of Athletes in Doping Cases,* T.M.C. Asser Press, 2006.

SOSSIN Lorne M. and Colleen M. FLOOD, *Administrative Law in Context*, Toronto: Emond Montgomery Publications, 2013.

TULCHINSKY Thedore H. and Elena VARAVIKOVA, *The new public health an introduction for the 21st century*, Academic Press, 2000.

UNITED KINGDOM, *House of Commonas Science and Technology Committeee-Human Enhancement Technologies in Sport*, Second Report of Session 2006-2007, HC 67-I (Cm 7088)., 2007.

ULUSOY Ali, *Bağımsız İdari Otoriteler*, Turhan Kitabevi, 2003.

UNODC, *World Drug Report 2012*, United Nations: Vienna, 2012.

UNODC, *World Drug Report 2013*, United Nations: Vienna, 2013.

VANDAL Frank J., *Strict Liability: Legal and Economic Analysis*, New York / London: Quorum Books, 1989.

VOY Robert O. and Kirk D. DEETER, *Drugs, Sport, and Politics*, Champaign, Ill.: Leisure Press, 1991.

WILSON Wayne and Ed DERSE, *Doping in Elite Sport: The Politics of Drugs in the Olympic Movement*, Champaign, IL: Human Kinetics, 2001.

ZEN-RUFFINEN Piermarco, *Droit Du Sport*, Zurich: Schulthess, 2002.

II JOURNAL ARTICLES and COLLECTIVE WORKS

AHDIEH Robert B., "From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction," (2007) 57/1 *Emory Law Journal,* pp. 1-30.

ALVARGONZÁLEZ David, "Multidisciplinarity, interdisciplinarity, transdisciplinarity, and the sciences," (2011) 25 *International Studies in the Philosophy of Science,* pp. 387-403.

AMAN Alfred C., "Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy and the Furtherance of a Global Public Interest (Earl A. Snyder Lecture in International Law)," (1999) 6/ 2 *Indiana Journal of Global Studies*, pp. 397-420.

AMAN Alfred C., "The Limits of Globalization and the Future of Administrative Law: From Government to Governance," Indiana Journal of Global Legal Studies (2001) 8/*2 Indiana Journal of Global Studies*, pp. 379-400.

ARAMAN Ahmet, "Dünyada ve Ülkemizde Dopingle Mücadele Kurumları" in Turgay ATASÜ, İlker YÜCESİR, and Bülent BAYRAKTAR (eds.), *Dopingle Mücadele Ve Futbolda Performans Artırma Yöntemleri*, Ankara: Ajansmat, 2011, pp. 135-146.

ARVANITI Nellie, "Ethics in Sport: The Greek Educational Perspective on Anti-Doping," (2006) 9/2 *Sport in Society,* pp. 354-370.

ASIYANBOLA Bolanle and Winston SOBOYEJO, "For the Surgeon: An Introduction to Nanotechnology," (2008) 65/2 *Journal of Surgical Education*, pp. 155-161.

ATASÜ Turgay and İlkerYÜCESİR , "Dopingin Tarihçesi" in Turgay ATASÜ, İlker YÜCESİR, and Bülent BAYRAKTAR (eds.), *Dopingle Mücadele Ve Futbolda Performans Artırma Yöntemleri*, Ankara: Ajansmat, 2011, pp. 1-16.

ATASÜ Turgay, "Futbol Açısından Ülkemizde ve Dünyada Doping Konusuna Genel Bakış" in Turgay ATASÜ, İlker YÜCESİR, and Bülent BAYRAKTAR (eds.), *Dopingle Mücadele ve Futbolda Performans Artırma Yöntemleri*, Ankara: Ajansmat, 2011, pp. 17-32.

AUBY Jean-Bearnard, "Public Goods and Global Administrative Law" in Gordon ANTHONY, Jean-Bernard AUBY, John MORISON, and Tom ZWART, *Values in Global Administrative Law*, Hart Publishing, 2011, pp. 239-251.

AUDRAN Michel, "Blood Doping: Substances, Methods, Detection," (2012) 31/ 334 *Le dopage sanguin: Substances, méthodes, détection,* pp. 28-30.

BAŞÇI Nursabah., "Türkiye Doping Kontrol Merkezi" in Turgay ATASÜ, İlker YÜCESİR, and Bülent BAYRAKTAR (eds.), *Dopingle Mücadele Ve Futbolda Performans Artırma Yöntemleri*, Ankara: Ajansmat, 2011, pp. 147-56.

BELLAMY Richard, "Introduction: Constitutionalism, Democracy and Sovereignity" in Richard BELLAMY (ed.), *Constitutionalism, Democracy and Sovereignity: American and European Perspectives*, Avebury, 1996, pp. 1-8.

BELLEY Jean G., "L'État et la régulation juridique des sociétés globales : pour une problématique du pluralisme juridique," (1987) 18/1 *Sociologie et sociétés,* pp. 11-32.

BENABID Alim L., Thomas COSTECALDE, Napoleon TORRES, Cécile MORO, Teyana I. AKSENOVA, Andrey ELISEYEV, Guillaume CHARVET, Fabien SAUTER, David RATEL,

Corinne MESTAIS, Pierre R. POLAK, and Stéphan J. CHABARDÈS, "Deep Brain Stimulation. Bci at Large, Where Are We Going To?," (2011) 194, *Prog Brain Res.,* pp. 71-82.

BENVENISTI Eyal and George W. DOWNS, "Toward Global Checks and Balances," (2009) 20/3-4 *Constitutional Political Economy,* pp. 366-387.

BERMAN Paul S., "Global Legal Pluralism," (2007) 80/6 *Southern California Law Review,* pp. 1155-1237.

BISSIRIOU Gabriel and Francis KERN*,* "Could education as a global public good be compatible to the General agreement on trade in services?," (2005) 33/ 4 *L'éducation comme bien public mondial est-elle compatible avec l'Accord général sur le commerce des services?*, pp. 39-55.

BLUEMEL Erik B., "Unraveling the global warming regime complex: Competitive entropy in the regulation of the global public good*,*" (2007) 155/6 *University of Pennsylvania Law Review*, pp. 1981-2049.

BOIDIN Bruno, "Is health a global public good or a human right?," (2005) 33/3 *La santé: Approche par les biens publics mondiaux ou par les droits humains?,* pp. 29-44.

BOUSFIELD Dan and Jean M. MONTSION,"Transforming an International Organization: Norm Confusion and the International Olympic Committee," (2012) 15/6 *Sport in Society,* pp. 823-838.

BROUSSEAU Eric and Tom DEDEURWAERDERE, "Global Public Goods: The Participatory Governance Challenges" in Eric BROUSSEAU, Tom DEDEURWAERDE RE, and Bernd SIEBENÜNER (eds.), *Reflexive Governance for Global Public Goods*, The MIT Press, 2012, pp. 21-36.

BRUNKHORST Hauke, "Globalising Democracy without a State: Weak Public, Strong Public, Global Constitutionalism," (2002) 31/3 *Millennium: Journal of International Studies,* pp. 675-690.

CALLERY Craig and David MCARDLE, "Doping, European Law and the Implications of Meca-Medina," (2011) 3/2 *International Journal of Sport Policy,* pp. 163-175.

CAMERON Charlotte, "Regulating Human Enhancement Technologies: The Role of the Law and Human Dignity," (2010) 17/5 *Journal of law and medicine,* pp. 807-815.

CAMPBELL Judith L., "DNA Replication: Changing Faces, Trading Places," (2010) 6/10 *Nature Chemical Biology*, pp. 701-702.

CANN Wesley A., "On the Relationship between Intellectual Property Rights and the Need of Less-Developed Countries for Access to Pharmaceuticals: Creating a Legal Duty to Supply under a Theory of Progressive Global Constitutionalism," (2004) 25/3 *University of Pennsylvania Journal of International Economic Law,* pp. 755-944.

CARSTAIRS Caatherine, "The Wide World of Doping: Drug Scandals, Natural Bodies, and the Business of Sports Entertainment," (2003) 11/4 *Addiction Research and Theory*, pp. 263-281.

CASINI Lorenzo, "Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (Wada)," (2009) 6/2 *International Organizations Law Review,* pp. 421-446.

CASINI Lorenzo, "The Making of a Lex Sportiva by the Court of Arbitration for Sport," (2011) 12/5 *German Law Journal,* pp. 1317-1340.

CASSESE Sabino, "Administrative law without the State? The Challenge of Global Regulation," (2005) 37 *N.Y.U.J. Int'l. L. & Pol.*, pp. 663- 694.

CZARNOTA Paul A. "The World Anti-Doping Code, the Athlete's Duty of " Utmost Caution," and the Elimination of Cheating," (2012) *23/1 Marquete Sports Law Review*, pp. 45-73.

ÇETİN Ebru, Burcu E. DÖLEK, and Özlem ORHAN, "Gazi Üniversitesi Beden Eğitimi ve Spor Yüksekokulu Öğrencilerinin Ergojenik Yardımcılar, Doping ve Sağlık Hakkındaki Bilgi ve Alışkanlıklarının Belirlenmesi," (2008) 6/3 *SPORMETRE Beden Eğitimi ve Spor Bilimleri Dergisi,* pp. 129-132.

CHARLISH Peter, "The Biological Passport: Closing the Net on Doping," (2011) 22/1 *Marquette Sports Law Review,* pp. 61-90.

CHEN Lincoln C., Tim G. EVANS, and Richard A. CASH, "Health as a Global Public Good" in Inge KAUL, Isabelle GRUNBERG, and Marc A. STERN (eds), *Global Public Goods: International Cooperation in the 21st Century*, UNDP, 1999, pp. 264-265.

CHHATBAR Pratik Y. and S. SAHA, "The Future of Implantable Neuroprosthetic Devices: Ethical Considerations," (2009) 19/2 *Journal of Long-Term Effects of Medical Implants,* pp. 123-137.

DALRYMPLE Dana G., "International agricultural research as a global public good: Concepts, the CGIAR experience, and policy issues," (2008) 20/3 *Journal of International Development,* pp. 347-379.

DE MONTMOLLIN Jérôme and Dmitry A. PENTSOV, "Do Athletes Really Have the Right to a Fair Trial in 'Non-Analytical Positive' Doping Cases?," (2011) 22/2 *American Review of International Arbitration*, pp.189-240.

DE PENCIER Joseph, "Law and Athlete Drug Testing in Canada," (1994) 4/2 *Marquette Sports Law Journal,* 4/2, pp. 259-300.

DELPIAZZO Carlos E., "Global Administrative Law and Comparative Administrative Law in Latin America" in *Towards A Lex Administrativa*, Javier R.-ORELLANA and Jaime Rodriguez-Arana MUNOZ, CMP Publishing-London, 2010, pp. 99-136.

DORN Nicholas, "UK Policing of Drug Traffickers and Users: Policy Implementation in the

Contexts of National Law, European Traditions, International Drug Conventions, and Security after 2001," (2004) 34/3 *Journal of Drug Issues,* pp. 533-550.

DOWNIE Rachelle, "Improving the Performance of Sport's Ultimate Umpre: Reforming the Governance of the Court of Arbitration for Sport," (2011) 12/2 *Melbourne Journal of International Law,* pp. 315-344.

DUCLOS Martine, "Doping and Its Consequences in Terms of Individual Health and Public Health," (2012) 35/2 *Le dopage et ses conséquences en termes de santé individuelle et de santé publique,* pp. 57-65.

EBBESEN Mette and Thomas G. JENSEN, "Nanomedicine: Techniques, Potentials, and Ethical Implications," (2006) 51516 *Journal of Biomedicine and Biotechnology,* pp. 1-11.

EKSTRÖM Lena, Erdal GÖK, Maria JOHANSSON, Mats GARLE, Anders RANE, and Jenny J. SCHULZE, "Doping and genetic testing: Sex difference in UGT2B15 expression, testosterone glucuronidation activity and urinary testosterone/epitestosterone glucuronide ratio," (2012) 10 *Current Pharmacogenomics and Personalized Medicine*, pp. 125-131.

ESCRIVA Jean P., "Policy Uses of Athlete Doping: Business Morality to Questions of Public Health?," (2002) 8/3-4 *Usages politiques du dopage sportif: De l'entreprise morale aux questions de santé publique?,* pp. 47-58.

ESTY Daniel C., "Good Governance at the Supranational Scale: Globalizing Administra- tive Law," (2006) 115/7 *Yale Law Journal,* 1490-1562.

FABER Nicolass M and Bernard G. M. VANDEGINSTE, "Flawed Science 'Legalized' in the Fight against Doping: The Example of the Biological Passport," (2010) 15/6 *Accredita- tion and Quality Assurance,* pp. 373-374.

FERLEZ Mitja and Joško OSREDKAR, "Biological Passport in the Fight against Doping," (2012) 81/10 *Biološki potni list v boju proti dopingu,* pp. 717-725.

FERRAJOLI Luigi, "Beyond Sovereignity and Citizenship: A Global Constitutionalism" in Richard BELLAMY (ed.), *Constitutionalism, Democracy and Sovereignity: American and European Perspectives*, Avebury, 1996, pp. 151-160.

FOUCAULT Michel, "The Subject and Power," (1982) 8/4 *Critical Inquiry,* pp. 777-795.

FROMKIN Michael A., "Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution," (2000) 50/ *17 Duke L. J.*, pp. 17-186.

GENÇTÜRK Gözde, Tekin ÇOLAKOĞLU, and Mehmet DEMİREL, "Elit Sporcularda Doping Bilgi Düzeyinin Ölçülmesine Yönelik Bir Araştırma (Güreş Örneği)," (2009) 3 *Niğde Üniversitesi Beden Eğitimi ve Spor Bilimleri Dergisi,* pp. 213-221.

GILSON Eric T., "Exploring the Court of Arbitration for Sport," (2006) 98/3 *Law Library Journal,* 98/3, pp. 503-514.

GREELY Henry T., "Regulating Human Biological Enhancements: Questionable Justifications and International Complications," (2005) 7 *UTS Law Review,* pp. 87-110.

GREENE Paul, "United States Anti-Doping Agency v. Montgomery: Paving a New Path to Conviction in Olympic Doping Cases," (2007) 59/1 *Maine Law Review,* pp.149-168.

GUIRAUD David, "Interfacing the Neural System to Restore Deficient Functions: From Theoretical Studies to Neuroprothesis Design," (2012) 335/1 *Comptes Rendus – Biologies,* pp.1-8.

HAILEY Nicholas, "A False Start in the Race against Doping in Sport: Concerns with Cycling's Biological Passport," (2011) 61/2 *Duke Law Journal,* pp. 393-432.

HANSTAD Dag V. and Sigmund LOLAND, "Elite Athletes' Duty to Provide Information on Their Whereabouts: Justifiable Anti-Doping Work or an Indefensible Surveillance Regime?," (2009) 9/1 *European Journal of Sport Science,* pp. 3-10.

HARLOW Carol, "Global Administrative Law: The Quest for Principles and Values," (2006) 17/1 *European Journal of International Law,* pp. 187-214.

HEILMANN Daniel, "International Control of Illegal Drugs and the U.N. Treaty Regime: Preventing or Causing Human Rights," (2011) 19/2 *Cardozo Journal of International and Comparative Law,* 19/2 (2011), pp. 237-286.

HIRSCH Andrew V., "The Offence Principle in Criminal Law: Affront to Sensibility or Wrongdoing?," (2000) 11/1 *Kings College Law Journal,* pp. 78-89.

HOULIHAN Barrie, "Detection and Education in Anti-Doping Policy: A Review of Current Issues and an Assessment of Future Prospects," (2008) 49 *Hitotsubashi Journal of Arts and Sciences,* pp. 55-71.

HOWMAN David, "Progress Based on Research," (2007) 2 *Play True Magazine*, p. 2.

ISAACS Eugen and Nathan EHRLICH, "The Sociology of Law," (1922) 36/2 *Harvard Law Review,* pp. 130-145.

KARATAŞ Mehmet, Özgür KARATAŞ, and Hakan ÇEVRİM, "Beden Eğitimi ve Spor Yüksekokulu Öğrencilerinin Doping Kullanımına Bakışları Ve Etik," (2012) 14/3 *Düzce Tıp Dergisi,* pp. 28-31.

KARCH Steven B, "Changing Times: DNA Resequencing and the 'Nearly Normal Autopsy,'" (2007) 14/7 *Journal of Forensic and Legal Medicine*, pp. 389-397.

KARSENTY Alain and Romain PIRARD, "Tropical forests - The question of global public good and multilateral economic instruments for establishing an international regime," (2007) 59/5 *Forêts tropicales: La question du bien public mondial et la quête d'instruments économiques multilatêraux pour un régmie international*, pp. 537-545.

KAUL Inge, Isabelle GRUNBERG, and Marc A. STERN,"Defining Global Public Goods" in

Inge KAUL, Isabelle GRUNBERG, and Marc A. STERN (eds), *Global Public Goods: International Cooperation in the 21st Century*, UNDP, 1999, pp. 2-19.

KAUL INGE, "Rethinking Public Goods and Global Public Goods" in Eric BROUSSEAU, Tom DEDEURWAERDERE, and Bern SIEBENHÜNER (eds.), *Reflexive Governance for Global Public Goods*, The MIT Press, 2012, pp. 37-54.

KHOURY Dina R., "Administrative Practice between Religious Law (Shari'a) and State Law (Kanun) on the Eastern Frontiers of the Ottoman Empire," (2001) 5/4 *Journal of Early Modern History,* pp. 305-330.

KIMIJIMA Akihiko, "Japan's Contribution to Global Constitutionalism," (2009) 4/2 *Societies Without Borders,* pp. 105-116.

KINDERLERER Julian and Diane LONGLEY, Human Genetics: "The New Panacea," (1998) 61 *Modern Law Review* in Shelia A.M. MCLEAN (dir.), *Genetics and Gene Therapy*, The International Library of Medicine, Ethics and Law, Dartmouth / Ashgate, 2005, pp. 603-620.

KINGSBURY B. and L. CASINI, "Global administrative law dimensions of international organizations law," (2009) 6/2 *International Organizations Law Review*, pp. 319-358.

KINGSBURY Benedict, Nico KRISCH, and Richard B. STEWART, "The Emergence of Global Administrative Law," (2005) 68/ 3-4 *Law and Contemporary Problems,* pp. 15-62.

KINNEY Eleanor D., 'The Emerging Field of International Administrative Law: Its Content and Potential', (2002) 54 *Administrative Law Review,* pp. 415-434.

KLEIN Lawrence R., "Paul Samuelson as a 'Keynesian' Economist'" in Michael SZENBERG, *Samuelsonian Economics and the Tewnty-First Century*, Oxford University Press, 2006, pp. 166-177.

KNOPPERS Bartha M. and Claudine FECTEAU, "Human genomic databases: A global public good?," (2003) 10 *European Journal of Health Law,* pp. 27-41.

KOLLER Dionne L., "How the United States Government Sacrifices Athletes' Constituti- onal Rights in the Pursuit of National Prestige," (2008) 5 *Brigham Young University Law Review,* pp. 1465-1544.

KÖNIG Bettina, Katharina DIEHL, Karen TSCERNING, and Katharina HELMING, "A framework for structuring interdisciplinary research management," (2013) 42/1 *Research Policy*, pp. 261-272.

KOSKENNIEMI Martti, "The Fate of Public International Law: Between Technique and Politics," (2007) 70/1 Modern *Law Review*, pp. 1-30.

KREFT Lev, "Elite Sportspersons and Commodity Control: Anti-Doping as Quality Assurance," (2011) 3/2 *International Journal of Sport Policy,* pp. 151-161.

KRISCH Nico, "The Pluralism of Global Administrative Law," (2006) 17/1 *European Journal*

of International Law, pp. 247-278.

KUO Ming-Sung., "Inter-Public Legality or Post-Public Legitimacy? Global Governance and the Curious Case of Global Administrative Law as a New Paradigm of Law," (2012) 10/4 *International Journal of Constitutional Law,* pp. 1050-1075.

LAJOIE Andrée, "Synthèse introductive" in Andrée LAJOIE, Jean M. BRISSON, Sylvio NORMAND, and Alain BISSONNETE, *Le statut juridique des peuples autochtones au Québec et le pluralisme*, Québec, Yvon Blais, 1996, pp. 1-60.

LAW David S. and Mila VERSTEEG, "The Evolution and Ideology of Global Constitutionalism," (2011) 99/5 *California Law Review,* pp. 1163-1257.

LESCANO Fischer A. and Gunther TEUBNER, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law," (2004) 25/4 *Michigan Journal of International Law,* pp. 999-1046.

LIPPI, Giuseppe, Massimo FRANCHINI, and Gian C. GUIDI, "Doping in Competition or Doping in Sport?," (2008) 86/1 *British Medical Bulletin*, pp. 95-107.

LJUNQVIST Arne "Championing the Science," (2007) 2 *Play True*, pp. 3-8.

MACDONALD Roderick A.,"Pour une reconnaissance d'une normativité juridique implicite et inférentielle" in (1987) 18/1 *Sociologie et sociétés*, pp. 47–58.

MASKUS Keith & Jerome REICHMAN, "The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods," (2004) 7/2 *Journal of International Economic Law*, pp. 279-320.

MATTLI Walter and Tim BUTHE, "Global Private Governance: Lessons from a National Model of Setting Standards in Accounting," (2005) 68 *Law and Contemporary Problems*, pp. 225-262.

MCGEE Eileen M., "Toward Regulating Human Enhancement Technologies," (2010) 1/2 *AJOB Neuroscience,* pp. 49-50.

MCLAREN Richard H., "Cas Doping Jurisprudence: What Can We Learn?" (2006) 1 *Sweet & Maxwell-International Sports Law Review,* pp. 4-22.

MCLAREN Richard H., "Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror," (2010) 20/2 *Marquette Sports Law Review,* pp. 305-334.

MCLAREN Richard H., "An Overview of Non-Analytical Positive & Circumstantial Evidence Cases in Sports," (2006) 16-2 *Marquette Sports Law Review*, pp. 193-212.

MEHLMAN Maxwell J., Elizabeth BANGER, and Matthew M. WRIGHT, "Doping in Sports and the Use of State Power," (2005) 50/1 *Saint Louis University Law Journal,* pp.15-74.

MEILAN Gil J.L., "Global Administrative Law and Human Rights" in Javier R.-ORELLANA and Jaime Rodriguez-Arana MUNOZ (eds.), *Towards A Lex Administrativa*, CMP Publishing-

London, 2010, pp. 11-32.

MICHAELS Ralf, "The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism," (2005) 51/3 *Wayne Law Review,* pp. 1209-1259.

MITTEN Matt J., "Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations," (2009) 10/1 *Pepperdine Dispute Resolution Law Journal,* pp. 51-68.

MOCKLE Daniel, "Le débat sur les principes et les fondements du droit administratif global, " (2012) 53 *Cahiers de Droit*, pp. 3-48.

MØLLER Verner, "One Step Too Far - About Wada's Whereabouts Rule," (2011) 3/2 *International Journal of Sport Policy*, pp. 177-190.

MOORE Sally F., "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study," (1973) 7 *Law and Society Review*, pp. 719-746.

MORISON John and Gordon ANTHONY, "The Place of Public Interest" in Gordon ANTHONY et al. (eds.), *Values in Global Administrative Law*, Hart Publishing, 2011, pp. 215-238.

MULLIGEN Johannes G.V., "Global Constitutionalism and the Objective Purport of the International Legal Order," (2011) 24/2 *Leiden Journal of International Law,* pp. 277-304.

MURRAY Thomas H., "Doping in Sport: Challenges for Medicine, Science and Ethics," (2008) 246/2 *Journal of Internal Medicine*, pp. 95-98.

MURRAY Thomas H., "Reflections on the Ethics of Genetic Enhancement," (2002) 4/6 SUPPL *Genetics in Medicine,* pp. 27S-32S.

NAFGIZER James A.R., "Circumstantial Evidence of Doping: Balco and Beyond," (2005) 16 *Marquette Sports Law Review*, pp. 46-47.

NELKEN David, "Eugen Ehrlich, Living Law, and Plural Legalities," (2008) 9/2 *Theore- tical Inquiries in Law,* pp. 443-472.

NEUBERGER Elmo W. I., Magdalena JURKIEWICZ, Dirk A. MOSER, and Perikles SIMON, "Detection of Epo Gene Doping in Blood," (2012) 4/11 *Drug Testing and Analysis,* pp. 859-869.

NORDHAUS William D., "Paul Samuelson and Global Public Goods: A commemorative essay for Paul Samuelson" *in* Michael SZENBERG, Lall RAMRATTAN, and Aron A. GOTTESMAN (eds.), *Samuelsonian Economics and the Twenty-First Century,* Oxford University Press, 2006, pp. 89-98.

OJEMANN Jeffrey G., Eric C. LEUTHARDT, Kai J. MILLER, "Brain-Machine Interface: Restoring Neurological Function through Bioengineering," (2007) 54 *Clinical Nanosur- gery*, pp. 134–136

OLIVEIRA Renata S.,T. COLLARES, Kevin R H SMITH, T.V. COLLARES and Fabiana K. SEIXAS, "The use of genes for performance enhancement: doping or therapy?," (2011) 44-12 *Brazilian Journal of Medical and Biological Research*, pp. 1194-1201.

ÖNER Mehmet Zülfü, "Türk Ceza Hukuku'nda Uyuşturucu Madde İmal, İthal ve İhraç Suçları," (2010) 88 *TBB Dergisi,* pp. 106-150.

PALANDRI Lucrezia, "Theoretical Reflections on Legal Pluralism and Global Constitutionalism: Their Possible Reconciliation in an Alternative Model of Plural Constitutionalism," (2013) 54/1 *Acta Juridica Hungaria,* pp. 58-72.

PASQUALE Frank, "Technology, Competition, and Values," (2007) 8 *Minnesota Journal of Law, Science & Technology*, pp. 607-622.

PENDLEBURY A. and J. MCGARRY, "Location, Location, Location: The Whereabouts Rule and the Right to Privacy," (2009) 40 *Cambridge Law Review,* pp. 63-75.

PEREZ Oren., "Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law," (2003) 10/ 2 *Indiana Journal of Global Legal Studies,* pp. 25-64.

PETERS Anne and Heiner SCHWENKE, "Comparative Law Beyond Post-Modernism," (2000) 49/4 *International and Comparative Law Quarterly,* pp. 800-834.

POSNER Richard A., "In Defense of Prometheus: Some Ethical, Economic, and Regula- tory Issues of Sports Doping," (2008) 57/6 *Duke Law Journal*, pp. 1725-1742.

PREUSS Ulrich K., "The Political Meaning of Constitutionalism" in Richard BELLAMY (ed.), *Constitutionalism, Democracy and Sovereignity: American and European Perspectives*, Avebury, 1996, pp. 11-30.

RAVJANI Abbas, "The Court of Arbitration for Sport: A Subtle Form of International Delegation," (2009) 2/2 *Journal of International Media & Entertainment Law,* pp. 241-284.

RAZ Joseph, "The Identity of Legal Systems," (1071) 59/3 *California Law Review,* pp. 795-815.

REILLY Louise, "An Introduction to the Court of Arbitration for Sport (Cas) & the Role of National Courts in International Sports Disputes," (2012) 2012/1 *Journal of Dispute Resolution,* pp. 63-82.

RIEU Michel and Patrice QUENEAU, "The flight against doping: A public health challenge (La lutte contre le dopage: Un enjeu de santé publique)," (2012) 196/6 *Bull. Acad. Natle Métle,* pp. 1169-1172.

RIGOZZI Antonio, "Challenging Awards of the Court of Arbitration for Sport," (2010) 1/1 *Journal of International Dispute Settlement,* 1/1 (2010), pp. 217-265.

ROBINSON Neil, Martial SAUGY, Alan VERNEC, and Pierre-Eduard SOTTAS, "The Athlete Biological Passport: An Effective Tool in the Fight against Doping," (2011) 57/6 *Clinical Chemistry,* pp. 830-832.

ROCHER Guy, "Hégémonie, fragmentation et mondialisation de la culture," (2000) 11 *Horizons philosophiques Horizons philosophiques,* pp. 125-134.

ROCHER Guy, "Pour une sociologie des ordres juridiques" in Guy ROCHER, *Études de sociologie du droit et de l'éthique*, Montréal, Thémis, 1996, pp. 134-135.

ROHR John A., "Dicey's Ghost and Administrative Law," (2002) 34/1 *Administration & Society,* pp. 8-31.

ROOM Robin and Peter REUTER, "How Well Do International Drug Conventions Protect Public Health?," (2012) 379/ 9810 *The Lancet,* pp. 84-91.

ROSAHL Steffen K., "Neuroprosthetics and Neuroenhancement: Can We Draw a Line," (2007) 9-2 *Virtual Mentor,* pp. 32-139

RUDOLPH Holly, "Horse Sense and High Competition: Procedural Concerns in Equestrian Doping Arbitration," (2010) 2/1 *Kentucky Journal of Equine, Agriculture, & Natural Resources Law,* pp. 47-80.

SAMUELSON Paul A., "The pure theory of public expenditure," (1954) 36 *The Review of Economics and Statistics,* pp. 387-389.

SANDEL Michael J., "The Case against Perfection - What's Wrong with Designer Children, Bionic Athletes, and Genetic Engineering: A Prominent Political Philosopher Investigates the False Promise of Human Mastery," (2004) *The Atlantic monthly,* pp. 51-62.

SANDLER Todd and Daniel G. ARCE, "New Face of Development Assistance: Public Goods and Changing Ethics" in Eric BROUSSEAU et al. (eds.), *Reflexive Governance for Global Public Goods*, The MIT Press, 2012, pp. 55-72.

SCHJERLING Peter, "The basics of gene doping" in C. TAMBURRINI and T. TÄNNSJÖ (dir.), *Genetic Technology and Sport: ethical questions*, 2005, Routledge: London / New York, pp. 19-31.

SCHNEIDER Angela J., Matthew N. FEDORUK, and Jim L. RUPERT, "Human Genetic Variation: New Challenges and Opportunities for Doping Control," (2012) 30/11 *Journal of Sports Sciences,* pp. 1117-1129.

SCHWÖBEL Christine E. J., "Organic Global Constitutionalism," (2010) 23/3 *Leiden Journal of International Law,* pp. 529-553.

SEGURA Jordi, Núria MONFOR, and Rosa VENTURA, "Detection Methods for Autologous Blood Doping," (2012) 4/11 *Drug Testing and Analysis*, pp. 876-881.

SEVER Murat P. and Mitchel ROTH, "The Kurdish Workers Party (PKK) as Criminal

Syndicate: Funding Terrorism through Organized Crime, A Case Study," (2007) 30/10 *Studies in Conflict and Terrorism*, pp. 901-920.

SHAFFER Gregory, "International law and global public goods in a legal pluralist world," (2012) 23/3 *European Journal of International Law*, pp. 669-693.

SHEPHERD Robert K., "Special Section on Medical Bionics," (2012) 9/6 *Journal of Neural Engineering,* pp. 1-3.

SIMESTER Andrew P. and A. V. HIRSCH, "Rethinking the Offense Principle," (2002) 8/3 *Legal Theory,* pp. 269-95.

SLAUGHTER Anne M. and D. ZARING, "Networking Goes International: An Update," (2006) 2 *Annual Review of Law & Social Science*, pp. 211-229.

SLAUGHTER Anne M., "The Accountability of Government Networks," (2001) 8 *Indiana Journal of Global Legal Studies,* pp. 347-368.

SMITH Richard, David R. WOODWARD, Arnab K. ACHARYA, Robert H. BEAGLEHOLE, and Nick DRAGER, "Communicable disease control: A 'Global Public Good' perspective," (2004) 19/5 *Health Policy and Planning,* pp. 271-278.

SNYDER Francis, "Governing Economic Globalisation: Global Legal Pluralism and European Law," (1999) 5/4 *European Law Journal,* pp. 334-374.

SPROULE David W., "The Un Drug Trafficking Convention: An Ambitious Step," (1989) 27 *Canadian Yearbook of International Law,* pp. 263-294.

STARICOFF Joseph, "International Law and the Opium Conventions," (1936) 18 /1-4 *Journal of Comparative Legislation and International Law,* pp. 94-100.

STARKE Joseph G., "The Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs," (1937) 31/1 *American Journal of International Law,* pp. 31-43.

STEWART Laura S., "Has the United States Anti-Doping Agency Gone Too Far - Analyzing the Shift from Beyond a Reasonable Doubt to Comfortable Satisfaction," (2006) 13/1 *Villanova Sports & Entertainment Law Journal,* pp. 207-244.

STIGHLITZ Joseph, E., "Global public goods and global finance: does global governance ensure that the global public interest is served?" in Jean P. TOUFFUT, *Advancing public goods,* Edward Elgar, 2006, pp. 149-152.

STRAUBEL Michael S., "Lessons from Usada V. Jenkins: You Can't Win When You Beat a Monopoly," (2010) 10/1 *Pepperdine Dispute Resolution Law Journal,* pp. 119-156.

STRAUBEL Michael, "Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better," (2005) 36/4 *Loyola University Chicago Law Journal,* pp. 1203-1272.

STRAUBEL Michael, "The International Convention against Doping in Sport: Is It the

Missing Link to Usada Being a State Actor and Wadc Coverages of U.S. Pro Athletes," (2008) 19/1 *Marquette Sports Law Review,* pp. 63-90.

TAMANAHA Brian Z., "The Folly of the 'Social Scientific' Concept of Legal Pluralism," (1993) 20/ 2 *Journal of Law and Society*, pp. 192-217.

TAMANAHA Brian Z., "A Non-Essentialist Version of Legal Pluralism," (2000) 27/2 *Journal of Law and Society,* pp. 296-321.

TAMANAHA Brian Z., "Understanding Legal Pluralism: Past to Present, Local to Global," (2008) 30/3 *Sydney Law Review,* pp. 375-411.

TAMBURINI Claudio and Torbjörn TÄNNSJÖ, "Genetic Engineering and Elitism in Sport" in Claudio TAMBURINI and Torbjörn TÄNNSJÖ (dir.), *Genetic Technology and Sport*, Routledge: London / New York, 2005, pp. 1-39.

TAVANI Alessandra, Paolo COLOMBO, Vilma SCARPINO, Piergiorgio ZUCCARO, Roberta PACIFICI, and Carlo La VECCHIA, "Beliefs on and Attitude toward Doping Use among Athletes: An Italian Survey," (2012) 9/4 *Italian Journal of Public Health,* pp. e8669.1-e69.7.

TEALE Phil, James SCARTH, and Simon HUDSON, "Impact of the Emergence of Designer Drugs Upon Sports Doping Testing," (2002) 4/1 *Bioanalysis*, pp. 71-88.

TEUBNER Gunther, "Breaking Frames: The Global Interplay of Legal and Social Systems," (1997) 45/1 *American Journal of Comparative Law,* pp. 149-208.

TEUBNER Gunther, "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy," (1997) 31/4 *Law and Society Review,* pp.763-787.

TEUBNER Gunther, "Global Bukowina: Legal Pluralism in the World Society" in Gunther TEUBNER (ed.), *Global Law without a State*, Darthmouth, Aldershot, 1997, pp. 3-28.

THORSTEINSDÓTTIR Halla, Abdallah S. DAAR, Richard D. SMITH, Peter A. SINGER, "Genomics-A global public good?," 361/9361 *Lancet,* pp. 891-892.

TORRES Christian, "Passport Control to Prevent Athlete Doping," (2010) 16/2 *Nature Medicine,* p. 142.

UNNEVEHR Laurian J., "Food safety as a global public good," (2007) 37/S1 *Agricultural Economics*, pp. 149-158.

URUENA René, "How to start thinking about conflict of interest in global governance?" in Anne PETERS and Lukas HANDSCHIN (eds.), *Conflict of Interest in Global, Public and Corporate Governance*, Cambridge, 2012, pp. 85-102.

VANDERLINDEN Jacques, "Vers une nouvelle conception du pluralisme juridique," (1993) 18/2 *Revue de la recherche juridique droit prospectif,* pp. 573-583.

WADDINGTON Ivan, "Surveillance and Control in Sport: A Sociologist Looks at the Wada

Whereabouts System," (2010) 2/3 *International Journal of Sport Policy and Politics,* pp. 255-274.

WAGNER Ulrik and Dag V. HANSTAD, "Scandinavian Perspectives on Doping - a Comparative Policy Analysis in Relation to the International Process of Institutionalizing Anti-Doping," (2011) 3/3 *International Journal of Sport Policy,* pp. 355-372.

WAGNER Ulrik, "The International Cycling Union under Siege-Anti-Doping and the Biological Passport as a Mission Impossible?," (2010) 10/3 *European Sport Management Quarterly,* pp. 321-342.

WEINBERG Mea A. and Michael S. INSLER, "Lasik Refractive Eye Surgery in the 21st Century," (2010) 35/4 *U.S. Pharmacist*, pp. 20-24.

WENDT John T., "Reflecting on Beijing - a Time of Transition in the War on Doping," (2009) 26/4 *Entertainment and Sports Lawyer,* pp. 10-18.

WESTON Maureen A., "Doping Control, Mandatory Arbitration, and Process Dangers for Accused Athletes in International Sports," (2009) 10/1 *Pepperdine Dispute Resolution Law Journal,* pp. 5-50.

WESTON Maureen A., "Simply a Dress Rehearsal-U.S. Olympic Sports Arbitration and De Novo Review at the Court of Arbitration for Sport," (2009) 38/1 *Georgia Journal of International and Comparative Law,* pp. 97-130.

WHITE Thomas M. and Lawrence J. LENARD, "Improving Icanns Governance and Accountability: A Policy Proposal," (2011) 23/2 *IEPOL Information Economics and Policy,* pp. 189-199.

WISE Aaron N, "'Strict Liability' Drug Rules of Sports Governing Bodies," (1996) *146* New Law Journal, pp. 1161-1164.

WOUTERS Marije, Annemieke BENSCHOP, Dirk J. KORF, and Margriet V. LAAR, "Cannabis use and proximity to coffee shops in the Netherlands," (2012) 9/4 *European Journal of Criminology*, pp. 337-353.

WOZNY Michael, "The Biological Passport and Doping in Athletics," (2010) 376/9735, *The Lancet,* p. 79.

YOUNG Ernest A., "The Trouble with Global Constitutionalism," (2003) 38/3 *Texas International Law Journal,* pp. 527-546

ZORZOLI Mario and Francesca ROSSI, "Case Studies on Esa-Doping as Revealed by the Biological Passport," (2012) 4/11 *Drug Testing and Analysis,* pp. 854-858.

ZORZOLI Mario, "The Athlete Biological Passport from the Perspective of an Anti-Doping Organization," (2011) 49/9 *Clinical Chemistry and Laboratory Medicine,* pp.1423-1425.

III OPINIONS, NEWS, and OTHER ONLINE SOURCES

ACC, "Organised Crime and Drugs in Sport: New Generation Performance and Image Enhancing Drugs and Organized Criminal Involvement in Their Use If Professional Sport," Camberra: Australia Crime Commission, February 2013.

ASEAN, "Official Website," available at HYPERLINK: < http://www.asean.org > [last visited on April 21, 2013].

ASEAN, "The 22th ASEAN Summit's Declarations on Drug-Free ASEAN 2015, Bandar Seri Begawan," Malaysia, 24-25 April 2013, available at HYPERLINK: < http://www.asean.org/news/asean-statement-communiques/item/chairmans-statement-of-the-22nd-asean-summit-our-people-our-future-together> [last visited on November 2, 2013].

AU Plan of Action on Drug Control (2013-2017), Submitted for consideration by the 5th Session of the Africa Union Conference of Ministers of Drug Control (CAMDC5), 8-12 October 2012.

AU, Department of Social Affairs, available at HYPERLINK: < http://sa.au.int/> [last visited on April 23, 2013].

BBC News, "Tour tarnished by drugs scandal," 3 August 1998, available at HYPERLINK: <http://news.bbc.co.uk/2/hi/special_report/1998/07/ 98/tour_de_france/144326.stm> [last visited on February 2, 2013].

BERGER Michael, "A closer look at nanomedicine," *Nanowerk*, 23 May 2007, available at HYPERLINK: <http://www. nanowerk.com/spotlight/spotid=1975.php> [last visited on

BERGER Michael, "Nanotechnology coming to a brain near you," *(July 2007) Nanowerk*, available at HYPERLINK: < http://www.nanowerk.com/ spotlight/spotid=2177.php> [last visited on October 28, 2013].

BESTROM Craig and John STREGE, "Eyes of the Tiger- Tiger Woods- LASIK laser eye surgery- Brief Article, (June 2002), Golf Digest," available at HYPERLINK: <http://www.medownick lasereyesurgery.com.au/laser-eye-surgery/tiger-woods/> [last visited on January 3, 2013].

CAS, "ICAS Members," available at HYPERLINK: <http://www.tas-cas.org/d2wfiles/document/459/5048/0/CIAS-bios20net20(2011).pdf> [last visited on February 21, 2013].

CCES, "Funding," available at HYPERLINK: <http://www.cces.ca/en/aboutus> [last visited on February 27, 2013].

CICAD, "Hemisphreic Plan of Action on Drugs 2011-2015," 49th Reg. Session, Paramaribo, Suriname, 17 May 2011.

CICAD, "Official Web Site," available at HYPERLINK: < http://cicad. oas.org/> [last visited on April 23, 2013].

COE, “Compilation of national laws with respect to the fight against doping,” available at HYPERLINK: < http:// www.coe.int/t/dg4/sport/Doping/ Antidoping database> [last visited on March, 9 2013].

COE, “EU Drugs Strategy (2013-20),” 7 December 2012, available at HYPERLINK: < http://ec. europa.eu/justice/anti-drugs/european-response/strategy/index _en. htm> [last visited on November 2, 2013].

COSTA, Jean P., “Legal opinion regarding the draft World Anti-Doping Code,” 25 June 2013, Strasbourg, p. 6, available at HYPERLINK: <Legal opinion regarding the draft World Anti-Doping Code> [last visited on November 10, 2013].

DONATI Alessandro, “World Traffic in Doping Substances” (Translated by Alessandra Lombardi), February 2007, p. 78-79, available at HYPERLINK: < http://www.wada-ama.org/ Documents/World_AntiDoping_Program/Governments/WADA_Donati_Report_On_Trafficking _2007.pdf> [last visited on April 28, 2014]

DE LISLE Tim, “How Did Sport Get so Big? DID SPORT,” More Intelligent Life, available at HYPERLINK: <http://moreintelligentlife.com/content/ideas/tim-de-lisle/how-did-sport-get-so-big> [last visited on April 14, 2013].

ECHR, “Judges of the Court,” available at HYPERLINK: < http://www.echr. coe.int/ Pages/ homeaspx?p=court/judges&c =#n 1368718271 710_pointer> [last visited on September 5, 2013].

EJP, “The European e-Justice Portal,” available at HYPERLINK: < https://e-justice.europa. eu/content_ member_state_law-6-en.do> [last visited on June 24, 2013].

EMCDDA, “Official Website,” available at HYPERLINK: < http://www.emcdda.europa.eu/> [last visited on November 2, 2013].

FAHEY John, “Statement from WADA President John Fahey in response to UCI press release,” 28 January 2013, available at HYPERLINK: <http://playtrue.wada-ama.org/news > [last visited on February 1, 2013]

GIBSON Owen, “Drugs in Sport: Wada Says Doping and Organised Crime “Too Big to Manage,”’The Guardian, 15 February 2013, available at HYPERLINK: <http://www.guardian. co.uk/sport/2013/feb/15/drugs-wada-organised-crime> [last visited on November 2, 2013].

GOLDENCIEL Jill, “Global Administrative Law-Global Governance Debate Program,” comment, 29 June 2012, available at HYPERLINK: < http://network.globalgovernan ceprog ram me.eu/498/ > [last visited on July 5, 2013].

HONNATTI Meghana and Gareth HUGHES, “Intracellular Nanosurgery,” zyvex application note 9721, available at HYPERLINK: <http://www.zyvex.com/Documents/9721.pdf> [last visited on January 3, 2013].

ICANN, “About the GAC,” available at HYPERLINK:<https://gacweb.icann.org/display/gac-web/About+The+GAC > [last visited on July 10, 2013].

ICANN, "Constitution (Bylaws) of the ICANN," available at HYPERLINK: < http://www.icann.org/en/about/governance/bylaws> [last visited on November 3, 2013].

ICANN, "Glossary," available at HYPERLINK: < http://www.icann.org/en/about/learning/glossary> [last visited on July 6, 2013].

IILJ, "The Global Administration Law Project," New York University School of Law, available at HYPERLINK: <http://www.iilj.org/gal/> [last visited on November 3, 2013].

INCB, "Monitoring and supporting Governments' compliance with the international drug control treaties," available at HYPERLINK: < http://www.incb.org/ > [last visited on November 2, April 21, 2013].

"Information, Law and Technology (JILT)," available at HYPERLINK: <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2003_1/komaitis/> [last visited on July 10, 2013].

IOC, "Official Website," available at HYPERLINK: <http://www.olympic.org> [last visited on February 5, 2013].

IONNIDIS Gregory, "Legal Regulation of Doping in Sport: The Case for The Prosecution," (2003) 1-1 Obiter, 15-17. The article is also available at HYPERLINK: <http://www.lawfile.org.uk/Obiter 1-2003.pdf > [last visited on October 28, 2013].

ISI, "Web of Science Official Website," available at HYPERLINK: <www.isinet.com> [last visited on November 4, 2013].

ISO, "Website," available at HYPERLINK: < http://www.iso.org/iso/home/news_index/iso-in-action.htm> [last visited on August 24, 2013].

ITU, "Global Support for Information Society Targets in ITU Survey," 17 May 2004, available at HYPERLINK: < http://www.un.org/News/ Press/docs/2004/pi1580.doc.htm > [last visited on November 3, 2013].

KETANI Assia, "Vive La Recherche Libre ! - De L'utilitarisme à La Prostitution Intellectuelle," Le Devoir, 21 February 2009, available at HYPERLINK: <http:// www. ledevoir.com/societe/science-et-technologie/235083/vive-la-recherche-libre-de-l-utilitarisme-a-la-prostitution-intellectuelle> [last visited on August 13, 2013].

KOMAITIS Konstantionos, "ICANN: Guilty as Charged?," (2003) 1 *The Journal of Information, Law and Technology (JILT)*, available at HYPERLINK : <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2003_1/komaitis/> [last visited on August 3, 2014].

LAROUCHE Pierre, "Comment on GAL Debate," 29 June 2012, available at HYPERLINK: < http://network.globalgovernan ceprogramme.eu/498/ > [last visited on July 5, 2013].

MCDDA, "Country Profiles," available at HYPERLINK: <http://www.emcdda. europa.eu/countries> [last visited on March 9, 2013].

MCKENZIE Christopher, "The Use of Criminal Justice Mechanisms to Combat Doping in

Sport," 9.7.2007, Sports Law eJournal, available at HYPERLINK: <http://epublications.bond.edu.au/ slej/4/> [last visited on February 26, 2013].

MIAH Andy, "Why Oscar Pistorius Has Already Made History and Why It's a Good Thing for Everyone," Huffintonpost, 14 July 2012, available at HYPERLINK : <http://www.huffingtonpost.co.uk/andy-miah/why-oscar-pistorius-has-already-made-history_b_1664742.html>[last visited on February, 2, 2013].

MPG, "Project Group Legal Pluralism of Max Planck Institute for Social Anthropology," New Project: Law Against The State, a draft of project is available at HYPERLINK: < http://www.eth.mpg.de/ > [last visited on June 2, 2013].

OAS, "Convenio Constitutivo de la Comision CentroAmericana Permanente para la Erradicacion de la Producion, Trafico, Consumo y Uso Ilicitos de Estupefacientes y Sustancias Psicotropicas (CCP)," Guatemala City, Republic of Guatemala, 29 October 1993, available at HYPERLINK:< http://www.oas.org/juridico/spanish/tratados/sp_conve_ cons_ centroame_ rerma_erradi_produ_tafic_onsui_licito_estupe_sustan_psico.pdf > [last visited on November 2, 2013].

"Oxford Dixtionares (OD)," available at HYPERLINK <http://oxforddictionaries.com> [last visited on July 3, 2013].

OSCE, "Official Website," available at HYPERLINK: < http://www.osce.org> [last visited on October 31, 2013].

PAOLI Letizia and Alessandro DONATI, "The Supply of Doping Products and the Potential of Criminal Law Enforcement in Anti-Doping: An Examination of Italy's Experience," 30 Januray 2013, p. 7, 12, 21, 31, available at HYPERLINK: <http://www.wadaama.org/Documents/News_Center/ News/2013-Paoli-Donati-Report-Executive-Summary-EN.pdf> [last visited on April 28, 2014]

PPI, "3rd Ministerial Conference of the Paris Pact Partners on Combating Illicit Traffic in Opiates Originating in Afghanistan- Vienna Declaration," Vienna, Austria, 16 February 2012.

PPI, "Official Website," available at HYPERLINK: < https://www.paris-pact.net/> [last visited on April 23, 2013].

RÉMY Jean P., "Where Are the African Carmakers?," Guardian Weekly, 9 August 2011, available at HYPERLINK: <http://www.theguardian.com/society/2011/ aug/09/africa-development-industrial-sector-kenya> [last visited on August 24, 2013].

RENOLDS Gretchen, "Outlaw DNA [Gene Doping in Sports]," 4 June 2007, New York Times. The full story is available at HYPERLINK:<http://geneticsandsociety.org/article. php?id=3484 > [last visited on February 2, 2013].

SCHIMIZU Jed, "Changing The Language of DNA," available at HYPERLINK: <http://www.scq.ubc.ca/changing-the-language-of-dna/> [last visited on February 2, 2013].

SHINN David H., "Massive Health Care Needs in Africa," International Policy Digest, 30 November 2012, available at HYPERLINK: <http://www.internationalpolicydigest.org/

2012/11/30/massive-health-care-needs-in-africa/ > [last visited on November 3, 2013].

SICA, "Instituciones del SICA, CCP," available at HYPERLINK: <http://www.sica.int/> [last visited on April 23, 2013].

TALBOT Margaret, "Brain Gain: The underground world of 'neuroenhancing' drugs", The New Yorker, 2009, available at HYPERLINK: <http://www.newyorker.com/reporting/2009 /04/27/0 0427fa_fact_talbot> [last visited on February 3, 2013].

THESEARUS, "The Synonyms of Quasi," available at HYPERLINK: <http://thesaurus.com/ browse/quasi> [last visited on March 31, 2013].

UCI, "UCI to disband Independent Commission in favour of Truth and Reconcialiation process," 28 January 2013, available at HYPERLINK: <http://www.uci.ch/Modules/ENews > [last visited on February 1, 2013].

UCI, "UCI releases Fahey letters in response to WADA's 'blatant and aggressive' untruths," 29 January 2013, available at HYPERLINK: <http://www.uci.ch/Modules/ENews> [last visited on February 2013].

UCI, "UCI to seek to establish a Truth and Reconciliation Commission with WADA," 25 January 2013, available at HYPERLINK: <http://www.uci.ch/Modules/ENews > [last visited on February 1, 2013]

UN, "UN Treaty Collection," available at HYPERLINK: < http://treaties.un.org/Pages/Index. aspx> [accessed 15 April 2013].

UN, "Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances," 20 December 1988, p. 12-26, available at HYPERLINK: <http:// www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the _united_nations_convention_1988_E.pdf> [last visited on November 2, 2013].

UNESCO, "States Parties to the UNESCO Doping Convention: list sorted by date of deposit," available at HYPERLINK: < http://www.unesco.org/eri/la/convention.asp?KO =31037& language=E > [last visited on October 31, 2013].

UNESCO, "Sweden first State to ratify Convention Against Doping in Sport," 25.11.2005, available at HYPERLINK: <http://portal. unesco.org/en/ev.php> [last visited on March 4, 2013].

UNESCO, "Towards a Better Sport," available at HYPERLINK: <http://www.unesco.org/ new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/> [last visited on February 8, 2013].

UNODC, "Country Reports," available at HYPERLINK: <http://www.unodc.org/enl/browse_ countries> [last visited on March 9, 2013].

UNODC, "Commission on Narcotic Drugs," available at HYPERLINK: < http://www.unodc. org/ unodc/en/commissions/CND/ > [last visited on April 21, 2013].

UNODC, “Official Website” available at HYPERLINK: < http://www.unodc.org/> [last visited on November 2].

UNODC, “Official Website,” available at HYPERLINK: < http://www.unodc.org/> [last visited on April 21, 2013].

USFDA, “Official Website,” available at HYERLINK:<http://www.fda.gov/Medica lDevices/ Products and MedicalProcedures/SurgeryandLife Sup port/LASIK/ ucm061358.htm> [last visited on January 3, 2013].

VNGOC, “Membership,” available at HYPERLINK: <http://www.vngoc.org/ > [last visited on April 21, 2013].

WADA, “Contributions to WADA’s Budget 2013,” February 2013, available at HYPERLINK: <http://www.wada-ama.org/PageFiles/18892/WADAContributions 2013 updateEN.pdf> [last visited on February 6, 2013].

WADA, “Governance-Advisory Committees,” (last updated on January 2013), available at HYPERLINK: <http://www.wada-ama.org/en/About-WADA/Governance/> [last visited on February 7, 2013].

WADA, “WADA History,” last updated on November 2009, available at HYPERLINK: <http://www.wada-ama.org/en/About-WADA/History/WADA-History/> [last visited on

February 6, 2013].

WADA, “Independent Observer Program Reports,” available at HYPERLINK: <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-AntiDopingOrganizations/Independent-Observers-Program/Reports/> [last visited on October 30, 2013].

WADA, “A Brief History of Doping,” last updated on June 2010, available at HYPERLINK: <http://www.wada-ama.org/en/About-WADA/History/A-Brief-History-of-Anti-Doping/>[last visited on February 2, 2013].

WADA, “Anti-doping collaboration launched with 2 Fields 1 Goal campaign,” Play True Magazine, 23.7.2013, available at HYPERLINK: < http://playtrue.wada-ama.org/news/anti-doping-collaboration-launched-wtih-2-fields-1-goal-campaign/ > [last visited on October 31, 2013].

WADA, “Code and IS Review,” available at HYPERLINK: <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/CodeReview /> [last visited on June 1, 2013].

WADA, “Doping Control Documentation,” available at HYPERLINK: <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/Tools/Doping-Control-Documentation/> [last visited on February 16, 2013].

WADA, “Governance-Foundation Board,” last updated on January 2013, available at HYPERLINK: <http://www.wada-ama.org/en/About-WADA/Governance/FoundationBoard/ >

[last visited on February, 7 2013].

WADA, "INTERPOL and WADA joins forces to fight cheats," available at HYPERLINK: < http://www.wada-ama.org/en/media-center/archives/articles/INTERPOL-and-wada-join-forces-to-fight-sports-cheats/> [last visited on September 28, 2013].

WADA, "KOHLER Gabrielle K. and Antonio RIGOZZI, 'Legal Opinion on the Conformity of Article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes," 2007, available at HYPERLINK:<http://www.wada-ama.org/rtecontent/ document/ Legal Opinion Conformity_10_6_complete_document.pdf> [last visited on December 2, 2012].

WADA, NATER H., C. SCHMIDHAUSER, and S. NETZLE, "Cas Advisory Opinion on Fifa Compliance with the World Anti-Doping Code," available at HYPERLINK:< http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADPLegal_Library/Advisoryand_ Legal_Opinions/CAS_Opinion_FIFA.pdf> [last visited on November 15, 2013].

WADA, "Q&A on the Code Review Process," available at HYPERLINK: <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/ Code-Review/QA-on-the-Code-Review-Process/> [last visisted on June 1 2013].

WADA, "Questions & Answers on the Athlete Biological Passport," available at HYPERLINK: <http://www.wada-ama.org/en/Science-Medicine/Athlete-Biological-Passport/Q--A-on-the-Athlete-Biological-Passport/> [last visited on February 2, 2013].

WADA, "Research," available at HYPERLINK: <http://www.wadaama.org/en/sciencemedicine/research/> [last visited on August 13, 2013].

WADA, "Richard Pound and Hein Verbruggen and UCI Reach Legal Settlement," available at HYPERLINK: <http://www.wada-ama.org/en/Media -Center/Archives/Articles/Richard-Pound -and-Hein-Verbruggen-and-UCI-Reach-Legal-Settlement-/> [last visited on February 2, 2013].

WADA, "The WADA Consultation Process," available at HYPERLINK: < http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/ Code-Review/Consultation-Process/> [last visited on September 20, 2013].

WADA, "UCI Lawsuit Causes Termination of WADA Pilot Project in Cycling "Athlete's Passport," 27 March 2008, available at HYPERLINK: < http://www.wada-ama.org/en/media-center/archives/articles/uci-lawsuit-causes-termination-of-wada-pilot-project-in-cycling-athletes-passport/> [last visited on October 30, 2013].

WADA, "ADAMS," last updated on April 2012, available at HYPERLINK: <http://www.wada-ama.org/en/ADAMS/> [last accessed on February 19, 2013].

WADA, "A. Rigozzi, 'Legal Opinion on the Conformity of the Exclusion of "Team Athletes" from Organized Training During Their Period of Inelligibility with Swiss Law, Including the General Principles of Proportionality and Equal Treatment,"' 9 July 2008, pp. 251-52.

WADA, "C. ROUILLER, 'Legal Opinion on Whether Article 10.2 of the World Anti-Doping Code Is Compatible with the Fundamental Principles of Swiss Domestic Law,'" 25 October

2005, 46 p.

WADA, “E. PARHAM, 'Australia and the World Anti-Doping Code, 1999-2008,’” 1 June 2008, available at HYPERLINK: <http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADPLegal_Library/Legal_Articles_On_The_Code/Australia_and_the_World_Anti_Doping_Code_1999_2008.pdf> [last visited on Novembe 15, 2013].

WADA, “G. KAUFMANN-KOHLER and A. RIGOZZI, 'Legal Opinion on the Conformity of Article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes’”, 13 November 2007, 50 p.

WADA, “G. KAUFMANN-KOHLER, G. MALINVERNI, and A. RIGOZZIi, 'Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law,”’ 26 February 2003, available at HYPERLINK:< http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-Legal_Library/Advisory_and_Legal_Opinions/kaufmann-kohler-full.pdf> [last visited on November 15, 2013].

WADA, “L. HORTA, A. SAX, and J. EBERMANN, ‘Independent Observer Report- Tour De France 2003,”’ available at HYPERLINK: <http://www.wada-ama.org/rtecontent/ document/tdf_io_report.pdf> [last visited on October 31, 2013].

WADA, “Funded Research Projects,” available at HYPERLINK: < http://www.wada-ama.org/en/Education-Awareness/Social-Science/Funded-Research-Projects/> [last visited on November 2, 2013].

WADA, “Minutes of the Wada Foundation Board Meeting,” 20 November 2011, available at HYPERLINK: <http://www.wada ama.org/ Documents/ About_ WADA/ FoundationBoard_ Minutes/WADA_ Foundation_Board_ Meeting_Minutes_ 20Nov2011_ ENG_FINAL.pdf> [last visited on October 31, 2013].

WADA, “Whereabouts Requirements-Introductory Note,”available at HYPERLINK: <http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-Testing/WADA_Whereabouts_IntroductoryNote_EN.pdf> [last visited on October 30, 2013].

WADA, “World Anti-Doping Agency Doping Control Leaflet,” 14 January 2009, available at HYPERLINK:<http://www.wada-ama.org/Documents/Anti-Doping_Community/Doping_ Control_Leaflet_EN.pdf> [last visited on October 30, 2013].

WADA, “Blood Doping,” June 2012 (Last updated), available at HYPERLINK: <http://www.wada-ama.org/en/Science-Medicine/Science-topics/QA-on-Blood-Doping/> [last visited on February 2, 2013].

WADA, “Code Compliance Assessment Survey,” available at HYPERLINK: <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/Tools/Code-Compliance-Assessment-Survey/ > [last visited on February 16, 2013].

WEINBERG Jonathan, “Governments, Privatization, and ‘Privatization:’ ICANN and the GAC,” (2011) 18 *Mich. Telecomm. Tech. L. Rev.,* pp. 189-194, also available at HYPERLINK:

<http://www.mttlr.org/voleighteen/weinberg.pdf> [last visited on July 10, 2013].

WINFREY Oprah, "Oprah and Lance Armstrong: The Worldwide Exclusive," Oprah Winfrey Network (OWN), 16 January 2013, available at HYPERLINK: <http://www.oprah.com/own_ tv/ onc/lance-armstrong-one.html> [last visited on Fenruary 2, 2013].

WSLP, "Ömer Riza ECHR Case to Test Post-Cas Avenues of Appeal," (May 2012) 10/5 *World Sports Law Report.*

IV LEGISLATION

INTERNATIONAL TRATIES and OTHER INTERNATIONAL DOCUMENTS:

Council of Europe Anti-Doping Convention (ETS 135, 16.11.1989), available at HYPERLINK: <http://conventions.coe.int/Treaty/en/ Treaties/Html/135.htm> [last visited on October 31, 2013].

Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, available at HYPERLINK: <http://www.unodc.org/unodc/en/treaties/illicit-trafficking.html> [last visited on November 2, 2013].

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, The USA, 10 June 1958, available at HYPERLINK:< ww.uncitral. org/pdf/ english/ texts/ arbitration/ NY-conv/XXII _1_e.pdf > [last visited on October 30, 2013].

Convention on Psychotropic Substances, 1971, available at HYPERLINK:< http://www. unodc.org/unodc/en/treaties/psychotropics.html> [last visited on November 2, 2013].

International Convention against Doping in Sport, 2005, available at HYPERLINK: <http://www. unesco.org/new/en/social-and-human sciences/themes/ anti-doping/international-convention-aga inst-doping-in-sport/> [last visited on October 29, 2013].

Single Convention on Narcotic Drugs, 1961, available at HYPERLINK: <https://www. unodc.org/unodc/en/treaties/single-convention.html> [last visited on November 2, 2013].

Single Convention on Narcotic Drugs (1961) as amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs, 1972, available at HYPERLINK: <http://www.unodc.org/ pdf/convention_1961_en.pdf > [last visited on November 2, 2013]

United Nations Convention against Transnational Organized Crime, 15 November 2000, available at HYPERLINK: <http://www.unodc.org/unodc/treaties/CTOC/> [last visited on November 2, 2013].

Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 2007/C 306/01, 13 December 2007, available at HYPERLINK: < http:// eur-lex.europa.eu/en/treaties/ index.htm> [last visited on November 2, 2913].

Arbitration Rules for the Olympic Games, 14 October 2003, New Delhi, available at HYPERLINK: <http://www.tas-cas.org/adhoc-rules> [last visited on October 30, 2013].

CND Res.2 (XXII), January 1968, available at HYPERLINK: < http://www.unodc.org/ documents/commissions/CND-Res-1960to1969/CND-session22-1968/CND-Resolution-22.2.pdf> [last visited on November 2, 2013].

Commentary on the Convention on Psychotropic Substances, 21 February 1971, available at HYPERLINK: <http://www.unodc.org/ documents/ treaties/organized_crime/Drug%20Convention/Commentary_on_the_Convention_1971.pdf> [last visited on November 2, 2013].

Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, 1961, 25 March 1972, available at HYPERLINK: < http://www.unodc.org/documents/treaties/ organized_ crime/Drug%20Convention/Commentary_on_the_protocol_1961.pdf> [last visited on November 2, 2013].

Constritutive Instrument of WADA Foundation, 10 November 1999, available at HYPERLINK: < https://wcd.coe.int/ViewDoc.jsp?id=433715&Site=COE > [last visited on October 29, 2013]. The modified and latest version of the Instrument dates back 1 September 2009 and is available at HYPERLINK:< http://www.wada-ama.org/Documents/About_ WADA/ Statutes/WADA _Statutes_2009_FR.pdf > [last visited on November 3, 2013].

Copenhagen Declaration on Anti-Doping in Sport, March 2003, available at HYPERLINK: < http://www.wada-ama.org/en/World-Anti-Doping-Program/Governments/Copenhagen-Declaration-on-Anti-Doping-in-Sport/> [last visited on October 29, 2013].

Econ. & Soc. Council Res. 1991/49, at 42, U.N. Doc. E/1991/103/Add.1, 21 June 1991, available at HYPERLINK: <http://daccess-dds ny.un.org/doc/RESOLUTION/GEN/NR0/696/47/IMG/ NR069647.pdf?OpenElement> [last visited on November 2, 2013].

Econ. & Soc. Council Res. 9(1), at 129, U.N. Doc. E/RES/1946/9(1) (Feb. 16, 1946), available at HYPERLINK: < http://www.unodc.org/unodc/en/commissions/CND/09-resolutions-40s. Html > [last visited on November 15, 2013].

EU Drugs Strategy (2013-20), 7 December 2012, available at HYPERLINK: < http://ec.europa.eu/justice/anti-drugs/european-response/strategy/index _en. htm > [last visited on November 2, 2013].

Recommendation No. R (92), *13 Rev. of The Committee of Ministers to Member States on the Revised European Sports Charter*, revised on 16 May 2001, available at HYPERLINK: < http:// www.coe.int/t/dg4/epas/resources/charter_en.asp> [last visited on October 28, 2013].

The World Anti-Doping Code 2009, available at HYPERLINK: <http://www.wada ama.org/ Documents/World_Anti-Doping_Program/WADP-The-Code/WADA_Anti-Doping_CODE_ 2009_EN.pdf> [last visited on October 29, 2013].

The World Anti-Doping Code 2015, available at HYPERLINK: < http://www.wada-ama.org/ Documents/World_Anti-Doping_Program/WADP-The Code/Code_ Review/ Code% 20Review %202015/ Code%20Final%20Draft/WADA-2015-World-Anti-Doping-Code.pdf > [last visited on October 29, 2013].

The IOC Charter 2011, available at HYPERLINK: <http://www.olympic. org/documents/ olympic_charter_en.pdf> [last visited on February 5, 2013].

The Statutes of the Bodies Working for the Settlement of Sports-Related Disputes, 1 March 2013, Switzerland, available at HYPERLINK: <http://www.tas-cas.org/d2wfiles/ document/4962/50 48/0/Code20201320FINAL20VERSION20_en_.pdf > [last visited on October 30, 2013].

The Uniform Domain Name Dispute Resolution Policy (UDRP), available at HYPERLINK: < http://www.icann.org/en/help/dndr/udrp/policy> [last visited on July 3, 2013].

The CAS Mediation Rules, available at HYPERLINK: <http://www.tas-cas.org/mediation-rules> [last visited on October 30, 2013].

The Agreement Related to the Constitution of the International Council of Arbitration for Sport (ICAS), Paris, France, 22 June 1994, available at HYPERLINK: < http://www.tas-cas.org/en/ arbitrage.asp/4-3-294-1023-4-1-1/> [last visited on October 30, 2013].

The World Anti-Doping Code International Standards for Testing and Investigation, 1 January 2015, available at HYPERLINK: <http://www.wada-ama.org/Documents/World_Anti-Doping_ Program/WADP-The-Code/Code_Review/Code%20Review%202015/Code%20 Final%20 Draft /WADA-2015-ISTI-Final-EN.pdf> [last visited on April 4, 2014]. **[**The WADC Testing]

The World Anti-Doping Code International Standards for Laboratories, 1 January 2015, available at HYPERLINK:<http://www.wada-ama.org/Documents/World_Anti-Doping_Prog ram/WADP -TheCode/Code_Review/Code%20Review%202015/IS%20Final%20Draft/WADA-ISL-2015-Final-v8.0-EN.pdf> [last visited on April 4, 2013].

The World Anti-Doping Code International Standard for Therapeutic Use Exemptions, 1 January 2015, available at: HYPERLINK: < http://www.wada-ama.org/Documents/World_ Anti-Doping _Program/WADP-The-Code/Code_Review/Code%20Review%202015/Code%20Final%20 Draf t/ WADA-2015-ISTUE-Final-EN.pdf> [last visited on October 29, 2013].

The World Anti-Doping Code International Standard Protection of Privacy and Personal Information, 1 January 2015, available at HYPERLINK: < http://www.wada-ama.org/Docu men ts/World_Anti-Doping_Program/WADP-TheCode/Code_Review/Code%20Review%202015/Co de%20Final%20Draft/WADA-2015-ISPPPI-Final-EN.pdf> [last visited on October 29, 2013].

The World Anti-Doping Agency Prohibited List, 'The 2014 Prohibited List-World Anti-Doping Agency', January 2014, available at HYPERLINK: < http://www.wada-ama.org/ Documents/ World_Anti-Doping_Program/WADP-Prohibited-list/2014/WADA-prohibited-list-2014-EN. pdf> [last visited on March 17, 2014].

NATIONAL LEGISLATIONS:

CONSTITUIONS

Basic Law for the Federal Republic of Germany, 23 May 1949 [last amended on July 21, 2010].

Constitution of Canada, 1 July 1867 [last amended on December 6, 2001].

Constitution of Greece, June 11 1975 [last amended on May 27, 2008].

Constitution of Luxembourg, 17 Octobre1868 [last amended on March 12, 2009].

Constitution of Malta, 21 September 1964 [last amended on September 28, 2007].

Constitution of Romania, 21 November 1991 [last amended October 29, 2003].

Constitution of Ireland, 1 July 1937 [last amended on June 24, 2010].

Constitution of the Republic of Poland, 2 April 1997 [last amended on October 21, 2009].

Constitution of the Repubic of Estonia, 28 June 1992 [last amended on July 22, 2011].

Constitution of the Republic of Slovenia, 23 December 1991 [last amended on 20 June 2006].

Constitution of the Slovak Republic, 1 October 1992 [last amended on May 1st, 2006].

Constitution of the Kingdom of Belgium, 17 February 1994 [last amended on July 9, 2012].

Constitution of the Republic of Finland, 11 June 1999 [last amended on March1st, 2012].

Constitution of the Italian Republic, 27 December 1947 [last amended on April 20, 2012].

Constitution of the Kingdom of Sweden, 1974 [1 January 2011].

Constitution of the Republic of Bulgaria, 12 July 1991 [last amended on February 6, 2007].

Constitution of the Republic of Cyprus, 16 August 1960.

Fundamental Law of Hungary, 18 April 2011 [last amended on April 1st, 2013].

Constitution of the Republic of Lithuania, 25 October 1992 [last amended on June 1st, 2006].

Constitution of the Kingdom of the Netherlands, 24 August 1815 [last amended on July 7, 2002].

Constitution of the Czech Republic, 16 December 1992 [last amemded on November 14, 2002].

Constitution of the Federal Republic of Austria, 1 October 1920 [last amended on December 14, 2010].

Constitution of the Republic of Latvia, 15 February 1922 [last amended on April 9, 2009].

Constitution of the Republic of Turkey, 7 November 1982 [last amended on September 12, 2010].

French Constitution, 4 October 1958 [last amended on July 21, 2008].

Spanish Constitution, 31 October 1978.

CRIMINAL CODES

Australian Criminal Code Act, 13 March 1995 [last amended on June 7, 2010].

Criminal Code of Bosnia and Herzegovina, 27 June 2003 [last amended on February 2, 2010].

Criminal Code of Canada, R.S.C., 1985, c. C-46 [last amended on July, 2013].

Criminal Code of Finland, 19 December 1889 [last amended on 28 December 2012].

Criminal Code of Georgia, 15 February 2000.

Criminal Code of the Republic of Hungary, 31 December 1978.

General Penal Code of Iceland, 12 February 1940 [last amended on 30 December 2003].

Criminal Code of Lithuania, 26 September 2000 [last amended on February 11, 2010].

Criminal Code of Mongolia, 1 September 2002.

Criminal Code of the Republic of Albania, 27 January 1995 [last amended on October 13, 2009].

Criminal Code of the Republic of Armenia, 18 April 2003.

Criminal Code of the Republic of Azerbaijan, 1 January 2000 [last amended on June 18, 2010].

Criminal Code of the Kingdom of Belgium, 8 June 1867 [last amended on January 1, 2012].

Criminal Code of the Republic of Estonia, 1 September 2002 [last amended on July 15, 2013].

Criminal Code of the Republic of Bulgaria, 1 May 1968 [last amended on May 28, 2010].

Criminal Code of the Federal Republic of Germany, 13 November 1998 [last amended on October 2, 2009].

Criminal Code of the Republic of Kazakhstan, 16 July 1997 [last amended on 9 December 2004].

Criminal Code of the Kyrgyz Republic, 1 October 1997 [last amended on February 13, 2006].

Criminal Code of the Republic of Latvia, 17 June 1998 [last amended on April 1, 2013].

Criminal Code of the Republic of Malta, 10 June 1854 [last amended on October 22, 2013].

Criminal Code of the Republic of Moldova, 18 April 2002 [last amended on March 6, 2012].

Criminal Code of the Republic of Montenegro, 17 December 2003 [last amended on July 19, 2006].

Criminal Code of the Kingdom of Norway, 22 May 1902 [December 21, 2005].

Criminal Code of the Republic of Romania, 28 July 2005.

Criminal Code of the Russian Federation, 13 June 1996 [last amended on June 29, 2009].

Criminal Code of the Kingdom of Sweden, 1 January 1965 [last amended on 1 May 1999].

Criminal Code of the Swiss Confederation, 21 December 1937 [1 July 2013].

Criminal Code of the Republic of Turkey, 26 September 2004 [last amended on 5 July 2012].

French Penal Code, 12 October 2005 [last amended on October 13, 2013].

USC: Title 18- Crimes and Criminal Procedure, 25 June 1948 [last amended on August 13, 2013]

OTHER ACTS and LEGISLATIONS

Australia

Australian Sports Anti Doping Authority Act (no. 6), 2006.

Controlled Substances Act, (no. 52), 1984.

Austria

Anti-Doping Federal Act (Anti-Doping-Bundesgesetz), 1.7.2007.

Narcotic Substance Act, 1998.

Belgium-Flanders

Flemish parliament Act on Medically and Ethical Justified Practice, 1.8.2008.

Flemish Government Decree implementing the 13 July 2007 Flemish Parliament Act on medically and ethically justified sports practice, 1.8.2008.

Loi du 24 février 1921 concernant le trafic des substances vénéneuses, soporifiques, stupéfiantes, désinfectantes ou antiseptiques, 28.2.2001.

Canada

Canadian Anti-Doping Program, 1 March 2011.

Controlled Drugs and Substances Act, S.C. 1996, c. 19, 20.6.1996.

Physical Activity and Sport Act, S.C. 2003, c. 2, 19.3.2003.

China

Narcotic Drug Control Act, 28.11.1987.

Psychotropic Drug Control Act, 27.12.1988.

The State Council of China Anti-Doping Regulation, 1.3.2004.

Cuba

Constitution of the Republic of Cuba, 1976.

DecretoSobre confiscación por hechos relacionados con las drogas, actos de corrupción o con otros comportamientos ilícitos (no. 232)*,* 21.1.2003.

Ley de Creación del Instituto Nacional del Deporte y la Recreación (no. 936), 23.2.1961.

Ley Codigo Penal Cubano (no. 62*)*, 29.12.1987.

Dr Congo

Arrete No 91-107 Portant creation d'un comité de lutte conte la drouge.

Loi n° 11/023 du 24 décembre 2011 portant principes fondamentaux relatifs à l'organisation et à la promotion des activités physiques et sportives en République démocratique du Congo.

Cyprus

Narcotic Drugs and Psychotropic Substances Law 1977, 29.6.1979.

Ratifying Law of the International (UNESCO) Convention Against Doping In Sports (No 7(Iii), 15.5.2009.

Denmark

Act on Promoting of Doping-Free Sport (Act No. 1438 of 22 December 2004).

Act on Prohibition of Certain Doping Substances (Act no. 232 of 21 April 1999).

Euphoriants Act, 1955.

Executive Order on Promotion of Doping-Free Sport (Executive Order no. 1681 of 12 December 2006).

Finland

Doping offence, 24.5.2002.

Narcotics Act (no. 1289), 17.12.1993.

France

Décret n°2006-1204 du 29 septembre 2006 relatif à l'organisation et au fonctionnement de l'Agence française de lutte contre le dopage.

Décret no 2011-58 du 13 janvier 2011 relatif aux sanctions disciplinaires en matière de lutte contre le dopage.

La loi du 31 décembre 1970, relative aux mesures sanitaires de lutte contre la toxicomanie et à la répression du trafic et de l'usage illicite de substances vénéneuses.

Loi n° 99-223 du 23 mars 1999 relative à la protection de la santé des sportifs et à la lutte contre le dopage'.

Loi n° 2006-405 du 5 avril 2006 relative à la lutte contre le dopage et à la protection de la santé des sportifs.

Loi no 2008-650 du 3 juillet 2008 relative à la lutte contre le trafic de produits dopants.

Loi no 2012-158 du 1er février 2012 visant à renforcer l'éthique du sport et les droits des sportifs.

Ordonnance n° 2010-379 du 14 avril 2010 relative à la santé des sportifs et à la mise en conformité du code du sport avec les principes du code mondial antidopage

Ordonnance no 2006-596 du 23 mai 2006 relative à la partie législative du code du sport.

Ghana

Narcotic Drugs (Control, Enforcement and Sanctions) Law 1976 (PDCL 236).

Sports Act 1976 (S.M.C.D. 54).

Guatemela

Ley Nacional para el Desarrollo de la Cultura Física y del Deporte (no. 76-97 del Congreso de la República de Guatemala) (Decree no. 92-70), 16.12.1970.

Regulations for the Control of Psychotropic Substances (no. 1977/41), 24.8.1975.

Greece

Decree on Necessary Measures and Procedures, Mechanisms and Systems provided by the International Convention against Doping (doping) in Sports (Gazette 343), 17.2.2012.

Decree on List of Banned Substances and Methods 2012, 30.12.2011. Law on Combat against the Spread of Drugs, Protection of Youth and other Provisions (no.1729), 7.8.1987.

Law on Combating Violence Occasion Sporting Events and other Provisions (no.3708), 8.3.2008.

Hungary

Act on Anti-Doping Convention (no. 2003/78), 21.11.2003.

Act on Additional Protocol of the Anti-doping Convention (no. 2007/34), 19.5.2007.

Government Decree (no. 43/2011), 7.4.2011; Sport Act (no. 2004/1), 13.3.2004.

Government Decree on Publishing of the Anti-Doping Convention (no. 99/2007), 9.5.2007.

Government Decree on Publishing the modification of the International Convention against doping in sport (Prohibited list) (no. 42/2011), 24.3.2011.

Hungarian Criminal Code (Act IV), 1978.

Iceland

Act on Habit-Forming and Narcotic Substances (no. 65), 21.5.1974.

Irish Sports Council Act, 1999.

Law on Pharmaceuticals (Lög isi umlyfjamal), 18.4.2009.

The Misuse of Drugs Act, (1977 &1984).

Italy

Decree on Consolidation of the Laws Governing Drugs and Psychotropic Substances, The Prevention, Treatment and Rehabilitation of Drug Addicts (no. 309), 9.10.1990.

Disciplina della tutela sanitaria delle attività sportive e della lotta contro il doping, law number 376 – 2000.

India

Narcotic Drugs and Psychotropic Substances Act, 14.11.1985.

Prevention of Illicit Trafficking in Narcotic Drugs and Psychotropic Substances Act, 4.7.1988.

Japan

Act Concerning Special Provisions for the Narcotics and Psychotropic Drug Control Act, etc. and Other Matters for the Prevention of Activities Encouraging Illicit Conducts and Other Activities Involving Controlled Substances Through International Cooperation, 5.10.1991.

Narcotics and Psychotropics Control Act (no. 14), 1953.

Cannabis Control Act (no. 124), 1948.

Opium Act (no. 7-11), 1954.

Sports Promotion Act, 1961.

Stimulant Drug Control law (no 250), 1951.

Kazakhstan

Law On Physical Culture and Sports Law of the Republic of Kazakhstan (no. 490), 2.12.1999.

Law Criminal Code of the Republic of Kazakhstan (no. 167), 16.7.1997.

Law on Narcotic Drugs, Psychotropic Substances and Precursors and the Measures to Counter-act Illicit Drug Trafficking and Abuse, 10.6.1998.

Latvia

Law on Council of Europe Anti-Doping Convention, 3.1.1997.

Law on Additional Protocol of Council of Europe Anti-Doping Convention, 30.10.2002.

Law on International Convention against doping in sports, 10.3.2006.

Law on Precursors, 9.5.1996.

Law on Procedures for the Legal Trade of Narcotic and Psychotropic Substances and Drugs, 9.5.1996.

Pharmacy Law, 10.4.1997.

Lithunia

Government resolution on formation of Lithuanian Anti-doping Commission (no.747), 23.7.2008.

Law on the Control of Precursorsof Narcotic Drugs and Psychotropic Substances (no 8-1207), 1.6.1999.

Law on Council of Europe Anti-Doping Convention, 7.11.1995.

Law on Physical Education and Sports Law, 20.12.1995.

Law on UNESCO International Convention against Doping in Sports in Lithuania, 26.5.2006.

Order on implementation of International Convention against Doping in Sports in Lithuania, 17.1.2008.

Luxembourg

Loi concernant le sport, 3.8.2005.

Law on the sale of drugs and the fight against drug addiction, 19.2. 1973.

Mexico

Ley General de Cultura Física y Deporte, 24.2.2003.

Reglamento a la Ley General de Cultura Física y Deporte, 14.4.2004.

Regulations Concerning Narcotic Drugs and Psychotropic Substances (no 1977-1), 23.7.1976.

Ley General de Salud, 7.2.1984.

Morocco

Le Code Pénale Marocain, 26.11.1962.

Loi n° 30-09 relative à l'éducation physique et aux sports, 24. 8.2010.

Projet de loi N° 51.08 relatif à la lutte contre le dopage dans la pratique sportive.

New Zealand

Misuse of Drugs Act, (no. 16), 1975.

New Zealand Sports Drug Agency Act, 1994.

Public Act (no. 75), 26.7.1994.

Public Act (no.78), 7.11.2006.

Sports Anti-Doping Act, 2006.

Nicaragua

Ley General del Deporte, Educacion Fisica y Recreacion Fisica (no.512- Gaceta No 68), 8.4.2005.

Narcotic Drigs, Psychotropic Substances and other Controlled Substances Act (no 177), 22.5.1994.

Niger

National Institute for Sports Act (no 31), 8.7.1992.

National Drug Formulary and Essential Drug List Act (no. 16-252), 1990.

National Drug Law Enforcement Agency Act (no. 16-253), 1990.

Norway

Act Relating to Medicaments and Poisons, etc. (no. 1966-51), 20.6.1964.

Act on Medical Products, etc. (no 132), 4.12.1992.

The General Civil Penal Code (no.10), 22.5.1902.

Peru

Ley de promoción y desarrollo del deporte (no. 28036), 24.7.2003.

Ley de Represion del Trafico Illicito de Drogas (no. 22095), 21.2.1978.

Portugal

Decree on control, use and traffic of narcotic drugs, psychotropic substances and precursors (no.15/93), 22.1.1993.

Estabelece o regime jurídico da luta contra a dopagem no desporto (no. 27), 19.6.2009.

Law on the Legal Framework Applicable to the Consumption of Narcotics and Psychotropic Substances, together with the Medical and Social Welfare of the Consumers of such Substances without Medical Prescription (no. 30), 29.11.2000.

Romania

Goverment Decree (no. 1592), 2006, updated as Government Decree 1056 on 29.11.2006.

Law on Combatting Illicit Drugs Trafficking and Consumption (no. 143), 26.7.2000.

Law regarding prevention and fight against doping in sport (no. 227), 18.6.2006.

Law regarding prevention and fight against the manufacture and illicit traffic of the high risk doping substances (no. 104/2008), 28.6.2011.

Russian Federation

All-Russian anti-doping rules, 13.4.2011.

Federal Act on Narcotic Drugs and Psychotropic Substances, 10.12.1997.

Federal law on physical culture and sport in the Russian Federation, 30.3.2008.

Federal Law on amendments to the Federal Law 'On physical culture and sport in the Russian Federation,' 9.11.2010.

Labor Code of the Russian Federation (extracts), 1.2.2002.

San Marino

Act on Control of, Trade in and Use of Narcotic Drugs (no. 7), 23.2.1957. Law (no. 32), 7.3. 1988.

Council Chamber Decree on Ratification of the International Convention against Doping in Sports and its Annexes (no. 32), 28.1.2010.

Serbia

Law on prevention of doping in sport, 14.11.2005.

Law about ratification of International convention against doping in sport, 25.5.2009.

Law on the Production and Trade in Narcotic Drugs, 14.2.1991.

Singapore

Misuse of Drugs Act (MDA) (no. 5), 7.7.1973.

Singapore Sports Council Act (no. 44), 1.10.1973.

Slovakia

Act support sport (no.300), 1.9.2008.

Act on Narcotic, Psychotropic Substances and Preparations (no. 139), 2.4.1998.

Sri Lanka

Ordinance on Poisons, Opium and Dangerous Drugs of 1935 (amended in 1984 with act no. 13).

Sports Law (no. 25), 1973.

South Africa

Controlled Drugs and Substances Act, SC 1996, c 29.

Drugs and Drug Trufficking Act (no. 140), 1992.

Misuse of Drugs Act, 1971.

South African Institute for Drug-Free Sport Act, 23.5.1997.

Spain

Ley Organica sobre Proteccion de la Segruidad Ciudadana (no. 4252), 21.2.1992.

Ley Organica 3/2013, de 20 de junio, de proteccion de la salud del deportista y lucha el dopaje en la actividad deportiva, numbered 'law no 6732 of 3 June 2013.

Public General Act on the Protection of Health and the Fight against Doping in Sport (no. 7), 21.11. 2006.

Swaziland

The Constitution of the Kingdom of Swaziland Act, 2005.

The Swaziland Opium and Habit-Forming Drugs (Amendment) Proclamation (no. 2), 13.1.1956.

Sweden

Act on Penalties for Smuggling (SFS 2000:1225), 30.11.2000.

Act concerning trade with drugs (SFS 2013:40), 29.5.2007.

Act on Prohibition of Certan Substances which are Dangerous to the Health (SFS 1999:42).

Lag (1991:1969) omförbud mot vissa dopningsmedel, 19.12.1991.

Narcotic Drug Controls Act (SFS 1992:860).

Prohibition of Certain Doping Agents Act (SFS 1991:1969), 1.7.1992.

RF:s Stadgar I lydelse efter RF-stämman 2011.

Switzerland

Swiss Federal Code on Private International Law (CPIL), 18 December 1987.

Tunisia

Décret n° 2008-103 du 16 janvier 2008, fixant l'organisation ainsi que les modalités de fonctionnement de l'agence nationale de lutte contre le dopage, 16.1.2008.

Décret n° 2008-2681 du 21 juillet 2008, fixant les cas d'autorisation d'usage des substances et méthodes interdites dans le sport ainsi que les conditions et les procédures de son octroi, 21.8.2008.

Décret n° 2008-3937 du 22 décembre 2008, fixant les critères et modalités de prélèvement des

échantillons biologiques dans le cadre de la lutte contre le dopage dans le sport, 22.12.2008.

Loi No.69-54, portant réglementation des substances vénéneuses, 26.7.1969.

Loi no 94-104 du 3 aout 1994, portant organisation et développement de l'éducation physique et des activités sportives, 3.8.1994.

Loi n° 2007-54 du 8 août 2007, relative à la lutte contre le dopage dans le sport (1), 8.8.2007.

Turkey

Gençlik ve Spor Genel Müdürlüğü, 'Genclik Ve Spor Genel Müdürlüğü Dopingle Mücadele Yönetmeliği,' 26.8.1993.

Regulation on Sanctions for Amateur Sports: Gençlik ve Spor Genel Müdürlüğü, 'Gençlik ve Spor Genel Müdürlüğü Amatör Spor Dalları Ceza Yönetmeliği,' 07 January 1993.

Türkiye Doping Kontrol Merkezi Yönetmeliği, 20 July 2004.

Türkiye Futbol Federasyonu Futbolda Dopıngle Mücadele Talimatı, 25.08.2009.

Türkiye Basketbol Federasyonu Dopingle Mücadele Yönergesi, 08.2.2010.

Uruguay

Decreto Ley Nº 14294-Junta Nacional de Drogas (no. 14294), 11.11.1974.

Ley Actividad Deportiva (no. 14.996), 18.3.1980.

Ley Rendicion Nacional de Cuentas Correspondiente a los Ejercicios (no. 13.737), 9.2.1969.

Ley Estupefacientes (no. 17.016), 28.10.1998.

The Philippines

Comprehensive Dangerous Drugs Act of 2002 (no. 9165), 7.6.2002.

The Philippine Sports Commission Act (no. 6847), 1990.

The United Arab Emirates

Law concerning Dubai Sports Council (DSC) (no. 11), 2009.

UAE Federal Law of 1995 on the Counter Measures against Narcotic Drugs and Psychotropic substances (no. 14), 1995.

The United Kingdom

Misuse of Drugs Act 1971, c.38.

Medicines Act 1968*,* c. 67.

Proceeds of Crime Act 2002, c. 29.

The United States of America

Bylaws of the United States Anti-Doping Agency, 10 February 2012.

Chapter 25 Miscellaneous Anti-Drug Abuse Provisions, 7.1.2011.

Controlled Substances Act, [21 U.S.C. 801 et seq], 1970.

United States Anti-Doping Agency Protocol for Olympic and Paralympic Movement Testing, 01 January 2009.

V JURISPRIDENCE

CAS JURISPRUDENCE:

CAS 2007/A/1370 FIFA v. STJD & CBF & Mr Ricardo Lucas Dodô CAS 2007/A/1376 WADA v. STJD & CBF & Mr Ricardo Lucas Dodô, order on provisional measures of 10 December 2007.

CAS 2007/A/1396 & 1402 WADA & UCI v. Alejandro Valverde & RFEC, award of 31 May 2010.

CAS 2008/A/1583 Benfica v. UEFA & FC Porto CAS 2008/A/1584 Vitória Guimarães v. UEFA & FC Porto, award of 15 July 2008.

CAS 2011/A/2425 Ahongalu Fusimalohi v/ FIFA, award of 8 March 2012.

CAS 2011/A/2426 Amos Adamu v/ FIFA, award of 24 February 2012.

CAS 2006/A/1029 Maccabi Haifa FC v. Real Racing Club Santander, award of 2 October 2006.

CAS 2008/A/1639 RCD Mallorca v. FA & Newcastle United, award of 24 April 2009.

CAS 98/200 AEK Athens and SK Slavia Prague / UEFA, award of 20 August 1999.

CAS 2012/A/2702 Györi ETO v. UEFA, award of 8 May 2012.

CAS Ad hoc Division CG 02/001G. / CGC & TC, award of 2 August 2002.

CAS 2011/A/2384 UCI v. Alberto Contador Velasco & RFEC, CAS 2011/A/2386 WADA v. Alberto Contador Velasco & RFEC, award of 6 February 2012.

CAS 2004/O/645 USADA v. M. & IAAF, award of 13 December 2005

CAS 2004 /O/649 CAS 2004/O/649 USADA v/Ch. Gaines, award of 13 December 2005.

CAS 2004/A/607 B. v. IWF, award of 6 December 2004.

CAS 2003/A/507 Strahija v. FINA, award of 9 February 2004.

CAS 98/211 B. v. FINA, award of 7 June 1999.

CAS 2003/A/484 Kicker Vencill v. USADA, award of 11 March 2004.

CAS 98/222, B. / International Triathlon Union (ITU), para. 26, award of 9 August 1999.

CAS 00/289/A Union Cycliste Internationale (UCI)/ C. & Fédération Française de Cyclisme (FFC), award of 12 January 2001.

CAS 2001/A/317 A. / Fédération Internationale de Luttes Associées (FILA), para. 26, award of 9 July 2001.

CAS 2007/A/1396 & 1402 WADA & UCI v. Alejandro Valverde & RFEC, para. 118, award of 31 May 2010.

CAS 2008/A/1583 Benfica v. UEFA & FC Porto CAS 2008/A/1584 Vitória Guimarães v. UEFA & FC Porto, award of 15 July 2008.

CAS 2009/A/1918 Jakub Wawrzyniak v. HFF, para. 19, award of 21 January 2010.

CAS 2011/A/2426 Amos Adamu v. FIFA, para. 68. TAS 2011/A/2433 Amadou Diakite c. FIFA, para. 27. sentence du 8 mars 2012.

CAS 2007/A/1370 FIFA v. STJD & CBF & Mr Ricardo Lucas Dodô CAS 2007/A/1376 WADA v. STJD & CBF & Mr Ricardo Lucas Dodô, order on provisional measures of 10 December 2007.

CAS 2007/A/1396 & 1402 WADA & UCI v. Alejandro Valverde & RFEC, award of 31 May 2010.

CAS 2008/A/1583 Benfica v. UEFA & FC Porto CAS 2008/A/1584 Vitória Guimarães v. UEFA & FC Porto, award of 15 July 2008.

CAS 2011/A/2425 Ahongalu Fusimalohi v/ FIFA, award of 8 March 2012.

CAS 2011/A/2426 Amos Adamu v/ FIFA, award of 24 February 2012.

CAS 2006/A/1029 Maccabi Haifa FC v. Real Racing Club Santander, award of 2 October 2006.

CAS 2008/A/1639 RCD Mallorca v. FA & Newcastle United, award of 24 April 2009.

CAS 98/200 AEK Athens and SK Slavia Prague / UEFA, award of 20 August 1999.

CAS 2012/A/2702 Györi ETO v. UEFA, award of 8 May 2012.

CAS Ad hoc Division CG 02/001G. / CGC & TC, award of 2 August 2002.

TAS 2009/A/1879 Alejandro Valverde Belmonte c. CONI, sentence du 16 mars 2010.

TAS 2011/A/2433 Amadou Diakite c. FIFA, sentence du 8 mars 2012.

TAS 2011/A/2433 Amadou Diakite c. FIFA, sentence du 8 mars 2012.

TAS 2009/A/1879 Alejandro Valverde Belmonte c. CONI, sentence du 16 mars 2010.

OTHER JURISPRUDENCE:

Agraira v. Canada (Public Safety and Emergency Preparedness), [2013] SCC 36.

Azerbaijan Field Hockey Federation. v. Fédération Internationale de Hockey, 4A_424/2008 (1st Civil Ct., 22 January 2009).

Arret Du Tribunal Federal Suisse, 1st Civil Division, 15 March 1993.

C-519/04P David Meca-Medina and Igor Macjen v. Commission, [2006] ECR I-6991.
Gundel v. FEI Decision 4P.217/1992 of 15 March 1993, reported in Digest of CAS awards, p. 561-575.

Larissa Lazutina and Olga Danilova v. IOC (ATF 129 III 445).

R. v. *Betty,* [2008] 1 S.C.R. 49.

R. v. Carson, (2004) 185 O.A.C. 298.

*R.*c. *Freedman,* (2006) QCCS 8022.

*R.*v. *Mabior,* [2012] SCC 47.

R v. *Malmo-Levine,* [2003] SCC 74.

R. v. *Sault Ste. Marie (City)*, [1978] 2 R.C.S. 1299.

R. v. *Vincent,* [1971] 18 C.R.N.S. 330, 4 N.B.R. (2d) 289.

Reference re *Assisted Human Reproduction Act,* [2010] SCC 61.

Reference re *Validity of Section 5 (a) Dairy Industry Act,* [1949] S.C.R. 1.

Swiss Federal Tribunal, 2nd Civil Division, Judgment of 31 March 1999, 5P.83/1999, c. 3.d cited in CAS 2009/A/1912 & 1913 P. & DESG v. ISU, award of 25 November 2009.

USADA v. *Collins*, AAA No.30 190 00658 04 (2004).

390 U.S. 544, 550-51 (1968).