

## INTRODUCTION

The last two decades of the twentieth century saw many doping scandals concerning the major sporting events and leading athletes. Events such as the 1988 Olympic 100m final, where a steroid-assisted Ben Johnson won the gold medal in startling fashion, are etched in the sporting memories of many fans as tarnished magic moments.<sup>1</sup> However, it was the doping affair concerning the Festina cycling team during the 1998 Tour de France which highlighted the need for more coordinated global action against doping. The foundation of the World Anti-Doping Authority (WADA), which was established as a private foundation under the laws of Switzerland on 10 November 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms, was the most significant response to this need.

While doping investigations and scandals continue in the sporting world,<sup>2</sup> WADA remains a highly visible player in efforts to combat doping. The World Anti-Doping Program, introduced by WADA, which has

1 This run and the outcry in Canada produced the Dubin Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance, which led to significant changes in the organisation of testing for prohibited substances in Canada and other countries. Ultimately, Mr Johnson was banned for life under the IAAF Rules when he committed a further doping violation. For the decision in the Ontario Court (General Division) rejecting the challenge to this life ban, see *Johnson v. Athletics Canada and IAAF* [1997] No. 3201 (Chapter 10, page 505).

2 The cycle of scandals producing reports that produce calls for reform and indeed rule changes has continued. Athletics and cycling have perhaps continued to provide the most prominent headlines in the media. The recent reports commissioned by WADA contained findings which significantly affected the integrity of sporting competition ahead of the Rio Olympics. The first, two-part report by the WADA Independent Commission was focussed on evidence of systematic doping and the corrupt covering up of positive tests in athletics. The second report concerned systematic doping and avoidance of the return of positive tests. See Chapter 10, pages 530–4 for more detail on the position surrounding the Rio Olympics and related CAS awards. It should be noted that the various decisions made in relation to sports rules introduced as a result of the reports' findings related not to sanctions imposed under the Code, but rather to rules implemented by sporting organisations such as the IOC, IPC and IAAF because a Signatory was alleged to have not complied with its

the World Anti-Doping Code ('Code') at its centre as a uniform set of anti-doping rules, has been at the heart of these efforts. This book seeks to provide a guide to the Code, and to the International Standards which operate together with it, for all those who work with the Code, whether as administrators, advisers or participants in sport.

### Origins of WADA and the Code

The International Olympic Committee (IOC) convened the World Conference on Doping in Sport which took place in Lausanne in February 1999. As a result of a proposal from the Conference, WADA was established as an independent body<sup>3</sup> intended to create and maintain unified standards for anti-doping testing and the imposition of sanctions for doping violations, and to coordinate the efforts of sports organisations, anti-doping organisations and governments in combating doping in sport.

Until WADA was founded, the IOC had taken the lead role in implementing measures to prevent doping in sport.<sup>4</sup> Olympic sports, and sports outside the Olympic movement, had adopted the Olympic Movement Anti-Doping Code (OMADC), which was produced and refined by the IOC. WADA took over this role and sought to build a wider acceptance throughout the global sporting community for a standard approach to the detection and punishment of doping. WADA assumed the role of producing the list of prohibited substances and methods from the IOC and

obligations under the Code. The second part of the report from the WADA Independent Commission was published in December 2016.

Cycling has seen a number of scandals, lengthy investigations and results management processes, which led to a report by the Cycling Independent Reform Commission in February 2015 as the sport sought to reform. This report made a range of recommendations for the better conduct of anti-doping procedures by UCI and for reform of the governance of the body.

- 3 The governance structure of WADA is outside the scope of this text. The make-up of the WADA Foundation Board – the supreme decision-making body at WADA – which has a fifty/fifty split in its composition between Government and IOC appointees has been the subject of criticism on grounds that IOC appointees may have conflicts of interest in addressing certain issues and that this might undermine the independence of WADA. At a recent WADA Foundation Board meeting on 20 November 2016 the Board appointed a working group to examine strengthening WADA's governance structure to ensure its independence from governments and sporting organisations.
- 4 The IOC initially established its Medical Code under the Olympic Charter. This Code sought to provide for prohibited substances, sanctions and such matters, and to harmonise the approach to doping across international federations and national Olympic committees.

developed the Code,<sup>5</sup> in pursuit of its main objective of developing harmonised rules, disciplinary procedures and sanctions.

The Code aims to produce international harmony by fostering agreement between the organisations which are Signatories to it. It contains key Articles relating, primarily, to doping violations, proof of violations and sanctions, which Signatories have to implement without significant amendment in order to accept the Code. Other Articles provide for standards relating to the handling of anti-doping matters. Signatories have to meet these, but are allowed to do so in different ways. Implementation occurs by the adoption of rules which apply to members or to those taking part in sporting competition. Because of the manner in which it operates, the effectiveness of the Code depends on those who agree to comply with it and to apply its terms meeting their obligations. While the Code does provide for its implementation by Signatories to be monitored by WADA, and does contain some general sanctions where there is non-compliance by Signatories, those sanctions are limited, and the focus of the Code is on establishing a regime which regulates the conduct of individuals and which sanctions those individuals who breach the provisions of the regime.<sup>6</sup>

### Adoption of the Code

The Code was the product of an extensive consultation and drafting process, and was unanimously adopted by the World Conference on Doping at Copenhagen in March 2003. Since its adoption, the Code has been accepted by Signatories around the world. The organisations which can accept the Code as Signatories (in addition to WADA itself) include the IOC, national Olympic committees, the International Paralympic Committee (IPC), national paralympic committees, international federations, national anti-doping organisations (NADOs) and major event organisations. The number of Signatories in these categories is currently

5 For the full text of the 2004, 2009, and 2015 Codes, see the WADA website, [www.wada-ama.org](http://www.wada-ama.org). The version of the 2015 Code redlined with the changes from the 2009 Code is of real assistance in understanding the significant changes made.

6 The Foundation Board meeting on 20 November 2016 agreed to grant WADA authority to impose proportionate sanctions on Signatories who were proven not to have complied with their obligations under the Code. This proposed new sanctions regime will be developed after consultation with stakeholders. It will represent a significant development of the Code and the role of WADA under it.

approaching 100 per cent.<sup>7</sup> Through agreement by Signatories to apply the Code, an interlocking structure of agreements containing the Code's key Articles and other provisions which fulfil its standards has been created throughout the world of sport at both international and national level.

Neither governments nor national sporting organisations (NSOs) can be Signatories to the Code. NSOs and their members become bound to the Code through the agreements made by and with Signatories which adopt the Code, such as international federations and NADOs. NSOs are either bound by their membership of other organisations which are Signatories, or enter into specific agreements with Signatories. Individual participants in a sport become bound as members of a sporting organisation which has implemented the Code, or when they agree to the terms on which an event is held at national or international level. Although they cannot agree to the Code, governments have an important part to play in supporting it by implementing the UNESCO Anti-Doping Convention. The Convention has secured global acceptance and provides important State-level support for the Code.

### The Code and the International Standards

In the last decade, the Code has become the central rallying point for the fight against doping in sport, and its existence has received widespread media coverage. Together with the International Standards concerning the Prohibited List, Testing and Investigations, Laboratories, Therapeutic Use Exemptions (TUEs) and, most recently, the Protection of Privacy and Personal Information and the model Guidelines for Signatories produced by WADA,<sup>8</sup> the Code makes up the World Anti-Doping Program, which is intended to bind participants in sport in the same way as the rules of the sport themselves. This programme encompasses both the key substantive elements of the anti-doping regime, such as the violations and sanctions, and the technical operational procedures (provided primarily by the International Standards) by which anti-doping rule violations, in particular the

7 For the current position on the acceptance of the Code, see [www.wada-ama.org](http://www.wada-ama.org). International federations outside the Olympic movement were slower to adopt the Code (see e.g. the lengthy process by which FIFA adopted the Code) but, again, acceptance is now widespread. The process of acceptance by FIFA included obtaining an advisory opinion from CAS on the compatibility of provisions of the Code with fundamental principles of Swiss law (see CAS 2005/C/976 & 986, *FIFA and WADA* in Chapter 10, pages 499–501).

8 For more on the International Standards, which are a mandatory aspect of the Code, and the various Guidelines published by WADA, see Chapter 2.

presence of prohibited substances or methods in bodily samples given by athletes, will be detected, such as sampling and testing.

Some idea of the scope of the WADA programme is provided by the fact that some 283 304 samples were collected and analysed in 2014.<sup>9</sup> In addition, anti-doping organisations are now devoting more time and resources to the gathering of accurate whereabouts information from elite athletes, to test planning and target testing and to the investigation of doping violations, such as trafficking, which are not established by positive tests, but by obtaining and presenting other evidence.<sup>10</sup> A significant development in recent years has been the use of the Athlete Biological Passport (ABP), which allows sporting organisations to adopt biological passport regimes under which doping can be detected by the analysis and expert evaluation of blood or urine values for an athlete over time. Again, WADA has published and amended Guidelines for the operation of the ABP.

The practical result of the acceptance of the Code is that both national- and international-level athletes who are bound by the Code can be subject to both testing for the presence of prohibited substances and prohibited methods in their bodily samples in-competition and out-of-competition (and to the various related obligations connected with a testing programme, such as the provision of information concerning their whereabouts) and to investigation in respect of various violations<sup>11</sup> which do not require adverse analytical findings or the analysis of bodily samples. In addition, the conduct of other persons bound by the Code, such as athlete support personnel, who may commit anti-doping rule violations, such as trafficking or administering prohibited substances, may be investigated by the anti-doping organisations responsible for administering the Code, at both national and international level. Investigations will be carried out by the anti-doping organisation which has jurisdiction under the Code over the athlete or other person. An investigation may lead to the bringing of allegations by the organisation responsible for managing the results of an investigation, and, where a violation is established, to the imposition of sanctions by the tribunal which hears the allegation.<sup>12</sup> The tribunal

9 See 2014 Anti-Doping Testing Figures Report on the WADA website.

10 For the ABP Guidelines, the proof of such violations and case summaries, see Chapter 5, pages 205–24.

11 The Code uses the phrase ‘anti-doping rule violations’. In the text, this or the abbreviation ‘violation’ is used.

12 See Chapter 7, pages 292–4 for the position on which organisation has responsibility for investigation and results management.

hearing an allegation will be either a national- or an international-level sporting tribunal or the Court of Arbitration for Sport (CAS), depending on the rules and policies of the particular anti-doping organisation which manages the results.<sup>13</sup>

The aim of the Code is to provide for the process of investigating and hearing doping violations to be carried out in a consistent and coordinated way throughout the sporting world. The central place of CAS – an arbitral institution established by the Olympic movement in the mid-1980s to hear sports-related disputes – in interpreting and applying the Code is important in bringing about a consistent approach to its application. However, to a significant extent, the Code operates and is applied at either national level or in international federations, with many decisions on the application of the Code being made by tribunals functioning at this level.<sup>14</sup>

While governments cannot be Signatories to the Code, most have declared their support for it. The International Convention against Doping in Sport was developed and adopted by the General Conference of UNESCO at its 33rd Session on 19 October 2005. This Convention has come into effect and has been widely ratified in a short period of time.<sup>15</sup> The Convention provides a means by which State parties can commit themselves to take steps to support the Code.<sup>16</sup> It is again important, however, to note that the Code's legal enforceability is not derived from this State-level commitment or from legislative acts by individual States, but, as with the anti-doping regimes which the Code replaced (and, indeed, other disciplinary regimes in sport), from the agreement by sporting organisations, their members and participants in sport to apply it.

### Other Methods of Regulation

The Introduction to the Code specifically provides that it is enforceable by agreement and forms a sport-specific set of rules, and that it is not

13 Tribunals will have jurisdiction by agreement over the hearing of alleged violations under the Code and may well be regarded as functioning as arbitral bodies in considering the allegations brought (see Chapter 10, pages 485–7).

14 By way of example, for consideration of the way in which Code decisions are made at the national level in New Zealand, see Paul David QC, 'Hearing Anti-Doping Cases in New Zealand' in *Doping in Sport and the Law* (Hart Publishing, 2016). The establishment of independent tribunals by the State to hear anti-doping allegations under the Code at national level (as opposed to those allegations being heard by internal domestic tribunals set up by the sporting organisations themselves) is becoming more common.

15 On 17 November 2010, Fiji became the 150th country to ratify the Convention. At the time of writing, over 200 countries have ratified it. Since the Convention came into force on 1 February 2007, it has been one of UNESCO's most rapidly implemented treaties.

16 See Chapter 2, pages 88–90 for an outline of the main provisions of the Convention.

intended to be subject to the national requirements of criminal or civil law.<sup>17</sup> Doping in sport can be made subject to the provisions of criminal or civil law by national governments, and some States have enacted specific anti-doping legislation criminalising doping in sport. In many jurisdictions, however, there is no criminal or other legislation which is specifically concerned with the problem of doping in sport. Criminal allegations in the context of doping in sport have been relatively rare, although increased political awareness of the problem of drugs in sport has seen more countries enact specific anti-doping laws (with Germany being the most recent). Where criminal allegations are brought, they are usually made under legislation which is concerned with the regulation of the supply of prescription medicines or with customs control, or under general misuse of drugs provisions, where the use of substances which are prohibited in sport falls within the terms of the legislation.

The Code functions at a transnational level, independently of the national laws of States. In some instances, while an outcome reached under national law will be applied within a particular State, the agreement of an athlete to the application of the Code (and, as a consequence, decisions made under the Code by the tribunals with responsibility for hearings) can mean that, internationally, in the world of sport, the outcome in disciplinary proceedings may differ from the outcome of proceedings in State courts.<sup>18</sup>

### Liaison with State Authorities

The Code functions as an international agreement across national boundaries and seeks to bring about a coordinated approach among Signatories. The investigation of anti-doping rule violations under the Code may also involve liaison between anti-doping organisations operating under the Code and the State authorities responsible for enforcing criminal law or customs legislation (or, perhaps, other bodies responsible for professional disciplinary matters). The extent to which this kind of liaison

17 The Code will be subject to the legal principles which protect fundamental rights in national courts, and the Introduction to the 2015 Code records at p. 17 that the Code is intended to be applied in a way which respects the principles of human rights and proportionality. For the purposes of the application of fundamental rights, it is submitted that the better view is that regimes under the Code, and in particular its sanctions, are not criminal in nature.

18 See further Chapter 2, pages 80–1 for a case summary which provides an example. There are many examples of CAS awards reaching decisions under anti-doping regimes which are binding internationally in sport but differ from decisions made by national sporting bodies or, indeed, national courts in relation to the same conduct.

and reporting occurs will depend on the rules and policies of the organisation responsible for investigation and results management under the Code, and the relevant national legislative provisions which are potentially applicable.<sup>19</sup> The territorial nature of criminal law has meant that there has, to date, been relatively little international coordination by authorities responsible for the application of laws concerning such matters as trafficking in prohibited substances. However, WADA is now seeking to promote greater cross-border cooperation between States in the light of growing concern at the large scale of the criminal activity involved in the trafficking of performance-enhancing drugs and methods. This area of the possible international criminal regulation of doping in sport lies outside the Code (and the general scope of this book, until specific rules or Guidelines for Signatories to the Code are developed), but has to be kept in mind by those involved in investigations and those operating under the Code, both from the point of view of sharing information with State authorities and in relation to the conduct of investigations concerning possible violations under the Code, where athletes or other persons may also be subject to criminal proceedings related to the matters under investigation.

### The Challenges for the Code

#### *The Need for Consistency*

As with any instrument which seeks to produce a standard, harmonised approach in an area of wide-ranging international activity, the Code faces considerable challenges. Perhaps the main areas where constant effort is required, if the Code is to achieve its goals, are the challenges presented

<sup>19</sup> The investigation and criminal prosecutions and anti-doping violation proceedings relating to the Bay Area Laboratory Cooperative run by Mr Conte (the 'BALCO affair') provide a good early example of the interaction between the criminal law of a State and the disciplinary system agreed to by athletes under the Code. Mr Conte and others involved in a wide-ranging doping conspiracy were subject to criminal punishment for charges involving trafficking in drugs under the US misuse of drugs legislation, while a number of high-profile athletes received periods of ineligibility of up to eight years under the rules of the USATF/IAAF following hearings before the American Arbitration Association (AAA) and CAS, to which they were bound. Several recent doping cases have started with searches carried out by police in criminal investigations (see e.g. Operación Puerta in Spain, in which a search of a medical facility by police revealed bags of blood for use in blood transfusions). The case against the cyclist Alejandro Valverde provides an interesting example of the issues which can arise where the application of national laws and sporting rules across territorial frontiers is involved. See Chapter 2, pages 82–7 for a summary of the various proceedings.

by the need for the consistent application and interpretation of the Code's provisions by tribunals hearing anti-doping violations around the sporting world, and by the need for those who are bound by the Code to be aware of the principles concerning liability for, and punishment of, anti-doping rule violations under the Code. While WADA, governments, the various Signatories to the Code (in particular, the NADOs and international federations) and NSOs devote considerable energy to the education of sporting participants (and the Code is often referred to in the sporting media), the cases which come before national tribunals and CAS still continue to show that there remains a good deal of ignorance among many sporting participants, their coaches and their advisers, at both national and international level, concerning the nature of the anti-doping regime under the Code (in particular, the high level of obligation imposed on athletes by the strict liability regime under the Code) and the consequences of violations.

### *Access to Decisions under the Code*

In the area of decision-making under the Code, CAS occupies a central position in its interpretation and application. CAS Panels have emphasised the need for consistency in their awards. The goal of harmonisation is relatively difficult to achieve when many tribunals (particularly at the national level) may well not be aware of the decisions made and principles applied in interpreting and applying Articles of the Code by other sporting tribunals or CAS. In recent years, access to decisions has improved significantly, with CAS providing an online database of decisions going back to 1986 and regularly publishing the most recent decisions.<sup>20</sup> However, the production of a range of decisions worldwide by various sporting tribunals and CAS makes the task of consistent decision-making harder. This book seeks to assist by providing a guide to the fundamental principles of the Code for those involved in sport, whether as participants in sporting competitions, sports administrators, advisers or decision-makers. In key areas, the operation of the provisions of the Code is illustrated by reference to summaries of decisions by CAS and other sporting tribunals.

<sup>20</sup> The CAS website ([www.tas-cas.org](http://www.tas-cas.org)) reproduces the most recent decisions (generally, six decisions are posted at a time, with different decisions appearing on the French and English parts of the site) and provides an online library of past decisions. Digests of CAS awards dating back to 1986 have also been produced: see Digest of CAS decisions I (1986–88), II (1998–2000) and III (2001–03). References to CAS awards in the period 1986–2003 in the text refer to the references in the Digests.

### Outline of the Text

After a short description of the development of anti-doping measures in the area of sporting activity, the book outlines the legal principles relating to liability for doping which were developed before the advent of the Code and which are, to a significant extent, carried forward into the Code. The text then outlines, by reference to decisions of CAS Panels and national courts, the lack of harmony in the approach to doping (in particular, as regards the imposition of sanctions) which the Code was produced to address. An overview of the Code and the World Anti-Doping Program follows, before a commentary on the interpretation and application of the key Articles of the Code by reference to decisions made by tribunals and CAS.<sup>21</sup>

The structure of the book broadly follows that of Part One of the 2015 Code<sup>22</sup> and provides an explanation of, and commentary on, the Articles, with summaries of relevant CAS awards and sporting tribunal decisions set out after the Articles to which they apply or at the end of each chapter. The Code has been the subject of two review processes, in accordance with its terms, which produced the 2009 Code (which considerably amended the 2004 Code) and the 2015 Code (which again considerably amended the 2009 Code, in particular as regards the regime of sanctions for anti-doping rule violations). References to the Code in the text are to the 2015 Code unless otherwise stated. The full texts of the 2004 and 2009 Codes are available on the WADA website. It is still quite possible that allegations will

21 The liberty given to sporting organisations in relation to managing results means that there are many different sporting tribunals which have to interpret and apply the Code. Additionally, at the national level, in some jurisdictions, tribunals which are independent of NSOs have been established to hear sports-related disputes by agreement with NSOs. An example is the New Zealand Sports Tribunal ([www.sporttribunal.org.nz](http://www.sporttribunal.org.nz)). In other jurisdictions, established arbitration bodies provide the first-instance decision-making tribunal for anti-doping rule violations (see e.g. the AAA in the US anti-doping regime). The United Kingdom has established an independent tribunal to hear doping allegations: the United Kingdom Anti-Doping Tribunal. The text refers to CAS awards and decisions in the courts and to the decisions of sporting tribunals at the national and the international level, where the decisions assist in understanding the operation of the provisions of the Code. Many anti-doping allegations under the Code will be decided by national-level tribunals or by tribunals established by the relevant international federation.

22 The text also outlines, in Chapter 2, the provisions of the Code concerning the roles and responsibilities of Signatories under Part 3, but as noted, the focus of the rules in the Code and of sanctions under it is on the conduct of individuals. The Code depends upon its Signatories doing all they can to implement and enforce it, and sanctions for non-compliance are limited.