



Arbitration CAS 2011/O/2422 United States Olympic Committee (USOC) v. International Olympic Committee (IOC), award of 4 October 2011

Panel: Prof. Richard McLaren (Canada), President; Mr. Michele Bernasconi (Switzerland); Mr. David Rivkin (USA)

Olympics

Doping

Validity and enforceability of a rule prohibiting doped athletes from participation in the next Olympic Games

Definition of eligibility rules

Definition of sanctions

Proper characterisation of the rule

Consistency with the WADA Code

Principle of autonomy of the association

Consistency with the Olympic Charter

Principle of double jeopardy or ne bis in idem

- 1. CAS jurisprudence has indicated that qualifying or eligibility rules are those that serve to facilitate the organization of an event and to ensure that the athlete meets the performance ability requirement for the type of competition in question. A common point in qualifying (eligibility) rules is that they do not sanction undesirable behaviour by athletes. Qualifying rules define certain attributes required of athletes desiring to be eligible to compete and certain formalities that must be met in order to compete.**
- 2. In contrast to qualifying rules are the rules that bar an athlete from participating and taking part in a competition due to prior undesirable behaviour on the part of the athlete. Such a rule, whose objective is to sanction the athlete's prior behaviour by barring participation in the event because of that behaviour, imposes a sanction. A ban on taking part in a competition can be one of the possible disciplinary measures sanctioning the breach of a rule of behaviour.**
- 3. Having regard to its objective and purpose and to its scope and application, a rule prohibiting doped athletes from participation in the next Olympic Games is more properly characterised as a sanction of ineligibility for a major Competition, i.e. as a disciplinary measure taken because of a prior behaviour, than as a pure condition of eligibility to compete in the Olympic Games. Even if one accepts that the rule has elements of both an eligibility rule and a sanction, it nevertheless operates as, and has the effect of, a disciplinary sanction.**
- 4. A rule prohibiting doped athletes from participation in the next Olympic Games provides for a period of ineligibility (non-participation) that is not provided for under Article 10 of the WADA Code. In so doing, the rule constitutes a substantive change to**

the WADA Code, which Signatories of the WADA Code have contractually committed themselves not to do and which is prohibited by Article 23.2.2 of the WADA Code.

5. **Recognised by the Swiss federal Constitution and anchored in the Swiss law of private associations is the principle of autonomy, which provides an association with a very wide degree of self-sufficiency and independence. The right to regulate and to determine its own affairs is considered essential for an association and is at the heart of the principle of autonomy. One of the expressions of private autonomy of associations is the competence to issue rules relating to their own governance, their membership and their own competitions. However, this autonomy is not absolute.**
6. **Because the Panel has found that the rule prohibiting doped athletes from participation in the next Olympic Games is not in compliance with the WADA Code, and because the WADA Code has been incorporated into the Olympic Charter, the rule is not in compliance with the IOC's Statutes, i.e. the Olympic Charter.**
7. **CAS case law has consistently held that the principle of *ne bis in idem* can apply to sanctions under sports law and academic authorities on the subject have come to the same conclusion. If the *ne bis in idem* principle is indeed applicable to sanctions imposed under anti-doping regulations, the rule prohibiting doped athletes from participation in the next Olympic Games would contravene this principle. The effective purpose of the sanction is the same (even if the underlying motivations are different); the sanction is attributable to the same behaviour, and the sanction results in the same consequence, ineligibility from Competition.**

The United States Olympic Committee (USOC; the "Claimant") is the National Olympic Committee of the United States of America (USA), responsible for the US Olympic Teams. It has its seat in Colorado Springs, USA.

The International Olympic Committee (IOC; the "Respondent") is "*an international non-governmental not for profit organization of unlimited duration, in the form of a Swiss association with the status of a legal person recognized by the Swiss Federal Council*" (see Olympic Charter (OC), Article 15(1)¹). It has its seat in Lausanne, Switzerland. The IOC is governed by Swiss private law, in articles 60-79 of the Swiss Civil Code (CCS).

The IOC Executive Board, at its meeting in Osaka, Japan on 27 June 2008, enacted the following rule which has come to be known as the "Osaka Rule" and is referred to as the "Decision" by the

¹ The parties have referred, during these proceedings, to the edition of the OC in force as from 7 July 2007. No argument has been made that any changes implemented with the edition of the OC in force as from 8 July 2011 would have any influence on the present dispute. The Panel, accordingly, will refer and quote the edition of the OC submitted to the file by USOC, i.e. the 2007 edition.

USOC and the “IOC Regulation” by the IOC. The Panel will refer to it as the “IOC Regulation” or the “Regulation”.

“The IOC Executive Board, in accordance with Rule 19.3.10 OC and pursuant to Rule 45 OC, hereby issues the following rules regarding participation in the Olympic Games:

- 1. Any person who has been sanctioned with a suspension of more than six months by any anti-doping organization for any violation of any anti-doping regulations may not participate, in any capacity, in the next edition of the Games of the Olympiad and of the Olympic Winter Games following the date of expiry of such suspension.*
- 2. These Regulations apply to violations of any anti-doping regulations that are committed as of 1 July 2008. They are notified to all International Federations, to all National Olympic Committee and to all Organizing Committees for the Olympic Games”.*

The IOC Regulation came into effect in July 2008 but does not appear to have impacted any athletes who applied to attend the Vancouver Winter Olympic Games in February 2010. However, the IOC Regulation will impact a number of athletes around the world for the 2012 Summer Olympic Games in London². The IOC Regulation appears to have also affected doping adjudications since it came into effect³.

In one of those athletes’ situations, the IOC Regulation came under scrutiny before AAA/North American Court of Arbitration for Sport in the case *USADA v. LaShawn Merritt*⁴ (referred to as the “Merritt Award”). In the Merritt Award, the AAA Panel was required to determine whether the IOC Regulation could be applied to Mr. Merritt, who had tested positive for the banned substance DHEA in a series of out-of-competition tests. Both the World Anti-Doping Agency (WADA) and the IOC were invited, but declined to submit their respective positions as to whether the IOC Regulation could validly be applied in this situation. In the Merritt Award, the Panel reduced the usual suspension on a finding of exceptional circumstances. It held that: (i) Mr. Merritt had no intention to dope and inadvertently used a banned substance; (ii) following his suspension, which would end on 27 July 2011, Mr. Merritt would be eligible to compete in the competitions of all Signatories to the Code of the World Anti-Doping Agency (the “WADA Code”), including the USOC, the IAAF and IOC; and (iii) the IOC Regulation could not be used to prevent Mr. Merritt from competing in the 2012 Olympic Trials or from having his name submitted from entry to the Olympic Games. A preventive appeal was filed by the athlete but withdrawn once the time period for expiry of appeals by any other interested party had expired.

The enforceability of the IOC Regulation also arose in an arbitration involving another U.S. athlete, Jessica Hardy⁵. Ms. Hardy tested positive for clenbuterol in July of 2008. In light of the positive test,

² Athletes identified in the parties’ briefs who may be affected by the IOC Regulation and are not otherwise mentioned in this decision include Brazilian cyclist Flavia Oliveira (see CAS 2010/A/2107 *USADA v. Oliveira*), the Hungarian wrestler Balazs Kiss, the US diver Harrison Jones and the US athletics competitor Thomas Freeman.

³ See the Amicus Curiae Brief of WADA. Also see AAA No. 77 190 E 00447 08 JENF, *USADA v. B.*: a US college swimmer tested positive for diuretics/masking agents in an out-of-competition test. The arbitration panel appears to have fixed the suspension at exactly 6 months in order to avoid the application of the IOC Regulation.

⁴ AAA No. 77 190 00293 *USADA v. Merritt*.

⁵ AAA No. 77 190 00288 08 *USADA v. Hardy*.

Ms. Hardy withdrew from the 2008 Olympic team. The AAA Panel in the Hardy matter held that Ms. Hardy should be suspended from competition for one year, i.e. the minimum period allowed under the governing rules. The Panel further determined that it would be manifestly unfair and a grossly disproportionate penalty for Ms. Hardy to be subject to the application of the IOC Regulation, which had come into effect only three (3) days prior to her positive drug sample. WADA appealed this ruling to the CAS⁶. Ms. Hardy requested unsuccessfully, that the IOC be joined as a party. The CAS Panel ultimately dismissed the appeal, and the one year sanction was maintained. Subsequently, on 21 April 2011, the IOC determined that it would not apply the IOC Regulation to Jessica Hardy.

The IOC Regulation put the USOC in a difficult position: A judicial body in the United States had declared that Mr. Merritt must be allowed to compete at the 2012 Olympic Trials and if he qualified, the USOC must name him to its Olympic Team. However, under the IOC Regulation, the IOC would not accept his nomination to the Team.

Both parties to this proceeding recognized that there was considerable uncertainty facing the world's aspiring Olympic athletes and their national Olympic committees because of the IOC Regulation. In recognition of these concerns and to their credit, in April 2011 the parties voluntarily entered into an Arbitration Agreement (the "Arbitration Agreement").

The Arbitration Agreement quoted in full the IOC Regulation and Rule 45.2 OC. The Arbitration Agreement referred to the Merritt Award and also to a CAS Advisory Opinion (TAS 2009/C/1824 IOC) of 11 June 2009 (the "CAS Advisory Opinion").

The Arbitration Agreement stated, that a dispute "*has arisen between the parties with respect to the validity and enforceability of the [IOC Regulation]*". The USOC sought relief so that "*the Decision be cancelled and declared null and void, or alternatively, that a mechanism be allowed for a case by case review of the appropriateness of the applicability of the Decision to each specific athlete*". The Arbitration Agreement stated that the IOC considered that the Regulation is an eligibility rule as to who may qualify as a competitor in the Olympic Games pursuant to Rule 45.2 OC, rather than an additional sanction, and the IOC "*requests that the CAS find that the Decision is valid in all the circumstances and dismiss the USOC's claim*". As described further below, the USOC and the IOC submitted this dispute for resolution by this Panel in a CAS Ordinary Arbitration Procedure.

The USOC also sought alternative relief in the Arbitration Agreement that if the Decision was determined by the Panel to be valid, then the Panel "*determine (...) the respective areas of enforceability of the CAS Award [meaning this Award] and the AAA Award [the Merritt Award]*".

In the USOC's Statement of Claim, it amended its claim for relief as follows:

"[T]hat the Panel issue an award holding that:

- (i) The IOC Executive Board's June 27, 2008 decision prohibiting athletes who have been suspended for more than six months for an anti-doping rule violation from participating in the next Olympic Games following the expiration of their suspension is illegal and unenforceable.*

⁶ CAS 2009/A/1870 WADA v. Hardy & USADA.

- (ii) *The costs of the present arbitration will be shared by the parties in equal shares. Each party shall bear its own costs.*

The USOC trusts that in the spirit of the Arbitration Agreement the IOC would then take the necessary measures for the Decision not to be enforced against any athlete pending its abrogation by the IOC Executive Board, and thus that there is no need to put forward any particular prayers for relief in this respect”.

The IOC, in its Answer Brief, made the following prayers for relief:

“In light of the above, the IOC respectfully requests that the Panel issue an award holding that:

- (i) *The IOC Regulation is legal, valid and enforceable.*
- (ii) *The costs of the present arbitration will be shared by the Claimant and the Respondent in equal shares with each party bearing its own costs”.*

The Arbitration Agreement provided for the resolution of the dispute under the CAS rules applicable to the Ordinary Procedure of the CAS Code of Sports-related Arbitration and Mediation Rules (2010 Edition) (the “CAS Code”).

The Arbitration Agreement provided that the CAS would hear the dispute in an expedited manner as provided for in Article R44 of the CAS Code.

The Arbitration Agreement provided further that “[t]he Panel shall determine (...) the law applicable to the merits in accordance with article R58 of the Code of Sports-related arbitration”. Under the heading “Law Applicable to the merits”, the agreement stated:

“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

The Arbitration Agreement provided for two written submissions per party. In accordance with the Procedural Order of the Panel dated 3 June 2011, the USOC filed its Statement of Claim on 17 June 2011; the IOC filed its Response (titled “Answer”) on 15 July 2011; the USOC filed its Reply on 25 July 2011; and the IOC filed its Second Response on 4 August 2011.

The Arbitration Agreement provided in paragraph 3.4 that: “(...) Each party may submit written witness statements as it deems appropriate. There shall be no live witnesses and experts (...). No third party will be allowed to appear at the hearing. Notwithstanding the foregoing, the Panel may determine otherwise, in accordance with the rule of CAS, should it consider it necessary”.

The USOC filed the following witness statements:

- LaShawn Merritt, 400 metre Olympic Gold Medallist at the Beijing Summer Olympics and world champion in the same discipline in 2009;

- Thomas J. Freeman, current national champion in the US in the hammer throw and ranked 36th in the world; and,
- Harrison Jones, US national champion in 2011 in the 3 metre diving event.

The IOC filed a witness statement from Dr. Jacques Rogge, President of the IOC.

The Arbitration Agreement provided for the filing of Amicus Curiae Briefs as attachments to either party's written submissions. This was done to ensure that the Panel would have as comprehensive a view as possible of the potential issues surrounding the IOC Regulation.

Along with USOC's Statement of Claim, it submitted the following Amicus Curiae Briefs:

- National Anti-Doping Organizations (Anti-Doping Denmark, Anti-Doping Norway, Drug Free Sport NZ, Japan Anti-Doping Agency, South African Institute for Drug-free Sport, UK Anti-Doping, and United States Anti-Doping Agency), submitted as Claimant's Exhibit "Amicus 1".
- Swiss Anti-Doping, submitted as Claimant's Exhibit "Amicus 2".
- Agence française de lutte contre le dopage (AFLD), submitted as Claimant's Exhibits "Amicus 3" and "Amicus 4" (translated).
- Netherlands Olympic Committee, submitted as Claimant's Exhibit "Amicus 5".
- Valparaiso University Sports Law Clinic, submitted as Claimant's Exhibit "Amicus 6".
- Hungarian Olympic Committee, submitted as Claimant's Exhibit "Amicus 7".
- Spanish Professional Cyclist Association, submitted as Claimant's Exhibit "Amicus 8".
- Russian Biathlon Union, submitted as Claimant's Exhibit "Amicus 9".

The IOC submitted that the USOC amicus curiae briefs did not raise any elements that were relevant to the Dispute and which were not already covered in the Statement of Claim. The IOC therefore stated that it had no need to produce *amicus curiae* briefs, although it responded to and criticized certain of the USOC's Amicus Curiae Briefs. The IOC also submitted and referred to the CAS Advisory Opinion.

In addition, WADA submitted, independently of the parties, an Amicus Curiae Brief on 13 July 2011. WADA submitted that its brief was not in "support" of either the IOC or the USOC but it wanted to draw the Panel's attention to a number of areas affected by the implementation of the IOC Regulation:

- (i) the introduction of Article 10.5.3 into the WADA Code (effective 1 January 2009), whereby an athlete is encouraged to give relevant information to WADA in exchange for a reduction of his/her sanction, has not been as successful as anticipated. WADA believes that athletes tend to litigate in an attempt to avoid a sanction greater than six months rather than co-operate and provide relevant information, which would only in the most exceptional circumstances lead to a reduction of the athlete's sanction to six months;

- (ii) WADA has noted that some tribunals seem inclined to look for arguments to reduce sanctions below six months, encouraging more lenient sanctions; and
- (iii) WADA believes that there might be an issue with proportionality. WADA concluded that it is conducting a further review of the Code at the end of 2011, at which time it will be possible to include an additional sanction in Article 10 of the Code, subject to such a change being compatible with the principle of proportionality and athletes' fundamental rights.

The parties also filed numerous exhibits and authorities in support of their positions and arguments. Some additional materials were submitted at the hearing.

In accordance with the Procedural Order issued on 3 June 2011 (the "Procedural Order"), the Panel held a hearing at the CAS Headquarters in Lausanne, Switzerland, on 17 August 2011. At that time, the parties were given a full and complete opportunity to make oral argument based upon their written submissions. At the conclusion of the Hearing, counsel for both parties agreed that they had been given a full and complete opportunity to be heard and so advised the Panel.

LAW

Jurisdiction of the CAS

1. Article R27 of the CAS Code provides as follows:

"These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to the CAS.

Such disputes may arise out of an arbitration clause inserted in a contract or regulations or of a later arbitration agreement (ordinary arbitration proceedings) or involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provides for an appeal to the CAS (appeal arbitration proceedings). Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests brought into play in the practice or the development of sport and, generally speaking, any activity related or connected to sport".

2. The jurisdiction of the Panel is derived from the Arbitration Agreement in accordance with Article R27 of the CAS Code. The Arbitration Agreement in paragraph 3.1 provided that *"The Dispute will be submitted exclusively to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, and settled definitively in accordance with the Code of Sports-related arbitration under the rules applicable to the Ordinary Arbitration Procedure"*. By signing the Arbitration Agreement and the Order of Procedure, the parties explicitly agreed that the CAS has the jurisdiction to hear and resolve this dispute.

Applicable Law

3. Article R45 of the CAS Code sets out the law applicable to resolve disputes using the Ordinary Procedure. However, in this matter, the parties in the Arbitration Agreement requested that the Panel determine the applicable law in accordance with Article R58 of the Code. That provision provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case the Panel shall give reasons for its decision”.

4. The “applicable regulations” within Article R58 CAS Code are those of the OC and of the WADA Code.

5. Article R58 CAS Code also provides for the Panel to decide the dispute in accordance with *“the rules of law the application of which the Panel deems appropriate”*. The parties are in agreement that the applicable law is Swiss law, including fundamental principles, the OC, and the WADA Code.

6. The OC’s legal characterization is given in the “Introduction to the Olympic Charter”, which specifies as follows:

“The Olympic Charter (OC) is the codification of the Fundamental Principles of Olympism, Rules and Bye-Laws adopted by the International Olympic Committee (IOC). It governs the organisation, action and operation of the Olympic Movement and sets forth the conditions for the celebration of the Olympic Games. In essence, the Olympic Charter serves three main purposes:

- a) *The Olympic Charter, as a basic instrument of a constitutional nature, sets forth and recalls the Fundamental Principles and essential values of Olympism.*
- b) *The Olympic Charter also serves as statutes for the International Olympic Committee.*
- c) *In addition, the Olympic Charter defines the main reciprocal rights and obligations of the three main constituents of the Olympic Movement, namely the International Olympic Committee, the International Federations and the National Olympic Committees, as well as the Organising Committees for the Olympic Games, all of which are required to comply with the Olympic Charter”.*

7. Article 60 of the CCS prescribes that the Statutes of a Swiss association must be in writing and must contain the necessary provisions as to the goal, the resources and the organization of the association. The OC constitutes the “Statutes” of the IOC (as indicated in lit. b of the above Introduction) and, like all other Swiss associations, the IOC is under the legal obligation to comply with its own Statutes. Pursuant to Rule 15.3 of the OC, the role of the IOC *“is to fulfil the mission, role and responsibilities as assigned to it by the OC”*.

8. The “Introduction to the Olympic Charter” refers to the “Fundamental Principles of Olympism”: *“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 of effort, the educational value of good example and respect for universal fundamental ethical principles”.

9. Chapter 1 of the OC, entitled “The Olympic Movement and its Action”, provides in Rule 1 for the “Composition and General Organisation of the Olympic Movement” that:

- “1. *Under the supreme authority of the International Olympic Committee, the Olympic Movement encompasses organisations, athletes and other persons who agree to be guided by the Olympic Charter. (...)*
2. *The three main constituents of the Olympic Movement are the International Olympic Committee (“IOC”), the International Sports Federations (“IFs”) and the National Olympic Committees (“NOCs”). Any person or organisation belonging in any capacity whatsoever to the Olympic Movement is bound by the provisions of the Olympic Charter and shall abide by the decisions of the IOC.*
3. *In addition to its three main constituents, the Olympic Movement also encompasses (...) the national associations, clubs and persons belonging to the IFs and NOCs, particularly the athletes, whose interests constitute a fundamental element of the Olympic Movement’s action (...). It also includes other organisations and institutions as recognised by the IOC”.*

10. Chapter 5 of the OC, entitled “The Olympic Games”, provides in Part II, “Participation in the Olympic Games”, the following rules:

Rule 41 “Eligibility Code”:

“To be eligible for participation in the Olympic games, a competitor, [...] must comply with the Olympic Charter as well as with the rules of the IF concerned as approved by the IOC, and the competitor, [...] must be entered by this NOC. The above-noted persons must notably:

- *respect the spirit of fair play and non violence, and behave accordingly, and*
- *respect and comply in all aspects with the World Anti-Doping Code”.*

Rule 44 “World Anti-Doping Code”:

“The World Anti-Doping Code is mandatory for the whole Olympic Movement”.

Rule 45 “Invitations and Entries”:

- “1. (...).
2. *Only NOCs recognised by the IOC may enter competitors in the Olympic Games. Any entry is subject to acceptance by the IOC, which may at its discretion, at any time, refuse any entry, without indication of grounds. Nobody is entitled to any right of any kind to participate in the Olympic Games.*
3. (...).
4. (...).”

11. Several provisions of the WADA Code are also relevant here. Pursuant to Article 10.2 WADA Code, entitled “Sanctions on Individuals”:

“The period of Ineligibility imposed for a violation of Article 2.1 [Presence of Prohibited Substance or its Metabolites or Markers], Article 2.2 [Use or Attempted Use of Prohibited Substance or Prohibited Method] or Article 2.6 [Possession of Prohibited Substances and Prohibited Methods] shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Article 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:

First violation: Two [2] years Ineligibility”.

12. In Appendix One to the WADA Code, the definition of Ineligibility and of Disqualification refers to the definition of “Consequences of Anti-Doping Rules Violations” as follows:

“An Athlete’s or other Person’s violation of an anti-doping rule may result in one or more of the following: (a) Disqualification (...); (b) Ineligibility means the Athlete or other Person is barred for a specified period of time from participating in any Competition or other activity or funding as provided in Article 10.9; and (c) Provisional Suspension (...).”

13. Part Three of the WADA Code, entitled “Roles and Responsibilities”, contains Chapter 20, “Additional Roles and Responsibilities of Signatories”. Within that Chapter is Article 20.1, “Roles and Responsibilities of the International Olympic Committee”, followed by further articles prescribing other Signatories’ responsibilities. Article 20.1.1 provides that the IOC is: “To adopt and implement anti-doping policies and rules for the Olympic Games which conform with the Code”.

14. In Part Four of the WADA Code, entitled “Acceptance, Compliance, Modification & Interpretation”, Article 23.2.1 provides that “The Signatories [of which the IOC is one] shall implement applicable Code provisions through policies, statutes, rules or regulations according to their authority and within their relevant spheres of responsibility”.

15. Article 23.2.2 of the WADA Code states (in part):

“The following Articles (and corresponding Comments) as applicable to the scope of the anti-doping activity which the Anti-Doping Organization performs must be implemented by Signatories without substantive change (...):

- *Article 1 (Definition of Doping)*
- *(...)*
- *Article 10 (Sanctions on Individuals)*
- *(...)*
- *Appendix 1 – Definitions*

No additional provision may be added to a Signatory’s rules which change the effect of the Articles enumerated in this Article”.

The Substantive Arguments

16. In accordance with the Procedural Order, the parties made extensive written submissions. The Panel does not propose to set out the arguments of the parties in full in this Award, for they are amply covered in the paper record of this proceeding. This section provides only an overview summary of the arguments as provided by the parties' submissions.

A. USOC Submissions

17. The USOC submits that the IOC Regulation constitutes a sanction on athletes and is not, as the IOC argues, an eligibility rule. It submits that the IOC Regulation is invalid and unenforceable for multiple reasons:

- a. The IOC Regulation violates the WADA Code, because it constitutes an impermissible substantive change to the Code in violation of Article 23.2.2., and because it was not enacted in compliance with the provisions of the Code.
- b. The IOC Regulation is not consistent with the OC, because it violates certain specific provisions of the OC. In addition, the application of the IOC Regulation will (i) inevitably result in unjustifiable discrimination between athletes, (ii) affect the dignity of athletes in a way that is at odds with the fundamental principles of the OC.
- c. The IOC Regulation violates Swiss Law:
 - (i) the application of the IOC Regulation would be incompatible with the principle of proportionality;
 - (ii) the application of the IOC Regulation would infringe the personality rights of the athletes;
 - (iii) the application of the IOC Regulation would be arbitrary, as it contravenes the principle of equal treatment and due process;
 - (iv) the application the IOC Regulation would violate the principle of double jeopardy or *ne bis in idem*; and
 - (v) the application of the IOC Regulation would be against public policy.
- d. The application of the IOC Regulation would constitute an unlawful restriction of competition.

18. The USOC further submits that, even if the IOC Regulation is considered to be an eligibility decision rather than a sanction, it is still invalid and unenforceable for some of the above reasons.

B. IOC Submissions

19. The IOC submits that it is a unique institution that has, since its foundation in 1894, promoted the universal values and principles of Olympism. It has a wide social mission, which

transcends the governance and administration of sport and aims to educate the youth of the world.

20. The IOC is bound by Swiss law to adhere to the terms of the OC, which constitutes its statutes. The objective of the IOC Regulation is to protect the values of the Olympic Movement and the Olympic Games from the threat and scourge of doping and to encourage potential participants in the Olympic Games to adhere strictly to the applicable anti-doping programmes. Thus, the IOC Regulation was proposed nearly one year before its implementation in July 2008 and was validly adopted by the IOC Executive Board in accordance with the powers and responsibilities vested in it by the OC.
21. The IOC asserts that the IOC Regulation does not breach any of its contractual obligations as a signatory of the WADA Code or the terms or principles of the OC.
22. The Regulation is an eligibility rule implementing Rule 45.2 of the OC and is not a sanction. The IOC has no disciplinary jurisdiction over athletes who potentially might come to the Olympic Games, and thus the IOC Regulation cannot be considered a sanction. The IOC's only disciplinary jurisdiction arises after selection by an NOC and the athlete makes a declaration to the IOC. Furthermore, the non-admission to one edition of the Olympic Games is completely different from the universal suspension resulting from a WADA Code ineligibility.
23. The IOC Regulation does not contravene any legal norms regardless of whether it is considered as an eligibility rule or a sanction. It is proportionate to the important aims the IOC pursues and does not infringe personality rights as there is no such right to participate in a single event. Similarly, it does not constitute an unlawful restriction on competition. It is not caught by the principle of *ne bis in idem*, as it pursues a wholly different purpose than an anti-doping ineligibility sanction. The IOC Regulation also does not contravene the principles of due process and equal treatment, nor does it violate public policy.
24. For all of the foregoing reasons, the IOC submits that the Panel ought to declare the IOC Regulation as being "*legal, valid and enforceable*".

The Panel's Findings on the Merits

A. Scope and Application of the IOC Regulation

25. The resolution of this dispute ought to begin with an analysis of the scope of the IOC Regulation.
26. The Regulation has no immediate effect on an athlete who is subject to a suspension under the WADA Code that either prevents him or her from participating in qualifying competitions to become a member of a National Olympic team or coincides with the Olympic Games themselves. Such an athlete would not be able to participate in that particular Olympic Games

because of the suspension under the WADA Code. However, that same athlete would be affected by the IOC Regulation at the time of the subsequent Olympic Games, assuming the prior suspension was of more than six months' duration and was served in the four-year period prior to that Olympic Games.

27. The IOC Regulation applies to all athletes of the Olympic Movement, but only becomes a consequence at the point a decision is made with respect to that athlete's acceptance, nomination, and accreditation to the Olympic Games. In other words, at the point when an NOC has selected an athlete to be a part of its Olympic Team and seeks the IOC's approval for its nomination, the Regulation starts to have a direct effect. The existence of the Regulation might well mean that an NOC will not seek to nominate an athlete who falls within its terms, rather than propose the athlete and have the nomination subsequently rejected by the IOC. Nevertheless, it is at the point that the IOC either accepts or denies the nomination that a decision is made, pursuant to Rule 45.2 of the OC, and that the IOC Regulation has its effect of not permitting participation of an athlete as outlined in the OC.
28. It is worth noting that the effects of a suspension under the WADA Code that overlaps with an Olympic Games or the qualification for that Games and of the application of the IOC Regulation are identical: in both circumstances, an athlete is denied the possibility to participate in the Olympic Games. A WADA Code suspension, of course, also has a broader effect as it bans participations in other competitions as well.
29. The IOC Regulation can also affect a team in a team sport, as an athlete subject to the application of the Regulation can be on the national team for all competitions other than the Olympic Games. Thus, there may be a ripple effect to the Regulation that extends beyond the athlete to whom the Regulation is applied.
30. As noted above, the USOC argues that the IOC Regulation is invalid and unenforceable because: (i) it is inconsistent with the WADA Code and the OC; (ii) it violates Swiss law and general fundamental principles of law; and (iii) it is an unlawful restriction of competition. In order to assess some of these arguments, it is necessary to determine whether the IOC Regulation is a sanction, as the USOC argues, or is an eligibility rule, as the IOC submits. The USOC argues additionally, however, that even if the Regulation was an eligibility rule, it is still invalid and unenforceable. Because certain branches of the arguments apply only in the event the Regulation is characterized as a sanction, the Panel's characterisation of it will be discussed next.

B. *Proper characterisation of the IOC Regulation as an eligibility rule or a sanction*

31. In the CAS Advisory Opinion requested by the IOC, *supra*, the Advisory Panel concluded, in consideration of Rule 45.2 of the OC, that the IOC Regulation was an eligibility rule. However, the manner in which the question for the Advisory Opinion was posed, together with the absence of an adversarial proceeding such as occurred in the proceedings before this Panel, essentially prevented the Panel in the Advisory Opinion from considering all of the

issues and arguments put forward in this case. In contrast, this Panel was benefitted by extensive arguments made by both parties and numerous Amicus Curiae Briefs.

32. Another CAS Panel provided a confidential Advisory Opinion to an International Federation (the “IF Advisory Opinion”) on its Rule that no athlete who had been declared ineligible to compete for at least two years could take part in the next edition of the Championships following the conclusion of the period of ineligibility (the “IF Rule”). For reasons that are found to be inapplicable here, that Panel concluded that the IF Rule was penal in nature and not an eligibility rule. The Panel found an intention to sanction the athlete. Therefore, that case is also distinguished from the current case.
33. Other CAS jurisprudence has indicated that qualifying or eligibility rules are those that serve to facilitate the organization of an event and to ensure that the athlete meets the performance ability requirement for the type of competition in question. A CAS Panel noted in CAS 2007/O/1381 RFEC & Alejandro Valverde v. UCI at paragraph 76 (the “Valverde case #1”), that a common point in qualifying (eligibility) rules is that they do not sanction undesirable behaviour by athletes. Qualifying rules define certain attributes required of athletes desiring to be eligible to compete and certain formalities that must be met in order to compete (see Valverde case #1 at paragraph 77). This same point is found in the IF Advisory Opinion.
34. In contrast to qualifying rules are the rules that bar an athlete from participating and taking part in a competition due to prior undesirable behaviour on the part of the athlete. Such a rule, whose objective is to sanction the athlete’s prior behaviour by barring participation in the event because of that behaviour, imposes a sanction. A ban on taking part in a competition can be one of the possible disciplinary measures sanctioning the breach of a rule of behaviour. The CAS first addressed the issue of whether the IOC can refuse entry into the Olympic Games to an athlete who has served an anti-doping rule related sanction in CAS OG 02/001 Prusis v. IOC⁷. The Panel in Prusis said that the effect of refusing the athlete entry to the Games was to impose a further sanction on him for the same offense.
35. In this particular case, what is the appropriate characterisation of the IOC Regulation?
36. In determining the answer to that question, it is helpful to examine the WADA Code and the OC. As set out in part 6 of this Award, the WADA Code provides that ineligibility means “*the Athlete (...) is barred for a specified period of time from participating in any Competition (...)*”. The IOC Regulation states that an athlete “*may not participate, in any capacity, in the next edition of the Olympic Games*” (in both provisions, the emphasis is that of this Panel.) The essence of both rules is clearly disbarment from participation in an event or a number of events.
37. As noted above, ineligibility according to the WADA Code is defined in the context of Competition. An *Event* is defined in the WADA Code as “*A series of individual Competitions conducted together under one ruling body*” (emphasis that of the Panel), and sets out as an example,

⁷ Prusis had tested positive for the steroid nandrolone due to a contaminated supplement. The governing IF, the FIBT, suspended him for 3 months thereby making him eligible to compete just 6 days before his event at the Winter Olympic Games in Salt Lake City. The IOC barred him and he appealed to the ad hoc division of the CAS resident at the Games.

the Olympic Games. Accordingly, the Panel finds that the Olympic Games come within the definition of Competition under the WADA Code.

38. Ineligibility is a sanction according to the provisions of Article 10 of the WADA Code and its definition. The OC in Rule 44 makes the WADA Code mandatory. Therefore, the Panel finds that a reading of the two documents together makes the IOC Regulation, insofar as it makes an athlete ineligible to participate in a Competition – i.e., the Olympic Games – a sanction.
39. The IOC submits that the Regulation cannot be disciplinary in nature, because the IOC only has disciplinary jurisdiction and powers over Olympic athletes during the Olympic Games. This argument is based on Rule 23.2 of the OC, stating that once an athlete has made his Olympic declaration according to the Bye-law 6 to Rule 45 OC, then the declaration, when accepted by the IOC, creates a contractual relationship between the IOC and the single athlete. Based on such relationship, an athlete may be sanctioned pursuant to the “Measures and Sanctions” provided for in Rule 23. That provision reflects the bifurcated jurisdiction for discipline between the IOC and an International Federation at the Olympic Games, but it does not answer the characterisation question. As the discussion above demonstrates, the ineligibility caused by the IOC Regulation falls squarely within the nature of sanctions provided in the WADA Code. Once the IOC Regulation is used to bar the participation of an athlete, the effect of the Regulation is disqualification from the Olympics and would be undeniably disciplinary in nature. Furthermore, the athlete would certainly perceive such a disqualification as a sanction, much like a suspension under the WADA Code. Therefore, the Panel is satisfied that the IOC Regulation has the nature and the inherent characteristics of a sanction.
40. This conclusion holds even though, as the IOC argues, an athlete who is prevented from participating in the Olympic Games by virtue of the IOC Regulation may nevertheless participate in another elite athletic competition in his or her sport at the same time, if one is being run concurrently. The IOC Regulation makes an athlete ineligible for the Competition of the Olympic Games, which as noted above, is a Competition under the WADA Code.
41. The Panel also notes that the Olympic Games are, for many athletes, the pinnacle of success and the ultimate goal of athletic competition. Being prevented from participating in the Olympic Games, having already served a period of suspension, certainly has the effect of further penalizing the athlete and extending that suspension.
42. Finally, it is noted that at the Olympic Games, the IOC adopts its own Anti-Doping Rules using the WADA Code as its model, as it is bound to do by Article 20.1.1 of the WADA Code and Rule 44 of the OC. Article 9.4 of the Beijing Olympic Anti-Doping Rules and Article 8.4 of the Vancouver Winter Olympic Anti-Doping rules contained the IOC Regulation within them. Therefore, even if the Regulation is operating as an eligibility rule, the disciplinary sanction in the Olympic Games Anti-Doping Rules would have to be applied if the athlete had been inadvertently accepted as an eligible competitor.

43. For all of the foregoing reasons, having regard to the objective and purpose of the IOC Regulation and to its scope and application, the Panel is of the view that the IOC Regulation is more properly characterised as a sanction of ineligibility for a major Competition, i.e. as a disciplinary measure taken because of a prior behaviour, than as a pure condition of eligibility to compete in the Olympic Games. Even if one accepts that the Regulation has elements of both an eligibility rule and a sanction, it nevertheless operates as, and has the effect of, a disciplinary sanction.

C. *Is the IOC Regulation consistent with the WADA Code and the OC?*

44. The USOC submits that the IOC Regulation is a substantive change not permitted by Article 23 of the WADA Code, or alternatively, that it was not enacted in compliance with Article 23.6 of the WADA Code. Similarly, it is submitted by USOC that the Regulation is not consistent with the OC.

a) WADA Code

45. The WADA Code is neither a law nor an international treaty. It is rather a contractual instrument binding its signatories in accordance with private international law⁸. The IOC is a Signatory of the WADA Code (see Art. 23.1.1).

aa) Is the IOC Regulation an impermissible substantive change?

46. As a Signatory of the WADA Code, the IOC is bound by contract to comply with its terms. That contract defines the IOC as an Anti-Doping Organization (ADO). Pursuant to Article 23 WADA Code, such organisations are required to follow all provisions of the WADA Code that are mandatory. The IOC accepts this responsibility by providing in Rule 44 OC that the WADA Code is mandatory for all members of the Olympic Movement, including of course itself.

47. Article 23.2.2 WADA Code further requires that Signatories accept, *“without substantive changes”*, the mandatory parts of the WADA Code. One of the mandatory provisions of the WADA Code is Article 10 relating to sanctions. Article 20.1.1 requires the IOC *“to adopt and implement anti-doping policies and rules for the Olympic Games which conform with the Code”*. Article 23.2.2 also provides that *“no additional provision may be added to a Signatory’s rules which change the effect of (...) the periods of Ineligibility provided for in Article 10 of the WADA Code”*.

⁸ The evidence of the contractual character of the WADA Code may be found in the introductory comment of Part Three entitled “Roles and Responsibilities”. It reads: *“All signatories shall act in a spirit of partnership and collaboration in order to ensure the success of the fight against doping in sport and the respect of the Code”*.

⁹ Article 9.4 of the Beijing Olympic Anti-Doping Rules and Article 8.4 of the Vancouver Winter Olympic Anti-Doping Rules contained within them, the IOC Regulation which are not in the WADA Code.

48. The IOC Regulation provides for an additional disciplinary sanction (as characterised by the Panel above) after the ineligibility sanction for an anti-doping rule violation under the WADA Code has been served. The Regulation thus provides for a period of ineligibility (non-participation) that is not provided for under Article 10 of the WADA Code. In so doing, the IOC Regulation constitutes a substantive change to the WADA Code, which the IOC has contractually committed itself not to do and which is prohibited by Article 23.2.2 WADA Code.
49. The purpose of Article 23.2.2 WADA Code is to ensure that Signatories do not introduce provisions that negate, contradict, or otherwise change the WADA Code articles that are mandatory, including the sanctions in Article 10. The Regulation is a substantive change to Article 10 because the period of ineligibility now becomes 2 years (or whatever lesser sanction in excess of 6 months is ordered) *plus at least the number of days of the Olympic Games*. The Regulation changes the effect of Article 10, through unilateral action by the IOC, by adding further ineligibility to the anti-doping sanction under the WADA Code after that sanction has been served.
50. By virtue of imposing an additional consequence that is over and above the consequences that are already provided for in the WADA Code, the IOC Regulation is not in compliance with the WADA Code.
51. In finding that the IOC Regulation is contrary to the WADA Code, the Panel wishes to make clear that it is not stating that the IOC Regulation could not be incorporated into the WADA Code or that the spirit or the rationale of the IOC regulation is *per se* right or wrong. If the IOC wants to exclude athletes who have been sanctioned for doping from the Olympics Games, it may propose an amendment to the WADA Code, which would allow other Signatories the time and opportunity to consider these issues and whether it should be adopted as provided in the Code. The Panel, of course, declines to comment on whether or how such an amendment should be enacted. It does note, however, that should the WADA Code be revised in this way, any issue of proportionality could be determined by the first instance adjudicatory body and reviewed on appeal, which would likely satisfy any requirement of proportionality. Such an amendment would also likely make moot any issue of double jeopardy, since the sanction including a ban from an Olympic Games would be a single sanction as a result of an anti-doping violation, with the adjudicatory body taking into due consideration the interplay of the two possible sanctioning elements. Similarly, issues regarding equal treatment and due process would also be solved.
 - ab) Was the Rule enacted in compliance with the WADA Code Article 23.6?
52. Given the above finding that the IOC Regulation is not in compliance with the WADA Code as it amounts to a substantive change to the sanctions provisions of the WADA Code, the Panel does not need to address this additional compliance argument in its Award.

b) Olympic Charter

53. Under Swiss law, private associations such as the IOC must act in compliance with Swiss law and applicable principles of law, as well as the association's own statutes. Indeed, a member of an association may seek redress for acts and decisions of the association that are contrary to the law or to the statutes of the association (see article 75 CCS).
54. In the present case, even though USOC is not a member of the IOC, the Panel is authorized to consider whether the IOC has acted in accordance with its statutes because the IOC agreed to arbitrate these issues with USOC. Following the desire of the parties to finally resolve the matters regarding to the validity and enforceability of the IOC Regulation, the Arbitration Agreement gives extensive powers to the Panel to resolve this dispute, including declaratory powers making it unnecessary for others to seek redress.
55. Recognized by the Swiss federal Constitution and anchored in the Swiss law of private associations is the principle of autonomy, which provides an association with a very wide degree of self-sufficiency and independence. The right to regulate and to determine its own affairs is considered essential for an association and is at the heart of the principle of autonomy. One of the expressions of private autonomy of associations is the competence to issue rules relating to their own governance, their membership and their own competitions. However, this autonomy is not absolute.
56. The OC constitutes the IOC's "Statutes" within the meaning of the law on Swiss associations, pursuant to Article 60 of the CCS. That provision prescribes that the statutes must contain the necessary provisions as to the goal, the resources and the organisation of an association. The OC is the codification of the Fundamental Principles of Olympism and, amongst other matters, governs the action and operation of the Olympic Movement.
57. By Rule 44 of the OC, the IOC has incorporated the WADA Code into the IOC's own Statutes. The IOC further provides in Rule 41 of the OC that a competitor must respect and comply with all aspects with the WADA Code. Accordingly, the IOC has by virtue of its own statutes and in particular, Rule 44, accepted the binding nature of the WADA Code.
58. Because the Panel has found that the IOC Regulation is not in compliance with the WADA Code, and because the WADA Code has been incorporated into the OC, the IOC Regulation is not in compliance with the IOC's Statutes, i.e. the OC, and is therefore invalid and unenforceable.

D. *Other arguments raised by the USOC*

59. As described above, the USOC also based its claim on Swiss law and fundamental principles of law, as well as competition rules. The parties provided extensive briefing and oral submissions on these issues. However, the conclusions above that the IOC Regulation violates the WADA Code and the OC make it unnecessary to deal with any of those

arguments. If the Panel adopted or denied any of these additional bases for the USOC's claim, the conclusion would still be the same: that the IOC Regulation is invalid and unenforceable.

60. Nevertheless, the Panel finds it appropriate to make the following comments with respect to one set of these issues. CAS case law has consistently held that the principle of *ne bis in idem* can apply to sanctions under sport law, and academic authorities on the subject have come to the same conclusion. The Panel considers that, if the *ne bis in idem* principle is indeed applicable to sanctions imposed under anti-doping regulations, the IOC Regulation would contravene this principle. The effective purpose of the sanction is the same (even if the underlying motivations are different); the sanction is attributable to the same behaviour, and the sanction results in the same consequence, ineligibility from Competition. As mentioned above, no *ne bis in idem* issue would be raised if the IOC Regulation were implemented in the WADA Code, so that one adjudicatory body would be in position to assess the proper sanction for a certain behaviour, taking into due consideration the overall effect of the sanction to be attributed¹⁰.

E. Conclusion

61. In summary, the Panel concludes for the reasons set out in this Award and taking in due consideration all arguments submitted by the parties as well as the amicus curiae briefs filed by third parties, that the IOC Regulation is not in compliance with the WADA Code and violates the IOC's own Statutes. The Arbitration Agreement provides for this dispute to "*be submitted exclusively to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, and settled definitively in accordance with the Code of Sports-related arbitration, under the rules applicable to the Ordinary Arbitration Procedure*". In the exercise of this power conferred upon the Panel by the Arbitration Agreement and in light of these findings, the IOC Regulation is found to be invalid and unenforceable. It is so declared by this Panel.
62. The Panel notes that in the spirit of the Arbitration Agreement, the IOC should take the necessary measures for the Regulation not to be enforced against any athlete pending its formal abrogation by the IOC Executive Board. Thus, there is no need to order other particulars of relief in this Award.

¹⁰ By contrast, for example, if the IOC issued a rule that persons convicted of a violent felony were not eligible to participate in the Olympic Games, such a rule would likely not violate the principle of *ne bis in idem*, because the effective purpose of that sanction would be different from the purpose of the criminal penalty associated with that violent felony.

The Court of Arbitration for Sport rules:

1. The IOC Executive Board's June 27, 2008 decision prohibiting athletes who have been suspended for more than six months for an anti-doping rule violation from participating in the next Olympic Games following the expiration of their suspension is invalid and unenforceable.
2. (...).