



Public enough: the need to incorporate a public interest consideration in anti-doping decision-making

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Abstract

The World Anti-Doping Agency (WADA), which governs anti-doping globally, is an international organisation that may be described as a hybrid public-private entity. Given that public entities are bound to act in the public interest, this article explores the extent to which WADA is bound to, or ought to, incorporate a public interest test in the exercise of its discretionary decision-making. Models assessing the nature of WADA and anti-doping often focus on its structure rather than its practical activities. Because WADA's structure is unusual, the anti-doping literature has primarily used Benedict Kingsbury's conceptualization of "publicness" to analyse the grey area between private and public that WADA occupies. Literature on the publicness of anti-doping predates several International Standards and does not reflect WADA's evolving role in anti-doping fields such as education. In this paper, using a novel holistic understanding of publicness drawing from the works of Kingsbury, Armin von Bogdandy et al. and Letitia Lo Giacco, we argue that WADA is sufficiently public in nature to require a public interest consideration. By embedding a public interest test, as is required of prosecutors in criminal justice systems worldwide, WADA decision-makers would be held to a common standard in articulating the rationale for their actions. This, in turn, would lead to greater consistency in decision-making and the embedding of procedural justice principles in anti-doping processes. We identify WADA's current roles in anti-doping as well as situations of discretionary decision-making in the World Anti-Doping Code, and illustrate how a public interest test would impact decision-making using case studies.

Keywords Publicness · Anti-doping · Discretion · Public interest · Discretionary decision-making

1 Introduction

The World Anti Doping Agency ("WADA") regulates anti-doping activities globally through its World Anti-Doping Code 2021 (the "Code"). The Code creates rules that govern the use of substances by athletes, determines which

substances are prohibited and establishes the rules for punishing breaches. In its purpose section, the Code states that it "has been drafted giving consideration to the principles of proportionality and human rights".¹ Proportionality and human rights are fundamentally public concepts.² By embedding these principles in its fundamental document, WADA assumes the mantle of publicness in the name of eradicating performance-enhancing substance use in sport. Even so, the Code does not always include the same guardrails around decision-making that are typical of public entities, such as considering the public interest.

The Code has governed anti-doping in sport since 2004. The anti-doping system has a unique legal structure, which has brought up questions about its true nature: private, public or somewhere in between. Disciplines including legal

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¹ (World Anti-Doping Code 2021 "Code 2021"), p. 10.

² (Kingsbury 2009b), pp. 177–179.

studies,³ sport management,⁴ and governance and policy have acknowledged WADA's unique structure and issues that arise from it.⁵ The literature is split as to whether WADA is more private,⁶ more public,⁷ or hybrid,⁸ though there is some acceptance in the legal literature that WADA is a hybrid entity with a high degree of publicness.⁹ The idea of publicness has its roots in international law.¹⁰ Though accepting that WADA shows a high degree of publicness because of its formal (i.e. public funding structure) and practical (i.e. regulatory and prosecutorial roles) characteristics as expanded below in Sect. 3, the legal literature has not considered what that public nature means for the anti-doping system.

In recent years, WADA's activities have expanded to include binding International Standards that regulate anti-doping education,¹¹ intelligence and investigations,¹² and Code compliance,¹³ on top of traditional topics like testing and laboratories.¹⁴ However, existing applications of publicness to anti-doping, cited in recent research, predate the contemporary Code and certain of its features.¹⁵ The current Code includes numerous opportunities for WADA to engage in discretionary decision-making without outlining requirements for how to make those decisions and whose interests must be considered. For example, WADA has a right to seize samples and to negotiate case resolutions, among others.¹⁶ While the scientific literature has addressed discretion at the sanctioning stage in the Code, often conducted by first instance tribunals,¹⁷ to date there has been scant analysis of the discretion given to WADA itself, other than its role in updating the Prohibited List.¹⁸

WADA's nature matters because it determines the limits to WADA's actions, and what kind of responsibilities

WADA owes to the people its work impacts. As WADA's roles evolve, and with a new Code coming in 2027, the question of WADA's nature remains relevant. We argue that, as WADA's activities continue to fill public roles, it is more than public enough to be constrained by boundaries that are most often applied to public entities. The first two sections introduce existing ideas of publicness and propose a new holistic way to think about it (Sect. 2), then review how publicness has been applied in the past (Sect. 3). Taking into consideration Code changes since the last analysis, Sect. 4 places WADA's activities in the current anti-doping landscape and identifies its five roles in the strict liability system. Section 5 concludes that WADA shows high holistic publicness. The last two sections introduce public interest considerations in domestic and international law, in particular the concept of prosecutorial discretion and the public interest test in prosecutions (Sect. 6). Section 7 identifies WADA's discretionary decision types, proposes a form of public interest test for anti-doping matters, and argues that employing the test would render WADA's decision-making more transparent and consistent.

2 Publicness – we know it when we see it

2.1 Characteristics of public and private entities

The anti-doping system, which is administered by WADA, comprises both public and private aspects. Public entities may take various forms but are funded by the public and act on behalf of the public, with states and government bodies as the clearest example. Acting in a public manner involves acting for, or speaking on behalf of, the relevant community.¹⁹ In contrast, private entities are not funded by the state and would be “obligated only to themselves”, rather than to the rest of society.²⁰ Private entities are autonomous from state influence, such as resourcing. However, they may nonetheless operate across jurisdictions and influence political outcomes.²¹ Hybrid entities such as social enterprises fall somewhere in the middle and show a combination of public and private attributes, and sometimes fill voids of resourcing and expertise that a state lacks, for example in the case of social enterprises.²² Public entities and private entities prioritize different motivations and as a result, owe different obligations to the people impacted by their operations. While private entities are not states and conduct economic

³ (Casini 2009; Siekmann 2012; du Pisani 2013)

⁴ (Toohey and Beaton 2017)

⁵ (Henne 2010; Chappelet and Van Luijk 2018)

⁶ (du Pisani 2013)

⁷ (Soek 2006)

⁸ (Rigozzi et al. 2015)

⁹ (Casini 2009; Siekmann 2012; Shahlaei 2024)

¹⁰ (Casini 2009), p. 440 (Siekmann 2012); p. 319 (Shahlaei 2024); p. 274.

¹¹ International Standard for Education (2021) (“ISE”)

¹² International Standard for Testing and Investigations (2023a) (“ISTI”)

¹³ International Standard for Code Compliance by Signatories (2024a) (“ISCCS”)

¹⁴ International Standard for Testing and Investigations (2023a) (“ISTI”)

¹⁵ (Casini 2009; Siekmann 2012; Shahlaei 2024)

¹⁶ (2021a), Art. 6.8, p. 51; Art. 10.8.2, p. 78–79.

¹⁷ (Jamieson and 2021; Exner 2020)

¹⁸ (Kambhampati and Star 2021a), p. 238.

¹⁹ (Lo Giacco 2023), p. 274.

²⁰ (Wolfe 1993), p. 1675.

²¹ (Lo Giacco 2023), p. 271.

²² (Lo Giacco 2023), p. 280.

activity for the profit of a select group,²³ public entities seek to protect the interests of the community. The same notions of public and private can be extended to legal systems.

While individual jurisdictions may differ as to where they draw the line between private and public, based on what tests they employ and factors they weigh, the distinction between public and private is a question of interest for legal systems.²⁴ Academic models that seek to categorize entities as either public or private tend to do so by examining the entity's structure.²⁵ However, by only taking an entity's formal nature into account, these models are less useful for understanding an entity's practical nature: how it acts, not just how it is structured. WADA's unusual form, split evenly between public and private and explained further in Sect. 3, makes it difficult to categorize. Anti-doping literature to date, starting with Casini's (2009) analysis following the first Code revision, has used Benedict Kingsbury's idea of publicness to explain WADA's practical nature.²⁶ Aside from Kingsbury, Armin von Bogdandy et al. and Leticia Lo Giacco present alternative theories of publicness. This paper builds on the existing anti-doping literature by synthesizing three ways of thinking about publicness in light of changes to the Code and International Standards.

2.2 Three ways to think about publicness

There are three general conceptions of publicness, which differ in how they identify publicness. First, that public entities can be identified by their exercise of authority; second, focusing on the idea that publicness is derived from acting by and for the community; and third, that public entities are characterized by accountability that drives legitimacy.²⁷ To date, we are unaware of any application of von Bogdandy et al.'s or Lo Giacco's framings of publicness to anti-doping.

2.2.1 Publicness: exercising authority

For von Bogdandy et al., the essential characteristic of publicness is whether an entity exercises international public authority, because authoritative acts need to be bounded or limited.²⁸ Public authority means having "the legal capacity to *determine* others and to reduce their freedom ... to unilaterally shape their legal or factual situation" (emphasis

in original).²⁹ The authors articulate a broad definition of authority, including not just directly authoritative acts, but also those that pressure (or 'condition') subjects to act in compliance.³⁰ In terms of which exercises of authority are public:

"... international public authority [includes] any authority exercised on the basis of a competence instituted by a common international act of public authorities, mostly states, to further a goal which they define, and are authorized to define, as a public interest".³¹

Though formally public authorities are the best fit for this definition, the authors acknowledge that some entities, though not operating with delegated authority from a public source, engage in activities that are "functional equivalents to ... activit[ies] on a public legal basis".³² Activities that directly affect public goods, manage global infrastructures, or balance conflicting interests, are examples of functional equivalences that show practical publicness. von Bogdandy et al. take the position that exercises of public authority need to be limited, and uncertainty is not a good enough reason to shirk any constraints.³³

2.2.2 Publicness: by and for the community

Kingsbury sees publicness as "the claim of law to stand in the name of the whole society and to speak to that whole society even when any particular rule may in fact be addressed to narrower groups".³⁴ Law is both public in source and in content: it must be "wrought by the whole society ... [on] matters of concern to the society".³⁵ Kingsbury notes that this means law is not top-down but instead has a relational quality.³⁶ Kingsbury identifies five principles often seen in general public law that point to publicness: legality, rationality, proportionality, rule of law, and human rights.³⁷ Further, Kingsbury identifies characteristics of publicness: institutional design/constitution; norms and decisions that materially affect other entities, states or individuals; and procedural norms.³⁸ Kingsbury sees a role for democratic-type mechanisms in the idea of publicness, but does not

²³ (Wolfe 1993; Lo Giacco 2023)

²⁴ See for example: EU context (Julicher et al. 2019); Singapore context (McGregor and Coe 2023)

²⁵ (Pilon and Mansurov 2024; Henne 2010; Toohey and Beaton 2017; Chappelet and Van Lwijk 2018)

²⁶ (Casini 2009; Shahlaei 2024), p. 440 & p. 274 respectively.

²⁷ (von Bogdandy et al. 2008; Kingsbury 2009b; Lo Giacco 2023)

²⁸ (von Bogdandy et al. 2008), p. 1376.

²⁹ (von Bogdandy et al. 2008), pp. 1381–1382.

³⁰ (von Bogdandy et al. 2008), p. 1382.

³¹ (von Bogdandy et al. 2008), p. 1382.

³² (von Bogdandy et al. 2008), p. 1384.

³³ (von Bogdandy et al. 2008), pp. 1385–1386.

³⁴ (Kingsbury 2009b), p. 174.

³⁵ (Kingsbury 2009a), pp. 175–176.

³⁶ (Kingsbury 2009b), p. 176.

³⁷ (Kingsbury 2009a), pp. 177–179.

³⁸ (Kingsbury 2009a), p. 34.

centre his conception of publicness around democracy as a “normative starting point”.³⁹ For Kingsbury, “publicness is immanent in law, so the choice to use law (or lawlike structures) and so benefit from the value added by using law, brings with it the requirements of publicness”.⁴⁰

2.2.3 Publicness: accountability lends legitimacy

For Lo Giacco, publicness is not an absolute state, but rather a quality that falls somewhere between public and private. Publicness can occur in two ways: formally and practically.⁴¹ Lo Giacco defines publicness as “... the authority to stand in the name of and for the community, including by defining community interests, rather than self-or particular interests, in a way that secures legitimacy and accountability towards the members of the community”.⁴² This framing identifies four interwoven components: authority, community interests, legitimacy and accountability. The source of authority is not delegated but instead comes from the community and is tempered by accountability measures. In a practical sense, Lo Giacco notes that private or hybrid entities may end up in more public positions because states lack resourcing or expertise to solve a problem.⁴³ When this happens, Lo Giacco notes that “while private entities typically approach a ... function from a profit-based perspective, community interests warrant protection regardless of whether they are more or less profitable”.⁴⁴

2.3 A holistic conception of publicness for anti-doping

All three authors agree that society or community is at the heart of publicness: public authorities step forward and speak on behalf of the community.⁴⁵ So too are acts of authority, whether authority *as against* subjects,⁴⁶ or authority *on behalf* of subjects that bolsters and legitimates action: “... power stemming from the consent of the governed to be bound by rules”.⁴⁷ Finally, each agree that public authority must be limited, whether through procedural norms⁴⁸ or by other mechanisms of accountability to the community.⁴⁹

There are ways to know publicness when you see it, though the indicators vary. One group of indicators occurs when an entity’s action resembles the activities of known public entities (i.e. functionally equivalent actions, principles like proportionality and human rights, or procedural norms and structures that ‘look like’ public entities – like review processes or appeal channels).⁵⁰ Alternatively, returning to the essence of publicness to identify whether a unilateral act of authority has occurred by an entity charged with speaking on behalf of some public, can also identify publicness.⁵¹

As such, a holistic view of publicness, as applied to the anti-doping context, asks:

- (1) Is WADA speaking for and standing on behalf of the community, on topics that concern the community?
- (2) Is WADA exercising unilateral authority, including pressure that ‘conditions’ people:
 - a. As against subjects?
 - b. On behalf of the community?
- (3) Are WADA’s actions functionally equivalent to a public entity’s actions?
- (4) Do the structures in the Code reflect public principles and democratic-type mechanisms? If those mechanisms are absent, can subjects hold WADA accountable in any other way?

Though these authors write from different viewpoints, the definitions of publicness are cohesive. Each author’s contribution is additive and builds out a more robust idea of publicness. The holistic concept of publicness will serve as a useful framing for analysing WADA’s activities. To put the analysis in context, Sect. 3 will review the historical use of publicness to explain WADA’s nature, as well as subsequent changes to the anti-doping system. Section 4 will use the combined understanding of publicness developed above to analyse WADA’s degree of publicness, with particular attention to recent developments in the last two versions of the Code.

³⁹ (Kingsbury 2009b), p. 196.

⁴⁰ (Kingsbury 2009a), p. 40.

⁴¹ (Lo Giacco 2023), p. 274.

⁴² (Lo Giacco 2023), p. 275.

⁴³ (Lo Giacco 2023), p. 272.

⁴⁴ (Lo Giacco 2023), p. 272.

⁴⁵ (Kingsbury 2009a; Lo Giacco 2023)

⁴⁶ (von Bogdandy et al. 2008), pp. 1381–1382.

⁴⁷ (Lo Giacco 2023), p. 275.

⁴⁸ (von Bogdandy et al. 2008; Kingsbury 2009a)

⁴⁹ (Lo Giacco 2023), p. 276.

⁵⁰ (von Bogdandy et al. 2008, p. 1381; Kingsbury 2009b, a)

⁵¹ (Lo Giacco 2023)

3 Historical applications of publicness in anti-doping

3.1 Publicness assessment – two Codes ago

There have been four versions of the Code to date, in 2003, 2009, 2015 and 2021. Casini, writing in 2009 following the first Code amendment, noted the following characteristics in support of his assessment that WADA shows high publicness, which remain apt. First, WADA's structure and funding model demonstrate publicness by virtue of close links to state governments. WADA receives half of its funding from world governments, with the other half from the International Olympic Committee.⁵² WADA's governance structure maintains equal representation from world governments and from the Olympic Movement, whose parties contribute to Code drafting.⁵³ Second, WADA is part of an international law structure by virtue of its link to the UNESCO International Convention Against Doping in Sport (the "Convention").⁵⁴ While states must sign the Copenhagen Declaration and then ratify the Convention, private entities such as the IOC and international sports federations are direct signatories to the Code itself.⁵⁵ The Convention has been ratified by 191 states; those signatories are required to abide by the WADA Code and enforce it in their jurisdictions, though the Code is incorporated as an Appendix.⁵⁶

In practical terms, Casini points to WADA's public goals as indicators of publicness, such as protecting athlete health, harmonizing global efforts to curtail doping, conducting anti-doping education and coordinating scientific research.⁵⁷ Fourth, WADA's role as a global standard-setter, by which it produces soft law, shows publicness.⁵⁸ Using a slightly different framing, other authors conclude that the punitive nature of the system makes it more analogous to a public, criminal system.⁵⁹ At the time of Casini's analysis, WADA produced five standards on topics including the Prohibited List, testing, laboratories, Therapeutic Use Exemptions (TUEs) and privacy protection.⁶⁰

⁵² (Casini 2009), pp. 431–432.

⁵³ (Casini 2009), pp. 431–432. See also (Windholz 2022, Constitutive Instrument of Foundation, 2023; Shahlai 2024).

⁵⁴ (2005) UNESCO *International Convention Against Doping in Sport*, 19 October 2005.

⁵⁵ (Casini 2009), pp. 433–435.

⁵⁶ (Shahlai 2024), pp. 245–246.

⁵⁷ (Casini 2009), p. 432.

⁵⁸ (Casini 2009), p. 433.

⁵⁹ (Soek 2006), summing up at pp. 327–338 (Siekmann 2012, citing Soek); p. 331.

⁶⁰ (Casini 2009), p. 434.

3.2 Changes to Code since 2009 analysis

Since 2009, the scope of WADA's activities has expanded to include three further International Standards governing specific aspects of the anti-doping system. Between 2021 and 2024, the International Standard on Code Compliance by Signatories ("ISCCS"),⁶¹ the International Standard for Education ("ISE"),⁶² and the International Standard for Results Management ("ISRM"),⁶³ became a part of the rule texts for anti-doping. In addition, while previously only addressing testing, the International Standard for Testing and Investigations ("ISTI") has expanded in scope: it now regulates how anti-doping organizations must seek, respond to, and use intelligence in their anti-doping activities.⁶⁴ In addition to recent changes that broaden the scope of WADA's work, with expanded topics for standard-setting, Casini's analysis does not address WADA's roles other than as a standard-setter. The following section identifies WADA's contemporary roles in the Code.

4 WADA's activities in context

4.1 Wearing five hats: WADA's contemporary roles

Regulatory entities act in three basic roles: rule making, rule administration, and rule enforcement.⁶⁵ This section will expand this idea to specify WADA's five roles in the anti-doping system: (1) legislative, including standard-setting (aspects of rule-making), (2) advisory (a subset of rule administration), (3) compliance (rule enforcement), (4) appellate/prosecutorial (rule enforcement), and (5) decision-making (rule enforcement), and argue that they are essentially public functions.

First, WADA fills a legislative or rule-making role: the Code gives powers for WADA to draft and make amendments to foundational anti-doping documents, including the Code, the Prohibited List,⁶⁶ the International Standards and the accompanying Guidelines.⁶⁷ As the overarching decision-maker, WADA sets the direction for anti-doping based on its values and priorities, sometimes expressly in binding documents – as when the Code references the principles

⁶¹ International Standard on Code Compliance by Signatories ("ISCCS") (2024)

⁶² International Standard for Education ("ISE") (2021)

⁶³ International Standard for Results Management ("ISRM") (2023)

⁶⁴ International Standard for Testing and Investigations ("ISTI") (2023), Part III (pp. 56–59).

⁶⁵ (Windholz 2022), p. 98.

⁶⁶ Code (2021), Art. 4.1, p. 31.

⁶⁷ Code (2021), pp. 10–11.

of human rights and proportionality⁶⁸ – and sometimes indirectly.⁶⁹ WADA's standard-setting role is particularly important.⁷⁰ WADA determines the minimum standards for numerous aspects of the system.⁷¹ The Code provides for a consultation process for amendments where WADA regularly conducts reviews and solicits feedback from the anti-doping community on its publications⁷² – though without any role for the athletes⁷³ and without the same procedures as when legislating activities happen in a government context.⁷⁴ WADA subcommittees are responsible for gathering feedback, reviewing it, and drafting and amending rule texts.⁷⁵ The International Organization for Standardization (ISO) is a similar example outside of sport, which sets standards on environmental and other topics that are widely used and accepted.⁷⁶ By establishing, developing and promoting the rule system for anti-doping, WADA acts in a public capacity.⁷⁷

In its legislative function, WADA determines what the rules are. In its advisory function, WADA explains how Signatories can succeed in complying with the rules. In addition to the basic standards, WADA publishes in-depth, non-binding Guidelines which puts WADA in an advisory role in relation to the NADOs and sport federations as they implement Code and International Standards. WADA's advisory role in developing its guidelines, with detailed assistance on achieving compliance in various realms, is also a public role. An organization that publishes guidelines with the goal of facilitating compliance of its constituent members with its rules is not acting solely in its own self-interest. It is acting to assure the system can continue by giving its subordinates the tools to succeed.

WADA also has a compliance role in relation to Signatories: it is responsible for ensuring that Code Signatories comply with the Code and the International Standards and

Technical Documents. WADA collects information about the actions of the Signatories through its reporting mechanisms, such as its Code Compliance Questionnaire.⁷⁸ WADA determines whether the Signatories are complying with standards, supports Signatories to improve identified compliance issues⁷⁹, and has powers to sanction non-compliant Signatories, though it reserves this power as a matter of last resort.⁸⁰ WADA's actions on compliance show that it acts in a public manner. In its compliance role, WADA does not act solely in its own interest: rather, it takes a supportive role, giving signatories many opportunities to improve compliance, especially demonstrated through the principle of last resort.

While the procedure of investigating and prosecuting anti-doping rule violations is first conducted by ADOs and sport federations at first instance tribunals, WADA has rights to appeal first instance decisions on findings of guilt and on sanction decisions.⁸¹ It has standing and can dispute decisions made by lower panels. This role places WADA in an adversarial position in relation to the accused athlete when it assumes the role of prosecutor, which is a purely public role. The prosecutor represents the public that has been harmed by a criminal action. Though the NADO or federation fulfills the first instance prosecutorial role, including the investigation capacity, WADA may reach a negotiated resolution⁸², call evidence and even bring expert evidence⁸³ to dispute the facts of a case. Acting in a prosecutorial capacity on appeals means WADA may adopt the actions taken by the earlier prosecuting body, such as procedural steps (i.e. disclosure) or acts regarding evidence (i.e. chain of custody).

Finally, in certain narrow instances, the Code provides for WADA to make decisions. First, in the context of a major event, WADA may take on the role of reviewing contested Therapeutic Use Exemptions (TUEs)⁸⁴, if CAS is not performing that function. Second, WADA may decide on disputes between anti-doping organizations to determine responsibility for Results Management.⁸⁵

⁶⁸ Code (2021), pp. 10.

⁶⁹ (2025) For example, as in the Strategic Plan 2025–2029 document: https://www.wada-ama.org/sites/default/files/2025-02/wada_strategic_plan_2025-2029_en_v13_03feb2025.pdf

⁷⁰ (Casini 2009), p. 424.

⁷¹ International Standards include: Code Compliance by Signatories, Education, Prohibited List, Therapeutic Use Exemptions (TUEs), Testing and Investigations, Laboratories, Results Management, and Protection of Privacy and Personal Information.

⁷² Code (2021), Art. 4.3.2 Commentary, p. 34 – for example, consultation and review of Prohibited List.

⁷³ (Straubel 2010), pp. 25–26.

⁷⁴ (Kornbeck 2015), p. 124.

⁷⁵ See WADA “What we do” section of website: <https://www.wada-ama.org/en/what-we-do/world-anti-doping-code/code-review>; also using the term “rule texts” in place of “laws” (Franck 1990); p. 41 (Chapter 3 Legitimacy: A Matter of Degree).

⁷⁶ (Klabbers 2008), p. 93–94.

⁷⁷ (Casini 2009), p. 433 (Siekman 2012), p. 318.

⁷⁸ ISCCS (2024), Art. 5.1.2, p. 18.

⁷⁹ ISCCS (2024), Art. 6.0, p. 22.

⁸⁰ ISCCS (2024), Art. 5.4, pp. 19–20.

⁸¹ Code (2021), Art. 13, pp. 91–92.

⁸² Code (2021), Art. 10.8.1 & 10.8.2, pp. 77–79.

⁸³ Code (2021), Art. 3.2, pp. 27–31.

⁸⁴ Code (2021), Art. 4.4.4.3, p. 30.

⁸⁵ Code (2021), Art. 7.1.1, p. 54.

4.2 Public actions justified by public reasons: the significance of WADA's multiple roles in the strict liability anti-doping system

All of WADA's roles weave together to form a punitive system based on the idea of general deterrence.⁸⁶ General deterrence, where the punishment for a prohibited act is intended not only to punish the particular offender, but to have significant consequences that discourage others from committing the same prohibited act for the purpose of reducing the frequency of the act in society, appears where the Code's Introduction embeds the principle of deterrence and states its goal of "divert(ing) potential dopers".⁸⁷ The idea of general deterrence is deeply connected to the idea of the public: general deterrence is a message to the public that serves a public goal (society's safety or well-being).

The Code sets out a strict liability model which imposes a mandatory finding of guilt if a prohibited substance is found in an athlete's body, which is then followed by the sanctioning exercise. Sanctioning takes athlete intent into account and sanctions range from no sanction if the athlete is found to have No Fault, to longer sanctions like bans from sport.⁸⁸ Strict liability systems are often justified where they are the only way to stop a prohibited behaviour that threatens the public good.⁸⁹ For example, in the UK, the *Terrorism Act 2000* creates a strict liability offence with no *mens rea* assessment if a person carries a terrorist organization's flag. The strict liability system, though it can result in harsh consequences, was found to be justified partially because it protects national security and prevents disorder.⁹⁰

Similar to general deterrence, strict liability is defined in reference to the public. States justify using strict liability systems to achieve accountability while maintaining an efficient system, conscious of resourcing challenges, that streamlines the accountability process.⁹¹ These justifications are rooted in a consideration for the public interest. Liberal democracies place a high value on individual freedoms, so a strict liability system must have a pressing, fundamental social⁹² purpose to protect – a very good reason for disregarding intent in adjudicating the offence.

Protecting fairness in sport⁹³, and specifically maintaining fair competition, is the primary justification advanced

for the strict liability model in anti-doping.⁹⁴ Further, the Code relies on the spirit of sport, defined as the "intrinsic value of sport [and] ... the ethical pursuit of human excellence through the dedicated perfection of each Athlete's natural talents".⁹⁵ The spirit of sport concerns "the value of clean sport to the world"⁹⁶, though the Code does not explain what the value is, how it is assessed, or who is included in 'the world'. Similarly, some proposed values of sport are the sense of belonging it brings, self-fulfilment and the pursuit of excellence associated with sport,⁹⁷ the social standing of sport,⁹⁸ and the standing of athletes as role models and their potential positive impact on the community.⁹⁹ Protecting athletes' health is another justification for the strict liability system¹⁰⁰: a court noted that constraints on the system's ability to detect doping infractions increased the danger to athletes' health.¹⁰¹ Finally, the Code advances harmonization as the ultimate justification for the system.¹⁰² Harmonization means that the impact of an action should be the same when applied to different individuals¹⁰³, but faces challenges in anti-doping due to the global nature of the regulatory structure.¹⁰⁴ Casini notes that WADA has a "public interest mission".¹⁰⁵

In sum, there is not one single very good reason offered to justify the strict liability system in anti-doping, nor one clearly defined public interest. Instead, the Code and the literature advance many reasons, some involving concern for a public but not defining who is included in that public. Historically, legal opinions sought by WADA have either ignored the question of the public interest; stated that a public interest exists; or declared a self-evident public interest.¹⁰⁶ The Code never expressly details the nature of the public interest that underpins the entire anti-doping system and justifies the onerous strict liability system.¹⁰⁷ Since WADA relies on the public interest to underpin its

those committing anti-doping rule violations, while also helping to disrupt anyone engaged in doping behavior".

⁹⁴ (Rigozzi et al. 2003), p. 42.

⁹⁵ Code (2021), at p. 13.

⁹⁶ Code (2021), at p. 13.

⁹⁷ (Goldsworthy 2018), p. 200.

⁹⁸ (Rigozzi et al. 2003), p. 43.

⁹⁹ (Rigozzi et al. 2003), p. 43.

¹⁰⁰ (Rigozzi et al. 2003), p. 42.

¹⁰¹ (Goldsworthy 2018), p. 200, citing *Federation Nationale des Syndicats Sportifs (FNASS) and Others v France* (2017) ECHR 018 (FNASS Case) – French (Casini 2009),; p. 432.

¹⁰² (Soek 2006), p. 263 (Siekman 2012),; p. 318.

¹⁰³ (Soek 2006), p. 263.

¹⁰⁴ (Read et al. 2023), p. 8.

¹⁰⁵ (Casini 2009), pp. 432–433.

¹⁰⁶ (Goldsworthy 2018), pp. 199–200.

¹⁰⁷ (Goldsworthy 2018), p. 198.

⁸⁶ (Soek 2006), Ch. 5 System of Sanctions.

⁸⁷ Code (2021), p. 9.

⁸⁸ Code (2021), Art. 10.5, pp. 69–70.

⁸⁹ (Goldsworthy 2018), p. 198.

⁹⁰ *Pwr v Director of Public Prosecutions*, [2022] UKSC 2 (2022), paras. 55, 58, 64 & 77.

⁹¹ (Goldsworthy 2018), p. 198.

⁹² (Goldsworthy 2018), p. 198.

⁹³ (Rigozzi et al. 2003), p. 42. Regarding Detection: it is ... also effective in protecting clean Athletes and the spirit of sport by catching

actions, it should be clear who constitutes the relevant public and whose interests will be prioritized. If not, there is no standard to check against to determine whether decisions are being made correctly. What is clear, however, from the many reasons offered as justification, is that they all serve public goals.¹⁰⁸

5 WADA shows high holistic publicness

Keeping the context of the strict liability anti-doping system in mind, this section uses the guiding questions identified in Section I to conduct a holistic publicness analysis of WADA's contemporary roles and activities in the anti-doping system.

5.1 Speaking for the community

First, in each of its roles, and with its broadening mandate, WADA declares itself the voice of the anti-doping public. Publicness asks whether an entity acts on behalf of the public on topics that are relevant to the public.¹⁰⁹ In WADA's case, being the voice of the anti-doping community was central to its formation and underpins its legitimacy. Established at a historical point of reputational crisis for sport,¹¹⁰ the IOC's primary goal, through its new creation in WADA, to harmonize anti-doping efforts on a global scale was fundamentally an action to establish a cohesive voice on the issue. In conjunction with its public interest justifications,¹¹¹ the formation and continuous position of WADA as the "world's unifying force for doping-free sport",¹¹² demonstrates that it situates itself as acting on behalf of the global sport public.

5.2 Exercising (conditioning) authority

Second, WADA exercises authority in both senses: as against and on behalf of subjects, whether through unilateral pressure or conditioning. Lo Giacco's *authority on behalf on the community* framing builds on WADA's position speaking for the global sport public. In addition, as in von Bogdandy et al.'s *authority as against the community* framing, WADA unilaterally changes the conditions of athletes subject to its rules whenever there is a new Code amendment or change to an International Standard. Though athletes may participate

in the review and comment process, most comments come from other anti-doping groups.

In its compliance function, WADA both conditions NADOs to follow its standards "... because the benefits of observing them outweighs the disadvantages of ignoring them ... [and] because they [WADA] are equipped with implementing mechanisms imposing positive and negative sanctions".¹¹³ WADA's Code Compliance Questionnaire process (ISCCS) and its ability to impose a wide range of consequences on non-compliant Signatories (Code Art 24.1) demonstrate both kinds of conditioning.¹¹⁴

Perhaps, however, the greatest exercise of authority *against the community* in anti-doping is when an individual athlete tests positive in the strict liability model, which seeks to accomplish general deterrence through inflexible and significant sanctions. The sanctioning of an athlete implies publicness in two senses: first, the very concept of general deterrence is inextricably linked to ideas of community and public meaning. What does this community tolerate or condemn? Second, the imposition of a sanction that removes an athlete from sport and dislodges them from connections to coaches and teammates is an exercise of unilateral authority that changes the conditions of the sanctioned athlete's life in fundamental and tangible ways. The collateral consequences of shame and reputational damage draw their power from community reactions and necessarily involve publicness.

It is important to note that the exercise of authority against the community through the act of sanctioning constitutes exercise of international public authority, using von Bogdandy's definition. Casini notes that one major factor pointing to WADA's high degree of publicness is its formal relationship to international law: how the Copenhagen Declaration and the UNESCO Convention Against Doping in Sport, signed by states, give WADA the regulatory power over the global anti-doping system.¹¹⁵ This is an example of the legality of the authority: von Bogdandy's definition requires an entity to be acting with competence conferred by international authorities, usually states.¹¹⁶ States conferred the authority – albeit indirectly – to exercise authority in examples like explained above.¹¹⁷ Here, von Bogdandy et al.'s conception of exercising unilateral authority as a symptom of publicness builds on Casini's assessment of publicness: the anti-doping system is not simply linked to the international law system, it draws its authoritative power from international state actors and so is inherently exercising

¹⁰⁸ (Casini 2009), p. 432.

¹⁰⁹ (von Bogdandy et al. 2008; Kingsbury 2009a; Lo Giacco 2023)

¹¹⁰ (Hunt et al. 2012), p. 58.

¹¹¹ (Goldsworthy 2018)

¹¹² WADA website, "Who We Are": Who We Are | World Anti Doping Agency.

¹¹³ (von Bogdandy et al. 2008), p. 1382.

¹¹⁴ (Code 2021), Art. 24.1, p. 147; (ISCCS) 2024).

¹¹⁵ (Casini 2009), pp. 433–436.

¹¹⁶ See also (Soek 2006) legality analysis in Ch. 3.

¹¹⁷ (von Bogdandy et al. 2008), p. 1383.

international public authority when it shapes, determines and conditions participants in the anti-doping system.

5.3 Showing functional equivalence

Third, each of WADA's roles identified in Section II(c) are essentially public functions: they are functional equivalents to how a public body acts.¹¹⁸ For example, if an innovative new medicine arrives on the market, a government and its subordinate public bodies would legislate standards for its use, educate and offer advice to pharmacists and doctors about prescribing and delivering the medicine, and monitor compliance with the rules. If a pharmacy departed from the standards, a public body would investigate and prosecute the non-compliance. WADA not only performs functionally equivalent roles, but in addition, over time, WADA has stepped into regulating functionally equivalent topics; in particular, education, intelligence gathering, and investigations. The content WADA regulates belongs most often to states, especially investigations and intelligence where police and military expertise is required.

5.4 Accountability measures via public principles

Finally, the Code embeds fundamentally public principles.¹¹⁹ The Purpose, Scope and Organization section of the Code refers to principles of the rule of law, proportionality and human rights.¹²⁰ The Code notes that it has been “drafted giving consideration to” proportionality and human rights,¹²¹ and clarifies in the Introduction that the anti-doping rules are “intended to be applied in a manner which respects the principles of proportionality and human rights”.¹²² Similarly, the Code also includes procedural rights, such as the right to a fair and timely hearing; the right to notice of hearing decision; and some rights to appeal, which indicate a higher degree of publicness.¹²³ The Code also refers to the rule of law.¹²⁴ In addition to these principles, democratic-type mechanisms for decision-making are present. For example, review and comment processes, called consultation, are embedded in the Code.¹²⁵

Note, however, that there are few accountability mechanisms for anti-doping community members to directly

check WADA's actions because it occupies the apex role in the anti-doping system and holds a monopoly on sport participation. Legal reviews of WADA decisions are the major accountability tool embedded in the Code. The Court of Arbitration for Sport (“CAS”) occasionally condemns WADA actions. Otherwise, the only modes of accountability are soft modes like reputation, for example how the public perceives anti-doping sanctions.

The role of reputation as an accountability measure demonstrates Lo Giacco's point that accountability and legitimacy are related in the context of public entities and the idea of publicness. An entity with high publicness and developed institutional mechanisms would be able to respond to illegitimate acts through accountability activities. While WADA shows high publicness, it has less developed institutional mechanisms as compared to a state, so dissenting opinions either tolerate WADA's decisions or leave and begin new, outlier enterprises (i.e. the Enhanced Games). Without massive resources, ordinary participants in sport, namely athletes, have little choice or power to hold WADA accountable.

6 Public interest considerations in domestic and international law

In each of its roles, and in regulating public topics, WADA shows a high degree of publicness – especially given the addition of new International Standards over the past ten years. Though a sporting public, made up of many kinds of parties, exists and is affected by WADA's actions, WADA has never articulated a clear public interest justifying its activities,¹²⁶ nor does the Code explain whose interests are considered when anti-doping system decisions are made. This section will introduce public interest considerations in domestic and international law, which are used as a tool to clarify and check public bodies when they make discretionary decisions.

6.1 Public interest considerations

Various mechanisms may constrain states when they interact with individuals. There is a massive power imbalance between a state and an individual.¹²⁷ The imbalance of power includes in the form of resources, information and manpower. Boundaries, which aim to rectify the power imbalance, can take the form of rights and remedies protected in a constitution, or as requirements to consider the public interest, as in many prosecutorial roles.

¹¹⁸ (von Bogdandy et al. 2008), p. 1384.

¹¹⁹ (Kingsbury 2009b)

¹²⁰ (Code 2021), pp. 9–10.

¹²¹ (Code 2021), p. 10.

¹²² (Code 2021), pp. 17–18.

¹²³ (Code 2021), Art. 8.1, p. 61 – right to a fair and timely hearing; Art. 8.4, p. 62 – notice of decisions; Art. 13.2, p. 92 – rights to appeal from anti-doping decisions.

¹²⁴ (Code 2021), p. 9.

¹²⁵ (Kingsbury 2009a; Lo Giacco 2023); (Code 2021), p. 11.

¹²⁶ (Goldsworthy 2018)

¹²⁷ (Lo Giacco 2023), p. 301 (citing Waldron).

As a starting point, the public interest is “everything that a private interest is not”;¹²⁸ that is, people making decisions in the public interest are not acting with “a degree of self-interest to advance one’s own goals”.¹²⁹ Instead, decisions made in the public interest balance the needs of the greater society. There are different ways to frame the public interest, for example Rousseau’s general will in Western theory, but the question of what decision is best for a community is central to many systems that organize communities.¹³⁰ Public interest considerations apply in numerous situations where a state actor makes discretionary decisions, but in all cases, “public decision-makers are expected to act responsibly, to be accountable for their actions, and to be open to scrutiny”.¹³¹ The following section will outline the role of the public interest in prosecutorial decision-making.

6.2 Overview of prosecutorial discretion

The role of prosecutorial discretion is an important feature of criminal law systems. It is essential for a criminal system to have discretion for resource efficiency and adaptability.¹³² The argument for discretion is that it supports a fair and independent prosecution, free of pressure.¹³³ The risk of discretion is that it may result in uneven outcomes. Discretion occurs at decision points including whether to open a file, whether to continue it, whether to resolve the file by accepting a guilty plea, whether to continue a trial after hearing the evidence, whether to discontinue a prosecution, and whether to appeal, among others.¹³⁴ The exercise of discretion is a rolling consideration. A prosecutor must constantly review the strength of their case as new evidence emerges. Discretion is exercised by reference to guidance from ethical standards or policies that vary by jurisdiction.

Fundamentally, however, the test used in common law countries and international criminal law to guide the exercise of discretion is whether (1) the evidence is sufficient to secure a conviction, and (2) whether continuing the prosecution is in the public interest. Forms of this test are used in the UK,¹³⁵ Canada¹³⁶, the United States¹³⁷, and in international

criminal law¹³⁸, among other jurisdictions. The specific evidentiary standards may vary¹³⁹, but consideration for the public interest is a fundamental aspect of exercising prosecutorial discretion, because the prosecutor literally speaks and acts for the public in litigation against accused persons.

In civil law and hybrid legal systems, the idea of acting in the public interest appears too, though in slightly different contexts. In France, prosecutors are obliged to prosecute cases that have a “general interest” in continuing, and can discontinue cases for public interest reasons such as where the crime caused very little harm.¹⁴⁰ French prosecutors may also waive prosecutions to divert offenders to therapeutic alternative pathways.¹⁴¹ In Germany and in Sweden, prosecutors are first bound by the obligation to prosecute a file where sufficient evidence exists, but may exercise discretion in certain exceptions, such as where they can choose to discontinue minor files where continuing is not in the public interest.¹⁴² In the Japanese criminal law system, prosecutors can exercise discretion to discontinue a prosecution, and do so by considering public interest factors, including most importantly whether the victim has been compensated.¹⁴³ In Ethiopia, making decisions in the public interest is one of the fundamental powers and duties of prosecutors.¹⁴⁴ The notion of the public interest, and its role in decision-making, appears as part of prosecutorial discretion across civil and hybrid systems to varying degrees.

Factors that may be considered while applying a public interest test depend to some extent on the context of the file. Common factors include the seriousness of the prohibited behaviour or the nature of the offence, the offender’s age, the extent of the likely punishment, how long ago the events occurred, whether the victim will participate (which underpins the likelihood of conviction), and how well-resourced the prosecution service is.¹⁴⁵ However, other factors may become relevant based on the situation: for example, in the prosecutions under the International Criminal Tribunal for Rwanda, there was a unique need to ensure balanced prosecutions across all geographical regions of the country, so the

¹²⁸ (MacNair 2006), p. 181.

¹²⁹ (MacNair 2006) p. 181.

¹³⁰ (Bezemek & Dumbrovsky 2020), pp. 4–5.

¹³¹ (MacNair 2006), p. 184.

¹³² (Jallow 2005), p. 145. See also (Griffin 2001), pp. 263–264.

¹³³ (Jallow 2005), p. 154.

¹³⁴ (Woolley 2017), p. 798 at footnote 11.

¹³⁵ Crown Prosecution Service, Prosecutions: The decision to prosecute, web link: <https://www.niacro.co.uk/sites/default/files/publication/The%20Decision%20to%20Prosecute-CPS-2010.pdf>

¹³⁶ (Woolley 2017), p. 798 at footnote 12.

¹³⁷ (Green 2017), p. 474 at footnote 86.

¹³⁸ (Jallow 2005), p. 147 at footnote 1.

¹³⁹ In Canada, the formulation is “reasonable likelihood of conviction beyond a reasonable doubt”, but in the US, the requirement is that there is “probable cause” – see (Green 2017), p. 465 at footnote 30.

¹⁴⁰ (Gilliéron 2014a), pp. 295, 297.

¹⁴¹ (Gilliéron 2014a), p. 297.

¹⁴² (Gilliéron 2014b), p. 268 (Asp 2012); p. 156.

¹⁴³ (UNAFEI Faculty Paper 1998); see also (Haley 2015) p. 3.

¹⁴⁴ (Tesfay 2017); see also No. Proclamation No. 943/2016, “A proclamation to provide for the establishment of the Attorney General of the Federal Democratic Republic of Ethiopia”, 2nd May 2016 in Addis Ababa, at s. 6(3)(a) & (e).

¹⁴⁵ (Woolley 2017), pp. 809–810 (Jallow 2005); p. 147.

accused's geographical location was a factor used to assess the public interest.¹⁴⁶

7 Proposing a public interest test for anti-doping

7.1 Public interest vs. private interest: how does WADA currently make decisions?

Though the Code sets out detailed procedures for the global anti-doping program, it remains difficult to access the inner workings of WADA's operations and decision-making. What WADA considers when making discretionary decisions, as well as whose interests, are not publicly stated. The only available resource that hints at WADA's process is the WADA Code of Ethics.

One listed general duty for people subject to the Code of Ethics is to "... [r]efrain from any behavior which would bring, or risk bringing WADA into disrepute".¹⁴⁷ This clause identifies that WADA's interests include maintaining its reputation. Similarly, Art. 5 identifies "... the need to protect the image and the integrity of WADA" as a relevant consideration in determining sanctions for breach of the Code of Ethics.¹⁴⁸

Another clause of the Code of Ethics provides that:

"The Independent Ethics Board may decide to publish the decisions it makes under the WADA Code of Ethics. In the interest of transparency and good governance *and provided that public interest so requires* (emphasis added), the Independent Ethics Board shall favor publication ..."¹⁴⁹

This is a form of public interest test, but one that is limited to only situations involving the Independent Ethics Board. The above examples show a tension between, on the one hand, decisions made to protect WADA's reputation, and then on the other hand, decisions on publication of material where it would be in the public interest.

The Code also references a form of public interest test. Article 10.7 governs the effect of Substantial Assistance on sanctioning and allows for WADA to approve confidentiality agreements where "WADA determines it would be in the best interest of anti-doping".¹⁵⁰ This formulation recognizes an interest other than WADA's interests or the NADO's

interests, but it is not as clear of a test as the public interest test. It is difficult to articulate how a public interest decision is made without identifying relevant factors, so even where a public interest-type test is present, there is room to clarify it.

7.2 Discretion points in anti-doping

The following Code sections identify situations where WADA uses discretion and where a public interest test could impact the exercise of that discretion. WADA's unilateral annual review and updates to the Prohibited List are the most well-known example.¹⁵¹ The public interest test is most directly transferable where WADA plays a prosecutorial or investigative role. For example, WADA has a discretionary seizure right¹⁵²: to physically seize samples. The test for justification of this significant power is not found in the body of the section, but rather in the commentary. The commentary states:

WADA would not, of course, unilaterally take possession of Samples or analytical data *without good cause related to* a potential anti-doping rule violation, non-compliance by a Signatory or doping activities by another Person. However, the decision as to whether good cause exists is for WADA to make in its discretion and shall not be subject to challenge. In particular, whether there is good cause or not shall not be a defense against an anti-doping rule violation or its Consequences.¹⁵³

(emphasis added)

The test in the commentary is (1) having "good cause" to act, and (2) the seizure action being related to a potential infraction. However, there is no definition of good cause, nor any reference to an existing legal standard. The commentary is also silent on how close the relation must be to an infraction for it to count. There are also no publicly available guidance or policy regarding how WADA exercises this discretion. Finally, the commentary guards against prejudice to WADA's case. It rejects the possibility of challenging WADA's discretion and excludes the possibility of a failure by WADA being used as a defence.

The seizure action is significant because it involves taking physical possession of an athlete's bodily fluids or analytical data, which engages fundamental and highly significant privacy rights. This has proven to be most controversial in

¹⁴⁶ (Jallow 2005), p. 153.

¹⁴⁷ WADA Code of Ethics (2024b), Art. 3.1, p. 5.

¹⁴⁸ WADA Code of Ethics (2024b), Art. 5, p. 9.

¹⁴⁹ WADA Code of Ethics (2024b), Art. 5.1.7, p. 19.

¹⁵⁰ Code (2021), Art. 10.7.1.3, pp. 75–76.

¹⁵¹ (Kambhampati and Star 2021), p. 235.

¹⁵² Code (2021), Art. 6.8, p. 51.

¹⁵³ Code (2021), Commentary to Art. 6.8, p. 51.

the European Union, where data protection is a fundamental right under the EU Charter of Fundamental Rights.¹⁵⁴ Although Recital 112 of the GDPR flags the need to “reduce and/or eliminate doping in sport” as an example of a public interest that might require a derogation to the data transfer rules, this has been left to each individual state to legislate for.¹⁵⁵ Some states, such as Germany, have imposed strict limits on the transfer of data, permitting its National Anti-Doping Agency broad entitlements to collect, process and use personal data of athletes to administer its doping control system, but only allowing the transmission of results (not the personal data itself) to WADA.¹⁵⁶ Outside of the EU, too, WADA’s processing of data has proven controversial. The Privacy Commissioner in Canada, where WADA is headquartered, recently initiated an investigation into whether the anti-doping related data collected and stored by WADA in its global ADAMS system was used by international federations to make sex-based eligibility decisions.¹⁵⁷

Further, the drafting does not provide for an appeal or ability to challenge the seizure decision. As such, it is an example of a purely discretionary decision – and one with no embedded guardrails. Implementing a public interest test drawn from prosecutions at this point would be a significant step to increasing transparency in exercise of discretion and demonstrate commitment to rights protections and acknowledge seriousness of the action, as well as referencing an existing legal standard or defining “good cause”. This is especially important given the multiple conflicting roles that WADA plays and the potential for partiality that arises.

The following examples demonstrate where WADA sits in a prosecutorial role and where a public interest test with reference to the factors noted in the section above would improve the operations of the Code:

- As above, at Article 6.8 with its discretionary seizure power.¹⁵⁸
- At Article 10.7.1.2: negotiated resolutions to incentivize whistleblowing.¹⁵⁹
- At Article 10.8.2: where an athlete enters an early ‘guilty plea’ their sanction can be reduced, but this requires the consent of WADA and is a pure exercise of discretion without an appeal mechanism.¹⁶⁰

- At Article 13, where WADA has various rights to appeal.¹⁶¹
- At Article 20.7.14, where the Code imposes a responsibility for WADA to initiate investigations, placing it in an investigative role.¹⁶²

In WADA’s other roles, a general public interest consideration would assist in making its decisions more transparent and better articulated. For example, when Code review processes occur, WADA must ‘review and respond’ to comments but is not guided by any principle in how it makes its editing decisions.¹⁶³ Other roles such as standard-setting and compliance do not have specific guidance or commentary in the Code on how they are to be conducted.

Another difficult element of maintaining accountability on the above-noted discretion points is that many are not made public or documented in the slim percentage of files that are published at CAS or by NADOs.¹⁶⁴ For example, while negotiated resolutions have been present in the WADA Code since 2021, public outrage arose when tennis superstar Jannik Sinner resolved his case via negotiations with WADA under Art. 10.8.2 in February 2025.¹⁶⁵ At the first instance, Sinner’s arguments about skin-to-skin contamination were believed and he was found to bear No Fault or Negligence and faced no period of ineligibility.¹⁶⁶ WADA subsequently appealed; while waiting for the appeal hearing to be set, WADA and Sinner agreed to a sanction of three months (well below the sanction Sinner would likely have faced if the appeal had been decided against him, and perfectly timed to avoid missing any Grand Slam tournaments). The outcry was rooted in (1) the public’s lack of awareness of the negotiated resolution clause in the WADA Code¹⁶⁷ and (2) the lack of any guidelines on how negotiated resolution decisions are made by WADA.¹⁶⁸ WADA commented that the negotiated resolution clause

¹⁵⁴ (McDermott 2017)

¹⁵⁵ (Viret 2019)

¹⁵⁶ German Anti-Doping Act 2015, s. 10 Health data.

¹⁵⁷ (2024), news release of the office of the Privacy Commissioner of Canada.

¹⁵⁸ Code (2021), Art. 6.8, p. 51.

¹⁵⁹ Code (2021), Art. 10.7.1.2, p. 75.

¹⁶⁰ Code (2021), Art. 10.8.2, pp. 78–79.

¹⁶¹ Code (2021), Art. 13, pp. 91–98.

¹⁶² Code (2021), Art. 20.7.14, p. 135.

¹⁶³ Code (2021), Art. 25.1.2, p. 158.

¹⁶⁴ (Star and Kelly 2021), p. 107.

¹⁶⁵ (Scott and Jurejko 2025) Scott and Jurejko (2025) Inside the doping deal for tennis’ world number one. BBC. Accessed 24 Oct 2025. URL: <https://www.bbc.co.uk/sport/tennis/articles/cy5ny6lx5dqq>.

¹⁶⁶ (2024) SR/250/2024, *International Tennis Integrity Agency v Jannik Sinner*, decision of 19 August 2024.

¹⁶⁷ (2025) “‘Sad day for tennis’ – Sinner doping ban ‘leaves sour taste’”, BBC Sports news report, 15 February 2025: <https://www.bbc.co.uk/sport/tennis/articles/cz7e412248wo>. See Liam Broady social media post: “Didn’t realise you could reach a settlement regarding a doping ban ... Interesting ...” and Tara Moore social media post: “Can someone explain how a negotiation was possible?”

¹⁶⁸ (2025) See statement of the Professional Tennis Players Association (PTPA): “It’s not just the different results for different players. It’s

“... has been used dozens of times for cases with exceptional circumstances ... given there are many thousands of cases, it is not used that often ... but there has been plenty of precedent for this. Ultimately in this case three months represents a fair outcome under the specific circumstances.”¹⁶⁹

WADA’s reasoning in this statement skips over the lack of publicly available precedent, does not shed any light on why the decision was made, and leans on the appropriateness of the sanction as a justification for the agreement – focusing on a fair outcome while silent on criticisms around fair process.

7.3 Incorporating a public interest test into WADA procedures

In terms of classic prosecution decisions like decision to open a file, continue it, or appeal it, Khambampati and Star make brief reference to this idea, drawn from the policies of Drug Free Sport New Zealand, which is a public entity.¹⁷⁰ Factors would include both universal factors and ones specific to anti-doping. Khambampati and Star propose considering the gravity of the offence and the offender’s age as relevant general factors.¹⁷¹ Other relevant general factors should also include the extent of the likely punishment, how long ago the events occurred, and how well-resourced the prosecuting body is (whether the first instance prosecuting body or WADA itself).

Khambampati and Star identify anti-doping education as one of the factors specific to anti-doping.¹⁷² This factor is relevant because of the relationship between anti-doping education and knowledge about the anti-doping system, including the strict liability system, and rooted in an instinct to inquire about the offender’s intent and moral culpability. Currently, if an anti-doping organization fails in its obligations to provide anti-doping education, that failure does not constitute a defence to an anti-doping rule violation.¹⁷³ CAS decisions are variable: some CAS decisions do not treat a lack of education as a pure mitigating factor; rather, education level is one subjective factor that tribunals consider

when assessing fault.¹⁷⁴ One player raised a lack of education in general as well as a lack of anti-doping education as a mitigating factor. However, the CAS panel, though accepting that the player had limited education:

... noted that the anti-doping rules cannot be interpreted differently based on different levels of education or cultural background. This would defeat the whole purpose of having a consistent and fair anti-doping system.¹⁷⁵

In contrast, in a situation where two players demonstrated a severe misunderstanding of the anti-doping rules and were therefore delayed in sample collection, the CAS panel offered a different view of the role of education in mitigation.¹⁷⁶ While the CAS panel in *Mannini, Possanzini* acknowledged a “taxing duty [for athletes] to properly inform themselves”,¹⁷⁷:

At the same time, one of the corollaries of the diligence required of professional athletes and of the severity of the sanctions attached to anti-doping violations is that athletes must be given a fair opportunity to fully inform and educate themselves, with the benefit of user-friendly tools and materials ... because the regulatory framework is complex and partly private and contractual in nature, any other approach would be unfair.¹⁷⁸

The effect of a lack of anti-doping education on sanction is limited. The strict liability system does not allow for any full defences, and the sanctioning system does not provide for much flexibility based on moral culpability because of its focus on harmonization over individualized deterrence. Though education is relevant, the current misalignment between education as relevant on assessing public interest and as not relevant on sanction could present problems in implementing the test. Jamieson and Ordway examined the use of discretion at sanctioning in anti-doping files by

the lack of transparency. The lack of process. The lack of consistency ...”

¹⁶⁹ (2025) “‘Sad day for tennis’ – Sinner doping ban ‘leaves sour taste’”, BBC Sports news report, 15 February 2025: <https://www.bbc.co.uk/sport/tennis/articles/cz7e412248wo>.

¹⁷⁰ (Khambampati and Star 2021), p. 233.

¹⁷¹ (Khambampati and Star 2021), p. 233.

¹⁷² (Khambampati and Star 2021), p. 233.

¹⁷³ Code (2021), Commentary to Art. 3.2.3, p. 29.

¹⁷⁴ (2021) 2020/A/7536, *Ashley Kratzer v International Tennis Federation (ITF)*, award of 15 June 2021.

¹⁷⁵ (2017) 2017/A/5139, *World Anti-Doping Agency (WADA) v. Confederação Brasileira de Futebol (CBF) & Olivio Aparecido da Costa*, award of 7 December 2017, para 123.

¹⁷⁶ (2009) 2008/A/1557, *Federazione Italiana Giuoco Calcio (FIGC), Daniele Mannini, Davide Possanzini & Comitato Olimpico Nazionale Italiano (CONI) v. World Anti-Doping Agency (WADA)*, award of 27 July 2009.

¹⁷⁷ (2009) *ibid.*, para 41.

¹⁷⁸ (2009) 2008/A/1557, *Federazione Italiana Giuoco Calcio (FIGC), Daniele Mannini, Davide Possanzini & Comitato Olimpico Nazionale Italiano (CONI) v. World Anti-Doping Agency (WADA)*, award of 27 July 2009.

examining the case of Athlete XYZ, an amateur athlete, volunteer and member of his local surf and golf clubs in New Zealand who was sanctioned for buying weight-loss pills online that contained prohibited substances.¹⁷⁹ Athlete XYZ was subject to New Zealand's national anti-doping regulations by way of his membership in local sports clubs, but had never received any anti-doping education and was not aware that he was subject to anti-doping rules. The first instance tribunal had no discretion and was bound by regulations to sanction Athlete XYZ by the time the matter arrived on its docket, but commented that the "utility and fairness in prosecuting recreational athletes who do not receive the educational attention on anti-doping that elite athletes do" is questionable.¹⁸⁰

Another anti-doping-specific factor would be the offender's role in the events, in particular whether a coach or athlete support person (ASP) was involved in the administration of the prohibited substance. This factor is also tied to moral culpability, but in a sense that does have a basis in the current Code with the Substantial Assistance provisions.¹⁸¹ Another factor is whether the athlete has the status of a Protected Person under the Code.¹⁸² If a person was administered a substance by their coach and hold Protected Person status, the public interest calculation would change because the Protected Person would be considered more vulnerable.¹⁸³

Similar to the context in the international criminal tribunal, another relevant factor is whether the matter could or has already been dealt with by other methods i.e. criminal prosecution. Though the CAS considered the issue of double jeopardy in the context of IOC bans double-punishing athletes,¹⁸⁴ there is little literature available to assess whether a previous criminal prosecution would limit an anti-doping prosecution. It would likely be a question of resourcing for the prosecuting anti-doping body.

Finally, the role of evidentiary sufficiency is equally as important as public interest factors in determining whether a file should continue. This includes taking account of procedural issues and disclosure issues. In anti-doping files, potential for these issues arise exists most often in terms

of notice problems, for example with communicating the allegations and the status of samples; laboratory problems including chain of custody and documentation sufficiency; and disclosure of sample information.

In addition to particular factors, a public interest test also considers whether continuing with the prosecution would serve the public interest and maintain confidence in the system. In *WADA v. Federação Pernambucana de Futebol & Alex Bruno Costa Fernandes* ("Fernandes"), WADA pursued an appeal up to CAS despite the file being dogged by compounding notice issues, missing laboratory documentation, and procedural and sample handling issues including years of delay.¹⁸⁵ The CAS panel found that its de novo review power could not heal the severely flawed proceedings.¹⁸⁶ The panel noted:

"The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-apppliers must begin by being strict with themselves" (CAS 94/129) ... It is the responsibility and duty of all international sports federations to conduct themselves in a fashion which is beyond reproach and is scrupulously in accordance with their anti-doping rules and policies contained within their organization's rulebook.¹⁸⁷

(emphasis in original)

The idea that federations ought to act in a manner "beyond reproach" echoes the expectation that "public decision-makers ... act responsibly, [are] ... accountable for their actions and [are] open to scrutiny".¹⁸⁸

The public interest test drawn from prosecutions is useful for the specialized context of exercising discretion about how to proceed on a file. However, though WADA fulfils a prosecutorial role, it also fulfils other public roles. Considering the public interest during the lifecycle of public activities like drafting and standard-setting may not rely on specific factors in the same way as in a prosecution. Instead, the overarching concern, as with government employees, is that the public interest must be the priority in decision-making, rather than personal interests. Personal interests could constitute the literal personal interests of the people who make up the WADA organization, but also, because WADA plays so many roles in the anti-doping system that are sometimes at odds with each other, there is the concern

¹⁷⁹ (Jamieson and 2021), pp. 69–71.

¹⁸⁰ Jamieson and (2021), p. 70.

¹⁸¹ Code (2021), Art. 10.7.1, pp. 72–77.

¹⁸² Code (2021), Art. 10.3.3, p. 68. Protected person status is a relevant factor on sanction where a person has administered a substance to a protected person; it is considered aggravating.

¹⁸³ See definition of "Protected Person" in Code, Annex 1, footnote 127, explaining that protected persons "... may not possess the mental capacity to understand and appreciate the prohibitions against conduct contained in the Code".

¹⁸⁴ (2011) CAS 2011/O/2422 *United States Olympic Committee (USOC) v. International Olympic Committee (IOC)*, award of 4 October 2011.

¹⁸⁵ (2013) CAS 2012/A/2922, *World Anti-Doping Agency (WADA) v. Federação Pernambucana de Futebol & Alex Bruno Costa Fernandes*, award of 10 December 2013.

¹⁸⁶ (2013) *Fernandes*, para 105.

¹⁸⁷ (2013) *Fernandes*, para 140.

¹⁸⁸ (MacNair 2006), p. 184.

for WADA's own interests taking precedent over the greater sport world its activities serve. In WADA's roles other than prosecutorial, the Code and constituting documents should embed a requirement to make decisions in the public interest and clearly articulate that public interest.

8 Limitations and future research

Despite its potential usefulness, adding a public interest test to the anti-doping regulatory structure is not without its difficulties. One challenge for the implementation of publicness in anti-doping, and in particular the use of a public interest test, is whether it makes sense in a global context underpinned by diverse legal cultures. On this point, publicness has been used to analyse Taiwan and China's relationship in an international law context.¹⁸⁹ While East Asian concepts of publicness use different fundamental assumptions about how people interact with their communities, the idea of publicness is also present in Korean literature, though regarding the publicness of societies instead of the publicness of entities.¹⁹⁰ Turning to the African context, the idea of publicness may have limited applicability because notions of "public" in post-colonial countries may not align with Western conceptions of the public.¹⁹¹ As well as various understandings of public and publicness, different jurisdictions have different ways of drawing a distinction between public and private entities in their national laws. Achieving a harmonized public interest test application across jurisdictions might be difficult, though this is a perennial challenge for the global anti-doping apparatus. The pre-existing presence of a public interest test in numerous legal systems, however, supports our argument that embedding a public interest test in WADA's operations already has a foundation in common law, civil and hybrid jurisdictions.

Another future challenge is that more conceptual research is required to operationalize a public interest test in anti-doping. Determining who "counts" as the public is a major question: first, whether that would include the athletes, the NADOs, the sport federations, the IOC, the fans, the player unions, the taxpayers in the funding governments, or other parties; and second, how WADA would prioritize and balance the interests of these parties that are often in conflict with one another. This is particularly relevant where WADA exercises non-prosecutorial powers, and where we have proposed a general public interest test. Further, acceptance of WADA's status as demonstrating high publicness is currently limited to academic consideration, not by practical

decision-makers. Nonetheless, where WADA takes prosecutorial and other public actions, the public interest test that recurs in many global legal systems is a useful tool for accountability.

9 Conclusion

The primary benefit of considering the public interest in moments of discretion in anti-doping is that the public interest serves as an overarching accountability measure, which in turn increases WADA's legitimacy. WADA has discretion while acting in both prosecutorial roles and rule-making activities like updating the Prohibited List and the International Standards, with few robust institutional mechanisms to act as checks on this discretion. While a public interest consideration is not a traditional institutional mechanism (as would be an appeal mechanism or procedural requirement), it is a tool commonly used in public systems to govern the use of discretion in various forms. As such, it adds a standard to judge actions against, as well as a manner of articulating a decision with a clear, consistent purpose. In the context of WADA, embedding this consideration would require first articulating the public interest that underpins and justifies its operations, as argued by Goldsworthy. Following, a public interest consideration rooted in the anti-doping context, both as a test involving the proposed factors and as a general boundary on discretion, would improve legitimacy by adding accountability.

We propose that public interest test for anti-doping should consider factors including the gravity of the anti-doping rule violation, the offender's age and whether they are a Protected Person, the extent of likely sanction, how long ago the events occurred, the resourcing level of the prosecuting body, the offender's access to anti-doping education, the offender's role in the events, and whether the matter has or can be dealt with in another venue. We propose that such a test should be considered by WADA, in conjunction with weighing evidentiary sufficiency including procedural problems, in situations where it acts with discretion, whether in a prosecuting role or legislating role.

Demonstrating reference to the public interest in the sanctioning context would likely have the greatest impact on legitimacy, as sanctions are the most public-facing anti-doping activity, the most reported on, and the most accessible to the general public.¹⁹² Similarly, as seen in the previous section, many of WADA's powers in the sanctioning context are prosecutorial in nature and employing a public interest test in that context has significant precedent. Sanctioning is both a public demonstration of the anti-doping system's

¹⁸⁹ (Kuo 2012)

¹⁹⁰ (Yee 2022)

¹⁹¹ (Adebanwi 2017)

¹⁹² (Roberts and Plesničar 2015)

functionality and an opportunity to clarify the driving public interest behind the strict liability system. In conclusion, embedding a public interest consideration in WADA's operations would increase legitimacy and accountability and improve the system's fairness for individuals interacting with this "public enough" entity.

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Declarations

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