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Genevieve F.E. Birren

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# THE RODCHENKOV ANTI-DOPING ACT: THE UNITED STATES' RESPONSE TO THE RUSSIAN DOPING SCANDAL

GENEVIEVE F.E. BIRREN\*

## INTRODUCTION

In December of 2014, after the Winter Olympic Games in Sochi, Russia, a Russian middle-distance runner, Yuliya Stepanova, alleged a state-run doping scheme and provided German broadcaster ARD with evidence of performance-enhancing drug (PED) use by athletes, coaches, and officials.<sup>1</sup> The World Anti-Doping Agency (WADA) responded by appointing an Independent Commission to investigate the allegations.<sup>2</sup> In November of 2015, the Independent Commission issued a 335-page report, which found violations by multiple Russian sport organizations, coaches, and athletes.<sup>3</sup> It was this investigation and subsequent report which revealed Dr. Grigory Rodchenkov's involvement in the Russian doping scheme to the world.<sup>4</sup> Within six months of the Independent Commission issuing its report, Dr. Rodchenkov was living in Los Angeles, California and working on a film about the Russian doping

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\* Associate Professor in the Sport Management Department, SUNY Cortland; Ph.D., University of New Mexico; M.S., New York University; J.D., Marquette University Law School; B.A., University of Wisconsin-Madison.

1. John T. Wendt, *Flying Down to Rio - The 2016 Summer Olympic Games*, 33 ENT. & SPORTS LAW. 1, 58 (2017).

2. *Id.*; *WADA Announces Details of Independent Commission*, WORLD ANTI-DOPING AGENCY (Dec. 16, 2014), <https://www.wada-ama.org/en/media/news/2014-12/wada-announces-details-of-independent-commission>.

3. Richard W. Pound et al., *The Independent Commission Report #1 Final Report*, WORLD ANTI-DOPING AGENCY (Nov. 9, 2015), [https://www.wada-ama.org/sites/default/files/resources/files/wada\\_independent\\_commission\\_report\\_1\\_en.pdf](https://www.wada-ama.org/sites/default/files/resources/files/wada_independent_commission_report_1_en.pdf).

4. *Id.*

scheme,<sup>5</sup> which would become the award-winning documentary *Icarus*.<sup>6</sup> At the end of 2020, the Rodchenkov Anti-Doping Act was signed into law, giving the United States extraterritorial jurisdiction over foreign nationals involved in sports doping schemes that impact United States citizens.<sup>7</sup> This article discusses Dr. Rodchenkov's involvement in the Russian doping scandal and examines the law enacted in his name, the international response to the Act, and its enforceability and prospective future.

## I. WHO IS DR. GRIGORY RODCHENKOV?

In the summer of 2006, Dr. Grigory Rodchenkov, who holds a Ph.D. in analytical chemistry,<sup>8</sup> became the Director of the Anti-Doping Center, Russia's only WADA-accredited laboratory, a position he would hold until November 2015.<sup>9</sup> He was relieved of his position after WADA released the Independent Commission's report regarding a state-sanctioned doping scandal in Russia.<sup>10</sup>

### A. Early Un-cooperation

The 2015 investigation was not the first time that Dr. Rodchenkov was scrutinized regarding PEDs. In 2011 Russian officials investigated him in relation to a doping scheme involving his sister, Marina, an elite runner.<sup>11</sup> Marina Rodchenkov was convicted on PED-related charges in December of 2013, and although Dr. Rodchenkov was arrested, the charges were eventually dropped.<sup>12</sup>

Throughout 2015, Dr. Rodchenkov was interviewed by the Independent Commission on three separate occasions during its' investigation and was found to be evasive during these interviews, claiming to be under pressure to engage in the doping scheme but was unwilling to provide specific allegations and evidence.<sup>13</sup> During these interviews, Dr. Rodchenkov claimed to have

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5. Rebecca R. Ruiz & Michael Schwartz, *Russian Insider Says State-Run Doping Fueled Olympic Gold*, N.Y. TIMES (May 12, 2016), <https://www.nytimes.com/2016/05/13/sports/russia-doping-sochi-olympics-2014.html>.

6. ICARUS (Alex Productions, Chicago Media Project, Diamond Docs & Impact Partners 2017).

7. Rodchenkov Anti-Doping Act of 2019, 21 U.S.C. § 2401 (2020) [hereinafter Rodchenkov Act].

8. Ruiz & Schwartz, *supra* note 5.

9. Natalia Maryanchik, *10 фактов о Григории Родченкове [10 Facts about Grigory Rodchenkov]*, SPORT EXPRESS (May 13, 2016, 10:30 AM), <https://www.sport-express.ru/doping/reviews/999332/>.

10. Ruiz & Schwartz, *supra* note 5.

11. Pound et al., *supra* note 3, at 207.

12. *Id.*

13. *Id.* at 204.

intentionally destroyed over 1,400 samples in December of 2014, just prior to a WADA audit of his laboratory.<sup>14</sup> He further confirmed knowledge of individuals involved in doping but refused to state who or make any official allegations.<sup>15</sup> The Independent Commission concluded that Dr. Rodchenkov had colluded to “conceal positive drug tests by swapping clean samples for known dirty ‘A’ samples” and was paid for doing so.<sup>16</sup> As a result of its findings, the Independent Commission recommended that Dr. Rodchenkov be removed as the Director of the Anti-Doping Center and that he be added to WADA’s Prohibited Advisor List.<sup>17</sup> After being removed from his position, he moved to the United States shortly thereafter, ostensibly for his own safety; a concern that seemed valid when two of his former colleagues died unexpectedly in February of 2016.<sup>18</sup>

### *B. McLaren Reports and Russian Bans*

Once in the United States, in May of 2016, Dr. Rodchenkov made more specific allegations regarding the Russian doping scandal, first during an interview on 60 Minutes and then in an article in *The New York Times*.<sup>19</sup> Within a week of the reports, WADA appointed Prof. Richard McLaren to investigate Dr. Rodchenkov’s allegations.<sup>20</sup> In July of 2016, McLaren issued his report, confirming many of Dr. Rodchenkov’s allegations and concluding that there had been an effective, state-run scheme to hide positive test results at the Sochi Olympic Games, as well as the 2013 International Amateur Athletic Federation (IAAF, now World Athletics) Championships.<sup>21</sup> In December of 2016, WADA released the second part of the McLaren report, which built upon the first report with additional evidence, and concluded that the state-sponsored Russian doping scheme went back to 2011 and had been in place during the 2012 London Olympic Games.<sup>22</sup>

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14. *Id.* at 203, 279.

15. *Id.* at 205, 210.

16. Pound et al., *supra* note 3, at 212, 221-222, 225, 279-280, 291, 300.

17. *Id.* at 312, 323.

18. Ruiz & Schwirtz, *supra* note 5.

19. *60 Minutes Russia’s Dark Secret* (CBS television broadcast May 8, 2016); Ruiz & Schwirtz, *supra* note 5.

20. Richard H. McLaren, *The Independent Person Report*, WORLD ANTI-DOPING AGENCY (July 18, 2016), [https://www.wada-ama.org/sites/default/files/resources/files/20160718\\_ip\\_report\\_newfinal.pdf](https://www.wada-ama.org/sites/default/files/resources/files/20160718_ip_report_newfinal.pdf).

21. *Id.* at 9-17.

22. Richard H. McLaren, *The Independent Person 2nd Report*, WORLD ANTI-DOPING AGENCY (Dec. 9, 2016), [https://www.wada-ama.org/sites/default/files/resources/files/mclaren\\_report\\_part\\_ii\\_2.pdf](https://www.wada-ama.org/sites/default/files/resources/files/mclaren_report_part_ii_2.pdf).

Following the release of Part I of the McLaren Report, WADA recommended to the International Olympic Committee (IOC) that Russia be banned from the 2016 Olympic Games in Rio, however, the IOC declined to issue a blanket ban; instead, nearly 110 Russian athletes were banned individually.<sup>23</sup> The International Paralympic Committee (IPC) did ban Russia in its entirety from the 2016 Paralympic Games in Rio.<sup>24</sup> Further investigations continued throughout 2017, and in December of that year, the IOC officially banned Russia from the 2018 Winter Olympic Games in PyeongChang; however individual Russian athletes were permitted to compete under the Olympic Flag as an “Olympic Athlete[] from Russia.”<sup>25</sup> Dr. Rodchenkov continued to speak out and make allegations throughout 2017 and 2018, including accusing a member of the Russian FIFA World Cup team, however, insufficient evidence was found to support that allegation.<sup>26</sup> In 2020, Dr. Rodchenkov published a book about his involvement with the doping scandal and his later cooperation to bring it down, which won the William Hill Sports Book of the Year Award, however, Dr. Rodchenkov remains under witness protection in the United States.<sup>27</sup>

## II. WHAT IS THE RODCHENKOV ANTI-DOPING ACT?

### *A. Reasons for Creation*

On October 22, 2019, the House of Representatives passed the Rodchenkov Anti-Doping Act of 2019.<sup>28</sup> Over a year later, in November of 2020, the Senate passed the Rodchenkov Act, and on December 4, 2020, President Donald

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23. Greg Myre & Tom Goldman, *Dubious Olympic Record: More Than 110 Russian Athletes Barred from Rio*, NAT'L PUB. RADIO (Aug. 2, 2016, 10:13 AM), <https://www.npr.org/sections/thetorch/2016/08/02/487642811/the-russian-tally-more-than-110-athletes-barred-from-the-olympics>.

24. *The IPC Suspends the Russian Paralympic Committee with Immediate Effect*, INTERNATIONAL PARALYMPIC COMMITTEE (Aug. 7, 2016), <https://www.paralympic.org/news/ipc-suspends-russian-paralympic-committee-immediate-effect>.

25. Rebecca R. Ruiz & Tariq Panja, *Russia Banned from Winter Olympics by I.O.C.*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/2017/12/05/sports/olympics/ioc-russia-winter-olympics.html>.

26. *FIFA Contacts McLaren over Doping Claims in Football*, BRITISH BROAD. CO. (Nov. 21, 2017), <https://www.bbc.com/sport/football/42062974>.

27. Sean Ingle, *Russian Doping Whistleblower Wins William Hill Sports Book of Year*, GUARDIAN (Dec. 3, 2020, 9:19 AM), <https://www.theguardian.com/sport/2020/dec/03/russian-doping-whistleblower-grigory-rodchenkov-wins-william-hill-sportsbook-of-year-russian-doping-scandal>.

28. Rodchenkov Act, 21 U.S.C. § 2401 (2020).

Trump signed it into law.<sup>29</sup> The Rodchenkov Act “imposes criminal sanctions. . . on certain persons involved in international doping fraud conspiracies, provides restitution for victims of such conspiracies, and requires sharing of information with the United States Anti-Doping Agency (USADA) to assist its fight against doping.”<sup>30</sup>

The House of Representatives report regarding the Rodchenkov Act notes that other countries have criminalized various aspects of doping, but that WADA does not support criminalization.<sup>31</sup> Additionally, Congress found support for the creation of the Rodchenkov Act from the Commission on Security and Cooperation in Europe (Helsinki Commission), which in February of 2018:

held a briefing on “The Russian Doping Scandal: Protecting Whistleblowers and Combating Fraud in Sports.” The briefing featured Dr. Rodchenkov's attorney, Jim Walden . . . [who] discussed combating fraud in sports and the role of whistleblowers in safeguarding the integrity of international competitions. Walden called on Congress to pass legislation to add criminal penalties for doping and stated that a statute could be similar to the Foreign Corrupt Practices Act, a “long-arm statute,” which sanctions foreign government officials for actions that impact U.S. businesses, or amending the Controlled Substances Act to give the U.S. government power to persecute foreign officials and athletes that engage in doping and provide whistleblower protection.<sup>32</sup>

The Helsinki Commission held a further hearing in March of 2018, regarding the 2016 Global Magnitsky Act, which “allows the U.S. government to sanction those who it sees as human rights offenders, freezing their assets and banning them from entering the United States[,]” and then a third in July of 2018 regarding the failure of international sport governing bodies such as WADA, the IOC, and the Court of Arbitration for Sport (CAS) to address problems in

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29. *Id.*

30. H.R. REP. NO. 116-251, at 2 (2019), <https://www.congress.gov/116/crpt/hrpt251/CRPT-116hrpt251.pdf>.

31. *Id.* at 8.

32. *Id.* at 8-9.

sport doping.<sup>33</sup> The World Anti-Doping Code (Code) provides criteria for banned substances and doping methods, testing, sanctions, and a variety of other aspects of doping, but is limited in its scope to those organizations and associated individuals who agree to the terms of the Code.<sup>34</sup> The Rodchenkov Act was created as a response to these hearings in order to “fill an important gap with regard to U.S. law enforcement, serve as a deterrent to those considering engaging in doping fraud, and . . . provide a portal to gain visibility into a wider net of international corrupt practices that are connected to doping fraud.”<sup>35</sup>

### *B. What does the Rodchenkov Act do?*

The Rodchenkov Act “impose[s] criminal sanctions on certain persons involved in international doping fraud conspiracies, to provide restitution for victims of such conspiracies, and to require sharing of information with the United States Anti-Doping Agency to assist its fight against doping, and for other purposes.”<sup>36</sup> Persons, as defined by the Act, include “any individual, partnership, corporation, association, or other entity,” with the exception of athletes, who are specifically excluded.<sup>37</sup>

The scope of the Act is limited to major international sport competitions, which may be for a single event or series of events held over a period of time.<sup>38</sup> There are three criteria which must be met for the event(s) to be considered a major international sport competition under the Act: 1) a competition where “one or more United States athletes and three or more athletes from other countries participate;”<sup>39</sup> 2) the competition “is governed by the anti-doping rules and principles of the Code;”<sup>40</sup> and 3) “the competition organizer or sanctioning body receives sponsorship or other financial support from an organization doing business in the United States; or . . . the competition organizer or sanctioning body receives compensation for the right to broadcast the competition in the United States.”<sup>41</sup>

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33. *Id.* at 9.

34. *World Anti-Doping Code*, WORLD ANTI-DOPING AGENCY (2021), [https://www.wada-ama.org/sites/default/files/resources/files/2021\\_wada\\_code.pdf](https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf).

35. H.R. REP. NO. 116-251, at 9 (2019), <https://www.congress.gov/116/crpt/hrpt251/CRPT-116hrpt251.pdf>; see Rodchenkov Act, 21 U.S.C. § 2401 (2020).

36. 21 U.S.C. § 2401 (2020).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

These criteria mean that U.S. national championships hosted by U.S. sport national governing bodies, professional sport leagues, and collegiate sport organizations are not covered by the Act. U.S. national championships do not include athletes from other countries, and thus fail on the first criteria. Neither the National Collegiate Athletic Association (NCAA) nor any professional leagues in the United States have signed onto the Code,<sup>42</sup> and thus fail to meet the second criterion. A potential result of the Rodchenkov Act may be that it discourages U.S. professional leagues and the NCAA from signing on to the Code in the future, lest they become subject to the Act.

Other features of the Rodchenkov Act provide for criminal penalties, including up to ten years in prison, fines up to \$250,000 for individuals, and up to \$1,000,000 for persons other than individuals, as well as property forfeiture and restitution.<sup>43</sup> The statute of limitations is ten years and requires coordination and information sharing between U.S. government agencies and USADA.<sup>44</sup> Finally, the Act specifically states that, “[t]here is extraterritorial Federal jurisdiction.”<sup>45</sup> This last component has been the focus of much of the international response to the Rodchenkov Act and presents the greatest challenge to the Act’s potential impact.

### *C. Extraterritorial Jurisdiction and Enforcement*

To understand the scope of the Rodchenkov Act, as well as the subsequent responses from international sport governing bodies and anti-doping organizations, the concept of extraterritorial jurisdiction must be explained. At its simplest, extraterritorial jurisdiction is the exercise of legal powers outside of a nation’s territorial border.<sup>46</sup> Of course, it is not that simple.

Jurisdiction manifests in three types: adjudicative, enforcement, and prescriptive.<sup>47</sup> Adjudicative jurisdiction generally involves courts and their right to have power over a person or subject matter.<sup>48</sup> Enforcement jurisdiction gives, “the power ‘to induce or compel compliance or to punish noncompliance’ with

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42. *Code Signatories*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/code-signatories> (last visited Dec. 1, 2021).

43. 21 U.S.C. § 2401.

44. *Id.*

45. *Id.*

46. Anthony J. Colangelo, *What is Extraterritorial Jurisdiction*, 99 CORNELL L. REV. 1303, 1304 (2014).

47. *Id.* at 1310.

48. *Id.* at 1311.

the law.”<sup>49</sup> This can include the enforcement of a judgement rendered by a U.S. court or the actions taken by law enforcement. Lastly, “prescriptive jurisdiction is the power to make and apply law to persons or things.”<sup>50</sup> Congress exercised prescriptive jurisdiction with the passage of the Rodchenkov Act, and enforcement jurisdiction is needed to apply the Act to alleged violators.

Enforcement jurisdiction may be where the Rodchenkov Act faces its greatest challenges, as it will require cooperation from other countries and international law enforcement organizations,<sup>51</sup> as well as international sport organizations. To facilitate this cooperation, the Federal Bureau of Investigation (FBI) created the Sport and Gaming Initiative before the Rodchenkov Act was passed and has begun reaching out to international law enforcement agencies and sport organizations, as well as the U.S. Department of Justice.<sup>52</sup> Additionally, the FBI has met with:

Interpol and the Council of Europe’s Network of National Platforms, in which more than 30 countries work together to probe sports competition. Known as the Group of Copenhagen, the multinational entity has relationships with organizations such as FIFA and the International Olympic Committee, and the FBI was among the agencies on-site at the 2019 Women’s World Cup, aiding real-time investigative efforts.<sup>53</sup>

The International Testing Agency (ITA), discussed later in this article, is another organization that the United States government would need to work with to increase the potential effectiveness and enforceability of the Rodchenkov Act, as well as WADA. WADA has shown a willingness to work with a country’s law enforcement in the past, such as with Interpol and French officials,<sup>54</sup> but WADA’s response to the Rodchenkov Act raises questions as to

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49. *Id.*

50. *Id.* at 1310.

51. Rick Maese, *Behind New Law, the FBI is Getting into Anti-Doping, but Not Everyone Wants the Help*, WASH. POST (Apr. 9, 2021, 8:26 AM), <https://www.washingtonpost.com/sports/2021/04/09/fbi-sports-corruption-rodchenkov-act/>.

52. *Id.*

53. *Id.*

54. Chine Labbé, *Former IAAF Head Diack Targeted in Corruption Inquiry*, REUTERS (Nov. 4, 2015, 5:15 PM), <https://www.reuters.com/article/csports-us-athletics-corruption-probe-idCAKCN0ST34C20151104>.

whether it will work with U.S. law enforcement similarly.<sup>55</sup>

How effectively the Rodchenkov Act can be enforced remains to be seen, and opinions are split. Mark Drumb, the Director of the Transnational Law Institute at the Washington and Lee School of Law, states:

These types of laws are helpful in terms of creating some kind of definition of the crimes. But their bark is often way worse than their bite[.] . . . You can't bring a case if you don't have evidence. Without the transfer of people, information, witnesses, it leads to nothing.<sup>56</sup>

However, Helsinki Commission policy advisor Paul Massaro believes that “[the Rodchenkov Act] has real teeth, and we expect real enforcement. We expect real deterrence, and we have the capacity to do so. We’ve seen exactly this happen with all sorts of extraterritorial criminal law.”<sup>57</sup>

An example of the type of law Mr. Massaro was referring to is the U.S. Foreign Corrupt Practices Act (FCPA).<sup>58</sup> An anti-bribery law with extraterritorial criminal jurisdiction that rarely results in criminal prosecutions, the FCPA is cited by multinational companies as an impetus for anti-bribery compliance.<sup>59</sup> It has also served as a model for other countries passing similar laws.<sup>60</sup> The passage of China’s law, mere weeks after the passage of the Rodchenkov Act, focused on the involvement of non-athletes in sport doping which may be a sign that the Act is already serving as a model similar to the FCPA.<sup>61</sup>

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55. Maese, *supra* note 51; *WADA Statement on U.S. Senate’s Passing of the Rodchenkov Anti-Doping Act*, WORLD ANTI-DOPING AGENCY (Nov. 17, 2020), <https://www.wada-ama.org/en/media/news/2020-11/wada-statement-on-us-senates-passing-of-the-rodchenkov-anti-doping-act> [hereinafter *WADA Statement on U.S. Senate*].

56. Maese, *supra* note 51.

57. *Id.*

58. Alexandra Wrage, *New Anti-Doping Law Could Be a Games-Changer, if Enforced*, FORBES (July 20, 2021, 12:15 PM), <https://www.forbes.com/sites/alexandrawrage/2021/07/20/new-anti-doping-law-could-be-a-gamechanger-if-enforced/?sh=15c7509d250e>.

59. *Id.*

60. *Id.*

61. *Criminal Penalties for Doping Kick in March 1, 2021*, MINISTRY OF JUSTICE OF THE PEOPLE’S REPUBLIC OF CHINA, [http://en.moj.gov.cn/2021-03/02/c\\_597472.htm](http://en.moj.gov.cn/2021-03/02/c_597472.htm) (Mar. 2, 2021) [hereinafter *Criminal Penalties*].

## III. RESPONSES AND ACTIONS

*A. Initial Responses to the Rodchenkov Act*

The Rodchenkov Act not applying to U.S. sport organizations, athletes, and events has been criticized by WADA and IOC. Before the Act passed the U.S. Senate, the IOC was supportive of the legislation's focus on the "athletes' 'entourage'" but concerned about the omission of U.S. professional and college sports from the Act.<sup>62</sup> It encouraged U.S. professional leagues and the NCAA to sign on to the Code, which would make their omission moot.<sup>63</sup>

WADA was more direct in its criticism of the exemption of U.S. sport organizations. WADA president Witold Banka stated:

We join other stakeholders around the globe in asking why this U.S. legislation, which purports to protect athletes and claims jurisdiction overseas, specifically excludes the hugely popular and influential professional and college leagues. Nearly half a million athletes compete in U.S. college sports, and thousands more in the professional leagues. These leagues were originally included in the Act but were subsequently removed without explanation. Why are those who surround the athletes in these associations and leagues now exempt from the scope of this legislation? If it is not good enough for American sports, why is it being imposed on the rest of the world?<sup>64</sup>

Additionally, WADA expressed concern regarding the potential impacts of the U.S. exercising extraterritorial jurisdiction.<sup>65</sup>

In contrast to the international responses, USADA issued a short statement after the passage of the Rodchenkov Act in the Senate, but before it was signed into law, simply thanking the Senate for passing the Act and summarizing the law's key purposes.<sup>66</sup> The United States Olympic and Paralympic Committees'

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62. *IOC Statement on the Rodchenkov Act*, INTERNATIONAL OLYMPIC COMMITTEE (Mar. 12, 2020), <https://olympics.com/ioc/news/ioc-statement-on-the-rodchenkov-act>.

63. *Id.*

64. *WADA Statement on U.S. Senate*, *supra* note 55.

65. *Id.*

66. *Statement from USADA CEO Travis T. Tygart on the Senate Passage of the Rodchenkov Anti-Doping Act*, U.S. ANTI-DOPING AGENCY (Nov. 16, 2020), <https://www.usada.org/statement/travis-tygart-statement-rodchenkov-act/>.

joint response was even briefer, a one-paragraph press release thanking Congress and citing the importance of the Act in the fight against doping.<sup>67</sup> No statements from the NCAA or U.S. professional sports leagues were found.

### *B. Actions Taken by International Organizations and Other Countries*

Although WADA has been critical of the Rodchenkov Act, even before the passage of the act, WADA, IOC, and other countries took some action in response to the Russian doping scandal.

#### 1. International Testing Agency

In December of 2014, the same month that the Russian doping scandal was first brought to light, Recommendation 15 of the Olympic Agenda 2020 called for the protection of clean athletes.<sup>68</sup> Nearly a year later, WADA created a working group to investigate how to make testing independent from sport organizations.<sup>69</sup> In May of 2016, the ITA Policy Steering Group was created.<sup>70</sup> Two years later, in July of 2018, the ITA began full operation.<sup>71</sup>

The ITA serves several functions, including managing in-and out-of-competition testing, assisting major sporting events with doping protocol development and implementation, working with testing laboratories, providing risk assessments, administering the Athlete Biological Passport program and therapeutic use exemptions, results management and sample storage, education, regulatory compliance, and intelligence and investigation.<sup>72</sup> This last function, intelligence, and investigation, includes investigation into actual or potential anti-doping rule violations (ADRV), information gained through whistleblowers and other sources, as well as collaborating with other stakeholders such as international and national sport governing bodies, governments, and law enforcement.<sup>73</sup> This last group should include U.S. law enforcement agencies such as the FBI.

One potential challenge to the ITA's future cooperation with U.S. law

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67. *U.S. Olympic & Paralympic Committee Statement on the Passage of the Rodchenkov Anti-Doping Act*, TEAM USA (Dec. 5, 2020, 3:11 PM), <https://www.teamusa.org/Media/News/USOPC/120520-USOPC-statement-on-the-passage-of-the-Rodchenkov-Anti-Doping-Act>.

68. About Us, International Testing Agency, <https://ita.sport/about-us/> (last visited Dec. 1, 2021).

69. *Id.*

70. *Id.*

71. *Id.*

72. Services, International Testing Agency, <https://ita.sport/services/> (last visited Dec. 1, 2021).

73. *Id.*

enforcement is the nature of the ITA's governance structure. The ITA states that "WADA cannot be the founding body of the ITA nor directly involved in its operations"<sup>74</sup> and lists the IOC as the "Founder" in its statutes;<sup>75</sup> however, WADA was directly involved in the ITA's creation and the WADA Executive Committee has final approval of the membership of the ITA's Foundation Board.<sup>76</sup> This creates the potential for conflicts of interest if board members are submitted that the WADA Executive Committee determines would not be in WADA's best interest. Given the ITA's youth, it remains to be seen if this conflict will arise.

## 2. Actions by Other Countries

In November of 2015, French officials took several IAAF (now World Athletics) officials into custody based on an investigation into extortion and money laundering related to covering up the positive doping test of Russian runner Lilia Shobukhova.<sup>77</sup> These officials included Lamine Diack, the former head of the IAAF, Dr. Gabriel Dollé, the former head of the IAAF's medical and anti-doping department, and Habib Cissé, a senior IAAF official and legal adviser to Diack.<sup>78</sup> Diack's son was also charged; however, he was then, and remains, in Senegal and has not been extradited.<sup>79</sup> In March of 2019, France issued additional arrest warrants related to the investigation for the former head of Russian athletics, Valentin Balakhnichev, and Alexei Melnikov, a former Russian national team coach.<sup>80</sup> The charges involved money laundering alleged to have occurred in France, which was how France was able to exercise

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74. Structure, International Testing Agency, <https://ita.sport/about-us/structure/> (last visited Dec. 1, 2021).

75. Statutes of International Testing Agency, International Testing Agency (Dec. 6, 2019), <https://ita.sport/uploads/2021/02/English.pdf>.

76. *Id.*

77. *French Court Sentences Russia's Ex-Athletics Chief Balakhnichev to Three Years in Prison*, TASS: RUSSIAN NEWS AGENCY, <https://tass.com/sport/1201563> (Sept. 16, 2020, 10:38 AM) [hereinafter TASS].

78. *Id.*; Sean Ingle, *Lamine Diack, Former IAAF Head, Under Investigation in Corruption and Doping Inquiry*, GUARDIAN (Nov. 4, 2015, 7:03 AM), <https://www.theguardian.com/sport/2015/nov/04/lamine-diack-investigation-iaaf-corruption-doping>.

79. *See France Issues Arrest Warrants in Russian Doping Probe*, BRITISH BROAD. CO. (Mar. 19, 2019), <https://www.bbc.com/news/world-europe-47631020>; *Lamine Diack: Former IAAF Head Found Guilty of Corruption and Jailed*, BRITISH BROAD. CO. (Sept. 16, 2020), <https://www.bbc.com/sport/athletics/54176537> [hereinafter *Lamine Diack*].

80. *France Issues Arrest Warrants in Russian Doping Probe*, *supra* note 79.

jurisdiction.<sup>81</sup> In September of 2020, a French court found Balakhnichev, Melnikov, and Diack guilty of corruption charges, sentencing them to prison terms of three, two, and four years respectively; however, Diack's sentence included a two-year suspension and a 500,000 euros fine.<sup>82</sup> Diack's son, Papa Massata Diack, was sentenced, in absentia, to five years in prison and a one million euros fine.<sup>83</sup>

The French investigation began in June of 2015 because of a WADA 'raid' on the IAAF office in Monaco, seizing several documents.<sup>84</sup> The documents that WADA seized indicated criminal activity, and WADA contacted Interpol, which began an investigation.<sup>85</sup> WADA admitted to sharing the information, stating "[t]hese (French) investigations are a result of information passed on by WADA's Independent Commission (IC) to the relevant authorities."<sup>86</sup>

Even before the Russian doping scandal came to light, several countries had already criminalized doping.<sup>87</sup> In 2010, twenty-two of the twenty-seven European Union member countries had laws making the trade and distribution of doping paraphernalia a criminal offense,<sup>88</sup> as did "China, the Democratic Republic of Congo, Mexico, New Zealand, Nicaragua and Tunisia" as of 2013.<sup>89</sup> At the time, only Italy and France permitted criminal penalties for the use of doping products.<sup>90</sup> As far back as 2013, Australia has dealt with doping offenses, including distribution, production, and use, under its criminal code.<sup>91</sup> In 2016, the German Anti-Doping Act went into effect, which provided criminal penalties for possession, distribution, and production of doping items, as well

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81. *Id.*

82. TASS, *supra* note 77.

83. *Lamine Diack*, *supra* note 79.

84. Ingle, *supra* note 78.

85. *Id.*

86. Labbé, *supra* note 54.

87. *The Implementation of the WADA Code in the European Union*, T.M.C. ASSER INSTITUTE (Aug. 2010), [https://www.asser.nl/upload/documents/9202010\\_100013rapport%20Asserstudie%20\(Engels\).pdf](https://www.asser.nl/upload/documents/9202010_100013rapport%20Asserstudie%20(Engels).pdf) [hereinafter *The Implementation*].

88. *Id.* at 37.

89. Jaan Murphy, *Where in the World is Doping a Crime? (Doping in Sports pt. 6)*, PARLIAMENT OF AUSTRALIA (Apr. 24, 2013), [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/FlagPost/2013/April/Where\\_in\\_the\\_world\\_is\\_doping\\_a\\_crime\\_doping\\_in\\_sports\\_pt\\_6](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2013/April/Where_in_the_world_is_doping_a_crime_doping_in_sports_pt_6).

90. *The Implementation*, *supra* note 87, at 10, 24.

91. Jaan Murphy, *Is Doping in Sport a Crime? (Doping in Sports pt. 5)*, PARLIAMENT OF AUSTRALIA (Apr. 24, 2013), [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/FlagPost/2013/April/Is\\_doping\\_in\\_sport\\_a\\_crime\\_doping\\_in\\_sports\\_pt\\_5](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2013/April/Is_doping_in_sport_a_crime_doping_in_sports_pt_5).

as for “elite athletes of organized sport,” who “are defined as athletes that are members of an anti-doping testing pool, which provides mandatory tests also during training.”<sup>92</sup> In 2020, just weeks after the passage of the Rodchenkov Act, China strengthened its criminal laws regarding doping, focusing not on athletes but on those who are involved with providing athletes with banned substances and those involved in organizing doping by athletes,<sup>93</sup> making the law similar to the Rodchenkov Act in its scope of targeted individuals. The law specifically excluded athletes “because cheating athletes will be punished by bans and fines in accordance with the anti-doping rules.”<sup>94</sup>

WADA has not supported the criminalization of doping for athletes but has supported the use of criminal penalties for trafficking and distribution.<sup>95</sup> WADA acknowledged “that countries that have introduced criminal legislation for doping have been effective in catching athlete support personnel that possess or traffic performance enhancing drugs. It seems that, given the threat of being imprisoned, these personnel are often more cooperative with anti-doping authorities.”<sup>96</sup> In its statement WADA cited Italy as an example of a country that had been applying such laws.<sup>97</sup> This seems in contradiction to WADA’s response to the Rodchenkov Act. However, at the time of WADA’s statement, 2015, the Italian and French actions were focused internally; on Italian citizens and activities that occurred within France, respectively, whereas WADA’s later reaction to the Rodchenkov Act focused on the lack of inclusion of U.S. sport organizations and the law’s extraterritorial provisions.<sup>98</sup>

### *C. Actions Taken by the United States*

In 2018, the U.S. Justice Department, in a display of extraterritorial criminal jurisdiction, charged seven officers of Russia’s military intelligence, the Main Intelligence Directorate (GRU), with “computer hacking, wire fraud,

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92. Christian Keidel & Nicolas Klein, *Should Doping in Sport Be Criminalised? A Review of Germany's New Anti-Doping Act*, LAWINSPO (Feb. 10, 2016), <https://www.lawinsport.com/topics/item/should-sports-be-criminalising-doping-a-review-of-germany-s-new-anti-doping-act>.

93. *Criminal Penalties*, *supra* note 61.

94. *Id.*

95. *WADA Statement on the Criminalization of Doping in Sport*, WORLD ANTI-DOPING AGENCY (Oct. 25, 2015), <https://www.wada-ama.org/en/media/news/2015-10/wada-statement-on-the-criminalization-of-doping-in-sport>.

96. *Id.*

97. *Id.*

98. *See generally id.*

aggravated identity theft, and money laundering.”<sup>99</sup> The accused allegedly targeted online “systems used by international anti-doping organizations and officials.”<sup>100</sup>

Among the goals of the conspiracy was to publicize stolen information as part of an influence and disinformation campaign designed to undermine, retaliate against, and otherwise delegitimize the efforts of international anti-doping organizations and officials who had publicly exposed a Russian state-sponsored athlete doping program and to damage the reputations of athletes around the world by falsely claiming that such athletes were using banned or performance-enhancing drugs.<sup>101</sup>

In 2020, Germany charged one of the seven individuals charged in the United States with breaching the German Parliament website.<sup>102</sup> In 2021, Sweden publicly blamed the Russian GRU for hacking the Swedish Sports Confederation but decided it did not have the legal authority to charge and extradite foreign nationals who acted on behalf of a foreign government.<sup>103</sup> As of the writing of this article, none of the Russian officials charged have been extradited to the United States or faced trial, and there is no indication that they will be, demonstrating the challenge in enforcing U.S. laws extraterritorially.

In May of 2021, the Office of National Drug Control Policy (ONDCP) issued a report to Congress regarding WADA governance.<sup>104</sup> The report included a discussion of the status of reforms WADA had made as of the report and “the top ten reform challenges faced by WADA and its stakeholders,

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99. Press Release, The U.S. Dep’t of Just., U.S. Charges Russian GRU Officers with International Hacking and Related Influence and Disinformation Operations (Oct. 4, 2018), <https://www.justice.gov/opa/pr/us-charges-russian-gru-officers-international-hacking-and-related-influence-and>.

100. *Id.*

101. *Id.*

102. Catalin Cimpanu, *German Authorities Charge Russian Hacker for 2015 Bundestag Hack*, ZDNET (May 5, 2020), <https://www.zdnet.com/article/german-authorities-charge-russian-hacker-for-2015-bundestag-hack/>.

103. Catalin Cimpanu, *Sweden Drops Russian Hacking Investigation Due to Legal Complications*, THE RECORD (Apr. 13, 2021), <https://therecord.media/sweden-drops-russian-hacking-investigation-due-to-legal-complications/>.

104. *Report on World Anti-Doping Agency Governance*, OFF. OF NAT’L DRUG CONTROL POL’Y (May 17, 2021), [https://www.usada.org/wp-content/uploads/ONDCP-2021-WADA-Report-to-Congress\\_Final.pdf](https://www.usada.org/wp-content/uploads/ONDCP-2021-WADA-Report-to-Congress_Final.pdf).

accompanied by a roadmap on how to begin addressing them.”<sup>105</sup> The report addressed five reforms that had already been made: The “Formation of an Independent Ethics Board and Ethics Code; United States Representation within WADA; Attempts to Increase Independent Voices at WADA; Role of Independent Athletes; [and] WADA’s Approach to Subsequent Governance Reforms.”<sup>106</sup> In all five areas, the report acknowledged recent positive changes had been made but that more work was needed.<sup>107</sup> Of the ten challenges with recommendations for future action, several involved increased participation by other organizations and individuals, such as National Anti-Doping Agencies, independent athletes, and other stakeholders, as well as looking at WADA’s member appointment process and Executive Committee structure to address conflict of interest concerns.<sup>108</sup> There were also suggestions to create a diversity, equity, and inclusion policy, increase support for signatories that are in need of it, and look at concerns related to the independence and transparency of CAS.<sup>109</sup>

WADA’s response to the report was mixed, mostly pointing out the United States’ acknowledgement of the work that WADA had already done, while not addressing the recommendations made regarding the future.<sup>110</sup> WADA again addressed the lack of U.S. college and professional sports adhering to the Code, stating:

In addition, WADA continues to offer its support to the U.S. Government, the ONDCP and the United States Anti-Doping Agency in their efforts to strengthen the fight against doping in their country. Currently, approximately 90% of American athletes do not compete under the terms of the World Anti-Doping Code, with the main professional leagues and college sports so far operating outside that protection.<sup>111</sup>

In contrast to WADA’s statement, USADA’s statement regarding the report focused exclusively on the ten challenges and corresponding recommendations

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105. *Id.* at 1.

106. *Id.* at 11.

107. *Id.*

108. *See generally id.* at 18-30.

109. *Id.* at 18.

110. *WADA Statement on the U.S. Office of National Drug Control Policy Report to Congress*, WORLD ANTI-DOPING AGENCY (May 17, 2021), <https://www.wada-ama.org/en/media/news/wada-statement-on-the-us-office-of-national-drug-control-policy-report-to-congress>.

111. *Id.*

with no mention of the reforms WADA had made to date.<sup>112</sup>

Two days before the start of the Summer Olympic Games in Tokyo in 2021, the Helsinki Commission held a hearing regarding Rodchenkov Act enforcement at the Tokyo Games.<sup>113</sup> Witnesses at the hearing included Edwin Moses, Emeritus Chair, U.S. Anti-Doping Agency.<sup>114</sup> Mr. Moses raised concerns regarding a lack of transparency on the part of WADA based on WADA's unwillingness to release testing numbers prior to the Tokyo Summer Olympic Games.<sup>115</sup> He also noted that testing was down by nearly half in 2020 and twenty percent as of that point in 2021.<sup>116</sup> However, this drop may well be due to the COVID-19 pandemic, limiting the ability of doping collection officers to travel to collect samples and the cancellation of many sporting events.<sup>117</sup> Mr. Moses also commended the ONDCP for withholding partial payment of the United States' dues to WADA pending action on the recommendations in the ONDCP report.<sup>118</sup>

It is unknown at this time what involvement the FBI had in the Tokyo Olympic Games.<sup>119</sup> The FBI was hoping to be involved in an operation similar to the one it was involved with at the 2019 FIFA Women's World Cup,<sup>120</sup> but the low number of positive tests (six)<sup>121</sup> thus far from the Games decreases the opportunity for investigations to arise.

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112. *USOPC AAC and USADA Joint Statement and Summary of Recommendations: ONDCP Report on WADA Governance Reform*, U.S. ANTI-DOPING AGENCY (May 17, 2021), <https://www.usada.org/statement/usopc-aac-usada-joint-statement-ondcp-report-wada-reform/>.

113. *The First Clean Olympics? Rodchenkov Act Enforcement at Tokyo 2021: Hearing Before the Comm'n on Sec. & Coop. in Eur.: U.S. Helsinki Comm'n*, 117th Cong. (2021), <https://www.csce.gov/sites/helsinkicommission.house.gov/files/unofficial-transcript/0721%20The%20First%20Clean%20Olympics%20-%20Rodchenkov%20Act%20Enforcement%20at%20Tokyo%202021%20.pdf> [hereinafter *The First Clean Olympics?*].

114. *Id.*

115. *Id.* at 6.

116. *Id.*

117. Rick Maese, *Covid Disrupted Drug Testing. Athletes Hope that Doesn't Taint Tokyo Olympics*, WASH. POST (July 23, 2021, 3:14 PM), <https://www.washingtonpost.com/sports/olympics/2021/07/23/doping-testing-tokyo-olympics/>.

118. *The First Clean Olympics?*, *supra* note 113.

119. *See* Maese, *supra* note 51.

120. *Id.*

121. *Anti-Doping Rule Violations: Olympic Games Tokyo 2020*, INTERNATIONAL TESTING AGENCY, <https://ita.sport/sanction/Olympic-games-tokyo-2020/> (last visited Dec. 1, 2021).

## CONCLUSION

The impact of the Rodchenkov Anti-Doping Act remains to be seen. For the law to be effective, cooperation from international sports and anti-doping organizations and international law enforcement entities is required, and that cooperation is not guaranteed. The continued international criticism regarding the omission of United States collegiate and professional sports combined with the U.S. government's continued investigations and criticisms into WADA's governance may well create an environment too hostile to allow the necessary cooperation for the Rodchenkov Act to be applied. The activity surrounding the regulation of doping, and the Rodchenkov Act, in particular, is significant and developing right now. Five or so years from now, these activities and their outcomes, as well as indictments that may arise from the Rodchenkov Act, will likely be ripe for examination.