

# The International Olympic Committee Suspends The Russian Olympic Committee But May Permit Russian Athletes To Participate In The 2018 PyeongChang Olympic Games

*December 11, 2017*

On December 5, 2017, the International Olympic Committee (“IOC”) Executive Board issued a sweeping decision suspending the Russian Olympic Committee (“ROC”), among others, and imposed “strict conditions” on the participation of Russian athletes in the 2018 PyeongChang Winter Olympic Games (“2018 PyeongChang Games”). The decision is the IOC’s most recent response to an alleged doping scheme directed by the Russian Ministry of Sport, with support from the Russian Federal Security Service, Center of Sports Preparation of National Teams of Russia and laboratories in Moscow and Sochi accredited by the World Anti-Doping Agency (“WADA”).

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## Background

In May 2016, the American television program “60 Minutes” and the New York Times reported allegations by Dr. Grigory Rodchenkov, the former director of the Moscow WADA-accredited laboratory that, among other things, elite Russian athletes used a cocktail of three prohibited anabolic steroids developed by the alleged whistle-blower himself in the lead-up to the London Olympics in 2012 and during the Sochi Games with state support.<sup>1</sup>

Dr. Rodchenkov’s statements led WADA to commission an independent investigation by Richard McLaren, who attempted to confirm Dr. Rodchenkov’s claims through interviews with Dr. Rodchenkov, a review of materials provided by Dr. Rodchenkov during his tenure at the Moscow and Sochi laboratories, such as emails, databases and Excel spreadsheets, and forensic analysis of doping control samples.<sup>2</sup>

The first of McLaren’s reports, published on July 16, 2016, weeks before the 2016 Rio Games, served as the basis for the IOC Executive Board’s decision of July 24, 2016, in which it determined that “all Russian athletes seeking entry to the Olympic Games Rio 2016 are considered to be affected by a system subverting and manipulating the anti-doping system” and “have to assume the consequences of what amounts to a collective responsibility in order to protect the credibility of the Olympic competitions.”<sup>3</sup> However, the IOC also

acknowledged that “every human being is entitled” to “individual justice” and committed to applying the “rules of natural justice.”<sup>4</sup> Accordingly, the IOC allowed Russian athletes to participate in the 2016 Rio Games if they could “rebut the applicability of collective responsibility” by demonstrating to their relevant international federation that they had a clean anti-doping record.<sup>5</sup>

In the lead-up to the 2018 PyeongChang Games, numerous anti-doping organizations have criticized the IOC’s conduct since the 2016 Rio Games, arguing that “IOC inaction imperils clean athletes and the future of the Olympic movement,” and called upon the IOC “to hold Russia accountable.”<sup>6</sup> At its December 5, 2017 Executive Board meeting, the IOC issued a sweeping decision that far surpasses the scope of its July 24, 2016 decision and imposed stiff penalties against the ROC and other Russian officials in sport.

Among other things, the December 5, 2017 IOC Executive Board decision suspends the ROC with immediate effect, refuses to accredit any official from the Russian Ministry of Sport for the 2018 PyeongChang Games and excludes former Minister of Sport, Vitaly Mutko, and former Deputy Minister, Yuri Nagornyykh, from participating in the 2018 PyeongChang Games as well as all future Olympic Games. The IOC also required the ROC to contribute US\$15 million toward the establishment of the Independent Testing Authority.<sup>7</sup>

Although the IOC Executive Board decision in theory allows Russian athletes to participate in the

<sup>1</sup> Rebecca R. Ruiz and Michael Schwartz, “Russian Insider Says State-Run Doping Fueled Olympic Gold,” NYTIMES (May 12, 2016); Richard McLaren, Independent Person Report (July 16, 2016), p. 2. Allegations of widespread doping in the Russian Federation began to surface in December 2014 in a German documentary. Matt Bonesteel, “German TV documentary alleges that ‘99 percent’ of Russian Olympic athletes are doping,” THE WASHINGTON POST (Dec. 4, 2014).

<sup>2</sup> The IOC also commissioned additional investigations by Samuel Schmid and Denis Oswald. *See, e.g.*, IOC Disciplinary Commission’s Report to the IOC Executive Board (Dec. 2, 2017); IOC Sanctions Two Russian Athletes as part of Oswald Commission Findings (Nov. 1, 2017).

<sup>3</sup> International Olympic Committee, Decision of the IOC Executive Board Concerning the Participation of Russian Athletes in the Olympic Games Rio 2016 (July 24, 2017).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Joint Statement Developed by National Anti-Doping Organization Leaders Following Summit in Denver, “Doping Crisis Threatens 2018 Winter Olympics” (Sept. 14, 2017).

<sup>7</sup> *See* Decision of the IOC Executive Board (Dec. 5, 2017), Sections I, III-VI and VIII. *See also* IOC Suspends Russian NOC and Creates a Path for Clean Individual Athletes to Compete in PyeongChang 2018 Under the Olympic Flag.

2018 PyeongChang Games, notwithstanding the ROC's suspension, the IOC has imposed strict conditions on their participation and has reserved "its absolute discretion" in determining who may qualify. The strict conditions require an athlete to "be considered clean," meeting the following three criteria: (i) "Athletes must not have been disqualified or declared ineligible for any Anti-Doping Rule Violation"; (ii) "Athletes must have undergone all the pre-Games targeted tests recommended by the Pre-Games Testing Task Force"; and (iii) "Athletes must have undergone any other testing requirements specified by the panel to ensure a level playing field."<sup>8</sup> Whether a Russian athlete is able to satisfy these conditions will be evaluated by a panel chaired by Valerie Fourneyron, Chair of the Independent Testing Authority, which will determine an "invitation list" of eligible athletes that the IOC will "in its absolute discretion" determine whom to invite to the 2018 PyeongChang Games. In addition, invited Russian athletes may only participate in the 2018 PyeongChang Games "under the name 'Olympic Athlete from Russia,'" must "compete with a uniform bearing this name and under the Olympic Flag" and will not hear the Russian national anthem during any medal ceremonies.<sup>9</sup>

### **Noteworthy differences between the IOC's approach to Russian athletes in the 2016 Rio and 2018 PyeongChang Games**

The strict conditions set forth in the IOC's December 5, 2017 Executive Board decision raise numerous uncertainties regarding the participation of Russian athletes in the 2018 PyeongChang Games, particularly in comparison to the IOC Executive

Board's treatment of Russian athletes in the 2016 Rio Games.

*First*, the IOC Executive Board has banned Russian athletes who "have been disqualified or declared ineligible for any Anti-Doping Rule Violation," which may reflect an attempt by the IOC to modify its approach from the 2016 Rio Games imposing a categorical ban on the participation of any athlete "who has *ever* been sanctioned for doping"<sup>10</sup> and which was struck down by *ad hoc* panels in Court of Arbitration for Sport ("CAS") proceedings in 2016.<sup>11</sup> Although the language in the December 5, 2017 decision is ambiguous, it could be read to allow Russian athletes who have been sanctioned for anti-doping rule violations in the past, but who have served their sanctions and who otherwise satisfy the remaining eligibility criteria, to participate in the 2018 PyeongChang Games.

*Second*, noticeably absent from its December 5, 2017 decision is any express commitment to respecting the rights of natural justice of Russian athletes. Whereas the IOC in 2016 expressly affirmed its commitment to honouring "the rules of natural justice, individual justice, to which every human being is entitled,"<sup>12</sup> the December 5, 2017 IOC decision does not include any such express commitment.<sup>13</sup> The IOC's silence in this regard may reflect an attempt to distinguish the reasoning in the above-referenced decisions by CAS *ad hoc* panels in 2016, which held that a categorical ban of Russian athletes with prior anti-doping rule violations was, *inter alia*, incompatible with the IOC's express commitment in 2016 to the rights of natural justice

<sup>8</sup> See Decision of the IOC Executive Board (Dec. 5, 2017), Section II. See also IOC Suspends Russian NOC and Creates a Path for Clean Individual Athletes to Compete in PyeongChang 2018 Under the Olympic Flag.

<sup>9</sup> Decision of the IOC Executive Board (Dec. 5, 2017), Section II.3.

<sup>10</sup> See Decision of the IOC Executive Board Concerning the Participation of Russian Athletes in the Olympic Games Rio 2016 [emphasis added].

<sup>11</sup> See, e.g., CAS ad hoc Division OG 16/004, Yulia Efimova v. ROC, IOC & FINA, award of August 5, 2016,

¶¶ 7.24-7.25; CAS ad hoc Division OG 16/013, Anastasia Karabelshikova & Ivan Podshivalov v. FISA & IOC, award of August 4, 2016, ¶ 7.22.

<sup>12</sup> See Decision of the IOC Executive Board Concerning the Participation of Russian Athletes in the Olympic Games Rio 2016.

<sup>13</sup> The Olympic Charter provides that "[a]ny dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration." See Olympic Charter, 2015, Rule 61(2).

and thus unenforceable,<sup>14</sup> and to insulate from review any of the conditions the IOC Executive Board has imposed on December 5, 2017. Irrespective of any express commitment by the IOC Executive Board to natural justice, athletes may still seek to challenge the conditions imposed by the IOC Executive Board as incompatible with the Olympic Charter, which guarantees the right to be heard.<sup>15</sup>

*Third*, in contrast with the IOC's 2016 Executive Board decision, which accorded significant responsibilities to international federations in evaluating the eligibility of Russian athletes, the IOC has established a two-tiered structure for evaluating whether an athlete meets these conditions, with the invitation list to be determined "by a panel chaired by Valerie Fourneyron, Chair of the [Independent Testing Authority]" and including "members of the Pre-Games Testing Task Force: one appointed by WADA, one by the DFSU [Doping-Free Sport Unit] and one by the IOC, Dr Richard Budgett" and with the IOC "ultimately determin[ing] the athletes to be invited from the list."<sup>16</sup>

*Finally*, the requirement that athletes "must have undergone any other testing requirements specified by the panel to ensure a level playing field," combined with the IOC's complete discretion to determine which Russian athletes to invite to the 2018 PyeongChang Games, introduces uncertainty into the conditions for entry for Russian athletes. It is unclear what additional "testing requirements" may be required by the panel, and whether it is feasible for Russian athletes to fulfil these requirements in the short timetable before the 2018 PyeongChang Games.

In sum, the IOC's December 5, 2017 Executive Board decision excludes numerous officials in the Ministry of Sport from participating in the 2018

<sup>14</sup> See CAS ad hoc Division OG 16/004, Yulia Efimova v. ROC, IOC & FINA, award of August 5, 2016, ¶¶ 7.24-7.25.

<sup>15</sup> See Olympic Charter, 2015, Bye-law to Rule 59.

<sup>16</sup> See Decision of the IOC Executive Board Concerning the Participation of Russian Athletes in the Olympic Games Rio 2016, Section II.I-II. See also IOC Suspend Russian NOC and Creates a Path for Clean Individual Athletes to Compete in PyeongChang 2018 Under the Olympic Flag.

PyeongChang Games as well as future Olympic Games,<sup>17</sup> but still in theory allows clean Russian athletes to participate in the 2018 PyeongChang Games, provided that they meet the strict conditions referred to in the IOC's decision. However, it remains to be seen whether each of these strict conditions will remain in effect and/or survive any appeals that athletes may file with CAS, which has exclusive jurisdiction to hear disputes "arising on the occasion of, or in connection with, the Olympic Games."<sup>18</sup>

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<sup>17</sup> See Decision of the IOC Executive Board Concerning the Participation of Russian Athletes in the Olympic Games Rio 2016, IV ("To exclude the then Minister of Sport, Mr Vitaly Mutko, and his then Deputy Minister, Mr Yuri Nagornykh, from any participation in all future Olympic Games"). The IOC Executive Board also withdrew "Mr Dmitry Chernyshenko, the former CEO of the Organising Committee Sochi 2014, from the Coordination Commission Beijing 2022." *Id.*, Section V.

<sup>18</sup> See above note 13.