

THE COMPETING JUSTICES OF CLEAN SPORT: STRENGTHENING THE INTEGRITY OF INTERNATIONAL ATHLETICS WHILE AFFORDING A FAIR PROCESS FOR THE INDIVIDUAL ATHLETE UNDER THE WORLD ANTI- DOPING PROGRAM

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I. INTRODUCTION

At the 2008 Summer Olympic Games in Beijing, China, track and field spectators marveled at the world-record breaking performance of Jamaican sprinter, Usain Bolt, in the Men's 100-Meter Final.¹ In running 9.69 seconds and breaking his previous world record of 9.72, Bolt stunned observers as he ran his time with no measurable wind assistance and slowed in the last 15 meters of the race to celebrate his victory.² Yet before 2008, Bolt had never broken 10 seconds in the 100 meters; in fact, the 100 meters was not even considered Bolt's strongest track event.³ Later that week, Bolt went on to claim two more world records while earning Olympic gold medals in the 200 meters and 4x100 meter relay.⁴

Not surprisingly, Bolt has faced questions from reporters about taking performance-enhancing drugs.⁵ While Bolt has denied such allegations and has never failed a drug test, he is subject to public skepticism, especially given track and field's tainted history of drug scandals by a number of Olympic champions, world champions, and record holders.⁶ As Bolt now must defend the legitimacy of

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1. David Powell, *A Closer Look Beyond Bolt and his 9.69*, INTERNATIONAL ASSOCIATION OF ATHLETIC FEDERATIONS, Aug. 18, 2008, <http://www.iaaf.org/OLY08/news/kind=103/newsid=46787.html>.

2. Christopher Clarey, *Sprinters Marvel at Bolt and Are Sure That His Best Is Yet to Come*, N.Y. TIMES, Aug. 19, 2008, at D7.

3. Powell, *supra* note 1 (stating that Bolt is considered more competitive in the longer sprint events).

4. IAAF, *News Flash: Bolt Does the Double with 19.30 Sec. World Record!*, INTERNATIONAL ASSOCIATION OF ATHLETIC FEDERATIONS, Aug. 20, 2008, <http://www.iaaf.org/OLY08/news/kind=101/newsid=47045.html>; IAAF, *News Flash: World 4x100m Record, 37.10 sec., Bolt and Jamaica Again!*, International Association of Athletic Federations, Aug. 22, 2008, <http://www.iaaf.org/OLY08/news/kind=100/newsid=47266.html>.

5. Jeré Longman, *Doubts Rise as 100-Meter Record Falls*, N.Y. TIMES, June 2, 2008, <http://www.nytimes.com/2008/06/02/sports/othersports/02track.html>.

6. *Id.* (noting that among such athletes who have been stripped of their honors for doping

his impressive performances to critics, his situation exemplifies precisely one of the negative effects of doping in athletics. Indeed, a common belief in the global athletic community is that many sporting events have become “competition[s] between pills, not skills, and that the sports champions of the future will be chemically created.”⁷ Even if an athlete like Bolt has never tested positive for any performance-enhancing substance, “the rumors, accusations and doubts weaken confidence in sport, particularly in the athletes who participate.”⁸

The International Olympic Committee (“IOC”) and the World Anti-Doping Agency (“WADA”) have recognized the importance of eliminating the use of performance-enhancing drugs at all levels of competition in order to restore the public’s trust in athletes and sports organizations.⁹ Nevertheless, a zero-tolerance anti-doping policy poses threats to fundamental legal principles regarding personal freedom and the protection of individual rights of accused athletes.¹⁰ This comment first discusses the legal framework underlying anti-doping policy, looking initially at the structure of the international governing bodies of sport, and then tracing the historical development of international anti-doping policy. In providing this background, it highlights the early challenges confronted by sports authorities in their initial efforts to eliminate doping from international competition.

Next, it examines the modern anti-doping movement, focusing on the two bodies at its center, the WADA and the Court of Arbitration for Sport (“CAS”) in order to show that through the evolution of these two organizations, the difficulties raised by previous anti-doping efforts were significantly reduced. However, despite such progress in international anti-doping policy, many procedural issues still persist; it is therefore important to balance the competing equities of promoting the integrity of athletics as a whole, while protecting the individual rights of the accused athlete through a fair legal process. Finally, this comment advocates that recent developments in international anti-doping policy have yielded beneficial results, bringing the movement closer to achieving a balance between the fight against doping in sport and the fair treatment of athletes.

violations are Ben Johnson, Marion Jones, Justin Gatlin, Tim Montgomery, and Kelli White).

7. Robyn R. Goldstein, *An American in Paris: The Legal Framework of International Sport and the Implications of the World Anti-Doping Code on Accused Athletes*, 7 VA. SPORTS & ENT. L.J. 149, 151 (Fall 2007) (quoting James B. Jacobs & Bruce Samuels, *The Drug Testing Project in International Sports Dilemmas in an Expanding Regulatory Scheme*, 18 HASTINGS INT'L. & COMP. L. REV. 557, 559 (1995)).

8. *Id.*

9. Andrew Goldstone, *Obstruction of Justice: The Arbitration Process for Anti-Doping Violations During the Olympic Games*, 7 CARDOZO J. CONFLICT RESOL. 361, 363 (2006).

10. Ryan Connolly, *Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. The Protection of Rights of Accused Athletes*, 5 VA. SPORTS & ENT. L.J. 161, 194 (2006).

II. STRUCTURE OF THE INTERNATIONAL GOVERNING BODIES OF SPORT

International sports law and policy have traditionally been centered on the Olympic movement.¹¹ Since its creation in 1894, the IOC has been the supreme authority on all issues surrounding the Olympic Games, including international doping control.¹² All International Federations (IFs), National Governing Bodies, and National Olympic Committees are subject to the IOC's rules, provided that their respective sport or team wishes to participate in the Olympic Games.¹³ IFs, such as the International Association of Athletic Federations ("IAAF"), set the rules for their particular sport and host competitions outside of the Olympics.¹⁴ IFs also establish eligibility rules, select judges, and resolve technical issues concerning their sport.¹⁵

National Governing Bodies, such as United States Track and Field, are members of IFs and manage a particular sport on a national level while adhering to the laws of their respective IFs.¹⁶ The IF recognizes only one National Governing Body per country for each sport.¹⁷ National Olympic Committees, such as the U.S. Olympic Committee, are responsible for selecting the athletes that will represent their country in the Olympic Games.¹⁸ The IOC's decisions have a broad reach, influencing the rules and principles underlying modern sport.¹⁹ The IOC's anti-doping regulations have informed the anti-doping programs of many International Federations and national anti-doping organizations.²⁰ In this way, the IOC sets the global agenda for anti-doping policy.²¹

III. DEVELOPMENT OF ANTI-DOPING REGULATIONS

The use of performance-enhancing drugs in athletics dates as far back as 3,000 years ago, when athletes in Ancient Greece followed special diets and ingested stimulating potions in order to gain an edge on their competitors.²² This trend continued into the 19th century as cyclists and other endurance athletes often used strychnine, caffeine, cocaine, and alcohol.²³ In 1904, Thomas Hicks won the

11. Goldstein, *supra* note 7, at 153.

12. Connolly, *supra* note 10, at 163.

13. *Id.*

14. Goldstein, *supra* note 7, at 154.

15. *Id.*

16. Connolly, *supra* note 10, at 163.

17. Goldstein, *supra* note 7, at 154.

18. Connolly, *supra* note 10, at 163.

19. Goldstein, *supra* note 7, at 154.

20. *Id.*

21. *Id.*

22. Connolly, *supra* note 10, at 162.

23. World Anti-Doping Agency, *A Brief History of Anti-Doping*,

<http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=312> (last visited Oct. 8, 2008) [hereinafter WADA, *Brief History*].

Olympic marathon in Saint Louis with the aid of raw egg, injections of strychnine, and doses of brandy administered to him during the race.²⁴

By the 1920s, sports organizations began to realize the need for restrictions on drug use in athletic competition.²⁵ Hence, in 1928, the IAAF became the first IF to ban doping, and soon many others followed suit.²⁶ However, because the IFs that banned doping did not perform any tests on athletes, their restrictions remained largely ineffective.²⁷ Meanwhile, the doping problem grew worse with the invention of synthetic hormones in the 1930s.²⁸

Beginning in the 1950s, weightlifters used testosterone to increase bulk and strength, while amphetamines became popular among cyclists in the 1960s.²⁹ Addressing this growing problem, in 1966, the International Cycling Union and the Fédération Internationale de Football Association were among the first IFs to introduce doping tests in their respective World Championships.³⁰ The following year, the IOC created the Medical Commission and produced its first list of prohibited substances.³¹ With these in place, the IOC introduced drug tests in 1968 at the Olympic Winter Games in Grenoble, France and at the Olympic Summer Games in Mexico City, Mexico.³²

Beginning in the 1970s, most International Federations implemented some form of early drug testing.³³ Yet anabolic steroid use increased, particularly in strength events, because the tests could not detect these drugs.³⁴ In 1976, after a more reliable test method had developed, the IOC added anabolic steroids to its list of prohibited substances, resulting in an increase in the number of disqualifications in the late 1970s.³⁵ Despite the increase in disqualifications, the IOC still rarely enforced its provisions for most of the 1970s; as a result, athletes continued to ignore the IOC's Anti-Doping Code.³⁶

The IOC's failure to consistently enforce the Anti-Doping Code was exposed at the 1988 Olympic Games in Seoul, Korea.³⁷ At that time, Ben Johnson, a Canadian sprinter tested positive for stanozolol, an anabolic steroid, just two days after winning the gold medal and breaking the world record in the 100 meters.³⁸

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Goldstone, *supra* note 9, at 364.

30. WADA, *Brief History*, *supra* note 23.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Goldstone, *supra* note 9, at 364.

37. *Id.*

38. WADA, *Brief History*, *supra* note 23.

Johnson's case, inciting much public outrage, increased the world's demand for stronger anti-doping enforcement.³⁹

In response to the fury and disgust that followed Ben Johnson's doping violation, sports organizations made a public effort to strengthen their anti-doping rhetoric.⁴⁰ However, most sports organizations continued to take a protective stance over the reputations of their athletes and their sport by issuing lenient sentences for violators in accordance with their own rules and regulations.⁴¹ Moreover, the anti-doping movement faced new challenges as athletes used modern and undetectable methods to enhance their performances, such as "blood doping."⁴² Although athletes had practiced blood doping since the 1970s, and the IOC banned it in 1986, increasing use of erythropoietin ("EPO") to raise levels of hemoglobin in the bloodstream presented a particular obstacle to anti-doping enforcement because no reliable EPO detection test existed.⁴³

Another obstacle hampering anti-doping efforts was the lack of coordination among various governing bodies. This was made apparent during the 1998 Tour de France, when French authorities discovered a car belonging to the Festina cycling team containing huge quantities of various performance-enhancing drugs.⁴⁴ The team was disqualified, and soon French officials uncovered more drugs at other team headquarters, causing six teams to drop out of the race in protest and leading to a major reassessment of the role of public authorities in anti-doping affairs.⁴⁵ At the time of this incident, the various forums, such as the IOC, sports federations and individual governments, maintained different definitions, policies, and sanctions. These differences created confusion over doping sanctions, which were often disputed and sometimes overruled in civil courts.⁴⁶ The Tour de France scandal highlighted the need for an independent international agency, which would set uniform standards for anti-doping regulation and coordinate the efforts of sports organizations and public authorities.⁴⁷

39. Goldstone, *supra* note 9, at 365.

40. *Id.*

41. *Id.*

42. WADA, *Brief History*, *supra* note 23 (explaining that "[b]lood doping" involves the removal and subsequent re-infusion of the athlete's blood in order to increase the level of oxygen-carrying hemoglobin); World Anti-Doping Agency, *Q&A on the Code*, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=367> (last visited Sept. 26, 2009) (stating that blood doping has also come to refer generally to the use of performance enhancing drugs in endurance sports).

43. WADA, *Brief History*, *supra* note 23 (noting that an EPO detection test, based on a combination of blood and urine analysis, was not implemented until 2000 at the Sydney Olympic Games).

44. *Tour Tarnished by Drugs Scandal*, BBC NEWS, Aug. 3, 1998, http://news.bbc.co.uk/2/hi/special_report/1998/07/98/tour_de_france/144326.stm.

45. *Id.* (stating that the protesting riders complained that the night-time raids and routine blood tests by French police made it impossible to perform and said that they were being "treated like cattle").

46. *Brief History*, WADA, *supra* note 23.

47. *Id.*

Seeking a solution to this issue, in February 1999, the IOC convened the World Conference on Doping in Sport in Lausanne, Switzerland.⁴⁸ The IOC invited not only all the Olympic member organizations, but also representatives from governments of several powerful countries with the hope of creating a global approach towards fighting the war on doping in sport.⁴⁹ The Conference produced the Lausanne Declaration, a multi-national and multi-organizational pledge to combat doping at every level of organized sports.⁵⁰ With its history of inconsistent enforcement and ulterior motives, the assembled delegates recognized that the IOC was not the proper organization to direct this mission.⁵¹ The need for an international doping authority besides the IOC led to the founding of the World Anti-Doping Agency (“WADA”) on November 10, 1999.⁵² The WADA is a private Swiss law foundation with its seat in Lausanne, Switzerland and its headquarters in Montreal, Canada.⁵³

IV. THE CURRENT WORLD ANTI-DOPING PROGRAM

A. *The World Anti-Doping Program*

The WADA established the World Anti-Doping Program to create a single list of banned drugs, a single system of drug testing, and a single protocol for sanctions.⁵⁴ The objectives of the World Anti-Doping Program are twofold: first, to promote the health, fairness, and equality of athletes worldwide by protecting the athlete’s fundamental right to participate in doping-free sport; and second, to ensure harmonized, coordinated, and effective anti-doping programs at the international and national level with regard to detection, deterrence, and prevention of doping.⁵⁵ The program is structured around three sets of rules, which include the World Anti-Doping Code,⁵⁶ International Standards,⁵⁷ and Models of Best Practice

48. *Id.*

49. Goldstone, *supra* note 9, at 365; see OLYMPIC INFORMATION CENTER, LAUSANNE DECLARATION 17 (1999), <http://www.la84foundation.org/OlympicInformationCenter/OlympicReview/1999/OREXXVI25/OREXXVI25g.pdf> (“[r]ecognizing that the fight against doping in sport is the concern of all”).

50. Goldstone, *supra* note 9, at 365-66.

51. *Id.* at 366.

52. WADA, *Brief History*, *supra* note 23.

53. World Anti-Doping Agency, *Mission & Priorities*, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=255> (last visited Oct. 10, 2008) [hereinafter WADA, *Mission & Priorities*].

54. Goldstein, *supra* note 7, at 155.

55. World Anti-Doping Agency, *The World Anti-Doping Program*, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=820> (last visited Oct. 10, 2008) [hereinafter WADA, *World Anti-Doping Program*].

56. WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE 1 (2003), http://www.wada-ama.org/rtecontent/document/code_v3.pdf [hereinafter 2003 Code] (“The Code is the core document that provides the framework for harmonized anti-doping policies, rules, and regulations within sport organizations and among public authorities.”).

57. World Anti-Doping Agency, *International Standards: Introduction*,

and Guidelines.⁵⁸ While the World Anti-Doping Code and International Standards are mandatory for signatories, the Models of Best Practice and Guidelines are only recommendations.⁵⁹ On March 3, 2003, at the Second World Conference on Doping in Sport, approximately 1,200 delegates representing governments from eighty nations, the IOC, the International Paralympic Committee, all Olympic sports, national Olympic and Paralympic committees, athletes, national anti-doping organizations, and international agencies unanimously agreed to adopt the World Anti-Doping Code.⁶⁰ The World Anti-Doping Code and International Standards were officially implemented on January 1, 2004,⁶¹ and the World Anti-Doping Code made its first appearance at the Olympics with the commencement of the 2004 Summer Games in Athens, Greece, having been accepted by all summer Olympic sports.⁶²

B. Court of Arbitration for Sport

In the adjudication of doping cases, the World Anti-Doping Code implements WADA's right of appeal to the Court of Arbitration for Sport ("CAS"), headquartered in Lausanne, Switzerland, on rulings by anti-doping organizations operating under it.⁶³ In the 1980s, "a sharp rise in the number of disputes between sport governing bodies, organizations, and athletes" led to the creation of the CAS, which was dedicated to resolving a variety of sports-related disputes.⁶⁴ In 1984, the CAS was formed to provide a forum for the world's athletes and sports federations to resolve legal disputes quickly and inexpensively through arbitration or

<http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=268#> (last visited Oct. 10, 2008) (There are five International Standards aimed at bringing harmonization among anti-doping organizations: the Prohibited List (i.e., anabolic agents, hormones and related substances, beta-2 agonists, hormone antagonists and modulators, diuretics and other masking agents, enhancement of oxygen transfer, chemical and physical manipulation, gene doping, stimulants, narcotics, cannabinoids, glucocorticosteroids, alcohol, and beta-blockers), testing, laboratories, therapeutic use exemptions, and protection of privacy and personal information).).

58. World Anti-Doping Agency, *Model Rules & Guidelines*,

<http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=269> (last visited Oct. 10, 2008) ("WADA has developed Model Rules for National Olympic Committees, Ifs, and National Anti-Doping Organizations in order to assist these organizations in drafting anti-doping rules in line with the WADA code.").

59. WADA, *World Anti-Doping Program*, *supra* note 55.

60. World Anti-Doping Agency, *WADA Brochure*,

http://www.wada-ama.org/rtecontent/document/WADA_Brochure_eng_fr_sp.pdf (last visited Oct. 10, 2008).

61. World Anti-Doping Agency, *WADA Annual Report 2003*, 6,

<http://www.wada-ama.org/rtecontent/document/WADAAnnualReport2003.pdf> (last visited Oct. 10, 2008).

62. Richard H. McLaren, *CAS Doing Jurisprudence: What Can We Learn?*, 1 I.S.L.R. 4, 4 (2006).

63. World Anti-Doping Agency, *The Code*, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=822> (last visited Oct. 10, 2008).

64. Goldstone, *supra* note 9, at 366-67.

mediation “by means of procedural rules adapted to the specific needs of the sports world.”⁶⁵

Although labeled a “court,” the CAS is truly an arbitral tribunal.⁶⁶ As such, arbitration rather than litigation is the principle method of resolving international sports-related disputes.⁶⁷ CAS arbitrators are legally trained and highly competent in the field of sports.⁶⁸ Where there are written arbitration agreements, courts construe those agreements to bar litigation.⁶⁹ The IOC and all Olympic IFs have agreed to CAS jurisdiction.⁷⁰ By their rules, “IFs require their respective member NGBs and athletes to submit all disputes with the IF to CAS arbitration.”⁷¹

Before 1994, “the IOC established the CAS’s rules and procedures by statute and paid its operating costs,” and the IOC’s president appointed some members of the CAS.⁷² Additionally, prior to the 1994 statute and regulations, there was only one type of CAS adversarial proceeding, regardless of the nature of the parties’ dispute.⁷³ There was also a procedure to obtain an advisory opinion from the CAS.⁷⁴

This all changed, however, after the case of Elmar Gundel.⁷⁵ In September 1992, Gundel, an equestrian, filed an appeal for arbitration with the CAS on the basis of the arbitration clause contained in the International Equestrian Federation’s statutes.⁷⁶ Gundel challenged the validity of a CAS penalty arising out

65. CAS, *20 Questions About the CAS: What is the Court of Arbitration for Sport?*, <http://www.tas-cas.org/20question> (last visited Feb. 27, 2009).

66. MATTHEW J. MITTEN ET. AL., *SPORTS LAW AND REGULATION* 331 (Aspen Publisher 2005).

67. *Id.*

68. *Id.*

69. CAS, *History of the CAS: Types of Disputes Submitted to the CAS*, <http://www.tas-cas.org/history> (follow “Types of Disputes Submitted to the CAS” hyperlink) (last visited Feb. 27, 2009); see also MITTEN, *supra* note 66 (citing *N. v. Federation Equestre Internationale* (Swiss Tribunal 1996) in *Digest of CAS Awards 1986-1998* at 585 (Reeb, ed. 1998); *Raguz v. Sullivan*, 2000 NSW Lexis 265 (Sup. Ct. NSW, Ct. of Appeal 2000); *Slaney v. IAAF*, 244 F. 3d 580, 590-91 (7th Cir. 2001) (noting that valid written agreement to arbitrate before foreign arbitral tribunal enforceable under New York Convention treaty)).

70. MITTEN, *supra* note 66, at 331.

71. *Id.*

72. *Id.*

73. Matthieu Reeb, *Recueil des sentences due TAS*, *DIGEST OF CAS AWARDS III 2001-2003* at xxviii (2004) (The claimant would submit his request to the CAS “Requests’ panel,” which would rule on its admissibility, subject to a final decision by a panel of arbitrators which would then be called on to hear and rule on the dispute, if necessary. The parties then remained free to continue their action in spite of a rejection decision by the Requests’ panel. The proceedings would then move to an attempt at achieving conciliation, either at the proposal of the parties, or pursuant to a decision by the CAS President if he determined that the dispute was suitable for conciliation. If this failed, the arbitration procedure would commence.).

74. *Id.* (Through this procedure, the CAS would give an opinion on a legal question concerning any activity related to sport in general.).

75. See *G. v. Federation Equestre Internationale*, *Tribunal Federal Suisse [ATF] [Federal Court]* Mar. 15, 1993, *DIGEST OF CAS AWARDS 1986-1998*, 564 (Reeb, ed. 1998).

76. *Id.* at 561.

of the International Equestrian Federation's finding of a doping violation and imposition of a disciplinary sanction.⁷⁷ In his public appeal of the CAS decision with the Swiss Federal Tribunal, the question arose whether the CAS was sufficiently independent and impartial to be considered as a proper arbitration court.⁷⁸

In its March 15, 1993 judgment, the Swiss Federal Tribunal recognized the CAS as a true court of arbitration.⁷⁹ The court noted, *inter alia*, that the CAS was not an organ of the International Equestrian Federation, did not receive instructions from it, and retained sufficient autonomy from it, since only three arbitrators out of a maximum of sixty members in the CAS were from the federation.⁸⁰ Nevertheless, the Swiss Federal Tribunal also noted in its decision a number of connections between the CAS and the IOC: (1) the CAS was financed almost exclusively by the IOC; (2) the IOC was competent to modify the CAS Statute; and (3) the IOC and its president had considerable power to appoint CAS members.⁸¹ Such links, according to the Swiss Federal Tribunal, would have been sufficient to "call into question the independence of the CAS in the event of the IOC's being a party to the proceedings before it."⁸² Thus, the Swiss Federal Tribunal's decision sent a message that the CAS had to become more independent from the IOC both organizationally and financially.⁸³

In response, the CAS revised its Statute and Regulations to make them more efficient and to modify the structure of the institution so that it was definitively independent of the IOC.⁸⁴ The most significant change resulting from these revisions was the establishment of an International Council of Arbitration for Sport ("ICAS") to look after the running and financing of the CAS, thereby replacing that function of the IOC.⁸⁵ "Other major changes included the creation of two arbitration divisions" of the CAS – the Ordinary Division and the Appeals Division – in order to clarify the "distinction between disputes of sole instance and those arising from a decision taken by a sports body."⁸⁶ Finally, the CAS reforms were

77. *Id.* at 567.

78. *Id.*

79. *Id.* at 568.

80. *Id.* at 569.

81. *Id.* at 569-70.

82. CAS, *History of the CAS: Types of Disputes Submitted to the CAS*, <http://www.tas-cas.org/history> (follow "The 1994 Reform" hyperlink) (last visited Feb. 27, 2009) [hereinafter CAS, *1994 Reform*]; see also G. v. Federation Equestre Internationale, Tribunal Federal Suisse [ATF] [Federal Court] Mar. 15, 1993, DIGEST OF CAS AWARDS 1986-1998 570 (Reeb, ed. 1998) (stating that if the IOC had been a party to the case along with the Federation Equestre Internationale, then the impartiality of the CAS could be more properly called into question).

83. CAS, *1994 Reform*, *supra* note 82.

84. *Id.*

85. CAS, *History of the CAS: Types of Disputes Submitted to the CAS*, <http://www.tas-cas.org/history> (follow "The Organisation and Structure of the ICAS and CAS" hyperlink) (last visited Feb. 27, 2009).

86. CAS, *1994 Reform*, *supra* note 82.

fixed in a new Code of Sports-related Arbitration (“CAS Code”),⁸⁷ “which came into force on November 22, 1994 and was revised on January 1, 2004.”⁸⁸ The creation of the ICAS and the revised structure of the CAS were approved in Paris on June 22, 1994 with the signing of the “Paris Agreement” by the presidents of the IOC, the Association of Summer Olympic International Federations, the Association of International Winter Sports Federations, and the Association of National Olympic Committees.⁸⁹

The new structure of the CAS was not put to the test until May 27, 2003, when the Swiss Federal Tribunal assessed the court’s independence in detail after hearing an appeal by two Russian cross-country skiers, Larissa Lazutina and Olga Danilova.⁹⁰ Lazutina and Danilova were disqualified by the IOC after the Olympic Winter Games in Salt Lake City, Utah, for doping violations,⁹¹ and in June 2002, the International Ski Federation suspended them for two years.⁹² Their appeal to the CAS, calling for the IOC and International Ski Federation’s decisions to be overturned, was rejected.⁹³ Finally, they appealed to the Swiss Federal Tribunal against the CAS awards.⁹⁴ The Swiss Federal Tribunal “rejected all of the arguments put forward by the athletes . . . confirming . . . that the CAS offered all the guarantees of independence and impartiality to be regarded as a real court of arbitration.”⁹⁵ The Swiss Federal Tribunal “dissected the current organization and structure of the ICAS and the CAS,” concluding that the CAS was sufficiently independent of the IOC, as it was of all other parties that called upon its services.⁹⁶

V. PROCEDURAL ISSUES OF ANTI-DOPING JURISPRUDENCE

A. *Due Process*

A doping infraction is regulated by private contract law.⁹⁷ An athlete agrees to be bound by the rules that govern the sport in which he or she participates, including rules that forbid the use of prohibited substances or methods to enhance

87. CAS Code of Sports-related Arbitration, <http://www.tas-cas.org/rules> (follow “Download the code” hyperlink) (last visited Feb. 27, 2009) [hereinafter CAS Code].

88. CAS, *1994 Reform*, *supra* note 82.

89. CAS, *The Paris Agreement*, <http://www.tas-cas.org/history> (follow “The Paris Agreement” hyperlink) (last visited Feb. 27, 2009).

90. CAS, *1994 Reform*, *supra* note 82.

91. Matthieu Reeb, FasterSkier.com, *Larissa Lazutina and Olga Danilova Appeals Dismissed*, June 25, 2003, <http://www.fasterskier.com/news403.html>.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. CAS, *1994 Reform*, *supra* note 82.

97. Connolly, *supra* note 10, at 174 n. 46 (“Athletes... must almost always sign a document which states that the athlete agrees to be bound by the rules of the sporting body.”).

performance.⁹⁸ If the athlete commits a doping violation, he or she has already agreed to accept the punishments issued by the governing body of his or her sport.⁹⁹ Because the Fourteenth Amendment Due Process Clause does not extend to private contracts, athletes accused of doping violations have no recourse in U.S. courts under this constitutional provision.¹⁰⁰ Nevertheless, Article 8 of the Code, titled “Right to a Fair Hearing,” imposes some minimum standards of due process for all anti-doping hearing proceedings, as it provides:

The hearing process shall respect the following principles: a timely hearing; fair and impartial hearing body; the right to be represented by counsel at the *Person's* own expense; the right to be fairly and timely informed of the asserted anti-doping rule violation; the right to respond to the asserted anti-doping rule violation and resulting *Consequences*; the right of each party to present evidence, including the right to call and question witnesses (subject to the hearing body's discretion to accept testimony by telephone or written submission); the *Person's* right to an interpreter at the hearing, with the hearing body to determine the identity, and responsibility for the cost of the interpreter; and a timely, written, reasoned decision.¹⁰¹

Though the WADA standards only slightly resemble the due process rights granted by the U.S. Constitution, they are derived from the same general principles.¹⁰²

Despite mandating these minimum protections for athletes, the WADA does not go far enough to ensure adequate due process because certain provisions of the Code interfere with the right of the athlete to a fair hearing.¹⁰³ For example, the Code permits disqualification of an athlete before a hearing takes place,¹⁰⁴ and the Code allows public disclosure of a positive test result before a hearing occurs.¹⁰⁵ Clearly, these inadequacies can have dire consequences on the careers of accused athletes, immediately withdrawing them from competition and damaging their reputations without providing them any opportunity to rebut evidence of their alleged doping violations beforehand.

Other aspects of anti-doping regulation raise the question of whether the athlete has been given adequate notice in addition to a fair hearing. In *USA Shooting & Quigley v. International Shooting Union*,¹⁰⁶ a case arising prior to the

98. *Id.* at 174-75.

99. *Id.* at 175 (“If the athlete breaches this provision and is deemed guilty of a doping violation, he or she has already agreed to face the punishments dictated by the governing body.”).

100. Goldstein, *supra* note 7, at 170.

101. 2003 Code, *supra* note 56, art. 8 (emphasis in original).

102. Goldstone, *supra* note 9, at 370 (describing general principles as derived and recognized by national, international, and human rights law).

103. *Id.*

104. 2003 Code, *supra* note 56, art. 7.5.

105. *Id.* art. 14.2.

106. *USA Shooting & Quigley v. International Shooting Union (UIT)*, CAS 94/129, 1, Award of 23 May 1995, <http://jurisprudence.tas->

organization of the WADA and implementation of a uniform anti-doping program, the CAS recognized the importance of providing athletes with proper notice of the precise rules to maintain the integrity of the anti-doping system.¹⁰⁷ While the applicable International Shooting Union Anti-Doping Regulations defined doping as “the use of one or more [prohibited] substances . . . with the aim of attaining an increase in performance,”¹⁰⁸ the International Shooting Union maintained that its regulations were based on strict liability.¹⁰⁹ The athlete claimed that he had been given cold medication by his doctor that contained a prohibited substance.¹¹⁰ Because the International Shooting Union was unable to prove that the athlete had used this product to enhance his performance, as required by its rules, the CAS overturned the doping offense and reinstated the athlete as the winner of the competition.¹¹¹ The CAS panel concluded that in order for a strict liability standard to apply, it must be clearly stated in the governing body’s anti-doping regulations.¹¹² Anti-doping rules “have since provided clear notice to athletes that they will be held strictly liable for banned substances found in their [bodies].”¹¹³

However, some anti-doping rules controvert the policy of providing notice and are deliberately kept vague.¹¹⁴ For example, the prohibited lists of almost all anti-doping programs contain the “and related substances” clause following the list of banned substances in each category.¹¹⁵ This provision ensures “that an athlete cannot ingest a substance that has been chemically altered in a minor way and then claim that the new substance is not prohibited because it is not expressly listed.”¹¹⁶ Certainly, this is a legitimate objective, as evidenced by the Bay Area Laboratory Co-Operative (“BALCO”) scandal. In September 2003, FBI agents, after searching the premises of the Bay Area Laboratory at the direction of the U.S. Justice Department,¹¹⁷ discovered that BALCO was distributing prohibited doping agents to various high-profile Olympic athletes.¹¹⁸ The drugs provided were either undetectable or difficult to detect in routine testing.¹¹⁹ Because the existence of these substances was unknown at the time, it would have been impossible for anti-doping authorities to add them to the prohibited list.¹²⁰ At the same time, it would

cas.org/sites/CaseLaw/Shared%20Documents/129.pdf. [hereinafter *USA Shooting*].

107. *Id.* at 9.

108. *Id.* at 6 (emphasis in original).

109. *Id.* at 7.

110. *Id.* at 1-2.

111. *Id.* at 3.

112. *USA Shooting*, *supra* note 106, at *9.

113. Connolly, *supra* note 10, at 185.

114. *Id.* at 186.

115. *Id.* (stating that the classic definition of a “related substance” is one that has a “similar chemical structure of similar pharmacological effect(s)” as those substances on the prohibited list).

116. *Id.*

117. McLaren, *supra* note 62, at 10.

118. *Id.* at 10-11.

119. *Id.* at 11.

120. Connolly, *supra* note 10, at 186.

have been unfair to allow the athletes who used the substances to avoid disqualification and suspension simply because their choice of performance enhancing drug was so new that it was previously unknown to the authorities.¹²¹ Ultimately, in this particular area of anti-doping regulation, requiring full notice to athletes of all drugs prohibited would further encourage advancements in undetectable doping agents, and impede the fight against doping in sport.

Related to the concept of providing proper notice is the use of precedent by the CAS panel. A CAS panel is not bound by the precedent of prior arbitration proceedings or obligated to follow the rules of *stare decisis*.¹²² However, the CAS “Code Rules 46 and 59 provide that before an award can be signed by the arbitrators, it must be reviewed by the CAS Secretary General who may draw to the panel’s attention fundamental issues of principle.”¹²³ According to the current CAS Secretary General, one of the purposes of this process is to allow the Secretary General to highlight discrepancies in the panel’s award from existing CAS precedent so that the panel may conform the award with existing principles, if it so desires.¹²⁴ Despite having such oversight, the Secretary General lacks authority under the CAS Code to force a change in the award.¹²⁵ The Secretary General may simply ask that the panel explain in the award why it has departed from existing principle.¹²⁶ However, the panel can still refuse even to explain its divergent approach.¹²⁷

It has been noted that in recent years “there has been general agreement among CAS arbitrators that panels should generally follow the reasoning of previous tribunals unless there are compelling reasons in the interest of justice not to do so.”¹²⁸ Consequently, “CAS has developed its own body of case law, providing predictability and certainty to many of the disputes that come before the CAS,” including those that involve doping violations.¹²⁹ As this case law continues to grow, athletes and governing bodies alike will gain greater clarity with regard to the principles guiding the adjudication of anti-doping disputes.¹³⁰

121. *Id.*

122. *Id.* at 197.

123. Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do its Job Better*, 26 LOY. U. CHI. L.J. 1203, 1255-56 (2005); CAS Code, *supra* note 87, at R46, R59.

124. Straubel, *supra* note 123, at 1255 (citing Interview with Matthieu Reeb, Sec’y Gen., Court of Arbitration for Sport, in Lausanne, Switz. (May 25, 2004)).

125. *Id.*

126. *Id.*

127. *Id.* at 1256 (internal citations omitted).

128. Connolly, *supra* note 10, at 197 (citing A.C. v. FINA, CAS 96/149, 251 Award of 13 March 1997, CAS Digest I).

129. *Id.*

130. *Id.* at 197-98 (pointing out this trend but also arguing that the clarity would be increased if CAS instituted measures, like advisory opinions or a supreme arbitration panel, that would resolve the conflicts that still occur between different panels).

B. Standard and Burden of Proof

As pointed out by one commentator, Connolly, while anti-doping regulation is governed by private contract law, the standard of proof in anti-doping hearings is higher than the standard of proof commonly used in breach of contract proceedings.¹³¹ The CAS requires more than the civil law standard of a preponderance of the evidence to prove the particular elements of a doping offense.¹³² However, it does not go so far as to mandate the criminal law standard of proof, beyond a reasonable doubt.¹³³ Rather, the elements of a doping offense must be shown “to the comfortable satisfaction” of the arbitration panel.¹³⁴

Some similarities between doping law and criminal law may suggest that the standard of proof used in doping law is insufficient to protect the interests of accused athletes. For instance, an athlete convicted of a doping offense is referred to as guilty, rather than as a breaching party, and the athlete’s suspension is considered punishment.¹³⁵ Connolly points out that the term “punishment” is “a feature of criminal law, not contract law.”¹³⁶ Moreover, athletes lack the traditional bargaining rights available under contract law, notwithstanding the contractual nature of anti-doping regulations.¹³⁷ In light of the parallels between anti-doping law and criminal law, another commentator, Straubel, has suggested that athletes should be entitled to increased procedural protections, such as the inclusion of the “beyond a reasonable doubt” standard.¹³⁸

The prosecuting sports body has the burden of proof in doping cases; it must establish the presence of a named substance in the biological sample of the accused athlete to the comfortable satisfaction of the arbitration panel.¹³⁹ Once the prosecutor has shown this, the athlete may present affirmative evidence in his or her defense to rebut the evidence of a positive test.¹⁴⁰ Doping offenses are generally established by direct evidence in the form of a positive drug test, but in some cases circumstantial evidence is enough to indicate that a doping offense has

131. *Id.* at 175.

132. *Id.*

133. *See* B. v. Fédération Internationale de Natation Amateure, CAS 98/211, 10, Award of 7 June 1999 at 266, <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/211.pdf> [hereinafter B. v. FINA] (explaining that “to adopt a criminal standard... is to confuse the public law of the state with the private law of an association.”).

134. 2003 Code, *supra* note 56, art. 3.1 (stating that “the standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.”).

135. Connolly, *supra* note 10, at 175, n.47.

136. *Id.*

137. *Id.* (remarking that athletes must follow the same anti-doping rules as all similar athletes, just as people in a particular jurisdiction must follow the same non-negotiable criminal code).

138. *See* Straubel, *supra* note 123, at 1272.

139. Connolly, *supra* note 10, at 176 (citing B. v. International Judo Federation, CAS 98/214, 308, Award of 17 Mar. 1999, CAS Digest II, <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/214.pdf>).

140. *Id.* at 176-77.

occurred.¹⁴¹ “Cases based on circumstantial evidence of a doping offense typically involve [an athlete’s] apparent manipulation or contamination of a sample.”¹⁴² The CAS has confirmed that a doping offense may be proven even if the evidence is only circumstantial.¹⁴³ “Where circumstantial evidence implicates an athlete in a doping offense, the body enforcing the anti-doping rules [does not need to] eliminate all possibilities other than commission of the offense by the athlete.”¹⁴⁴

Prosecuting sports bodies have used circumstantial evidence to prove that an athlete has committed a doping offense, even in the absence of a positive drug test.¹⁴⁵ Violations proved in this manner are commonly referred to as “non-analytical positives.”¹⁴⁶ The case of Michele Collins was the first decision dealing with non-analytical positives.¹⁴⁷ In 2004, the United States Anti-Doping Agency (“USADA”) investigated Collins, a world-class American sprinter, for “the use of banned substances and methods provided by BALCO.”¹⁴⁸ Seeking a lifetime ban from competition, the USADA charged the sprinter with the violation of anti-doping rules of the IAAF.¹⁴⁹ Even though Collins never tested positive for a prohibited substance, the USADA presented evidence, including emails between her and BALCO President, Victor Conte, in which she admitted to “using some prohibited substances and techniques and that she never tested positive by an IOC accredited lab.”¹⁵⁰ This evidence strongly supported the charges against her.¹⁵¹

The procedure for a non-analytical positive hearing is distinct because, although the same burden of proof applies, there is no positive drug test, no presumption of fault, and therefore no presumption for the athlete to rebut.¹⁵² The non-analytical positive charge is a valuable tool in the fight against doping because it allows anti-doping authorities to use circumstantial evidence to overcome the difficulties of establishing a doping offense in the absence of strict liability.¹⁵³ On the other hand, while the evidence in the *Michele Collins* case overwhelmingly proved her use of prohibited substances, not every non-analytical positive case will

141. McLaren, *supra* note 62, at 9.

142. *Id.* at 10.

143. *Id.* at 10; *accord* B. v. FINA, *supra* note 133, at 255 (relying on circumstantial evidence that Irish swimmer contaminated urine sample with alcohol), and B. v. IWF, CAS 2004/A/607, Award of 7 June 1999, 1, <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/607.pdf> (using circumstantial evidence to conclude that urine sample was manipulated since three urine samples from three different Bulgarian athletes were identical).

144. *Id.* at 10.

145. Goldstone, *supra* note 9, at 384.

146. McLaren, *supra* note 62, at 10-11.

147. *Id.*

148. *Id.* at 11.

149. *Id.*

150. *Id.*

151. *Id.*

152. Goldstone, *supra* note 9, at 384.

153. McLaren, *supra* note 62, at 11.

be so straightforward, thus raising some concern that the burden never shifts to the athlete to challenge a finding of guilt.

C. *Strict Liability*

The Code applies strict liability for doping violations.¹⁵⁴ Under this doctrine, the mere detection of a prohibited substance results in a legal presumption that the athlete is guilty of the violation.¹⁵⁵ The finding of an infraction is in no way based on the athlete's intent.¹⁵⁶ Some commentators find this aspect of anti-doping regulation the most troubling, pointing to particular instances where the doctrine of strict liability has worked undue hardship on athletes.¹⁵⁷

Andreea Raducan, for example, was a 16-year-old Romanian gymnast who won the gold medal in the Women's Individual All-Around competition at the 2000 Summer Olympic Games in Sydney, Australia.¹⁵⁸ While warming up, she complained to her team doctor that she was not feeling well, so he "gave her a pill of an over-the-counter decongestant."¹⁵⁹ The doctor gave the same medication to her teammate as well.¹⁶⁰ After the medal ceremony, Raducan was drug-tested, revealing the presence of the prohibited substance pseudoephedrine in two of her samples.¹⁶¹ The IOC immediately disqualified her and rescinded her medal.¹⁶²

Raducan then appealed the IOC's decision, requesting a hearing before the CAS Ad Hoc Division tribunal.¹⁶³ Raducan claimed in her defense that the amount of urine in one of her samples "was less than the minimum required by the Code, that there was a discrepancy between the amount of urine" she provided and the amount at the laboratory, that the substance did not have an enhancing effect on her performance, and that her "disqualification violated principles of fairness and equality."¹⁶⁴ The panel denied her appeal without a hearing on the merits. The gold medal was then awarded to her teammate who had taken the same decongestant but was not disqualified, likely because she was taller and heavier than Raducan, therefore having "a reduced and legal concentration of the substance."¹⁶⁵

154. 2003 Code, *supra* note 56, art. 2.1.1 cmt.

155. Goldstone, *supra* note 9, at 382 (citation omitted).

156. McLaren, *supra* note 62, at 4.

157. Goldstone, *supra* note 9, at 372-74 (highlighting *Raducan v. IOC*, CAS OG 2000/011, *1, Award of 29 Sept. 2000, <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/OG%2000-011.pdf> and *Baxter v. IOC*, CAS 2002/A/376, Award of 15 Oct. 2002, <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/376.pdf> (as examples of undue hardship)).

158. *Raducan v. IOC*, CAS OG 2000/011, *supra* note 157, at *1.

159. Goldstone, *supra* note 9, at 372.

160. *Id.*

161. *Raducan*, CAS OG 2000/011, *supra* note 157, at *3.

162. *Id.*

163. Goldstone, *supra* note 9, at 372.

164. *Id.* at 372-73.

165. *Id.*

At the 2002 Winter Olympic Games in Salt Lake City, Utah, the IOC stripped Alain Baxter of his bronze medal in the men's slalom skiing competition because he had used a Vicks inhaler containing a prohibited substance.¹⁶⁶ This episode served as another example of an apparently undeserved outcome resulting from the application of strict liability.¹⁶⁷ Baxter had used a Vicks inhaler that did not contain the prohibited substance levmetamfetamine in the United Kingdom, but was unaware that its formulation in the United States did contain it.¹⁶⁸ Although the panel found that he had not intended to ingest the substance, it nevertheless denied his appeal and upheld the IOC's sanctions against him for the doping violation.¹⁶⁹

While both Baxter and Raducan were at least cognizant of their consumption of the substances at issue, under the policy of strict liability, an athlete need not even *ingest* the prohibited substance to be guilty of a doping offense.¹⁷⁰ In one instance, a male athlete's "urine tested positive for traces of clostebol metabolites," and he was held strictly liable for having the steroid in his system even though he claimed his urine "was contaminated as a result of sexual intercourse with a woman who had administered a medication containing [the steroid] for a vaginal infection."¹⁷¹

There is an additional issue regarding substances included on the prohibited list which may be produced endogenously.¹⁷² Testosterone, for example, is a banned substance that the human body produces naturally.¹⁷³ Until only a few years ago, doping laboratories could not distinguish between endogenous and exogenous testosterone.¹⁷⁴ Although there now exists a method that can positively identify exogenous testosterone, many other endogenous substances, such as human growth hormone (hGH) and EPO are more difficult to distinguish reliably from their artificial forms, placing constraints on the anti-doping program's ability to prosecute cheating athletes.¹⁷⁵

Recently, the WADA announced that it is prepared to introduce a new "Athlete Passport" system.¹⁷⁶ Under this system, athletes would provide a blood sample, giving drug testers a "biological fingerprint" against which they could

166. *Id.* at 374.

167. *Baxter v. IOC*, CAS 2002/A/376, 1 Award of 15 Oct. 2002, <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/376.pdf>.

168. *Id.* at 2.

169. *Id.* at 1-2.

170. Connolly, *supra* note 10, at 180.

171. *Id.* (citing Henrique Pereira, et al. *Incidental Clostebol Contamination in Athletes after Sexual Intercourse*, 50 *CLINICAL CHEMISTRY* 456 (2004), available at <http://www.clinchem.org/cgi/content/full/50/2/456>).

172. Connolly, *supra* note 10, at 167 (clarifying that "endogenous" substances are produced naturally by the human body).

173. *Id.*

174. *Id.* (citation omitted).

175. *Id.* at 167-69.

176. Gordon Farquhar, *WADA Close to 'Athlete Passports'*, BBC SPORT, Feb. 24, 2009, http://news.bbc.co.uk/sport2/hi/front_page/7908777.stm.

compare later drug-test samples.¹⁷⁷ Then, drug testers could identify anomalies, such as increased hemoglobin levels, which might suggest EPO abuse.¹⁷⁸ An independent panel of experts would next analyze any abnormal findings to decide whether there is evidence of a doping violation.¹⁷⁹ This system has been in development since 2006 and is still not ready for implementation.¹⁸⁰ Notwithstanding some frustration over the delay,¹⁸¹ the WADA and other sports organizations understand that they must exercise caution before introducing new detection methods, recognizing the potentially harsh consequences that would result from an athlete's disqualification based on a false positive drug test.¹⁸²

As strict liability's grave impact seems unwarranted to the individual athlete punished without any showing of a guilty state of mind, the anti-doping movement's unwavering adherence to this standard finds justification in its paramount goal: to preserve fair competition.¹⁸³ Hence, requiring sports federations to prove the athlete's intent to ingest a prohibited substance would severely hamper efforts to ensure an equal playing field. As the arbitration panel in *USA Shooting* stated,

[I]t appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently. Moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations – particularly those that run on modest budgets – in their fight against doping.¹⁸⁴

Albeit a sound policy objective on its face, it runs afoul of circumstances, such as *Raducan's*, where the testimony of expert witnesses confirmed that the substance she had ingested would have actually impaired, not enhanced, her gymnastics skills.¹⁸⁵ Nevertheless, the CAS consistently stated that neither the showing of the athlete's intent nor evidence of his or her competitive advantage is needed to establish a doping offense.¹⁸⁶

By implication then, anti-doping policy is concerned not that the presence of the prohibited substance, whether ingested intentionally or negligently, will *actually* alter the results of the event but that it could *potentially* unbalance the

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* (stating that “[t]he problem has been getting the scientists to come up with a system that the lawyers will be happy to defend in court. That moment is now very close.”).

181. *Id.*

182. Connolly, *supra* note 10, at 167-68.

183. *Id.* at 182.

184. *USA Shooting*, *supra* note 106, * 6, Award of 23 May 1995, <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/129.pdf>.

185. *Raduccan v. IOC*, CAS OG 2000/011, *supra* note 157, *7.

186. *Id.* at 1.

playing field. However, in light of the articulated policy underlying strict liability, it would make more sense for anti-doping authorities to first consider the actual performance-enhancing impact of the substance on a case-by-case basis before making the sweeping finding of a doping violation and immediately disqualifying the athlete from competition.

D. Sanctions under the Code

Cases involving the inadvertent use of prohibited substances, such as *Baxter* and *Raducan*, have “highlighted the need to ameliorate the effects of strict liability” in some instances.¹⁸⁷ While the immediate consequence of a doping violation (i.e., disqualification from the athlete’s event) is based on the principle of strict liability, the subsequent punishment (i.e., a two-year suspension for first offenses and a lifetime ban for second offenses), may be mitigated depending on the circumstances.¹⁸⁸ The WADA code provides the Arbitration Panel with discretion to reduce sanctions that follow from a positive drug test where the athlete establishes that he or she bears “no fault or negligence,” or “no significant fault or negligence.”¹⁸⁹ Under the first “no fault or negligence” category, the sanction must be wholly eliminated.¹⁹⁰ Under the alternative “no significant fault or negligence” category, the Arbitration Panel has discretion to reduce the sanction by a maximum of one half of what it would have otherwise been.¹⁹¹

Arbitrators have defined “no fault or negligence” as occurring when the athlete could not, even with the exercise of the utmost caution, reasonably have suspected that he or she had been administered a prohibited substance.¹⁹² This is a very high standard that will be met only in exceptional circumstances.¹⁹³ The WADA provides that an athlete may establish no fault or negligence, resulting in the total elimination of a sanction, if he or she proves that despite all due care, he or she was sabotaged by a competitor.¹⁹⁴ Conversely, circumstances where the sanction could *not* be limited on the basis of “no fault or negligence” include the following:

[A] positive test resulting from a contaminated or mislabeled vitamin or nutritional supplement[.]

[T]he administration of a prohibited substance by the [a]thlete’s personal trainer or physician without disclosure to the [a]thlete[.] [and]

187. McLaren, *supra* note 62, at 18.

188. 2003 Code, *supra* note 56, art. 10.

189. McLaren, *supra* note 62, at 18-19 (citing World Anti-Doping Agency, *World Anti-Doping Code*, art. 10.5.2 (Jan. 1, 2004), available at http://www.wada-ama.org/rtecontent/document/code_v3.pdf).

190. *Id.* art. 10.5.1.

191. *Id.* art. 10.5.2.

192. *Id.* app. 1.

193. *Id.* art. 10.5.2 cmt.

194. 2003 Code, *supra* note 56, art. 10.5.2 cmt.

[S]abotage of the [a]thlete's food or drink by a spouse, coach, or other person within the [a]thlete's circle of associates.¹⁹⁵

Not surprisingly, then, no suspected athlete has yet established "no fault or negligence" in a case.¹⁹⁶ Although arguably such limited application renders the exception virtually null, the case law suggests that it is easily justified since a different, more permissive approach would open the door to abuse, allowing athletes to hide behind their physicians' errors, or the like, to escape any sanction.¹⁹⁷

To show "no significant fault or liability," the athlete must establish that his or her negligence, when viewed in the totality of the circumstances, was not significant in relationship to the anti-doping rule violation.¹⁹⁸ A CAS panel found in *WADA v. USADA*¹⁹⁹ that this standard had been met. In that case, Lindsey Scherf, an accomplished collegiate distance runner diagnosed with exercise-induced asthma, took Flovent® for her condition.²⁰⁰ She had applied for and received an Abbreviated Therapeutic Use Exemption for this medication from the IAAF in 2005 and the USADA in 2006 and 2007.²⁰¹

Scherf competed in the Gold Coast Marathon on July 1, 2007, with the aim of qualifying for the U.S. Olympic Team Trials in the Women's Marathon.²⁰² With only an Abbreviated Therapeutic Use Exemption from the USADA, Scherf believed that she needed a separate exemption from her International Federation, so she applied for one with the IAAF on April 26, 2007.²⁰³ By late June, she still had not received word concerning the status of her application with the IAAF.²⁰⁴ Three weeks before the marathon race, however, she had contracted a serious throat and lung infection, so she continued to take her Flovent medication.²⁰⁵

On advice from the USADA, Scherf contacted the race officials of the Gold Coast Marathon to determine whether there would be drug testing, and they informed her that there had not been drug testing in the three previous years.²⁰⁶ Scherf ran the race and finished second in a time qualifying her for the U.S.

195. *Id.*

196. McLaren, *supra* note 62, at 19.

197. *See, e.g.*, ITF Independent Anti-Doping Tribunal, *ITF v. Koubek*, at para. 75 (Jan. 18, 2005) (stating that "at any rate other than in the most exceptional cases, for the purposes of determining whether a no-fault defense succeeds, the fault of an adviser such as a physician must be attributed to the player even if the player is not personally at fault: otherwise the fight against doping in sport would be seriously undermined.").

198. 2003 Code, *supra* note 56, app. 1.

199. *WADA & IAAF v. USADA*, CAS 2007/A/1416, Award of 11 Aug. 2008, http://www.wada-ama.org/rtecontent/document/CAS_2007_A_1416_Scherf.pdf (last visited Dec. 1, 2009) [hereinafter *WADA & IAAF v. USADA*].

200. *Id.* at 2.

201. *Id.*

202. *Id.*

203. *Id.* at 2-3.

204. *Id.* at 3.

205. *WADA & IAAF v. USADA*, *supra* note 199, at *3.

206. *Id.*

Olympic Team Trials.²⁰⁷ Shortly after she finished, race officials advised Scherf that she would be drug-tested, but fearing a positive result, she refused to submit to the test.²⁰⁸ Later, she discovered that since the Gold Coast Marathon was not an international event, she did not even need an exemption from the IAAF, but that the one she had obtained from the USADA would have cleared her to compete while taking her asthma medication.²⁰⁹

Given the conflicting nature of the IAAF rules and procedures governing the Therapeutic Use Exemption application process, Scherf's diligence in pursuing the matter of drug-testing at the race, and Scherf's errors in judgment being the direct result of the errors made by the agencies, the CAS panel found that exceptional circumstances existed and agreed that Scherf did not bear any significant fault or negligence.²¹⁰ The CAS panel nevertheless wished to make clear that this was a rare case in which an athlete who had failed or refused to provide a sample would be able to satisfy the no significant fault or negligence standard.²¹¹

Scherf's case is illuminating because it not only illustrates how truly exceptional the circumstances must be in order for the athlete to have his or her sanctions reduced under the "no significant fault or negligence" standard; but it also shows how procedural inefficiencies within sports governing bodies can obstruct an athlete's efforts to exercise utmost caution in ensuring compliance with anti-doping rules.

E. Scope of Appeals before the CAS

Article R47 of the CAS Code expressly provides that a CAS panel may adjudicate an appeal from the decision of a federation, association, or sports-related body, or an award rendered by CAS acting as a first instance tribunal.²¹² Article R57 provides that a CAS panel serving on appeal "shall have full power to review the facts and the law."²¹³ Emerging from these provisions is the well-established principle that any case brought before a CAS appeal panel is heard *de novo*.²¹⁴ Consequently, any defect or procedural error that may have occurred at first instance will be cured by an appeal hearing of the CAS, and therefore, the appeal panel need not consider allegations such that the original panel was biased;²¹⁵ that the wrong burden of proof was applied;²¹⁶ that the athlete was not

207. *Id.*

208. *Id.* at 4.

209. *Id.*

210. *Id.* at 12-13.

211. WADA & IAAF v. USADA, *supra* note 199, at 13.

212. CAS Code, *supra* note 87, at R47.

213. *Id.* at R57.

214. McLaren, *supra* note 62, at 4.

215. B. v. FINA, *supra* note 133 (not considering whether the original panel had exhibited bias because the nature of *de novo* review made such considerations unnecessary); *see also* B. v. Int'l Weightlifting Fed'n, CAS 2004/A/607, 14-15, Award of 6 Dec. 2004, <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/607.pdf> (finding that the

granted the right to be heard,²¹⁷ that there was a lack of due process,²¹⁸ that the right to cross-examination was not provided,²¹⁹ that the right to a fair hearing was not provided,²²⁰ and that there was no distinction between the investigatory body and the disciplinary body.²²¹

In *Fazekas v. IOC*,²²² the CAS panel explained why such arguments were irrelevant, proclaiming that the “virtue of an appeal system which allows for a full rehearing before an appellate body is that issues of fairness of the hearing before the tribunal of first instance ‘fade to the periphery.’”²²³ Yet how does the CAS ensure such fairness when it acts as both the court of first instance and the court of appeals? To be sure, a separate division oversees the appeals proceeding,²²⁴ but as CAS arbitrators are themselves not attached to a particular division, they may sit on panels in both the Ordinary Arbitration Division and the Appeals Arbitration Division.²²⁵ Therefore, the possibility remains for arbitrators to commit procedural harms at both hearings despite the presumed remedial effect of *de novo* review.

The potential for abuse is exacerbated by the question of arbitrator impartiality. Despite efforts to increase the court’s independence from the governing bodies of the Olympic movement, doubts remain over the actual autonomy of the CAS arbitrators who hear disputes.²²⁶ There are two potential limits on the autonomy of CAS arbitrators. First, because the initial selection

original panel did not obey all the principles of a fair hearing, but dismissing this issue because of the nature of *de novo* review).

216. *B. v. FINA*, *supra* note 133, at 9-10 (not considering whether the original panel had applied the appropriate burden of proof because this could be corrected on the *de novo* appeal).

217. *B. v. Int’l Weightlifting Fed’n*, *supra* note 215, at 14-15 (finding that the athlete had not been given the opportunity to be heard in local procedures, but dismissing this issue because of the nature of *de novo* review).

218. *Id.* (finding that the original panel had not respected all aspects of due process, but dismissing this issue because of the nature of *de novo* review).

219. *S. v. Union Cycliste Internationale*, CAS 2002/A/378, 4, Award of 8 Aug. 2002, <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/378.pdf> (rejecting S’s argument that his right to cross-examination was violated).

220. *See N. v. Fédération Internationale de Natation Amateure*, CAS 98/208, 14, Award of 22 Dec. 1998, <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/208.pdf> (finding it unnecessary to consider whether the original hearing violated the appellant’s due process rights because of the *de novo* review established by R57).

221. *S. v. Union Cycliste Internationale*, *supra* note 219 (rejecting S’s argument that the principle of separation between the investigatory and disciplinary bodies had been violated); *see also USA Shooting*, *supra* note 106, at *13-14, (declining to rule on whether the original hearing violated due process because the person bringing the case was also the person imposing the sanction, because such deficiencies can be cured on appeal).

222. *Fazekas v. IOC*, CAS 2004/A/714, Award of 31 Mar. 2005, <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/714.pdf>.

223. *Id.* at 17 (citation omitted).

224. CAS Code, *supra* note 87, at S20.

225. CAS, *History of the CAS: Organization and Structure of ICAS and CAS*, <http://www.tas-cas.org/en/infogenerales.asp/4-3-238-1011-4-1-1/5-0-1011-3-0-0/> (last visited Feb. 28, 2009).

226. *Straubel*, *supra* note 123, at 1229.

process of arbitrators involves a finite list, it potentially fosters reliance by the selected arbitrators on the body creating the list of candidates.²²⁷ Second, the panel selection process creates the opportunity for the appointment of biased arbitrators.²²⁸

Under the CAS Code, the CAS maintains a master list of at least 150 arbitrators who must be legally trained, competent in sports law or international arbitration, and have a strong command of English or French.²²⁹ The CAS Code further requires that the arbitrators represent the different continents and judicial cultures of the world.²³⁰ The IOC, the IFs, and the National Olympic Committees each nominate one-fifth of the arbitrators on this list.²³¹ The arbitrators comprising the fourth one-fifth of the master list should be appointed “with a view to safeguarding the interests of the athletes,” and those on the final one-fifth must be individuals that are independent of the ICAS and the CAS.²³² The ICAS must approve all of the nominated arbitrators.²³³

Notwithstanding this arrangement of a seemingly diversified group, there are concerns that the list is dominated by potentially biased arbitrators.²³⁴ The Olympic governing bodies nominate three-fifths of the master list, and the ICAS identifies and approves the remaining two-fifths of arbitrators.²³⁵ Since members appointed by the Olympic family dominate the ICAS, arguably all of the arbitrators are in some way connected to the Olympic family.²³⁶ What is more, the list includes arbitrators who continue to represent parties before the CAS, including governing bodies, creating a possible conflict of interest or the appearance of partiality.²³⁷ These ties cast doubt over the impartiality of arbitrators, particularly in doping cases, where the collective interest of the Olympic Movement is called into question by an accused athlete.²³⁸

227. *Id.* at 1232.

228. *Id.* at 1235.

229. CAS Code, *supra* note 87, at S13-14 (stating that “[t]here are at least one hundred and fifty arbitrators and at least fifty mediators[,]” and that ICAS “shall call upon personalities with full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language.”).

230. *Id.* at S16.

231. *Id.* at S14.

232. *Id.*

233. *Id.* at S6 (defining one of the functions that the ICAS performs as “[appointing] the personalities who are to constitute the list of arbitrators and the list of CAS mediators and can remove them from those lists”).

234. Straubel, *supra* note 123, at 1233.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 1234.

The selection of panel members likewise raises the issue of potentially biased arbitrators, particularly in the Appellate Division.²³⁹ In both the Ordinary and Appellate Divisions, each party to a dispute is permitted to name an arbitrator to the panel.²⁴⁰ In Ordinary Division cases, the two party-appointed arbitrators select the President or third member of the panel.²⁴¹ In the Appellate Division, the panel President is appointed by the Division President.²⁴² Naturally, the parties in both Divisions will appoint arbitrators sympathetic to their positions in the case, resulting in two arbitrators with directly opposite views on the panel.²⁴³ With two votes potentially predetermined, the third panel member plays the critical tie-breaking role, likely making his appointment pivotal in determining the outcome of the case.²⁴⁴ In this way, at the Appellate level, the Division President of the CAS, who selects the panel President, serves an important role in deciding which party wins the case.²⁴⁵ Such prevailing control by the CAS over a dispute's resolution further weakens the claim that any procedural infirmities are remedied by the panel's *de novo* review on appeal.

F. CAS Choice of Law Questions

Article R58 of the CAS Code provides that the panel shall decide the dispute according to the applicable regulations and “the rules of law chosen by the parties.”²⁴⁶ Often, it is clear what rules of law the parties have chosen, but sometimes, ambiguity may arise in this context.²⁴⁷ For instance, in *French v. Australian Sports Commission*,²⁴⁸ French, a cyclist, appealed a CAS award that found him in contravention of the Australian Sports Commission Doping Policy and Cycling Australia Anti-Doping Policy.²⁴⁹ The Australian Sports Commission and Cycling Australia cross-appealed part of the award, contesting the dismissal of one of the alleged doping offenses, and proposing to introduce new evidence.²⁵⁰ This brought into question the applicable law of procedure for determining

239. *Id.* at 1235.

240. CAS Code, *supra* note 87, at R40.2, 48, 53.

241. *Id.* at R40.2.

242. *Id.* at R54.

243. Straubel, *supra* note 123, at 1235-36.

244. *Id.* at 1236.

245. *Id.*

246. CAS Code, *supra* note 87, at R58. The Code provides:

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

Id.

247. McLaren, *supra* note 62, at 6.

248. *French v. Austl. Sports Comm'n*, CAS 2004/A/651, 21 Award of 21 Jan. 2005, Interlocutory Hearing # 1.

249. McLaren, *supra* note 62, at 5-6.

250. *Id.* at 5.

whether the evidence that had not been adduced at the hearing of first instance would be admissible on cross-appeal.²⁵¹ French argued that the CAS Code's silence on the issue required the appeal panel to apply the law of Australia as to the admissibility of new evidence on an appeal by way of rehearing.²⁵² The Australian Sports Commission and Cycling Australia urged that the contract between the parties provided that the CAS Code should govern the issue.²⁵³

In the second interlocutory ruling, the panel held that "the CAS Code and its related jurisprudence were not silent on the issue," as the CAS Code informed the meaning of the word "rehearing," and the parties in their agreement intended to use the appeal procedure contemplated under the CAS Code.²⁵⁴ In accordance with the definition of "rehearing" under the CAS Code, the new evidence was deemed admissible.²⁵⁵

Under Article R58 of the CAS Code, in the absence of a choice of applicable law by the parties, a CAS appeals panel has the discretion to apply the rules of law it deems appropriate, provided the panel documents its reasons for doing so.²⁵⁶ In the case of Elmar Lichtenegger,²⁵⁷ an Austrian hurdler banned for use of the anabolic steroid nandrolone, the parties substantially disagreed on the rules of law that were to govern the case.²⁵⁸ Lichtenegger and his national federation claimed Austrian law should apply, while the IAAF conversely claimed that the law of Monaco should apply.²⁵⁹ Guided by the relevant CAS jurisprudence the CAS panel decided to apply principles of law common to both the laws of Austria and Monaco.²⁶⁰

The CAS appeals panel is permitted to exercise its independent judgment in determining choice of law questions under the CAS Code. Consequently, if the parties have not agreed to the applicable rules of law to settle potential disputes, they confront unpredictability and the risk of the panel applying a set of laws unfavorable to one of the parties. It is therefore imperative that sports federations and athletes have a clear understanding of the applicable rules of law governing arbitration proceedings.

251. *Id.*

252. French v. Austl. Sports Comm'n, CAS 2004/A/651, 31, 33 Award of 30 Mar. 2005, Interlocutory Hearing # 2.

253. *Id.*

254. McLaren, *supra* note 62, at 6.

255. *Id.*

256. CAS Code, *supra* note 87, at R58.

257. IAAF v. ÖLV & Elmar Lichtenegger, CAS 2004/A/624, 1, Award of 7 July 2004.

258. McLaren, *supra* note 62, at 7.

259. *Id.*; see also IAAF v. ÖLV & Elmar Lichtenegger, *supra* note 257, at 4 ("Appellant [IAAF] submitted that... '[t]he IAAF is given legal personality under the laws of Monaco and its Statutes and Rules derive their status from Monegasque law.'").

260. *Id.*

G. CAS Jurisdiction and U.S. Courts

Under U.S. law, the Ted Stevens Olympic and Amateur Sports Act (“Amateur Sports Act”) provides the USOC with exclusive jurisdiction over all matters concerning the country’s participation in the Olympic Games.²⁶¹ U.S. courts have held that issues regarding an athlete’s eligibility to participate in the Olympic Games or any of its qualifying events are reserved solely for the USOC, and the country’s civil courts have no jurisdiction to entertain a private right of action that might impinge upon an eligibility determination.²⁶² If an athlete’s course of administrative remedies results in arbitration before the CAS, his or her case may arguably be beyond the reach of the Amateur Sports Act.²⁶³ This is because claims that have been properly submitted to arbitration are ruled upon by entities such as CAS and, as a result, are barred from re-litigation in U.S. courts pursuant to the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”).²⁶⁴

However, to ameliorate the effect of inherently unjust adjudication, U.S. courts provide one extremely narrow exception to this rule, allowing re-litigation in U.S. courts where enforcement of the award by the CAS would be contrary to public policy.²⁶⁵ To trigger this exception the decision must violate the “most basic notions of morality and justice.”²⁶⁶ Therefore, even if a U.S. court determines that an arbitration panel’s decision is arbitrary and capricious, it still may not pierce the veil of the jurisdictional bar.²⁶⁷

These requirements seriously disconcerted one federal judge ruling on American sprinter Justin Gatlin’s motion to enjoin the USADA from enforcing his suspension from competition so that he could participate in the U.S. Olympic Track and Field Trials beginning June 27, 2008.²⁶⁸ Gatlin challenged his suspension on grounds that the USADA violated his rights under the Americans with Disabilities Act and the Rehabilitation Act of 1973 (“ADA”).²⁶⁹ Gatlin, the gold medalist in the 100 meters at the 2004 Athens Games, was serving a four-year suspension that was due to expire in May 2010.²⁷⁰ He petitioned the CAS to

261. 36 U.S.C. § 220503(3)(A) (2006).

262. Slaney v. IAAF, 244 F.3d 580, 594-95 (7th Cir. 2001) (“We agree... that strict questions of athlete’s eligibility are preempted by the Amateur Sport’s Act’s grant of exclusive jurisdiction to the USOC over all matters pertaining to United States participation in the Olympic Games.”).

263. Gatlin v. U.S. Anti-Doping Agency, Inc., No. 3:08-cv-241/LAC/EMT, 2008 WL 2567657, *1 (N.D. Fla. 2008).

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at *2.

268. *Id.*

269. Gatlin, *supra* note 263, at *2.

270. Associated Press, *Gatlin Won’t Run After Judge Reverses Ruling*, N.Y. TIMES, June 25, 2008, at D6.

rescind another violation from 2001, thereby reducing the suspension to two years and allowing him to participate in the Olympic Trials.²⁷¹

Gatlin's first violation was testing positive for amphetamines contained in prescription drugs used to treat attention deficit disorder.²⁷² Gatlin argued that using the 2001 offense to enhance the sanction for the second violation would in effect be forcing USATF to violate the ADA.²⁷³ While conceding that the CAS was not bound by the ADA, Gatlin contended that the CAS could not impose a sanction that would force an American entity to violate American law.²⁷⁴

The CAS rejected Gatlin's claims, holding that there was no discrimination on the basis of a disability because Gatlin was not prevented from competing by virtue of his disability.²⁷⁵ In making this finding, the Panel stated, "While Mr. Gatlin's disability admittedly put him at a disadvantage in the classroom, it in no way put him at a disadvantage on the track."²⁷⁶ The U.S. District Court judge found the result of this determination "quite troubling because Mr. Gatlin [was] being wronged, and the United States Courts have no power to right the wrong perpetrated upon one of its citizens."²⁷⁷ The judge expressed further disgust in noting,

By imposing sanctions on athletes like Mr. Gatlin who take medication for their legitimate disability, the Anti-Doping Organizations are willfully violating the law – behaving as if they are above the law. In these circumstances, they are nothing more than bullies preying on the vulnerable. The federal government should take a serious look at this practice.²⁷⁸

Gatlin's case thus raises several issues, including whether the automatic consequences of liability, irrespective of the particular circumstances present in each case, are too rigid to ensure the fair treatment of athletes; and whether the preclusion of domestic courts from jurisdiction over matters decided by foreign arbitration panels except in very narrow circumstances allows anti-doping organizations to operate above the laws of the athlete's home countries.

VI. RECENT DEVELOPMENTS IN ANTI-DOPING JURISPRUDENCE

Several revisions to the Code were approved by the WADA Foundation Board for implementation in January 2009.²⁷⁹ While recognizing that the Code has

271. *Id.*

272. *Id.*

273. IAAF v.USATF & Gatlin, CAS 2008/A/1462 1, 11, Award of 10 Sept. 2008, <http://www.tas-cas.org/d2wfiles/document/2153/5048/0/award%201461%20+%201462%20internet.pdf>.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Gatlin*, *supra* note 263, at *2.

278. *Id.* (quoting Campbell, dissenting, 2006 AAA Panel, Doc. 5, ex. j at 1).

279. WADA, *Q&A: Code Revisions 1*, Feb. 20, 2008,

proven to be a very powerful and effective tool in the harmonization of anti-doping efforts since it came into force on January 1, 2004, the WADA always intended the Code to operate as a living document, evolving to meet new demands in the fight against doping in sport.²⁸⁰

A. *Sanctions*

The first major changes to the Code affected sanctions for violations. The revised Code provides for increased sanctions in doping cases involving aggravating circumstances, such as the athlete participating in a large doping scheme, the athlete using multiple prohibited substances or a prohibited substance on multiple occasions, or the athlete engaging in deceptive conduct to avoid detection of an anti-doping rule violation.²⁸¹ While the earlier Code allowed for a four-year ban for a first serious anti-doping rule violation exclusively in cases of trafficking or administration of a prohibited substance or method, the revised Code broadens the spectrum of anti-doping rule violations that may result in a four-year ban for a first serious doping offense.²⁸²

At the same time, the revised Code has introduced greater flexibility with respect to sanctions in general, allowing for reduced sanctions where the athlete can establish that the substance involved was not intended to enhance performance.²⁸³ In particular, the former Code provided that “[t]he Prohibited List may identify specified substances which are particularly susceptible to unintentional anti-doping rule violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents,” and modified sanctions where an athlete could establish that the use of such a specified substance was not intended to enhance sport performance.²⁸⁴ By contrast, the revised 2009 Code now provides that *all* prohibited substances, except substances in the classes of anabolic agents, hormones and those stimulants so identified on the Prohibited List, shall be “specified substances” for the purposes of sanctions.²⁸⁵

As a result of the 2009 revisions, the Code allows an athlete to have his or her sanction reduced to a reprimand without a period of ineligibility at a minimum, and

http://www.wada-ama.org/rtecontent/document/QA_2009_Code_en.pdf (last visited Feb. 1, 2009).

280. *Id.*

281. *Id.* at 3.

282. *Id.* (in addition to the circumstances listed in the accompanying text, “[a]ggravating circumstances also include situations in which a normal individual would be likely to enjoy the performance-enhancing effects of the anti-doping rule violation(s) beyond the otherwise applicable period of ineligibility.”)

283. WADA, *Q&A: Code Revisions 1*, *supra* note 279; *see also* World Anti-Doping Code (2009), art. 4.2.2. cmt., http://www.wada-ama.org/rtecontent/document/code_v2009_En.pdf [hereinafter 2009 Code] (“[T]he strong consensus of stakeholders is that . . . that Code sanctions should be made more flexible where the Athlete... can demonstrate that he or she did not intend to enhance sport performance. The change to Article 4.2... provides this flexibility[.]”).

284. 2003 Code, *supra* note 56, art. 10.3.

285. 2009 Code, *supra* note 283, art. 4.2.2.

a two-year ban at a maximum, if he or she can establish how a specified substance entered his or her body or came in his or her possession, and that the specified substance was not intended to enhance performance.²⁸⁶ This makes it more likely that specified substances, as opposed to other prohibited substances, could be excused by a credible, non-doping explanation.²⁸⁷ Because this list of specified substances has been expanded to include all prohibited substances, except those identified in the Prohibited List, it is more likely that the presence of a prohibited substance could be excused by a credible, non-doping explanation.

Next, the revised Code has strengthened incentives to come forward by increasing the potential reduction of an ineligibility period from one-half of the otherwise applicable ineligibility period under the former Code to three-quarters. Such a mitigated sentence is available when an athlete or another person (a third party) provides substantial assistance to an anti-doping organization, criminal authority, or professional disciplinary body which results in the anti-doping organization discovering the rule violation, criminal conduct, or breach of professional rules by another person.²⁸⁸ Moreover, where an athlete or another person voluntarily admits the commission of an anti-doping rule violation prior to receiving notice of a sample collection which could establish an anti-doping rule violation, or where no anti-doping organization is aware that an anti-doping rule violation might have been committed, the period of ineligibility may be reduced up to one-half of the period of ineligibility otherwise applicable.²⁸⁹ Lastly, the revised Code allows anti-doping organizations to provide their own financial sanctions against those who violate their rules.²⁹⁰

These changes to the Code provisions involving sanctions attempt to reconcile two conflicting objectives: the alignment of anti-doping sanctions with generally accepted principles of proportionality, taking into consideration the athlete's unique circumstances; and the equal imposition of punitive measures on all guilty athletes across all sports in all countries. It is clear from such revisions that as anti-doping case law evolves, the WADA has become better equipped to anticipate the exceptional circumstances that may arise and to codify provisions that will address them in a more predictable, uniform manner. The revised Code thus ensures more consistent application of penalties for anti-doping violations while still allowing for sanctions proportional to the degree of an athlete's fault under the circumstances.

B. Procedural Efficiency and Uniformity of Rules

In addition to offering greater flexibility through changes in rules governing sanctions, the revised Code improves the efficiency of its procedures and increases

286. WADA, *Q&A: Code Revisions*, *supra* note 279, at 3.

287. *Id.* at 3-4.

288. 2009 Code, *supra* note 283, art. 10.5.3.

289. *Id.* art. 10.5.4.

290. *Id.* art. 10.12.

the uniformity of its rules. The revised Code expressly provides for WADA's right to appeal cases directly to the CAS where an anti-doping organization fails to render a decision on an anti-doping rule violation within a reasonable deadline, in the same manner they would appeal an organization's finding that there was no anti-doping rule violation.²⁹¹

Another important revision to the Code is the harmonization of its rules. For example, under the former Code, there were no requirements as to the number of missed tests that should lead to a potential anti-doping rule violation, leaving it to the discretion of anti-doping organizations to determine this number based on the varying circumstances encountered in different sports and countries.²⁹² These rules have been formalized under the revised Code, which requires that any combination of three missed tests and/or failures by an athlete to provide accurate "whereabouts" information²⁹³ within an eighteen-month period, as determined by the anti-doping organizations with jurisdiction over the athlete, shall constitute an anti-doping rule violation.²⁹⁴

The revised Code also mandates that the IOC accept bids for the Olympic Games only from countries whose government has ratified, accepted, approved, or acceded to the United Nations Education, Scientific, and Cultural Organization ("UNESCO") International Convention Against Doping in Sport,²⁹⁵ and where the National Olympic Committee, National Paralympic Committee, and National Anti-Doping Organization are in Compliance with the Code, thus aligning all Olympic participants under a single anti-doping system.²⁹⁶ Through appeals to one judicial body, more formalized rules, and adherence by all Olympic participants to the same governing code, the revised Code provides greater clarity in the anti-doping system. Increased reliance on the CAS to adjudicate cases on appeal will contribute to more certainty and predictability in anti-doping jurisprudence as the court increasingly relies on the precedents established by its previous decisions. Formalizing the Code's rules will ensure that athletes are better informed of their responsibilities and can avoid inadvertent doping violations. Finally, the externalization of anti-doping programs to the WADA will further reduce conflict-of-interest issues that beleaguered previous anti-doping efforts.

C. "Whereabouts" Provision

The release of the updated Code on January 1, 2009 has faced vehement opposition from athletes regarding the "whereabouts" provision.²⁹⁷ "Whereabouts"

291. WADA, *Q&A: Code Revisions*, *supra* note 279, at 4.

292. *Id.* at 4-5.

293. See discussion *infra*, Section VI.C.

294. 2009 Code, *supra* note 283, art. 2.4.

295. UNESCO International Convention Against Doping in Sport, Oct. 19, 2005, art. 1, <http://unesdoc.unesco.org/images/0014/001425/142594m.pdf#page=2> ("The purpose of this Convention... is to promote the prevention of and the fight against doping in sport, with a view to its elimination.").

296. *Id.* art. 20.1.8.

297. Matt Slater, BBC Sport, *Legal Threat to Anti-Doping Code*, Jan. 22, 2009,

refers to information provided to the IF or National Anti-Doping Organization by a designated number of top elite athletes regarding their location. With this information, the IFs or National Anti-Doping Organizations place the athletes in their respective registered testing pool.²⁹⁸ “Whereabouts” rules are part of the International Standard for Testing, which is mandatory for Anti-Doping Organizations that have adopted the Code.²⁹⁹

Two major changes were implemented in relation to “whereabouts.” First, the revised Code requires top-level athletes included in the registered testing pool of either their IF or NADO to specify one hour each day, seven days a week, between 6:00 a.m. and 11:00 p.m. during which they can be located at a specified time for testing.³⁰⁰ An athlete submits this information on a form online and can update it by email or text message.³⁰¹ Under the former Code, any athlete in his or her country’s testing pool would have to specify, three months in advance, a time and a place each day, five days a week, when they could be found to give a no-notice drug test.³⁰² Athletes could pick any hour between 5:00 a.m. and 11:00 p.m., and they only had to be in the stated place for a portion of that hour, with the burden on the test administrators to be there for the full hour.³⁰³

The second change to the whereabouts provisions under the revised Code provides that any combination of three missed tests and/or failures to provide accurate “whereabouts” information within an eighteen-month period will open a disciplinary proceeding by the anti-doping organization with jurisdiction over the athlete.³⁰⁴ Even an athlete’s failure to fill out the form identifying his or her whereabouts correctly, or failure to provide full details of his or her competition and training schedule three months in advance, counts towards the three-strike limit.³⁰⁵ Sanctions range between one and two years depending on the circumstances of the case.³⁰⁶ Previously, the length of sanctions was discretionary for anti-doping organizations with a suggested range of between three months and two years.³⁰⁷

http://news.bbc.co.uk/pr/fr/-/sport2/hi/front_paeg/7844918.stm.

298. WADA, *Q&A: Whereabouts Requirements* 1, http://www.wada-ama.org/rtecontent/document/qa_whereabouts_requirements_en.pdf (last visited Feb. 22, 2009).

299. *Id.* at 2.

300. *Id.*

301. Slater, *Legal Threat to Anti-Doping Code*, *supra* note 297.

302. Matt Slater, *Anger Grows Over Anti-Doping Code*, BBC SPORT, Feb. 4, 2009, http://news.bbc.cok.uk/go/pr/fr/-/sport2/hi/front_page/7870729.stm (last visited Feb. 21, 2009).

303. *Id.*

304. WADA, *Q&A: Whereabouts Requirements*, *supra* note 298, at 2.

305. Slater, *Legal Threat to Anti-Doping Code*, *supra* note 297.

306. *Id.*; see 2009 Code, *supra* note 283, art 10.3.3 (“For violations of Article 2.4 (Whereabouts Filing Failures and/or Missed Tests), the period of Ineligibility shall be at a minimum one (1) year and at a maximum two (2) years based on the Athlete’s degree of fault.”).

307. Slater, *Legal Threat to Anti-Doping Code*, *supra* note 297; see 2003 Code, *supra* note 56, art. 10.4.3 (“For violations of Article 2.4 (Whereabouts Violation of Missed Test) the period of Ineligibility shall be at a minimum [three] months and at a maximum two years in accordance

As a result of these changes, some athletes are concerned that they could be charged with a missed test if they are late for a test or in the middle of a training session.³⁰⁸ Others are annoyed that they now must wait for testing administrators to randomly appear for one hour each day, 365 days a year.³⁰⁹ A group of Belgian professional athletes have initiated legal proceedings against their regional government on the issue of “whereabouts,” challenging the new provisions as an invasion of privacy under European Union law.³¹⁰ The WADA rejected this claim, contending that “the 2009 international standards for testing were drafted with the protection of athletes in mind by providing appropriate, sufficient and effective privacy protection, taking into account various international and regional data protection laws.”³¹¹ Furthermore, the WADA points out that the requirements were actually reduced to one hour a day from the 24/7 requirement previously applied by a number of anti-doping organizations.³¹²

Obviously, the whereabouts provisions are a crucial means of deterrence and detection of drug violations by allowing anti-doping organizations to conduct out-of-competition testing without notice to athletes. Without access to athletes, such controls would be nearly impossible to administer. Nevertheless, the WADA should consider making a few minor adjustments to the new whereabouts rules, addressing some of the current criticisms while still fulfilling their fundamental purpose. The issuance of strikes for filling out the form incorrectly seems too harsh a measure, especially in light of the fact that athletes complete the form over the internet and update the information by email or text message, leaving the system potentially vulnerable to non-human errors. Instead, the WADA should take into account clearly unintentional mistakes, committed not by any fault of the athlete but by technological failures.

The start of the testing window should also be pushed back to 5:00 a.m., as it was under the former whereabouts rules, providing more flexibility for athletes whose training sessions begin early in the morning.³¹³ As a final amendment, the WADA should shift the burden back from the tested athlete to the test administrator, requiring the tester and not the athlete to be present for the full hour.³¹⁴ This would ease athletes’ apprehension that a late arrival to out-of-competition drug testing would result in a strike.

These deficiencies in the revised Code suggest that the World Anti-Doping Program is still a work in progress. Naturally, complaints will arise in response to change, regardless of any actual advances made. The WADA should acknowledge

with the rules established by the Anti-Doping Organization whose test was missed or whereabouts requirement was violated.”).

308. Slater, *Anger Grows Over Anti-Doping Code*, *supra* note 302.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. Matt Slater, *Why the Code's Not It For WADA*, BBC SPORT, MATT SLATER'S BLOG, Feb. 19, 2009, http://www.bbc.co.uk/blogs/mattslater/2009/02/why_the_codes_not_it_for_wada.html.

314. *Id.*

the current criticisms and be prepared to offer solutions, even if that means re-writing recent revisions to the Code. In doing so, the WADA can, without compromising its efforts to catch athletes who violate the anti-doping rules, earn even greater trust and respect from athletes worldwide.

VII. CONCLUSION

While the current anti-doping system under the revised Code is not flawless, it certainly comes closer to the WADA's objective of striking "a reasonable balance between effective anti-doping enforcement for the benefit of clean athletes and fairness in the exceptional circumstances where a prohibited substance entered into an athlete's system through no fault or negligence on the athlete's part."³¹⁵ In articulating this goal, the WADA apparently concedes that individual injustices may result from the rigid application of its rules and addresses this concern through greater proportionality of its sanctions. By enumerating with increased precision the mechanisms for a reduction or elimination of sanctions based on exceptional circumstances, the revised Code aims to minimize undue hardship on the individual athlete to the fullest extent possible without sacrificing the vigilance and efficacy of its anti-doping regime. Of course, this still requires of individual athletes a heightened responsibility to remain informed of international anti-doping rules.

Although their responsibility may at times appear onerous, the WADA has sought to alleviate some of the burden on athletes through its revisions to the Code, providing greater clarity of the rules, consistency of enforcement, and predictability of adjudication. As the anti-doping system continues to advance a more uniform approach, coordinated on a global scale across all governing bodies of sport, and as the revised Code is increasingly put to the test, clean competitors and spectators of international sport alike can be confident that incredible athletes are truly clean, and that the integrity of international competition is uncompromised.

315. WADA, *Q&A: Whereabouts Requirements*, *supra* note 298, at 5.