

**WHAT ABOUT THE CLEAN ATHLETES? REFOCUSING
INTERNATIONAL SPORT’S ANTI-DOPING APPROACH
ONTO EQUITABLE REMEDIES FOR DOPING’S VICTIMS,
PARTICULARLY CLEAN ATHLETES FROM DEVELOPING
COUNTRIES**

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ABSTRACT

This Comment will aim to refocus thinking about sports doping and remedies by focusing instead on doping’s negative impact on clean athletes who are victimized by the practice, particularly those from developing countries. The relative cost to these athletes of not placing higher in their sport, and of not receiving the associated monetary awards and endorsements, is larger than it is for athletes from developed countries. The loss of potential earned income that results from not being awarded their medals at the time of competition in front of a commercially significant audience is not adequately acknowledged or rectified by current remedies. This Comment will propose methods for monetizing these lost opportunities, and propose legal reforms and institutions that could reasonably provide equitable remedies to these athletes, and thus further discourage the practice of doping.

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I. INTRODUCTION

A. Context of the Problem

In July 2002, a young Usain Bolt, not yet a household name, won his country's only individual medal in the 200 meter dash at the International Association of Athletics Federation's World Junior Track and Field Championships in Kingston, Jamaica.¹ He ultimately finished the meet with three medals total, including two silver medals for participation in the 4x100 meter and 4x400 meter team relays.² By the end of 2002, the sportswear company Puma signed Bolt to his first endorsement deal, worth \$250,000.³ As of August 2016, Bolt's net worth totaled approximately US\$71.4 million, 97.67% of which has been derived from endorsement deals.⁴

By comparison, 40% of jobs in Jamaica pay about J\$11,500 a week,⁵ equivalent to \$88.36 in U.S. dollars, as of September 2017.⁶ Almost one in three men and one in two women in their early twenties cannot find work, and those that do find work mostly work in farming, fishing, or automobile repair.⁷ Most Jamaicans do not participate in Gucci and Puma apparel fashion shoots, but Usain Bolt is not most Jamaicans.⁸ Bolt is one of the most decorated track and field athletes of all time, and his recent 2016 victories in Rio de Janeiro illustrate his global athletic domination.⁹ In Rio de Janeiro, Bolt became the first athlete to ever achieve the "triple-triple"—simultaneous gold medals in the 100 meter, 200 meter,

Unless otherwise indicated, the currency of all monetary amounts in this Comment is the United States dollar.

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1. *Biography*, USAIN BOLT, <http://usainbolt.com/bio/> (last visited Sept. 29, 2017).

2. *Id.*

3. Tom Gerencer, *Usain Bolt Net Worth: Oh Those Jamaica Tax Rates*, MONEY NATION (Aug. 20, 2016), <http://moneynation.com/usain-bolt-net-worth/>.

4. *See id.* (attributing remaining portion of net worth that is not from endorsements to Track & Field and "other sources," which include talk show appearances and a book about his life).

5. Keiran King, *Why Jamaica Is Poor*, THE GLEANER (Mar. 5, 2014), <http://jamaica-gleaner.com/gleaner/20140305/cleisure/cleisure2.html>.

6. THE MONEY CONVERTER, <https://themoneyconverter.com/USD/JMD.aspx> (last visited Sept. 14, 2017).

7. King, *supra* note 5.

8. Shira Springer, *Usain Bolt Shows How a Life Can Change on the Way to Sports Icon Status*, BOS. GLOBE, Aug. 13, 2016, at C1.

9. Greg Myre, *Usain Bolt Makes History with a Triple-Triple as Jamaica Wins Spring Relay*, NAT'L PUB. RADIO (Aug. 19, 2016, 9:54 AM), <http://www.npr.org/sections/thetorch/2016/08/19/490704754/usain-bolt-makes-history-with-a-triple-triple-as-jamaica-wins-sprint-relay>.

and 4x100 meter relay races.¹⁰ Forbes magazine recently listed Bolt's current net worth at \$34.2 million, \$30 million of which comes from endorsements by brands like Puma.¹¹

It is easy to imagine how different Usain Bolt's life would be if not for his worldwide success. Bolt has acknowledged the difference that athletic opportunity created in his life—specifically, financial success—stating, “You're in sports to better your life. I definitely think that's the aim, to make as much money out of this as possible before you retire.”¹² However, many elite, rule-abiding athletes will never achieve such life-changing success and wealth, because they will lose opportunities for medals, prize money, and endorsements to triumphant athletes who dope.¹³ In this regard, clean athletes are victims of athletic doping.

Support for formal testing of doping in international competition traces back to the death of a doping Danish cyclist, Knut Jensen, in the 1960 Olympic Games in Rome.¹⁴ In 1967, a British cyclist died during the Tour de France while on a televised portion of the race.¹⁵ A combination of amphetamines and cognac were found in his bloodstream.¹⁶ Despite efforts to eradicate doping in international sports, the practice continues and has even included instances of government-sponsored doping.¹⁷ An investigative report from the World Anti-Doping Agency (WADA)¹⁸ proved the Russian government's involvement in a state-run doping program and its attempted cover-up.¹⁹ It was revealed that performance enhancing drugs were administered to Russian athletes on a grand scale. Russia's former anti-

10. *Id.*

11. *Usain Bolt Profile*, FORBES, <https://www.forbes.com/profile/usain-bolt/> (last visited Sept. 14, 2017).

12. *Springer*, *supra* note 8.

13. James Ellingworth, *Clean Athletes Still Waiting for Prize Money from Dopers*, THE ASSOCIATED PRESS (Dec. 1, 2016), <https://apnews.com/72e72a45ed3f47fca647664560ecb692> (positing athletes that dope not only unfairly win medals, but also deprive clean athletes of potential income, which negatively impacts clean athletes' livelihood).

14. Matthew Hard, *Caught in the Net: Athletes' Rights and the World Anti-Doping Agency*, 19 S. CAL. INTERDISC. L. J. 533, 537 (2010) (identifying death of cyclist as starting push for testing for doping, because amphetamines were found in cyclist's blood after fracturing his skull during race); *see also* Richard I.G. Holt et al., *The History of Doping and Growth Hormone Abuse in Sport*, 19 GROWTH HORMONE & IGF RES. 320 (2009); *A Brief History of Anti-Doping*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/About-WADA/History/A-Brief-History-of-Anti-Doping> (last updated June 2010) (providing a historical account of doping practices).

15. *Hard*, *supra* note 14, at 537.

16. *Id.*

17. *See e.g.*, Rebecca R. Ruiz, *Russia May Face Olympics Ban as Doping Scheme Is Confirmed*, N.Y. TIMES (July 18, 2016), http://www.nytimes.com/2016/07/19/sports/report-confirms-state-sponsored-doping-by-russia-at-olympics.html?_r=0 (discussing a report by the World Anti-Doping Agency that proves the Russian government ordered its former anti-doping lab director, Dr. Grigory Rodchenkov, to cover up a state-run doping program that administered performance-enhancing drugs to athletes and concealed incriminating urine samples).

18. *See Who We Are*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/who-we-are> (last visited Sept. 15, 2017) (explaining origins, form, and functions of WADA).

19. Ruiz, *supra* note 17.

doping lab director admitted to actively tampering with and concealing incriminating urine samples with the assistance of Russia's intelligence agency.²⁰

While WADA has reported that only 1–2% of athletes are caught doping, studies suggest that the actual prevalence of doping in sports is likely somewhere between 14% and 39%.²¹ Following the revelations of Russia's state-run doping program, sports officials began retesting urine samples from previous Olympic Games. The tests found more than seventy-five athletes from the Summer Games in Beijing and London were guilty of doping.²²

The Olympic Games are the most famous international sporting events, and the events are cherished around the globe partly because, in theory, all athletes are treated equally regardless of their origin. In the spirit of fair competition, athletic success at the Olympic-level depends entirely on the athlete's skills and talent, or in the case of team sports, the collective talent of the team. According to the Olympic Charter, "[t]he practice of sport is a human right Every individual must have the possibility of practising sport, without discrimination of any kind"²³ This responsibility requires "mutual understanding with a spirit of friendship, solidarity[,] and fair play."²⁴ The mission of the International Olympic Committee (IOC)²⁵ includes "protect[ing] clean athletes and the integrity of the sport, by leading the fight against doping, and by taking action against all forms of manipulation of competitions[,] and related corruption."²⁶ Therefore, the IOC fails to fully achieve its mission to protect clean athletes whenever one is victimized by other athletes who are doping—depriving clean athletes of Olympic victories and the potential economic benefits and opportunities that Olympic victory can create.

B. Comment Purpose and Structure

Even though the IOC has taken steps to eradicate doping,²⁷ not all athletes are treated equally by its current strategy.²⁸ This Comment will demonstrate that when efforts to eradicate doping focus only on punishing the athletes who dope, then clean athletes from developing countries are at a disadvantage. These clean athletes

20. *Id.*

21. See Olivier de Hon et al., *Prevalence of Doping Use in Elite Sports: A Review of Numbers and Methods*, 45 *SPORTS MED.* 57, 58–60 (2014) (using the Randomized Response Technique to arrive at their result and noting that doping is most prevalent in adult elite athletes).

22. *Id.*

23. INTERNATIONAL OLYMPIC COMMITTEE, *Olympic Charter* 13 (2015), https://stillmed.olympic.org/Documents/olympic_charter_en.pdf.

24. *Id.*

25. See *What We Do*, INTERNATIONAL OLYMPIC COMMITTEE, <https://www.olympic.org/the-ioc/what-we-do> (last visited Sept. 12, 2017) (describing the IOC ability to collaborate with National Olympic Committees (NOCs), International Sports Federations (IFs), athletes, Organizing Committees for the Olympic Games (OCOGs), and TOP partners).

26. *Supra* note 23, at 18.

27. See *IOC Sets Up Independent Testing Authority in Bid to Eradicate Doping Abuse in Sports*, TASS (Mar. 16, 2015, 5:32 PM), <http://tass.com/sport/935987> (discussing the IOC's move to an "independent global Anti-Doping System" with the goal of protecting non-doping athletes).

28. See discussion *infra* Part III.

often have less individual wealth and fewer resources provided by their home country to support their competition in the first place.²⁹ They also have fewer resources to sustain themselves when they lose out on medals, prize money, or endorsements that they lost the opportunity to earn because of other athletes' doping.³⁰ When these athletes are at such a disadvantage, the spirit of fair play is lost. Therefore, compliance with the mission of the IOC requires that the interested international and sporting communities address the issue of clean athletes from developing countries, who are disproportionately and adversely affected by doping in ways that clean athletes from developed countries are not. If ignoring the negative effects of doping on clean athletes from developing countries continues, then efforts to eradicate doping in international sporting competition will always be undermined—and therefore deficient.

Regulatory efforts by international organizations and nations focus on punishing athletes who dope and stripping those athletes of the medals and titles they have unfairly won.³¹ This Comment will aim to refocus thinking about doping remedies by focusing instead on doping's negative impact on clean athletes who are victimized by the practice, particularly those from developing countries.³² The relative cost to these athletes of not placing higher in their sport, and not receiving the associated monetary awards and endorsements, is larger than it is for athletes from developed countries.³³ International sporting organizations and agencies misplace their focus on punishing athletes who dope and leave clean athletes from developing countries with no effective remedy for their loss. By solely awarding the winners' medals to the rightful athletes—often years after they participated in the event—the loss of potential earned income that results from not being awarded their medals at the time of competition in front of a commercially significant audience is not adequately acknowledged or rectified by current remedies.³⁴

There are no cases of non-doping athletes suing doping athletes or international sports federations and receiving damages³⁵ because there has never been an appropriate forum in which these athletes could seek damages.³⁶ This

29. See discussion *infra* Section III.A.

30. See discussion *infra* Section III.B.

31. See Rebecca R. Ruiz, *Olympic History Rewritten: New Doping Tests Topple the Podium*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/21/sports/olympics/olympics-doping-medals-stripped.html> (describing how in the wake of Russia's doping scandal at Sochi, sports officials have begun retesting urine samples from previous Olympic Games, and are retroactively bringing disciplinary proceedings against athletes who are caught for doping in the past).

32. See discussion *infra* Section II.B.2.

33. See discussion *infra* Section III.A.

34. See Mike Philbrick, *Never Mind the Athletes...What Happens to the Medals?*, ESPN (Aug. 20, 2008, 11:25 AM), <http://www.espn.com/espn/page2/story?page=philbrick/080820> (noting that since Olympic athletes found guilty of doping are not technically required by the IOC to return medals, but can return medals as an act of fair play, it may be true that some clean athletes will never receive their medals).

35. As of September 2017, there is no recorded case of an athlete suing to correct the results of, or to receive compensation for, tainted competitions.

36. See discussion *infra* Section IV.B.

Comment will provide a framework for evaluating the quantification of damages in circumstances where clean athletes lost to athletes who dope and thereby missed out on medals, prize money, and endorsements.³⁷ Having established that these costs are quantifiable, this Comment will further argue that a remedy is therefore appropriate, and will provide possible solutions.³⁸ Should a remedy be provided, this Comment argues that efforts to eradicate doping will be more comprehensive and effective if focused on the clean athletes, not those who dope.³⁹

Part II of this Comment highlights the disjuncture between typical arbitral tribunals and the Court of Arbitration for Sport (CAS)—mainly that other tribunals exist to provide for punishment and equitable remedies, whereas the CAS serves primarily to punish wrongdoing. The CAS's use of an exclusively punitive regime is tied to its primary goal—reducing doping. This Comment argues that focusing on providing an equitable remedy for clean athletes should also be included in the CAS's mission. Furthermore, Section II.A discusses the roles of the IOC and WADA in eradicating doping, and the creation and role of the World Anti-Doping Code.⁴⁰

Section II.B describes the role of the CAS and its current Anti-Doping Division.⁴¹ Guilty athletes turn to the CAS Anti-Doping Division to appeal decisions of international organizations, like the IOC and WADA, for suspensions from international competition. The CAS's Anti-Doping Division is not currently constituted as a forum for clean athletes seeking damages from athletes who prevailed over them with the aid of doping, causing clean athletes to lose out on the opportunities and monetary benefits of winning medals.

Part III of this Comment will explain why athletes from developing countries are disproportionately affected by doping and why the CAS does not provide a sufficient remedy for these athletes. Section III.A discusses quantifying the most apparent economic losses that occur when an athlete loses to an athlete who dopes: the market value of the medal award, and any cash prizes awarded by home countries. This section also examines how much these benefits could impact the lives of athletes from developing countries. Section III.B explains that the largest potential losses to clean athletes are endorsements. This section also addresses how awarding clean athletes their rightful medals years after participation is far too late to capitalize on endorsement opportunities, as the ability of an advertiser to capitalize on an athlete's success has passed during that duration as well.

Part IV of this Comment will briefly analyze solutions to doping that have been proposed by various scholars. Section IV.A discusses a proposed new role for the CAS, drawing on current reform ideas for the CAS. This solution involves

37. See discussion *infra* Section IV.B.

38. See discussion *infra* Section IV.B.

39. See discussion *infra* Section III.B.

40. WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE (2015), <https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code.pdf> (last visited Sept. 29, 2017).

41. See *id.* at 130–52. Specifically, Appendix 1 defines important terms throughout the Code, and Appendix 2 provides examples of the application of Article 10, which addresses sanctions for athletes found guilty of doping. See *generally id.*

reforming various aspects of the CAS, to change it into a forum for all athletes who are affected by doping, instead of only using the CAS to punish athletes accused and found guilty of doping. This solution may provide some benefit to clean athletes from developing countries who have been victimized by the consequences of other athletes in their sport who engage in doping and reap ill-gotten rewards. Furthermore, Section IV.A notes that leading reform efforts for the CAS disproportionately focus on providing the accused athlete a fair hearing as opposed to providing a remedy for clean athletes in doping disputes. Section IV.B discusses a proposed new role for the CAS based on concepts for an international court of civil justice to supplement the current International Court for Justice (ICJ). Section IV.B also argues that this imperfect solution would nonetheless be a step in the right direction, if athletes from less affluent countries could afford to engage in proceedings and are provided with counsel.

This Comment concludes with a call to action for sports law scholars and policymakers to refocus their efforts to develop international sport adjudication, to expand its role beyond punishing doping athletes, and to provide a legal remedy for clean athletes. According to the analysis of this Comment, the clean athlete's legal remedy should be constructed to address the particular context and proportionally greater challenges of athletes from developing countries.

C. Economic Parameters of this Analysis

In order to analyze the effects of doping on athletes from developing countries, we must first define “developing country.” Developing countries are frequently defined as those where GDP per capita is \$12,000 or lower, although exceeding the \$12,000 GDP per capita threshold does not automatically qualify a country as being developed.⁴² Another metric to determine whether or not a country is developed is The Human Development Index (HDI), created by the United Nations (U.N.) as a metric to assess social and economic development of countries.⁴³ An additional factor relevant to a country's status as developed or undeveloped is the percentage of a country's population living at or below the poverty line.⁴⁴ Economists use these metrics to examine the totality of a country's economic profile before classifying its economy, which is accomplished without

42. See *Top 25 Developed and Developing Countries*, INVESTOPEDIA (Sept. 28, 2016 2:09 PM), <http://www.investopedia.com/updates/top-developing-countries/> (describing GDP per capita as the primary factor for distinguishing developed countries from developing countries, while also listing other characteristics typical of developed countries such as a high level of industrialization, stable birth and death rates, higher number of women in the workforce, disproportionate use of resources, and higher debt levels).

43. See *id.* (describing the HDI as a metric that qualifies life expectancy, educational attainment, and income into a standardized number between zero and one, with values closer to one indicating a greater level of development—most developed countries have HDIs of 0.8 or higher).

44. See *Population Below Poverty Line*, *The World Factbook*, C.I.A., <https://www.cia.gov/library/publications/the-world-factbook/fields/2046.html> (last visited Sept. 29, 2017) (providing an exhaustive list of all countries showing the percentage of population living below the poverty line).

the use of universal standards.⁴⁵ Accordingly, disagreements over a country's status are not uncommon.⁴⁶ For this Comment, developing countries will be considered those countries which have a GDP per capita level at or below \$12,000. For the purposes of generating practical analysis, this Comment will make some underlying assumptions about athletes from developing countries, most significantly that an athlete from one of these countries is an average citizen of average means.

II. HISTORY AND ROLES OF MODERN INTERNATIONAL SPORTING ORGANIZATIONS AND THE CAS

A. *The International Olympic Committee and the World Anti-Doping Agency*

After the events in international cycling in the early 1960s,⁴⁷ the world began to address doping in international competition.⁴⁸ By the 1960s, individual nations began enacting domestic anti-doping legislation.⁴⁹ In 1966, The International Cycling Union (UCI) and the Fédération Internationale de Football Association (FIFA) were among the first international sports federations to implement drug tests.⁵⁰ Seeing a clear need for a unified set of standards to govern international sport, the IOC convened the World Conference on Doping in Sport in February 1999.⁵¹

Following the World Conference on Doping in Sport, the IOC established the World Anti-Doping Agency (WADA)⁵² on November 10, 1999.⁵³ WADA is supported by intergovernmental organizations, governments, public authorities, and other public and private bodies campaigning against doping in sport.⁵⁴ WADA's mission is to "lead a collaborative worldwide movement for doping-free sport."⁵⁵ At the core of WADA's role in eradicating doping is maintaining the World Anti-Doping Code ("the Code").⁵⁶

45. See *Top 25 Developed and Developing Countries*, *supra* note 42 (noting that there are no set minimums or maximums for any of the metrics used by economists to determine a country's development status).

46. See *id.* (noting that countries such as Mexico, Greece, and Turkey are considered developed by some organizations and still developing by others).

47. See *supra* notes 14–16 and accompanying text.

48. *Id.*

49. See FIFA, *A Brief History of Doping*, available at <http://www.fifa.com/development/news/y=2007/m=5/news=brief-history-doping-514062.html> (last visited Oct. 3, 2016) (identifying France as the first country to enact anti-doping legislation and indicating that other nations followed suit).

50. *Id.*

51. *Id.*

52. *Who We Are*, *supra* note 18.

53. *Id.*

54. *Id.*

55. *Id.*

56. See *id.* (stating other key activities of WADA include scientific research, education, and development of anti-doping capacities); see also WORLD ANTI-DOPING AGENCY, *supra* note 40 and accompanying text for information on the Code (noting that this was most recently approved in its current form in Johannesburg, South Africa on Nov. 15, 2013).

Today, the Code is “the core document that harmonizes anti-doping policies, rules[,] and regulations within sport organizations and among public authorities around the world,”⁵⁷ and is supported through the power of international law by the nearly universally ratified International Convention against Doping in Sport, which entered into force in 2007.⁵⁸ The Code is designed to address previous problems with “disjointed and uncoordinated anti-doping efforts, including, among others: a scarcity . . . of resources required to conduct research and testing; a lack of knowledge about specific substances and procedures being used and to what degree; and an inconsistent approach to sanctions for those athletes found guilty of doping.”⁵⁹

The Code is organized into four parts which include twenty-five articles, one hundred and eight subsections, and two appendices of definitions and hypothetical commentary to clarify rule application.⁶⁰ The Code can be conceived of as split into two themes: rules and the application of rules to athletes. The first theme is encompassed in Part I of the Code, which promulgates the anti-doping rules and principles that organizations are responsible for adopting, implementing, or enforcing.⁶¹

The rules in Part I, as well as all other provisions of the Code, are mandatory but do “not replace or eliminate the need for comprehensive anti-doping rules to be adopted by each *Anti-doping Organization*.”⁶² This means that “while some provisions . . . must be incorporated [by these organizations] without substantive change” to the language used in the Code, other rules only provide “mandatory guiding principles that allow flexibility in the formulation of rules by each *Anti-Doping Organization*.”⁶³ Part I of the Code mandates that all athletes or other persons under the authority of a signatory and its member organizations must accept and be bound by the rules established in the Code as a condition of participation in the sport.⁶⁴ Signatories include sport organizations within the Olympic Movement,⁶⁵ government-funded organizations (NADOs),⁶⁶ and

57. *The Code*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/what-we-do/the-code> (last visited Sept. 17, 2017).

58. *International Convention against Doping in Sport*, UNESCO, <http://www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/> (last visited Nov. 20, 2017).

59. *See The Code*, *supra* note 57.

60. *See generally* WORLD ANTI-DOPING AGENCY, *supra* note 40.

61. *Id.* at 16. These organizations, collectively referred to as Anti-Doping Organizations, include the International Olympic Committee, International Paralympic Committee, International Federations, National Olympic Committees and Paralympic Committees, Major Event Organizations, and National Anti-Doping Organizations. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *See Leading the Olympic Movement*, INT’L OLYMPIC COMM., (Oct. 4, 2016) (“The Olympic Movement is the concerted, organized, universal and permanent action, carried out under the supreme authority of the IOC, of all individuals and entities who are inspired by the values of Olympism”).

66. *See* WADA, *National Anti-Doping Organizations (NADO)*, <https://www.wada->

organizations outside of the Olympic Movement.⁶⁷ The remainder of the Code shifts the focus from promulgating rules to the application of the rules in practice, and the modification of the rules over time.⁶⁸

Article I of the Code defines doping as “the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.10 of the Code.”⁶⁹ The anti-doping violations listed in Article 2 are expansive. Some violations include presence of a prohibited substance or its metabolites or markers in an athlete’s sample;⁷⁰ use or attempted use by an athlete of a prohibited substance or prohibited method;⁷¹ evading, refusing or failing to submit a sample;⁷² tampering or attempting to tamper with any part of doping control;⁷³ possession of a prohibited substance or prohibited method;⁷⁴ trafficking or attempting to traffic a prohibited substance or method;⁷⁵ and intentional complicity involving an anti-doping violation.⁷⁶

In addition to defining doping and anti-doping violations, Article 1 of the Code includes the list of prohibited substances and methods of doping;⁷⁷ means of testing for prohibited substances and methods and analysis of samples;⁷⁸ sanctions to individual athletes and sporting bodies;⁷⁹ and appeals from decisions regarding anti-doping violations.⁸⁰

While Part 1 states the rules, the remainder of the Code discusses the practical application of the rules. This includes provisions related to education and research

ama.org/en/national-anti-doping-organizations-nado (last visited Oct. 4, 2016) (“National Anti-Doping Organizations . . . are Government-funded organizations responsible for testing national athletes . . . adjudicating anti-doping rules violations; and [providing] anti-doping education.”).

67. See WADA, *Code Signatories*, <https://www.wada-ama.org/en/code-signatories> (last visited Oct. 4, 2016) (providing the full list of signatories to the Code).

68. See generally WORLD ANTI-DOPING CODE, note 40.

69. *Id.* at 18.

70. See *id.* (stating it is the athlete’s personal duty to not allow prohibited substances in his or her body and athletes who violate this rule will be found strictly liable).

71. See *id.* at 20 (stating that the success or failure of the use of the prohibited substance or method is immaterial in determining whether or not the rule violation is committed).

72. See *id.* at 21 (stating that without compelling justification, failure to submit a sample will constitute a violation).

73. See WORLD ANTI-DOPING CODE, *supra* note 40, at 21 (describing the violation as one which involves conduct that undermines the doping control process “but would not otherwise be included in the definition of *Prohibited Methods*”).

74. See *id.* at 28–36 (noting regulations, as well as prohibited substances and methods).

75. *Id.* at 22.

76. See *id.* at 23 (defining complicity as “[a]ssisting, encouraging, aiding, abetting, conspiring, covering up or any other type of intentional complicity involving an anti-doping rule violation, *Attempted* anti-doping rule violation[,] or violation . . . by another *Person*”); see also *id.* at 18–24 (demonstrating the exhaustive list of anti-doping violations and their definitions).

77. See *id.* at 31 (providing a list of therapeutic use exemptions (TUE) which allow athletes to use a prohibited substance or method of doping for health purposes if he or she applies to his or her National Anti-Doping Organization).

78. *Id.* at 36–45.

79. WORLD ANTI-DOPING CODE, *supra* note 40, at 60–80.

80. *Id.* at 80–86.

(Part 2);⁸¹ roles and responsibilities of individual athletes, signatories, and governments (Part 3);⁸² and means of acceptance, compliance, modification, and interpretation of the Code (Part 4).⁸³ In Part 1, Article 10, subsection 10.9, clean athletes negatively affected by doping are acknowledged and their remedies discussed:

The priority for repayment of CAS cost awards and forfeited prize money shall be: first, payment of costs awarded by CAS; second, reallocation of forfeited prize money to other *Athletes* if provided for in the rules of the applicable International Federation; and third, reimbursement of the expenses of the *Anti-Doping Organization* that conducted results management in the case.⁸⁴

In a comment to that provision, the Code notes that clean athletes are not precluded “from pursuing any right which they would otherwise have to seek damages from” athletes who commit anti-doping rule violations.⁸⁵ The World Anti-Doping Agency has not made publicly available any documentation regarding how often this provision is used and how often athletes are actually awarded their medals and prize money at a later date.⁸⁶ However, there is reason to believe it is infrequent, particularly within the sporting context of the Olympic Games.⁸⁷

In accordance with IOC policy, the National Olympic Committee of the accused athlete’s nation is responsible for retrieving the medal.⁸⁸ Even in cases where the National Olympic Committee wants to retrieve the medal and return it to the IOC, “[t]he return of the medals is still an act of fair play by the athlete because the IOC and its respective national Olympic committees have no legal jurisdiction to demand the [medal’s] return.”⁸⁹ If an athlete refuses to return the medals, it is unclear what equitable remedy sanctions or legal actions the IOC can enforce against the doping athlete.⁹⁰ Therefore, the Code’s prioritization in returning

81. *Id.* at 96–101.

82. *Id.* at 102–119.

83. *Id.* at 120–129.

84. *Id.* at 72.

85. WORLD ANTI-DOPING CODE, *supra* note 40, at 72.

86. *See generally id.*

87. *See generally* Victor Mather, *Cheated World Track Medalists to Finally Have a Proper Ceremony*, N.Y. TIMES, (July 26, 2017), <https://www.nytimes.com/2017/07/26/sports/track-and-field-world-championships-medals-doping.html?mcubz=3> (eleven clean athletes and five teams were awarded medals at the London World Championships of track and field in 2017, these medals were previously awarded to finalists who were eventually discovered to have violated anti-doping rules); *see also* Philbrick, *supra* note 34 (discussing limited cases where Olympians were given medals stripped from athletes found guilty of doping).

88. Philbrick, *supra* note 34.

89. *Id.*

90. Associated Press, *Russian Athletes Refuse to Return Stripped Olympic Medals*, NBC SPORTS (Feb. 2, 2017, 12:14 P.M.), <http://olympics.nbcsports.com/2017/02/02/russia-olympic-doping-medals-stripped-returned/> (noting that legal proceedings may be ineffective due to multiple jurisdictions and lengthy proceedings and sports sanctions fail to affect retired athletes); *but see* *Russia to Punish Athletes Who Don’t Return Olympic Medals*, VOICE OF AM. NEWS (Feb. 16, 2017, 9:48 A.M.), <https://www.voanews.com/a/russia-olympic-medals-return/3726941.html> (stating that local Russian officials have vowed to kick Russian track and field athletes caught

medals to the appropriate clean athlete may be merely aspirational in situations where an athlete does not wish to return the medal.

B. The Court of Arbitration for Sport

1. History of the CAS and the 1994 Reform

When Juan Antonio Samaranch, President of the IOC from 1980–2001,⁹¹ launched a committee charged with creating a unified arbitration court for sport in 1981,⁹² he envisioned it as “a kind of Hague Court in the sports world.”⁹³ Prior to the creation of the Court of Arbitration for Sport, doping disputes were resolved in a piecemeal fashion by numerous organizations.⁹⁴ Due to the lack of harmonization in sports adjudication and uniform punishments for violations of the Code, public trust in the IOC’s ability to enforce the code was beginning to erode.⁹⁵ In order to fairly implement the Code, WADA designated the Court of Arbitration for Sport (CAS) as the exclusive tribunal for international doping matters.⁹⁶ The CAS came into full effect in 1984, and has provided alternative dispute resolution services for a variety of sports related enterprises ever since, including the Olympic system.⁹⁷ At the outset, the CAS was based solely out of Lausanne, Switzerland, and included 60 members appointed by the IOC, the International Federations (IFs), National Olympic Committees (NOCs), and the IOC President.⁹⁸ At first, the CAS had only one type of proceeding for all disputes—the requests panel—whose function was to examine the arbitration agreement and hear the merits of the dispute if the agreement was valid.⁹⁹

The CAS was restructured in 1994 after an appeal of a CAS decision to the Swiss Federal Tribunal called into question the independence of the CAS.¹⁰⁰ The

doping off of the national team if they refuse to give up their medals).

91. Jere Longman, *Juan Antonio Samaranch, Who Transformed the Olympics, Dies at 89*, N.Y. TIMES (Apr. 21, 2010), <http://www.nytimes.com/2010/04/22/sports/22samaranch.html?pagewanted=all&mcubz=3>.

92. COURT OF ARBITRATION FOR SPORT, *History of the CAS: Origins*, http://www.tas-cas.org/fileadmin/templates/inside_1_col.html (Last visited Sept. 15, 2017).

93. *Speech Delivered by Mr. Juan Antonio Samaranch IOC President*, 176 OLYMPIC REV. 314, at 317 (1982).

94. See Steffi Jose, *From Sport’s Kangaroo Court to Supreme Court*, 20 SW. J. INT’L L. 401, 409 (2014) (describing the world of sports adjudication prior to the creation of the CAS as inconsistent and being performed primarily by numerous organizations within the Olympic family with varying philosophies and complex relationships).

95. See *id.* at 407 (noting that the IOC’s creation of WADA, which designates the CAS as its exclusive tribunal for doping matters, began to restore public trust in the Olympic movement by foreclosing access to litigation outside of the IOC’s walls).

96. See Zachary Gotlib, *Athletes Have Rights Too, Right? Investigating the Extreme Unfairness in Sports Purported Supreme Authority – Why the International Court of Arbitration for Sport Fails to Reign Supreme*, 24 CARDOZO J. INT’L & COMP. L. 389, 399–40 (2016).

97. See *id.* at 390, 393 (describing some of the other sports enterprises utilizing the CAS as international leagues, individual teams, and sports governing bodies).

98. *Id.* at 393–94.

99. *Id.*

100. See Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 PEPP. DISPUTE RESOLUTION L.J. 51, 51 (2009)

appeal alleged that the CAS's independence was compromised because the CAS was financed almost exclusively by the IOC and the IOC was given considerable power to appoint members to the CAS.¹⁰¹ As a result, the CAS went through a major reform that included creating the International Council of Arbitration for Sport (ICAS) to monitor the CAS and assume the primary monitoring role from the IOC.¹⁰²

The reform also split the CAS into two divisions: the Ordinary Arbitration Division, which resolves disputes of first instance; and the Appeals Arbitration Division, which resolves disputes brought after a resolution has been reached through other sports bodies.¹⁰³ The Appeals Arbitration Division typically handled doping or player discipline matters and also heard appeals from judgments rendered by the Ordinary Arbitration Division.¹⁰⁴ This CAS structure was codified in 1994 through the "Agreement concerning the constitution of the International Council of Arbitration for Sport."¹⁰⁵

2. The Modern CAS

The CAS still uses the 1994 structure today.¹⁰⁶ The "divisions hear both commercial and disciplinary disputes . . . with commercial disputes usually submitted to the Ordinary Appeals Division and disciplinary matters submitted to the Appeals Arbitration Division."¹⁰⁷ The Appeals Division hears appeals, including doping cases, that are brought by IFs and WADA.¹⁰⁸ As of September 2017, of approximately 272 cases submitted to the CAS classified as "doping matters," not a single case was brought seeking damages against another athlete a result of doping.¹⁰⁹ Rather than focusing on clean athletes, these cases instead involved an athlete accused of doping versus an international federation that

(citing *Gundel versus Fédération Equestre Internationale*, 92/A/63 (1992)).

101. COURT OF ARBITRATION FOR SPORT, *History of the CAS*, <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> (last visited Jan. 22, 2017).

102. See Gotlib, *supra* note 96, at 395 (describing the reform as also including a revisions and modification of the CAS Statute and Regulations that govern the CAS and noting that notwithstanding minor changes, the CAS operates under a similar arrangement today).

103. *Id.*

104. *Id.*

105. *Id.* at 396; see also DIGEST OF CAS AWARDS II 1998–2000, 883 (Matthieu Reeb ed., 2002) for a printed version of the Paris Agreement.

106. See *id.* at 396 (noting the CAS also operates an ad-hoc division tasked with settling disputes that occur during major international sporting events, such as the Olympic Games, within a 24 hour period and are heard at the actual site of a competition).

107. See *id.* at 395–96 (including as commercial disputes sponsorship agreements, broadcasting rights, player transfers, the staging of sporting events, and other player contract matters).

108. See Gotlib, *supra* note 96, at 395, 411 (describing the Appeals Division and the CAS's approach to resolving doping disputes).

109. See COURT OF ARBITRATION FOR SPORT, Case Law Documents Database, available at <http://jurisprudence.tas-cas.org/Shared%20Documents/Forms/AllDecisions.aspx> for a publicly searchable database of all cases arbitrated before the CAS as well as the decisions rendered in those cases.

handled the disciplinary action as a result of an alleged doping violation prior to bringing the case to the CAS.¹¹⁰

For athletes accused of doping before the CAS, the CAS uses a strict liability standard.¹¹¹ An athlete's liability "does not depend on guilty intent[ions] of the athlete in taking the [prohibited] substance or having it in their body."¹¹² Rather, an athlete violates the Code by virtue of the presence of a prohibited substance in their competition sample tested for doping.¹¹³ This standard precludes consideration of athlete awareness or of secret, government-sponsored doping.

At any given time, the CAS is comprised of over 275 arbitrators who are legally trained and knowledgeable of sports law, and appointed by the ICAS to serve four-year terms.¹¹⁴ These arbitrators can only rule on the merits of the case if the parties agree to be bound by the CAS's jurisdiction.¹¹⁵ However, the scope of the CAS's jurisdiction has been interpreted so broadly that the CAS has never ruled that it lacked authority because the matter was outside the sports realm.¹¹⁶

Further, participation in the Olympic Games requires athletes to comply with the Olympic Charter and to be bound by the IOC's rules, including the stipulation that all disputes "arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport."¹¹⁷ Given that the contracts are not negotiable, if an athlete wishes to compete in the Olympics, he or she has no choice but to arbitrate in the CAS in the event of a later dispute.¹¹⁸ Therefore, current CAS rules presumably require a clean athlete seeking damages for competitive loss against an athlete who engaged in doping to agree to arbitrate the issue in the CAS, even though this scenario has never been brought before the CAS.¹¹⁹

110. See generally *id.* (listing all the doping matter cases arbitrated before the CAS brought forth by IFs).

111. Thomas Wyatt Cox, *The International War Against Doping: Limiting the Collateral Damage from Strict Liability*, 47 VAND. J. TRANSNAT'L L. 295, 308 (2014).

112. *Id.*; see also Gotlib, *supra* note 96, at 411–12 (discussing the implications of strict liability).

113. See Cox, *supra* note 111, at 305 (explaining the Code mandates the mere presence of a prohibited substance in athlete requires disqualification, regardless of its source).

114. Gotlib, *supra* note 96, at 397.

115. *Id.*

116. *Id.*

117. INT'L OLYMPIC COMM., OLYMPIC CHARTER 105 (2015), available at http://www.olympic.org/Documents/olympic_charter_en.pdf (last visited Oct. 31, 2016).

118. See Gotlib, *supra* note 96, at 400 (describing the only real choice athletes have is to either compete and be bound by the CAS or not compete at all). Some non-Olympic athlete contracts contain similar CAS arbitration provisions. *Id.*

119. See Jose, *supra* note 94 and accompanying text (stating that the CAS is the appeals body for all international doping-related disputes).

III. THE DISPROPORTIONATE EFFECT OF DOPING ON ATHLETES FROM DEVELOPING COUNTRIES

A. *The Value of Lost Medals and Cash Prizes*

A minimal measure of the monetary damage to clean athletes from doping is quantifiable because medals and cash prizes have an associated monetary value. As mentioned previously, the prevalence of doping is unclear, since testing by WADA has only found that about 1% to 2% of athletes dope, but other research indicates the percentage of athletes who dope may be as high as 39%.¹²⁰ If this estimate is correct, then the amount of total compensation due to victimized athletes may be very significant; in fact, the Associated Press reported that as much as \$410,000 may be owed to dozens of athletes resulting from just four Russian and Belarusian track and field athletes who have never returned prize money from the Olympic Games after testing positive for doping.¹²¹ Some of the debts owed to victimized athletes may go back more than a decade.¹²² Given the ease with which these costs can be quantified, this is the most logical place to begin an analysis about the disproportionate effect of doping on athletes from developing countries. While these medals and cash prizes may not seem significant to athletes from developed countries, the value of medals and cash prizes can be significant to athletes from developing countries.

One way to measure the value of a medal, such as an Olympic medal, is its scrap value. A medal's scrap value is calculated by determining what the medal is worth if it were to be melted down.¹²³ Unsurprisingly, Olympic medals are not made entirely out of the metal for which they are named.¹²⁴ For example, the gold Olympic medals presented at the Rio Summer Olympic Games in August 2016 contained 92.5% silver and only 1.34% gold—with copper filling the rest.¹²⁵ The Olympic Committee only requires each first place medal to contain six grams of gold in the plating at a minimum.¹²⁶ In contrast, silver medals in Rio were composed of 100% silver (92.5% purity).¹²⁷ Bronze medals were composed of 95%

120. de Hon et al., *supra* note 21, at 57.

121. James Ellingworth, *Clean Athletes Still Waiting for Prize Money from Dopers*, ASSOCIATED PRESS (Dec. 1, 2016), <http://bigstory.ap.org/article/72e72a45ed3f47fca647664560ecb692/clean-athletes-still-waiting-prize-money-dopers>.

122. *Id.*

123. Ethan Wolff-Mann, *How Much Is an Olympic Gold Medal Really Worth? Here are 4 Possible Answers*, TIME (Aug. 5, 2016), <http://time.com/money/4418118/olympic-medal-worth-value/>.

124. See Natalie Keegan, *Going for Gold? The Bronze is Only Worth £3 and the Gold is 92 Per Cent Silver . . . What the Olympic Medals are Actually Made Of*, THE SUN (Aug. 15, 2016), <https://www.thesun.co.uk/sport/rio-2016/1612841/the-bronze-is-only-worth-3-and-the-gold-is-92-per-cent-silver-what-the-olympic-medals-are-actually-made-of/> (providing the compositions of gold, silver, and bronze Olympic medals).

125. *Id.*

126. *Id.*

127. *The Composition of the Rio Olympics Medals*, COMPOUND INTEREST (Aug. 15, 2016), <http://www.compoundchem.com/2016/08/15/olympic-medals/>.

copper and 5% zinc.¹²⁸ As a result of their mostly silver composition, Olympic gold medals are estimated to be worth on average only \$366 to \$501 each when melted down.¹²⁹ This value depends on the diameter, thickness, composition, and weight of the medal, all of which vary from games to games.¹³⁰

The value also depends on the varying price of precious metals on the market. The scrap value of a gold medal in 2004 was worth \$166.41.¹³¹ The value of that same medal rose to \$616.35 in 2016, and the value of gold has risen 8% since Brexit,¹³² trading at \$1,355.50 per ounce.¹³³ Silver prices have risen nearly 20% since Brexit, trading at \$20.22 per ounce.¹³⁴

Another way of considering the value of a medal is the value of that medal to a potential collector if the medal were to be sold at auction. The auction price of a medal varies largely based on the popularity of the athlete who won it, the sport involved, and the context of those particular Olympic Games. For example, one of Jesse Owens's gold medals from the 1936 Olympic Games sold for \$1.47 million in 2013, and one of the "Miracle on Ice" medals from the 1980 USA hockey team was expected to sell for a price between \$1.5 to \$2 million in 2017.¹³⁵

However, even lesser known athletes can realize a significant price by selling their medals. RR Auction, a Boston-based auctioneer who frequently sells gold medals, reported that a gold medal from a lesser known sport and not won by a famous athlete still sells for around \$10,000.¹³⁶ Further, some medals increase in value as they become rarer commodities.¹³⁷ RR Auction's archives show a January 2016 sale that included a gold medal from the 1924 Chamonix Olympic Games that sold for \$47,746.83 and a 1956 Melbourne Olympic Games gold medal that sold for \$10,114.83.¹³⁸

In addition to receiving a medal for placing or winning in an international sporting competition, athletes are also often awarded a cash prize by their sponsor

128. Keegan, *supra* note 124. In fact, in an effort to promote an environmentally conscious message, each of the bronze medals at the Rio Olympics contained 30% recycled materials, and the neck ribbons themselves were made mostly from recycled plastic bottles, indicating that maybe these medals are worth even less than bronze medals at past games.

129. Wolff-Mann, *supra* note 123.

130. *See id.* (noting the average diameter, thickness, weight, and composition of Olympic medals).

131. Jacob Bogage, *How Much are Michael Phelps's Gold Medals Really Worth?*, WASH. POST (Aug. 12, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/08/12/how-much-are-michael-phelpss-gold-medals-really-worth/> (providing a graph that indicates the precious metal prices found in the Olympic medals).

132. Alex Hunt & Brian Wheeler, *Brexit: All You Need to Know About the UK Leaving the EU*, BBC NEWS (Jan. 17, 2017), <http://www.bbc.com/news/uk-politics-32810887> (defining the term "Brexit" as a shorthand way of identifying the event in which the UK left the EU by referendum on June 23, 2016).

133. Bogage, *supra* note 131.

134. *Id.*

135. Wolff-Mann, *supra* note 123. The "Miracle on Ice" medals from the 1980 Team USA hockey team failed to sell at auction in 2017. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

country. The value of this cash prize varies by country, and not every country gives their athletes cash prizes or bonuses.¹³⁹ Some countries give bonuses in the form of cars or apartments.¹⁴⁰ Singapore awards its athletes \$757,000 for a gold medal, the largest such award, while silver and bronze medalists are awarded \$370,000 and \$189,000, respectively.¹⁴¹ In Malaysia, gold medal Olympians are awarded a solid gold bar worth roughly \$600,000.¹⁴² Gold medal athletes in the Philippines and Thailand can expect to receive cash prizes of \$237,000 and \$314,000, respectively, spread out over a twenty-year period.¹⁴³

For athletes from developing countries like the Philippines, Thailand, and Malaysia, competing in international sporting events and being awarded a medal or a cash prize can make a significant difference in their lives. In the Philippines, GDP per capita was \$2,878 in 2015.¹⁴⁴ The majority of people from the Philippines work in the services or agricultural industries,¹⁴⁵ and the average annual income was \$3,520 in 2015.¹⁴⁶ In Thailand, GDP per capita was \$5,815 in 2015,¹⁴⁷ and the majority of people there also work in the services and agricultural industries.¹⁴⁸ The average annual income was \$5,690 in 2015.¹⁴⁹ By comparison, the United States had a GDP per capita of \$56,207 in 2015,¹⁵⁰ and the average income per person was

139. *See Cash for Gold: Some Countries Pay Big Bucks to Their Olympic Champions*, NBC OLYMPICS (Aug. 20, 2016), <http://www.nbcolympics.com/news/cash-gold-some-countries-pay-big-bucks-their-olympic-champions> (noting that while almost every country now gives some sort of bonus to medal winners, Sweden and the South Pacific islands of Vanuatu do not give its athletes any cash prizes).

140. *Id.*

141. *Rio Olympics 2016 Medal Value & Cash Prize Money*, TOTAL SPORTEK (Aug. 9, 2016), <http://www.totalsportek.com/news/olympic-gold-medal-prize-money/>.

142. *Id.*

143. *Id.*

144. *GDP per Capita: Philippines*, WORLD BANK GROUP, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=PH> (last visited Aug. 31, 2017).

145. *World Factbook: East & Southeast Asia: Philippines*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/rp.html> (last updated Aug. 1, 2017).

146. *GNI per Capita, Atlas Method: Philippines*, WORLD BANK GROUP, <http://data.worldbank.org/indicator/NY.GNP.PCAP.CD?locations=PH> (last visited Aug. 31, 2017).

147. *GDP per Capita: Thailand*, WORLD BANK GROUP, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=TH> (last visited Aug. 31, 2017).

148. *World Factbook: East & Southeast Asia: Thailand*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/th.html> (last updated Aug. 1, 2017).

149. *GNI per Capita, Atlas Method: Thailand*, WORLD BANK GROUP, <http://data.worldbank.org/indicator/NY.GNP.PCAP.CD?locations=TH> (last visited Aug. 31, 2017).

150. *GDP per Capita: United States*, WORLD BANK GROUP, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=US> (last visited Aug. 31, 2017).

\$56,070.¹⁵¹ The average GDP per capita throughout the world was \$10,151 in 2015,¹⁵² and the average annual income per person was \$10,578.¹⁵³

Not only do medals and cash prizes have immense value in comparison to the average incomes in developing countries, but winning those medals and cash prizes may require a proportionally higher investment for athletes from developing countries than for athletes from developed countries. For the many athletes, competing in the Olympic Games can strain personal resources if the athlete's nation does not sponsor their activities.¹⁵⁴ In fact, a large number of athletes training for the Olympics—including those from developed countries like the United States—struggle to stay above the poverty line.¹⁵⁵ Some athletes with internet access resorted to setting up crowdfunding websites to help raise money to compete at the 2016 Rio Games.¹⁵⁶ However, corporate sponsors of athletes from developed countries may pay living expenses, as well as provide free high-quality uniforms and gear.¹⁵⁷

Athletes from some developing countries often have limited funding for their training, living expenses, and other costs necessary to compete at the highest level. In Kenya, for example, the Olympic program is entirely government-sponsored, and for the Summer Olympics in Beijing, Kenya only had a \$1.5 million budget to provide to their 80 competing athletes.¹⁵⁸ This budget pales in comparison to the estimated \$50 million the United States Olympic Committee

151. *GNI per Capita, Atlas Method: United States*, WORLD BANK GROUP, <http://data.worldbank.org/indicator/NY.GNP.PCAP.CD?locations=US> (last visited Aug. 31, 2017).

152. *GDP per Capita*, WORLD BANK GROUP, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD> (last visited Aug. 31, 2017).

153. *GNI per capita, Atlas Method*, WORLD BANK GROUP, <http://data.worldbank.org/indicator/NY.GNP.PCAP.CD> (last visited Aug. 31, 2017).

154. See Suzanne McGee, *Go for Gold, Wind Up Broke: Why Olympic Athletes Worry About Money*, GUARDIAN (Aug. 7, 2016, 8:00 AM), <https://www.theguardian.com/sport/2016/aug/07/olympic-games-rio-athletes-personal-finance-struggle> (describing how the vast majority of athletes are simply happy to qualify for the Olympic Games and strive to not end up broke after the competition has ended).

155. See Tim Struby, *Rower Megan Kalmoe is an Olympic Medalist – and She Lives Just Above the Poverty Line*, ESPN (May 9, 2016), <http://www.espn.com/espnw/sports/article/15421001/us-rower-megan-kalmoe-money-struggles-olympians> (describing the struggles of American athletes from lesser known sports trying to balance the hardships of full-time training and also being grossly underpaid).

156. See Kanyakrit Vongkiatkajorn, *Why Some American Olympians Had to Crowdfund Their Way to Rio*, MOTHER JONES (Aug. 6, 2016, 10:00 AM), <http://www.motherjones.com/politics/2016/08/olympic-american-athletes-rio-money-costs-usoc> (describing one athlete's plight to raise \$15,000 to help fund equipment, health care, and training costs, while another athlete set up the crowdfunding site in order to help pay bills after quitting his engineering job in order to train).

157. See *Olympic Funding Often Reflects Country's Values*, VOICE OF AM. (Oct. 27, 2009), <http://www.voanews.com/a/a-13-2008-06-16-olympic-funding-often-reflects-country-values-66821302/374425.html> (illustrating how one company's support of long-distance runners includes free housing, health insurance, coaching, free running shoes and gear, and part-time jobs in their stores).

158. This amounts to about \$19,000 per athlete (\$1.5M divided by 80). See *Id.*

fundraises to spend on its athletes.¹⁵⁹ Despite some government sponsored programs, one of Kenya's best athletes, Boston Marathon winner Robert Cheruiyot, claimed he never received any government funding.¹⁶⁰ Often, the only support afforded to athletes from developing countries is from the IOC itself, which has set up a solidarity program for underdeveloped and struggling countries to compete in the games.¹⁶¹

Given that some developing countries promise hefty cash prizes, the lives of these athletes could be significantly altered after winning an Olympic medal, and presumably, the cash prizes would help offset the greater personal costs accrued to those athletes choosing to compete. Indeed, the scrap value of a medal alone can equate to a couple months of per capita income for an athlete from a developing country. Due to the profound, financial significance medaling in an Olympic competition can have for an athlete from a developing country, losing to an athlete who doped has a disproportionately negative impact on athletes from developing countries than from developed countries.

For clean athletes from developing countries who were wrongfully deprived of their medals and cash prizes because of doping, the solution would seem simple: once an athlete is found guilty of doping, simply award the medal to the correct athlete and have the home country provide the cash prize. Unfortunately, athletes do not always receive their medal or they receive it long after the competition actually took place.¹⁶² At least twenty-five doping cases where athletes who should have won Olympic gold were not awarded their medal until later have been reported since 1968.¹⁶³ There are forty-one similar cases of upgrading athletes to silver medals, often long after the medals ceremony.¹⁶⁴ There are also fifty-four cases of eventually awarding a bronze medal to athletes who missed out on the chance to stand on the podium.¹⁶⁵ Some of this is a result of the slow nature of the

159. See David Ingold & Eben Novy-Williams, *Money for Medals: Inside the Performance-Driven Funding of U.S. Olympic Teams*, BLOOMBERG (Aug. 5, 2016), <https://www.bloomberg.com/graphics/2016-olympics-usoc-return-on-investment/> (noting that the committee gives more than \$50 million to over 40 different sporting federations in the U.S.).

160. *Olympic Funding Often Reflects Country's Values*, *supra* note 157 (noting that corruption is often a source of concern with government-sponsored programs and officials often take the majority of money designated for athletes).

161. See Phillip Chrysopoulos, *Greek Olympic Team Received Aid from Fund for Developing Countries*, GREEK REPORTER (Aug. 23, 2016), <http://greece.greekreporter.com/2016/08/23/greek-olympic-team-received-aid-from-fund-for-developing-countries/> (noting that none of athletes from Greece received any funding from the state to compete in Rio and all athletes were supported via the solidarity program as well as from private donations).

162. See Nicole He et al., *Athletes Who Were Denied Their Olympic Medal Moments Because Others Were Doping*, N.Y. TIMES (Aug. 14, 2016), http://www.nytimes.com/interactive/2016/08/14/sports/olympics-medal-doping.html?_r=0 (describing how changes to official records of the Olympics as a result of athletes being found guilty of doping often do not take place until years after medal ceremonies have ended).

163. *Id.*

164. *Id.*

165. *Id.*

testing and appeals processes for athletes found guilty of doping, where often medals are not rescinded for more than a year after the games have ended.¹⁶⁶ However, there are also instances of athletes who never surrendered medals even after being caught for doping,¹⁶⁷ which means clean athletes may never receive their medals.

B. The Value of Endorsements

1. How Endorsement Deals Work and How They Are Reached

While the value of a medal and corresponding prize money can be life-changing by itself, the greatest benefit afforded to athletes who win or place in international sporting competition is the opportunity for endorsements and public careers.¹⁶⁸ Not only do endorsements amount to much larger sums of money than any potential cash prize, they can mean a steady stream of income for a period that extends long after the competition has ended.

Endorsement deals come into play when companies wish to use an “athlete’s popularity and reputation to help promote” products and services.¹⁶⁹ Sometimes, companies will seek athletes out, but this is rare and typically only happens for the most famous athletes.¹⁷⁰ Some of the larger global sponsors are Coca-Cola, GE, Intel, Visa, Samsung, and P&G.¹⁷¹ In the case of Olympic athletes and endorsement deals, there are only a handful of Olympic athlete sponsors, meaning there are only a few spots for which every athlete is vying.¹⁷² Therefore, most endorsement deals are a product of the hard work of an agent.¹⁷³

When negotiating a contract for an athlete, agents try to leverage both the

166. *Id.*; see also Rebecca R. Ruiz, *Olympics History Rewritten: New Doping Tests Topple the Podium*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/21/sports/olympics/olympics-doping-medals-stripped.html> (noting doping violations are rarely found during the games because the science at the time cannot detect “such small residual concentrations”).

167. Cf. Mike Philbrick, *Never Mind the Athletes . . . What Happens to the Medals?*, ESPN (Aug. 20, 2008), <http://www.espn.com/espn/page2/story?page=philbrick/080820> (noting that there is no legal avenue to force the athletes found guilty of doping to return their medals).

168. See, e.g., Tom Gerencer, *Usain Bolt Net Worth: Oh Those Jamaican Tax Rates*, MONEY NATION (Aug. 20, 2016), <http://moneynation.com/usain-bolt-net-worth/> (noting the value of Bolt’s endorsement deals).

169. See BISK, *The Basics of Sports Endorsement Deals*, VILLANOVA UNIV., <https://www.villanovau.com/resources/bls/sports-endorsement-deals/#.WGLAQjtEyqA> (last visited Jan. 22, 2017) (stating that exceptional athletes often gain the attention of companies that would like to use the athlete’s popularity and reputation to promote a product or service).

170. See *Olympic Athletes Go For Gold, And Green*, MORNING EDITION NPR (July 23, 2012), <http://www.npr.org/2012/07/23/157217100/olympic-athletes-go-for-gold-and-green> (describing the important role of agents in finding endorsement deals and sponsorships for athletes from less popular sports).

171. THE INTERNATIONAL OLYMPIC COMMITTEE, *The Olympic Partner Programme*, <https://www.olympic.org/sponsors> (last visited Sept. 1, 2017).

172. *Olympic Athletes Go For Gold, And Green*, *supra* note 170.

173. See *id.* (noting that Olympic athletes who are not exceptionally famous need competitive agents to help them land sponsorships).

athlete's performance on the field of play and the athlete's personal story.¹⁷⁴ Other important factors that may determine whether or not an athlete gets an endorsement deal include an athlete's fit with the corporate brand image or personality, physical attractiveness, the athlete's particular sport, and perhaps most importantly, media coverage.¹⁷⁵ This means that some low-income athletes are at a disadvantage even without doping, depending on their particular circumstances. It also means that an athlete who performs well despite a disadvantaged background may be particularly attractive to potential sponsors.

Often, agents are hired before the athlete competes on a bigger stage like the Olympics.¹⁷⁶ Hiring an agent early on is critical because one of the most important functions of an agent is to strike while the iron is hot and secure an endorsement deal when media coverage of the athlete's success is greatest, which is typically immediately after the athlete competes.¹⁷⁷ Agents work on commission, which is based on the endorsement and salary deals they broker, so low-income athletes who have not yet gained fame can still secure an agent to search for endorsement deals on their behalf prior to participating in major international competition.¹⁷⁸ A typical agent will earn 10–20% of a client's endorsement contract although the exact amount may vary by sport and type of contract.¹⁷⁹

Endorsement deals for athletes come in a variety of forms and sizes. Endorsement deals can include royalties, incentives, free products, testing products, and fixed fees.¹⁸⁰ They can also include a requirement for the athlete to make certain appearances in person and speak on behalf of the partnering company.¹⁸¹ Endorsement contracts normally also include terms about exclusivity and companies will try to get the greatest level of exclusivity possible.¹⁸² In recent

174. *See id.* (describing an agent's use of the "mom card" for her athlete as a marketing tool to help leverage an endorsement deal).

175. Ryan Kelly & Bill Shea, *Individual Gold; Olympic Stars Hope to Cash in with Endorsements*, CRAIN'S DETROIT BUSINESS (Aug. 6, 2012, 12:00 PM), <http://www.craindetroit.com/article/20120805/FREE/308059962/individual-gold>.

176. *See Olympic Athletes Go For Gold, And Green*, *supra* note 170 (noting that an agent's work starts as soon as she is hired in chasing sponsors and continues after the Olympic athlete's event has passed).

177. *See* Dan Adams, *Turning Gold Into Green: For New England's Olympic Medalists, Endorsement Deals Will Depend on the Popularity of Their Sport and How Quickly They Can Get in the Door*, BOS. GLOBE (Aug. 14, 2012), http://archive.boston.com/business/articles/2012/08/14/medals_in_hand_new_england_olympians_hunt_for_endorsements/ (noting the importance of agents to be proactive in marketing their athletes when there are few standout athletes capable of transcending other athletes).

178. Marie Gentile, *The Average Sports Agent's Commission*, HOUS. CHRON. <http://work.chron.com/average-sports-agents-commission-21083.html> (last visited Dec. 27, 2016).

179. *Id.* (stating that track and field agents, for example, typically require fifteen percent commission on shoe company endorsements and a twenty percent commission on all other endorsements contracts outside of the primary shoe deal).

180. Bisk, *supra* note 169.

181. *Id.*

182. *See id.* ("If a company wants the player to endorse gloves, for instance, then that specific item should be in the contract. If the contract uses a blanket term like 'sports apparel' or

years, in the case of endorsement deals that are signed before participation in major international competitions, such as the Olympics, companies are giving less money up front, with bigger incentives if the athletes actually win a medal.¹⁸³

The face value of endorsement deals varies as well. For the best-known athletes such as Usain Bolt and Michael Phelps, endorsement contracts, in total per athlete, can run anywhere from \$12 to \$30 million a year.¹⁸⁴ Deals this large are uncommon, but lesser known athletes can still take advantage of their successes through endorsement deals with smaller sponsors. Lesser-known athletes still create significant media buzz in their hometowns, and local companies are often eager and willing to enter into endorsement deals.¹⁸⁵ There is little hard data on the endorsement financial information of non-superstars, but “for every star like Michael Phelps there must be thousands of athletes who get help in one way or another from local businesses.”¹⁸⁶

However, there are some lesser-known athletes who have secured smaller endorsement deals. Kayla Harrison, the first US athlete to win Olympic gold in Judo in 2012, was expected to be able to land endorsement deals valued at somewhere between \$100,000 to \$250,000.¹⁸⁷ While this may not seem like a lot of money, smaller endorsement deals are not only very valuable as income for low-income athletes, but they also potentially allow lesser-known athletes to continue to compete and train for a longer period of time without having to worry about finding additional sources of income.¹⁸⁸ Jordyn Wieber, gymnastic world champion in 2011, failed to qualify for a spot in the Olympic all-around competition in the same year but was still a member of the gold-winning team and was projected to collect somewhere between \$200,000 and \$400,000 in endorsements over the following four years.¹⁸⁹ Wieber went on to secure a sponsorship from Adidas

‘apparel’, it may prevent the athlete from signing a second endorsement contract for shirts or shoes, for example, at some future date.”).

183. *See id.* (noting the difficulty for companies in justifying spending a lot of money on endorsement deals for athletes in low-profile sports such as the more obscure Olympic sports like luge).

184. Laura Woods, *5 Olympic Athletes with Insanely Big Endorsement Deals*, TIME (Aug. 19, 2016) <http://time.com/money/4459824/2016-rio-olympics-endorsement-deals/> (stating that Michael Phelps’ \$12 million in endorsements come from sponsors such as Under Armour, Omega, and Master Spas while Usain Bolt’s \$30 million in endorsements come mostly from Puma and include an expected \$4 million annually to stay as a brand ambassador after Bolt retires).

185. *See Kelly and Shea, supra* note 175 (describing how lesser known athletes can still capitalize on local popularity to score endorsement deals).

186. *See id.* (asserting that the lack of data on smaller endorsement deals is probably by design since the buyers and sellers of that kind of information do not want to get into the public domain and that collating information from local sponsors would likely be impossible).

187. *See Adams, supra* note 177 (quoting Harrison’s coach who thought that this dollar valuation of endorsement deals would be a realistic opportunity for Harrison given the lack of popularity of her sport and noting that Harrison’s opportunities would include working with the Centers for Disease Control and Prevention speaking out about her previous sexual abuse).

188. *See id.* (quoting Harrison’s coach who states that small endorsement deals are about athletes avoiding having to worry about where the next paycheck is coming from or how to cover rent and basic expenses).

189. Kelly & Shea, *supra* note 175.

before retiring from gymnastics in 2016.¹⁹⁰ Although there may not be any comprehensive data on athletes getting smaller endorsement deals, Harrison and Wieber are proof that these smaller deals do exist. If an athlete from a developing country landed an endorsement contract the size of Harrison's or Wieber's contracts, it would make a significant economic difference for the athlete.

There is also evidence which suggests that from a corporate sponsor's perspective, developing countries may provide the best opportunity for new sponsorship targets at a low cost, despite historically having less Olympic medal recipients.¹⁹¹ These deals can be lucrative for major corporate sponsors as well as the athletes because the corporate sponsors can gain access to markets previously less interested in international sports.¹⁹² For example, Abhinav Bindra's Olympic gold win in shooting in Beijing in 2008 drew the heightened attention of more than a billion people in India, because India had never won an Olympic gold medal in any individual event in the history of the Games.¹⁹³ As thanks for his performance, the Board of Control for Cricket—India's wealthiest sporting institution—offered Bindra 2.5 million rupees,¹⁹⁴ and there was immediate buzz after his win that corporate sponsorship deals were soon to follow.¹⁹⁵ For athletes from developing countries, these deals and prizes can be life-changing.

2. The Difficulty of Measuring the Effect of Doping on Endorsement Opportunities

Although it is hard to measure the value of lost endorsement deals for athletes who lose to athletes who dope, there are instances of athletes having been awarded medals once the doping was discovered who could no longer capitalize on their success. This demonstrates that awarding the clean athlete their deserved medal at a later date does not necessarily put that athlete in the same position they would have been in had they been awarded the medal on the podium. One example of this is the case of Shirley Babashoff, who competed as a swimmer in the Montreal Olympic Games in 1976.¹⁹⁶ She was favored to win multiple gold medals but came

190. Taylor Aquino, *Gymnastics: The Competitive Demands*, DAILY BRUIN, <https://dailybruin.com/features/jordyn-wieber-brings-strength-to-ucla-gymnastics-team/> (last visited Jan. 22, 2017); see also Jeff Seidel, *Why Jordyn Wieber Isn't at This Year's Olympics*, DETROIT FREE PRESS (June 26, 2016, 12:09 PM), <http://www.freep.com/story/sports/columnists/jeff-seidel/2016/06/25/jordyn-wieber-gymnastics-ucla-olympics-rio/86397082/> (noting that Wieber ended her career so she could continue to work as a team manager for the UCLA women's gymnastics team and focus on school).

191. Dae Ryun Chang & John A. Davis, *Think Small in Olympic Sponsorship*, HARV. BUS. REV. (Aug. 9, 2012), <https://hbr.org/2012/08/think-small-in-olympic-sponsor>.

192. Heather Timmons, *With India's First Gold, Suddenly a Billion People Notice the Olympics*, N.Y. TIMES (Aug. 11, 2008), <http://www.nytimes.com/2008/08/12/sports/olympics/12indiagold.html>.

193. *Id.*

194. 2.5 million rupees was the equivalent of \$59,000 at the time. *Id.*

195. Avinash Nair, *Bindra Magic: Now, Corporates to Sponsor Shooting*, THE ECON. TIMES (Aug. 12, 2008), <https://economictimes.indiatimes.com/bindra-magic-now-corporates-to-sponsor-shooting/articleshow/3353916.cms?inttarget=no>.

196. Brent Rutemiller, *Shirley Babashoff Breaks 30-Year Silence on East Germany's*

away with only four silver medals and one gold medal.¹⁹⁷ Before she competed in 1976, she was already being compared to the famous swimmer Mark Spitz and she hoped to have similar success.¹⁹⁸ Mark Spitz swam in the 1972 Summer Games where he won seven gold medals; following the Games, he earned \$1 million from a sponsorship with the Hyatt hotel chain and multiple television appearances.¹⁹⁹ Babashoff lost almost every competitive event to swimmers from East Germany, who were found to be a part of a government sponsored doping scandal in 2007.²⁰⁰

Babashoff spoke out while participating in the Montreal games in 1976 and accused the East German women of being on growth hormones.²⁰¹ The media labeled her as a poor sportswoman at the time, but, despite being vindicated thirty years later, she has not been compensated for her loss.²⁰² Babashoff retreated from public life and now is a single mother working as a postal carrier.²⁰³ Despite the discovery of the doping, Babashoff has been unable to capitalize on endorsement deals because her window of opportunity has closed, and now most people do not know who she is, rendering her unattractive to potential endorsers.²⁰⁴

Babashoff's predicament is also a good example of the difficulties associated with trying to measure the value of endorsement contracts that she could have received. While a proposed remedy to Babashoff's problem will be discussed later in this Comment, Babashoff would need to prove that she would have secured an endorsement contract had she won in her events in order to recover some of the value of these lost endorsement deals. This may not be as simple as saying that Babashoff would have secured any endorsement deal that the East Germans who

Systematic Doping of Olympians, SWIMMING WORLD (Feb. 5, 2016, 8:30 AM), <https://www.swimmingworldmagazine.com/news/exclusive-shirley-babashoff-breaks-30-year-silence-on-east-germanys-systematic-doping-of-olympians/>.

197. *Id.*

198. Bill Littlefield, *Forgive And Forget? For Olympian Shirley Babashoff, Maybe Not*, WBUR (July 22, 2016), <http://www.wbur.org/onlyagame/2016/07/22/shirley-babashoff-olympics-doping-montreal>.

199. Matthew Futterman, *Mark Spitz Gets a Life as Former Greatest Olympian Ever*, WALL ST. J. (Aug. 21, 2008, 11:59 PM), <http://www.wsj.com/articles/SB121927884457658697> (noting that Spitz continues making appearances and also works as a sports broadcaster during the Olympic Games).

200. Rutemiller, *supra* note 196.

201. *Id.*

202. See Caitlin Yoshiko Kandil, *'They Took a Lot Away from Me': Olympian Shirley Babashoff Still Speaks Out Against the Doping That Cost Her Gold Medals in '76*, L.A. TIMES (Aug. 19, 2016, 3:20 PM), <http://www.latimes.com/socal/weekend/news/tn-wknd-et-shirley-babashoff-olympics-20160813-story.html> (stating that Babashoff, as of August 2016, has not been formally awarded the gold medals).

203. See Karen Crouse, *Clean Athletes, and Olympic Glory Lost in the Doping Era*, N.Y. TIMES (Aug. 1, 2016), <https://www.nytimes.com/2016/08/01/sports/olympics/shirley-babashoff-swimming-montreal-olympics-medals.html> (describing Babashoff's career as a high-profile endorser as "blockaded" by the East Germans).

204. See James F. Peltz, *Most Olympic Athletes Won't Be Able to Cash in on Their Glory*, L.A. TIMES (Aug. 18, 2016, 11:30 AM) <http://www.latimes.com/business/la-fi-olympics-endorsements-20160819-snap-story.html> (noting that Olympians have a hard time landing sponsorship deals because they're no longer on television and because they're less likely to maintain social media buzz).

beat her secured, or that Mark Spitz secured.

Placing a value on Babashoff's lost endorsement contract income is difficult because there are many factors to a company's decision to seek out an athlete as an endorser of their product, including attractiveness, personality, and fit with the company's brand,²⁰⁵ which may work for or against Babashoff. However, if Babashoff were provided a venue in which to plead her case, the appropriate fact finder could assess the value of her lost endorsement contracts based on whatever evidence Babashoff could provide that she would have received such contract offers, weighed against evidence the doping athlete would provide that Babashoff would not have received any endorsement contracts.²⁰⁶ This is important because endorsements can be a main source of income for athletes, and thus can make a big difference for many athletes,²⁰⁷ particularly those from developing countries. Therefore, the difficulty of providing an exact value of what a clean athlete's endorsement deals would have been should not bar an appropriate remedy for these athletes.

IV. A PROPOSED SOLUTION AND PROPOSED CAS REFORMS

A. *Current Reform Ideas are Inadequate and Place Focus on the Accused Athlete*

Doping disputes have been at the center of the discussion about reforming the CAS, but most suggestions for reform have focused on the accused athlete and not the clean athletes victimized by doping.²⁰⁸ Since reform efforts have focused on punishing athletes who dope, it is not surprising that efforts at reform have not been focused on making whole the clean athletes who have been victimized by doping. In fact, some current reform proposals may actually harm clean athletes wishing to recover from another athlete or sports organization because of another athlete's doping. Minimally, current reforms of the CAS are ineffective to help athletes victimized by doping because they misplace focus on providing athletes accused of doping with greater due process and provide no better process for clean athletes. Despite their inefficiencies, these reforms serve as a starting point for understanding the specific needs of victimized athletes seeking a remedy and where the focus should be placed in designing a proper remedy.

Most reform suggestions revolve around turning the CAS into a prototypical

205. See Kelly & Shea, *supra* note 175.

206. This problem may be described as deciding how to characterize endorsement contracts in a damages context and what burden of proof should apply to proving these damages. See generally Charles L. Knapp et al., *Problems in Contract Law: Cases and Materials*, § 11 (7th ed. 2012). Given that this Comment is focused on drawing attention to the problem of a lack of remedy to clean athletes from developing countries victimized by doping, this comment will not provide an answer to this question.

207. *How Olympic Athletes Make a Living*, SPORTS MANAGEMENT DEGREE HUB, <http://www.sportsmanagementdegreehub.com/olympic-athletes-salaries/> (last visited Oct. 1, 2017).

208. Rachele Downie, *Improving the Performance of Sport's Ultimate Umpire: Reforming the Governance of the Court of Arbitration for Sport*, 12 MELB. J. INT'L L. 315, 341 (2011).

court.²⁰⁹ For the most part, the conversation about reconstituting the CAS as a court of law has revolved around affording athletes accused of doping a fair hearing.²¹⁰ The primary advantage of reconstituting the CAS as a true “sports court”²¹¹ is that, as a court of law, the CAS would operate entirely independent of the Olympic Movement and outside the jurisdiction of the Swiss Supreme Court.²¹² Further, by judges resolving disputes as opposed to arbitrators, litigants’ concerns about the independence of arbitrators in doping cases would be reduced and litigants would also be afforded procedural advantages and protections not available in arbitration.²¹³ For victimized athletes wishing to seek recovery from doping athletes, reconstituting the CAS as a court of law would potentially provide some advantages. First, for athletes wishing to recover from doping athletes, an independent CAS would provide greater assurance to clean athletes that their claim would be fairly heard and there would be no advantage for the doping athlete.²¹⁴ Second, prototypical courts typically offer access to greater information and the right to legal advisors that may not otherwise be affordable for clean athletes from developing countries to obtain on their own.²¹⁵ The CAS already provides an application for free legal aid for those who wish to arbitrate in the CAS and are able to substantiate that they cannot afford it.²¹⁶

On the other hand, transforming the CAS into a prototypical court could be disadvantageous to clean athletes too. Litigation can be lengthy and more costly than arbitration.²¹⁷ Athletes from developing countries may not be able to afford the best representation in an adversarial proceeding where costs are much greater than

209. This idea is reflected in the fact that some scholars describe the nature of doping disputes as “quasi criminal” and the fact that when the IOC launched the commission to create the court, the commission envisioned a court similar to that of the ICJ. The ICJ was created by the United Nations to “bring about by peaceful means . . . adjustment or settlement of international disputes or situations which might lead to a breach of the peace.” See U.N. Charter art. 1, ¶ 1; Downie, *supra* note 208, at 341.

210. See Downie, *supra* note 208, at 341 (discussing the aim of reforming the CAS by improving due process and evidentiary protections in doping proceedings).

211. See *id.* (citing Hayden Opie, *Drugs in Sport and the Law: Moral Authority, Diversity and the Pursuit of Excellence*, 14 MARQ. SPORTS L. REV. 267, 280 (2004)).

212. *Id.*

213. See *id.* (citing extensive discovery and evidentiary rules as some of the procedural advantages and protections of litigation as opposed to arbitration).

214. This is currently a concern with the current CAS because it is thought that sports organizations, like the Olympic Movement and the IOC, are at an advantage because they nominate a majority of the arbitrators to the CAS. See Downie *supra* note 208, at 322, 341 (outlining ICAS’ rules to ensure fairness and independent arbitration).

215. See Downie, *supra* note 208, at 329 (quoting Maureen A. Weston, *Doping Control, Mandatory Arbitration and Process Dangers for Accused Athletes in International Sports*, 10 PEPP. DIS. RESOL. L. J. 5 (2009)).

216. See generally COURT OF ARBITRATION FOR SPORT, *Legal Aid Guidelines*, <http://www.tas-cas.org/en/arbitration/legal-aid.html> (last visited Sep. 30, 2017) (indicating that the aim of the guidelines is to “guarantee the rights of natural persons without sufficient financial means”).

217. See Downie, *supra* note 208, at 342 (noting that sports disputes do not lend themselves to lengthy adversarial proceedings and that enhancing the CAS to make it a more independent venue for arbitration may be the better solution).

the costs of arbitration.²¹⁸ Given the importance of resolving sporting disputes as soon as possible, sporting disputes by their very nature may not lend themselves to lengthy litigation.²¹⁹ For clean athletes wishing to capitalize on the short-lived fame that comes after an international sporting event, protracted litigation makes it less likely that they are to be able to land any endorsement contracts or public speaking engagements.²²⁰

Other ideas for reform do not necessarily support reconstituting the CAS as a court of law, but rather focus on reforming some of the policies of the CAS to enhance the court's recognition as one which treats both athletes and sports organizations equally.²²¹ Such reforms include the CAS adhering to a policy of *stare decisis*;²²² changing the process of arbitrator selection to reduce the number of repeat arbitrators and increase independence from the IOC, IFs, and NOCs which account for nominating three-fifths of the arbitrators eligible for arbitration;²²³ revising the appeals process to include a new division of the CAS designated to hear appeals of earlier CAS proceedings;²²⁴ and ending the CAS's use of strict liability (as the Code requires) as the standard in doping proceedings.²²⁵

These reforms provide similar advantages and disadvantages to wronged athletes from developing countries as do reforms targeted at reconstituting the CAS as a court of law. They focus on providing greater independence to the CAS so that parties wishing to arbitrate there feel more confident that they are engaging in fair proceedings. Adhering to a policy of *stare decisis* would be advantageous to clean athletes because they would have greater knowledge going into the proceedings about their likelihood of success to recover and provide predictable outcomes.²²⁶ Reforming the process of selecting arbitrators creates the same advantage as replacing arbitrators with judges by increasing the level of

218. *But see* Seth Lipner, *Is Arbitration Really Cheaper?*, FORBES (July 14, 2009, 2:00 PM), <http://www.forbes.com/2009/07/14/lipner-arbitration-litigation-intelligent-investing-cost.html> (noting that arbitration is not necessarily always cheaper and the decision to arbitrate over litigate should be based in part on the kind of case in question such as whether or not it is a personal injury case or a financial case involving securities).

219. *Id.*

220. *See* Adams, *supra* note 177 and accompanying text.

221. *See* Gotlib, *supra* note 96, at 412–13.

222. *See id.* at 413 (noting that arbitrators already frequently utilize prior decisions and formally adhering to the practice would provide greater legitimacy and legal coherence to the CAS).

223. *See id.* at 415–16 (noting that the current role of the ICAS in creating the master list of arbitrators favors creating a list of arbitrators who will favor repeat players in the CAS because the majority of the CAS's revenue comes from repeat players, meaning that newcomers to the CAS are at a disadvantage).

224. *See id.* at 419 (noting that the CAS's current appeals process is overly restrictive but also consistent with other arbitral bodies).

225. *See id.* at 420 (suggesting the CAS revise its policy of strict liability and apply a rebuttable presumption that the athlete intended to take the drugs for the purpose of performance enhancement).

226. *See id.* at 415 (noting that formal adherence to *stare decisis* strengthens legal predictability and fosters stability allowing for a coherent body of law to develop).

independence of the CAS. Revising the appeals process would help clean athletes by making it easier for them to appeal a decision that an arbitrator would hand down to them if that decision was not in their favor, and would increase confidence that the new appellate panel was independent of the original panel.²²⁷

Ending the use of strict liability in doping cases would primarily disadvantage clean athletes because they would be less likely to recover if accused athletes were able to rebut the presumption they intended to take the drugs to enhance performance. Ending the use of strict liability would therefore lengthen proceedings, reducing the likelihood that clean athletes could capitalize on the small window of fame afforded to athletes who are victorious in their sport.²²⁸

Overall, CAS's existing reform proposals do not provide any additional advantages specifically to victimized athletes from developing countries seeking a remedy for the consequences of athletes who dope. Some reforms may even harm these athletes by providing greater advantages to the accused athletes from which they would want to recover. Therefore, a proposal designed specifically to address the needs of athletes victimized by doping is necessary.

B. A New Idea for Reform, Based on the Proposed "International Court of Civil Justice"

While the focus remains on punishing athletes who dope in international competitions, scholars have suggested the CAS shift their focus to acknowledging the clean athletes victimized by losing their medals and potential endorsement contracts. Although the proposed reforms are useful in identifying certain needs for the victimized athlete in their recovery quest, like low-cost and speedy proceedings, the reforms overall provide little help in designing an adequate CAS.²²⁹ In order to design a new CAS capable of providing a remedy for clean athletes, international sports could look toward reform ideas for other international tribunals and attempt to analogize to, and modify them, for the CAS.

Given that the CAS was designed to mimic the role of the ICJ in handling international disputes relating to maintaining peace, but for sport disputes, it is helpful to look at reform efforts for the ICJ when considering a new design for the CAS. In the case of the ICJ, some ideas for reform have centered on providing a remedy for victims of international disputes, specifically cross-border mass torts *de facto*.²³⁰ One particular idea for reform involves creating an entirely new court for resolving international civil disputes appropriately named the International Court

227. See Gotlib, *supra* note 96 (noting that the current appeals process involves an appeals panel that is not independent from the original panel and that a new system would allow parties to select the appeals arbitration panel at the same time the original panel is selected to ensure independence).

228. See Adams, *supra* note 177 and accompanying text.

229. *But see* WORLD ANTI-DOPING CODE, *supra* note 40, at 72 (noting that the Code provides that money from CAS awards in the form of prize money should be allocated to other athletes if provided for in the rules of the applicable International Federation).

230. Maya Steinitz, *The Case for an International Court of Civil Justice*, 67 STAN. L. REV. ONLINE 75, 75 (2014-2015).

of Civil Justice (ICCJ).²³¹ This particular reform is helpful because it creates for victims of cross-border mass torts what a reformed CAS would provide to victimized athletes: a cause of action. Any proposed CAS reforms that lack an explicit provision allowing a cause of action for victimized athletes automatically fails to provide an adequate remedy for these athletes.

This section will begin by describing a blueprint of the proposed ICCJ. It will then compare the kinds of disputes designed to be heard by the ICCJ with those that a new division of the CAS would hear—doping disputes between clean athletes and athletes who have been found to have engaged in doping. This section will then discuss using the ICCJ as a starting point to refocus discussions about the CAS reforms and emphasize the importance of creating a venue, which provides a cause of action to clean athletes victimized by doping. Finally, this subpart will discuss and respond to possible criticisms of such an approach for international sporting disputes.²³²

1. The Proposed ICCJ

The idea of an ICCJ was born in part out of a transnational dispute between Ecuador and Chevron.²³³ The litigation arose in 2003, when a class-action suit was brought against Texaco—acquired by Chevron in 2001—in an Ecuadorian court for severe environmental contamination of rainforests where Texaco conducted oil operations.²³⁴ The plaintiffs alleged the contamination resulted in serious health problems including increased rates of cancer for residents of the area.²³⁵ In February 2011, the Ecuadorian court issued a \$18.2 billion dollar judgment against Chevron (the “Lago Agrio Judgment”), making it the largest judgment ever imposed for environmental contamination by any court.²³⁶ A definitive legal outcome from this case is still to be determined, as the litigation is currently ongoing.²³⁷ By comparison, within weeks of BP’s record-setting 2010 oil spill in the Gulf of Mexico, BP announced the formation of a \$20 billion restitution trust-

231. *Id.*

232. It should be expected that much of the criticisms of such an approach will mimic the criticisms of the proposed ICCJ, as discussed within this section.

233. See Steinitz, *supra* note 230, at 76 (comparing the quick resolution of BP oil spill issue of compensating victims as well as governments effected by the spill to the lengthy proceedings aimed at resolving the issue of compensating victims of the Chevron devastation of the Ecuadorian rainforest); see also Maya Steinitz & Paul Gowder, *Transnational Litigation as a Prisoner’s Dilemma*, 94 N.C. L. REV. 751, 753 (2016) (using game theory and the example of the Chevron-Ecuador dispute to illustrate the problem of corruption in transnational litigation and the need for an ICCJ). Chevron Corporation is an American multinational energy company. *About, CHEVRON*, <https://www.chevron.com/about> (last visited October 5, 2017).

234. *Texaco/Chevron Lawsuits (re Ecuador)*, BUSINESS AND HUMAN RIGHTS RES. CTR., <https://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador> (last visited Sept. 30, 2017).

235. *Id.*

236. See Steinitz & Gowder, *supra* note 233, at 759–60 (noting that Chevron has vowed to continue litigating the case “until hell freezes over” and promised that the plaintiffs will “endure a lifetime of litigation”).

237. *Id.*

fund, backed by an uncapped commitment and an administrative program to fully compensate individual victims and federal, state, and local government entities in the United States.²³⁸

The disparity between the quick resolution of compensating victims in the U.S. for the BP oil spill, and the drawn out compensation for victims of Chevron's actions in Ecuador resulted in a call to action to create an international court capable of issuing enforceable judgments for cross-border torts.²³⁹ Maya Steinitz, associate Professor at the University of Iowa College of Law and member of the Court of the International Chamber of Commerce Jerusalem Arbitration Center,²⁴⁰ argues that international tribunals, including forums for international investment arbitration or international commercial arbitration, do not provide a cause of action for cross-border torts.²⁴¹ Consequently, there is an access-to-justice deficit for victims like the plaintiffs in Ecuador.²⁴² Steinitz notes that the lack of an appropriate forum is particularly troubling because the individual victims impacted most by its unavailability are those from developing countries.²⁴³

To solve this problem, Steinitz proposes the ICCJ.²⁴⁴ The court would have subject matter jurisdiction over cross-border mass torts as well as certain commercial matters.²⁴⁵ In addition to subject matter jurisdiction over cross-border torts, the ICCJ's jurisdiction would also encompass business-to-business contract disputes currently channeled to expensive, private, international commercial arbitration.²⁴⁶ Ideally, the court would have compulsory jurisdiction in which signatory states delegate authority to the ICCJ for certain cross-border mass torts.²⁴⁷ Noting the unwillingness of litigants and states to surrender jurisdiction to an ICCJ, particularly U.S. corporations, Steinitz suggests the ICCJ's jurisdiction

238. Steinitz, *supra* note 230, at 75–76.

239. *See id.* (noting that the disparity is in part because the United States is powerful in ways that Ecuador is not and that the Ecuadorian government was at least somewhat compliant in the practices of Texaco while the United States was not complicit in the practices of BP that led to the spill, but calling the source of the problem a lack of forum).

240. *Id.* at 75. The International Chamber of Commerce Jerusalem Arbitration center is an independent entity that addresses Palestinian-Israeli business related disputes. *The JAC Concept*, ISRAEL INT'L CHAMBER OF COM., <http://www.iccisrael.co.il/the-jac-concept.html> (last visited Sept. 30, 2017).

241. Steinitz, *supra* note 230, at 79 (including the World Bank's International Centre for Settlement of Investment Disputes and the Bilateral Investment Treaties known jointly as the ICSID-BIT regime).

242. *See id.* at 79–80 (noting that international commercial arbitration and international investment arbitration are irrelevant to the kinds of disputes that the ICCJ would be able to hear because the former is a private process between private parties involving private law claims and not torts, and the latter provides no right of action against foreign investors).

243. *See id.* at 80 (arguing that victims from developing countries are hurt most because there is a lack of deterrence from developed countries to end bad business practices that leads to a tremendous wealth transfer from the developing world, left paying for the consequences of these practices, to the developed world).

244. *See id.* at 77 (“[A]n ICCJ with jurisdiction over cross-border torts.”).

245. Steinitz and Gowder, *supra* note 233, at 802.

246. *Id.* at 809.

247. *Id.* at 802.

could be complementary, similar to the International Criminal Court's function.²⁴⁸ This would mean that if the home jurisdiction of the corporation is willing and able to hear the case, the corporation could remove the case to its home jurisdiction and the ICCJ would not exercise jurisdiction.²⁴⁹ In most other respects, the court would function as a prototypical court.²⁵⁰ By providing a cause of action for individuals seeking damages against multinational corporations, an ICCJ would explicitly create liability for torts and human rights abuses for corporations, and obviate the need to reform national legal systems to be able to hear these kinds of disputes.²⁵¹

While Steinitz does not offer a complete picture of what an ICCJ would look like, she argues that an ICCJ would produce a coherent jurisprudence of its own over time, capable of providing predictability to those who wish to utilize it.²⁵² Further, Steinitz's proposed solution is less about providing a perfect blueprint for the design of an ICCJ, but more about recognizing that the international community lacks a venue for individuals seeking damages for transnational mass torts and calling scholars and policymakers to create a court capable of hearing such disputes.²⁵³

2. Proposal for CAS Reforms, Inspired by the Proposed ICCJ

Similar to Steinitz's proposal for an ICCJ, this Comment does not suggest a fleshed-out blueprint for a new division of the CAS, but merely that the CAS structure requires a new division, either as a prototypical court or as an arbitration venue, to allow clean athletes to seek damages from doping athletes. Similar to an ICCJ, a new division of the CAS or a revision of the current Anti-Doping Division of the CAS would particularly help athletes from developing countries by giving these athletes a cause of action against the doping athletes to whom they lost.

All divisions of the CAS are governed by the Code of Sports-Related Arbitration (CAS Code).²⁵⁴ Not to be confused with the Code established by WADA, the CAS Code establishes procedures governing arbitration in the CAS

248. *Id.* at 805.

249. *Id.*

250. *See* Steinitz, *supra* note 230, at 80–82 (discussing the costs of transnational litigation and how a limitation on American-style pro-plaintiff procedural features such as juries, extensive discovery, and punitive damages could increase the efficiency of an ICCJ, suggesting that an ICCJ would otherwise function more as a prototypical court and less like an international arbitration system).

251. Nathan J. Miller, *Human Rights Abuses as Tort Harms: Losses in Translation*, 46 SETON HALL L. REV. 505, 512 (2016) (arguing that an ICCJ may be the better alternative to providing a venue for hearing individual claims of human rights abuses as opposed to focusing on reforming national legal systems).

252. Steinitz, *supra* note 230, at 82.

253. *See id.* at 83 (calling for scholars and policymakers of the world to either work on the creation of an ICCJ and the changes that may be necessary to domestic law in order to accommodate the new institution and its new legal regime).

254. *See* Gotlib, *supra* note 96, at 395–96 (stating that the Code of Sports-related Arbitration has been in effect since November 22, 1994 and was revised in 2003 to incorporate principles of CAS case-law that has been established over the years and were consistently followed by the arbitrators and the Court Office).

and also contains a set of mediation rules instituting a non-binding informal procedure allowing parties the option of negotiating with the help of a mediator to settle disputes.²⁵⁵ The new division must include specific rules about the standing of clean athletes to bring causes of action against doping athletes. The current CAS Code contains no specific rules concerning standing to bring a case before the CAS.²⁵⁶ As a result, CAS panels frequently turn to Swiss law to answer the question of “who can sue” before the CAS.²⁵⁷ Article 75 of the Swiss Civil Code has been interpreted to mean that sports associations can be sued in the CAS but makes no mention of individuals.²⁵⁸

The Anti-Doping Division specifically makes no mention of standing of an athlete to sue another athlete, and the rules only describe its jurisdiction as “the first instance authority for doping-related matters, responsible for the conduct of the proceedings and issuance of decisions when an alleged anti-doping violation and has been asserted and referred to it.”²⁵⁹ A reformed CAS would have to include specific standing rules allowing athletes to sue other athletes for damages resulting from doping. Just as Steinitz suggests with the ICCJ, once clean athletes could sue other athletes for damages resulting from doping violations, a body of jurisprudence would evolve over time to create a more efficient court.²⁶⁰

There is an obvious criticism that could arise from using the idea of an ICCJ as an analogy for a new division of the CAS, or a reformed Anti-Doping Division of the CAS. Specifically, the ICCJ speaks to disputes arising out of transnational mass tort law violations while the kinds of disputes that would arise between competing athletes may better be described as contract disputes because they are based on an athlete’s violation of the Code, which they contractually agree to abide

255. See *id.* (detailing that the Code of Sports-Related Arbitration includes rules for four distinct procedures including (1) procedures for the ordinary arbitration division; (2) the appeals arbitration division; (3) the advisory procedure, which is non-contentious and allows certain sports bodies to seek advisory opinions from the CAS; and (4) the mediation procedure).

256. Many cases explicitly indicate the CAS Code lacks specific rules regarding standing. See generally Branislav Krunic v. Bosnia and Herzegovina Football Fed’n (BIHFF), CAS 2014/A/3850, Court of Arbitration for Sport, ¶ 59 (July 17, 2015), <https://jurisprudence.tas-cas.org/Shared%20Documents/3850.pdf> (citing CAS 2008/A/1468, ¶ 82; CAS 2008/A/1517, ¶ 133; CAS 2008/A/1518, ¶ 22); Ionikos FC v. C., CAS 2008/A/1517, Court of Arbitration for Sport, ¶ 19-27 (Feb. 23, 2009); Ionikos FC v. L., CAS 2008/A/1518, Court of Arbitration for Sport, ¶ 20-27 (Feb. 23, 2009).

257. See Christian Keidel & Alexander Engelhard, *Whom to Sue Before the Court of Arbitration for Sport (CAS)?*, LAWINSPOORT (Aug. 14, 2014), <http://www.lawinsport.com/articles/item/whom-to-sue-before-the-court-of-arbitration-for-sport-cas-entry-d> (noting the ambiguity of Swiss law that provides that a party has standing to be sued if, for instance, it is personally concerned with the disputed right which is at stake).

258. See Estelle de La Rochefoucauld, *Standing to be Sued, A Procedural Issue Before the Court of Arbitration for Sport (CAS)*, CAS BULLETIN (Jan. 2010) at 50–51, http://www.tas-cas.org/fileadmin/user_upload/Bulletin01112010.pdf (noting that CAS Panels have consistently noted that neither the CAS Code nor FIFA Regulations contain specific rules about standing to be sued).

259. COURT OF ARBITRATION FOR SPORT, ARBITRATION RULES APPLICABLE TO THE CAS ANTI-DOPING DIVISION (2016), Art. 1, http://www.tas-cas.org/fileadmin/user_upload/Arbitration_Rules_for_the_Anti-doping_Division_final_.pdf.

260. See Steinitz, *supra* note 230, at 82

by when they participate in international sport.²⁶¹ The contractual nature of these disputes actually arises out of the agreement between the athlete and the sports organization as opposed to out of an agreement between athletes. Therefore, an ICCJ capable of hearing disputes between individuals and multinational corporations for mass tort violations and a reformed CAS capable of hearing disputes between athletes over doping violations is not a good comparison.

A response to this criticism would be the assertion that there can be a place for a reformed CAS that focuses on contractual disputes between clean athletes and athletes who engaged in doping. Such a reformed CAS would have to acknowledge the rights of a third party to a contract, in opposition to the concept of privity of contract. This is not a new idea in the sports world either.²⁶² In a famous English contract law case, it was held that when competitors in a yachting regatta contracted with the organizing yacht club and agreed in writing to abide by all the yacht club's rules,²⁶³ the competitors had not only entered into a contract with the yacht club but also with the other competitors.²⁶⁴ As a result of the creation of this collateral contract, the yacht owner whose negligence caused damage to another yacht in a collision was liable for damages to the owner of the yacht with which he collided.²⁶⁵ Similar to that case, a reformed CAS could recognize the creation of a collateral contract between competitors competing in international sporting competitions in which athletes contract with the appropriate sporting organization and agree to abide by the Code as a condition of competing.

Despite this major difference between the idea of an ICCJ and a reformed CAS capable of hearing doping disputes between athletes, the ICCJ still provides a useful analogy for what a reformed CAS might look like. This comment, like Steinitz's proposal for an ICCJ, does not seek to propose a perfect blueprint for what a reformed CAS would look like,²⁶⁶ but rather to offer a solution to the problem of clean athletes, particularly those from developing countries, not having a remedy when they lose to athletes who engage in doping. This Comment suggests that a reformed CAS based in part on the concept of an ICCJ is a productive starting point for a conversation about providing a remedy to these clean athletes.

261. *The Code*, *supra* note 57.

262. See JOSEPH CHITTY, CHITTY ON CONTRACTS: GENERAL PRINCIPLES 1379, (Sweet and Maxwell eds., 31st ed. (2012)) (describing situations in which it is uncertain in sporting competition who are the contracting parties when participating in the sport).

263. *Clarke v Dunraven (The Satanita)*, AUSTRALIAN CONTRACT LAW, <https://www.australiancontractlaw.com/cases/clarke.html> (last visited Sept. 30, 2017).

264. See *Clarke v. Dunraven (1897)*, LEOISAAC.COM, http://www.leoisaac.com/law/case_clarke.htm (last visited Jan. 22, 2017) (using the term collateral contract to describe the situation in which a contract is made with a third party who is also contracting with another for the same purpose and on the same terms as was the case in *Clarke*).

265. *Id.*

266. See Steinitz, *supra* note 230, at 83 (“An ICCJ is needed to resolve weighty problems of justice and inefficiency on a global scale.”).

V. CONCLUSION

Clean athletes who lose in international sporting competition to athletes using performance-enhancing drugs lack real remedies for their loss in the arena, bank accounts, and brand. That loss is substantial for athletes from developing countries, where the scrap value of a medal alone could make a significant difference in that athlete's life. The more lucrative loss is the lost opportunity of securing endorsement contracts since the small window to pursue them has closed by the time the doping athlete is caught. As these athletes are so greatly affected by the actions of athletes who dope, international sporting organizations, particularly those that utilize the Code, need to shift their efforts in providing justice for doping violations toward these athletes and provide them a remedy for their loss. This Comment suggests a new role for the Court of Arbitration for Sport as a venue for clean athletes to sue the athletes that beat them by doping. In order for full clarity, and for this or other satisfactory solutions to be realized, legal scholars and policymakers within international sports law should refocus their discussion of justice and doping in the sports world to the athletes hurt most by doping—clean athletes from developing countries.